THE SCRIVENER

Opinions That Made A Difference

By Scott Moïse

Legal writing takes many forms, including pleadings, motions, briefs, letters, and e-mails. At the top of the legal writing chain are the written opinions from our judges. Trying to winnow down the multitude of significant cases in South Carolina jurisprudence to a list of 10 is an impossible task. There is no chaff in this wheat field of opinions. In coming up with these cases, I have talked with justices, judges, and leading lawyers across the state, and these are the cases that were mentioned most often. This column covers some of these important cases, and others will be covered in the next issue.

The case of the charming "farmer": Prior bad acts

***State v. Lyle*,** 125 S.C. 406, 118 S.E. 803 (1923).

Lyle is a seminal case in South Carolina evidence law that introduced the rule of admissibility of prior bad acts. This opinion was authored by Justice John Hardin Marion, a native of Chester who served as S.C. representative and senator until 1922 when he was elected to the S.C. Supreme Court, where he served for five years.

This case addressed a situation in which the defendant was accused of passing fraudulent checks, with the State seeking to admit evidence that the defendant passed other bad checks under similar circumstances. The facts are as follows: In 1923, a young man named Milton A. Lyle—who was alleged to have travelled from town to town dressed like "a good country farmer" and charmed several bank tellers into giving him money under false pretenses—was convicted of uttering a forged check. His M.O. was to approach the teller and give a false name and a check from a local citizen and ask to open an account and withdraw a certain amount of money from it. The tellers fell for this ruse repeatedly. In one instance at a bank in Aiken, the swindled teller began his own investigation and tracked down Lyle at a hotel in Augusta, Georgia and positively identified Lyle to the police as the perpetrator.

At trial the State introduced evidence, over the defendant's objection, to prove that Mr. Lyle was the same man who issued the forged check, through testimony of five tellers (two in Aiken and three in Georgia). The tellers identified Mr. Lyle as having passed fraudulent checks in their banks and provided bank documents containing signatures from the man who had defrauded their banks. The State also introduced Mr. Lyle's signature from the hotel register in Augusta and his signature on a card written after his arrest. Then, over objection, the State introduced testimony from three experts who testified that the handwriting on the bank forgery documents and that of Mr. Lyle were from the same person.

The court addressed the issue of whether the testimony of the five tellers and the writings they identified were prejudicially erroneous because they tended to prove the defendant committed other distinct crimes similar to the crime in the indictment. The court first noted the long-standing English rule that evidence of the accused's other crimes may not be introduced into evidence "merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." *Id.* at 406, 118 S.E. at 807. The effect of the evidence of other crimes is to predispose the juror to believe the defendant's guilt in the case before them, thus effectively stripping him of the presumption of innocence. *Id.*

Relying on a case from the New York Court of Appeals, the *Lyle* court recognized five exceptions to the general rule that evidence of prior bad acts are inadmissible: evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. *Id.* at 407, 118 S.E. at 807.

Recognizing the difficulty of determining if the evidence falls within an exception to the general of exclusion, the court held that the "acid test" is the testimony's "logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." *Id.; see also* Julius

Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 1006 (1938); *see generally* Warren Moïse, *A Checklist for Introducing Prior Bad Acts*, S.C. Law., March 2007.

The case of the lumber mill and the insurer: Bad faith failure to settle

Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933).

Justice Milledge Lipscomb Bonham was a newspaper editor in Ninety-Six and Newberry before going to law school, which may explain his ability to write such a groundbreaking opinion and his subsequent rise to chief justice. *Tyger River* is the leading case in this state on the duty of insurers to defend and reasonably settle claims against their insureds, giving rise to the doctrine of bad faith insurance claims settlement and equitable subrogation. Almost 90 years later, courts are still relying on this case. *See, e.g.*, *ContraVest Inc. v. Mt. Hawley Ins. Co.*, No. 9:15-CV-00304-DCN, 2020 WL 901459, at *7–8 (D.S.C. Feb. 25, 2020).

Under *Tyger River*, a liability insurer owes a duty to settle covered claims when reasonable. However, if the insurer unreasonably refuses or fails to settle a covered claim within the policy limits, it is liable for the entire amount of the judgment obtained against the insured regardless of the limits contained in the policy.

In 1930 the Tyger River Pine Company was sued by its employee, Erwin Chesser, for injuries he received on the job at the lumber mill. Tyger River was insured by the Maryland Casualty Insurance Company with $5,000 policy limits. Liability against Tyger River was clear, and the potential damages exceeded the policy limits. The plaintiff agreed to settle the case for the policy limits, and the insured wanted to settle, but the insurer refused. Thereafter, the jury returned a verdict against Tyger River for a sum in excess of the policy limits. Even after the verdict, the plaintiff once again offered to settle for the policy limits, but the insurer once again refused.

After the verdict was affirmed on appeal, the insurer tendered its policy limits to the plaintiff, insisting that the lumber company pay the excess. Tyger River refused and instead sued the insurer for the amount of the judgment in excess of the policy limits, giving rise to the landmark *Tyger River* case. In *Tyger River* the S.C. Supreme Court set forth legal principles that would become the underpinnings of present day bad-faith litigation:

> Where an insurer under an employer's liability policy on being notified of an action for injuries to insured's servant assumed the defense thereof, and was negligent in conducting the suit, to the loss of the employer, the latter was entitled to sue the insurance company for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence.

170 S.E. at 348; *see also* George J. Kefalos, R. Davis Howser, Hon. William Howard, & Warren Moïse *Bad-Faith Insurance Litigation in the South Carolina Practice Manual*, S.C. Law., Aug. 2001, at 18, 21.

Of note, one of the lawyers for Tyger River was Donald Russell, who later became governor of South Carolina, U.S. senator, judge on the U.S. District Court and U.S. Fourth Circuit of Appeals, and president of the University of South Carolina. Also of note, in Judge Russell's first run for governor, he lost in the Democratic primary to Ernest F. "Fritz" Hollings. Four years later, Russell succeeded Hollings as governor.

The case of the dissent that roared: Desegregation in America

Briggs v. Elliott, 98 F. Supp. 529, 538–48 (E.D.S.C. 1951) (Waring, J., dissenting), *vacated,* 342 U.S. 350 (1952).

Briggs v. Elliott was brought by 46 minors and 20 adults who were residents of Clarendon County, alleging that they were discriminated against by the defendant school

board trustees and school officials in violation of the Constitution and laws of South Carolina. The case was heard by a three-judge federal court panel in Charleston—consisting of Circuit Judge John J. Parker and District Court Judges George Bell Timmerman and J. Waties Waring—which ruled against the plaintiffs. The decision was expected but was nevertheless deeply disappointing. However, it is not the majority opinion denying the relief sought, but the stinging 20-page dissent authored by Judge Waring, that had the lasting impact on the country. In the dissent, Judge Waring declared that segregation in education could never produce equality and was "an evil that must be eradicated" and concluded that "[s]egregation is per se inequality." *Briggs*, 98 F. Supp. at 548 (Waring, J., dissenting).

Briggs v. Elliott was then appealed to the U.S. Supreme Court: the first case challenging public school desegregation that was filed, tried, and appealed to the Supreme Court. *See* Leon Friedman & Richard Mark Gergel, *The dissent that changed America*, Nat'l L. J., at 1 (July 11, 2011). *Briggs* eventually was consolidated with four other cases that were heard by the Supreme Court, resulting in the landmark decision *Brown v. Board of Education*, 347 U.S. 483 (1954). The words of Judge Waring's lonely dissent in *Briggs* found new life in the *Brown* opinion in which Chief Justice Earl Warren echoed the underpinnings of Waring's dissent, writing, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown*, 347 U.S. at 495.

The legal story of *Briggs* and Judge Waring's dissent and role in desegregation in South Carolina are detailed in *Unexampled Courage* by Judge Richard Gergel, an incredible story of the sacrifice and courage of the plaintiffs, their lawyers (who included Thurgood Marshall and Columbia lawyer Harold R. Boulware), Judge Waring, and others who fought to relentlessly against daunting odds to bring the state into constitutional compliance.

The case of Spot Mozingo and the gearshift lever: The crashworthiness doctrine

Mickle v. Blackmon, 252 S.C. 202, 217, 166 S.E.2d 173, 178 (1969).

Mickle adopted the product liability "crashworthiness doctrine" in South Carolina. Justice James M. Brailsford authored the opinion, with Justice James Woodrow Lewis writing the dissent.

In 1962 a teenaged girl was a passenger in a 13-year-old car that was struck by another vehicle in an intersection. When the protective plastic knob on the gearshift lever shattered in the collision, the plaintiff was impaled on the "spear-like" lever during the collision, suffering complete and permanent paralysis.

Senator James P. "Spot" Mozingo, III and law partner Kenneth Baker represented the plaintiff and brought claims against the car manufacturer for negligent design and placement of the lever, arguing that the manufacturer had a duty to use reasonable care in the design of its product to prevent passenger injury in the event of a collision.

In a defense that seems astonishing today, the manufacturer argued that it had no duty to manufacture an automobile "in which it is safe to have a collision, or to exercise care to minimize the collision connected hazards presented to occupants by the design of the passenger compartment" and that its only duty was to manufacture a product free of latent defects and reasonably fit for its intended use and "such use does not include colliding with other vehicles or objects." *Id.* at 229, 166 S.E.2d at 184. The jury returned a verdict against the manufacturer valued at over $2.6 million today, but the trial court granted the manufacturer's motion for judgment notwithstanding the verdict.

The South Carolina Supreme Court noted that although products liability law rapidly developed after the landmark decision *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), scant authority existed on the issue before that time: "[D]oes a manufacturer owe a duty of care to reasonably minimize the risk of death or serious injury to collision victims who, quite predictably, will upon impact be forcefully thrown against the interior of the car or outside of it?" *Id.* at 185, 166 S.E.2d at 230.

The court was persuaded by two federal court cases: *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the first case to fully articulate the doctrine of crashworthiness, and *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962), in which the product was furniture polish (yes, really). In *Spruill* the court found that the definition of "intended use" was " 'not an inflexible formula to be applied apodictically to every case.' " *Id.* at 83.

The *Mickle* court further noted that the manufacturer's duty stems from the foreseeability of enhanced injury resulting from the second impact in automobile accidents: "An automobile manufacturer knows with certainty that many users of his product will be involved in collisions, and that the incidence and extent of injury to them will frequently be determined by the placement, design and construction of such interior components as shafts, levers, knobs, handles and others." 252 S.C. at 230, 166 S.E.2d at 185; *see also* Robert H. Brunson, *Comparing First Collison "Fault" with Second Collision "Defect,"* S.C. Law., Aug. 1999, at 39.

The *Mickle* crashworthiness opinion was cited by five different federal courts of appeals, federal district courts in 10 states, and 20 state courts. As an aside, it was also the first South Carolina case to use the word "apodictically," which—as we all know—means "incontrovertible."

This concludes the first installment of cases that made a difference in our state. If any reader has a case that should be added to the list, please let me know at scott.moise@nelsonmullins.com for possible inclusion in the next or future columns.