South Carolina Bar
Continuing Legal Education Division

Mastering Rules of Procedure & Evidence: Essential Strategies for S.C. Attorneys

S2023-010

Friday, September 29, 2023

presented by
The South Carolina Bar
Continuing Legal Education Division

Cle.scbar.org

SC Supreme Court Commission on CLE Course No. 930905

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2023 Mastering Rules of Procedure and Evidence: Essential Strategies for S.C. Attorneys

Friday, September 29, 2023

This program qualifies for 5.75 MCLE, including up to 1.0 LEPR credit hour.
SC Supreme Commission on CLE Course # 930905

8:30 a.m. **Registration**

8:50 a.m. **Welcome and Overview**
Justin S. Kahn
Kahn Law Firm, LLP, Charleston

9 a.m. **Mastering Key Discovery Issues**
John S. Nichols
Bluestein and Attorneys, Columbia

9:45 a.m. **Persuasive Motion Practice**
Justin S. Kahn

10:30 a.m. **Break**

10:45 a.m. **What's New in Federal Civil Practice**
Prof. William M. Janssen
Charleston School of Law

11:30 a.m. **Presenting Your Case Persuasively-How to Persuade the Trier of Fact Using Visuals and Demonstrative Evidence**
Justin S. Kahn

12:15 p.m. **Lunch**

1:30 p.m. **Appellate Advocacy: Persuasion, Preservation, and Pitfalls**
The Honorable John D. Geathers
S.C. Court of Appeals, Columbia

2 p.m. **Evolving Expert Evidence**
The Honorable Daniel M. Coble
S.C. Circuit Court, Columbia

2:45 pm **Break**

3 p.m. **Prior Bad Acts**
E. Warren Moise
Grimball & Cabaniss, LLC, Charleston

3:30 p.m. **Ethics for Litigators**
La'Jessica Stringfellow
Robinson Gray Stepp & Laffitte, LLC, Columbia

4:30 p.m. **Adjourn**

Mastering Rules of Procedure & Evidence: Essential Strategies for S.C. Attorneys

SPEAKER BIOGRAPHIES

(by order of presentation)

Justin S. Kahn

Kahn Law Firm, LLC
Charleston, SC
(course planner)

Justin is a civil litigator with Kahn Law Firm, LLP in Charleston, S.C. He handles a variety of cases including professional liability and personal injury. He has written, lectured, and taught throughout the country on advocacy, procedure, evidence, ethics, technology, and persuasion.

He is triple board certified by the American Board of Professional Liability Attorneys in medical malpractice by the National Board of Trial Advocacy as a civil trial advocate and in civil pretrial practice advocacy. Justin is currently president of ABPLA and is on the board of NBTA. He is a diplomate with the National College of Advocacy of the American Association of Justice.

He is AV rated by Martindale-Hubbell and certified by the South Carolina Supreme Court as a civil circuit court mediator.

As an adjunct professor at the Charleston School of Law, Justin teaches civil pretrial practice and deposition skills.

For over 30 years, he has authored the South Carolina Rules Annotated and the South Carolina Rules of Evidence Annotated used by judges and attorneys throughout South Carolina.

He is a member of various professional organizations including the American Association for Justice, South Carolina Association for Justice, South Carolina Bar Association, American Bar Association, permanent member of the Fourth Circuit Judicial Conference, MENSA and the International Brotherhood of Magicians.

He has practiced in state and federal courts throughout the country. He is admitted to practice before the United States Supreme Court, United States Fourth Circuit Court of Appeals, United States Third Circuit Court of Appeals, United States Second Circuit Court of Appeals, United States Court of Federal Claims, United States District Court for the District of South Carolina and the South Carolina Supreme Court.

He has argued appellate cases before the South Carolina Supreme Court and Court of Appeals, as well as Fourth and Second Circuit Courts of Appeal.

John S. Nichols

Bluestein Thompson Sullivan LLC
Columbia, SC

John Nichols received a BS in mathematics from Francis Marion College in 1978 and a JD from the USC School of Law in 1985. He first worked with Rogers & Koon focusing primarily on property litigation. In 1986, the SC Court of Appeals hired John as a staff attorney, and he became chief staff counsel in 1 993. John also served at times as a law clerk for Chief Judge Alex M. Sanders, Jr., Judge Randall T. Bell, and Acting Judge C. Bruce Littlejohn. From 1996 until 2000, John worked with Suggs & Kelly, primarily on pharmaceutical mass tort litigation around the country. In 2000, John

and Marti Bluestein founded Bluestein & Nichols which is now Bluestein Thompson & Sullivan. John's primary focus was on appellate practice, general tort litigation and representing attorneys before the Office of Disciplinary Counsel. In 2017, the Supreme Court of SC appointed John to serve as Disciplinary Counsel and he took over the office in January 2018.

John is admitted to practice in South Carolina's state and federal courts as well as the United States Coutts of Appeals for the Fourth Circuit, the Eleventh Circuit and the Federal Circuit, the United States Court of Appeals for Veterans Claims, and the Supreme Court of the United States.

From 2003 to 2018, John served on the SC Board of Law Examiners by Supreme Court appointment. In 2012 Governor Nikki Haley appointed John to the SC Commission on Indigent Defense and was reappointed by Governor Henry McMaster. From 2013 to 2017 John served as special counsel to the SC House Ethics Committee and the SC Senate Ethics Committee.

John has spoken at seminars for a number of groups, including the SC Bar, the SC Judicial Branch, SCAJ/SCTLA, the SCIWA, the SCDTAA, the SC Public Defenders Association, and the SC Prosecution Commission. He served on the Education Committee for the ABA's Council of Appellate Staff Attorneys and assisted the SC Judicial Branch in developing orientation seminars for new members of the SC Appellate Court, Circuit Court and Family Court as well as for attorneys employed by the Judicial Branch.

John has also authored, co-authored or edited several books and other publications for the SC Bar or Thomson Reuters (West). From 1995 through 2000, John served as editor of "What's New," the case summaries prepared by law professors for the South Carolina Lawyer magazine (SC Bar). He also served on the South Carolina Lawyer magazine's Editorial Board, serving as Edi tor-in-Chief from 2004 through 2006. John also served as editor of "The Bulletin," the magazine for the SCAJ.

John serves on USC's "B-Ball - Coaches versus Cancer" committee and is an officer with the Columbia USC Tip-Off Club. He enjoys painting, playing guitar, traveling and hiking with his wife, Michelle, and spending time with daughter, Beth, and grandson, Max.

Professor William M. Janssen

Charleston School of Law
Charleston, SC

William M. Janssen joined the Charleston School of Law faculty in 2006 after a lengthy practice with the mid-Atlantic law firm of Saul Ewing LLP, where he was a litigation partner, a member of the firm's seven-person governing executive committee, and chair of the interdisciplinary Life Sciences Practice Group.

Professor Janssen focuses his scholarship on federal practice and procedure. He is an author of six national titles in this discipline. He is the sole author of Federal Civil Procedure Logic Maps (West 3d ed. 2022), a visual learning resource for federal civil procedure, and a co-author of four texts: Practicing Civil Discovery (Carolina 2020), a coursebook for civil discovery simulations; A Student's Guide to the Federal Rules of Civil Procedure (West, annually, 26th ed. 2023), a rules book and study guide for students; Mastering Multiple Choice – Federal Civil Procedure (West 4th ed. 2022), a multiple choice practice tool; and the Federal Civil Rules Handbook (Thomson Reuters, annually, 30th ed. 2022), a national practitioner resource. The content of the Handbook is reprinted each year as Volume 12B of the national treatise, Wright & Miller's Federal Practice and Procedure (Thomson Reuters 2022, annually).

He is also a contributing author to Rice's Attorney-Client Privilege in the United States (Thomson Reuters, annually, 2023), a leading treatise on the privilege. His seventh text, a practitioner's discovery resource for new attorneys, is due to be published soon.

In addition to these books, Professor Janssen is also the author of various journal articles, book chapters, and bar review materials on federal civil procedure, and has lectured widely on civil procedure topics.

Professor Janssen's scholarship also includes an emphasis on constitutional religious liberty and

the Religion Clauses to the United States Constitution, an area of law in which he has written, spoken, and litigated.
While a student at the American University's Washington College of Law, Professor Janssen was the executive editor of the American University Law Review, a dean's fellow, a moot court board member, an interschool moot court competitor, and the first-year moot court champion. After law school, he served as a law clerk to a federal district court judge (Hon. James McGirr Kelly, E.D. Pa.) and to a federal court of appeals judge (Hon. Joseph F. Weis, Jr., 3d Cir.).
Before joining the Charleston School of Law faculty, Professor Janssen taught, while in active practice, as an adjunct instructor at Temple University School of Law for five academic terms and as an adjunct teaching business law at Saint Joseph's University.
Education: J.D., Washington College of Law at American University B.A., magna cum laude, Saint Joseph's University, Philadelphia, Pa.

The Honorable John D. Geathers

S.C. Court of Appeals
Columbia, SC

John D. Geathers currently serves on the South Carolina Court of Appeals as an Associate Judge. He was elected to his current position on May 21, 2008, to fill the unexpired term of John W. Kittredge, who was elected to the South Carolina Supreme Court. Prior to his election to the Court of Appeals, he served for thirteen years as an Administrative Law Judge with the South Carolina Administrative Law Court. He is a member of both the South Carolina and North Carolina Bar. He is a graduate of the University of South Carolina, receiving his undergraduate degree in 1983 and his juris doctor in 1986.

The Honorable Daniel M. Coble

S.C. Circuit Court
Columbia, SC

Daniel Coble is a resident judge for the Fifth Judicial Circuit and was elected to the bench in 2022. After graduating law school, Judge Coble worked as an assistant solicitor for the Fifth Judicial Circuit where he also was the lead prosecutor for South Carolina's first homeless court. He was appointed as a full-time magistrate judge for Richland County in 2017 and served as the associate chief from 2018-2021. Judge Coble subsequently opened his own law practice, Coble Law Group, and focused on criminal and civil litigation.

E. Warren Moise

Grimball & Cabaniss, LLC
Charleston, SC

Warren Moise brings to his practice over 33 years of experience as an attorney in South Carolina, focusing on auto-dealer fraud, insurance, consumer law, class action lawsuits, and vehicular accident cases. He also handles products liability cases for both plaintiffs and defendants. He is a frequent author and lecturer on legal topics, generally in the areas of evidence and trial advocacy.
Warren received his J.D., 1988, from the University of South Carolina School of Law (Articles Editor, *South Carolina Law Review*) and his B.A., *cum laude*, 1985 from the University of South Carolina.
Warren's admission to practice includes U.S. District Court, District of South Carolina, 1989; South Carolina, 1988; U.S. Court of Appeals, Fourth Circuit, 1989; U.S. Supreme Court, 2000.

Teaching Experience

- Adjunct Professor, Evidence; Advanced Evidence, and Trial Advocacy, Charleston School of Law, 2005 to 2018
- Adjunct Professor, Trial Advocacy, USC School of Law, 1999 to 2008;
- Instructor, Trial Academy, South Carolina Defense Trial Attorneys' Association, 1994-1995, 2001-10
- Adjunct Professor, American History, Baptist College, 1990
- Instructor: Legal Writing, University of South Carolina Law School, 1987-1988.

Legal societies and groups

- Charleston and American (Member, Trial Evidence Committee) Bar Association
- South Carolina Bar (Member Practice and Procedure Committee, 1997-2003 and Trial and Appellate Advocacy Council, 2011
- Christian Legal Society 2009-2010.

Boards

- University of South Carolina Board of Visitors
- Charleston County Management, Accountability, and Performance Commission
- Carolina Medical Assessment Center, Board of Directors
- East Cooper Coalition for Senior Citizens Center, Advisory Board

Honors and awards

- Compleat Lawyer Gold Award
- Best Lawyers of Charleston, South Carolina in Charleston Living Magazine
- South Carolina Bar Trial and Appellate Advocacy Award
- South Carolina Super Lawyers
- Best Lawyers in America
- South Carolina Year of the Child Hero
- AV Martindale-Hubbell Rating
- Founding Fellow, Litigation Counsel of America
- SC Bar House of Delegates, 1998-2002

La'Jessica M. Stringfellow

Robinson Gray Stepp & Laffitte, LLC
Columbia, SC

La'Jessica is very active in the South Carolina Bar and serves as the education subcommittee chair of the Diversity Committee. She also serves as the South Carolina Young Lawyers Division co-chair of the Protecting Our Youth committee and as Fifth Circuit Representative. La'Jessica is also active in the American Bar Association Section of Litigation and Young Lawyers Division. She currently serves as co-chair of the ABA Section of Litigation Young Advocate Committee. In January of 2021, La'Jessica was appointed by Chief Justice Donald W. Beatty of the state Supreme Court to serve a three-year term on the South Carolina Access to Justice Commission.

A native of Chester, South Carolina, La'Jessica graduated Magna Cum Laude from Virginia State University in 2011, receiving a bachelor's degree in public relations and a minor in English. After graduating from the University of South Carolina School of Law, La'Jessica served as law clerk to the Honorable John Cannon Few with the South Carolina Court of Appeals and the South Carolina Supreme Court. Prior to joining Robinson Gray, she served as assistant solicitor with the 11th Judicial Circuit Solicitor's Office prosecuting domestic violence, sexual assaults, and other violent crimes.

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What's New in Federal Civil Practice

Professor William M. Janssen

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What's New *in*
Federal Civil Practice

Professor William M. Janssen
CHARLESTON SCHOOL OF LAW

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Professor Janssen joined academia 18 years ago, after more than 16 years of active litigation practice at a AmLaw-200 law firm. He is author or co-author of FEDERAL CIVIL RULES HANDBOOK (Thomson-Reuters 31st Ed. 2024); Volume 12B WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE (Thomson-Reuters 2023); A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE (West Academic Press 26th Ed. 2023); FEDERAL CIVIL PROCEDURE LOGIC MAPS (West Academic Press 3d Ed. 2022); MASTERING MULTIPLE CHOICE—FEDERAL CIVIL PROCEDURE (West Academic Press 4th Ed. 2022); PRACTICING CIVIL DISCOVERY (Carolina Academic Press 2020).

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What's New *in* Federal Civil Practice

1. Recent Amendments to the FRCP (and FRAP)

2. More Recalibrations in Personal Jurisdiction

3. Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

1. Recent Amendments to the FRCP (and FRAP)

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What's New *in* Federal Civil Practice

1.

Recent Amendments to the FRCP
(and FRAP)

- ***Effective December 1, 2023:***
  - Adding Juneteenth to Federal Holidays List – Rule 6
  - Amendments as of Right – Rule 15
  - Serving Magistrate Judge Recommendations – Rule 72
  - NEW Civil Rules / Appellate Rules Emergencies – Rule 87
- ***Effective December 1, 2022:***
  - Disclosing Citizenship – Rule 7.1
  - NEW Rules for Social Security Review Cases
- ***Effective December 1, 2021:***
  - Appellate Designations – Fed. R. App. P. 3(c)
- ***Effective December 1, 2020:***
  - Deposing Organizations – Rule 30(b)(6)
- ***Effective December 1, 2018:***
  - Mandatory E-Filing/Permissive E-Service – Rule 5
  - Class Actions' Notice, Court Approval, Appeals – Rule 23
  - Post-Judgment Automatic Stay Extension – Rule 62
  - Providing Security – Rule 65.1

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Juneteenth now a Federal Holiday

(eff. 12/1/2023)

In computing federal time periods (except for dates-certain), **Rule 6(a)** provides that any such period that would otherwise end on a "legal holiday" is extended to the end of the next day that is not a legal holiday or weekend.

Juneteenth (June 19) is now added as the 11th federally-recognized legal holiday.

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Amendments As-Of-Right

(eff. 12/1/2023)

Pleaders may, under **Rule 15(a)**, amend a pleading once, without leave or adversary consent, if done: (a) "within" 21 days after serving or (b) "within" 21 days after service of an opponent's responsive pleading or pre-answer Rule 12 motion.

"**Within**" is revised to "**no later than**" to eliminate any time gap (*i.e.,* period now continues without interruption until (b) period occurs).

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Magistrate Judge Recommendations

(eff. 12/1/2023)

Clerk's Office must under **Rule 72(b)(1)** "promptly mail" a copy of R&Rs each party.

"**Promptly mail**" is replaced with "**immediately serve**" so as to permit service by any permitted Rule 5(b) method (*e.g.*, via mail, hand-delivery, leaving at office, sending electronically to registered users of e-filing system, by other consented-to means).

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Civil / Appellate Rules Emergency

(eff. 12/1/2023)

Under new **Rule 87** and new **FRAP 2(b)**, the Judicial Conference of the U.S. may declare a "rules emergency" which may be invoked to:

- Liberalize the permitted manner for service of process;
- Extend the time for filing post-trial motions;
- Modify appellate rules (except time limits imposed by statute).

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❖ ***Effective December 1, 2022:***
- Disclosing Citizenship – Rule 7.1
- NEW Rules for Social Security Review Cases

Disclosing Citizenship

(eff. 12/1/2022)

In diversity cases, pleaders are now required by **Rule 7.1(a)(2)** to state the citizenship of every person or entity whose citizenship is attributed to the disclosing party. Disclosures must be as they existed when the action was filed, when removed to federal court, and when any other jurisdiction-affecting event occurs.

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  - Disclosing Citizenship – Rule 7.1
  - NEW Rules for Social Security Review Cases

Social Security Review Cases

(eff. 12/1/2022)

To achieve national uniformity to actions filed to obtain review of a final decision by the Commissioner of Social Security, eight (8) **special supplemental federal rules** were adopted—addressing complaints, service, answers/motions, presentment, and briefing.

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What's New *in* Federal Civil Practice

1.

Recent Amendments to the FRCP (and FRAP)

Appellate Designations

(eff. 12/1/2021)

To avoid inadvertent losses of appeal rights, notices of appeal are now treated under **FRAP 3(c)** as encompassing the lawsuit's final judgment, whether or not so identified, so long as the notice designates: (a) an order adjudicating all claims and all parties or (b) an order resolving post-trial motions. All interim orders that merge into the final judgment are encompassed.

- ***Effective December 1, 2021:***
  - Appellate Designations – Fed. R. App. P. 3(c)
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What's New *in* Federal Civil Practice

1.

Recent Amendments to the FRCP
(and FRAP)

Deposing Organizations

(eff. 12/1/2020)

Before or promptly after service of a deposition notice or subpoena for an entity deposition, **Rule 30(b)(6)** now requires that both the deposer and the entity confer—in the hope that such conferral will clarify the intended focus of the deposition and permit more appropriate entity designations.

- ***Effective December 1, 2020:***
  - Deposing Organizations – Rule 30(b)(6)
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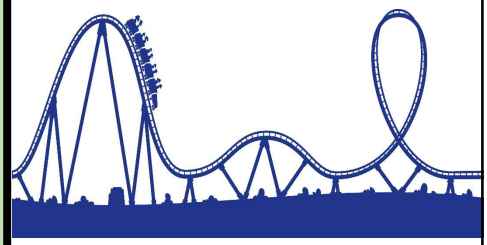
What's New *in* Federal Civil Practice

- **Goodyear Tires *v.* Brown** (2011)
- **J. McIntyre Machinery *v.* Nicastro** (2011)
- **Daimler AG *v.* Bauman** (2014)
- **Walden *v.* Fiore** (2014)
- **Bristol-Myers Squibb *v.* Superior Ct.** (2017)
- **BNSF Railway *v.* Tyrrell** (2017)

2.

More Recalibrations in Personal Jurisdiction



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What's New *in* Federal Civil Practice

Ford Motor Co. *v.* Montana Eighth Judicial District Court

(March 2021)

2.

More Recalibrations in Personal Jurisdiction

"conduct-linked"

❖ ***Specific Personal Jurisdiction:***

(The International Shoe Test)

- ✓ Defendant **purposefully availed** itself of conducting activities in the forum, *and*
- ✓ The lawsuit **arises out of or relates to** those purposeful activities, *and*
- ✓ Exercising personal jurisdiction on that basis is **not unreasonable**.

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What's New *in* Federal Civil Practice

Ford Motor Co. *v.* Montana Eighth Judicial District Court
(March 2021)

2.
More Recalibrations in Personal Jurisdiction

arises out of or relates to

- Causal relationship suffices, but is not always required ("relates" can suffice too).
- But this "does not mean anything goes," since **relates-to** "incorporates real limits."
- Ford's actions to exploit the Montana market did not "cause" plaintiff's injury (b/c vehicle purchased by someone else somewhere else, and designed + mfr'd somewhere else)…
- But Ford's actions to exploit the Montana market did "relate to" the injury because Ford "systematically served a market in Montana" for "the very vehicles" alleged to have caused the plaintiff's injury.

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What's New *in* Federal Civil Practice

Ford Motor Co. *v.* Montana Eighth Judicial District Court
(March 2021)

2.
More Recalibrations in Personal Jurisdiction

MAJORITY

CONCUR #1 CONCUR #2

DNP

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What's New *in* Federal Civil Practice

Mallory *v.* Norfolk Southern Railway Co.
(June 2023)

2.
More Recalibrations in Personal Jurisdiction

"all-purpose"
❖ ***General Personal Jurisdiction:***

- ✓ A court may hear "any and all claims" against a party when its affiliations with the forum State are so constant and pervasive as to render it "essentially at home" there.
  - For natural persons = domicile.
  - For corporations = their place of incorporation and principal place of business.

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What's New *in* Federal Civil Practice

Mallory *v.* Norfolk Southern Railway Co.
(June 2023)

2.
More Recalibrations in Personal Jurisdiction

Essentially at home

- ❖ Even if "essentially-at-home" inquiry would forbid general jurisdiction, the Defendant can always consent to the court's exercise of such jurisdiction.
- ❖ Pennsylvania requires out-of-State corporations to register to do business if they desire to conduct local activities in PA.
- ❖ Such registration is treated as consent to general jurisdiction in Pennsylvania.
- ❖ Conditioning registration on such consent does not violate due process …
- ❖ … but whether it violates the dormant Commerce Clause is left for another day.

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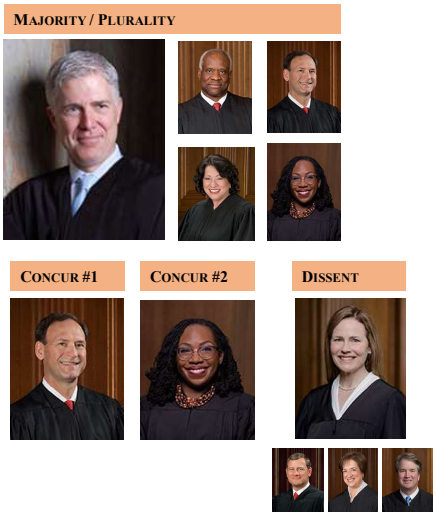
What's New *in* Federal Civil Practice

Mallory *v.* Norfolk Southern Railway Co.
(June 2023)

2.

More Recalibrations in Personal Jurisdiction



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What's New *in* Federal Civil Practice

Rule 4(d) permits plaintiffs to request a defendant to waive formal service of process. A refusing defendant generally must reimburse service costs; an agreeing defendant receives an extended time to answer.

Some courts (none, yet, in South Carolina) have held that a defendant can *self-initiate* this waiver option by filing a waiver with the court—even though none was requested by the plaintiff—and obtain the extended time to answer.

See, e.g., Greer v. Tenn. Dep't of Correction, 2022 WL 163692, at *4 (M.D. Tenn. Jan. 18, 2022), *adopted*, 2022 WL 481239 (M.D. Tenn. Feb. 16, 2022); *Cutler v. Green*, 2017 WL 2957817, at *4 n.7 (E.D. Pa. July 11, 2017), *aff'd*, 754 Fed. Appx. 96 (3d Cir. 2018).

3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

Rule 8(c) obligates a party responding to a claim to "affirmatively state" any avoidance or affirmative defense it intends to assert.

Most of the Nation remains divided on the question of whether *Twombly/Iqbal* "plausibility" is required to properly raise an affirmative defense.

- **Rule 8(a)(2)** requires that "a claim for relief" must include "a short and plain statement of the claim showing an entitlement to relief."
- **Rule 8(b)(1)(A)** requires that defenses be asserted in "short and plain terms;" with **Rule 8(c)** adding that parties "must affirmatively state" its avoidances o affirmative defenses.

3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

"While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant set out *in detail* the facts upon which he bases his claim, Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007) (7-2) (cleaned up)

- **Rule 8(a)(2)** requires that "a claim for relief" must include "a short and plain statement of the claim **showing** an entitlement to relief."
- **Rule 8(b)(1)(A)** requires that defenses be asserted in "short and plain terms;" with **Rule 8(c)** adding that parties "must **affirmatively state**" its avoidances o affirmative defenses.

3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

Rule 8(c) obligates a party responding to a claim to "affirmatively state" any avoidance or affirmative defense it intends to assert.

Most of the Nation remains divided on the question of whether *Twombly/Iqbal* "plausibility" is required to properly raise an affirmative defense.

Neither the US Supreme Court nor the Fourth Circuit has yet ruled on this question.

Eleven (11) South Carolina federal district opinions have addressed the question, ten of which took a position:

3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

***Twombly* Does Not Govern (8):**

- **Hon. Shiva V. Hodges, M.J. (*Columbia Div.*):**
  Twitty v. First Fin. Asset Mgmt., Inc., 2023 WL 2478365 (D. S.C. Mar. 13, 2023).
- **Hon. Molly Cherry, M.J. (*Beaufort Div.*):**
  Cionci v. Wells Fargo Bank, N.A., 2022 WL 18584373 (D. S.C. Dec. 6, 2022).
- **Hon. David C. Norton, D.J. (*Charleston Div.*):**
  Yacht Basin Prov. Co. v. Inlet Prov. Co., 2022 WL 17068795 (D. S.C. Nov. 17, 2022).
- **Hon. J. Michelle Childs, D.J. (*Columbia Div.*):**
  Doosan Mach. Tools v. Mach. Solutions, 2018 WL 1374066 (D. S.C. Mar. 19, 2018).
- **Hon. Richard M. Gergel, D.J. (*Charleston Div.*):**
  Hand Held Prods., Inc. v. Code Corp., 2017 WL 2537235 (D. S.C. June 9, 2017).
- **Hon. Cameron McGowan Currie, D.J. (*Columbia Div.*):**
  Cohen v. Suntrust Mortg., Inc., 2017 WL 1173581 (D. S.C. Mar. 30, 2017).
- **Hon. Kaymani D. West, M.J. (*Florence Div.*):**
  Cooper v. Omni Ins. Co., 2014 WL 12768163 (D. S.C. Aug. 29, 2014).
- **Hon. Jacquelyn D. Austin, M.J. (*Charleston Div.*):**
  Palmetto Pharm. v. AstraZeneca Pharm., 2012 WL 6025756 (D. S.C. Nov. 6, 2012).

3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

Twombly Does Govern (2):

- **Hon. J. Michelle Childs, D.J. (*Orangeburg Div.*):**
  Sentry Select Ins. v. Guess Farm Equip., 2013 WL 5797742 (D. S.C. Oct. 25, 2013) (applying *Monster Daddy* precedent, but recanting in 2018 *Doosan Mach.* Ruling).
- **Hon. Henry M. Herlong, D.J. (*Greenville Div.*):**
  Monster Daddy v. Monster Cable Prods., 2010 WL 4853661 (D. S.C. Nov. 23, 2010) (following "majority" view among district courts).

Twombly Left Unresolved (1):

- **Hon. Joseph F. Anderson, D.J. (*Columbia Div.*):**
  Amazon v. PK Mgmt., LLC, 2011 WL 1100169 (D. S.C. Mar. 23, 2011) (debate noted, but resolving motion on untimeliness grounds).

3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

Only Federal Court of Appeals Decision:

- **U.S. Court of Appeals for the Second Circuit:**
  GEOMC Co., Ltd. v. Calmare Therapeutics Inc., 918 F.3d 92, 97-98 (2d Cir. 2019) (noting national debate among trial courts and commentators, then choosing to apply *Twombly* to affirmative defenses with a "degree of rigor" adjusted to accommodate this setting).

3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

Rule 12(b) permits defenses to be asserted (and, thus, preserved) either in an answer or in a pre-answer motion. Each option preserves the defense.

But a defense that is timely and properly asserted in an answer can nonetheless ***still*** be deemed waived (forfeited) if a post-answer Rule 12(c) motion for judgment on the pleadings is filed which neglects to press that otherwise-preserved defense. (Language anomaly in Rule 12.)

See, e.g., Boulger v. Woods, 306 F. Supp. 3d 985, 994–95 (S.D. Ohio 2018), *aff'd*, 917 F.3d 471 (6th Cir. 2019); *Mississippi ex rel. Hood v. Entergy Mississippi, Inc.*, 2017 WL 2973998, at *2 (S.D. Miss. July 11, 2017).

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3.

Other Intriguing Federal Case Law Oddities

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What's New *in* Federal Civil Practice

1.

Recent Amendments to the FRCP
(and FRAP)

2.

More Recalibrations in Personal Jurisdiction

3.

Other Intriguing Federal Case Law Oddities

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Best wishes in federal court.

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South Carolina Bar

Continuing Legal Education Division

Presenting Your Case Persuasively-How to Persuade the Trier of Fact Using Visuals and Demonstrative Evidence

Justin S. Kahn

South Carolina Bar

Continuing Legal Education Division

Appellate Advocacy: Persuasion, Preservation, and Pitfalls

The Honorable John D. Geathers

Appellate Advocacy: Persuasion, Preservation, and Pitfalls

September 29, 2023

John Geathers, Judge, South Carolina Court of Appeals

Procedural traps for the unwary

1. The Rule 59(e) motion:

   A. Appellate Jurisdiction

   If a Rule 59(e) motion is late, then the Court of Appeals will not have jurisdiction over any subsequent appeal. Rule 203(b)(1), SCACR (Appeals from the Court of Common Pleas) states, "When a *timely* motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." (emphasis added). The key word is "timely." If the Rule 59(e) motion is not served within ten days after receipt of written notice of the entry of the challenged order, it is not timely and, thus, will not stay the time for appeal.

   Suppose the circuit judge entertaining your 59(e) motion does not mention that your motion was filed late and opposing counsel is silent as well. You can still count on your Notice of Appeal being rejected for lack of appellate jurisdiction. Rule 6(b), SCRCP, states, "The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order." Further, the circuit court does not have the authority to order a new trial beyond ten days after the entry of judgment. *Citizens & S. Nat'l Bank of S.C. v. Easton*, 310 S.C. 458, 460, 427 S.E.2d 640, 641 (1993); *see also Brewton v. Shirley*, 93 S.C. 365, 76 S.E. 988 (1913) (holding that the circuit

judge without jurisdiction to amend order beyond the term of court).[1] Moreover, "Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985).

B. Issue Preservation for Unexpected Rulings

If you receive a written order that includes a ruling (or ground for a ruling) that was not previously made at trial or during other dispositive proceedings, you must file a Rule 59(e) motion to preserve the issue for review. *Gibbons v. Aerotek, Inc.*, Op. No. 6006 (S.C. Ct. App. filed August 2, 2023) (Howard Adv. Sh. No. 30 at 9, 12–13), 2023 WL 4919523 (citing *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998)).

2. Two-issue rule:

A. Circuit court rulings: "Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), *abrogated on other grounds by Repko v. Cnty. of Georgetown*, 424 S.C. 494, 505, 818 S.E.2d 743, 749 (2018).

B. Jury verdicts: "Under the 'two issue' rule, when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal." *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 419–20, 472 S.E.2d 253, 254 (1996) (quoting *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 473–74 (1985)).

In turn, "when a jury's general verdict is supportable by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals all causes of action." *Anderson*, 322 S.C. at 420, 472 S.E.2d at 254.

[1] Keep in mind, however, that a party "must make a motion for a new trial promptly after the jury is discharged or request ten days within which to make the motion." *Boone v. Goodwin*, 314 S.C. 374, 376, 444 S.E.2d 524, 525 (1994).

3. Electronic Service of the Notice of Appeal: Suppose your client has a case pending in circuit court, and the county you are in is operating under the guidelines for E-filing and electronic service. *See In re S.C. Elec. Filing Pol'ys & Guidelines* (SCEF), Section 4(e)(2), (3), 415 S.C. 1, 7–8, 780 S.E.2d 600, 603 (2015) (providing that when the parties are proceeding in the E-Filing system and a document must be filed or served under the SCRCP, the e-filing of the document, with the transmission of a notice of electronic filing (NEF), constitutes proper service as to all other parties who are E-Filers in that case); *see also Re Expansion of Elec. Filing Pilot Program Ct. of Common Pleas*, 419 S.C. 262, 262, 797 S.E.2d 720, 721 (2017).

Once the circuit court enters a judgment your client wishes to appeal, the South Carolina Appellate Court Rules govern the filing and service of a Notice of Appeal, and the sole method of electronic service under these rules is by email. *See Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 215, 810 S.E.2d 856, 858 (2018) (stating that the South Carolina Appellate Rules, rather than the South Carolina Rules of Civil Procedure, govern issues concerning appellate procedure). Because service of a Notice of Appeal is governed by our appellate court rules, service on opposing counsel pursuant to the SCEF protocols is not effective to confer appellate jurisdiction on this court. Under our appellate court rules, if you wish to electronically serve a Notice of Appeal, you must use opposing counsel's primary e-mail address listed in the Attorney Information System (AIS) and the Notice of Appeal must be attached to the e-mail in pdf format. Rule 262(c)(3). Any other e-mail address is ineffective for purposes of conferring appellate jurisdiction on us.

Rule 262(a)(3) and (c)(3) allow for electronic filing and service for most documents, including the Notice of Appeal, "by electronic means in a manner provided by order of the Supreme Court of South Carolina." The Supreme Court's May 6, 2022 amended order establishing the methods for the electronic filing and service of documents under these provisions is available at

https://sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2695

4. Motions to Dismiss:

If you file a motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, beware of either insisting that the claim must be dismissed with prejudice or opposing the claimant's request to amend the pleading in question. This may result in an unnecessary waste of time and money litigating the point only to have the circuit court's ruling in your favor reversed on appeal. This happened in *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019). In *Skydive*, our supreme court emphasized the gravity of dismissing a case with prejudice. 426 S.C. at 180–82, 826 S.E.2d at 587–88. The court explained that after a Rule 12(b)(6) motion to dismiss is granted, "any plaintiff is . . . entitled to accept the court's ruling the original complaint was deficient[] and replead in an attempt to fix the deficiency." *Id.* at 181, 826 S.E.2d at 588. The court found that, in the matter before it, "the circuit court erred not only in refusing to consider the request to amend, but also in effectively preventing [the plaintiff] from litigating a post-ruling motion to amend by immediately dismissing the claims 'with prejudice.'" *Id.* at 182, 826 S.E.2d at 588.

5. Summary judgment motions:

Take note that very recently, our supreme court clarified the burden of a party opposing summary judgment:

> We now clarify that the "mere scintilla" standard does not apply under Rule 56(c)[, SCRCP]. Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166. To the extent what we said in *Hancock*[*v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009)] is inconsistent with our decision today, *Hancock* is overruled.

Kitchen Planners, LLC v. Friedman, Op. No. 28173 (S.C. Sup. Ct. filed August 23, 2023) (Howard Adv. Sh. No. 33 at 11, 17), 2023 WL 5420401, at *3.

6. Preservation of rulings *in limine*:

As a general rule, if you wish to challenge a circuit court's denial of a motion *in limine* to exclude an item from evidence, you must still object to its

admission when opposing counsel begins to introduce it to preserve the challenge for review. *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). There are two exceptions:

(1) "[W]here a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is preserved[.]" *Id.*

> Here, the witness introducing the cocaine for the state was the initial witness in the trial. No evidence was taken between the trial court's ruling on the admission of the cocaine and its introduction. Since no opportunity existed for the court to change its ruling, [the defendant] did not need to object a second time to the introduction of the cocaine for the issue to be properly preserved for review.

Id. at 642–43, 541 S.E.2d at 840. "This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection." *State v. Wiles*, 383 S.C. 151, 156–57, 679 S.E.2d 172, 175 (2009).

(2) When the circuit court clearly indicates that the ruling is "a final, rather than preliminary, one[.]" *Id.* at 157, 679 S.E.2d at 175. In *Wiles*, our supreme court considered the circuit court's ruling to be final because the court "commented to the jury about petitioner's escape before any evidence was admitted" and "the escape was then referenced by both the State and petitioner's counsel in their opening statements." *Id.*

7. Rulings resulting from sidebars during jury trials:

If the circuit court makes a ruling during or immediately after a sidebar, the judge's reasoning will not show up in the record unless you request the judge to state the grounds for the ruling on the record. This request is necessary to adequately preserve any challenge to the ruling on appeal. *See Carroll v. Isle of Palms Pest Control, Inc.*, Op. No. 6011 (S.C. Ct. App. filed August 9, 2023) (Howard Adv. Sh. No. 31 at 36, 48) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." (quoting, in parenthetical, *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997))).

Tips for persuading the judges to rule in your client's favor

1. Use your oral argument time wisely:

   Most cases before the COA are assigned times of 10-10-5, i.e., ten minutes for Appellant's argument, ten minutes for Respondent's argument, and five minutes for Appellant to reply to Respondent's argument.

   If you think your case needs more time, make a request as soon as possible after receiving proposed dates from the Clerk's office.

   Think of oral argument as a give-and-take between you and the three judges on the panel assigned to your case rather than a stilted presentation. Don't waste time reciting all of the facts or procedural history that you have already set out in your brief. The judges have already read your briefs, so just remind the judges of the nature of the case, e.g., "This case concerns whether the plaintiff in a negligence action is a statutory employee of the defendant," and then weave the critical facts/procedural history into your discussion of the points that need oral argument the most, including any hurdles the judges might have to get over to rule in your client's favor. You have to place yourself in the shoes of the judges you wish to persuade to imagine their thought process in arriving at a well-reasoned opinion that justifies a ruling in your client's favor.

   In other words, prioritize the points that need the give-and-take that oral argument provides (versus the written brief). When preparing for oral argument, try to anticipate what questions the judges will have and prioritize the answers to those questions. Also, consider preparing an outline of the points you want to get across so that you can easily get back on track if you are interrupted by a judge's question.

2. Intellectual Honesty:

   A. Do not ignore facts that are unfavorable to your client's position. It is better to persuade the judges that the law is on your client's side despite those facts. Reasons:

1. If you don't address them, you can count on opposing counsel highlighting them and using them to persuade us that we should rule against your client.

2. You should preserve your credibility as an advocate. It is in your client's best interest, and it is in the best interest of your future clients. Keep your future appearances in mind when you argue a case. Ask yourself, "Will my words today establish me as a credible advocate in the next case I argue?"

B. Likewise, do not ignore case law, statutes, or issues that are unfavorable to your client's position

1. For example, if your client brought a case under the Declaratory Judgments Act, educate yourself on all of the provisions in the Act. Likewise, familiarize yourself with the whole body of case law in the general field of a particular issue.

2. If you want to rely on a certain opinion as binding precedent, read the whole opinion so that the court can rely on you as a reliable source of information. That can't happen if you don't understand all of the circumstances under consideration in the opinion and any nuances that went into the holdings of the opinion. Help the judges understand the nuances that make the opinion applicable to your client's case. Details matter.

   Also, you want to make sure, for example, that you are not quoting language that the opinion was merely recounting as the position of the losing party in that case.

3. Do not quote, or pincite to, material from an editor's note, for example the "Syllabus" at the beginning of U.S. Supreme Court opinions.

3. Give the judges a map or framework to use in drafting an opinion in your client's favor. Provide a step-by-step approach showing that a ruling in your client's favor logically follows from the applicable law, and ask for the specific ruling you think is appropriate.

4. Don't try to demonize your opponent or the court from which you are appealing. Likewise, show respect for appellate judges in and out of the

courtroom. When a certain appellate judge's law clerk met an attorney in private practice at a bar-sponsored event, his response when the law clerk mentioned she worked at the court of appeals was, "When are y'all gonna' get it right?" Don't bite the hand you want to feed you.

5. Know your record. A judge may ask you where in the record certain evidence or arguments can be found. Also, don't stray from the record. The appellate court is relegated to the record. Rule 210(h), SCACR.

6. In your brief, place your strongest argument first.

7. Make your briefs easy to read and understand. Asking at least one other person to read your brief and make suggestions will help.

8. Know the appellate court's standard of review for the decision on appeal.

9. When a particular statute controls the analysis in your case, know the rules of statutory interpretation. The same goes for a contract or a deed.

10. If you have never given an oral argument before the Court of Appeals, and your case is set for oral argument, one of the ways you should prepare is to watch oral arguments on other cases. You can view live or archived oral arguments through our video portal on the Judicial Branch website. For archived videos, go to the drop-down menu for the Court of Appeals and select "Video Portal." Then, click on the link for the Court of Appeals Archived Video page. For live arguments, select "Roster of Cases" from the drop-down menu for the Court of Appeals to see a schedule of when court is in session. When you are ready to view the argument at its scheduled time, select "Video Portal" from the Court of Appeals drop-down menu and click on the link for the Court of Appeals SCETV Live Stream page.

11. The day before your argument is scheduled to be heard, check your authorities to make sure they are still good law.

Additional Resources

I recommend the following additional resources for appellate advocacy:

Appellate Practice in South Carolina, Third Edition, By Jean Hoefer Toal, Amanda Waring Walker, and Margaret E. Baker (The South Carolina Bar – CLE Division 2016)

How Judges Think, By Richard A. Posner (Harvard University Press 2008)

Making Your Case - The Art of Persuading Judges, By Antonin Scalia & Bryan A. Garner

Advocacy Before the United States Supreme Court, By Robert H. Jackson, 37 CORNELL L. REV. 1 (1951)

South Carolina Bar

Continuing Legal Education Division

Evolving Expert Evidence

The Honorable Daniel M. Coble

Evolving Expert Evidence

Daniel Coble

Quick Overview

- History and Evolution
- Pre-Trial Hearings
- Proper Testimony
- *Crawford*

What's in a Name? *Daubert/Council*

History of Expert Testimony in South Carolina

1923

Frye Standard

General acceptance of the scientific principle in the scientific field to which it belongs.

1973

FRE Enacted

The Federal Rules of Evidence were officially enacted in 1973.

1979

State v. Jones

Jones was the expert evidence standard in S.C. prior to the adoption of the South Carolina Rules of Evidence.

1993

Daubert Standard

The Daubert standard replaced Frye. This new standard focuses on the judge as the gatekeeper.

1995

SCRE Enacted

South Carolina officially enacted the S.C. Rules of Evidence. SCRE is very similar to both FRE and prior S.C. evidentiary common law.

What's in a Name? *Daubert/Council*

History of Expert Testimony in South Carolina

1999

State v. Council

This is the seminal case for S.C. expert evidence. It is "extraordinarily" similar to Daubert.

2009

State v. White

White explained the standard for admitting "nonscientific" in nature expert testimony.

2010

Watson v. Ford

Watson emphasized the three-part test for expert testimony and SCRE 702: subject matter, expert qualifications, and reliability.

2012

Graves v. CAS

Graves specifically showed how the Council factors come into play with "scientific" in nature expert testimony.

2020

State v. Phillips

Phillips emphasized that trial courts need to conduct pretrial "Daubert/Council" hearings to comply with SCRE 702.

Frye Standard (1923)

- General acceptance in the scientific community
- "A court applying the *Frye* standard must determine whether or not the method by which that evidence was obtained was generally accepted by experts in the particular field in which it belongs." *Legal Information Institute*

Federal Rules of Evidence Enacted (1973)

- FRE are put into place
- This includes FRE 702 – Expert Testimony
- Did the new rules change the standard?

Daubert Standard (1993)

- The Court agreed that FRE 702 had superseded *Frye* and that nowhere "in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a 'general acceptance' standard." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

- Under *Daubert*, when scientific expert testimony is offered, the trial court should look to several factors to determine if it is reliable, which include:

  - 1.) testing of the theory/technique;
  - 2.) subject to peer review or publication;
  - 3.) potential error rate;
  - 4.) standards; and
  - 5.) widespread acceptance. *Id.*, 509 U.S. at 593-594.

State v. Jones (1979)

- S.C. never accepted *Frye* standard
- More liberal than *Frye* standard
- The standard *Jones* set out for expert testimony was "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)

State v. Council (1999)

- Seminal Case
- S.C. Supreme Court again rejected *Frye*
- Held that *Jones* was still good law
- Very specific: not adopting *Daubert*
- Factors to consider:
    - 1.) publication and peer review; 2.) prior application of the method; 3.) quality control procedures; and 4.) consistency of the method.
- **Trial courts should apply *Jones* (i.e., *Council*), SCRE 702, and SCRE 403**

State v. Phillips (2020)

- ***Daubert/Council* hearing**

- "The trial court should have required the State to present the factual and scientific information necessary to establish the foundation required by Rule 702. The trial court also should have conducted an on-the-record balancing of probative value and the danger of confusion of the issues and misleading the jury required by Rule 403." *Phillips*, 430 S.C. at 341.

- The majority explained that in two previous cases where expert testimony was used, the proponents of the evidence **"presented deposition testimony of their experts and/or live testimony outside the presence of a jury, and each expert explained in detail the factual and scientific basis for their opinions."**
- The court referred favorably to the previous supreme court case *Graves* and explained that in that case the expert **"testimony was presented in a pre-trial *Daubert/Council* hearing."**

State v. Phillips (2020)

- ***Daubert/Council* hearing**

- "Before any expert opinion may be admitted into evidence, the proponent of the opinion must convince the trial court that each element of the Rule 702 foundation has been established."

Graves v. CAS (2012)

- "In determining whether to admit expert testimony, the court must make three inquiries. **First**, the court must determine whether 'the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.' **Second**, the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field.' **Finally**, the substance of the testimony must be reliable. It is this final requirement of reliability which is the central feature of the inquiry." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74 (2012).

Pre-Trial Hearing

1. Evidence will assist the trier of the fact (**Subject Matter**).
2. The expert must be qualified in that particular field (**Expert Qualifications**).
3. The underlying science is reliable (**Reliability**).

    Scientific in nature (*Council* factors):

        the publications and peer review of the technique;

        prior application of the method to the type of evidence involved in the case;

        the quality control procedures used to ensure reliability; and

        the consistency of the method with recognized scientific laws and procedures.

    Nonscientific in nature (*State v. White*):

        No set test. Judge must still play gatekeeper though.

4. Passes SCRE 403.

State v. Wallace (2023)

- To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of **three** elements: "the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *Council*, 335 S.C. at 20, 515 S.E.2d at 518.

- In this case we are concerned with only the second *Council* element: whether "the expert witness is qualified." *Id.* (referring to the statement "a witness qualified as an expert by knowledge, skill, experience, training, or education" in Rule 702).

State v. Wallace (2023)

- When expert testimony is scientific in nature, or when it is based on more complex technical or specialized knowledge, the witness providing the testimony will need a greater degree of "knowledge, skill, experience, training, or education" to be qualified.

- As a comparison between cases like *Hamrick* and *Herrera* indicates, on the other hand, when expert testimony is based on less complex knowledge, a trial court may find the degree of qualification required to satisfy the second element of Rule 702 is not as high.

State v. Wallace (2023)

- *Compare Hamrick*, 426 S.C. at 649, 828 S.E.2d at 602 (stating, "Accident reconstruction is a highly technical and specialized field in which experts employ principles of engineering, physics, and other knowledge," and noting attendance at a few classes was not sufficient "to satisfy the 'qualified as an expert' element of the Rule 702 foundation"), *with Herrera*, 425 S.C. at 563, 823 S.E.2d at 925 (finding a witness qualified to identify marijuana in bags—which "it does not appear that Herrera disputes"—based on nothing but his experience as a police officer).

SCRE 703 and *Crawford*

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." SCRE 703

Generally, "pass through" hearsay is not allowed:

- "The fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, *but may not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule*." State v. King, 422 S.C. 47 (2017)

SCRE 703

Crawford rule:

- "out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court" Crawford v. Washington, 541 U.S. 36 (2004)

What is testimonial?

- "In determining whether an out-of-court statement is testimonial, courts employ the primary purpose test, which consists of 'where the primary purpose of an out-of-court statement is to serve as evidence or an out-of-court substitute for trial testimony, the statement is considered testimonial.' … If the primary purpose is not to serve as evidence at a later trial or as a substitute for in person testimony, the Confrontation Clause does not apply and admissibility is left to the rules of evidence. State v. Brewer, 438 S.C. 37, 48–49 (2022)

State v. Brewer (2022)

- Defendant charged with homicide by child (overdose of drug)
- Pathologist performed autopsy and sent DNA sample to be tested by private lab
- Private lab tested DNA, sent report to pathologist, and pathologist used report to draw conclusion: amount of drugs in child's system

State v. Brewer (2022)

What was the issue in *Brewer*?

- Was the lab report testimonial in nature?

Defense: “She asserts the primary purpose of the report was to establish evidence likely to be used in a criminal trial, and that the trial court's ruling effectively permitted Fulcher, the pathologist, to testify as to the State's key piece of evidence without having any personal knowledge how the test was performed. Further, because Fulcher essentially vouched for the credibility and reputation of the NMS lab, Brewer argues this heightened the need to cross-examine the individual who actually conducted the test.”

State: “Conversely, the State asserts the lab report is not testimonial because objectively, the purpose of the report was to assist Fulcher in determining the child's cause of death, not to prepare a document in lieu of actual testimony at trial.”

State v. Brewer (2022)

"Accordingly, the State violated Brewer's Sixth Amendment right to confront the witnesses against her because it was permitted to use a surrogate witness to explain the results of a test involving a key fact at issue and to essentially vouch for the accuracy of that lab without undergoing the 'crucible of cross-examination.' "

State v. Brewer (2022)

Why a four-part holistic test?

Why not the simple "primary purpose" test?

- An expert may or may not be regurgitating that statement
- They may rely on it very tangentially
- They may have completely set it aside and used their own independent judgment
- Or based on the totality of that expert's testimony, it is clear the expert is not a conduit for the *testimonial proclamation*.

State v. Brewer (2022)

First

Who created the record/statement?

- Based on *Brewer*, the "who" will not merely be the person who created the actual record, but the person who initiated the creation.
- I believe this part of the test will also deal with a majority of the chain of custody issues.
- Was the *who* the final creator or merely someone who was in the chain of custody – look to *Brockmeyer* for guidance.

State v. Brewer (2022)

Second

Why was the record/statement created?

- Use *Brewer* as a guide. Many factors come into play, and possibly mandatory rules (e.g., autopsy statute).
- Look to *Melendez-Diaz*. Was it created for the "administration of an entity's affairs" or for future criminal proceedings?
- What was the status of the defendant at the time of the creation?
    - Was defendant a suspect or completely unknown?

State v. Brewer (2022)

Third

Does the record/statement for the basis of an essential fact or element of the charged crime?

- This could possibly be a sliding scale analysis?
- Compare a drug or blood analysis with a matching DNA result.

State v. Brewer (2022)

Fourth

Is the expert simply a conduit of the record/statement?

Or are they using their independent judgment, experience, and specialized understanding to draw their own conclusion?

- Did the expert interpret the data/report/statement and then create a conclusion?
- Or was the data/report/statement already in its conclusory form?

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