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Practice and Procedure

J. H. Tedards Jr.

PRACTICE AND PROCEDURE

I. INITIATION OF ACTION

A. *Jurisdiction*

The plaintiff in *Moses v. South Carolina Highway Department*[1] was arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor. His driver's license was suspended for refusal to submit to a breathalyzer test after being advised of the consequences of refusal; the suspension was lifted when he requested a hearing but was reinstated pursuant to the findings of the hearing officer.[2] Moses then brought an action in the Civil Court of Florence County challenging the procedure and decision on several constitutional and nonconstitutional grounds.

The trial judge treated this action as a petition for writ of certiorari, requesting an oral return by the hearing officer of the administrative proceedings. He then ruled that the statutory hearing, limited so as to deny the individual the right to contest whether there was probable cause for his arrest, was unconstitutional as a denial of due process violative of the fourteenth amendment.[3]

On appeal the Supreme Court of South Carolina determined that the lower court was without jurisdiction to review the administrative decision of the Highway Department, and the decision was reversed. The determining factor was that the lower court had been asked to review alleged errors on the part of the hearing examiner and had in fact treated the proceeding as an appeal. In spite of the character of the final decision by the lower court, certiorari is appellate in nature when used to examine the action of an inferior tribunal.[4] Because the only appellate jurisdiction granted to the Civil Court of Florence County is to hear appeals from magistrates' courts within the county,[5] it did not have jurisdiction of the action.

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1. 258 S.C. 233, 187 S.E.2d 888 (1972).

2. *See* S.C. CODE ANN. § 46-344 (Cum. Supp. 1971).

3. Record at 9, Moses v. South Carolina Highway Dept., 258 S.C. 233, 187 S.E.2d 888 (1972).

4. *See* City of Columbia v. South Carolina Pub. Serv. Comm'n, 242 S.C. 528, 131 S.E.2d 705 (1963).

5. S.C. CODE ANN. § 15-1610 (1962).

B. Venue

The question in *Williams v. Chrysler Motors Corp.*[6] was whether the lower court erred in transferring the case for trial from Darlington County to Florence County. The supreme court noted the established South Carolina rule that the trial court has both the authority and the responsibility to decide whether one defendant has been joined solely to permit the action to be tried in a place other than where the real defendant is entitled to be tried. It then proceeded to examine the evidence to determine whether that had occurred in this case.

The action was one for alleged fraud and deceit in the sale of a new truck, commenced against the manufacturer, the dealer, and an employee of the dealer residing in Darlington County. It was conceded that, except for the joinder of the employee, the venue would properly lie in Florence County. The undisputed evidence showed that the employee had been parts manager and later shop foreman during the period in question, but his closest connection with repair attempts on the truck had been the after-the-fact completion of two forms to support the dealer's reimbursement claim against Chrysler for repairs under warranty.

On these facts the supreme court found full evidentiary support for the lower court's decision that the employee was an immaterial defendant. It thus affirmed the order transferring the case to Florence County.

C. Limitations of Actions

Miller v. Dickert[7] presented a textbook problem in statutory interpretation. At issue was section 10-104 of the Code,[8] which

6. 193 S.E.2d 524 (S.C. 1972).

7. 259 S.C. 1, 190 S.E.2d 459 (1972).

8. S.C. CODE ANN. § 10-104 (1962) reads as follows:

If a person entitled to bring an action mentioned in article 3 of this chapter, except for a penalty or forfeiture or against a sheriff or other office for an escape, be at the time the cause of action accrued either:

(1) Within the age of twenty-one years;

(2) Insane; or

(3) Imprisoned on a criminal or civil charge or in execution under the sentence of a criminal court for a less term than his natural life;

The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended:

(1) More than five years by any such disability, except infancy; nor

(2) In any case longer than one year after the disability ceases.

gives certain relief from statutes of limitations to persons under specified disabilities at the time the cause of action accrues. The facts as alleged by plaintiff clearly presented the issue. He claimed that on July 31, 1969, the two defendant doctors knowingly and without examining plaintiff signed a false medical certificate which led to his involuntary commitment to the state hospital for the mentally ill. He further alleged that on August 1, 1969, he was arrested and committed to the hospital, where he remained until his discharge on August 28, 1969. Plaintiff later commenced this action for false imprisonment on August 27, 1971. The statute of limitations for such an action is two years;[9] both parties agreed that the alleged cause of action accrued on August 1, 1969, the time of the plaintiff's arrest.

Plaintiff conceded that his action would be barred unless salvaged by section 10-104. He claimed that he was "imprisoned on a civil charge" when the cause of action accrued, and that the two year statute did not begin to run until the disability was removed on August 28, 1969. For support he relied on a statement in the 1883 case of *Shubrick v. Adams*[10] that, "where a party is under a legal disability at the time his right of action accrues, the statute is not put in operation until the disability ceases."[11]

Defendants contended that under the literal language of the section, it could *never* operate to extend the period for bringing an action beyond one year after the disability has terminated. For judicial support of this interpretation, they relied most heavily on *Fricks v. Lewis*,[12] which was decided only four years after *Shubrick* but did not mention it. The court in *Fricks*, after a lengthy discussion[13] of several possible constructions of the statute, decided that in no case could the statute operate to *extend* a period more than one year after removal of the disability, but that neither could it ever operate to *reduce* a period otherwise allowed.

In the case at hand the supreme court decided that the interpretation in *Fricks* and its progeny was the correct and established rule and that the plea of the statute of limitations should have been sustained. As a matter of statutory construction this position seems unassailable.[14]

9. S.C. CODE ANN. § 10-145 (1962).
10. 20 S.C. 49 (1883).
11. *Id.* at 52.
12. 26 S.C. 237, 1 S.E. 884 (1887).
13. *Id.* at 241-44, 1 S.E. at 887-89.
14. It is interesting to note that after mentioning the statement from *Shubrick* the

II. CONDUCT OF TRIAL

A. *Pleading*

Section 10-609 of the South Carolina Code[15] allows the trial judge discretion to permit an answer to be filed after the specified 20 days[16] have expired. Rule 19 of the Circuit Court Rules[17] qualifies this by requiring a certificate from defendant's counsel that he believes defendant has a good and substantial defense upon the merits. Defendant in *Bledsoe v. Metts*[18] was granted such a privilege to file his answer on the ground that there was excusable neglect for his failure to answer within the statutory period. Plaintiff appealed, challenging the judge's findings and order as an abuse of discretion.

The supreme court said that such a decision would be overturned only upon "a clear showing of abuse of discretion,"[19] and then proceeded to emphasize just how difficult it would be to make such a showing in these circumstances:

> We have held that Section 10-609 of the Code should be given a liberal construction in furtherance of justice and in order that cases may be tried and disposed of upon their merits . . . . When a party makes a showing of mistake, inadvertence, surprise or excusable neglect and applies promptly for relief after notice and makes a *prima facie* showing of a meritorious defense, answer should be permitted to be filed.[20]

Not surprisingly, in light of the mood established by this statement, it was held that plaintiff had failed to show an erroneous exercise of discretion.

B. *Jury Selection*

The plaintiff in the automobile collision case of *Bowers v. Watkins Carolina Express, Inc.*,[21] was one of the three magistrates for Hampton County where the trial occurred. Twenty-one of the

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court did not overrule or distinguish it in any way. But the statement was pure dictum in the *Shubrick* case and should obviously not be considered of value as precedent.

15. S.C. CODE ANN. § 10-609 (1962).
16. *Id.* § 10-641 (1962).
17. S.C. CIR. CT. R. 19.
18. 258 S.C. 500, 189 S.E.2d 291 (1972).
19. *Id.* at 503, 189 S.E.2d at 293.
20. *Id.* at 503-04, 189 S.E.2d at 293.
21. 259 S.C. 371, 192 S.E.2d 199 (1972).

fifty-member jury panel for the case resided in the Estill-Scotia area, which was plaintiff's principal area of service. Defendant contended that this was a sufficient showing to raise an inference of bias that required automatic disqualification of those twenty-one; the supreme court disagreed, although it reversed the verdict for plaintiff on another point discussed later in this article.

The court was careful to point out the alternative available to defendant of requesting a voir dire examination of the jury panel pursuant to section 38-202 of the Code,[22] thus enabling further inquiry into the jurors' impartiality. Having failed to take advantage of a statutory provision directed at just such a situation, the defendant was unlikely to find the court receptive to his claim of prejudicial error.

C. Testimony

Two cases during the survey period involved significant questions about the propriety of testimony by witnesses for the plaintiff. The first of these, *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*,[23] was a suit for damages allegedly caused to an apartment complex by defective heating and cooling equipment manufactured by defendant.

The testimony at issue was given by plaintiff's president, when he stated without objection that twenty-five or thirty tenants had moved from the apartments because of the unsatisfactory air conditioner operation. This estimate was based on personal communications with tenants before the air conditioner was repaired. The president similarly testified as to the rate of vacancy during the period in question and the resulting loss of rental income. Defendant's counsel not only made no attempt to prevent such testimony but also conducted extensive cross-examination on the subject. Defendant subsequently moved to strike as conjecture all the testimony concerning lost rentals, but the request was denied by the trial judge.

The supreme court held that this was not reversible error. Any motion to strike evidence admitted without objection is addressed to the discretion of the court, imposing from the beginning a heavy burden on one who would challenge such a ruling. In this instance, the fact that counsel had conducted lengthy cross-examination on the subject before making his motion sup-

22. S.C. CODE ANN. § 38-202 (1962).

23. 259 S.C. 346, 191 S.E.2d 774 (1972).

plied ample basis for the discretionary refusal to strike the testimony.

In *Smoak v. Seaboard Coast Line R.R.*,[24] a wrongful death action involving a pickup truck and a freight train, defendant complained of unresponsive answers made on cross-examination by a witness for plaintiff. The witness, in answer to an unspecified question, replied that there had been no accidents at the crossing since the railroad company cut back the growth on the right-of-way and put up a stop sign. The trial court sustained defendant's objection and instructed the jury to disregard the answer of the witness in its entirety.

Defendant also moved for a mistrial at the time of the objection but the motion was overruled. On appeal this refusal was assigned as error, with defendant contending that it was prejudiced by the overall effect of the testimony and the court's instructions. The supreme court disposed of this contention by noting that such matters are within the discretion of the trial judge. The court agreed that the error was not of sufficient magnitude to warrant a mistrial and ruled that the judge properly cured the error with his timely instruction. Feeling compelled to go further, the court delivered the following commentary on the realities of litigation:

> The answers cannot be attributed to counsel for plaintiffs, or to the plaintiffs. They were spontaneous answers from one not accustomed to testifying. The defendant is not entitled to a perfect trial, but only a fair trial. Hardly any case is completed without some flaw. If a new trial were required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged.[25]

D. Arguments and Conduct of Counsel

One of the more interesting trial situations during the survey period is found in *Bowers v. Watkins Carolina Express, Inc.*[26] This was a personal injury case arising from a collision of plaintiff's automobile and defendant's tractor-trailer. The accident occurred at dusk in a light rain and mist, and the crucial issue was which vehicle had crossed the center line of the roadway. There

24. 193 S.E.2d 594 (S.C. 1972). *See* Survey of Administrative Law *supra*.
25. *Id.* at 598.
26. 259 S.C. 371, 192 S.E.2d 190 (1972).

were no eyewitnesses other than the two drivers, although there were exhibits and testimony concerning marks on the highway. The jury returned a verdict for plaintiff.

The waters were muddied, however, by the fact that plaintiff was one of three magistrates in Hampton County, where the case was tried in the circuit court. (The question of whether this has any impact on jury selection has been discussed above.) The supreme court also chose to point out that plaintiff's counsel was the solicitor of the judicial circuit encompassing Hampton County, although it made no further mention of this fact in the opinion.

In this setting plaintiff's counsel made the following statement during his closing argument to the jury:

> It has been testified that Karl Bowers is a magistrate in this county. Now it just doesn't seem to be that a man of Karl Bowers' type would get up here and tell you a deliberate falsehood merely for money. I don't believe he's that kind of person. If you don't bring in a verdict for him in this case, every time you see Karl Bowers henceforth in the future, you ought to say there goes a liar . . . .[27]

Defendant's counsel objected at this point that the argument was highly improper and prejudicial and requested proper instruction to the jury. Although the trial judge conceded that the argument could have been worded less suggestively, he overruled the objection by failure to admonish counsel or instruct the jury, and plaintiff's counsel continued his argument.

On appeal the supreme court granted a new trial. It recognized that generally the conduct of a trial must be left largely to the discretion of the trial judge, but decided that failure to sustain this objection carried so great a possibility of prejudice that the verdict could not be allowed to stand. The court read counsel's argument as a deliberate attempt to exploit any reluctance a juror might have to find against his magistrate, and as a plain suggestion that the magistrate would remember any juror who branded him a liar. Noting that the jury could reasonably have found against plaintiff on the basis of a mistaken belief rather than a deliberate falsehood, the court held that the argument was not only unduly coercive but also falsely premised.

27. *Id.* at 375, 192 S.E.2d at 192.

Any clear-cut value of the case as precedent is perhaps lost in the uniqueness of the facts. Certainly both the status of the plaintiff and the exact nature of the argument were important, and perhaps the status of plaintiff's counsel was also a significant factor. The court undertakes to state no rule or general principle in its opinion, and the decision can probably be used in future cases only by analogy.

E. Direction of Verdict

Another of many procedural points raised in *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*[28] concerned the refusal to grant defendant's motion for a directed verdict as to certain elements of damage. Testimony had been given at the trial concerning structural damage to plaintiff's apartments allegedly resulting from condensation spillage from the defective cooling equipment manufactured by defendant. There was further testimony relating to the installed cost of the equipment. At the close of the evidence, defendant moved for a directed verdict absolving it of liability for all damages which occurred after plaintiff discovered the condensation problem, and also for the cost of the units as an element of damage. The trial judge overruled both motions.

Citing the 1969 case of *Wilson v. Glock*[29] as controlling authority, the supreme court pointed out that motions such as the ones made by defendant are not recognized in South Carolina practice; hence they were properly overruled. A motion for a directed verdict "goes to the entire case and may be granted only when the evidence raises no issue for the jury as to defendant's liability."[30] It is implied in the *Wilson* case that defendant's proper course of action would have been to seek jury instructions concerning those elements of damage which it felt should not have been considered.

F. Instructions to Jury

Defendant-appellant in the *Carolina Home Builders* case, after challenging numerous instructions given by the trial judge, finally achieved a reversal and a new trial on the basis of one such challenge. For the most part these instructions were examined by the supreme court solely to see whether they violated the settled

28. 259 S.C. 346, 191 S.E.2d 774 (1972).
29. 252 S.C. 309, 166 S.E.2d 207 (1969).
30. 259 S.C. at 358, 191 S.E.2d at 779.

principle that instructions should be confined to issues raised by the pleadings and evidence. Further discussion of most of these points would concern primarily the law of negligence as applied to the evidence, and this discussion would not be of interest here. However, two points of a procedural nature did emerge.

Defendant complained of the fact that the instructions combined both the theories of implied warranty and negligence, asserting that a plaintiff cannot proceed on two distinct and contrasting theories of law in one cause of action. The court did not reach the question argued by plaintiff:[31] *Whether* negligence and implied warranty are actually contrasting theories under changing ideas about the basis of recovery for implied warranty. Instead, the court noted that plaintiff's complaint contained in a single count allegations appropriate to breach of warranty and others appropriate to negligence. Since defendant never made either a motion to strike or a motion to elect, the judge was held to have committed no error in including both theories of recovery in the instructions. In other words, the trial judge is not required on his own initiative to limit plaintiff to non-conflicting theories of recovery, or to determine which theory plaintiff has implicitly adopted from several set forth in his pleadings.

In another instruction the judge alluded to latent defects in the product which could result in damages to the *person* using the product. Defendant complained that this was inappropriate because only property damage was involved in the case. The supreme court, however, decided this was not prejudicial error, noting that the jury was unlikely to have been misled by the inappropriate use of the word "person." Construing the charge as a whole, the court emphasized that the corporations involved had been characterized earlier in the charge as legal persons, and that the word "damages" was also defined elsewhere to encompass loss from injury to property as well as personal injury.

G. Motion for New Trial

The discretion of the trial judge to grant a new trial was discussed in *Vandegrift v. Dent*.[32] The jury in this assault and battery case had returned a verdict for plaintiff in the amount of $50,000 actual damages and $25,000 punitive damages. Defendant's motion for a new trial was granted upon three stated

31. *See* Brief for Respondent at 26.

32. 258 S.C. 240, 188 S.E.2d 185 (1972).

grounds: (1) Improper and prejudicial jury argument by plaintiff's counsel; (2) erroneous exclusion of certain testimony offered by defendant; (3) a verdict so excessive as to indicate caprice, passion, or prejudice on the part of the jury.

The supreme court chose only to discuss the third ground in affirming the lower court, stating that such a motion is addressed to the discretion of the trial judge. As is frequently the case in such a setting, the court perceived no need to discuss the facts of the case and simply noted that the record fully sustained the judge's conclusion that the verdict was out of all proportion to the loss sustained. Plaintiff would have had to show the occurrence of that undefinable "abuse of discretion," and in the opinion of the court he had not done so.

III. JUDGMENT

A. *General Requisites*

The effect of a judgment issued without personal jurisdiction over the affected party was forcefully illustrated in *Webster v. Clanton*.[33] The issue involved custody and support of a 14-year-old boy, with the parties being the father of the child and a sister of the deceased mother.

The father had originally been given custody in December 1970 after a lengthy hearing, but in April 1971 the lower court entered an order awarding custody to the aunt. This latter order was issued by the county judge largely on his own initiative, based upon an oral complaint by the child, an examination of his school grades, and a conference with a school guidance counselor who did not know the father. There was no prior notice to the father and no pleading by any of the parties.

Subsequently, there were two more orders issued directing the father to make support payments to the aunt and authorizing enrollment of the child in a private school. The first of these arose pursuant to a petition by the aunt; there was an informal, unrecorded conference in June 1971 between the court and counsel, but no further hearing or notice to any party prior to the order filed in November 1971. The second order came after a motion by the father to vacate the first, based in part upon the alleged nullity of the granting of custody to the aunt. This order, denying the father's motion, was filed in December 1971.

33. 259 S.C. 387, 192 S.E.2d 214 (1972).

The father appealed from the latter two orders of support (November 1971 and December 1971) but not from the initial order granting custody to the aunt (April 1971). Nevertheless, the supreme court reversed the orders on appeal because of the invalidity of the initial custody proceeding. The court stated that the April order, although not appealed, was void and of absolutely no effect, with no appeal necessary to protect the father's rights. Thus, because the aunt did not have lawful custody, the support orders based upon that assumed custody were invalid. The court summarized as follows:

> It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.[34]

B. Foreign Judgments

Another aspect of judgments rendered without jurisdiction was discussed in *Seymour v. Seymour*.[35] Here the question was whether the husband could challenge on jurisdictional grounds a default divorce, child custody, and support decree issued in Kansas in favor of the wife. The family court judge decided that he could not challenge the decree. An order was issued giving full faith and credit to the Kansas decree and granting enforcement of its provisions as sought by the wife.

The supreme court reversed this order, stating that the full-faith-and-credit clause of the Federal Constitution does not prevent inquiry into the jurisdiction of the court in another state which rendered the judgment being offered in evidence. This also means that the record of the judgment rendered elsewhere can be contradicted as to the facts conferring jurisdiction, regardless of any recital in the judgment that such facts actually did exist.

For support of these principles, the court cited *State v. Campbell*,[36] which in turn was based partially on the 1945 United States Supreme Court case of *Williams v. North Carolina*.[37] In

34. *Id.* at 391, 192 S.E.2d at 216.
35. 259 S.C. 26, 190 S.E.2d 502 (1972).
36. 242 S.C. 64, 129 S.E.2d 902 (1963).
37. 325 U.S. 226 (1945).

Williams, Justice Frankfurter conducted a thorough examination of the policy factors allowing one state to reexamine the jurisdiction underlying a foreign divorce order; he also indicated the weight which should be attached to the findings of the sister state.

C. *Action on a Judgment*

An action on a judgment in *Garrison v. Owens*[38] presented several interesting questions to the South Carolina Supreme Court. A default judgment had been obtained against defendant on August 20, 1960; the judgment was assigned to plaintiff on March 30, 1970, by her husband. On June 24, 1970, plaintiff commenced this equitable action for the purpose of subjecting certain land owned by defendant to payment of the judgment. A motion to dismiss the complaint was heard by the trial judge subsequent to August 20, 1970.

The motion for dismissal was based upon noncompliance with Code section 10-1520,[39] which requires leave of the court, granted upon good cause and notice to the adverse party, before an action on a judgment may be brought. The lower court judge upheld this motion. He further held that the lien had expired under Code section 10-1561[40] because the authorized ten-year period had passed since the filing of the judgment. The judge decided that the lien was not saved or extended merely by the bringing of an action to enforce it, and that a lien expiring during pendency of the action could not be enforced. The supreme court affirmed on both grounds.

On the first point the court rejected plaintiff-appellant's characterization of her action as something other than an action upon a judgment. Looking at "its very essence,"[41] the court said its purpose was simply the collection of the judgment. Similarly rejected was plaintiff's contention that section 10-1520 by its terms was inapplicable to her because it only applies to an action "between the same parties." The court chose to adopt the broad rule that an assignee of a judgment stands in the place of the

38. 258 S.C. 442, 189 S.E.2d 31 (1972).

39. S.C. CODE ANN. § 10-1520 (1962) reads in relevant part as follows: "No action shall be brought upon a judgment rendered in any court in this State, except the court of a magistrate, between the same parties without leave of the court, or a judge thereof at chambers, for good cause shown on notice to the adverse party."

40. S.C. CODE ANN. § 10-1561 (1962).

41. 258 S.C. at 445, 189 S.E.2d at 33.

assignor and cannot acquire any better rights with regard to the judgment than possessed by the assignor.

Because section 10-1520 was operative, its effect was to leave plaintiff without a complete cause of action, and the dismissal was properly granted. Although the majority of states having such a statute apparently treat noncompliance as a mere irregularity that can be waived or cured,[42] the established rule in South Carolina is that the court is deprived of jurisdiction.[43]

With regard to the expiration of the lien, the court made the following statement: "A judgment lien is purely statutory; its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried."[44] As authority the court cited only a legal encyclopedia,[45] although an annotation to Code section 10-1561 makes the same statement and cites *Hughes v. Slater*[46] as authority. In *Hughes*, the court did discuss the issue in some detail but expressly declined to decide it.[47] The court was apparently aware of this and mentioned *Hughes* only as an analogue.

D. Summary Judgment

The supreme court continued during the survey period to develop case law interpreting the relatively new Circuit Court Rule 44[48] on the granting of summary judgment. Two cases in particular contained fairly extensive discussions of rule 44 and guidelines for its application.

Thevenot v. Commercial Travelers Mutual Accident Association of America[49] was a suit by a woman on a policy insuring her husband against accidental death. The husband had been killed during a struggle with the wife over a gun, which the wife was brandishing while commanding her husband's suspected mistress to leave the wife's home. Plaintiff had been tried for

42. *See* Annot., 160 A.L.R. 605 (1946).
43. American Agricultural Chem. Co. v. Thomas, 206 S.C. 355, 34 S.E.2d 592 (1945).
44. 258 S.C. at 446-47, 189 S.E.2d at 33 (1972).
45. 49 C.J.S. *Judgments* § 495 (1947).
46. 214 S.C. 305, 52 S.E.2d 419 (1949).
47. *Id.* at 313, 52 S.E.2d at 422.
48. S.C. CIR. CT. R. 44 (effective June 1, 1969).
49. 259 S.C. 235, 191 S.E.2d 251 (1972).

murder but had been acquitted. The defendant insurer answered by alleging that the insured husband's death was a foreseeable consequence of his own conduct, and therefore not accidental within the meaning of the policy. On the affidavits of both parties, the trial judge granted plaintiff's motion for summary judgment, holding that "[t]he evidence would not permit a jury to find that the insured should have foreseen that his conduct would bring about the injury from which he died."[50]

The supreme court seemed disturbed that neither of the affidavits of counsel appeared in the transcript of record, with the only relevant documents being unsworn statements of four law enforcement officers and one eyewitness to the shooting. The court described these statements as sketchy and self-contradictory on crucial points, being mostly hearsay. The court stated that "[t]he appropriateness of granting summary judgment on evidence of this character is doubtful."[51] Since defendant had only asserted that the statements, if taken as true, were insufficient to support the order, the court proceeded to further discussion. The court emphasized that on a motion for summary judgment all inferences must be drawn in favor of the party opposing the motion; also that summary judgment should be granted only where there is no dispute as to either the evidentiary facts in the case or the conclusions to be drawn from them. Consequently, the court reviewed the evidence in somewhat more detail, concluding that a jury might decide that a reasonably prudent man in the insured's position would have realized that it was foolhardy to grapple with his wife for the gun. Therefore, this question should have been submitted to the jury, and the summary judgment order was improper.

In *Spencer v. Miller*[52] the plaintiff was an attorney seeking to recover $3071 as compensation primarily for a title search and certification used by defendant to procure a mortgage loan of $625,000. This fee was admittedly the amount calculable from the York County Bar rates, but defendant contended it was not the amount agreed upon and did not constitute reasonable compensation under the circumstances. Plaintiff moved for summary judgment, and affidavits were filed by both parties. The trial court granted plaintiff's motion.

50. *Id.* at 237, 191 S.E.2d at 251.
51. *Id.* at 238, 191 S.E.2d at 252.
52. 259 S.C. 453, 192 S.E.2d 863 (1972).

The supreme court noted that the federal summary judgment rule[53] is similar to the South Carolina rule, and hence that federal court decisions could be instructive in view of the scarcity of South Carolina decisions. It then noted a number of guiding principles to be drawn from South Carolina and federal cases: The accompanying affidavits should be evidentiary in nature and not merely statements of ultimate facts and conclusions; the court's function is merely to determine whether there is any genuine issue of material fact; the ruling must be made on the record actually presented; the papers supporting the motion are closely scrutinized, while the opponent's are indulgently treated; there is no magic formula to determine the existence of a genuine issue of material fact.

In the case at hand, defendant admitted in his affidavit that he knew the York County Bar rates and that plaintiff had quoted these rates to him as the fee prior to doing the work. Defendant objected to the rates but plaintiff quoted no others. Subsequently, according to defendant, he telephoned plaintiff and told him to issue the mortgagee binder, with no further mention of the fee. Defendant also stated that plaintiff did no work other than that which he had already been required to do for the previous seller of the land, but the court rejected this as an ultimate fact insufficient to raise any genuine issue.

On this record the court affirmed the granting of summary judgment for plaintiff. It noted that in order to comply with defendant's request that he issue the binder, it was absolutely necessary for plaintiff to search and certify the title. Because only one fee had ever been mentioned for the title search and certification, the only reasonable inference was that defendant was impliedly agreeing to that fee. Because there was no other factual dispute, summary judgment was appropriate.

IV. FEDERAL COURTS

The plaintiff in *Vandross v. Ellisor*[54] sought to invoke the jurisdiction of the United States District Court for the District of South Carolina in order to have his name printed upon the ballot for a state senate seat in the Democratic primary. The court denied his prayer for relief (except for ordering a refund of the

53. FED. R. CIV. P. 56(c).

54. 347 F. Supp. 197 (D.S.C. 1972).

filing fee he had paid) and dismissed the complaint because of a lack of federal jurisdiction.

District Judge Hemphill felt that the only possible vehicle for jurisdiction was the broad and now familiar language of title 42, section 1983 of the United States Code.[55] However, he felt it well established that the opportunity to become a candidate for state office is not a right rising to federal protection, citing primarily the 1944 Supreme Court case of *Snowden v. Hughes*.[56] It is a right or privilege of state citizenship only. Since there was apparently no allegation of any discrimination which could be a state denial of equal protection, there was simply no possible deprivation of any federal rights, privileges or immunities within the language of section 1983.

The court nevertheless considered the substantive issues, in case an appellate court should find federal jurisdiction.[57] It found as a fact that plaintiff did not offer his intention of candidacy until several minutes after the statutory deadline. It also affirmed that such deadlines are almost universally held to be mandatory, and that in any event plaintiff had offered no significant excuse for being late. Hence he would not have obtained relief even if jurisdiction were present.

Ellison v. Rock Hill Printing & Finishing Co.[58] was an action against several defendants, including the International Association of Machinists and Aerospace Workers (IAM), alleging employment discrimination on the bases of race and sex. The action was instituted pursuant to title VII of the 1964 Civil Rights Act.[59] This order was concerned only with IAM's motion to dismiss for want of proper service and venue. The motion was denied on both grounds.

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55. 42 U.S.C. § 1983 (1970) reads as follows:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

56. 321 U.S. 1 (1944).

57. The words of the court in this context are worth noting:
Despite this court's conviction that jurisdiction does not exist, in the light of those judicial bombshells by which appellate courts, in the past, have used judicial fiat to enlarge and abort the limited federal jurisdiction originally intended by Congress, this court will treat the issues as and if jurisdiction existed.
347 F. Supp. at 202.

58. 347 F. Supp. 436 (D.S.C. 1972).

59. 42 U.S.C. § 2000e *et seq.* (1970).

The question of venue presented little difficulty, for Judge Hemphill found that South Carolina was both "the judicial district . . . in which the claim arose,"[60] and the district "in which the unlawful employment practice [was] alleged to have been committed."[61] The first of these factors is one criterion for proper venue of any civil action, while the second is incorporated in the 1964 Civil Rights Act itself.

With respect to the claimed lack of jurisdiction because of improper service, the key issue was whether jurisdiction was obtained pursuant to the long-arm statute[62] embedded in South Carolina's version of the Uniform Commercial Code. If it was so obtained, service by a United States Marshal in the District of Columbia leaving a copy of the summons with an officer of IAM was clearly sufficient under that Act.[63]

There was evidence that an IAM representative had dealt with Local 1779 in South Carolina pursuant to a contract between IAM and Local 1779, and that the complaint alleged IAM to be the superior union to Local 1779. There was also a deposition from the representative describing in some detail his activities and time spent in South Carolina on behalf of IAM. From these facts the court decided that accepting jurisdiction would not offend the due process clause of the fourteenth amendment. It also noted that, within the language of the long-arm statute, this was a prima facie showing that IAM was transacting business in the state (section 10.2-803(1)(a)) and was a party to a contract to supply services in the state (section 10.2-803(1)(b)).

The remaining question was whether relevant parts of the long-arm statute were in violation of the South Carolina Consti-

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60. 28 U.S.C. § 1391(b) (1970).

61. 42 U.S.C. § 2000e-5(f) (1970).

62. S.C. CODE ANN. § 10.2-803 (1962), which reads in part as follows:

(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in this State;

. . . .

(g) entry into a contract to be performed in whole or in part by either party in this State;

. . . .

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 10-310(3).

63. *See* S.C. CODE ANN. § 10.2-806(1) (1962).

tution because they pertained to a subject not expressed in the title of the Act.[64] Certain subsections relating to tortious acts committed in the state or resulting in injury within the state had been held unconstitutional on that basis,[65] but the court considered those subsections severable. It stated that there was "no *serious* contention that [subsections] (1)(a),(b), or (g) violate the South Carolina Constitution. . . ."[66] The court quoted a lengthy passage from a case[67] upholding section 10.2-803(1)(g) against just such a challenge, finding that the subject was covered by a phrase in the Act's title on regulation of procedure in actions involving certain contracts and transactions. Apparently the same reasoning was thus adopted for subsections (a) and (b).

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64. S.C. CONST. art. 3, § 17, reads as follows: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." *See* Survey of Legislation *supra.*

65. *See, e.g.,* Tention v. Southern Pac. R.R., 336 F. Supp. 25 (D.S.C. 1972).

66. 347 F. Supp. 436, 441 (D.S.C. 1972) (emphasis added).

67. Deering Milliken Research Corp. v. Textured Fibres, Inc., 310 F. Supp. 491 (D.S.C. 1970).