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Evidence

EVIDENCE

I. Res Gestae Exception Clarified and Federal Rule on Hearsay Within Hearsay Adopted

In *Bain v. Self Memorial Hospital*[1] and *Doe v. Asbury*,[2] the South Carolina Court of Appeals examined and rearticulated the scope of the *res gestae* exception to the rule against hearsay. Both cases hold that in order to be admissible under the *res gestae* exception, a statement must be spontaneous and contemporaneous with the event at issue. In *Bain* the court also indicated that South Carolina will follow the federal rule and admit several layers of hearsay if each layer is admissible under a recognized hearsay exception.[3]

Mrs. Bain was admitted to Self Memorial Hospital and remained there until her death a week later.[4] Hospital records indicate that she was often disoriented and repeatedly tried to climb out of bed. She died prior to the arrival of Dr. Allred, who subsequently informed her husband of her death.[5] Mrs. Bain's executor brought a wrongful death suit against the hospital and offered into evidence a pretrial deposition of Mr. Bain, who died prior to trial. In his deposition Mr. Bain stated that Dr. Allred told him that Mrs. Bain had "crawled out of the bed . . . and the jolt from the fall bursted her heart."[6] The trial judge excluded this as hearsay and granted a nonsuit in favor of the hospital. Mrs. Bain's executor appealed.[7]

The court of appeals acknowledged that both Mr. Bain's statements in his deposition and his report of what Dr. Allred said to him were hearsay since both were out-of-court statements offered to prove the truth of the matter asserted.[8] Finding

1. 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984).
2. 281 S.C. 191, 314 S.E.2d 849 (Ct. App. 1984).
3. 281 S.C. at 145, 314 S.E.2d at 608.
4. *Id.* at 141, 314 S.E.2d at 605.
5. *Id.* at 143, 314 S.E.2d at 606.
6. *Id.*
7. *Id.*
8. *Id.* at 144, 314 S.E.2d at 607.

no South Carolina authority on the issue of hearsay within hearsay, the court adopted the federal rule that hearsay within hearsay is not excluded if each portion falls within a recognized hearsay exception.[9]

The court concluded that the first hearsay segment - Mr. Bain's deposition statement - was admissible under the hearsay exception allowing previous testimony on a controlling issue if it was subject to cross-examination and the witness is unavailable at trial.[10] After extensive consideration of the second hearsay segment — Mr. Bain's recollection of Dr. Allred's statement to him — the court concluded that it was admissible under the *res gestae* exception.

The court indicated that there is no fixed time period during which statements made are absolutely admissible under the *res gestae* exception. Instead, the court stressed that a statement, to be admissible as *res gestae*, must satisfy several criteria. First, it must be "substantially contemporaneous" with the event in issue; second, it must be a "spontaneous" utterance; third, it must have been made while under the "immediate influences" of the event; and, fourth, it must not have been made as a result of reflection or as a self-serving declaration.[11] The rationale of the *res gestae* exception is that in some instances an out-of-court statement provides safeguards equivalent to those present in court,[12] and in those cases an absolute prohibition against hearsay would serve no useful purpose.

The court determined that because Dr. Allred's statement was made "in the midst of the circumstances surrounding [Mrs. Bain's death]," it was substantially contemporaneous with her death.[13] The court further concluded that the statement was made "spontaneously and instinctively while he was under the immediate influence of this event."[14] Finally, the court noted

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9. *Id.* at 145, 314 S.E.2d at 608. FED. R. EVID. 805 provides that "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

10. 281 S.C. at 145, 314 S.E.2d at 608.

11. *Id.* at 146, 314 S.E.2d at 608.

12. *Id.* at 147, 314 S.E.2d at 608.

13. *Id.* at 147, 314 S.E.2d at 609. The court noted that Dr. Allred made the statement immediately after he arrived at the scene and no more than twenty minutes after Mrs. Bain's death.

14. *Id.*

that the statement was not self-serving.[15] Thus, the evidence was admissible under the *res gestae* exception.

In *Doe v. Asbury* a truck driven by Asbury collided with a car driven by Doe. Doe claimed she had been in the median preparing to make a left turn when Asbury's truck ran head on into her car; Asbury asserted that Doe turned in front of his truck and caused the collision. After the accident, while she was being administered first aid, Doe told a policeman that she had been "parked in the median and the truck hit her in the median."[16] The trial court admitted the policeman's testimony regarding Doe's statement, and the jury returned a verdict for Doe.[17] Asbury appealed.

The court stated that each assertion of the *res gestae* exception must be decided on its own facts, with much discretion left to the trial judge.[18] The court then held that the evidence supported the trial judge's finding that the statement was sufficiently contemporaneous with the accident to qualify for admission under the *res gestae* exception.[19] The court indicated that such statements are not made inadmissible merely because, as here, they are self-serving; rather, the self-serving character may be considered as a factor in determining the spontaneity of the statement.[20]

With its decisions in *Bain* and *Doe*, the court of appeals has indicated that it will continue the South Carolina Supreme Court's flexible, fact oriented approach to the *res gestae* exception. These two cases make it clear that in order for a statement to be admissible under the exception, the statement must be spontaneous, substantially contemporaneous with the event, made under the immediate influences of the event, and uttered under circumstances precluding any reflection or self-serving intent. The court also indicated that South Carolina will follow

15. *Id.*
16. *Id.* at 194, 314 S.E.2d at 851.
17. *Id.* at 197, 314 S.E.2d at 852.
18. *Id.*, 314 S.E.2d at 852-53.
19. *Id.*, 314 S.E.2d at 853.
20. *Id.*

the federal rule regarding double and triple layers of hearsay.

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II. Scope of Judicial Notice Limited

In *Masters v. Rodgers Development Group*[21] the South Carolina Court of Appeals held that recitations in a deed filed in accordance with the state recording system did not constitute indisputable matter subject to judicial notice by an appellate court after entry of a default judgment. This decision indicates a limitation on the courts' use of judicial notice that was not apparent in prior decisions.

In September 1977 Masters contracted with Rodgers Development Group to install plumbing on property owned by Rodgers. Rodgers conveyed the property to Stevenson and filed the deed on October 13, 1977. Masters completed work on the property, but Rodgers refused to pay the balance due. Masters then filed notice of a mechanic's lien on the property and commenced a foreclosure action.[22] Stevenson failed to file responsive pleadings, and a default judgment was entered against him. After the judgment Stevenson moved to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. The circuit court denied the motion to dismiss and ordered the property sold to satisfy the lien. Stevenson appealed from the order of sale.[23]

The court of appeals stated that the default did not prevent Stevenson from challenging the sufficiency of the complaint,[24] but affirmed the foreclosure order. Foreclosure could have been avoided only if the facts pleaded in the complaint, and, thus,

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21. 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).

22. *Id.* at 253, 321 S.E.2d at 195.

23. *Id.* at 252-53, 321 S.E.2d at 195.

24. *Id.* at 254, 321 S.E.2d at 196. The court stated: " 'A party seeking a default judgment is entitled to only such relief as is framed by his pleading . . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error.' " *Id.* (quoting Mutual Sav. & Loan Ass'n v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980)). The court further noted that an objection based on a complaint's failure to state a cause of action is not waived by default. *Id.* (citing Gadsden v. Home Fertilizer & Chem. Co., 89 S.C. 483, 72 S.E. 15 (1911)).

admitted by Stevenson upon default, were sufficient to show that Stevenson took title without notice of the mechanic's lien and gave valuable consideration.[25] The court stated that nothing on the face of the complaint showed that Stevenson purchased for value from Rodgers and that the circuit court was correct in denying Stevenson's motion to dismiss.[26] The court refused to take judicial notice of the deed conveying the property, which Stevenson claimed would show the requisite valuable consideration.[27] Since judicial notice takes the place of proof, a matter subject to judicial notice must be so notorious that the court can assume its existence without proof.[28] The court stated that a judicially noticed fact must be either so common that it is accepted by the public without qualification or so accurate that it is capable of ready verification.[29]

Judicial notice after a default judgment is even more strictly limited. The court stated that prior authority suggested that after default notice can be taken only of "indisputable" matters. The recitals in the deed did not conclusively establish Stevenson as a purchaser for value.[30] Further, the court observed that appellate courts, limited to review of the record, are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Otherwise, the adverse party would be denied the opportunity to contest the noticed matters.[31] Consequently, the court held that "original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable."[32]

This opinion restricts the use of judicial notice further than prior decisions have done. In earlier cases South Carolina courts have indicated that the recording act was judicially noticed,[33] that courts were required to take judicial notice of public laws and statutes,[34] and that courts could take judicial notice of their

25. The requirements for priority of a mechanic's lien against a subsequent purchaser for value are contained in S.C. CODE ANN. § 30-7-10 (1976).

26. 283 S.C. at 254-55, 321 S.E.2d 194.

27. *Id.* at 256, 321 S.E.2d at 197.

28. *Id.* at 255, 321 S.E.2d at 196 (citations omitted).

29. *Id.* (citations omitted).

30. *Id.* at 256-57, 321 S.E.2d at 197.

31. *Id.* at 256, 321 S.E.2d at 197.

32. *Id.*

33. Green v. Rock Hill, 149 S.C. 234, 147 S.E. 346 (1929).

34. Robert Trent Jones, Inc. v. B-F Limited Partnership, 276 S.C. 469, 279 S.E.2d

own records, files, and proceedings.[35] More recently, however, the South Carolina Supreme Court began to adopt a more restrictive view, imposing a "specificity" requirement on facts subject to judicial notice.[36]

The court's holding in *Masters* is contrary to the majority view that judicial notice may be taken of state acts and records, including recorded deeds.[37] It is possible, however, under a narrow reading of the court's holding, that this restriction on judicial notice will apply only to situations in which judicial notice is requested at the appellate level after a default judgment has been entered.

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613 (1981). Two earlier cases, however, indicated a distrust of the recording system. In Burke v. Burke, 141 S.C. 1, 139 S.E. 209 (1965) and Williams v. Lawrence, 194 S.C. 1, 8 S.E.2d 838 (1940), the South Carolina Supreme Court held that the recording of a mortgage established only a prima facie case for its validity, which could be rebutted when inconsistent circumstances were established.

35. Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984).

36. In Spartanburg Sanitary Sewer Dist. v. Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984), a party requested that the circuit court take judicial notice that related cases were pending or had recently been tried. The supreme court responded: "Counsel should make clear at the trial level and at the appellate level what facts are to be judicially noticed and should refer the court to the evidence supporting its position, particularly when counsel requests the courts (trial and appellate) to consider facts in another appeal." *Id.* at 81 n.1, 321 S.E.2d at 266 n.1.

37. 32B AM. JUR. 2D *Federal Rules of Evidence* § 55 n.95 (1982)(citing Hay v. U.S., 461 F.Supp. 1168 (D. Cal. 1978)).