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EVIDENCE

I. RES GESTAE

In *State v. Blackburn*¹ the supreme court held that facts stated, but not conclusions drawn, by a hearsay declarant are admissible under the *res gestae*² exception to the hearsay rule. The court stated that a hearsay statement that “appears to be the product of consideration and reflection . . . cannot qualify as part of the *res gestae*.”³

The case arose from circumstances surrounding the death of Pamela Tanner. Ms. Tanner was assaulted, set on fire in her car, and later died as a result of her injuries. At trial, the state sought to show that appellant’s motive in allegedly procuring two men to kill Ms. Tanner was to prevent her from testifying against him on charges of arson, housebreaking and grand larceny. Appellant

1. 271 S.C. 324, 247 S.E.2d 334 (1978).

2. The term “*res gestae*” is one of many chameleonic legal terms the very use of which is problematic because the term lacks precision. See, e.g., Comment, *Res Gestae: A Synonym for Confusion*, 20 BAYLOR L. REV. 229 (1968). Professor Morgan opened his 1922 survey of seven types of evidentiary issues regarding which the term *res gestae* is most often used with a harsh attack on the abuse of the term:

The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the dealing with the admissibility of evidence as ‘*res gestae*.’ It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking. . . . It has been employed in almost every conceivable connection to warrant the admission or exclusion of evidence. . . . When used to describe utterances, it works unmitigated mischief.

Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229-30 (1922) (citations omitted). But McCormick is quick to point out that “[h]istorically . . . the phrase served its purpose well. Its very vagueness made it easier for courts to broaden it and thus provide for the admissibility of certain declarations in new fields.” C. McCORMICK, *McCORMICK ON EVIDENCE* § 288 at 687 (2d ed. 1972). Concluding, however, that “[t]he ancient phrase can well be jettisoned, with due acknowledgment that it has served well its era in the evolution of evidence law,” *id.*, the commentator favors the use “of more precise hearsay doctrine” terminology, *id.* at 686. The Federal Rules of Evidence do in fact use more precise terminology. See FED. R. EVID. 803(1) (present sense impression), 802(2) (excited utterances), 803(3) (then existing mental, emotional, or physical condition). Certainty being a virtuous goal of the law, South Carolina courts and practitioners should consider narrowly phrasing their decisions, and objections and arguments regarding the *res gestae* exception. The characterization of the *res gestae* exception by the court in *Blackburn* as being a combination of two federal exceptions, 271 S.C. at 329, 247 S.E.2d at 337, however, is not the most advisable or workable approach. See notes 20-23 *infra* and accompanying text.

3. 271 S.C. at 328, 247 S.E.2d at 337.

was convicted as an accessory before the fact of murder.⁴

In the course of the trial, the state introduced hearsay testimony of an oral statement made by Ms. Tanner to an officer at the hospital about an hour after the incident. A rescue squad worker who heard the statement testified:

Q: What did you hear her say?

A: She told the deputy sheriff or the patrol, I do not remember which one it was, that she felt sure that Gary Blackburn [appellant] was behind all of this, that she was a star witness, was supposed to be a witness in a case of his.⁵

This testimony was allowed into evidence by the trial court under the *res gestae* exception to the hearsay rule.⁶ The supreme court affirmed appellant's conviction and held that while the evidence was improperly received, the admission constituted harmless error in that the hearsay statement was cumulative to other incriminating evidence presented in the case.

In its opinion, the court characterized Ms. Tanner's statement as hearsay⁷ and then focused on the content of the hearsay

4. *Id.* at 326, 247 S.E.2d at 336.

5. Record, vol. 1, at 28.

6. Such was the conclusion of the supreme court. 271 S.C. at 327, 247 S.E.2d at 336. At trial, however, the circuit judge, even at the insistence of defense counsel, refused to state the reasons for admissibility. The following exchange occurred:

Mr. Williams: We wanted the whole statement out, Your Honor, so we could object to it.

The Court: Well, I overrule the objection. Bring in the jury please.

Mr. Williams: Before the jury comes in, on what grounds?

The Court: On what?

Mr. Williams: On what grounds do you overrule it?

The Court: I don't have to give you any grounds. Bring the jury in.

Record, vol. 1, at 30.

7. A popular definition of hearsay is Dean McCormick's: "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." MCCORMICK, *supra* note 2, § 246 at 584. But McCormick recognized that the most any definition of hearsay "can accomplish is to furnish a helpful starting point for discussion of the problems, and a memory aid in recalling some of the solutions." *Id.* Curiously, there are relatively few definitional statements of hearsay in South Carolina case law. After restating Dean McCormick's definition, Professor Dreher noted that "[u]nfortunately, this threshold proposition has never been fully articulated by the South Carolina Supreme Court." J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 59 (1967). One case that clearly draws upon the classical definition is *State v. Rivers*, 186 S.C. 221, 196 S.E. 6 (1938). In *Rivers* the court overruled a hearsay objection because the testimony in question did not depend for its veracity upon the truth of the matter asserted, stating:

If this evidence had been offered for the purpose of showing the truth of the

statement, holding that

[i]t is the very nature of Pamela Tanner's statement which renders it inadmissible under the *res gestae* exception. The declarant was stating her opinion as to *why* the assault occurred rather than giving a factual account of *how* it occurred While the statement may have been sufficiently close in point of time and place to form part of the *res gestae*, it failed to explain, elucidate or in some way characterize the nature of the event; rather it expressed a conclusion.⁸

The correct result, holding Ms. Tanner's statement inadmissible, was reached by the court in *Blackburn*; the analytical approach, however, is troubling. Under the court's approach the statement was inadmissible because it failed to fall into the *res gestae* exception to the hearsay exclusionary rule. A *conclusory* statement cannot properly be characterized as part of the *res gestae*; only a factual statement can, the court held.⁹ The more advisable approach, however, is to regard the statement itself as opinionated, *conclusory*, offered by a declarant who lacks first-hand knowledge, and thus, irrelevant.¹⁰ The distinction between the court's

statement . . . then it would have been objectionable, and should have been excluded as hearsay testimony, but, as we view the words in the case at bar, the issue was not as to the truth of the words spoken . . . but whether such words were actually uttered

Id. at 231-32, 196 S.E. at 11.

8. 271 S.C. at 328, 247 S.E.2d at 337 (emphasis in original).

9. *Id.*

10. While appellant's counsel briefly raised this point, the argument was not fully explored. Of course, from a practical point of view, appellant's further exploration of the issue was not necessary because appellant actually prevailed on the evidentiary matter since the court did find error, albeit harmless. Rather than casting the evidentiary argument in the terms suggested in text, appellant's counsel discussed and developed the requirements of the *res gestae* exception and then explained why the testimony at issue failed to meet those requirements. Brief of Appellant at 2-4. Appellant argued that the first basic requirement of the exception is that "the statement must be spontaneous with the event," *id.* at 3, and then asserted that "[h]ere there is no question but that the statement was made a substantial period of time after Pam Tanner was subjected to a startling event," *id.* The second requirement of the *res gestae* exception, according to appellant, is "that of place or proximity. Here the decedent had been removed from the scene of the injury, having travelled for a substantial distance, and period of time, to the hospital." *Id.* Appellant asserted that because of the attenuation of place of the accident and place of the oral statement, this requirement also was not met. The third requirement of the *res gestae* exception is "that '[t]he declaration must explain, elucidate or in some way characterize'" the startling event. *Id.* at 4 (citation omitted). In the context of the third requirement, termed the "most important requirement of the *res gestae* rule," *id.* at 3-4, appellant's counsel argued, *id.* at 4, and the supreme court held, 271 S.C. at 328, 247 S.E.2d at 337, that the oral statement at issue was an opinion or conclusion rather

approach and the more advisable approach is more than academic. Under the court's analysis, if the hearsay declarant were alive and in court she would be permitted to testify that the defendant "was behind all of this"¹¹ since the real bar to the statement's admissibility in the court's view was its hearsay character and the lack of an encompassing exception. Under the suggested approach, however, even if the declarant were alive and upon the witness stand, she would not be permitted to speculate who orchestrated her assault since her speculation would be irrelevant as a conclusory opinion offered by a lay witness lacking first-hand knowledge of the subject matter of her testimony.

Another difficulty with the evidentiary aspects of the court's opinion in *Blackburn* lies in the court's attempt¹² to arrive at a

than the type of description properly admissible under the *res gestae* exception. Briefly treating the approach suggested in text, appellant's counsel completed discussion of the third requirement with the sentence: "Put another way, the statement was an irrelevant opinion which neither tended to prove or disprove any fact in issue, and constituted hearsay." Brief of Appellant at 4.

Notwithstanding this passing mention of this argument in appellant's brief, the state did address the point. The state, however, misapprehended the issue stating "[t]hat there is submitted no question that the declarant would have been able to testify in the form of opinion if she had lived and been a witness." Brief of Respondent, at 4. Authority cited by the state for this proposition was *State v. McClinton*, 265 S.C. 171, 217 S.E.2d 584 (1975). *McClinton*, however, dealt with an entirely different issue: the rule that Dean McCormick referred to as "[t]he so-called 'short-hand rendition' rule." *McCORMICK*, *supra* note 2, § 11 at 25. The short-hand rule, an exception to the general requirement that a lay witness not be permitted to state an opinion, *see generally id.* at 22-26, allows a witness to testify to his conclusion that "A was drunk" rather than testifying that he "observed A exiting a bar staggering and belching." That precisely this type of issue was before the court in *McClinton* is without doubt. In that case a law enforcement officer was permitted to testify at trial that an injury on defendant's hand looked as if the hand had been bitten. 265 S.C. at 174, 217 S.E.2d at 586. The court observed by way of a footnote that Dean McCormick discussed "whether these remarks really are conclusions." *Id.* at 177, n.2, 217 S.E.2d at 586 n.2. *McClinton* clearly should not be relied upon as authority for the proposition that had Ms. Tanner lived and testified she would have been permitted to speculate on the witness stand regarding the motives behind her assault.

This analysis suggests that the approach discussed textually, that is, viewing Ms. Tanner's oral statement as inadmissible as a conclusory and irrelevant opinion of a lay witness without regard to the statement's hearsay nature, was not fully developed in briefs. The court's adoption of the appellant's approach, viewing the issue in terms of *res gestae* alone, is thus quite understandable.

11. Record, vol. 1, at 28.

12. *See* note 2 *supra*. For an often-cited definition of *res gestae* see *Marshall v. Thomason*, 241 S.C. 84, 127 S.E.2d 177 (1962). *Marshall* was heralded by Professor Dreher:

Our Supreme Court has now done all that it should need to do to put an end to this [confusion] by carefully defining in *Marshall* . . . what *res gestae* really means. The Court there said that statements will not be admissible under the *res gestae* doctrine unless they were "the spontaneous utterances of the mind

definition of *res gestae*. After stating its holding on the evidentiary issue,¹³ the court speculated that Ms. Tanner's statement would be admissible as an excited utterance in federal practice under Rule 803(2) of the Federal Rules of Evidence.¹⁴ "Under state practice, however, the statement must be both an excited utterance and a present sense impression to be admitted as part of the *res gestae*."¹⁵ The court's initial speculation that the statement at issue would qualify as an excited utterance under the Federal Rules of Evidence is far from certain. While the Advisory Committee Note to Rule 803 does indicate that an excited utterance "need only 'relate' to the startling event or condition,"¹⁶ the exception probably would not be construed to admit into evidence Ms. Tanner's accusatory and conclusory statement, especially in light of the clear dictate of Rule 701,¹⁷ which prevents a lay witness from offering an opinion except in narrowly defined circumstances,¹⁸ and that of Rule 602, which requires that a non-expert witness have personal knowledge of the subject matter of his testimony.¹⁹ The proposition is thus unlikely that Ms. Tanner's statement would be admissible as hearsay in federal practice under the excited utterance exception when the very subject

while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances were the result of reflection or designed to make false or self-serving declarations." A better definition could hardly be stated.

J. DREHER, *supra* note 7, at 78 (citations omitted). *Marshall*, however, was no panacea for the terminological ills of *res gestae*. See generally note 2 *supra*.

13. "It is the very nature of Pamela Tanner's statement which renders it inadmissible under the *res gestae* exception." 271 S.C. at 328, 247 S.E.2d at 337.

14. FED. R. EVID. 803(2).

15. 271 S.C. at 329, 247 S.E.2d at 337.

16. FED. R. EVID. 803, Advisory Comm. Note.

17. FED. R. EVID. 701.

18. Rule 701 states:

If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

FED. R. EVID. 701. This rule clearly requires a witness to have firsthand knowledge of the subject matter of his testimony, but allows a witness possessing such knowledge to draw short-hand conclusions of the type discussed in note 10 *supra*. FED. R. EVID. 701, Advisory Comm. Note.

19. FED. R. EVID. 602. Of course, Rule 602 "does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement," FED. R. EVID. 602, Advisory Comm. Note. However, the witness in *Blackburn* testified to a statement about which even the declarant, Ms. Tanner, ostensibly lacked firsthand knowledge.

matter of the statement would militate against admissibility even if the declarant sought to draw the identical conclusion as a witness in federal court.

In the context of speculating on the Federal Rules, the court in *Blackburn* offered a new definition of *res gestae*. To qualify under the *res gestae* exception, a statement by a hearsay declarant "must be both an excited utterance and a present sense impression" ²⁰ This new definition of *res gestae* would narrowly limit the exception's availability with regard to statements made at the time of or immediately after the occurrence of the exciting event. Such is the case because only a very slight lapse of time between event and hearsay declaration is permitted under the Federal Rules present sense impression exception. ²¹ While the court's definition would inject some predictability into the *res gestae* exception, it blurs the distinct rationale behind separate federal exceptions: a present sense impression is regarded as trustworthy because the "substantial contemporaneity of event and statement negates the likelihood of deliberate or conscious misrepresentation"; ²² an excited utterance is regarded as trustworthy because circumstances surrounding the statement "may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." ²³ These arguably ²⁴ legitimate rationales sug-

20. 271 S.C. at 329, 247 S.E.2d at 337.

21. The Advisory Committee's Note to Rule 803 is rather explicit in this regard: "With respect to the *time element*, Exception (1) [present sense impression] recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence, a slight lapse is allowable." FED. R. EVID. 803, Advisory Comm. Note. (emphasis in original).

22. *Id.*

23. *Id.*

24. The rationale for the excited utterance exception is the subject of weighty criticism from commentators who have considered it. The theory that physical shock to a victim induces truthfulness has been said to be

faulty on every score. Excitement is not a guarantee against lying [E]xcitement exaggerates, sometimes grossly, distortion in perception and memory especially when the observer is a witness to a nonroutine, episodic event such as occurs in automobile collision cases and crimes. The likelihood of inaccurate perception, the drawing of inferences to fill memory gaps, and the reporting of nonfacts is high.

Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 28 (citations omitted). The Stewart article is an excellent source to a practitioner seeking to challenge the logic and rationale behind the common-law hearsay exception for excited utterances, spontaneous declaration, or the South Carolina hybrid *res gestae* as announced in *Blackburn*. Other authori-

gest that an approach more advisable than that taken by the court in *Blackburn* would discard the term *res gestae*,²⁵ yet recognize, as do the Federal Rules, the existence of two distinct exceptions in its stead.

II. EXPERT TESTIMONY

A. Underlying Facts Requirement

In *Young v. Tide Craft, Inc.*,²⁶ the South Carolina Supreme Court held that even an expert who has *personally* examined the subject matter of his testimony must testify to the facts underlying his analysis. *Tide Craft* is the most unequivocal statement of this requirement in South Carolina case law.²⁷

Respondent Young was awarded \$200,000 in damages²⁸ for survival and wrongful death actions against appellant Tide Craft, Inc., the manufacturer of the boat in which respondent's husband was killed. At the jury trial, respondent advanced alternative theories of recovery in negligence, breach of implied warranty and strict tort liability.²⁹

A critical element of respondent's case was the causal connection between alleged steering system design defects in decedent's boat and decedent's fatal injuries. Respondent attempted to establish causation at trial through the testimony of

ties note and explore this problem. See McCormick, *supra* note 2, § 297 at 704. "The entire basis for the exception is, of course, subject to question." *Id.* See also Hutchins and Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 437 (1928). "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation." *Id.*

25. See generally note 2 *supra*.

26. 270 S.C. 453, 242 S.E.2d 671 (1978).

27. Two prior South Carolina cases, *Benford v. Berkeley Heating Co.*, 258 S.C. 357, 188 S.E.2d 841 (1972), and *Chapman v. Foremost Dairies, Inc.*, 249 S.C. 438, 154 S.E.2d 845 (1967), were cited in *Tide Craft* as supporting the requirement that the expert disclose facts underlying his analysis on direct examination; however, the cases only *tend* to point toward such a holding. *But see* *Bailey v. McDougall*, 251 S.C. 290, 162 S.E.2d 177 (1968); *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930). On the basis of *Bailey*, Justice Ness argued in his dissent in *Tide Craft* that "an expert's opinion must either be based on facts within his knowledge or upon facts obtained from evidence presented or to be presented at trial which are tendered in the form of a hypothetical question." 270 S.C. at 474, 242 S.E.2d at 681 (Ness, J., dissenting). See generally Note, *The New Federal Rules of Evidence and South Carolina Evidentiary Law: A Comparison and Critical Analysis*, 28 S.C.L. REV. 481, 534-35 (1977).

28. The award consisted of \$30,000 actual damages for conscious pain and suffering, \$160,000 actual damages for wrongful death, and \$10,000 punitive damages for wrongful death. 270 S.C. at 461, 242 S.E.2d at 675.

29. *Id.*

an expert witness who was qualified, over objection,³⁰ as a “human factors” engineer.³¹ The expert testified that he personally had inspected the boat in question and had made measurements from which he calculated the “motion and lateral forces on the person if the boat did lose the steering.”³² In part through his calculations, the expert was able to conclude at trial that each defect was a contributing cause “of Young’s ejection and that, if any one . . . had been removed, Young would not have met his death.”³³

The supreme court reversed, holding *inter alia* that the expert did not testify to the facts underlying his conclusion of causation and therefore “his conclusion was simply a surmise, lacking in probative value and inadequate to establish the alleged causal connection.”³⁴ The supreme court did, however, indicate a minor

30. Record at 226-27.

31. The witness explained the “human factors” field:

This is a discipline that’s been around . . . for 40 or 50 years You have a base of psychology and engineering combined in your undergraduate and graduate curriculum. The objective is to analyze products, whatever the product may be, from the standpoint of how the human being fits that product. How does he operate, . . . what are the dangers concerned with it, how does the human being use his five senses, his basic strengths, his size

Id. at 212-13.

32. Record at 230.

33. 270 S.C. at 467, 242 S.E.2d at 678. The majority opinion noted that respondent’s expert relied on a “domino theory” of causation. The theory regarded “loss of steering and each of the defects which allegedly resulted in the propensity to eject” as a single domino.

Id. The theory and supporting evidence, however, were insufficient to establish cause “with any reasonable degree of accuracy”:

[D]espite [expert] Fowler’s testimony that he could have mathematically rated each of the “dominoes” as to its potential for danger, he made no attempt to ascertain the nature and extent of the operative, dynamic forces, nor did he attempt to scientifically determine the contribution, if any, of the individual “dominoes” to ejection. Not having done so, it was impossible to say with any reasonable degree of accuracy that the dynamic forces attributable to the alleged defects contributed to Young’s ejection to the extent that ejection would not have occurred in the absence of the alleged defects.

Id. at 470, 242 S.E.2d at 679. For a focused discussion of the nonevidentiary issues in *Tide Craft*, see *Products Liability, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 101, 109 *passim* (1979).

34. 270 S.C. at 468, 242 S.E.2d at 678. In his dissent, Justice Ness argued, in effect, that because the expert had personally examined the boat the expert testimony should not be held to have been improperly admitted for failure to state underlying facts:

Here, respondent’s expert testified at length and in detail regarding his examination and testing of the boat in question. His findings with respect to the absence of seat locks and deadman switches, the positioning of the seat and the horsepower of the boat were unchallenged. Thus, the factual basis for his conclusions was predicated on his examination of the boat and the manufacturer’s specifications. His conclusion that the absence of these features contributed to

qualification to the underlying facts requirement, stating that it "is by no means intended to be a requirement that the expert set out his calculations or detail the scientific or professional knowledge leading to his conclusions."³⁵ The court clearly expressed concern with an expert rendering an opinion based on irrelevant, nonmaterial facts and warned that the minor qualification was not a license to disregard the requirement:

Neither should it be implied, however, that the complexity of the expert's area of knowledge relieves him of establishing, before the jury, the underlying basis for his opinion. However complex or esoteric the specialized knowledge the expert draws upon, he must show that in formulating his opinion, he has taken into consideration the material facts of the case being tried which was [sic] necessary to the formation of an intelligent opinion.³⁶

The court's requirement that an expert who has personally examined the subject matter of his testimony state the underlying basis of his opinion would clearly discourage an expert's reliance upon assumed or debatable facts. Such reliance would invade the jury's province as the trier of fact³⁷ because the expert would, without disclosure, resolve factual disputes in the formulation of his opinion. The *Tide Craft* requirement insures that the jury knows which facts are assumed or debatable prior to the expert's opinion testimony. Once the underlying facts are disclosed, jurors are free to question the facts and to assign due weight to them.

The supreme court in *Tide Craft* rejected the more modern approach embodied in the Federal Rules of Evidence, which provide that "[t]he expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."³⁸ The essential distinction between the *Tide Craft* opinion and the federal rule is that the

the injuries *cannot be attacked for failure to state the facts* upon which they were based, as they were premised on physical evidence.

Id. at 474, 242 S.E.2d at 681 (Ness, J., dissenting) (emphasis added).

35. *Id.* at 468, 242 S.E.2d at 678.

36. *Id.* at 469, 242 S.E.2d at 678.

37. See generally Comment, 21 N.Y.L.F. 669, 673 (1976).

38. FED. R. EVID. 705.

former requires the proponent of the expert testimony to elicit the underlying facts while the latter places this burden upon the cross-examiner.³⁹ The Federal Rule, however, can be used skillfully by the cross-examiner who chooses to elicit only those underlying facts that cause the jury to doubt the expert and chooses not to elicit testimony regarding those underlying facts that are beyond dispute.⁴⁰ *Tide Craft*, on the other hand, stands for a more complete factual disclosure on direct examination, prior to the admission into evidence of expert testimony.

B. Hypothetical Question

The court in *Tide Craft* implied that a hypothetical question would have been a viable way to admit the expert testimony.⁴¹ Similarly, in *Ballew v. Liberty Life Insurance Co.*,⁴² the supreme court approved the use of a hypothetical question to elicit expert testimony.

In *Ballew*, appellant beneficiary brought an action to recover on the double indemnity clause of his deceased son's life insurance policy. On its face, the clause provided that the double indemnity benefit "shall not be payable if the Insured's death shall result directly or indirectly, wholly or partly, from . . . disease, illness or infirmity of the body or mind" Respondent's theory at trial, buttressed by expert testimony, was that the insured died from drug addiction and that addiction is a disease falling within the policy's exclusionary clause. The jury returned a verdict in favor of the insurance company.

On appeal, appellant contended that the hypothetical question forming the basis of testimony by respondent's drug addiction expert should not have been admitted because the hypothetical differed significantly from the facts developed in the case.⁴⁴

39. See J. WALTZ, *THE NEW FEDERAL RULES OF EVIDENCE: AN ANALYSIS* 112-13 (1975).

40. For the cross-examiner to use this technique effectively, he must be aware of the facts that the expert used in formulating his opinion. This necessity may present problems when discovery is limited, but at least in federal practice, which permits broad use of discovery devices, the technique can be used. See FED. R. CIV. P. 26(b)(4); FED. R. EVID. 705, Advisory Comm. Note; McCORMICK, *supra* note 2, § 16 at 37 n.12.

41. 270 S.C. at 467-68, 242 S.E.2d at 278. In situations in which the expert has first-hand knowledge of the facts, however, generally "it is unnecessary to couch questions eliciting the inferences in hypothetical form and it would certainly weaken the effect of the testimony to do so." McCORMICK, *supra* note 2, § 14 at 31.

42. 270 S.C. 301, 241 S.E.2d 907 (1978).

43. Record at 126. See 270 S.C. at 303, 241 S.E.2d at 908.

44. 270 S.C. at 304, 241 S.E.2d at 909.

Affirming the trial court, the supreme court approved of the hypothetical. "Although some of the details assumed in the hypothetical question propounded by respondent may not have been specifically proven, the material facts assumed were within the range of the evidence and there was no error in permitting the expert to give his opinion in response to the question."⁴⁵

In recent years, the hypothetical question has sustained weighty criticism.⁴⁶ The response of Congress and some state legislatures has been to facilitate methods other than the hypothetical question to elicit expert testimony. The note accompanying Federal Rule 705⁴⁷ states:

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. . . . While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.⁴⁸

Thus, as Professor Waltz has observed, "Rule 705 does not do away with the hypothetical question absolutely; it simply does away with any absolute requirement that a hypothetical be used by counsel."⁴⁹ Evidentiary codes adopted in several jurisdictions, notably California⁵⁰ and New York,⁵¹ have taken the approach of the federal rule. The New York statute, for example, provides that "[u]nless the court orders otherwise, questions calling for

45. *Id.*

46. Dean McCormick criticized the hypothetical question observing that it is an ingenious and logical device for enabling the jury to apply the expert's scientific knowledge to the facts of the case. Nevertheless, it is a failure in practice and an obstruction to the administration of justice. If we require that it recite all the relevant facts, it becomes intolerably wordy. If we allow, as most courts do, the interrogating counsel to select such of the material facts as he sees fit, we tempt him to shape a one-sided hypothesis.

MCCORMICK, *supra* note 2, § 16 at 36. See also 2 J. WIGMORE, EVIDENCE § 686 at 812 (1940 & Supp. 1979); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 427 (1952); Note, *The Hypothetical Question in the Examination of Expert Witnesses*, 28 OKLA. L. REV. 650, 650-51 (1975); Note, *supra* note 27, 28 S.C.L. REV. 481, 534-35 (1977).

47. FED. R. EVID. 705, Advisory Comm. Note.

48. *Id.* (citation omitted).

49. J. WALTZ, *supra* note 39, at 112-13 (citations omitted).

50. CAL. EVID. CODE § 802 (West 1966).

51. N.Y. CIV. PRAC. LAW § 4515 (McKinney 1963).

the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data"⁵²

The South Carolina Supreme Court expressed no dissatisfaction with the use of the hypothetical question in *Ballew*. Indeed, the court's requirement in *Tide Craft* that underlying facts of an expert's opinion be made known to the jury by the proponent of the evidence suggests that the trial lawyer may frequently resort to a hypothetical question in order to accumulate relevant underlying facts in an orderly and comprehensible presentation. When used in federal court, the hypothetical question is virtually unassailable as incomplete since Rule 705 does not require disclosure of underlying facts. In state practice, however, the hypothetical question must still contain a fair rendition of the facts of the case and the material facts must be "within the range of the evidence"⁵³

III. BUSINESS RECORDS

In 1978, the state legislature passed the Uniform Business Records as Evidence Act:

The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

This section may be cited as the Uniform Business Records as Evidence Act.⁵⁴

This legislation codifies the business records exception to the hearsay exclusionary rule.⁵⁵

52. *Id.*

53. 270 S.C. at 304, 241 S.E.2d at 909.

54. S.C. CODE ANN. § 19-5-510 (Cum. Supp. 1978). Section 2 of the South Carolina Act contains the Uniform Photographic Copies of Business and Public Records as Evidence Act. S.C. CODE ANN. § 19-5-510(2) (Cum. Supp. 1978).

55. The uniform Act as adopted in South Carolina is substantially similar to the

The traditional justification for the exception is the high degree of reliability of regularly kept records, the value of which to the record keeper depends upon their accuracy.⁵⁶ The statute clearly states that the custodian of the document or another qualified witness may be called to identify it. This fact is significant because the South Carolina common-law approach pre-dating the 1978 statute is unclear on the issue of identification of the business record sought to be admitted. In *State v. Johnson*,⁵⁷ for example, the court noted that the corporate records at issue were identified by "several employees of the bank, and persons who also kept the books of the trust company."⁵⁸ The court did not explicate, however, whether the law required each person in the document's chain of custody to testify. Indeed, the general common-law, regularly kept records exception required that the proponent either "call as witnesses all links in the organizational chain by which the entry was made" or establish their unavailability.⁵⁹ The South Carolina business records exception statute, however, expressly rejects the chain of custody approach by not insisting upon custodial identification of records to be admitted.

Two key limitations that the statute places upon the admis-

business records exception applicable in federal practice through Rule 803(6):

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

Prior to the enactment of section 19-5-510, the scope of the business records exception to the hearsay rule in South Carolina was unclear. *See, e.g.,* *Watson v. Little*, 229 S.C. 486, 93 S.E.2d 645 (1956); *Currie v. Davis*, 130 S.C. 408, 126 S.E. 119 (1923); *United Grocery Co. v. Donnelly & Son*, 93 S.C. 168, 76 S.E. 195 (1912); *Seaboard A.L. Ry. v. Railroad Comms.*, 86 S.C. 91, 67 S.E. 1069 (1910). *But see* *Grand Strand Constr. Co. v. Graves*, 269 S.C. 594, 239 S.E.2d 81 (1977), clarifying the common law. *See generally Evidence, Annual Survey of South Carolina Law*, 30 S.C.L. Rev. 92, 96-100 (1979).

56. McCORMICK, *supra* note 2, § 306 at 720. *See generally* Laughlin, *Business Entries and the Like*, 46 Iowa L. Rev. 276 (1961).

57. 149 S.C. 195, 146 S.E. 657 (1929).

58. *Id.* at 210, 146 S.E. at 662.

59. McCORMICK, *supra* note 2, § 312 at 729.

sion into evidence of records lie in the requirements that the record be made both in the regular course of business and with sufficient contemporaneity with the occurrence of the act recorded. These requirements attempt to insure reliability and accordingly are critical attributes of the statute; however, the terms are not defined in the statute. The statutory language granting the trial court discretion in admitting the record may lead judges to decide close "regular course" and contemporaneity issues on the basis of whether "the sources of information, method and time of preparation were such as to justify [the record's] admission."⁶⁰

The enactment of the Uniform Business Records as Evidence Act is a positive step in the development of South Carolina evidentiary law. The act eliminates much of the unpredictability that surrounds a purely judicial exception to the hearsay rule and replaces the essentially case-by-case, common-law approach to the exception with a broadly worded statute that will facilitate the admission of regularly kept records.

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60. S.C. CODE ANN. § 19-5-510 (Cum. Supp. 1978).