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Evidence

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EVIDENCE

I. TESTIMONY REGARDING BATTERED WOMAN'S SYNDROME ADMISSIBLE

In *State v. Hill*[1] the South Carolina Supreme Court reversed a trial court decision which excluded proffered expert testimony on the battered woman's syndrome.[2] The court held in this case of first impression that such testimony was admissible to help establish a claim of self-defense in a homicide case.[3]

Sherry Hill was charged with murder in the shooting death of her boyfriend, Ricky Goodman, and she was later convicted of voluntary manslaughter. Hill admitted shooting Goodman, but claimed self-defense.[4] Testimony in the trial centered around Goodman's verbal and physical abuse of Hill. Hill testified that on the morning of the shooting, the deceased beat her, pointed a pistol at her, and said he would either "beat the hell out of [her] or . . . kill [her]."[5] Hill testified that when she shot Goodman she believed she was in imminent danger.[6]

The State attempted to discredit Hill's testimony by arguing that if Hill truly feared Goodman she would have left him.[7] A central issue at trial, therefore, was the reasonableness of Hill's belief that her life was in imminent danger.[8] To support her claim of self-defense, Hill proffered expert testimony on the

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1. 287 S.C. 398, 339 S.E.2d 121 (1986).

2. The battered woman's syndrome is a psychosocial theory that describes identifiable characteristics common to women who have experienced physical and emotional abuse over an extended period of time in an intimate relationship. Battered women tend to have an extraordinary emotional dependence on men and suffer from low self-esteem. Verbal abuse usually accompanies the beatings and contributes to their belief that they must be doing something wrong to cause their mate to beat them. These continuous beatings create a "learned" helplessness, evidenced by a reduction in motivation to avoid the beatings and an altered perception of the woman's ability to succeed at even simple tasks. *See* L. WALKER, THE BATTERED WOMAN (1979).

3. 287 S.C. at 399, 339 S.E.2d at 122.

4. *Id.*

5. Record at 227.

6. 287 S.C. at 399, 339 S.E.2d at 121.

7. *Id.*, 339 S.E.2d at 122.

8. Brief of Appellant at 7.

battered woman's syndrome. She claimed that the testimony was relevant to explain why a battered woman would remain with her mate although she reasonably feared serious harm from him.[9] The trial judge excluded the testimony on the grounds that it was irrelevant and cumulative.[10]

In South Carolina the admissibility of evidence is determined by a test similar to that used under the Federal Rules of Evidence.[11] To be admissible under the South Carolina standard, the evidence must "make more or less probable, some matter in issue, and bear directly or indirectly thereon."[12] In holding that the battered woman's syndrome meets these criteria and is thus a proper subject for expert testimony,[13] the court relied on cases from other jurisdictions.[14] Adopting the majority view, the supreme court concluded that the expert testimony would have served two relevant functions.[15] First, the testimony would have supported Hill's belief that she was in imminent danger when she shot Goodman[16] and would have reinforced her contention

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9. 287 S.C. at 399, 339 S.E.2d at 122.

10. *Id.*

11. *See* W. REISER, A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW (1976).

12. Ellison v. Simmons, 238 S.C. 364, 368, 120 S.E.2d 209, 211 (1961).

13. 287 S.C. at 399, 339 S.E.2d at 122.

14. *See, e.g.*, Terry v. State, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985) (expert opinion evidence about battered woman's syndrome is admissible to extent it relates to a defendant's claim of self-defense); Smith v. State, 247 Ga. 612, 619, 277 S.E.2d 678, 683 (1981) ("Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman."); State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984) (in a murder prosecution which resulted in conviction of reckless manslaughter, expert testimony on battered woman's syndrome was relevant to reasonableness of defendant's belief that she was in imminent danger of death or serious injury and would have permitted conclusion, contrary to general misconceptions regarding battered women, that defendant's failure to leave victim reinforced her credibility as to severity and frequency of prior beatings); People v. Torres, 128 Misc. 2d 129, 134, 488 N.Y.S.2d 358, 362 (1985) ("[P]roffered expert evidence [on battered woman's syndrome] is admissible [in second-degree murder prosecution] as having a substantial bearing on the defendant's state of mind at the time of the shooting and is, therefore, relevant to the jury's evaluation of the reasonableness of her perceptions and behavior at that time.").

15. Some courts have excluded battered woman's syndrome testimony as irrelevant to the woman's self-defense claim. *See, e.g.*, State v. Thomas, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981).

16. Some courts have allowed the jury to consider the defendant's gender in assessing the reasonableness of her actions. In State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977), a landmark decision on sex bias in the law of self-defense, the Washington Su-

that she acted in self-defense.[17] Second, the expert would have supplied an interpretation of the facts relating to the defendant's state of mind at the time of the shooting.[18]

Although expert testimony concerning this syndrome is relevant when self-defense is asserted, some jurisdictions have found other problems with its admissibility.[19] First, admitting syndrome testimony allows the expert to state his opinion on an

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preme Court reversed the conviction of a woman for the murder of a male attacker. The court held that a woman's constitutional right to equal protection is violated when jury instructions on self-defense couched in all male pronouns suggest that her conduct must be measured against the reasonable male in the same circumstances. *Id.* at 239-41, 559 P.2d at 559; *see also* Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, in WOMEN'S SELF-DEFENSE CASES (E. Bochnak ed. 1981).

17. Under South Carolina law, to prove self-defense in a homicide case, the defendant must establish the following:

> (1) That he was without fault in bringing on the difficulty.
>
> (2) That he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury, . . . *or he actually was in imminent danger of losing his life or of sustaining serious bodily injury.*
>
> (3) If his defense is based on his actual belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief, . . . or if his defense is based on his being in actual and imminent danger, that "the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life."
>
> (4) That he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

State v. Hendrix, 270 S.C. 653, 657-58, 244 S.E.2d 503 505-06 (1978) (citations omitted) (emphasis in original).

18. The key to self-defense lies in the definition of what perceptions are reasonable for a victim of violence. According to Dr. Lenore Walker, a prominent writer on the battered woman's syndrome, relationships characterized by physical abuse tend to develop battering cycles. Violent behavior directed at the woman occurs in three distinct and negative stages: the tension-building phase, the acute battering incident, and the extreme loving behavior phase. The cyclical nature of battering behavior helps explain why more women simply do not leave their abusers. The loving behavior demonstrated by the batterer during phase three reinforces whatever hopes these women might have for their mate's reform and keeps them bound to the relationship. *See* L. WALKER, *supra* note 2, at 55-70. Testimony as to the cycle theory of violence common to battered women indicates a predictable pattern of abuse and demonstrates the reasonableness of a woman's perception that she is in imminent danger.

19. For decisions holding expert testimony on battered woman's syndrome irrelevant in claims of self-defense, see People v. White, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980). In Buhrle v. State, 627 P.2d 1374 (Wyo. 1981), the court held that the expert testimony on battered woman's syndrome was irrelevant in view of the particular facts of the case. *See also* State v. Necaise, 466 So. 2d 660 (La. Ct. App. 1985); State v. Thomas, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

ultimate issue of fact and, therefore, to invade the province of the jury.[20] For South Carolina and other jurisdictions adopting the Federal Rules of Evidence with respect to expert opinion,[21] "[t]estimony in the form of opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[22] Second, syndrome testimony relates to a subject within the experience of the average layman:[23] arguably, fear and belief of imminent danger are elements within the average juror's experience and do not require expert explanation.[24] The majority of the courts that have ruled on the admissibility of battered woman's syndrome testimony, however, have followed the decision of *Ibn-Tamas v. United States*.[25] That decision held that to understand the defendant's state of mind, the jury must understand the battered woman's special beliefs that are not within the experience of the average layman.[26] Last, some courts question the reliability of the battered woman syndrome theory.[27] Although reliability problems might indicate that syndrome testimony should be excluded, South Carolina courts hold that the trial court, in its discretion, should determine whether the witness qualifies as an expert.[28]

Hill, therefore, recognized the relevancy of battered woman's syndrome testimony as a matter of law, but limited its use to situations in which the expert has been qualified properly.[29] The testifying witness must still meet the traditional test for ex-

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20. *See* 627 P.2d at 1378.

21. South Carolina appears to have adopted the Federal Rule with respect to expert opinion. W. REISER, *supra* note 11, at 35.

22. FED. R. EVID. 704.

23. Expert testimony is appropriate when the subject of the inquiry is outside the normal experience and understanding of the jury; however, "on matters for which all materials for judgment are already before the jury, and no specific skill or experience is necessary in order to reach a conclusion, . . . opinion evidence is properly excluded." Huggins v. Broom, 189 S.C. 15, 18, 199 S.E. 903, 904 (1938).

24. *See* State v. Thomas, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981).

25. 407 A.2d 626 (D.C. 1979).

26. *Id.* at 634-35; *see also* Smith v. State, 247 Ga. 612, 619, 277 S.E.2d 678, 683 (1981).

27. Dr. Lenore Walker has admitted that many of her research conclusions are tentative and that further research may be necessary to confirm her contentions. L. WALKER, *supra* note 2, at xv-xvi.

28. 287 S.C. at 400, 339 S.E.2d at 122.

29. *See* Note, *Self-Defense: Battered Woman Syndrome on Trial*, 20 CAL. W.L. REV. 485, 507-10 (1984); Note, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U.L. REV. 348, 365-67 (1982).

pert qualifications,[30] leaving trial courts free to limit who may testify about battered woman's syndrome.

In the wake of *Hill*, practitioners should be aware of the possible uses and limits of testimony concerning the battered woman's syndrome. Significantly, the court is "not recognizing the battered woman's syndrome as a separate defense."[31] Testimony relating to the syndrome, therefore, while not endorsing the use of deadly force as a justifiable retaliation against battering, may be offered to educate juries about the peculiar mental and emotional state of a battered woman.[32] The expert's role as educator would serve to dispel a jury's misconceptions about battered women, but would not establish the battered woman's syndrome as a defense to murder. Further, *Hill* marks the first step toward judicial recognition of the syndrome by concluding as a matter of law that the theory is relevant to show a fear of imminent danger and state of mind. Since the admission of the testimony into evidence is within the trial judge's discretion, however, the guidance which *Hill* provides to future litigants on the ultimate question of admissibility is limited.[33]

Sally A. Hildebrand

II. PHOTOGRAPH OF NUDE HOMICIDE VICTIM NOT UNDULY PREJUDICIAL

In *State v. Todd*[34] the supreme court, in accordance with South Carolina case law[35] and the general rule throughout the country,[36] allowed a photograph of a homicide victim into evi-

30. To qualify as an expert, a "witness must have acquired by reason of study or experience or both such knowledge and skill in business, profession, or science that he is better qualified than the jury to form an opinion on particular subject of testimony." Botehlo v. Bycura, 282 S.C. 578, 585-86, 320 S.E.2d 59, 64 (Ct. App. 1984).

31. 287 S.C. at 400, 339 S.E.2d at 122.

32. *See* Note, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony*, 35 VAND. L. REV. 741 (1982).

33. For example, in a decision dated just two months after *Smith*, the Georgia Supreme Court held that expert testimony on the battered woman syndrome was inadmissible because the testimony related to the defendant's reasonable fears, which could be comprehended by average jurors. Mullis v. State, 248 Ga. 338, 282 S.E.2d 334 (1981).

34. 290 S.C. 213, 349 S.E.2d 339 (1986).

35. State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984); State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940).

36. Annotation, *Admissibility of Photograph of Corpse in Prosecution for Homi-*

dence. The court affirmed a lower court ruling and stated that the photograph, which depicted a gunshot wound beneath the exposed left breast of the female decedent, should be admitted if its use was not "calculated to arouse the sympathy or prejudice of the jury [and was not] irrelevant or unnecessary to substantiate facts."[37] The chief issue on appeal was whether the photograph was unduly prejudicial because, in the same proceeding, the defendant also faced charges of assault with intent to commit criminal sexual conduct.[38]

Todd argued that no material issue of fact concerning the cause of death remained because testimony regarding the autopsy report was entered without objection and Todd admitted that the gunshot entered the victim's chest.[39] The photograph, therefore, had no probative value, while the "obvious sexual overtones"[40] of the photograph exacerbated the danger of undue prejudice. The inappropriate and likely result of admitting the evidence, according to Todd, was that the photograph's impact overshadowed testimony that medical personnel, not Todd, removed the victim's brassiere.[41]

The supreme court held that the trial court validly exercised its discretion in admitting the photograph. The court found that the evidence was corroborative of the pathologist's testimony that the bullet entered the victim's chest near the heart and followed a downward path, lodging in the victim's lower back.[42] Todd, however, offered inconsistent testimony which depicted the victim as standing above or sitting directly across from Todd when the shooting occurred.[43] Although it is

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cide or Civil Action for Causing Death, 73 A.L.R.2D 769 (1960).

37. 290 S.C. at 215, 349 S.E.2d at 340.

38. Record at 1. Before the photograph was taken, emergency medical personnel, not the defendant, removed the victim's blouse and brassiere to administer aid. Record at 11.

39. Brief of Appellant at 4-5. Todd's argument is similar to the argument advanced in State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953), *cert. denied*, 348 U.S. 951 (1955). In *Waitus*, relevant facts were established fully by uncontradicted medical and lay testimony. Because there was no dispute about these facts, the court found that the photographs of the victim "were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary." 224 S.C. at 27, 77 S.E.2d at 263; *see also* State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

40. Brief of Appellant at 6.

41. *Id.*

42. 290 S.C. at 215, 349 S.E.2d at 340; Record at 13-14.

43. Record at 55-58.

not clear in this case that photographs of the gunshot wound showed the trajectory of the bullet,[44] the supreme court traditionally has affirmed the admission of photographs that tend to corroborate medical testimony on record.[45]

Also significant in the decision to allow the photograph into evidence was "explicit testimony"[46] that medical personnel removed the victim's blouse at the scene of the shooting. Generally, a court may admit photographs that show conditions different from those described by eyewitnesses if the differences are sufficiently explained to the jury to avoid distortion or confusion.[47] In adopting this general rule, the supreme court also found that the testimony regarding removal of the blouse reduced the chances of undue prejudice.[48]

Todd indicates that photographs of a homicide victim which are not gruesome will be difficult to exclude from evidence, especially when medical testimony concerning cause of death is in the record. Although admitting photos of a nude victim into evidence often will be prejudicial to a defendant who is also facing sexual misconduct charges, the showing of that prejudice must be quite strong for exclusion of the evidence. In the view of the supreme court, such evidence retains sufficient probative value to be admissible.

James D. Myrick

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44. The State argued:

> Inasmuch as Appellant argued that the killing was accidental, all circumstances surrounding the shooting were relevant to ascertain the truth. This is particularly true of the location and appearance of the bullet wound because of the inconsistencies between the Appellant's testimony and the physical evidence offered by the State as to the downward movement of the bullet through the victim's body.

Brief of Respondent at 4.

45. In State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31, *cert. denied*, 449 U.S. 1037 (1980), contradictory testimony arose concerning whether death was by asphyxiation or strangulation. The supreme court held that photographs of band-like bruises on the face and neck of the victim were admissible as corroborative of medical testimony indicating strangulation. Similarly, in an earlier case, the court held that the photographs of a victim's body were admissible to confirm the examining physician's conclusion that strangulation was the cause of death. State v. Bellue, 260 S.C. 39, 194 S.E.2d 193 (1973).

46. 290 S.C. at 215, 349 S.E.2d at 340.

47. *See* Washington v. Commonwealth, 228 Va. 535, 552, 323 S.E.2d 577, 588 (1984), *cert. denied sub nom.* Washington v. Virginia, 471 U.S. 1111 (1985).

48. 290 S.C. at 215, 349 S.E.2d at 340.

III. SCOPE OF DEAD MAN'S STATUTE ENLARGED

In *In re Estate of Mason v. Mason*[49] the South Carolina Court of Appeals held that self-serving testimony, whether designed to affirm or to negate a fact concerning the destruction of a will, falls within the purview of the South Carolina Dead Man's Statute.[50] By excluding this testimony, the court enlarged the scope of the Dead Man's Statute.

This litigation arose when Ruth Carlton petitioned the court to prove the will of Roma Mason[51] by the exemplification of a photocopy of the will. The original will was destroyed before Mason's death. The trial judge allowed Ruby Ingle, Mason's daughter, to testify that she destroyed the will of the decedent in his absence and without his consent. After hearing Ingle's testimony the trial court found that the decedent died testate. The trial court held that the missing original will executed by the

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49. 289 S.C. 273, 346 S.E.2d 28 (Ct. App. 1986).

50. *Id.* at 280, 346 S.E.2d at 33. "It was the general rule at common law that a person interested in the outcome of an action could not be relied on to testify accurately and was therefore incompetent as a witness." Long v. Conroy, 246 S.C. 225, 231, 143 S.E.2d 459, 462 (1965). The common-law rule has been changed in most respects by statute. Under S.C. CODE ANN. § 19-11-10 (Law. Co-op. 1985), a party to an action may testify in the same manner and subject to the same rules of examination as any other witness. Section 19-11-10, however, is subject to the exceptions set forth in § 19-11-20, known as the Dead Man's Statute. The Dead Man's Statute provides as follows:

> Notwithstanding the provisions of § 19-11-10, no party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him.

S.C. CODE ANN. § 19-11-20 (Law. Co-op. 1985).

51. The statutory heirs at law of Roma Mason were his daughters, Ruth Carlton, Ruby Ingle, Alma Spooner, and Frances Crymes; and his sons, Charles Calvin Mason and Clyde Mason. Ruby Ingle stood to receive much more under the will than under the Statutes of Descent and Distribution, S.C. CODE ANN. §§ 21-3-10 to -60 (Law. Co-op. Supp. 1986) (repealed 1987). 289 S.C. at 275, 346 S.E.2d at 30.

decedent was not destroyed *animo revocandi*[52] and that the copy should be submitted to probate.[53] Appellant Alma Spooner claimed that Ingle's testimony violated the Dead Man's Statute and, therefore, should not have been admitted into evidence.

The South Carolina Dead Man's Statute prohibits an interested witness from testifying against the estate of the deceased or insane person when the testimony is "in regard to any transaction or communication"[54] between the witness and the deceased or the insane person, and the witness has or had a personal interest in the outcome.[55] The crux of the case was the interpretation of the word "transaction." The court recognized that under a strict reading of the statute, Ingle's testimony that she destroyed the will was neither a transaction nor a communication.[56] The court reasoned, however, that the admission of the testimony would circumvent the purpose of the statute by allowing the witness "to testify as to matters, of which, if such testimony is untrue, it cannot be contradicted by the deceased."[57]

In refusing to admit Ingle's testimony, the court also relied on the broad interpretation of "transaction" used in the Georgia

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52. When a will that cannot be found following the death of the testator is shown to have been in his possession when it was last seen, the presumption is that he destroyed it *animo revocandi* (with intention to revoke). Davis v. Davis, 214 S.C. 247, 255, 52 S.E.2d 192, 195 (1949); 79 AM. JUR. 2D *Wills* § 606 (1964). A party may rebut this presumption by presenting evidence that the will existed at the time of the testator's death, was lost subsequent to his death, or was destroyed by another without the testator's authority. Lowe v. Fickling, 207 S.C. 442, 447, 36 S.E.2d 293, 295 (1945).

53. Reply Brief of Appellant at 3.

54. S.C. CODE ANN. § 19-11-20 (Law. Co-op. 1985).

55. The South Carolina Supreme Court interpreted the statute in Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1969) and Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896). Under the Dead Man's Statute, four groups of people are incompetent to testify: (1) parties to an action or proceeding; (2) parties with an interest which may be affected by trial; (3) parties who once had an interest which may be affected by trial; and (4) an assignee of a thing in controversy in the action. 246 S.C. at 232, 143 S.E.2d at 462. Not only must a party fall into one of these four groups to be deemed incompetent, but that party must also meet each of the following three further tests: (a) One's testimony must be about a transaction or occurrence between himself and the deceased or insane person; (b) the testimony must be offered against the personal representative or the survivor of the deceased person or the assignee or committee of an insane person; and (c) the present or previous interest of the witness must be affected by the testimony. *Id.* at 232, 143 S.E.2d at 462; 47 S.C. at 492, 25 S.E. at 799.

56. 289 S.C. at 279, 346 S.E.2d at 32.

57. *Id.* (citing Trimmier v. Thomson, 41 S.C. 125, 19 S.E. 291 (1894)).

case *Daniel v. O'Kelley*.[58] In *Daniel* the Georgia Supreme Court held that a claim by a witness that a decedent did not enter into a contract is similar under the Dead Man's Statute to testimony that the decedent did enter into a contract.[59] By analogy the South Carolina Court of Appeals held that testimony that a testator did not perform a certain act is equivalent to testimony that he did perform the act.[60]

While the South Carolina courts generally have given a narrow construction to the Dead Man's Statute as a whole,[61] *Mason* indicates that the word "transaction" may be given a more liberal interpretation in some cases to effectuate the purpose of the statute.[62] Although the word "mutual" does not appear in the statute, South Carolina cases have held that "the word 'transaction', as used in the statute, implies mutuality; something done in concert, in which both take some part."[63] The South Carolina courts, therefore, have limited a "transaction" to an act in which the deceased participated. A "transaction" has not included testimony concerning a matter known to the witness by means other than dealings with the decedent.[64] *Mason* indicates, however, that an interested party cannot prove the existence of an express agreement, or deny the agreement, on the strength of his

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58. 227 Ga. 282, 180 S.E.2d 707 (1971).

59. *Id.* at 286, 180 S.E.2d at 709-10.

60. 289 S.C. at 280, 346 S.E.2d at 33. The variants of the Dead Man's Statute are so numerous that no statute seems entirely typical, and a great deal of conflicting and confusing case law exists as to their interpretation. In a majority of jurisdictions, however, a party or interested person is incompetent to deny that a particular transaction occurred. *See* Annotation, *Dead Man Statute as Applicable to Testimony Denying Transaction or Communication Between Witness and Person Since Deceased*, 8 A.L.R.2D 1094 (1949).

61. Hicks v. Battey, 259 S.C. 426, 192 S.E.2d 477 (1972); Lisenby v. Newsom, 234 S.C. 237, 107 S.E.2d 449 (1959).

62. The Dean Man's Statute was enacted to protect the estates of deceased persons from uncontradicted interested testimony. Trimmier v. Thomson, 41 S.C. 125, 130, 19 S.E. 291, 294 (1894).

63. Starnes v. Miller, 275 S.C. 16, 18, 266 S.E.2d 790, 791 (1980); 259 S.C. 426, 192 S.E.2d 477 (in personal injury action, plaintiff permitted to relate his observations of how accident happened, including the independent, involuntary acts of the deceased); Sullivan v. Latimer, 38 S.C. 158, 17 S.E. 701 (1893) (in suit by doctor for services rendered to deceased, doctor allowed to testify as to the physical condition of the deceased).

64. The court applied this definition of "transaction" in *Starnes* where the court permitted the sole survivor of a one-car accident to testify as to the identity of the deceased driver and the speed of the vehicle at the time of the accident. The court reasoned that the testimony "concerned the independent act of appellant's intestate in operating the vehicle; he simply related what he saw." 275 S.C. at 19, 266 S.E.2d at 791.

uncorroborated testimony, because this is "testimony amounting to a denial of the material issue of the case."[65]

This decision is harsh for those wishing to testify against the estate of a decedent. According to the court, the purpose of the statute is "to prevent an undue advantage on the part of the living over the dead."[66] The assumption that a deceased person would be unable to protect his own interests against a living adversary is faulty, however, because the representatives of a decedent generally will have a sufficiently strong stake in the case to defend the decedent's interests.[67]

The Federal Rules of Evidence effectively abolish the Dead Man's Statute[68] except in diversity cases, and several states have created a hearsay exception for statements by the deceased as to matters in dispute.[69] A court in a state recognizing the hearsay exception thus has the benefit of all the available evidence on the matter and can make a decision according to the relative weight it chooses to give the evidence.[70] In South Carolina, however, the Dead Man's Statute is deeply ingrained and probably will not be repealed by the legislature.

By holding that testimony either confirming or denying a fact is prohibited by the Dead Man's Statute, the court of appeals in *Mason* enlarged the scope of the statute. While the rule may have been intended to protect the estate of decedents against fraud, the exclusion operates indiscriminately to bar testimony which is favorable, as well as that which is unfavorable.[71] Both parties would better be protected by creating a hearsay exception which would allow the survivor to testify without restriction.

Sally A. Hildebrand

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65. 289 S.C. at 280, 346 S.E.2d at 32.

66. *Id.* at 279, 346 S.E.2d at 32 (quoting Owens v. Owens, 14 W. Va. 88, 95 (1878).

67. *Accord* Note, *The Dead Man's Rule in Alabama*, 23 ALA. L. REV. 405, 419-20 (1971).

68. "Every person is competent to be a witness except as otherwise provided in these rules." FED. R. EVID. 601.

69. *See* CONN. GEN. STAT. § 52-172 (1958); N.H. REV. STAT. ANN. § 516:25 (1974); S.D. CODIFIED LAWS ANN. § 19-16-34 (1979).

70. For further discussion of the hearsay exception alternative, see Chadbourn, *History and Interpretation of the California Dead Man's Statute: A Proposal for Liberalization*, 4 UCLA L. REV. 175 (1957).

71. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 65 (E. Cleary 3d ed. 1984).

IV. NONMEDICAL PSYCHOLOGIST QUALIFIED AS EXPERT ON MENTAL DISTURBANCE

In *Howle v. PYA/Monarch, Inc.*[72] the South Carolina Court of Appeals addressed whether nonmedical psychologists are competent to testify on the diagnosis, prognosis, and causation of mental and emotional disturbances. In concluding that these witnesses are competent, the court settled a question of first impression in South Carolina and adopted the more liberal majority approach that delineates the allowable extent of a psychologist's expert testimony.

Howle was injured in an automobile collision with an employee of PYA/Monarch (PYA). Howle brought a tort action against the employee and PYA. The trial judge allowed Howle to present testimony of a nonmedical psychologist, Jan Bixler, who qualified as an expert because of his extensive education, training, and experience.[73] Bixler testified that Howle was suffering from acute anxiety neurosis with depression caused by the accident and that the residual effects of the accident would remain with her indefinitely.[74]

On appeal PYA argued that because Bixler was not a medical doctor he was not qualified to give expert opinion testimony concerning his diagnosis, prognosis, and determination of causation of Howle's mental condition.[75] Rejecting this argument, the court noted that the qualification of a witness as an expert is within the discretion of the trial judge.[76] The court of appeals

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72. 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986).

73. Record at 83-87.

74. Record at 95-97.

75. "Qualified" and "competent" are adjectives often mistakenly used interchangeably, but the subtle differences and similarities in the meanings of the words is significant. Generally, an expert witness is "qualified" if he has the requisite skill and knowledge concerning the subject of testimony. In a strict sense, however, a witness is "competent" to testify if he is not proscribed by law from so doing. Because PYA ultimately argued that statutory law prevented Bixler from testifying, PYA was, in the strict sense of the word, making a "competency" argument. Unfortunately, the clarity of this opinion is skewed since PYA never used the word "competent" in its argument. The court of appeals, however, used it freely in its opinion and finally predicated its holding on the word "competent."

76. 288 S.C. at 592, 344 S.E.2d at 160 (citing Madden v. Cox, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985)).

reasoned that neither section 40-47-40[77] nor section 40-55-50[78] of the South Carolina Code bars a nonmedical psychologist from testifying about diagnosis, prognosis, or causation.[79] The court concluded that since section 40-55-60 contemplates a psychologist diagnosing, prescribing, treating, or advising clients within the limits of his practice,[80] the statute implies that he may testify to those activities.[81] Virtually every state has addressed this issue, and the jurisdictions are split roughly between three positions. The majority rule—which South Carolina has now adopted—allows psychologists to testify as to diagnosis, prognosis, or causation.[82] Second, some jurisdictions permit only psychiatrists to give this type of expert testimony.[83] Last, some jurisdictions bar psychologists from giving expert testimony concerning causation, but allow them to testify concerning diagnosis and prognosis.[84]

The few jurisdictions that allow only psychiatrists to give expert testimony on mental illness generally rely on the reasoning that mental illness is a medical matter in which only medical doctors have sufficient training to qualify as experts.[85] Of these jurisdictions, some base their reasoning on statutes that preclude psychologists from engaging, in any manner, in the practice of medicine.[86] The overwhelming trend, however, is to follow the approach contemplated by Rule 702 of the Federal Rules of Evidence "that it is the qualifications of the witness that count rather than his title."[87]

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77. S.C. CODE ANN. § 40-47-40 (Law. Co-op. 1986) defines the "practice of medicine."

78. S.C. CODE ANN. § 40-55-50 (Law. Co-op. 1986) enumerates the acts that constitute practice as a psychologist.

79. 288 S.C. at 594, 344 S.E.2d at 161.

80. S.C. CODE ANN. § 40-55-60 (Law. Co-op. 1986).

81. 288 S.C. at 594, 344 S.E.2d at 161.

82. *Id.*; *see* Kravinsky v. Glover, 263 Pa. Super. 8, 396 A.2d 1349 (1979); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978).

83. *See* Bilbrey v. Industrial Comm'n, 27 Ariz. App. 473, 556 P.2d 27 (1976); Campbell v. Pommier, 5 Conn. App. 29, 496 A.2d 975 (1985); Spann v. Bees, 23 Md. App. 313, 327 A.2d 801 (1974).

84. *See* Kriewitz v. Savoy Heating & Air Conditioning Co., 396 So. 2d 49 (Ala. 1981); *see also* Reese v. Naylor, 222 So. 2d 487 (Fla. Dist. Ct. App. 1969).

85. *See* cases cited *supra* note 83.

86. *See* 27 Ariz. App. 473, 556 P.2d 27.

87. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[04], at 702-25 (1985); FED. R. EVID. 702.

The significance of *Howle* is twofold. First, the court of appeals indicated a willingness to allow psychologists to testify about areas in which only psychiatrists were once considered capable.[88] Second, and more importantly, this case demonstrates the proper analysis for determining whether a witness is qualified to give expert testimony in South Carolina. *Howle* quells again[89] the old argument that a witness must have a certain educational title or license in order to qualify as an expert witness. Under the *Howle* analysis, the court will first determine if the witness has acquired, through study or experience or both, the particular knowledge and skill which would make him better qualified than the jury to form a particular opinion.[90] The trial judge then has the discretion whether to qualify the witness as an expert.[91] Practitioners should note, therefore, that the lack of a title, a formal education, or a license in an area no longer automatically excludes a nonmedical psychologist from offering expert testimony.

J. James Duggan

V. Evidence of Prior Guilty Plea to Accommodation Sale of Controlled Substance Admissible for Impeachment

In *Porter v. State*[92] the Supreme Court of South Carolina held that admitting for impeachment purposes evidence of a prior guilty plea to an accommodation sale of a controlled substance was proper. Porter, the defendant, contended that the trial judge erred in allowing the prosecution to impeach his testimony by introducing Porter's previous plea of guilty to the sale of a controlled substance. The supreme court, however, affirmed the lower court's denial of post-conviction relief.[93] Porter was sentenced in 1981 for an "accommodation sale" conviction under

88. The probative value of psychological testimony is often criticized. *See generally* Comment, *The Psychologist As Expert Witness*, 38 Md. L. Rev. 539 (1979) (suggesting that the probative value of expert testimony is diminished since the court fails to ensure the accuracy of underlying psychological techniques, diagnosis, and opinions).

89. *See* Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984).

90. An analysis of *Howle* and *Botehlo* suggests that the law in South Carolina on testimony by experts is essentially the same as federal law outlined in Fed. R. Evid. 702.

91. Madden v. Cox, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985).

92. 290 S.C. 38, 348 S.E.2d 172 (1986).

93. *Id.* at 39, 348 S.E.2d 173.

section 44-53-460 of the South Carolina Code.[94] Because the statute provides that one convicted of an accommodation sale may be sentenced as one convicted of simple possession, Porter argued that the lower court should have treated the prior conviction as simple possession for purposes of impeachment. Porter relied on *State v. Harvey*[95] which held that "simple possession . . . does not constitute a crime of moral turpitude."[96] Building on that premise, Porter sought to invoke the rule that "[a] witness may not be impeached by evidence of specific acts of misconduct, except for crimes involving moral turpitude and not too remote."[97] Under Porter's theory, simple possession is not a crime of moral turpitude; thus, the trial court's use of the prior conviction for impeachment purposes was improper.

The supreme court rejected this argument. Basing its opinion on a reading of section 44-53-460 and on a prior decision,[98] the court held that evidence of an accommodation sale is considered only in mitigation of sentence and does not affect the nature of the underlying conviction for impeachment purposes. Since possession of a controlled substance with intent to distribute *is* a crime of moral turpitude,[99] the court found Porter was properly impeached with his prior conviction for sale of a controlled substance.

The practitioner should note from this decision that although Porter's argument is logical, the supreme court will not allow the rules of evidence governing impeachment by prior conviction to be circumvented by the accommodation sale statute. Section 44-53-460 of the South Carolina Code relates only to the *sentencing* of a person convicted of an accommodation offense; the supreme court made clear in *Porter* that it will uphold this

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94. S.C. CODE ANN. § 44-53-460 (Law. Co-op. 1985) states in pertinent part that "[i]f the convicted person establishes by clear and convincing evidence that he delivered . . . a controlled substance . . . only as an accommodation . . . the court shall *sentence* the person as if he had been convicted of a violation of § 44-53-370(c)." (emphasis added).

95. 275 S.C. 225, 268 S.E.2d 587 (1980).

96. *Id.* at 227, 268 S.E.2d at 588.

97. *Id.* at 226, 268 S.E.2d at 587.

98. The court in State v. Martin, 278 S.C. 427, 429, 298 S.E.2d 87, 88 (1982), explained the ramifications of § 44-53-460 and noted that "[t]he statute does not exonerate appellant upon showing that he distributed marijuana as an accommodation, but only allows such testimony on the question of mitigation of sentence."

99. State v. Lilly, 278 S.C. 499, 500, 299 S.E.2d 329, 330 (1983).

reading and its prior decision[100] interpreting the statute.

Matthew S. Moore III

VI. Voluntarily Given Accident Reports Admissible for Impeachment

In *Ellison v. Pope*[101] the South Carolina Court of Appeals decided whether handwritten, voluntary statements given to an investigating officer at the scene of an accident are confidential "accident reports" inadmissible at trial under section 56-5-1340 of the South Carolina Code.[102] In concluding that such statements are not confidential and, therefore, are admissible at trial, the court settled a question of first impression in South Carolina and adopted a restrictive interpretation of the term "accident report."

Ellison was injured when his automobile crashed into a van owned by the defendant Pope. The defendant-driver, Stacey, had left the van in a lane of traffic at night without lights or warning signals. After the accident a police officer made out an accident report and had the defendants submit voluntary statements.[103] At trial the judge allowed Ellison's attorney to use the statements for impeachment. The jury returned a verdict for Ellison which was affirmed on appeal.[104]

Pope argued that the trial judge committed reversible error by allowing Ellison to use the handwritten statements for purposes of impeachment. The court of appeals, however, held that neither section 56-5-1290[105] nor section 56-5-1340[106] rendered the voluntary statements either confidential or unusable at a later trial.[107] Under the court's analysis of the applicable statutes, only the "written report" prepared by the investigating of-

100. *See* 278 S.C. 427, 298 S.E.2d 87.

101. 290 S.C. 100, 348 S.E.2d 367 (Ct. App. 1986).

102. Section 56-5-1340 provides that no "accident reports" shall be used "as evidence in any trial . . . arising out of an accident." S.C. Code Ann. § 56-5-1340 (Law. Co-op. 1976 & Supp. 1986).

103. 290 S.C. at 102, 348 S.E.2d at 368.

104. *Id.* at 100, 348 S.E.2d at 367.

105. Section 56-5-1290 provides that none of the reports required by §§ 56-5-1260 to -1280 may be used in any way in a trial to recover damages. S.C. Code Ann. § 56-5-1290 (Law. Co-op. 1976).

106. S.C. Code Ann. § 56-5-1340 (Law. Co-op. Supp. 1986).

107. 290 S.C. at 106, 348 S.E.2d at 371.

ficer and forwarded to the department was deemed confidential. The court of appeals construed the term "accident reports" as used in section 56-5-1340 to include only accident reports which the law requires a person to make, not reports made voluntarily.[108] The court reasoned that too much information gathered at the scene of an accident would be considered confidential if a broader definition of the term were allowed. This decision followed those of other jurisdictions with similar confidentiality statutes.[109]

The court of appeals stated that an operator of a vehicle only needs to give notice to an investigating officer that an accident occurred; the driver does not also have to explain how the accident occurred.[110] Under this view section 56-5-1340[111] does not appear designed to encourage persons to give full and accurate accounts of their accidents for accident prevention purposes, as in some states.[112] Instead, this section probably reflects South Carolina's interest in ensuring that police are promptly informed of serious accidents so that they can render assistance.[113] To promote this interest, South Carolina gives immunity to statutorily required statements. Thus, the argument that this decision will cause accident victims to refrain from giving detailed information to investigating law enforcement officers is not persuasive. Because the statements in *Ellison* were not required by statute, prohibiting the use at trial of such voluntary statements was not necessary to encourage compliance with the statute.

J. James Duggan

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108. *Id.* at 107, 348 S.E.2d at 371.

109. *See* Creary v. State, 663 P.2d 226 (Alaska Ct. App. 1983); Davies v. Superior Court, 36 Cal. 3d 291, 682 P.2d 349, 204 Cal. Rptr. 154 (1984); Brackin v. Boles, 452 So. 2d 540 (Fla. 1984); Rockwood v. Pierce, 235 Minn. 519, 51 N.W.2d 670 (1952); Spradling v. State, 628 S.W.2d 123 (Tex. Ct. App. 1981).

110. 290 S.C. at 108, 348 S.E.2d at 372. It seems unfair for the court to assume, however, that the average person knows he does not have to explain to an investigating police officer how an accident occurred.

111. S.C. CODE ANN. § 56-5-1340 (Law. Co-op. Supp. 1986).

112. *See* Davies v. Superior Court, 36 Cal. 3d 291, 682 P.2d 349, 204 Cal. Rptr. 154 (1984); Selected Risks Ins. Co. v. White, 447 So. 2d 455 (Fla. Dist. Ct. App. 1984).

113. *See* Creary v. State, 663 P.2d 226 (Alaska Ct. App. 1983).