South Carolina Law Review

Volume 23
Issue 4 *Survey of South Carolina Law*

Article 1

1971

Appeal

John E. Carbaugh Jr.

APPEAL

I. FORM AND REQUISITES

A. Supreme Court Rules and Procedures

On May 15, 1970, the supreme court adopted an amendment to RULE 1, RULES OF SOUTH CAROLINA SUPREME COURT, which stated:

> No case shall be docketed in this Court after the expiration of two hundred ten (210) days from the date of the service of the notice of intention to appeal, except by leave of this Court, upon good cause shown after notice to the respondent.[1]

Since the adoption of this change, the court has not been generous to counsel seeking to docket their cases after the expiration of the 210 day period; indeed, in the majority of attempts by counsel to have the Rule's provision waived, the court has refused the request.

Bootle v. Labrasca, Inc.[2] was a case whose outcome turned on a strictly procedural matter. In this personal injury action arising from the plaintiff's fall in the defendant's restaurant, the defendant urged that the evidence was insufficient to establish any negligence on its part as the proximate cause of the plaintiff's injuries, and, alternatively, the plaintiff was contributorily negligent as a matter of law. The supreme court, in a per curiam decision, held that the defendant's issues were not before the court because "the record fails to establish that they were presented to the trial judge by a motion for a directed verdict." The court further pointed out that "Absent such a motion at the appropriate stage of the trial, a motion for a judgment *non obstante veredicto* will not lie."[3]

B. Raising Question for First Time on Appeal; Issues Not in Record

The most frequently discussed problem in the area of appeals concerned the raising of questions on appeal that were not raised at the trial stage. In *McKenzie v. McKenzie*,[4] a divorce action brought by the husband on the grounds of physical cruelty, the appellant wife contended that the trial court erred in failing to award her any part of the property acquired by her and her husband during their twenty five years

1. S.C. SUP. CT. R. 1(1), *as amended* (1970).
2. 255 S.C. 134, 177 S.E.2d 544 (1970).
3. *Id.* at 135-36, 177 S.E.2d at 545.
4. 254 S.C. 372, 175 S.E.2d 628 (1970).

of marriage. Since the wife did not raise the issue during the trial, the supreme court refused to allow the matter to be raised for the first time on appeal: "It is well settled that an issue which has not been presented or passed upon by the circuit court will not be considered here."[5]

Timmons v. South Carolina Tricentennial Commission[6] was a celebrated case dealing with the condemnation of certain lands of the appellant for use as a parking facility by the state Tricentennial Commission. On appeal to the supreme court, several issues dealing with appeals were raised. One such question dealt with whether the trial judge was in error because certain evidence offered to show prejudice on the part of several witnesses was excluded. "Although evidence attacking the credibility of an adverse witness is normally admissible," the court pointed out that because the testimony of the witness in question was not included in the record and was not, therefore, before the court, "It cannot be said that the exclusion of [the] evidence was reversible error. . . ."[7]

In *Gore v. Skipper*,[8] an action to establish a prescriptive right to use certain roads on the defendant's lands, a compulsory order of reference was granted, whereupon the defendant appealed on certain grounds which, according to the record from the court below, were not raised or decided upon there. Such issues, the court held, were not properly before it for review or decision.

Another instance in which the court refused to consider on appeal facts not appearing in the record as agreed upon and referred to only in an exception, occurred in *Jackson v. Jackson*,[9] an appeal from a lower court order which liberalized a mother's visitation rights with her three minor children. On appeal, the husband contended that the lower court erred in refusing to allow him to introduce certain testimony. In upholding the decision of the lower court, the court noted that "the record nowhere indicates that the husband offered any testimony which the court refused to admit."[10]

In *Buckner v. Preferred Mutual Insurance Co.*,[11] the supreme

5. *Id.* at 375, 175 S.E.2d at 630.
6. 254 S.C. 378, 175 S.E.2d 805 (1970).
7. *Id.* at 382, 175 S.E.2d at 808.
8. 255 S.C. 18, 176 S.E.2d 569 (1970).
9. 181 S.E.2d 266 (S.C. 1971).
10. *Id.* at 267.
11. 255 S.C. 159, 177 S.E.2d 544 (1970).

court held, per curiam, that where the appellant insurance company did not except, at the trial stage, to the second ground for the trial court's decision, nor did the company argue against such in its brief, then the finding of the court below, "right or wrong, is the law of this case and requires affirmance. It would be pointless to consider the exceptions which do not reach this dispositive finding."[12]

The court issued its most strongly worded statement concerning those who raise an issue on appeal that was not before the court during the trial stage in *Powers v. City of Aiken.*[13] In this case, Powers sued the city for damages sustained in an intersectional collision with an approaching city police patrol car which had just made a U-turn. The jury awarded Powers actual damages and the city appealed, questioning whether, as required by law,[14] there was any evidence in the record tending to show actionable negligence on the part of the city in bringing about the collision.

Powers pointed out that city's contention that there was no evidence of actionable negligence by the city was not raised in the court below. After a search of the record, the supreme court agreed that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question was not properly before the court. Thereupon, the court issued the following admonition:

> This is a court of review, the purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him. For the guidance of the bar we restate the holding made by this court in many cases heretofore: This court will not grant relief on alleged error asserted for the first time on appeal.[15]

C. *Standing on Appeal*

Cisson v. McWhorter[16] was an action to foreclose a mechanic's lien upon real property. The lower court directed the requested foreclo-

12. *Id.* at 160, 177 S.E.2d at 544.

13. 255 S.C. 115, 177 S.E.2d 370 (1970).

14. S.C. CODE ANN. § 47-71 (1962) [repealed by 1968 (55) 3027, effective July 1, 1968] required that negligent acts on the behalf of the city be the sole proximate cause of injury in order for recovery to be had.

15. Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970).

16. 255 S.C. 174, 177 S.E.2d 603 (1970).

sure and the holder of the first mortgage appealed. In affirming the decision of the lower court, the supreme court pointed out that the property was sold subject to the first mortgage lien, and the holder thereof "was not aggrieved by the judgment of the trial court, but rather benefitted therefrom,"[17] and therefore had no standing to appeal.

In an appeal from a lower court's denial of the defendant's habeas corpus petition, the appellant in *Schneider v. State*[18] challenged the constitutionality of Section 32-970 of the Code, which provided that a person charged with a crime and admitted to the State Hospital shall, at the end of thirty days from his initial confinement, "be returned to the court if found mentally competent, or if he is found mentally ill, then the superintendant of the State Hospital shall certify such findings to the court and shall retain the person as a patient subject to further orders from the court."

The court pointed out that the defendant had neither alleged nor sought to prove his sanity, nor had he sought to prove himelf mentally competent to stand trial for the crimes he was charged with, but had asked only for his absolute release. The court held that the appellant had no standing nor was he in any position to challenge the constitutionality of Section 32-970: "A person who does not seek or desire a judicial or jury hearing as to his sanity is in no position to complain that the statute does not specifically provide therefor."[19]

D. Jurisdiction of the Courts

In the famous case of *Mickle v. Blackmon,*[20] a personal injury action against the defendant Blackmon and co-defendant Ford Motor Company, the plaintiff was awarded a judgment against defendant Blackmon, which was affirmed on appeal. Mickle was awarded a judgment against Ford, which was changed by the trial judge to a judgment *non obstante veredicto* on Ford's motion, which judgment was reversed by the supreme court on appeal and the case remanded.[21] A petition by Blackmon and Ford for a rehearing was denied and the remittitur was issued on March 5, 1969. On July 21, 1969, the plaintiff moved

17. *Id.* at 178, 177 S.E.2d at 605.
18. 255 S.C. 594, 180 S.E.2d 340 (1971).
19. *Id.* at 595, 180 S.E.2d at 341.
20. 255 S.C. 136, 177 S.E.2d 548 (1970).
21. Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).

for a partial summary judgment against Ford on the issue of damages. The motion was refused.

In affirming the decision of the lower court, the supreme court held that:

> on the former appeal, we found that prejudicial error in the instructions required a new trial as to Ford and remanded the case for that purpose. The effect of this mandate was to set aside the verdict *in toto* and require a retrial of all issues. If this exceeded the relief to which Ford was entitled, plaintiff's remedy was by petition to this court before the remittitur went down. We now have no jurisdiction of the issues involved in that appeal.[22]

Parklands, Inc. v. Gibson[23] was an action in which several plaintiffs sought to have the conflicting claims of several defendants adjudicated by the court so that funds might be paid out and certain properties transferred to the defendants. On a prior appeal in the case,[24] the court held that property situated in South Carolina was the subject of the action and that jurisdiction upon the appellants-defendants had been properly acquired by service upon certain ones of them in Texas, since they claimed an interest in real estate in South Carolina.

The present action was before the court on appeal from an order of the lower court overruling a demurrer of the defendants to the complaint. Defendants' demurrer, *inter alia,* contended that the prayer for relief in the complaint characterized the action as one in personam, rather than as one in rem, and accordingly, the court could have no jurisdiction without personal jurisdiction over the defendants. The supreme court held this contention to be without merit, "for more than one reason. . . . [T]he prayer for relief is no part of the cause of action and this contention might be disposed of on that ground alone, but additionally, even if there be merit in the contention, such comes too late, not having been urged when these defendants appeared specially for the purpose of challenging jurisdiction." Furthermore, the court pointed out, "Where the court, on a prior appeal has expressly or impliedly decided that it had jurisdiction at that time, it will not reconsider that question on a subsequent appeal. . . ."[25]

22. Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970); *see* Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881; *Ex parte* Dunovant, 16 S.C. 299 (1881).

23. 255 S.C. 226, 178 S.E.2d 255 (1970).

24. Parklands, Inc. v. Gibson, 253 S.C. 367, 170 S.E.2d 669 (1969).

25. Parklands, Inc. v. Gibson, 255 S.C. 226, 228, 178 S.E.2d 255, 256 (1970).

In *Petroleum Transportation, Inc. v. Public Service Commission,*[26] the court dealt with the problem of whether the Richland County Court of Common Pleas had the proper subject matter jurisdiction to review a decision of the Public Service Commission. The plaintiff had been denied a certificate of convenience by the Commission, whose decision was reversed on appeal by the plaintiff to the Richland County Court of Common Pleas. The Commission did not appeal the order of the Common Pleas Court, but, after the time for appeal had lapsed, moved unsuccessfully to set aside the order because of an alleged lack of jurisdiction of the Common Pleas Court to issue such an order.

Pointing out that "lack of subject matter jurisdiction cannot be waived even by consent and may be raised in this court without an exception,"[27] the court reviewed applicable law concerning appeals from public service commissions[28] and held that while it found no statutory authority for such an appeal, "The absence . . . of statutory authorization for an appeal does not preclude judicial review of decisions of the commission in such cases."[29] As a result, the court held that the Richland County Court of Common Pleas did not exceed its jurisdiction in this case and upheld the decision of that court.

The court delineated the lines of appellate review of administrative decisions more closely in *South Carolina Board of Examiners in Optometry v. Cohen.*[30] There, the Board of Examiners filed an order suspending Cohen's optician's license for a period of twelve months. Cohen then petitioned the lower court for a writ of certiorari, which was granted; whereupon, the lower court reversed the Board and held that there was insufficient evidence to support its decision. Both Cohen and the Board appealed.

In dealing with the lower court's review of the order of the Board, the court pointed out that "The statutory law does not provide for an

26. 255 S.C. 419, 179 S.E.2d 326 (1971).

27. *Id.* at 424, 179 S.E.2d at 328.

28. In City of Columbia v. South Carolina Pub. Serv. Comm'n, 242 S.C. 528, 131 S.E.2d 705 (1963), the court held that there is no appeal from the decisions, orders, or regulations of public service commissions except as provided for by constitutional or statutory provisions, and inthe absence of such provisions, no such right exists.

29. Petroleum Transp., Inc. v. Public Serv. Comm'n, 255 S.C. 419, 423, 179 S.E.2d 326, 328 (1971); *see also,* Bramlett v. Young, 229 S.C. 519, 93 S.E.2d 873 (1956); Hunter v. Boyd, 203 S.C. 518, 28 S.E.2d 412 (1943).

30. 180 S.E.2d 650 (S.C. 1971).

appeal from the actions of the board. Traditionally, in this State, the actions of this board have been reviewed by the courts on a writ of certiorari."[31]

In order o clarify the role which a lower court should play in a review of the work of an administrative board by way of a writ of certiorari, the court quoted from *Feldman v. South Carolina Tax Commission*,[32] which held that

> A writ of certiorari cannot be made a substitute for an appeal. . . . We have held in numerous cases that this court on writ of certiorari will confine its review to the correction of errors of law only, and will not review the findings of fact of an inferior court or body except where such findings are wholly unsupported by the evidence.[33]

After a review of the evidence submitted at the Board's hearing and available to the lower court, the court sustained the appeal of the Board, authorizing it to carry out its order and stating "We think the judge in the lower court erred when he concluded that . . . [certain] testimony was vague. . . ."[34]

In *Allen v. Foss*,[35] the court pointed out that the appellate jurisdiction of the Spartanburg County Court did not extend to appeals from decisions of the Spartanburg Planning Commission.[36] The court also refuted the respondent's argument that the appellants had waived all questions of jurisdiction "by appearing generally and contesting the appeal on its merits. It is elementary that lack of jurisdiction of the subject matter of an action cannot be waived."[37]

Vereen v. Bell[38] was an action to rescind and cancel a deed to real estate on the ground of the alleged mental incapacity of the grantor, Vereen. The court pointed out that "Although tried below and argued here, without objection as an action at law, it is clear that the case is

31. *Id.* at 652; *see also*, Wagner v. Ezell, 249 S.C. 421, 154 S.E.2d 731 (1967).

32. 203 S.C. 49, 26 S.E.2d 22 (1943).

33. *Id.* at 51, 26 S.E.2d at 24.

34. South Carolina Brd. of Exam. In Optom. v. Cohen, 180 S.E.2d 650, 652 (S.C. 1971).

35. 255 S.C. 336, 178 S.E.2d 659 (1971).

36. S.C. CODE ANN. § 15-806 (1962) *as amended* by an Act of the General Assembly, 1970, (56) 2487, as interpreted through City of Columbia v. South Carolina Pub. Serv. Comm'n, 242 S.C. 528, 131 S.E.2d 705 (1963).

37. Allen v. Foss, 255 S.C. 336, 339, 178 S.E.2d 659, 660 (1971).

38. Op. 19236 (S.C. Jun. 9, 1971).

one of equitable jurisdiction."[39] The court then proceeded to review the facts of the case as they appeared in the record of the trial court, noting that "In an appeal in equity cases this court has jurisdiction to find the facts in accordance with its view of the preponderance of the evidence and may reverse findings of fact by the trial court when the appellant satisfies this court that such findings are without evidentiary support or are against the clear preponderance of evidence."[40] After its review of the evidence as found in the record, the court affirmed the decision of the trial court, holding that Vereen "had the mental capacity to know what he was doing. . . ."[41]

Wallace v. Wallace[42] was an action to require the administrator of the estate of J. W. Wallace, Sr. to account for certain stocks. The administrator, as appellant, challenged the jurisdiction of the Civil Court of Florence for the first time on appeal. When the action was instituted, the Florence Civil Court's jurisdiction was limited to matters in which the claim did not exceed $11,000.00.[43] The appellant claimed that the value of the stock in question exceeded the jurisdictional limits of the court; no fraud was charged. The supreme court pointed out that "The complaint in this action alleged that the value of the shares of stock in controversy does not exceed the jurisdictional limits of this court. This allegation was admitted in the answer of the appellant." The court stated further that "Upon service of the complaint, appellant had the right to object to the allegation as to the value of the stock. Instead of doing so, he admitted that such was true."[44] As a result of such inaction by the appellant, the court held that "The uncontested allegation of the complaint was to the value of the stock in question determined jurisdiction"[45] and held that proper jurisdiction was had in the Florence Civil Court.

II. THE SUPREME COURT AS A COURT OF REVIEW

A. Review of Findings of Fact and Points of Law

Another of the several appeals questions which arose in *Timmons*

39. *Id.*
40. *Id.*
41. *Id.*
42. Op. 19242 (S.C. Jun. 16, 1971).
43. S.C. CODE ANN. § 15-1608 (1962), *as amended*, S.C. CODE ANN. § 15-1608 (1968).
44. Op. 19242 (S.C. Jun. 16, 1971).
45. *Id.*

v. South Carolina Tricentennial Commission[46] centered around whether the trial judge erred in admitting evidence over the objections of the appellant. Noting that the admission of evidence is "largely a matter of discretion"[47] of the trial judge, the court stated that

> "In order for this court to reverse a case based on the erroneous exclusion of evidence, the plaintiff must show error and prejudice."[48]

The court also noted that the testimony in question was not a part of the transcript of record and, therefore, there could not be found in the record before the court "a basis for holding that there was such an abuse of discretion as to warrant a new trial."[49]

Jeanes v. Jeanes[50] was a proceeding in which the husband sought to be relieved from the liability of the payment of alimony to the wife due to her common law remarriage.

Pointing out that divorce, as well as support and maintenance actions, are proceedings in equity, and, as such, "this court has the jurisdiction and the power to find the facts in accord with its view of the preponderance or greater weight of the evidence, at least in the absence of a jury trial,"[51] the court surveyed the evidence and went beyond the findings of the lower court, holding that "Although the lower court was reluctant to so find, we are convinced that a common law marriage of the appellant wife to . . . [X] was established by the clear preponderance and greater weight of the evidence."[52] The decision of the lower court was, therefore, affirmed.

Senn v. J. S. Weeks & Co.[53] dealt with an action arising out of an intersectional collision between two automobiles. The lower court refused to allow to be admitted as evidence certain pictures offered to show the view that a motorist allegedly would have had of the stop sign on approaching the intersection.

In reversing the lower court's judgment against the defendant, the court held the pictures to be "relevant to the one basic and vital issue

46. 254 S.C. 378, 175 S.E.2d 805 (1970).
47. *Id.* at 405, 175 S.E.2d at 819.
48. *Id.*
49. *Id.* at 405-06, 175 S.E.2d at 819.
50. 255 S.C. 161, 177 S.E.2d 537 (1970).
51. *Id.* at 165, 177 S.E.2d at 539.
52. *Id.*
53. 180 S.E.2d 336 (S.C. 1971).

in the case. The crucial nature of . . . [such] evidence made its exclusion prejudicial. Its exclusion constituted an abuse of discretion and warrants the granting of a new trial on that ground."[54]

South Carolina State Highway Department v. Wilson[55] was a land condemnation case in which witnesses for the landowners bringing the original suit were allowed to testify, over objection, concerning the sale price of two properties sold nine years prior to the commencement of the case in question. Holding the admission of the evidence in question to be a matter "addressed to the sound discretion of the trial judge,"[56] the court then noted that, in this particular instance, "While the sales referred to were quite remote in point of time, we are not convinced, under the circumstances here, that there was any abuse of discretion or prejudice to the Department."[57]

Burns v. Caughman[58] was an action by the sister of the decedent against the administratrices of his estate to recover reasonable value of certain items furnished and services rendered by her to her brother during his lifetime. A judgment was given to the plaintiff and the administratrices appealed, contending that testimony allowed by the lower court to be given by the plaintiff regarding her rendered services was inadmissible under the Dead Man's Statute.[59]

However, in view of admissions by the defendants in their answer that " 'certain items were furnished and services performed by plaintiff for defendant's intestate,' "[60] the plaintiff contended that for the court to allow the testimony in question from her was not prejudicial to the defendants. With this contention the court agreed.

The court further pointed out that it was not prejudicial error for the trial judge to allow to be entered into testimony, over the objections of the defendants, the appraised value of the decedent's estate as a matter of public record, when later, upon finding out that the plaintiff sought such testimony as an element to be considered in estimating the value of the plaintiff's services, the trial judge ruled the same evidence inadmissible for such purposes.

---

54. *Id.* at 338.
55. 254 S.C. 360, 175 S.E.2d 391 (1970).
56. *Id.* at 369, 175 S.E.2d at 396.
57. *Id.*
58. 255 S.C. 199, 178 S.E.2d 151 (1970).
59. S.C. CODE ANN. § 26-402 (1962).
60. Burns v. Caughman, 255 S.C. 199, 204, 178 S.E.2d 151, 153 (1970).

Ruth v. Lane[61] was a tort action brought by a common laborer against his employer to recover for injuries suffered when the laborer was severely burned while using an acetylene torch. A jury verdict was given for the laborer, and the employer moved for a judgment *non obstante veredicto,* which was denied.

On appeal, the appellant contended that he was entitled to a new trial because the trial court erred in refusing to charge the following:

> The master would have the right to assume that a servant 14 years of age and upwards was of reasonable capacity for comprehending and understanding obvious and patent dangers, and if he engaged in the employment, he did so knowing the risks and therefore assuming them.[62]

The charge itself was taken verbatim, though out of context, from a charge which had been approved by the court earlier in the case of *Goodwin v. Columbia Mills Co.*[63] Commenting on the requested charge, the court said that "under the facts and circumstances to this case the requested charge would have been inappropriate in the absence of considerable modification or revision by the court."[64]

The court, therefore, found no prejudicial error in the trial court's refusal of the requested charge, noting further that the trial court had submitted the defense of assumption of the risk to the jury by charging the jury, in language more forceful than that requested, that an employee is charged with the knowledge of "obvious danger, obvious to a person of ordinary reason and prudence. . . ."[65]

In *Ex parte Guaranty Bank & Trust Co.*,[66] the trustees of the estate of R. P. Byrd, Sr. brought an action to obtain approval of the court to deviate from the terms of a testimentary trust set up by Byrd in his will.

The case was referred to the Master in Equity for Florence County, who recommended that the trustees be directed by the court to sell the portion of the estate in question. Exceptions were taken to the Master's report. The circuit judge dismissed them and ordered the relief

61. 254 S.C. 431, 175 S.E.2d 820 (1970).
62. *Id.* at 437, 175 S.E.2d at 823.
63. 80 S.C. 349, 61 S.E. 390 (1908).
64. Ruth v. Lane, 254 S.C. 431, 438, 175 S.E.2d 820, 823 (1970).
65. *Id.*
66. 255 S.C. 106, 177 S.E.2d 358 (1970).

recommended by the Master. In upholding the decision of the circuit court, the court pointed out that

> We have . . . in an equity case findings of fact by the Master, concurred in by the circuit judge, and such will not be disturbed by this court unless found to be without evidentiary support or against the clear preponderance of evidence.[67]

In *Campbell v. Robbins Tire & Rubber Co.*,[68] an action to recover for personal injuries, the defendant appellant moved at appropriate times for nonsuit and a directed verdict in its favor; and after the judgment for a judgment *non obstante veredicto*, or in the alternative, for a new trial. The court pointed out that the appeal could be disposed of readily "by determining whether there is any evidence to prove the allegation"[69] of negligence in the complaint. Upon reviewing the evidence as found inthe record of the trial court below, the court reversed the lower court's decision for the plaintiff.

Sellers v. Public Savings Life Insurance Co.[70] was an action by a widow on a life insurance policy of her husband who accidentally had drowned. A judgment was given for the widow and the insurer appealed, contending to be reversible error the exclusion of a witness' opinion as to whether the decedent was "highly intoxicated" at the time of the accident which brought about his death, when the defendant's defense to the action was that the insured was either intoxicated or under the influence of narcotics at the time of his death.

The court agreed with the appellant, stating that "It is well settled that a lay witness may testify whether or not, in his opinion, a person was drunk or sober, on a given occasion when observed by that witness, and that the weight of such testimony is for the jury."[71] Thereupon, the court reversed the judgment of the lower court and remanded the case for a new trial.

Moss v. Malone Freight Lines, Inc.[72] dealt with an action for damages to the plaintiff's truck which ran into the overturned trailer

67. *Id.* at 110-11, 177 S.E.2d at 360. *See also* Todd v. Todd, 242 S.C. 263, 130 S.E.2d 552 (1963).

68. Op. 19233 (S.C. Jun. 9, 1971).

69. *Id.*

70. 255 S.C. 251, 178 S.E.2d 241 (1970).

71. *Id.* at 256-57, 178 S.E.2d at 243. *See also* State v.Ramey, 221 S.C. 10, 68 S.E.2d 634 (1952); State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909).

72. 255 S.C. 435, 179 S.E.2d 603 (1971).

of the defendant. The defendant's trailer had been disabled on the highway near the crest of a hill for some six hours before the daytime collision, but during the six hours the defendant had failed to display warnings as required by law.[73] A jury verdict gave the plaintiff a judgment for both actual and punitive damages.

On appeal, the defendant-appellant contended that the testimony, as a matter of law, showed that the plaintiff was guilty of contributory negligence and contributory recklessness. In affirming the decision of the lower court, the supreme court held that "The answer of the defendant pled contributory negligence but did not plead contributory recklessness or wilfullness, and the motions at trial conformed strictly to the answer on this point. Therefore, the claim that the only reasonable conclusion from the evidence is that the plaintiff was guilty of contributory recklessness raised no issue of determination by us. . . ."[74]

The common law doctrine that the release of one of multiple joint tort-feasors releases all was in issue in *Bartholomew v. McCartha.*[75] There, the plaintiff-respondent was injured in a collision between an automobile driven by defendant McCartha, and a truck, driven by co-defendant Shealy. Bartholomew sued both drivers, settling with and executing a release to co-defendant McCartha. A judgment was held against Shealy and he appealed.

On appeal, the court held that the common law doctrine that served as the basis of Shealy's appeal did not apply in South Carolina; and, further, with regard to Shealy's exception to the lower court's allowance of the plaintiff's motion to amend his complaint by striking all reference to the co-defendant McCartha, the court pointed out that "The allowance of the amendment appears to have been in the furtherance of justice. Certainly no abuse of discretion has been shown."[76]

B. Review of Lower Court's Use of Discretion in Procedural Matters

Small v. Mungo[77] was concerned with the trial court's dismissal, with prejudice, of appellant's cause of action when neither the appellant

73. S.C. CODE ANN. §§ 46-626 -627 (1962).

74. Moss v. Malone Freight Lines, Inc., 255 S.C. 435, 437, 179 S.E.2d 603, 605 (1971).

75. 255 S.C. 489, 179 S.E.2d 912 (1971).

76. *Id.* at 491, 179 S.E.2d at 914.

77. 254 S.C. 438, 175 S.E.2d 802 (1970).

nor his attorney appeared when the trial was called. The supreme court held that the question of whether an action should be dismissed under Section 10-1502 of the South Carolina Code[78] (dismissal for failure to proceed) was "left to the discretion of the circuit judge and his decision will not be disturbed except upon a clear showing ofan abuse of such discretion."[79] The court, however, held that to dismiss the action *with prejudice* was not justified and modified the decision of the lower court accordingly.

Anders v. Nash[80] involved two actions, both of which arose out of an automobile-pedestrian accident. Judgment was given for the plaintiff in both actions. Nash appealed, charging, *inter alia,* that the lower court erred (1) in permitting Mrs. Anders, after the jury was sworn, to amend her complaint so as to include alleged disfigurement as an element of damages; and (2) in refusing to strike, as a conclusion and a non-responsive answer, testimony of Mrs. Anders that she looked and was cautious as she crossed the street where she was struck by the defendant's car.

The court found no abuse of discretion on the part of the lower court in allowing Mrs. Anders to amend, holding that "The court has very broad discretion . . . to grant amendments to the pleadings in furtherance of justice and the exercise of such power will not be disturbed by this court except upon a showing of an abuse of such discretion."[81]

Furthermore, the court held that Mrs. Anders' statement, that she had looked and was cautious, "might have been properly stricken as a conclusion and not responsive to the question asked. However, the ruling was discretionary and we find no abuse of discretion or resulting prejudice to defendant's rights from refusal to strike the testimony. . . ."[82]

78. S.C. CODE ANN. § 10-1502 (1962): *"Dismissal for Neglect to Serve a Summons or Failure to Proceed* —The court may dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants or to proceed in the case against the defendant or defendants served."

79. Small v. Mungo, 254 S.C. 438, 441, 175 S.E.2d 802, 804 (1970).

80. 180 S.E.2d 878 (S.C. 1971).

81. *Id.* at 880; S.C. CODE ANN. § 10-692 (1962) gives to the courts broad discretionary powers to grant amendments to the pleadings.

82. *Id.* at 880-81.

State v. Greene[83] was a prison riot case in which the court, in a divided opinion held, *inter alia,* that the conduct of the trial and the admission or exclusion of evidence had to be left largely to the discretion of the trial judge.

The final appeal issue raised in *Timmons v. South Carolina Tricentennial Commission*[84] dealt with the fact that the trial judge refused appellant Timmons' motion for a continuance. In finding no abuse of discretion on the part of the trial judge in refusing appellant's motion, the court held that "The matter of a continuance is addressed to the discretion of the trial court; such ruling will not be disturbed unless manifestly erroneous."[85]

III. THE FEDERAL COURTS

A. Procedural Matters

In *Bistrick v. University of South Carolina,*[86] the plaintiff sought a three judge federal panel to hear his allegations that the Board of Trustees of the defendant University had denied certain of his constitutional rights. The District Court held that a district judge, to whom such application is made, must determine whether a substantial federal question exists; if such does exist, then the three judge panel must be convened. Noting that "In deciding whether to request the convening of a three judge court, the district judge to whom the petition is made must rest his conclusion on the law as he understands it and the allegations of the complaint,"[87] the court thereupon reviewed each cause of action in the complaint, found no substantial federal question involved, and denied the request of the plaintiff.

In a per curiam decision, the Fourth Circuit Court of Appeals in *McGowen v. Gillenwater,*[88] a personal injury action, held that the district judge did not abuse his discretion in barring from the jury the amount of damages alleged in the plaintiff's complaint. The court pointed out that such evidence obtained, from the pleadings, was "no part of the proof and it had no role to play in the jury's consideration

83. 255 S.C. 548, 180 S.E.2d 179 (1971).
84. 254 S.C. 378, 175 S.E.2d 805 (1970).
85. *Id.* at 405, 175 S.E.2d at 819.
86. 319 F. Supp. 193 (D.S.C. 1970).
87. *Id.* at 194.
88. 429 F.2d 587 (4th Cir. 1970).

of the case. . . . Indeed, the better practice ordinarily is to withhold all pleadings from the jury."[89]

The court then proceeded to dismiss another contention of the appellant because it was "never properly presented to the district judge, and it cannot be raised at this time."[90]

B. Habeas Corpus Proceedings

In *Weathers v. United States,*[91] the District Court held that the petitioner in a habeas corpus proceeding, a federal prisoner who previously had filed two motions attacking his conviction and who had been afforded a full and complete evidentiary hearing on his first petition, did not have the "endless right to burden the court with repeated petitions [attacking his conviction] . . . nor can he play 'hide and seek' by withholding claims, so that he may obtain a second or third review of his conviction."[92]

Blackwell v. United States[93] was an appeal from a district court's denial of habeas corpus relief to the petitioner, a federal prisoner. The prisoner contended that he was entitled to be given credit on his present sentence for time served under a prior, unrelated, federal sentence which had been vacated. The court rejected the petitioner's contention and upheld the district court's decision, citing as its basis for its holding *Davis v. United States Attorney General.*[94]

JOHN E. CARBAUGH, JR.

89. *Id.*
90. *Id.*
91. 322 F. Supp. 602 (D.S.C. 1970).
92. *Id.* at 603-04.
93. 438 F.2d 518 (4th Cir. 1971).
94. 432 F.2d 777 (5th Cir. 1970).