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PRACTICE AND PROCEDURE

I. INITIATION OF ACTION

A. *Jurisdiction*

Developments in this area were most noticeable in disputes concerning in personam jurisdiction over out-of-state defendants. Analysis of the case law is complicated by a series of decisions declaring unconstitutional the state's long-arm statute[1] and the subsequent reenactment of the statute[2] which has been upheld in several court decisions.[3] *Triplett v. R.M. Wade & Co.*[4] amply demonstrates the difficulties in this analysis because the action was commenced prior to the reenactment.

In *Triplett* an Oregon corporation, a manufacturer of pipe-coupling devices, was served with summonses[5] in wrongful death and survival actions arising from an alleged malfunction of its product in South Carolina. The defendant appeared specially to contest jurisdiction. Although the defendant corporation was not domesticated in South Carolina and had no agents or property in the state, the trial judge upheld jurisdiction. His decision was

1. S.C. CODE ANN. § 10.2-803 (1962). For cases declaring parts of this statute unconstitutional *see* Comment, 24 S.C.L. REV. 474 (1972). The defect of the statute was technical, not related to its substantive provisions. *See* note 26, infra and accompanying text.

2. No. 1343, [1972] S.C. Acts & Jt. Res. 2518.

3. Howard v. Allen, 368 F. Supp. 310 (D.S.C. 1973), *aff'd*, 487 F.2d 1397 (4th Cir. 1974); Segars v. Gomez, 360 F. Supp. 50 (D.S.C. 1972).

4. 200 S.E.2d 375 (S.C. 1973).

5. The defendant corporation was served pursuant to S.C. CODE ANN. § 10-424 (1962):

> Service on foreign corporations generally.—If the suit be against a foreign corporation other than a foreign insurance company the summons and any other legal paper may be served by delivering a copy to any officer, agent or employee of the corporation found at the place within this State designated by the stipulation or declaration filed by the corporation pursuant to § 12-721. But if such foreign corporation transacts business in this State without complying with that section such service may be made by leaving a copy of the paper with a fee of one dollar in the hands of the Secretary of State or in his office, and such service shall be deemed sufficient service and shall have like force and effect in all respects as service upon citizens of this State found within its limits if notice of such service and a copy of the paper served are forthwith sent by registered mail by the plaintiff to the defendant foreign corporation and the defendant's return receipt and the plaintiff's affidavit of compliance therewith are filed in the cause and submitted to the court from which such process or other paper issued.
>
> Such service may also be made by delivery of a copy thereof to any such corporation outside the State, and proof of such delivery may be made by the affidavit of the person delivering such copy. Such affidavit shall be filed in the cause and submitted to the court from which the process or other paper issued.

affirmed by the supreme court with two justices dissenting. Although the appellant raised several questions, the court resolved the case on the single question of whether such assertion of in personam jurisdiction over a foreign corporation met due process requirements under the United States Supreme Court standard of "fair play and substantial justice."[6] The court analyzed the relationship between the defendant and its southeastern distributer, a Virginia corporation, but found that the only real connection between the distributor and South Carolina was that the state was within the territory served. The defendant reserved the right to sell to irrigation and farming enterprises and to various specifically named customers independent of its southeastern distributor. But the dissent points out that the record shows

> [T]he only connection that the appellant had with South Carolina was (1) its couplers were being used by Lone Star Industries in Columbia, S.C.; and (2) after the accident happened, a representative of the appellant came to Columbia to investigate. . . .[7]

Although the dissent's view may be somewhat too severe, the record reveals very little contact of a substantive nature. The court itself notes that on the issue of jurisdiction the respondent supplied only the barest of facts.[8] Coupling devices were found in stock at a local farming and irrigation supply store, and two Wade publications were obtained by Lone Star, deceased's employer, prior to the accident. The court's decision, rather than being reached factually, seems conclusory in nature, for the court said:

> We deem to be immaterial, however, the precise means by which Lone Star acquired its couplers, it being readily inferable that such were acquired through one of Wade's designated channels for marketing the same in South Carolina.[9]

The court thus deemed the trial court's finding of facts to be supported by reasonable inferences from the evidence.

6. 200 S.E.2d at 376.

7. *Id.* at 383. The dissent pointed out that one of the commentaries supports the view that, without more, the presence of an agent in a state for the sole purpose of investigating a single claim does not qualify a corporation as transacting business. 20 C.J.S. *Corporations* § 1920(e)(3) (1940).

8. 200 S.E.2d at 376.

9. *Id.* at 378.

The decision is somewhat surprising in view of the holding in *Phillips v. Knapp-Monarch Co.*[10]:

> The fact, alone, that products manufactured by the defendant and bearing its trade name passed through the channels of trade into South Carolina and were here resold by independent merchants, did not constitute the transaction of business by the defendant in this state.[11]

The plaintiffs in both cases relied on service of process under section 10-424 of the Code; yet the majority here dismissed *Phillips* as factually dissimilar, while the dissent regarded it as controlling. A possible distinction is that in *Phillips* the plaintiff knew and reported too much about the product. However by merely asserting his claim and meager facts, the plaintiff in *Triplett* transferred his burden to the defendant, who, in attacking jurisdiction, supplied just enough information to support the inferences on which the decision was based.[12] As evidenced by the split decision, either result is arguably worthy of support. But aside from the factual distinctions, there seems to be an underlying reason for the majority decision. That is the notice given to the "legislative intent to broaden the concept of what constitutes transacting business in the State . . . and to extend South Carolina's jurisdiction accordingly."[13] Viewed in this perspective, *Triplett* seems to be a hybrid, spawned by the unusual circumstances existing after the demise of the long-arm statute. While arguably being an extension of previous section 10-424 jurisdiction, the majority's decision probably rests on the lingering *spirit* of the long-arm statute.

In personam jurisdiction over a foreign corporation was upheld in a federal diversity action in *Lee v. Walworth Valve Co.*[14] A Washington corporation was held amenable to suit in South Carolina though the alleged act did not occur in the state. A member of the United States Navy was killed on board a ship at sea, due to an allegedly faulty steam valve manufactured by defendant. The court noted that because the injury did not occur

10. 245 S.C. 383, 140 S.E.2d 786 (1965).

11. *Id.* at 384, 140 S.E.2d at 787.

12. In *Phillips* plaintiff was the retailer of the defective product and admitted that he had purchased the product from an out-of-state wholesaler having no affiliation with the manufacturer.

13. 200 S.E.2d at 378-79.

14. 482 F.2d 297 (4th Cir. 1973).

in any state, there were two possible forums: defendant's home state and South Carolina, home of the surviving spouse. Concluding that no jurisdictional problem would have existed if the injury had occurred in South Carolina, the court found jurisdiction based on the combination of four factors: plaintiff's interest in having the trial in the forum of residence, the state's substantial interest in the controversy, defendant's substantial and continuing contacts with the state, and the fact that the cause of the action itself suggested no forum.[15] Of these factors, the court emphasized the paternal nature of South Carolina's interest in the controversy in allowing recovery of appropriate compensation by one of its citizens if there is a substantive cause of action.[16] The court noted the similarity of the activity of defendants here with that involved in the much discussed case of *Ratliff v. Cooper Laboratories, Inc.*[17] The significant difference, which supports the finding of jurisdiction in this case, was that the plaintiff was a citizen of South Carolina and the state thus had a substantial paternal interest in the controversy. In *Ratliff* the plaintiff had no interest in a South Carolina forum except the state's relatively long statute of limitation.

The court's analysis in *Walworth* illustrates what seems to be the major failing of the *Triplett* decision. In both cases jurisdiction was asserted under section 10-424 which provides for the imposition of in personam jurisdiction over foreign corporations found to be transacting business within the state. In *Triplett* the court limited its inquiry to those traditional factors which tended to establish that Wade was doing business in the state, and the resulting decision is somewhat less than satisfying. Had the court proceeded to analyze other factors such as the nature of the various interests involved, a much stronger case could have been made for requiring Wade to defend the action in South Carolina.[18]

In two federal district court cases dealing with the reenacted version of the long-arm statute the principal issue was whether

15. *Id.* at 301.

16. *Id.* at 299-300.

17. 444 F.2d 745 (4th Cir. 1971). For in depth discussion of this case *see Conflict of Laws Symposium,* 25 S.C.L. REV. 169 (1973).

18. *See* Buckeye Boiler Co. v. Superior Ct., 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). The court in *Buckeye* emphasized "purposeful" activity of the defendent in availing itself of economic benefit in California. Then the court examined the interests of the plaintiff in bringing suit in the state of the state in protecting its citizens and of justice generally in finding a convenient forum. The system of analysis is logical and convincing.

the statute could be applied retroactively.[19] In *Segars v. Gomez*[20] and *Howard v. Allen*[21] South Carolina plaintiffs served process on out-of-state defendants for acts which occurred before the reenactment of the long-arm statute. Although reenactment cured the South Carolina constitutional defect it was still unclear whether the effective date of the statute was 1968 or 1972. Defendants in both cases alleged that retroactive application of the statute would be violative of procedural due process. The district courts applied the three criteria laid down in *Southern Machinery Co. v. Mohasco Industries, Inc.*[22] for determining the outer limits of *in personam* jurisdiction based upon a single act:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.[23]

The records demonstrated the first and second requisites and the courts noted that the interest of the State of South Carolina in providing a forum to its citizens and the likelihood that the majority of witnesses were located within the state made the exercise of jurisdiction over the defendants reasonable and in accord with traditional notions of fair play and substantial justice. Although decisions of federal courts interpreting South Carolina law without the benefit of prior South Carolina Supreme Court decisions are not dispositive, at least one circuit court judge[24] has followed the district court decisions approving the retroactive application of the reenacted statute.

The defect of the original statute under the South Carolina Constitution[25] was that the title of the Uniform Commercial Code

19. *See generally* Green v. Rock Hill, 149 S.C. 234, 147 S.E. 346 (1929); 62 AM. JUR. 2d *Process* § 80 (1972); 16A C.J.S. *Constitutional Law* § 421 (1956); 82 C.J.S. *Statutes* § 414 (1953).

20. 360 F. Supp. 50 (D.S.C. 1972).

21. 368 F. Supp. 310 (D.S.C. 1973), *aff'd*, 487 F.2d 1397 (4th Cir. 1974).

22. 401 F.2d 374 (4th Cir. 1968).

23. *Id.* at 381.

24. Thompson v. Hofman (C.P. Aiken County, Aug. 1, 1973), *appeal docketed*, No. 7442, S.C. Sup. Ct., Feb. 20, 1974. Judge Julius B. Ness decided the case in the circuit court before he was appointed to the supreme court.

25. S.C. CONST. art. III, § 17, provides: "One Subject. Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title."

gave no indication that it included a non-commercial long-arm provision. The reenacted version may serve the purpose of giving unconditional notice of the provisions therein and also remove doubt that the courts might have had regarding legislative awareness of the import of the act when first passed.[26]

In *Clark v. Babbitt Brothers, Inc.*[27] a South Carolina plaintiff brought suit against a Wisconsin firm to recover damages resulting from a collision in Kentucky. The accident occurred two months after defendant had ceased operations in South Carolina. Under the Federal Motor Carrier Act,[28] a carrier is required to designate an agent for service of process in each state where it operates, and plaintiff attempted service on the South Carolina agent. The supreme court upheld dismissal of the service because the cause of action arose in Kentucky and defendant had ceased doing business in South Carolina. Jurisdiction over foreign corporations, the court said, is a question of state law, and in the absence of a state provision for such jurisdiction, it cannot be conferred on state courts by the federal statute.[29]

Jurisdictional questions also arose in two divorce-related actions during the past year. *Everhart v. Everhart*[30] involved the issue of whether a trial court retained in personam jurisdiction over the parties after granting the divorce and awarding alimony and support payments to the wife. At the time of the divorce and the subsequent enforcement proceeding, the husband was a Georgia resident. The wife instituted action to enforce payments and served him personally in Georgia. The husband appeared specially to contest jurisdiction. The court stated, however, that "an application to enforce the alimony and support provisions of a support decree is not an independent proceeding nor the commencement of a new action,"[31] and ruled that jurisdiction continues whether or not it was specifically retained in the decree.[32] Justice Bussey, concurring in the result, took issue with this last position

26. The decision in *Thompson v. Hofman* is currently on appeal to the South Carolina Supreme Court. Both the constitutionality of the statute and its retroactivity are attacked by the appellant. The question is thereby raised whether the reenactment *did* cure the constitutional defect.

27. 260 S.C. 378, 196 S.E.2d 120 (1973).

28. 49 U.S.C.A. § 321(c) (1973).

29. 260 S.C. at 381, 196 S.E.2d at 121.

30. 200 S.E.2d 87 (S.C. 1973).

31. *Id.* at 88.

32. *Id.*

stating that, since the decree here did expressly retain jurisdiction, the latter issue was simply not before the court.[33]

In *Cannon v. Cannon*,[34] a divorce action, the court upheld personal service on an out-of-state wife in lieu of service by publication, as permitted by South Carolina Code sections 20-107 and 10-451 to 454. In the same action, the wife challenged the granting of custody of the children during pendency of the main action citing *May v. Anderson*[35] to support her position. The court upheld the trial court by distinguishing the present case from *May* because the children were physically present in South Carolina when the action was commenced by the father. Physical presence, the court decided, confers jurisdiction to determine the issue of custody.[36]

In two other actions, the supreme court also reviewed decisions involving jurisdictional questions. *State v. Dickert*[37] involved a conviction for driving under the influence of alcohol. The court reversed a circuit court order granting a new trial and restraining the South Carolina Highway Department from suspending the defendant's driving license. The defendant had been convicted in magistrate's court and had failed to move for a new trial or to appeal to the court of general sessions as permitted by statute.[38] Jurisdiction of the circuit court over decisions of the magistrate is appellate only.[39] In *Bourne v. Graham*[40] the court, construing the pertinent code section,[41] declared that the jurisdiction of the municipal court of North Charleston over criminal acts

33. *Id.* at 89. Justice Bussey expressed doubt that the law on this point was as settled as the majority indicated but did not document his search of the law. The majority, however, cites convincing commentary and case law. *Id.* at 88. The rule seems necessary to give the court's decree continuing effect.

34. 260 S.C. 204, 195 S.E.2d 176 (1973).

35. 245 U.S. 528 (1952). In *May* a Wisconsin couple separated, and the wife went to Ohio with the children. The husband filed for divorce and custody in Wisconsin state courts and was granted both. He succeeded in bringing the children back to Wisconsin, but when they did not return from a visit with the mother, he sought to have them returned by a habeas corpus proceeding in Ohio courts. The Wisconsin decree was given credit by the Ohio courts, but the United States Supreme Court subsequently overturned the decision saying that custody was a personal right and could not be decided by a court lacking in personam jurisdiction of the parties. Neither the wife nor children were present at the divorce action in Wisconsin.

36. 260 S.C. at 208, 195 S.E.2d at 178.

37. 260 S.C. 490, 197 S.E.2d 89 (1973).

38. *See* S.C. CODE ANN. §§ 43-142,-43 (1962) (new trial) and §§ 7-101,-02 (1962) (appeal).

39. S.C. CODE ANN. §§ 7-14, -101 *et seq.* (1962).

40. 260 S.C. 554, 197 S.E.2d 674 (1973).

41. S.C. CODE ANN. §§ 15-1002 *et seq.* (1962).

commited within its boundaries is concurrent with that of the county magistrate courts which were in existence prior to incorporation of the city.

B. *Venue*

In two cases the supreme court reaffirmed its well-established policy that rulings on motions for change of venue will not be disturbed absent a clear showing that the trial judge abused his discretion.[42] In *Jackson v. H. & S. Oil Co.*,[43] the court acknowledged the substantial right of a corporation to be sued in its county of residence. The court however, upheld denial of defendant's motion to change venue from Berkeley County, where the accident occurred. Under the South Carolina Code, a corporate defendant may be tried in any county in which it owns property and transacts business,[44] and the facts supported a finding that the defendant was so connected with Berkeley County. *Livingston v. Central Refrigeration Co., Inc.*[45] involved a situation in which the defendant, a Spartanburg corporation, was first granted a change of venue from Berkeley County on the grounds that it had no agent or place of business there, and plaintiff then moved to change venue back to Berkeley County for the convenience of witnesses and the ends of justice. The court ruled that the record supported the sound discretion of the trial judge in allowing plaintiff's motion.

C. *Statute of Limitations*

The case of *Hickman v. Fincher*[46] provides comment on the value of alleging alternative means of relief at the pleadings stage. The plaintiff, claiming racial discrimination in the sale of a house, sought declaratory and injunctive relief and money damages under both the Fair Housing Act of 1968[47] and title 42, section 1982 of the United States Code.[48] Defendant moved to dismiss on the ground that suit was not brought within the statutory

42. Dimery v. Bloom, 245 S.C. 367, 140 S.E.2d 600 (1965).

43. 199 S.E.2d 71 (S.C. 1973).

44. S.C. CODE ANN. § 10-421 (1962).

45. 261 S.C. 147, 198 S.E.2d 799 (1973).

46. 483 F.2d 855 (4th Cir. 1973).

47. 42 U.S.C.A. §§ 3604, 3696 (1973).

48. 42 U.S.C.A. § 1982 (1973) reads as follows: "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

time limit as set forth in the Fair Housing Act.[49] The district court, interpreting that section properly, dismissed the action. The court of appeals reversed, holding that, although the action was not maintainable under the Fair Housing Act, it could still stand under section 1982. Citing *Jones v. Alfred H. Mayer Co.*,[50] the court explained that the Fair Housing Act was not intended to alter possible actions under section 1982. The statute of limitations to be applied under section 1982 is that of the state statute which is expressly, or most nearly, applicable to the type of claim asserted.[51] Thus the court held the plaintiff's case was not barred because the minimum statutory limit in South Carolina for any cause of action is one year.[52]

D. *Abstention by Federal Courts*

Under the doctrine of *Erie Railroad Co. v. Tompkins*,[53] federal courts must apply the substantive law of the states. In situations where the question involves the interpretation of a state statute, some courts have chosen to hold the question in abeyance if state law is unclear. Thus, although the federal action is not dismissed, the doors to the federal forum are effectively closed until the matter has been settled. The district court re-examined and applied the fourth circuit position on abstention in *Louthian v. State Farm Mut. Ins. Co.*[54] The plaintiff, in a previous action, had been granted a verdict against the unidentified driver of a hit-and-run vehicle and sought to recover in this action against defendant insurance company under the uninsured motorist provision of his policy. The statute involved had not been construed by the state supreme court with regard to the specific question involved.[55] There was, however, an appeal pending before that court in a companion case.[56] Analyzing the pertinent Fourth Cir-

49. Under 42 U.S.C. § 3612 (1970), the limit is within 180 days of the last act of discrimination.

50. 392 U.S. 409 (1968).

51. 483 F.2d at 857.

52. S.C. CODE ANN. §§ 10-127, -142, -143, -147, and -148 (1962).

53. 304 U.S. 64 (1938).

54. 357 F. Supp. 894 (D.S.C. 1973).

55. S.C. CODE ANN. § 46-750.34 (Cum. Supp. 1971). For a discussion of factual issues, *see Survey of Insurance*, note 39, *supra* and accompanying text.

56. Louthian and the driver of the car, Spaulding, brought separate actions in Charleston County courts against the driver of another auto in addition to the unknown hit-and-run driver. Both won recoveries against the unknown driver, and Louthian chose the federal district court, Spaulding the state court, to proceed against defendant insurance company to recover on the judgments. Spaulding lost and appealed to the state supreme court.

cuit opinions,[57] the court concluded that when a state constitutional question is not involved, the abstention doctrine should not be used to avoid difficult questions of substantive law. The court reasoned that to abstain would, in effect, limit litigants in their opportunity to have their rights asserted in federal rather than state courts, contrary to the express congressional policy in providing for diversity jurisdiction. This result might not obtain in other federal circuits where the abstention doctrine is still used to avoid difficult questions of substantive law.[58]

II. DISCOVERY

In *Duplan Corp. v. Moulinage et Retordeire de Chavanoz*[59] the Federal District Court of South Carolina considered the narrow issue of whether an "attorney's work product privilege terminates with the termination of the litigation toward which the attorney's efforts were directed."[60] This issue was presented to the district court in the context of a multi-district patent and antitrust action. The plaintiffs in the action (hereinafter referred to as Throwsters) were seeking production of six hundred eighty-three documents for inspection to determine the defendant's prior knowledge of the patents in issue.[61] The defendants, Moulinage et Retorderie de Chavanoz (hereinafter referred to as Chavanoz), were withholding some of the documents on the contention that they were prepared by and for counsel in earlier litigation and, therefore, were protected as work product under Rule 26(b)(3) of the Federal Rules of Civil Procedure.[62] Throwsters, answering the

In another aspect of the case, the district court did not consider itself bound (under *Erie*) by the unreported lower court decision in the *Spaulding* suit on the question of state law, citing 1 BARRON & HOLTZHOFF, FEDERAL PRACTICE AND PROCEDURE § 8 (Wright rev. 1960).

57. A.F.A. Distrib. Co. v. Pearl Brewing Co., 470 F.2d 1210 (4th Cir. 1973), Martin v. State Farm Mut. Auto. Ins. Co., 375 F.2d 720 (4th Cir. 1967), Wohl v. Keene, 476 F.2d 171 (4th Cir. 1973).

58. *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 998-1009 (2d ed. 1973).

59. 61 F.R.D. 127 (D.S.C. 1973), labeled *Duplan Corp. v. Deering Milliken, Inc.* in the official reporter.

60. *Id.* at 135.

61. *Id.* at 129.

62. *Id.* at 130. FED. R. CIV. P. 26(b)(3) provides:

> Trial Preparation: Materials. Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer,

defendants' contention, alleged that the work product exemption from discovery does not extend beyond the termination of the litigation for which it was prepared.[63]

The district court held that

> (1) when a case in litigation finally is terminated; (2) by either decision of the court or by settlement among the parties; (3) the work product privilege is also terminated; and (4) the work product of attorneys in prior litigation is therefore subject to discovery in subsequent litigation.[64]

In terminating the attorney-work product privilege, the court distinguished two cases heavily relied upon by Chavanoz. Chavanoz cited *Insurance Co. of North America v. Union Carbide Corp.*[65] as holding that the purpose of the work product privilege was equally applicable to present and future litigation.[66] The district court found *Union Carbide* inapplicable because the documents therein were protected by the attorney-client privilege. Accordingly, the district court concluded that any language in *Union Carbide* concerning work product was merely dictum.[67] Considering *Republic Gear Co. v. Borg-Warner Co.*,[68] the district court found that even though the court in *Republic Gear* made broad statements about the purpose of the work product rule, it actually based its holding on the fact that the clients from the initial litigation remained subject to suit.[69] The court then cited *United States v. Kelsey-Hayes Wheel Co.*,[70] *Thompson v. Hoitsma*,[71] and *Transmirra Products Corp. v. Monsanto Chemical Co.*[72] as cases supporting the termination of the work product privilege upon

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or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

63. 61 F.R.D. 131.
64. *Id.* at 135.
65. 35 F.R.D. 520 (D. Colo. 1964).
66. 61 F.R.D. at 132-33.
67. *Id.* at 133.
68. 381 F.2d 551 (2d Cir. 1967).
69. 61 F.R.D. at 134.
70. 15 F.R.D. 461 (E.D. Mich. 1954).
71. 19 F.R.D. 112 (D.N.J. 1956).
72. 26 F.R.D. 572 (S.D.N.Y. 1960).

termination of the litigation for which the work product was prepared. Thus, on the weight of this authority, the court ruled that the documents held by Chavanoz were not protected as work product. Recognizing, however, the determination of the scope of the work product privilege under rule 26(b)(3) to be a "controlling question of law," the district court encouraged Chavanoz to appeal its interlocutory decision and certified the order to the court of appeals in accordance with title 28, section 1292(b) of the United States Code.[73]

In reversing and remanding the decision of the district court, the court of appeals took a different approach to the issue. Rather than basing its decision on a weighing of inconsistent prior case law, the court looked to the history of rule 26(b)(3) to determine its purpose.[74] The court found the rule was simply a codification of *Hickman v. Taylor*,[75] and turned to that decision for its answer.[76] The circuit court felt the answer was provided by the Supreme Court in *Hickman* when the Court stated:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[77]

The court of appeals reasoned that this rationale was no "less applicable to a case which has been closed than to one which is still being contested," because the *Hickman* rationale was not

73. 487 F.2d 480 (4th Cir. 1973). 28 U.S.C. § 1292(b) (1958) provides:
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

74. 487 F.2d at 481-82.

75. 329 U.S. 495 (1947).

76. 487 F.2d at 482, *quoting* 8 C. WRIGHT and A. MILLER, FEDERAL PRACTICE AND PROCEDURE, 193 (1969).

77. *Id.*, *quoting* 329 U.S. at 511.

based in any way upon "the rights or posture of the litigants vis-a-vis each other."[78] Following this reasoning, the court of appeals held that the work product privilege extended beyond the litigation for which the work product was prepared.

An analysis of these two decisions shows two different treatments of the same issue. In view of the inconsistent decisions in this area, the court of appeals took the preferred approach. The authority-weighing approach of the district court accomplished little more than allowing the court to conclude that a few more cases held one way rather than the other. The approach of the court of appeals, on the other hand, was to examine the policy underlying the rule, determine its purpose, and decide the issue in a way that best reflected that purpose. Following the latter method the court of appeals came to the correct result.[79] There remains, however, a great deal of confusion on this narrow, but important, issue of the work product privilege because of the many diverse decisions. This uncertainty will remain until the United States Supreme Court rules on this matter.

III. CONDUCT OF TRIAL

A. Pleading

In South Carolina the established rule of law is that although a demurrer admits the well-pleaded facts of a complaint, it does not admit any conclusion of law pleaded therein.[80] In *Stroud v. Riddle*[81] the plaintiffs alleged that although taxable property within School District No. 520 had a uniform millage imposed for educational purposes, the property was not being

78. *Id.* at 483. This conclusion follows the determination that the work product privilege is for the protection of attorneys and the legal system, and does not have any direct relationship to the rights of individual litigants.

79. As the court pointed out, this decision did not unjustly limit discovery because the work product privilege is only a qualified one. That is, a party may discover documents despite their being work product upon a showing that the information is essential to a fair trial and cannot be obtained in any other manner without undue hardship. [Rule 26(b)(3)]. Balancing the interest of the party seeking the documents against the interest of the attorney involved and the legal profession in light of the limited scope of the work product privilege, shows the fairness of the decision of the Court of Appeals. Since Rule 26(b)(3) would clearly allow the discovery if the party could show a great need for such, the interest of the party is protected by the rule itself; therefore, this causes the balance to tip in favor of the attorney, who prepared the work product, and the legal profession as a whole.

80. Costas v. Florence Printing Co., 237 S.C. 655, 118 S.E.2d 696 (1961).

81. 260 S.C. 99, 194 S.E.2d at 236.

valued or assessed uniformly in the three counties comprising the district.[82] Accordingly, the plaintiffs alleged that they were being denied equal protection under the law and prayed that the defendants be restrained from assessing and valuing property in the school district other than on a uniform basis. The trial judge granted defendant's demurrer on the ground that the complaint stated only a conclusion of law.[83] The supreme court reversed by holding that the complaint pleaded ultimate facts, not conclusions of law.[84] To reach this result the court stated that even though the lines of distinction between ultimate facts, conclusions of law, and evidentiary facts are "faint and often disputed," the distinction can be characterized as follows:

> The ultimate facts required to be stated in a pleading are those which the evidence upon the trial will prove, and not the evidence which will be required to prove those facts. Conclusions of law describe a legal status, condition, or legal offense.[85]

Accordingly, the court held the complaint was not demurrable.[86]

In *Cooper Tire and Rubber Co. v. Perry*,[87] respondent had demurred to appellant's malicious prosecution counterclaim upon the ground that "the subject of this counterclaim was an alleged tort or torts which did not arise out of the contract or transaction set forth in the complaints, nor was it connected with the subject matter of the action."[88] This demurrer was sustained by the lower court on statutory grounds under section 10-703(1) of the South Carolina Code.[89] Appellant did not take an exception to that ruling but was granted permission by the circuit court to file an amended answer and counterclaim. After appellant had filed his amended pleadings, respondent again demurred.[90]

82. *Id.* at 101, 194 S.E.2d at 236.

83. *Id.*

84. *Id.* at 103-04, 194 S.E.2d at 237.

85. *Id.* (footnotes omitted).

86. In view of the well-established principle that pleadings attacked by demurrer should be construed liberally in favor of the plaintiff, *Athanas v. City of Spartanburg*, 196 S.C. 19, 12 S.E.2d 39 (1940), it seems that the court correctly analyzed this close distinction between ultimate facts and conclusions of law and thereby reached the correct decision.

87. 201 S.E.2d 245 (S.C. 1973).

88. *Id.* at 246-47.

89. *Id.* at 247. Section 10-703(1) of the South Carolina Code specifically limits the causes of action assertable on counterclaim in a contract action to those actions "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action . . . ."

90. *Id.*

Upon finding that appellant's amended pleadings set out essentially the same cause of action as his original counterclaim, the circuit court sustained the second demurrer.[91] In affirming the circuit court's ruling on the second demurrer, the supreme court held that the lower court's decision to sustain the original demurrer had become the law of the case and thus was dispositive of the second demurrer also.

The correctness of the *Cooper Tire* reasoning is clear when it is recognized that the appellant used an amended pleading incorrectly. If the appellant felt that the circuit court had erred when it sustained the respondent's initial demurrer to the malicious prosecution counterclaim, he should have sought a review of that ruling through the usual appellate process. Since he failed to follow that procedure and instead sought to amend his pleadings, the appellant in essence had admitted to the circuit court that he agreed with its initial interpretation of section 10-703(1) as it was applied to his counterclaim. Because the appellant's amended counterclaim set out the same cause of action as his original counterclaim, it is logical that the circuit court's ruling on the first counterclaim and demurrer should also control the second. In addition, the appellant failed to take an exception to the circuit court's finding that his amended pleadings were the same as the original ones, and consequently he was unable to contest that finding on appeal.[92]

The supreme court, in *Revis v. Martin*,[93] reaffirmed its position of refusing to allow cases presenting issues of novel impression to be decided on demurrer. This rule was first announced in 1967, when the supreme court, in *Springfield v. Williams Plumbing & Supply Co.*,[94] overruled a demurrer because the plaintiff's pleadings presented questions of novel impression in a products liability case. The court reasoned that justice required the case to be decided on the merits with all the evidence before the court rather than on demurrer.[95] In *Revis* the court found the question of whether the father of an illegitimate child has any visitation rights to be a question of novel impression. The supreme court, affirming the lower court, followed *Springfield* and concluded that such a question should not be decided on

91. *Id.*
92. *Id.*
93. 260 S.C. 347, 195 S.E.2d 715 (1973).
94. 249 S.C. 130, 153 S.E.2d 184 (1967).
95. *Id.* at 139, 153 S.E.2d at 187.

demurrer.[96] Thus, the *Revis* case indicates that the principle announced in *Springfield* has become an established rule of law in South Carolina.[97]

B. Joinder of Parties

The issue of joinder of parties in a class action suit was presented in *Long v. Seabrook*.[98] Plaintiff brought a class action on behalf of other taxpayers of Charleston County seeking equitable relief and damages in tort[99] against the county assessment control board and other county officials. The trial court ruled that plaintiff could not maintain a class action damage suit "on the facts alleged."[100] The supreme court noted that essentially all the equitable relief sought had been granted in the trial court's order "for the purpose of discovery only and . . . not on adjudication of his case on the merits. . . ."[101] In its per curiam opinion the supreme court upheld the lower court's ruling on the tort class action citing *Hellams v. Switzer*[102] and *Ryder v. Jefferson Hotel Co.*,[103] cases finding joinder of parties improper unless plaintiffs had suffered "joint" injuries resulting in damages *in solido*.

It might be asked how *Ryder* and *Hellams*, cases concerned with permissive joinder, could affect class actions. In South Caro-

96. 260 S.C. at 349, 195 S.E.2d at 715-16.

97. *See also* Vaden v. College Heights Subdivision, 201 S.E.2d 113 (S.C. 1973); Twitty v. Key Life Insurance Co., 260 S.C. 573, 197 S.E.2d 656 (1973) (concurring and dissenting opinion); Gantt v. Universal C.I.T. Credit Corp., 254 S.C. 112, 173 S.E.2d 658 (1970); and Flowers v. Oakdale Realty and Water Corp., 253 S.C. 522, 171 S.E.2d 863 (1970).

98. 260 S.C. 562, 197 S.E.2d 659 (1973).

99. The complaint sought an order requiring defendants to provide a copy of tax assessment rolls and other pertinent documents and prayed for damages because of defendant's bad faith refusal in not allowing plaintiff to duplicate tax rolls. *Id.* at 565-66, 197 S.E.2d at 660-61.

100. Although the trial court could not justify a class action on the facts alleged, the supreme court opinion can be read quite broadly to preclude tort actions.

101. *Id.* at 567, 197 S.E.2d at 661. As noted the supreme court was concerned exclusively with the tort claim. If both equitable tort claims had been before the court, plaintiff might have argued that the main claim was equitable and only incidentally for damages —employing an ancillary concept to allow the action to continue.

Plaintiff might also have argued that in equity, once the court has taken jurisdiction over a matter properly before it, there will be an adjudication of the entire matter even to the extent of awarding damages. *See* Cloyes v. Middleburg Elec. Co., 80 Vt. 109, 66 A. 1039 (1907).

102. 24 S.C. 39 (1885).

103. 121 S.C. 72, 113 S.E. 474 (1922).

lina several old class action cases[104] have cited with approval section 392 of Pomeroy's *Code Remedies*:

> The parties thus represented by the plaintiff or defendant may not be in privity with each other, but there must be some bond of connection which unites them all with the question at issue in the action.The test would be to suppose that an action in which all of the numerous persons were actually made plaintiffs or defendants, and if it could be maintained in that form, then one might sue or be sued on behalf of the others; but if such actual joinder would be improper, then the suit by or against one as a representative would be improper, notwithstanding the permission contained in this section.[105]

Quite simply, the test of maintenance of class actions is whether joinder of all parties would be allowed.[106] Value of the permissive joinder to parties representing classes depends entirely on the liberality of permissive joinder.[107] In South Carolina, *Hellams* and *Ryder* are not liberal expressions of joinder. *Hellams* involved a joint action by individual property owners whose land was damaged by defendant's dam. In *Ryder* a husband and wife sued for wrongful ejectment from a hotel by its manager. The courts rejected both suits, employing essentially the following reasoning:

> The Code of Procedure [section 10-202] requires that the cause of action joined in the same complaint "must affect all parties to the action." Neither has a legal interest in the pecuniary recovery of the other, and in contemplation of law there can be no joint and common damage to both resulting from a wrong which gives rise to separate and distinct rights personal to each.[108]

The court in *Long* could have chosen to follow the old class action cases adopting the Pomeroy rationale or simply to ignore them, and reject the permissive joinder test, keeping in mind the basic policies to be served by the class action device. *Long*, however, reaffirmed the concept of "joint injuries,"and thus endorsed an antiquated and conceptually unsound doctrine repudiated by the

104. Whitaker v. Manson, 84 S.C. 29, 65 S.E. 953 (1909); Faber v. Faber, 76 S.C. 156, 56 S.E. 677 (1907); Stemmerman v. Lilienthal, 54 S.C. 440, 32 S.E. 535 (1899).

105. J. POMEROY, CODE REMEDIES § 392 (4th ed. 1904).

106. Starrs, *The Consumer Class Action*, 49 B.U.L. REV. 407 (1969).

107. For very liberal uses of the permissive joinder concept see Adams v. Albany, 124 Cal. App. 2d 639, 269 P.2d 142 (1954) and Akely v. Kinnicutt, 238 N.Y. 466, 144 N.E. 682 (1929).

108. 121 S.C. at 75, 113 S.E. at 475.

amended version of Rule 23 of the Federal Rules of Civil Procedure.[109] *Snyder v. Harris*[110] and *Zahn v. International Paper Co.*[111] have effectively closed federal courts to diversity consumer class actions for damages in which individual claims fall below the jurisdictional amount. Read broadly, *Long* can be interpreted as also closing South Carolina courts to consumer class actions for damages and effectively foreclosing the development of consumer actions within the state.[112]

C. *Motion for Continuance*

It is well-established in South Carolina that a motion for a continuance, which is provided for in Rule 27 of the Circuit Court Rules,[113] is subject to the discretion of the trial judge. Only upon a showing of abuse of discretion is his disposition of such a motion reversible.[114] The supreme court's continued reliance on this rule is evidenced by *State v. Marshall.*[115] The court unanimously affirmed the trial judge's denial of a continuance to a defendant indicted for murder, even though defendant received counsel only nineteen days before the trial.[116] Even though the rule of law

109. *See* Advisory Committee notes FED. R. CIV. P. 23.

110. 394 U.S. 332 (1969).

111. 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973).

112. For an unreported decision denying class status to a usury action see Howell v. Sears Roebuck & Co., Court of Common Pleas, Florence County (1968).

113. S.C. CIR. CT. R. 27, provides as follows:

> No motion for the postponement of trial beyond the term, either in the Common Pleas or General Sessions, shall be granted, on account of the absence of a witness, without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action of defense party moving; that the motion is not intended for delay; but is made solely because he cannot go safely to trial without such testimony; that he has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the Court that his motion is not intended for delay. In all such cases where a writ of subpoena has been issued, the original shall be produced, with proof of service, or the reason why not served endorsed thereon, or attached thereto; or, if lost, the same proof shall be offered, with additional proof of the loss of the original subpoena.
>
> A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to, and the grounds of such belief.

114. Fitch v. State, 2 Nott & McCord 558 (S.C. 1820).

115. 260 S.C. 323, 195 S.E.2d 709 (1973).

116. The relevant facts of this case were stated as follows:

> Appellant was arrested and charged with the crime on February 14, 1970. Counsel was appointed to represent him on February 20, 1970, and an inquest was held on February 23d . . . . [T]he trial began about March 11, 1970,

applied in *Marshall* is undisputed, the court's application of this rule seems very harsh in light of the factual situation. If the denial of the motion for continuance in this case was not an abuse of discretion by the trial judge, it is difficult to conceive of a situation in which there could be an abuse of discretion.[117]

In *Johnson v. State*[118] the supreme court held that the trial judge did not abuse his discretion when he denied defense counsel the opportunity to prepare the affidavits for a motion of continuance as required by Rule 27. The court placed great emphasis on its own finding that the defendant had " show(n) a complete lack of diligence . . . in failing to have his witnesses in court or in discovering that they were unavailable in time to have made appropriate motions before commencement of the trial."[119] It seems, therefore, that unless the defendant makes his motion before the commencement of the trial or can otherwise convince the court that he has acted with due diligence, his chances for a reversal of a trial judge's decision to overrule his motion for a continuance are slight.

D. Jury Instructions

It is established in South Carolina that an instruction on the law of self-defense should be given to the jury in a case when any evidence has been presented from which it might reasonably be inferred that the defendant's actions were justified by self-defense.[120] The supreme court reaffirmed this principle in *State v. Taylor*[121] by reversing and remanding the defendant's conviction of manslaughter. The trial judge had refused to instruct the jury on self-defense after the jury had requested such instruction. The court held that despite the absence of a plea of self-defense,

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which was about twenty-five days after the arrest of the appellant and nineteen days after the appointment of counsel.

Of the witnesses who were not present at the trial and whose presence appellant desired, the name of one and the whereabouts of two others were unknown; and a third, who fired his pistol and was allegedly struck by a bullet at the time of the killing in question, was either in, or on his way home from, Hot Springs, Arkansas. *Id.* at 326, 195 S.E.2d at 710.

117. For three additional decisions by the supreme court following this rule in the last year, see State v. Holland, 201 S.E.2d 118 (S.C. 1973); State v. Owens, 260 S.C. 79, 194 S.E.2d 246 (1973); State v. Butler, 200 S.E.2d 70 (S.C. 1973).

118. 200 S.E.2d 81 (S.C. 1973).

119. *Id.* at 82. *See also* State v. Butler, 200 S.E.2d 70 (S.C. 1973).

120. State v. Turner, 63 S.C. 548, 41 S.E. 778 (1902). *See* 41 C.J.S. *Homicide* § 375 (1944); 40 AM. JUR. 2d *Homicide* § 521 (1969).

121. 200 S.E.2d 387 (S.C. 1973).

the jury should be charged on the law whenever evidence has been introduced from which "it can be reasonably inferred that the accused inflicted the mortal wound but justifiably did so in self-defense. . . ."[122]

In *State v. Smalls*,[123] the supreme court upheld the necessity for trial courts to instruct juries that evidence of prior criminal convictions is limited to impeachment of the accused as a witness. It is well-settled in South Carolina that when an accused becomes a witness in his own trial, he is subjected to the same duties and liabilities as other witnesses. Therefore, evidence of prior convictions involving moral turpitude may be introduced for the purpose of impeaching his credibility as a witness.[124] If such evidence is introduced, the court must instruct the jury that such evidence can be considered only for the limited purpose of determining credibility.[125] In *Smalls*, this issue was complicated to some extent by the fact that defense counsel, anticipating the prosecutor's introduction of such evidence, introduced the defendant's prior criminal record on direct examination. The trial judge refused to give the limiting instruction, because the evidence was introduced by the defense. On appeal, the supreme court considered whether this factual difference had any effect on the trial judge's duty to give the limiting instruction to the jury. In reversing the lower court's decision and remanding the case for a new trial, the supreme court applied a common-sense analysis, and reached the conclusion that the defendant did have a right, upon request, to have the judge instruct the jury on this evidence. The judge's failure to do so constituted prejudicial error.[126] Thus, the supreme court has approved the introduction of a defendant's

122. *Id.* at 388.

123. 260 S.C. 44, 194 S.E.2d 188 (1973).

124. State v. Gilbert, 196 S.C. 306, 13 S.E.2d 451 (1941); State v. Milling, 247 S.C. 52, 145 S.E.2d 422 (1965). It should be noted that not all jurisdictions limit the permissible evidence of past crimes to those involving moral turpitude, but this does seem to be the general rule of evidence followed by the courts in South Carolina. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 18-19 (1967).

125. C. MCCORMICK, EVIDENCE § 59 (1972).

126. The court said:

> There is nothing to indicate that the present testimony was introducted by appellant for any purpose other than to gain such favorable reaction as might arise from a frank disclosure of damaging testimony, which the prosecution had the right to later introduce. The testimony, as introduced, related solely to the issue of credibility and appellant, upon request, had the right to have it so limited under appropriate instruction by the court. 260 S.C. at 47, 194 S.E.2d at 189.

prior criminal record by his own counsel when counsel feels it is a wise tactical move.

E. New Trial

In *Brewer v. South Carolina State Highway Dept.*,[127] the Richland County Court enjoined the highway department from suspending Brewer's driver's license pending the outcome of a new trial. Earlier Brewer had been convicted of operating a motor vehicle while under the influence of intoxicating liquor. In reviewing the highway department's appeal of the injunction, the supreme court considered two issues concerning new trials. First the court considered the timeliness of Brewer's motion for a new trial. The highway department contended that Brewer failed to make his motion for a new trial within five days of his conviction as required by section 43-143 of the South Carolina Code.[128] In the magistrate's court Brewer had been tried and convicted *in absentia*. Neither Brewer nor his attorney had received prior notice of the trial. The first notice Brewer received of his conviction was approximately twenty-three days later, when he was notified by the highway department that his license was suspended. One day later the magistrate granted Brewer a new trial upon the motion of his attorney. The supreme court followed the principle established in *O'Rouke v. Atlantic Paint Co.*[129] and held Brewer's motion to be timely, because the time period in which a party has to move for a new trial does not begin to run until he has notice of the trial.[130]

Secondly, the highway department contended that the granting of the new trial should not support an injunction restraining it from suspending Brewer's license pending the out-

127. 261 S.C. 52, 198 S.E.2d 256 (1973).

128. S.C. CODE ANN. § 43-143 (1962) provides: "No motion for a new trial shall be heard unless made within five days from the rendering of the judgment."

129. 91 S.C. 399, 74 S.E. 930 (1912). *O'Rouke* held as follows:

> The general law, as well as the statute, contemplate that a party shall have notice before his rights are cut off . . . the time to move for a new trial or appeal in a case like this does not begin to run until the party affected by the judgment has had notice of it. *Id.* at 402, 74 S.E. at 931.

It should be noted that a distinction could have been made between *O'Rouke* and the present case on the grounds of a difference in the statutory language. The code provision applied in *Brewer*, section 43-143 of the 1962 South Carolina Code, makes no mention of notice whereas *O'Rouke* relied on section 359 of the 1902 Code of Civil Procedure, which gave the moving party five days "after personal notice of the judgment, to serve his notice of appeal . . . ."

130. 261 S.C. at 56, 198 S.E.2d at 257.

come of the new trial. The supreme court, ruling that the injunction was properly issued by the county court, based its decision on the distinction between a pending appeal and a pending new trial.[131] While noting that "an appeal from a conviction for violation of Section 46-343 of the Code did not preclude the suspension of the license of the person so convicted . . . ,"[132] the court ruled that the granting of a new trial placed Brewer in the same position as if there had been no trial.[133] Thus, there being no basis upon which to suspend Brewer's license, the injunction was proper.[134]

F. Judgments

In *Bohumir Kryl Symphony Band v. Allen University*,[135] the supreme court established the rule that a judgment non obstante *veredicto* can be rendered only when the trial court should have directed a verdict during the trial for the moving party. Further, a judgment non obstante veredicto must be based upon the grounds set out in the motion for directed verdict. This general rule has been followed in South Carolina,[136] and the supreme court remained consistent in *Government Employment Insurance Co. v. Mackey*.[137] Following the *Bohumir* line of decisions, the supreme court affirmed the trial court's denial of Mackey's motion for judgment non obstante veredicto.[138] He failed to set forth his contentions in his earlier motion for directed verdict.[139]

131. *Id.* at 56-57, 198 S.E.2d at 258.

132. *Id., citing* Parker v. South Carolina Highway Dep't, 224 S.C. 263, 78 S.E.2d 382 (1953).

133. The court was following the rule established in State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966).

134. 261 S.C. at 57-58, 198 S.E.2d at 258.

135. 196 S.C. 173, 12 S.E.2d 712 (1940).

136. *See* Southern Ry. Co. v. Wilkinson Trucking Co., 243 S.C. 150, 136 S.E.2d 491 (1963); Standard Warehouse Co. v. Atlantic Coast Line R. Co., 222 S.C. 93, 71 S.E.2d 893 (1952). *See also* S.C. CIR. CT. R. 79, for a general rule concerning motions for judgments *non obstante veredicto*.

It should be noted that the law on this point varies throughout the jurisdictions, and it seems that most jurisdictions do not strictly limit motions for judgments *non obstante verdicto* to the grounds previously raised on motions for directed verdict. *See generally* 46 AM. JUR. 2d *Judgments* §§ 123, 130 (1969); 49 C.J.S. *Judgments* § 60 (1947); and Annot., 69 A.L.R.2d 449, 484 (1960).

137. 260 S.C. 306, 195 S.E.2d 830 (1973).

138. "The appellants moved for judgment *non obstante veredicto* on the ground that the respondent had failed to prove compliance with Sections 18 and 19 of the Assigned Risk Plans in that the notice of cancellation did not contain a statement that the insured had the right to appeal as therein set forth." *Id.* at 315, 195 S.E.2d at 834.

139. *Id.* at 316, 195 S.E.2d at 834.

The defendant in *McInerny v. Toler*[140] moved to have a default judgment against him vacated and the case reopened pursuant to section 10-1213 of the Code which provides:

> The court may, in its discretion and upon such terms as may be just, at any time within one year after notice thereof relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding. . . .[141]

Although the defendant admitted receiving the summons and complaint for the original trial, he contended that his failure to consult counsel was "excusable neglect" since he thought the plaintiff had made a mistake.[142] The lower court's denial of the defendant's motion was affirmed on appeal. The supreme court emphasized that section 10-1213 provides that such a motion is directed to the discretion of the trial court.[143] Furthermore, the court cited *Williams v. Ray*[144] for the well-settled rule that a party seeking relief under section 10-1213 must show that the judgment against him was caused by his inadvertence, mistake, surprise or excusable neglect and, secondly, that he had a meritorious defense. Applying this reasoning, the court in *McInerny* held there was clearly no abuse of discretion since the record "compels the conclusion that the appellant failed to meet the first requirement for relief because his own course of conduct negatives inadvertence, surprise and excusable neglect."[145] Thus, the merit of the appellant's defense was never considered.

IV. POST TRIAL RELIEF

A. *Appeal*

In *Richland County v. Palmetto Cablevision*,[146] the supreme court considered the issue of whether exceptions to a trial court decision, which were not argued under an "appropriately stated question" in the appellate brief, should be deemed abandoned for the purpose of appeal. Richland County appealed from a decision

140. 260 S.C. 382, 196 S.E.2d 122 (1973).
141. S.C. CODE ANN. § 10-1213 (1962).
142. 260 S.C. at 385, 196 S.E.2d at 123.
143. *Id.* at 386, 196 S.E.2d at 124.
144. 232 S.C. 373, 102 S.E.2d 368 (1958).
145. 260 S.C. at 387, 196 S.E.2d at 124.
146. 199 S.E.2d 168 (S.C. 1973).

by the court of common pleas refusing to enjoin the defendant from operating and maintaining a cable television system within the county.[147] The lower court had dismissed the complaint because the appellant was proceeding under an act which the court found:

> . . . to be special legislation and unconstitutional in violation to Article III, Sec. 34 of the South Carolina Constitution. Additionally, he concluded that said Act was unconstitutional as being a delegation of legislative power in violation of the South Carolina Constitution; as impairing the obligation of contracts, as depriving the respondent of its property without due process of law and as denying the respondent the equal protection of the laws, in violation of the applicable provisions of both State and Federal Constitutions.[148]

Although the appellant excepted to all of these holdings of unconstitutionality, the only exception argued in the appellant's brief was the holding that the act was unconstitutional as special legislation. On appeal, the supreme court, in compliance with a line of South Carolina cases beginning in 1898,[149] held that those exceptions not expressly argued by the appellant during his appeal would be deemed abandoned.[150] Following this analysis, the court held that the lower court's "holding of unconstitutionality on grounds other than being special legislation have [*sic*] become, right or wrong, the law of the case, rendering it virtually moot whether or not said Act is unconstitutional as special legislation."[151] This conclusion, while being clearly supported by South Carolina law, seems to be further supported by the logic of the situation, since an appellate court should be able to assume that unless an appellant argues against a decision of the lower court, he has accepted it.

B. State Post-Conviction Relief

During the past year, the supreme court addressed the gen-

147. In seeking this injunction, the plaintiff relied on Act No. 1083 of the 1972 Acts of the General Assembly which "amends the 1964 Act establishing the Board of Administrators (now the County Council) of Richland County and purports to confer upon it the authority to grant franchise licenses for the operation of cable television service in all areas of Richland County except the city of Columbia." *Id.* at 169.

148. *Id.* at 168-69.

149. Cromer v. Columbia, N. & L. Ry. Co., 52 S.C. 36, 29 S.E. 637 (1898).

150. 199 S.E.2d at 169.

151. *Id.*

eral issue of whether a defendant had met the requisite procedural requirements to obtain post-conviction relief.[152] In *Sellers v. Boone*,[153] the court considered the problem of a timely exception. Under the Uniform Post-Conviction Procedure Act[154] the petitioner sought relief from his prior conviction for the offense of riot. The petitioner argued that the supreme court's previous affirmance of his conviction violated the double jeopardy clauses of both state and Federal Constitutions, since he had received a directed verdict of not guilty in the lower court on the counts charging "conspiracy to commit riot and inciting persons to riot."[155] The court recognized this to be a novel approach, but found the contention lacking on two grounds.[156] First, the defendant's claim was improperly raised for the first time by his application for post-conviction relief. The court reasoned that any claim of double jeopardy available to the defendant on the grounds of the directed verdict arose at the time the charge of riot was submitted to the jury. Accordingly, the defendant's failure to raise this double jeopardy issue during the trial, during his appeal from the conviction, or during the period available to petition for rehearing, constituted a failure on his part to raise the issue in a timely fashion.[157] Secondly, the court found that even if it waived the defendant's failure to raise the issue properly his claim was without merit.[158] The court reached this conclusion after determining that the counts on which the defendant received directed verdicts constituted separate and distinct crimes from the count on which he was convicted.[159] Upon establishing this, the court analogized

152. This issue was considered in Sellers v. Boone, 200 S.E.2d 686 (S.C. 1973), and Johnson v. State, 200 S.E.2d 81 (S.C. 1973). *Sellers* is discussed in the text. In *Johnson*, the defendant appealed from the lower court's denial of his petition for post-conviction relief. Johnson alleged that the trial court erred when it denied his counsel an opportunity to prepare affidavits stipulating the testimony of absent witnesses for publication to the jury or in support of a motion for continuance. The court, looking to the actual statutory language involved, held that the appellant had clearly failed to allege any violation of a constitutional right or any of the other grounds for relief under the Uniform Post-Conviction Procedure Act; therefore, the appellant's avenues for appeal were limited to a direct review of the lower court's alleged error.

In coming to these conclusions, the court summarily treated the issues, but, in light of the direct statutory language involved, such treatment was correct.

153. 200 S.E.2d 686 (S.C. 1973).

154. S.C. CODE ANN. §§ 17-601,-12 (Cum. Supp. 1973).

155. 200 S.E.2d at 687.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 688-89. The court indulged in a discussion of the history of these respective charges; a discussion which is beyond the scope of this survey.

the situation to the dismissal of one or more counts of an indictment and logically concluded that such activity does not amount to double jeopardy.[160]

C. *Federal Habeas Corpus and Section 1983 Actions*

In 1973 the United States Supreme Court decided the controversial case of *Preiser v. Rodriguez*[161] in which it held that, in any action falling within the "core of habeas corpus," the sole federal remedy available is a writ of habeas corpus.[162] In *Preiser*, New York prison officials had cancelled for disciplinary reasons three prisoners' good-behavior time credits which would have entitled the prisoners to release before the expiration of their maximum sentences.[163] The prisoners sought restoration of these credits by bringing separate actions under the 1871 Civil Rights Act,[164] in conjunction with habeas corpus actions in federal court.[165] The Supreme Court held that these actions were within the "core of habeas corpus" which it defined as any action by a state prisoner challenging the fact or duration of his physical imprisonment and by which he seeks a determination that he is entitled to an immediate or speedier release.[166] Therefore, since the civil rights action was unavailable to the prisoners[167] and since they had not exhausted all state remedies before filing the writ of habeas corpus,[168] the prisoners were denied relief.

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160. *Id.* at 689.

161. 411 U.S. 475 (1973). It should be noted that the *Preiser* decision has been greatly criticized for its analysis; however, any discussion of the pros and cons of this decision is beyond the scope of this survey, which will deal with *Preiser* only to determine whether the two South Carolina cases correctly applied it. For criticism of the Court's analysis, see the extensive dissenting opinion; Plotkin, *Rotten to the "Core of Habeas Corpus": the Supreme Court and the Limitations on a Prisoner's Right to Sue; Preiser v. Rodriguez.* 9 CRIM. L. BULL. Vol. 518 (1973).

162. 411 U.S. at 500.

163. *Id.* at 476-77.

164. The Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983 (1970) provides:

> 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.

165. 411 U.S. at 478, 48-81.

166. *Id.* at 500.

167. *Id.*

168. *Id.* at 493. The exhaustion of state remedies requirement is imposed by 28 U.S.C. § 2254(b) (1970) which provides:

> An application for a writ of habeas in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or

Since the *Preiser* decision, the federal district court in South Carolina has found it directly applicable to two cases. In *Curley v. Bryan*[169] two state prisoners instituted an action under the Declaratory Judgment statute[170] and the Civil Rights Act[171] seeking their release from custody as well as money damages. They alleged that law enforcement officials had illegally searched them and used the fruits of their search in their trial. Addressing first the plaintiffs' prayer that they be released from custody, the district court cited *Preiser* as authority and held as follows:

> Insofar as plaintiffs' Complaint seeks their release from custody, their sole federal remedy is the writ of habeas corpus, with its attendant requirement of exhaustion of state remedies, and an action under the Civil Rights Act will not lie.[172]

Since this action sought immediate release and thus fell squarely within the scope of habeas corpus as described in *Preiser*,[173] the district court correctly denied the relief sought because the plaintiffs had failed to exhaust available state remedies.

The district court considered the plaintiffs' plea for monetary damages to be a proper section 1983 civil rights action and proceeded to examine the validity of the damages claim.[174] The court found that the alleged illegal search had never been determined to be illegal by any court. Rather, the only court to rule on the search found it to be valid, and the plaintiff had not appealed this determination to the state supreme court. Citing a Fourth Circuit Court of Appeals memorandum decision,[175] the court held that the plaintiffs were precluded from recovering monetary damages

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> that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner . . .

169. 362 F. Supp. 48 (D.S.C. 1973).

170. 28 U.S.C. § 2201 (1970).

171. 42 U.S.C. § 1983 (1970).

172. 362 F. Supp. at 51.

173. 411 U.S. at 487.

174. *See* 411 U.S. at 506-12 (dissenting opinion). It is interesting to note that Justice Brennan, dissenting in *Preiser*, forewarned the Court that the effect of its decision would be to force prisoners to bring actions for damages.

175. Gatling v. Midgett, No. 14, 863 mem. dec. (4th Cir. 1971). *See* 362 F. Supp. at 52. Even though the district court recognized that a memorandum decision had no value as precedent, the court decided that the principle stated in the decision had value and therefore applied it to the case at law. In *Gatling* the court ruled on a factual situation similar to *Curley* and said:

> In this context we think a broad rule of estoppel is appropriate: that a

under a rule of estoppel.[176] Since the plaintiffs had not appealed the state circuit court ruling on the validity of the search, they were estopped from seeking monetary damages in federal court.

Though the district court did not specifically refer to *Preiser* in concluding that this action for monetary damages was a proper section 1983 action, the majority in *Preiser* clearly set out that such an action was proper.[177] Therefore, the district court correctly applied the *Preiser* decision. In so doing, it appears that some of the fears of the dissenting justices in *Preiser* were well founded. First, just as those justices predicted,[178] in order to avoid the exhaustion requirement if the claim is within the core of habeas corpus, prisoners may add to their petition a claim for monetary damages. This happened in *Curley*. Furthermore, the result of such a petition was exactly as the dissenters expected. Upon finding the action for damages to be a valid section 1983 action, the district court proceeded to decide the validity of the specific allegations of the plaintiffs. At the same time, the court directed the plaintiffs to the state courts for relief sought which was within the core of habeas corpus in order to meet the exhaustion requirement. Thus, the same specific allegations and questions of law being decided by the federal court were referred to the state courts. The extreme inefficiency[179] of such a conclusion is evident. Since the federal court decided the issue of the legality of the searches and seizures against the plaintiffs, this decision will necessarily have some effect on a state court that later addresses the same issue.[180] It seems, therefore, that the *Curley*

§ 1983 civil action based on a search and seizure held valid in a criminal trial cannot be maintained so long as the criminal judgment of conviction remains undisturbed. Federalism, we think, requires such a result. It is difficult to conceive of a more abrasive example of indifference to state judicial process than to allow a civil action to proceed in a federal court on a fact hypothesis finally adjudicated and rejected in a presumably valid state criminal proceeding. No. 14, 863 mem. dec. at 2-3.

176. 362 F. Supp. at 52.

177. 411 U.S. at 494.

178. *Id.* at 506-07 (dissenting opinion).

179. *Id.* at 511.

180. Justice Brennan pointed out this problem in his dissent in *Preiser*:

Moreover, if the federal court is the first to reach decision, and if that court concludes that the procedures are, in fact, unlawful, then the entire state proceeding must be immediately aborted, even though the state court may have devoted substantial time and effort to its consideration of the case. By the same token, if traditional principles of res judicata are applicable to suits under § 1983, . . . the prior conclusion of the state court suit would effectively set at naught the entire federal court proceeding. This is plainly a curious prescription for improving relations between state and federal courts. *Id.*

court's correct application of *Preiser* actually illustrated some of the problems anticipated by the *Preiser* dissenters.

In *Baskins v. Moore*,[181] the *Preiser* decision was again found to be applicable. This action was initiated by several state prisoners who sought an initial declaration that various parole board procedures were unconstitutional. In granting the defendants' motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the court found that the only federal remedy available to the petitioners was a writ of habeas corpus. Since the petitioners had failed to seek relief under the Uniform Post Conviction Procedure Act, thus not exhausting available state remedies, the court denied their claim.[182]

This case, as does *Curley*, shows that the fears harbored by many concerning the effect that the *Preiser* decision would have on a prisoner's civil rights were not unfounded. It seems clear that in the *Baskins* case the district court properly applied *Preiser* since the majority in *Preiser* had recognized in dictum that the scope of habeas corpus was not limited to requests for immediate release and, in so doing, cited many of the same cases relied upon by the court in *Baskins*.[183] Therefore, when the court in *Baskins* said that "[t]he test fashioned by the [Supreme] Court requires an analysis of the relief sought measured against the 'essence' and 'core' of habeas corpus,"[184] it correctly pointed out the major issue of the case. In answering that issue the court clearly showed that the scope of habeas corpus has been expanded to such an extent that the *Preiser* decision would have a very serious and widespread effect on the civil rights of prisoners.[185] The *Preiser* decision may make exhaustion of state remedies a pre-requisite to most actions by a prisoner in federal court to protect his civil rights.

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181. 362 F. Supp. 187 (D.S.C. 1973).
182. *Id.* at 191-92.
183. *See* 411 U.S. at 485-88.
184. 362 F. Supp. at 190.
185. For a criticism of this widespread effect see Plotkin, *Rotten to the "Core of Habeas Corpus": the Supreme Court and the Limitations on a Prisoner's Right to Sue; Preiser v. Rodriguez*, 9 CRIM. L. BULL. 518 (1973).