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Evidence

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EVIDENCE

I. *Res Gestae* Exception to the Hearsay Rule Recognized for Police Report of Sexual Assault

In *State v. Harrison*[1] the South Carolina Supreme Court held that statements made by a victim to the police shortly after the victim allegedly was assaulted sexually qualified as a *res gestae* exception to the hearsay rule and the statements could be treated as admissible evidence. The supreme court did not consider the effect of the possible self-serving character of the victim's statements on the admissibility of the declarations.[2]

In *Harrison* the alleged victim claimed that Harrison attempted to rape her when she was walking home alone one night. The victim reported the attack to a police dispatcher who testified later at trial about their conversation. Several police officers also testified about their discussions with the victim. One investigator arrived at the crime scene within minutes after the victim reported the attack. At the scene, the victim made statements concerning the assault. The authorities assigned another investigator to the case, and he spoke with the victim fifteen hours after the incident.

At trial, the judge admitted the police testimony and both the report made at the crime scene and the statement made fifteen hours later, under the *res gestae* or excited utterance exception to the hearsay rule. Harrison's trial resulted in his conviction for kidnapping and criminal sexual conduct in the first degree. He appealed the conviction on several grounds, including the admission of the police testimony over his hearsay objection.[3]

Hearsay testimony generally is not admissible evidence.[4] Hearsay is not allowed into evidence because the testimony cannot be tested by cross-examination and, therefore, may be untrustworthy.[5] The Federal Rules of Evidence (FRE), however, contain several exceptions to this rule.[6] The first exception admits statements of present sense impression. Rule 803(1) defines present sense impression as "[a] statement describing or explaining an event or condition made while the declar-

1. 298 S.C. 333, 380 S.E.2d 818 (1989).
2. *See id.* at 336-37, 380 S.E.2d at 819-20.
3. *Id.*
4. Fed. R. Evid. 802.
5. *See* 5 J. Wigmore, Evidence § 1362, at 3 (Chadbourn rev. 1974).
6. Fed. R. Evid. 803(1)-(24) (hearsay exceptions).

ant was perceiving the event or condition, or immediately thereafter."[7] Under the conditions described by rule 803(1), the substantial contemporaneity between event and statement negates the likelihood of deliberate and conscious misrepresentation by the declarant.[8]

The second hearsay exception in the FRE covers "excited utterances." Rule 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[9] The theory behind this exception is that circumstances may produce a condition of excitement that temporarily relieves the declarant of the capacity for reflection and produces utterances free of conscious fabrication.[10] Spontaneity is the key factor in both of these exceptions.[11]

South Carolina courts have incorporated federal rules 803(1) and 803(2) into the *res gestae* exception to the hearsay rule.[12] For testimony to be admissible under the South Carolina *res gestae* exception, the statement "must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or designed to make false or self-serving declarations."[13] The South Carolina rule embraces the first two exceptions in the Federal Rules.[14] Furthermore, the rule leaves a great deal of discretion to the trial judge to determine whether the statements fit under

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7. *Id.* 803(1).

8. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 828 (4th ed. 1986).

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

10. *See* 5 J. WIGMORE, EVIDENCE § 1747 (Chadbourn rev. 1974).

11. FED. R. EVID. 803 Advisory Committee's Note. The subject matter of present sense impressions is narrower than the excited utterance exception. Present sense impressions are limited to statements describing or explaining the event, whereas excited utterances must only relate to the startling event. Excited utterances can also cover a longer period of time than allowed with present sense impressions. Present sense impressions, however, are broader in that they can cover events that are not startling, unlike excited utterances, which are limited to startling events. *See id.*

12. *See* W. REISER, A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW 50-51 (3d ed. 1987).

13. State v. Quillien, 263 S.C. 87, 97, 207 S.E.2d 814, 819 (1974) (quoting State v. Long, 186 S.C. 439, 195 S.E. 624 (1938)).

14. "The South Carolina rule that the statement be 'substantially contemporaneous with the litigated transaction' seems, when considered with the requirement that the mind of the declarant be 'under the active, immediate influences of the transaction,' to embrace both parts of the Federal Rule." W. REISER, *supra* note 12, at 50 (citing State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978)).

the exception.[15]

Harrison claimed throughout the trial that the victim had propositioned him. He further maintained that her statements to the police were self-serving and that she brought the rape charge to make her boyfriend jealous.[16] The court chose to focus on the contemporaneity of the event with the victim's statements rather than on the possibility of her self-serving intentions.

In *Harrison* the South Carolina Supreme Court followed a liberal approach similar to that of the South Carolina Court of Appeals in *Doe v. Asbury*.[17] Under the *res gestae* exception statements are not inadmissible merely because of their self-serving nature. The court may consider the self-serving character of a statement, however, as a factor in determining the spontaneity of the statement.[18] Other jurisdictions have also held that the self-serving nature of a statement is merely a factor and is not determinative on the issue of the admissibility of the *res gestae*.[19]

South Carolina courts consistently have admitted statements made by assault victims when the statements are made during the victim's first opportunity to speak to the police.[20] In *Harrison* the supreme court focused on the testimony by the police officers and dispatcher that the victim was in a very emotional state when she made her statements.[21] The court's emphasis implies that they believed the victim was still under the active, immediate influence of the alleged event. The court was not influenced by the fact that a significant amount of time had passed between the attack and the victim's first report, or that she had spoken to others before speaking to the police.

The supreme court did not rule that the trial judge abused his discretion when he admitted statements made by the dispatcher and officers who arrived shortly after the crime had been reported. The court did find, however, error in the judge's admission of testimony by

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15. *See* State v. Sosebee, 284 S.C. 411, 413, 326 S.E.2d 654, 656 (1985) (trial judge has considerable latitude in ruling on the admissibility of evidence).

16. Brief of Appellant at 12-13.

17. 281 S.C. 191, 314 S.E.2d 849 (Ct. App. 1984).

18. *Id.* at 197, 314 S.E.2d at 853.

19. *See, e.g.*, Bass v. Muenchow, 259 Iowa 1010, 1013, 146 N.W.2d 923, 925 (1966); Cluster v. Cole, 21 Md. App. 242, 247, 319 A.2d 320, 324 (1974); Walsh v. Table Rock Asphalt Constr. Co., 522 S.W.2d 116, 121 (Mo. Ct. App. 1975); Bennett v. Bennett, 92 N.H. 379, 386, 31 A.2d 374, 380 (1943); Cestero v. Ferrara, 57 N.J. 497, 502, 273 A.2d 761, 763 (1971); Clinard v. Southern Pac. Co., 82 N.M. 55, 58, 475 P.2d 321, 324 (1970); Zeller v. Dahl, 262 Or. 515, 519, 499 P.2d 1316, 1318 (1972).

20. *See* State v. Cox, 274 S.C. 624, 627, 266 S.E.2d 784, 786 (1980); State v. Quillien, 263 S.C. 87, 96-97, 207 S.E.2d 814, 818-19 (1974); State v. Sharpe, 239 S.C. 258, 271, 122 S.E.2d 622, 629 (1961).

21. *See Harrison*, 298 S.C. at 337, 380 S.E.2d at 820.

an officer who arrived fifteen hours after the attack.[22] Although the officer's testimony described the victim's upset, emotional condition,[23] the substantial period of lapsed time removed the victim from the immediate influence of the event and removed the officer's testimony from admissibility under *res gestae*.[24]

In *Harrison* the supreme court re-emphasized the importance of the contemporaneity of the event and the declarations by holding that statements made to the police shortly after the assault were admissible under *res gestae*, but statements made hours after the incident were not admissible. The court, however, declined to outline the factors for courts to consider when presented with possible self-serving declarations under the South Carolina *res gestae* equation.

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II. PARTIES CANNOT IMPEACH THEIR OWN WITNESS'S TESTIMONY WITH A PRIOR INCONSISTENT STATEMENT UNLESS THE TESTIMONY SURPRISES AND HARMS THE CALLING PARTY

In *State v. Bailey*[25] the South Carolina Supreme Court held that unless a witness's testimony surprises and harms the calling party, the court cannot declare the witness hostile, and, therefore, the calling party cannot impeach the witness's testimony with a prior inconsistent statement.

The defendant, Wayne Bailey, after arguing with his brother, Rex Bailey, shot a gun through his brother's house and pickup truck and stole his brother's shotgun.[26] Later that day, Rex Bailey gave a statement to the police and alleged that Wayne had shot the gun and gave the police other facts about the incident.[27] A neighbor's tip enabled police to seize the gun in Wayne's truck. The police charged Wayne with burglary in the first degree, discharging a firearm into a dwelling, grand larceny, and malicious injury to real and personal property.[28]

Prior to trial, Wayne's counsel notified the solicitor by letter that Rex's testimony at trial would be inconsistent with his prior statement.[29] The trial judge knew that the state intended to impeach Rex,

22. *Id.*
23. Record at 103.
24. 298 S.C. at 337, 380 S.E.2d at 820.
25. 298 S.C. 1, 377 S.E.2d 581 (1989).
26. *Id.* at 3, 377 S.E.2d at 582.
27. *Id.*, 377 S.E.2d at 582-83.
28. *See* Record at 1.
29. *Bailey*, 298 S.C. at 3, 377 S.E.2d at 583.

its own witness, with the prior statement,[30] but decided to allow its use to refresh Rex's memory.[31] Wayne's counsel objected to this use of the statement.[32]

At trial the state called Rex and he testified that "I remember writing a statement down, but I don't know everything I put in it."[33] The solicitor then produced a statement which Rex verified was the one he had given to the police.[34] When the solicitor questioned Rex about Wayne's confession, however, he claimed that he could not remember the conversation with Wayne or telling the police about it. Rex responded to the solicitor's request that he refresh his memory with the statement by stating that he was testifying "as well as I remember."[35] The judge then ordered him to read the statement aloud, and when Rex repeatedly attempted to qualify the statement, the judge directed the solicitor to publish the statement to the jury.[36]

It is unclear why the solicitor, rather than attempting to bully his own witness into reading the statement and, thus, impeaching him, did not simply offer it as substantive evidence under *State v. Copeland*.[37] In *Copeland* the supreme court allowed a police officer to testify about a statement made to him by a witness after the witness denied making the statement. The court reasoned as follows:

> [T]he requirements that the jury observe the declarant and that the defendant have an opportunity to cross-examine are met where the declarant takes the stand and is subject to cross-examination. The assertion by a person that the declarant made a prior statement is not itself hearsay, and the jury can determine the credibility of the witness on that point.[38]

In *Bailey* the trial judge apparently admitted the prior statement as substantive evidence because Rex verified it to be the one he had given and because he was available for cross-examination. A simple offer by the solicitor would have avoided the impeachment problem because Rex had not given any testimony that contradicted the statement, and no reason, therefore, existed to impeach him. Instead, the solicitor published the statement, and Wayne appealed his conviction

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30. *See id.*
31. *See id.*
32. *See* Record at 8.
33. *Id.* at 49.
34. *See id.*
35. *Id.* at 51.
36. *Bailey*, 298 S.C. at 3, 377 S.E.2d at 583.
37. 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 463 U.S. 1214, *reh'g denied*, 463 U.S. 1249 (1983).
38. *Id.* at 581-82, 300 S.E.2d at 69 (quoting Gibbons v. State, 248 Ga. 858, 863, 286 S.E.2d 717, 721 (1982)).

based, in part, on the trial court's error in allowing the state to impeach its own witness. The state asserted that no impeachment occurred. It argued that the prosecutor merely had used the statement to refresh Rex's memory.[39] The supreme court did not discuss the distinction between refreshment and impeachment when a witness asserts that he cannot remember. The key seems to be that when, as in *Bailey*, the witness does not deny making the statement, questioning him to induce an explanation is permissible, but publication by the solicitor amounts to impeaching his testimony.[40]

The *Bailey* court relied on *State v. Hamlet*[41] and held that the state impermissibly impeached its own witness because it had not been surprised by the testimony and the trial judge had not declared the witness hostile.[42] The *Bailey* decision follows South Carolina precedent[43] and reaffirms the orthodox view that a party can impeach his own witness only when the witness is hostile or recalcitrant.[44] This rule, however, has come into increasing disfavor because its rationale does not logically relate to the purposes of evidentiary restrictions in our modern adversarial system.[45]

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39. Record at 11.

40. *See Bailey*, 298 S.C. at 3-4, 377 S.E.2d at 583. The court's decision seems to be based on the fact that "[w]hen Rex persistently interspersed additional testimony into the statement, the Court directed the solicitor to publish the statement." *Id.* at 3, 377 S.E.2d at 583; *see also* State v. Richburg, 250 S.C. 451, 158 S.E.2d 769 (1968) *aff'd*, 253 S.C. 458, 171 S.E.2d 592 (1969), *cert. denied*, 399 U.S. 930 (1970) (prejudicial error to allow solicitor to read witness's statement to jury); State v. Nelson, 192 S.C. 422, 7 S.E.2d 72 (1940) (prejudicial error to allow solicitor to publish answers given by witness at coroner's inquest).

41. 294 S.C. 77, 362 S.E.2d 644 (1987).

42. The court, however, upheld the conviction because the error was harmless in light of the other evidence presented. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584 (record contains sufficient competent evidence to support conviction).

43. *See, e.g.*, State v. Hamlet, 294 S.C. 77, 79, 362 S.E.2d 644, 645 (1987) (when witness testified inconsistently with prior statement given to police, court held that state's impeachment of its own witness constituted error because witness was not declared hostile).

44. *See, e.g.*, Note, *The New Federal Rules of Evidence and South Carolina Evidentiary Law: A Comparison and Critical Analysis*, 28 S.C.L. REV. 481, 503 (1977) [hereinafter Note, *Comparison and Critical Analysis*] (South Carolina adheres to the orthodox rule rather than a rule similar to Federal Rule of Evidence 607, which allows any party to attack the credibility of any witness); Note, *Impeaching One's Own Witness*, 49 VA. L. REV. 996, 1001 (1963) (to allow admission of a prior inconsistent statement courts generally require that the witness' testimony be material, that it surprise counsel, and that it damage the party's case).

45. *See, e.g.*, C. MCCORMICK, MCCORMICK ON EVIDENCE § 38, at 84-85 (E. Cleary 3d ed. 1984) More and more jurisdictions are abandoning the rule prohibiting or limiting impeachment of one's own witness because the rule "is a serious obstruction to the ascertainment of the truth . . . ." *Id.*; *see also* 3A J. WIGMORE, EVIDENCE §§ 896-903, at 658-

The *Bailey* court gave two reasons for following the traditional rule:

> The reasons underlying the rule are, first, that the party by calling the witness to testify vouches for the trustworthiness of the witness, and second, that the power to impeach is the power to coerce the witness to testify as desired, under the implied threat of blasting the character of the witness if the witness does not.[46]

The first reason, known as the voucher theory, is based on the idea that the party calling the witness vouches for the trustworthiness of the witness. Accordingly, the trial court should not allow the party to contradict the testimony.[47] This reason applied when courts first formulated the rule,[48] and parties chose "oath helpers,"[49] usually family members and friends, to testify about the trustworthiness of the witness instead of about the occurrence of facts.[50] Most modern commentators, however, have rejected the voucher theory because today parties generally do not freely choose their witnesses. Instead, parties choose witnesses because they can testify about the occurrence of certain events.[51] Furthermore, courts should reject the voucher theory because,

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672 (J. Chadbourn ed. 1970) (The basis for the rule is no longer applicable. The only real danger is that the prior statement will be used as substantive evidence by the jury and courts can guard against this danger with proper instructions to the jury.).

46. State v. Bailey, 298 S.C. 1, 3, 377 S.E.2d 581, 583 (1989) (quoting C. McCORMICK, *supra* note 45, § 38). It is ironic that the *Bailey* court cites McCormick to justify its ruling because McCormick concludes that "a rule against the showing of prior inconsistent statements of one's own witness, to aid in evaluating the testimony of the witness, is a serious obstruction to the ascertainment of truth, even in criminal cases." C. McCORMICK, *supra* note 45, § 38, at 84-85.

47. *See, e.g.*, C. McCORMICK, *supra* note 45, § 38, at 82. "[T]he party by calling the witness to testify vouches for the trustworthiness of the witness . . . ." *Id.*

48. The exact origin of the rule prohibiting impeachment by the calling party is unknown, but at least three theories about the origin exist. *See, e.g.*, Note, *Impeaching One's Own Witness*, *supra* note 44, at 996. Authorities differ about whether rule originated in Roman law, in the medieval practice of trial by compurgation, or in the transition from an inquisitorial to an adversarial method of trial. *Id.*

49. J. WIGMORE, *supra* note 45, § 896, at 659.

50. *See id.*; Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI L. REV. 69, 69-70 (1939).

51. *See* FED. R. EVID. 607 Advisory Committee's Note. ("A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them."); C. McCORMICK, *supra* note 45, § 38, at 82 (Except when a party calls an expert or character witnesses, he has "little or no choice of witnesses [and] calls only those who happen to have observed the particular facts in controversy."); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 607-2 (quoting *The Proposed Rules of Evidence: Hearing Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93d Cong., 1st Sess., 284 (1973) (statement of Mr. Kleiboemer Staff of the Deputy Att'y Gen. for the Admin. of Criminal Justice)) (a witness who gave testimony that conflicted with a prior statement "is an essential witness in the sense that the jury

as Dean Ladd once stated, it "fails to take into account the inability of a party to select witnesses whose testimony he may predict with certainty."[52] *State v. Copeland*[53] contains additional support for this view. In *Copeland* the South Carolina Supreme Court noted that "the oath is not as strong a guaranty of truth as once it may have been . . . ."[54]

The South Carolina Supreme Court has created an exception that allows impeachment when the party is obliged to call a witness, such as a witness who has subscribed to an instrument.[55] In some criminal cases a witness might be so essential to the state's case that it is, for all practical purposes, compelled to call the witness.[56] In these cases the state cannot vouch for the witness' trustworthiness. Little distinction exists between having to take a witness the way one finds him and being obliged to call him. The courts should treat the calling party the same in both situations.[57]

The second reason given by the *Bailey* court to justify the prohibition on impeachment of one's own witness is the coercion theory.[58] In 1980 the supreme court stated that "[t]he rule against impeaching one's own witness is intended for the protection of the witness."[59] The coercion theory addresses this concern. The basis of the theory is that

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will be suspicious if you do not produce him."); 3A J. WIGMORE, *supra* note 45, § 898, at 662 (quoting May, *Some Rules of Evidence* in 11 AM. L. REV. 261, 264 (1876)) (Witnesses are determined by "history and course of the events which are to come under examination . . . . [They] are not such as the parties have selected at their pleasure."); Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A promise Unfulfilled*, 54 TEX. L. REV. 917, 920 (1976) ("[A] party does not select his witnesses, but simply takes the witnesses as he finds them."); Ladd, *supra* note 50, at 77 ("Except in the case of character witnesses and expert testimony, parties under the adversary system do not choose any persons they might like to place upon the witness stand, but are forced to take those, good or bad, who by fate or chance happen to have been exposed to the opportunity of observing or hearing facts which pertain to the case on trial.").

52. Ladd, *supra* note 50, at 78.

53. 278 S.C. 572, 300 S.E.2d 63 (1982) (court allowed use of prior statements as substantive evidence when the jury can observe the declarant, and the declarant is subject to cross-examination), *cert. denied*, 463 U.S. 1214, *reh'g denied*, 463 U.S. 1249 (1983).

54. *Id.* at 581, 300 S.E.2d at 69 (quoting Gibbons v. State, 248 Ga. 858, 863, 206 S.E.2d 717, 721 (1982)).

55. *See, e.g.*, White v. Southern Oil Stores, 198 S.C. 173, 177, 17 S.E.2d 150, 151 (1941) (subscribing witness to deed or will).

56. *See* J. WEINSTEIN & M. BERGER, *supra* note 51.

57. *See* Ladd, *supra* note 50, at 78 (though the party has no legal to duty to call "the particular witness . . . if he expects to present his case at all in court, he must select those available or have none" and, therefore, courts should treat the party as if it had such a duty).

58. *Bailey*, 298 S.C. at 3, 377 S.E.2d at 583.

59. Reid v. Kelly, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980); Fare v. Thompson, 25 S.C.L. (Chev.) 37, 45 (1839) (allowed impeachment by prior inconsistent deposition).

a party who can impeach can coerce the witness to testify as desired by the implied threat to blast the character of the witness if the witness does not testify as desired.[60]

While this theory is logical if the party impeaches the witness by attacking his character or by showing corruption, it does not apply to the use of a prior inconsistent statement which "merely casts doubt on a witness' [sic] trustworthiness in reporting one incident without attacking his character in general."[61] Dean Wigmore recognizes the concern that the fear of being abused by the calling party will "prevent a repentant witness from recanting a previously falsified story, and would more or less affect every witness who knew that the party calling him expected him to tell a particular story."[62] Wigmore, however, rebuts this concern:

> The policy of protecting the witness, subjectively, against the fear of being abused and held up to disgrace, in case he should disappoint the expectations of the party calling him, obviously cannot regard the exposure of a self-contradiction as a legitimate reason for such apprehension on the part of the witness. There is no necessary implication of bad character, no smirching of reputation, no exposure of misdeeds on cross-examination, nothing that could fairly operate to coerce either an honest or a dishonest witness to persist in an incorrect story through fear of the party calling him. An honest witness could readily explain how he came to make the former statement; a dishonest one would not be deterred from returning to truth by such a trifling obstacle.[63]

Other commentators have also questioned whether the threat of coercion justifies putting the calling party at the mercy of his witness and his opponent.[64] This possibility is particularly troublesome when, as in *Bailey*, one family member is asked to testify against another. In these cases a strong possibility exists that a family member's desire to protect the other will affect his testimony.[65] When the calling party

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60. *See Bailey*, 298 S.C. at 3, 377 S.E.2d at 583.

61. Graham, *supra* note 51, at 920.

62. 3A J. WIGMORE, *supra* note 45, § 899, at 664.

63. *Id.* § 903, at 669.

64. *See, e.g.*, FED. R. EVID. 607 Advisory Committee's Note (stating that the traditional rule is based upon "false premises"); C. MCCORMICK, *supra* note 21, § 45, at 82-83.

65. *See* Ladd, *supra* note 50, at 85 ("Sympathy for the accused in criminal cases plays a large part in causing witnesses to change their testimony, as many people dislike to take an active part in causing imprisonment, particularly when friends or relatives are involved."). *See also* Note, *Impeaching One's Own Witness*, *supra* note 44, at 1009 (indicating that bias should be equivalent to hostility). *Cf.* United States v. Insana, 423 F.2d 1165, 1170 (2d Cir. 1970) (court allowed substantive use of prior inconsistent statement when "recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to so testify is not a lack of mem-

cannot question the truth of the witness's statement, "the door [is open] to possible one-sided presentation. Such a situation is the antithesis of a search for truth, for both parties should be on the same footing."[66]

Although commentators generally have rejected both the voucher theory and the coercion theory,[67] a third reason for the rule against impeachment receives more favorable treatment. Professor McCormick explains that "[t]he theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that [the inconsistency] . . . raises a doubt as to the truthfulness of both statements."[68] He asserts that "[i]t is difficult to see any justification for prohibiting [impeachment by prior inconsistent statement]. . . . Perhaps there is a fear that the previous statement will be considered by the jury as substantive evidence of the facts asserted if, as in various jurisdictions, the statement for that purpose will be hearsay."[69] This notion is true if parties commonly use prior inconsistent statements to impeach. In South Carolina courts, however, the jury can consider prior inconsistent statements as substantive evidence.[70] In *Copeland* the supreme court stated its approval of the view that, at least in some situations, the prior statement is more reliable and should be admitted, and the trial court should leave the decision about its reliability to the jury.[71] The *Bailey* court perhaps recognized that using the third ration-

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ory but a desire 'not to hurt anyone' . . . ."), *cert. denied*, 400 U.S. 841 (1970); C. McCORMICK, *supra* note 21, § 33, at 72-73 (bias on account of emotional influences like kinship is one of the main ways to attack a witness' credibility).

66. Note, *Impeaching One's Own Witness*, *supra* note 44, at 1019.

67. *See supra* notes 47-66 and accompanying text.

68. C. McCORMICK, *supra* note 45, § 34, at 74.

69. *Id.* § 38, at 83. *See also* 3A J. WIGMORE, *supra* note 45, § 903, at 672 (only real danger is that jury will use prior statement as substantive evidence, but this is not serious enough to outweigh the advantages of using it and can be guarded against by instructing the jury).

70. *See* State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) (police officer testified concerning witness's prior statement; court held "testimony of prior inconsistent statements . . . [can be] used as substantive evidence when the declarant testifies at trial and is subject to cross-examination"), *cert. denied*, 463 U.S. 1214, *reh'g denied*, 463 U.S. 1249 (1983).

71. *See id.* at 582, 300 S.E.2d at 69. "[P]rior statements . . . are made closer in time to the event in question, when memories are fresher, and . . . the traditional rule requires the courts to give unrealistic and confusing instructions to the jury." *Id.* (quoting Gibbons v. State, 248 Ga. 858, 863, 286 S.E.2d 717, 721 (1982)). Commentators generally support substantive use of prior statements. *See, e.g.*, C. McCORMICK, *supra* note 45, § 34, at 75 (Statements "made when memory was more recent and when less time for the play of influence has elapsed, are often inherently more trustworthy than the testimony itself.").

ale given by Professor McCormick would be inconsistent with the *Copeland* decision and, thus, refused to use it to support its decision.

If the state had shown surprise and harm in the *Bailey* case, the trial judge could have declared Rex Bailey a hostile witness and allowed impeachment. This exception is based on the basic unfairness of holding a party to testimony that damages his case when a witness entrapped the party and the party had no opportunity to prevent the damage.[72] The court, by requiring surprise, ensures that the calling party does not profit by using the statement when it could have prevented the damage by refusing to call the witness.[73] Moreover, by requiring harm, the court ensures that evidence is not used substantively, but only to offset the harm already done.[74]

In *Bailey* the court addressed the surprise requirement and found that "[s]ince the State knew that Rex Bailey planned to change his statement through his testimony, the State could not demonstrate surprise when Mr. Bailey actually testified inconsistently with his statement."[75] This rule presents no problem when the prosecutor reads the entire statement to the jury like in *Bailey*.

The question remains, however, whether the court would allow a finding of surprise when the calling party believed that the testimony would be consistent with certain allegations in the prior statement, but it in fact contradicted them. This situation might occur when a solicitor, after receiving notice, probes to ascertain the extent to which the testimony will be inconsistent with the prior statement. If the solicitor does this, the testimony genuinely may surprise the solicitor if the testimony is not consistent with the portions of the prior statement that the solicitor expected it to support. This is true even though the solicitor knew that the witness "planned to change his statement through his testimony . . . ."[76] If this situation arises, the court should allow impeachment so that the solicitor can verify the fragments of the prior statement that he thought the witness would confirm.

The surprise and damage requirement is also problematic in at least three other ways. First, it seriously undermines the viability of the voucher theory. The surprise exception essentially reduces the voucher theory to the assertion that a party vouches for his own wit-

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72. *See* State v. Trull, 232 S.C. 250, 255-56, 101 S.E.2d 648, 650 (1958).

73. *Cf. infra* notes 78-79 and accompanying text.

74. *See* State v. Richburg, 250 S.C. 451, 458, 158 S.E.2d 769, 771 (1968), *aff'd*, 253 S.C. 458, 171 S.E.2d 592 (1969), *cert. denied*, 399 U.S. 930 (1970). "It is not proper to permit the impeaching testimony to go beyond the only purpose for which [the prior statement] is admissible—the removal of the damage the surprise has caused." *Id.* (quoting 58 AM. JUR. *Witnesses* § 799, at 445).

75. *Bailey*, 298 S.C. at 4, 377 S.E.2d at 583.

76. *Id.*

ness if the party knows what the witness's testimony will be. Second, the damage requirement basically tells the calling party that if it could have prevented the damage to the party's own case, the court should not allow the party to mitigate that damage. This exception, however, fails to recognize that the witness' failure to testify to the content of a prior statement can be just as disastrous to the state's case as testimony that exculpates the defendant.[77]

Finally, the reason for maintaining the surprise and damage requirement is inconsistent with the South Carolina rule that allows the jury to consider prior statements as substantive evidence.[78] Professor McCormick states, and other commentators agree, that these "limitations are explainable only as attempts to safeguard the hearsay policy by preventing the party from proving the witness' prior statements in situations where it appears that its only value to the proponent will be as substantive evidence."[79] In *Nelson* the South Carolina Supreme Court expressed the same concern:

> Evidence of contradictory statements is theoretically evidence affecting credibility only, and is not substantive evidence of the facts embraced in the contradictory statements; but, nevertheless, evidence of inconsistent statements does often influence the jury, and, because of this, a party should not be allowed to interrogate his own witness in respect to previous inconsistent statements unless he has actually suffered surprise or entrapment.[80]

The hearsay concerns of *Nelson* are inconsistent with the supreme court's *Copeland* decision.[81] In *Copeland* the witness, a prisoner, inhabited a jail cell next to an accomplice to a robbery and murder. The witness gave a statement to a police officer about the location of three guns that the suspects used in the robbery. At trial, the witness denied

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77. *See* J. WEINSTEIN & M. BERGER, *supra* note 51, at 607-2.

78. *See* State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) *cert. denied*, 463 U.S. 1214 (1983).

79. C. MCCORMICK, *supra* note 45, § 38, at 83-84. *See also* Graham, *supra* note 51, at 977 ("These requirements were developed to prevent a party's calling a witness in order to place before the jury prior inconsistent statements not admissible as substantive evidence."); 3A J. WIGMORE, *supra* note 45, § 904, at 673-74 (quoting Sturgis v. State, 2 Okla. Crim. 362, 390-92, 102 P. 57, 67-68 (1909) (explaining the implications of allowing hearsay to be introduced by criminal defendants, who might invent prior statements, would be to make conviction impossible)).

80. State v. Nelson, 192 S.C. 422, 427, 7 S.E.2d 72, 75 (1940).

81. A justification for the surprise and damage requirement, which is more logically consistent with *Copeland* than the *Trull* rationale, is that, because the reason for allowing impeachment here is to protect a party who was denied the opportunity to protect himself by not calling the witness at all, the limitations ensure that the only purpose for using the prior statement is to return him to the same position he would have been in if he had not called the witness.

giving the statement, but the trial court allowed the officer to testify about the statement. The court held that a party can use prior inconsistent statements as substantive evidence. The court explained:

> With respect to the truth of the prior statement, the jury has the opportunity to observe the declarant as he may repudiate or vary his former statement, and as he is cross-examined. Thus, the jury can determine whether to believe the present testimony, the prior testimony—or neither . . . . [P]rior statements . . . are made closer in time to the event in question, when memories are fresher, and . . . the traditional rule requires the courts to give unrealistic and confusing instructions to the jury. . . .
>
> We believe the adoption of this rule will more effectively aid in the discovery of truth, and more adequately insure the freedom of the innocent and the conviction of the guilty.[82]

The same considerations apply anytime a party calls a witness who has made a prior inconsistent statement. The rule against impeaching one's own witness with a prior statement could be disastrous to the jury's search for truth if the prior statement were more reliable than the witness' testimony.

In summary, the reasons courts have advanced in support of the rule against impeachment of one's own witness by prior inconsistent statements do not apply in our modern adversarial system. Furthermore, the exceptions to the rule that the South Carolina Supreme Court has established undermine the rule's continued vitality. In 1975, Congress abrogated the common law rule against impeaching one's own witness, to the extent that it had applied in federal courts, by adopting Federal Rule of Evidence 607. In its present form, Rule 607 states: "The credibility of a witness may be attacked by any party, including the party calling the witness."[83] In 1985, the South Carolina General Assembly adopted the Rules of Civil Procedure and further liberalized the South Carolina anti-impeachment rule. Professor Reiser explains that, "under S.C.R. Civ. P. 32(a)(2) 'the deposition of a party . . . may be used by an adverse party for any purpose.' And, under S.C.R. Civ. P. 43(b)(2), a party may impeach 'any hostile or unwilling witness'. . . ."[84] If the supreme court does not act to change the existing rule as it applies in criminal cases, then the General Assembly should consider a complete statutory abrogation of this harmful rule. Allowing impeachment of one's own witness in a case like *Bailey* "will more ef-

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82. *Copeland*, 278 S.C. at 582, 300 S.E.2d at 69 (quoting Gibbons v. State, 248 Ga. 858, 863, 286 S.E.2d 717, 721 (1982)).

83. FED. R. EVID. 607.

84. W. REISER, A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW 28 (3d ed. 1987).

fectively aid in the discovery of truth, and more adequately insure the freedom of the innocent and the conviction of the guilty."[85]

W. David Kelly, III

III. JUDGE'S INSTRUCTION TO JURY THAT MALICE MAY BE PRESUMED IS HARMLESS ERROR

In *Yates v. Aiken*[86] the South Carolina Supreme Court held that a judge's instruction to the jury that they may presume malice from the defendant's use of a deadly weapon was harmless error.[87] The court, however, acknowledged that the instruction was unconstitutional.[88] *Yates* is the first South Carolina case to follow the United States Supreme Court case *Rose v. Clark*,[89] in which the Court held a harmless error analysis applies to unconstitutional jury instructions that concern an element of the criminal offense.

In 1981 a jury convicted Yates of murder, armed robbery, assault and battery with intent to kill, and conspiracy. The court sentenced Yates to death.[90] Yates and another man, Davis, attempted to rob a rural store near Greenville. Yates entered the store with a gun while Davis brandished a knife. Yates demanded money from the store owner, and, when the owner hesitated, Yates shot him through the hand and wounded him in the chest. Yates took the money and fled to the car. The owner's mother entered the store when she heard the shots. Davis stabbed and killed her. The owner then shot and killed Davis. The State of South Carolina tried and convicted Yates for the murder of the owner's mother on the theory of accomplice liability.[91] The South Carolina Supreme Court affirmed Yates' murder conviction on direct appeal.[92] Yates petitioned the court for a writ of habeas corpus, and the South Carolina court denied the writ by summary order.

The United States Supreme Court vacated South Carolina's summary denial of Yates' petition for writ of habeas corpus.[93] The Court remanded Yates' petition for reconsideration in light of its decision in

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85. *Copeland*, 278 S.C. at 582, 300 S.E.2d at 69.

86. ___ S.C. ___, 391 S.E.2d 530, *cert. granted sub nom.*, Yates v. Evatt, 111 S. Ct. 41 (1990).

87. *Id.* at ___, 391 S.E.2d at 531.

88. *Id.*

89. 478 U.S. 570 (1986).

90. *Yates*, ___ S.C. at ___, 391 S.E.2d at 530.

91. *Id.* at ___, 391 S.E.2d at 531-32.

92. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982) (subsequent history omitted).

93. Yates v. Aiken, 474 U.S. 896 (1985) (subsequent history omitted).

Francis v. Franklin.[94] In *Francis* the United States Supreme Court held that due process prohibits the state from using evidentiary presumptions in a criminal jury charge because such a use effectively relieves the state of its burden of proof and persuasion on every element of the crime.[95] In *Francis* the defendant admitted that he had shot the victim, but he denied that he did so voluntarily or intentionally. He claimed that his gun went off by accident.[96] The erroneous instruction given by the trial judge in *Francis* dealt with the dispositive issue of Franklin's intent. The judge instructed the jury that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted."[97] The Court held that this instruction shifted the burden of persuasion on the intent element to Franklin.[98]

The South Carolina Supreme Court determined that the jury charge in *Yates* suffered from the same constitutional infirmity as the erroneous jury charge in *Francis*.[99] Thus, *Francis* appeared directly on point in *Yates*. The supreme court, however, did not apply *Francis*. First, the court noted that in *State v. Elmore*[100] the South Carolina Supreme Court previously disallowed jury instructions like those found in *Francis*.[101] The court decided *Elmore* two years after Yates' trial in 1983. Second, the court, as a matter of state law, decided not to apply *Elmore* retroactively to cases on collateral review.[102] The court did not address further the potential impact of the Supreme Court's holding in *Francis* on its decision in *Yates*. For the second time, the court refused to grant Yates' petition for a writ of habeas corpus.[103]

The United States Supreme Court in Yates v. Aiken[104] reversed South Carolina's decision and admonished the state court for not responding to the Court's mandate to reconsider Yates' petition in light of *Francis*. The Court held that South Carolina could not avoid *Francis* by declining to apply the opinion's constitutional rule retroactively in light of *Elmore*.[105] The *Yates* Court cited its decision in *Sandstrom*

94. 471 U.S. 307, 313-25 (1985).
95. *Id.* at 310-11.
96. *Id.* at 311.
97. *Id.* at 325.
98. Yates v. Aiken, 290 S.C. 231, 233, 349 S.E.2d 84, 85 (1986).
99. *Id.*
100. 279 S.C. 417, 308 S.E.2d 781 (1983), *appeal after remand*, 286 S.C. 70, 332 S.E.2d 762 (1985), *cert. granted* and *judgment vacated*, 476 U.S. 1101 (1986), *appeal after remand*, 300 S.C. 130, 386 S.E.2d 769 (1989), *cert. denied*, 110 S. Ct. 2633 (1990).
101. *Yates*, 290 S.C. at 233, 349 S.E.2d at 85.
102. *Id.* at 237, 349 S.E.2d at 87.
103. *Id.*
104. 484 U.S. 211, 214-15 (1988) (subsequent history omitted).
105. *Id.*

v. Montana[106] and held that *Francis* was merely an extension of the law that had existed prior to Yates' trial.[107] In *Sandstrom* the defendant denied that he purposefully or knowingly killed his victim. The trial judge, however, instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts . . . ."[108] The Supreme Court ruled that the instruction was unconstitutional because the jury may have interpreted the presumption as conclusive or as if it shifted the burden of persuasion from the state to the defendant.[109]

Once again the Supreme Court remanded the case for reconsideration with the following warning: "Since [the South Carolina Supreme Court] has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires."[110] On reconsideration the South Carolina Supreme Court admitted the Supreme Court's opinion and constrained it to apply *Francis*.[111] The South Carolina court, therefore, conceded to the Supreme Court and recognized the constitutional error in Yates' trial.[112] The persistent state court, however, ruled that the constitutional error was harmless.[113]

The South Carolina Court relied on *Rose v. Clark*,[114] a decision in which the United States Supreme Court held that jury instructions that violate *Francis* are subject to a harmless error analysis.[115] An erroneous mandatory presumption is harmless when "the evidence is so dispositive of the element subject to the presumption that the reviewing court can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the invalid presumption."[116]

The *Yates* holding confirms the South Carolina Supreme Court's opinion in *State v. Gaskins*.[117] In *Gaskins* the court held that an erroneous instruction on the presumption of malice was harmless.[118] *Gaskins*, however, concerned a particularly heinous, well known, and previously convicted murderer. The presence of these acts in *Gaskins*

106. 442 U.S. 510 (1979).

107. 484 U.S. 211, 216-17. Justice Finney made this same point in his dissent when the United States Supreme Court first remanded the case. Yates v. Aiken, 349 S.E.2d 84, 88-89 (1986) (Finney, J., dissenting).

108. 442 U.S. at 514-19.

109. *Yates*, 484 U.S. at 218.

110. *Id.*

111. *Yates*, ___ S.C. at ___, 391 S.E.2d at 531.

112. *Id.*

113. *Id.*

114. 478 U.S. 570 (1986).

115. *Id.* at 580-82.

116. *Yates*, ___ S.C. at ___, 391 S.E.2d at 531 (citing *Rose*, 478 U.S. at 583).

117. 284 S.C. 105, 326 S.E.2d 132, *cert. denied*, 471 U.S. 1120 (1985).

118. *Id.* at 116-17, 326 S.E.2d at 139-40.

perhaps gave the court more confidence to apply the harmless error analysis than was possible in *Yates*.

The court's harmless error analysis in *Yates* focused on "whether it [was] beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption . . . ."[119] The United States Supreme Court made the same inquiry in *Sandstrom*.[120] Because no one disputed that Davis brutally and repeatedly stabbed to death the store owner's mother, the court held that the jury did not have to rely on the erroneous instruction to conclude that Yates had acted with malice when he shot Willie Wood.[121]

The *Yates* dissenters, however, noted that the jurors may have been confused by the instruction that they were to presume malice from the use of a deadly weapon. The confusion may have existed because both Davis and Yates carried deadly weapons.[122] Even though Yates possessed a gun, this would have been insufficient to prove malice but for the erroneous instruction.[123] Moreover, the presumption may have defeated Yates' primary defense that he had withdrawn from the enterprise before it turned murderous.[124] For these reasons, the dissenters' opinion raised reasonable doubt as to the harmlessness of the instruction.[125]

South Carolina is not the only state to apply a harmless error analysis to the type of errors found in *Francis*. In *McKenzie v. Osborne*[126] the Montana Supreme Court held that an unconstitutional *Francis*-type jury charge was harmless because "overwhelming evidence support[ed] the conviction."[127] The Arizona Supreme Court also has held that erroneous burden-shifting instructions may be harmless. In *State v. Jensen*[128] the Arizona court considered an instruction that, like the one in *Yates*, implied malice from the use of a deadly weapon. The court held that under *Rose* the charge was harmless because the evidence of guilt was overwhelming and the judge had repeatedly emphasized to the jury that the state bore the burden of proof.[129]

Some justices, however, believe that errors in *Francis*-type instructions are too fundamental to be harmless. For example, Justice Black-

119. *Yates*, __ S.C. at __, 391 S.E.2d at 532.
120. 442 U.S. at 514-17.
121. *Yates*, __ S.C. at __, 391 S.E.2d at 532.
122. *Id.* at __, 391 S.E.2d at 534 (Toal, J., dissenting).
123. *Id.* at __, 391 S.E.2d at 534-35.
124. *Id.*
125. *See id.*
126. 195 Mont. 26, 640 P.2d 368 (1981).
127. *Id.* at 41, 640 P.2d at 377.
128. 153 Ariz. 171, 735 P.2d 781 (1987).
129. *Id.* at 178, 735 P.2d at 788.

mun in his *Rose* dissent argued that "the instruction . . . interfered so fundamentally with the jury's performance of its constitutionally mandated role that the error involved is analytically indistinguishable from those errors the Court finds inappropriate for harmless-error analysis."[130] When the United States Supreme Court first remanded *Yates*, Justice Finney argued in dissent that the instructions "extend to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury."[131]

Although the *Yates* dissenters on remand argued that the United States Supreme Court's latest opinion did not invite a harmless error analysis, that option clearly remains open under *Rose* until it is expressly foreclosed by the Court. Also, it is doubtful whether the subtle and highly technical differences between "mandatory presumptions" and "permissive inferences" are appreciated by jurors when presented in a lengthy oral jury charge. Whatever prejudice arises from the use of an erroneous presumption in a jury charge that is otherwise replete with references to the state's burden of proof should not require categorical reversal. Rather, the appellate courts should be relied upon to review each case's entire record and decide whether the error was harmless beyond a reasonable doubt.

Matthew Hubbell

IV. DECLARATORY JUDGMENT ORDER NOT ADMISSIBLE AS EVIDENCE IN LATER PROCEEDING IF IT PREJUDICES CLAIM OF PLAINTIFF WHO WAS NOT A PARTY TO THE DECLARATORY JUDGMENT

In *Rowe v. City of Columbia*[132] the South Carolina Supreme Court held that a defendant cannot use a declaratory judgment order as evidence in a subsequent proceeding if the order is prejudicial to a plaintiff who was not a party in the earlier proceeding.[133]

In March 1985 Lorinda Jean Rowe died when her car collided with a City of Columbia fire truck.[134] In April 1985 the South Carolina Supreme Court issued its opinion in *McCall v. Batson*,[135] which abolished sovereign immunity in South Carolina and allowed a plaintiff to recover up to the amount of the government's insurance coverage in

130. 478 U.S. at 593 (Blackmun, J., dissenting).

131. Yates v. Aiken, 290 S.C. 231, 239, 349 S.E.2d 84, 89 (1986) (Finney, J., dissenting).

132. 300 S.C. 447, 388 S.E.2d 789 (1989).

133. *Id.* at 449-50, 388 S.E.2d at 790-91.

134. *Id.* at 448, 388 S.E.2d at 789.

135. 285 S.C. 243, 329 S.E.2d 741 (1985).

cases filed on or before July 1, 1986.[136]

Joanna Rowe, the administrator of Rowe's estate, brought a wrongful death action against the truck driver and the City of Columbia (the City). The trial court dismissed the claim without prejudice. Shortly thereafter, the City brought a declaratory judgment action against its insurer to determine whether its policy covered injuries caused by the fire truck. The trial court held that the policy excluded such coverage and the supreme court affirmed.[137]

In May 1986 Rowe renewed the estate's claim against the City. The trial judge granted the City's summary judgment motion based on its finding that no applicable insurance coverage existed, and, therefore, under *McCall*, summary judgment was appropriate. The court of appeals affirmed the trial court's decision.[138] On appeal, the supreme court held that because the appellant was not a party to the declaratory judgment, the trial court's reliance on the declaratory judgment order for evidence that no applicable coverage existed was extremely prejudicial to Rowe and, thus, was prohibited by *Pharr v. Canal Insurance Co.*[139] and South Carolina Code section 15-53-80.[140]

In *Pharr* the supreme court held that a declaration that the insurer is not obligated to pay the claims of the insured does not bar claims by an injured person who was not a party to the declaratory action.[141] The City tried to distinguish *Pharr*, arguing that its holding

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136. *See id.* at 246, 329 S.E.2d at 743.

137. *Rowe*, 300 S.C. at 448-49, 388 S.E.2d at 790.

138. *Id.*

139. 233 S.C. 266, 104 S.E.2d 394 (1958).

140. *Rowe*, 300 S.C. at 449-50, 388 S.E.2d at 790.

141. 233 S.C. at 272-76, 104 S.E.2d at 397-99. *But see* Opheim v. American Interinsurance Exch., 430 N.W.2d 118 (Iowa 1988). The supreme court relied on old South Carolina Code section 10-2008 (Michie 1952). The *Rowe* court relied on the current version of that section which is Code section 15-53-80. S.C. CODE ANN. § 15-53-80 (Law. Co-op. 1976).

In *Opheim* the Iowa Supreme Court held that a declaratory judgment obtained by an insurer against its insured was binding against an injured party. The court attached significance to the injured party's adequate representation by the insured's vigorous defense to the insurance company's claim that no policy coverage existed. The court concluded that "[t]he interest of Allie [the insured] and Opheim [the injured] in securing this coverage is identical. In that regard, we do not believe Opheim could have litigated this issue in a manner materially different from that employed by Allie." *Opheim*, 430 N.W.2d at 121.

The facts in the *Rowe* case provide some evidence of vigorous representation because the City appealed the declaratory judgment order to the South Carolina Supreme Court. *Rowe*, 300 S.C. at 449, 388 S.E.2d at 790. It is unlikely, however, that the City had the same degree of interest as Rowe to have the policy cover the type of accident suffered by Rowe because under *McCall v. Batson* the City would not be liable if no coverage existed. *See supra* note 135 and accompanying text.

The *Opheim* court also noted that the Iowa rules lacked the language found in other

applied only to a res judicata defense. The City claimed that the trial court's use of the declaratory judgment order for "persuasive authority on the issue of insurance coverage"[142] did not prejudice Rowe because the court did not rely solely on the order to reach its decision.[143] The City contended that no evidence of insurance coverage would have existed even if the trial court had not considered the declaratory judgment order.[144] The supreme court rejected this argument. The court attached significance to the trial court's decision to make the summary judgment order contingent upon the result of the City's appeal in the declaratory action and held that "[t]he use of the declaratory judgment in this action was extremely prejudicial to Rowe because she could not maintain an action against the City unless it had insurance coverage."[145]

The *Rowe* court's opinion is consistent with the language of South Carolina Code section 15-53-80. Section 15-53-80 provides that "no declaration shall prejudice the rights of persons not parties to the proceeding."[146] If the court had interpreted the word "prejudice" narrowly in section 15-53-80, it may have reached a different result. This narrow interpretation, however, would have allowed the City to circumvent the requirement that the legislature set forth in section 15-53-80, which states that "all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ."[147]

Although the *Rowe* court correctly applied the statute, this decision raises a troublesome question whether the City could have a judgment entered against it and, at the same time, have no insurance to cover its liability. This situation arises if the court (1) allows Rowe to pursue her claim against the City in the insurer's absence, (2) rules that coverage exists, (3) enters judgment against the City, and (4) finds that no coverage exists in a subsequent proceeding by the City against the insurer. This situation does not arise, however, if the court joins the insurer as an indispensable party under SCRCP 19(a).[148] If the court does not join the insurer, the City could be forced to satisfy the

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jurisdictions that " 'no declaration shall prejudice the rights of persons not parties to the proceeding.' " 430 N.W.2d at 121 (citations omitted). Thus, in Iowa injured persons are proper rather than necessary parties to a declaratory judgment action. *Id.*

142. Brief of Respondents at 5.

143. *Id.* at 6.

144. *Id.* at 5.

145. *Rowe*, 300 S.C. at 450, 388 S.E.2d at 791.

146. S.C. CODE ANN. § 15-53-80 (Law. Co-op. 1976).

147. *Id.*

148. S.C.R. CIV. P. 19(a). This section provides, in pertinent part, that a person "shall be joined as a party in the action if . . . in his absence complete relief cannot be accorded among those already parties. . . . If he has not been so joined, the court shall order that he be made a party." *Id.*

judgment out of its own treasury, which would be contrary to the limited sovereign immunity doctrine set forth in *McCall v. Batson.*

The trial court used the judgment to prejudice Rowe's claim when it made the summary judgment order contingent on the outcome of the prior declaratory judgment. The supreme court prevented what was, in effect, an application of res judicata and upheld "the wholesome principle which allows every litigant one opportunity to try his case on the merits . . . ."[149] On remand, the trial court should require joinder of the insurer as a defendant before it decides whether the City and its driver are liable to prevent an outcome that is contrary to the limited sovereign doctrine set forth in *McCall.*

W. David Kelly, III

149. Mackey v. Frazier, 234 S.C. 81, 88, 106 S.E.2d 895, 899 (1959) (quoting Jenkins v. Atlantic Coast Line R.R., 89 S.C. 408, 412, 71 S.E. 1010, 1012 (1911)).