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## Practice and Procedure

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## PRACTICE AND PROCEDURE

### I. DEFENSIVE COLLATERAL ESTOPPEL: PRIVACY NO LONGER A REQUIREMENT

In *Graham v. State Farm Fire & Casualty Insurance Co.*,<sup>1</sup> the South Carolina Supreme Court held that the appellant insured was collaterally estopped from relitigating an issue decided against the insured in a previous case. The court maintained that collateral estoppel was appropriate despite a lack of privity between the two insurance companies. This decision changes the doctrine of defensive collateral estoppel<sup>2</sup> in South Carolina by eliminating the privity requirement,<sup>3</sup> and by allowing defendants to assert collateral estoppel in the absence of mutuality.<sup>4</sup> In addition, *Graham* may lay the foundation for the adoption of nonmutual offensive collateral estoppel in South Carolina.

A fire destroyed appellant Graham's home and damaged his automobile. State Farm Mutual Automobile Insurance Company (State Farm Mutual) insured the automobile, and the respondent, State Farm Fire and Casualty Insurance Company (State Farm Fire and Casualty) carried Graham's home owner policy. Despite the similarity of their names, the two insurance companies were separate entities and no privity existed between them.<sup>5</sup>

State Farm Mutual refused to pay appellant's claim for

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1. 277 S.C. 389, 287 S.E.2d 495 (1982).

2. Collateral estoppel is the doctrine preventing a party from relitigating an issue which he litigated and lost in a prior suit. BLACK'S LAW DICTIONARY 237 (5th ed. 1979). For a comprehensive examination of res judicata and collateral estoppel in South Carolina, see Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C.L. Rev. 451 (1977).

3. In *Hart v. Bates*, 17 S.C. 35 (1881), the South Carolina Supreme Court stated that three requirements must be met before a defendant will be allowed to assert collateral estoppel: "the parties must be the same, or their privies; the subject-matter must be the same, and the precise point must have been ruled." *Id.* at 40. These factors have been required in South Carolina for one hundred years, although the supreme court has made exceptions to the rule on policy grounds. See *infra* notes 15-16 and accompanying text.

4. Cf. Stewart, *supra* note 2, at 476.

5. Brief for Appellant at 11.

damages to his car. Graham sued for breach of contract, and the insurer defended by arguing that the fire was incendiary in nature and willfully caused by the appellant.<sup>6</sup> The sole issue before the jury was the cause of the fire, and the jury returned a verdict in favor of the defendant insurer.<sup>7</sup>

When State Farm Fire and Casualty refused to pay Graham's claim for damages to his home, he initiated a second breach of contract suit. State Farm Fire and Casualty defended on the ground that Graham was collaterally estopped by the previous judgment from relitigating the cause of the fire.<sup>8</sup> The trial court granted summary judgment for the insurer, and the South Carolina Supreme Court affirmed.<sup>9</sup>

In affirming the trial court's order, the supreme court rejected Graham's contention that lack of privity between the two insurance companies precluded the application of collateral estoppel by judgment.<sup>10</sup> "The modern trend," the court observed, "is to disregard the privity requirement in applying estoppel by judgment."<sup>11</sup> The court also noted that it had recognized estoppel by judgment in the absence of privity in *Mackey v. Frazier*,<sup>12</sup> *Watson v. Goldsmith*,<sup>13</sup> and *Jenkins v. Atlantic Coast Railroad Co.*<sup>14</sup>

In citing *Mackey*, *Watson*, and *Jenkins*, the court implied that South Carolina had previously abandoned privity as an element of collateral estoppel.<sup>15</sup> The court's implication is mislead-

6. 277 S.C. at 390, 287 S.E.2d at 495-96.

7. *Id.* at 390, 287 S.E.2d at 496.

8. *Id.*, 287 S.E.2d at 496.

9. *Id.* at 390, 287 S.E.2d at 495.

10. Brief for Appellant at 17.

11. 277 S.C. at 390, 287 S.E.2d at 496. Although the court cited no authority for this statement, cases from other jurisdictions do offer support. *E.g.*, *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n.*, 19 Cal. 2d 807, 122 P.2d 892 (1942); *Coca-Cola Co. v. Pepsi-Cola Co.*, 36 Del. 124, 172 A. 260 (1934); *Liberty Mut. Ins. Co. v. George Colon & Co., Inc.*, 260 N.Y. 305, 183 N.E. 506 (1932); *Atkinson v. White*, 60 Me. 396 (1872).

12. 234 S.C. 81, 106 S.E.2d 895 (1959)(the party who lost in an earlier suit against the defendant's employer was precluded from bringing a later suit against the employee based on the same occurrence).

13. 205 S.C. 215, 31 S.E.2d 317 (1944)(plaintiff's cause of action against trustee in his individual capacity barred because plaintiff lost in an earlier suit on same issue brought by trustee on trust's behalf).

14. 89 S.C. 408, 71 S.E. 1010 (1910)(party brought suit against lessor based on alleged negligence of lessee; when he lost he was precluded from bringing suit against lessee).

15. At least one other court agrees that South Carolina had previously abolished the

ing, however, because *Mackey*, *Watson*, and *Jenkins* created exceptions to the privity requirement without changing the doctrine of collateral estoppel.<sup>16</sup> In fact, *In re Asbestosis Cases*,<sup>17</sup> which was decided long after *Mackey*, reaffirmed the South Carolina Supreme Court's traditional support of the privity requirement.<sup>18</sup>

Whether the court previously abandoned the privity requirement or merely made exceptions in its application is a question rendered irrelevant by *Graham*. Now a party to a suit in South Carolina may assert the defense of collateral estoppel despite a lack of mutuality if the party against whom the defense is asserted had a full and fair opportunity to litigate the relevant issue in a previous action.<sup>19</sup>

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privity requirement. The California Supreme Court cited *Jenkins* as authority for its statement in *Bernhard* that the modern trend is to disregard the privity requirement when defensive collateral estoppel is at issue. *Bernhard*, 19 Cal. 2d at 812, 122 P.2d at 895.

16. Both *Mackey* and *Jenkins* dealt with derivative liability. In *Mackey*, the defendant counterclaimed against an employer for an employee's alleged tort. When the defendant lost on the counterclaim, he attempted to sue the employee, but was precluded from doing so because of the complete identity which exists between an employer and his employee. 234 S.C. at 34, 106 S.E.2d at 897. In *Jenkins*, the plaintiff brought an action against a lessor claiming negligence on the part of the lessee. The lessor was found not liable because the lessee was not negligent. The supreme court held that the plaintiff could not later sue the lessee because the issue had already been litigated and resolved in the lessee's favor. 89 S.C. at 413, 71 S.E. at 1012.

The results in *Mackey* and *Jenkins* might have been the same had the court simply relaxed its definition of privity. See generally, *First Nat'l Bank of Greenville v. United States Fidelity & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945)(privity involves a person so identified in interest with another that he represents the same legal right); *Dillingham v. Gardner*, 222 N.C. 79, 21 S.E.2d 898 (1942)(privies are persons connected together or having mutual interest in action by some relation other than that of contract). However, the court chose not to lower the requirements for a showing of privity. Instead, as in *Watson*, the court did not rely on the doctrine of collateral estoppel. Its decisions were based on the doctrine of "equitable estoppel" which rests "upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." *Jenkins*, 89 S.C. at 412, 71 S.E. 1012.

17. 274 S.C. 421, 266 S.E.2d 773 (1980). In *re Asbestosis Cases* dealt with the attempted use of *res judicata*. But *res judicata*, like collateral estoppel, traditionally has only been "available against persons who either were parties to the prior judgment on the merits or in privity with such parties." *Id.* at 432, 266 S.E.2d at 778.

18. See, e.g., *Birnbaum v. Hall*, 101 F. Supp. 605 (E.D.S.C. 1951); *Gleaton v. Southern Ry. Co.*, 212 S.C. 186, 46 S.E.2d 879 (1948); *In re Lemack's Estate*, 207 S.C. 137, 35 S.E.2d 34 (1945).

19. 277 S.C. at 390-91, 287 S.E.2d at 496. This is a constitutional due process requirement. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

While the holding in *Graham* is limited to defensive collateral estoppel, the court did not expressly preclude the offensive use of nonmutual collateral estoppel.<sup>20</sup> A few jurisdictions have already permitted offensive collateral estoppel in certain situations. In *Parklane Hosiery Co., Inc. v. Shore*,<sup>21</sup> the United States Supreme Court granted federal trial courts broad discretion to determine when offensive collateral estoppel should be applied.<sup>22</sup> The Court concluded, however, that collateral estoppel should not be allowed whenever a plaintiff "could easily have joined in the earlier action or where . . . [its] application . . . would be unfair to a defendant."<sup>23</sup> Recently, Iowa<sup>24</sup> and Maine<sup>25</sup> followed *Parklane* and granted trial courts discretion to allow the use of nonmutual offensive collateral estoppel when no unfairness to the defendant would result.<sup>26</sup>

It took many years for the South Carolina Supreme Court to abolish the mutuality requirement in defensive collateral estoppel. The facts in *Graham* made that case a propitious vehicle for altering the privity component of the doctrine. The *Graham* decision may be an indication of the court's willingness to reconsider ancient doctrines, so that if it were presented with cogent

20. In deciding whether collateral estoppel should be allowed "notwithstanding a lack of privity, the courts have taken into consideration whether the doctrine is used offensively or defensively. . . ." 277 S.C. at 390-91, 287 S.E.2d at 496.

21. 439 U.S. 322 (1979).

22. The court previously abandoned the mutuality requirement for assertion of defensive collateral estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971)(patentee sought to relitigate the validity of a patent after a federal court in a previous lawsuit declared it invalid).

23. 439 U.S. at 331.

24. *Hunter v. City of Des Moines*, 300 N.W.2d 121 (Iowa 1981) (absence of mutuality not necessarily a bar to offensive application of collateral estoppel, but not allowed in this case because plaintiff could have joined in previous suit).

25. *Hossler v. Barry*, 403 A.2d 762 (Me. 1979)(offensive collateral estoppel in the absence of privity allowed despite running of statute of limitations).

26. The Supreme Court of Maine allows a plaintiff to assert offensive collateral estoppel despite a lack of privity unless the defendant shows that the plaintiff should have joined in the first action, that allowing collateral estoppel would prejudice the defendant, or that he lacked a full and fair opportunity to litigate the issue in the prior suit. *Hossler*, 403 A.2d at 769. The Iowa Supreme Court also will not allow the use of offensive collateral estoppel when mutuality is lacking if the plaintiff could have joined in the first suit or the defendant did not have a fair and full chance to litigate the issue. *Hunter*, 300 N.W.2d at 125-26. The difference between the courts is that Iowa, unlike Maine, apparently places the burden of proof on the party seeking to assert collateral estoppel. In addition, Iowa's determination of the question of fairness is more extensive and considers all of the factors mentioned in *Parklane*. *Id.* at 124-25.

arguments, the court might well consider eliminating the privity requirement for offensive collateral estoppel as well.

*Daniel F. Norfleet*

## II. LONG ARM STATUTE JURISDICTION MAY NOT BE AVOIDED BY A DEFENDANT'S KNOWING REFUSAL OF NOTICE

In *Patel v. Southern Brokers, Ltd.*,<sup>27</sup> the South Carolina Supreme Court held that a non-resident defendant subject to South Carolina's long arm statute cannot avoid the jurisdiction of South Carolina courts by refusing to accept a certified letter known to contain a summons and complaint.<sup>28</sup> This decision places South Carolina in agreement with most other states that have considered the issue.<sup>29</sup>

In June 1978, Southern Brokers, Ltd., a North Carolina corporation transacting business in South Carolina, sold a motel located in Allendale, South Carolina to the plaintiffs, Pashabhai P. Patel and Shanta P. Patel.<sup>30</sup> The Patels subsequently brought an action for fraudulent representation against Southern Brokers.<sup>31</sup> Service of process was attempted pursuant to sections 36-2-803 and -806 of the South Carolina Code, commonly known as the long arm statute.<sup>32</sup> The Patels' attorney forwarded a copy of

27. 277 S.C. 490, 289 S.E.2d 642 (1982).

28. *Id.* at 493, 289 S.E.2d at 644.

29. See *Boss v. Irvine*, 228 F. Supp. 983 (S.D. Wash. 1939); *Fernandez v. Chamberlain*, 201 So.2d 781, 783 (Fla. Dist. Ct. App. 1967); *Mull v. Taylor*, 68 Ga. App. 663, 23 S.E.2d 595 (1942); *Schaff v. Brown*, 304 Ky. 466, 200 S.W.2d 909 (1947); *State v. District Court of Second Judicial Dist.*, 107 Mont. 489, 86 P.2d 750 (1939). *But see Dwyer v. Shalck*, 232 A.D. 780, 248 N.Y.S. 355 (1931).

30. 277 S.C. at 491, 289 S.E.2d at 643.

31. Record at 5-6, 18-22. The Special Referee found that, in the course of negotiations over the sale of the motel, the defendant, Southern Brokers, made reckless and knowing false, incomplete, and untrue representations about past and projected occupancy rates of the motel, gross receipts, gross operating profit, cash flow, and previous selling price, as inducements to buy the motel.

32. Brief for Respondent at 3. Relevant portions of S.C. CODE ANN. § 36-2-803 (1976) are 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;

...

(c) commission of a tortious act in whole or in part in this State;

...

(g) entry into a contract to be performed in whole or in part by

the summons and complaint to Southern Brokers' corporate office in North Carolina by certified mail, return receipt requested. Realizing the contents of the envelope, Southern Brokers refused to accept delivery,<sup>33</sup> and a default judgment resulted.<sup>34</sup> Southern Brokers sought to vacate the default judgment, claiming that the court lacked jurisdiction because the summons and complaint were never received.<sup>35</sup> The trial court denied the motion and the supreme court affirmed.

The supreme court reasoned that Southern Brokers received the opportunity to participate in and defend the action.<sup>36</sup> The Patels complied with the long arm statute by making the summons and complaint available to Southern Brokers. Thus, Southern Brokers was not denied due process but merely re-

either party in this State; . . .

Relevant portions of S.C. CODE ANN. § 36-2-806 (1976) are the following:

(1) When the law of this State authorizes service outside this State, the service, when reasonably calculated to give actual notice, may be made:

. . .

(c) by any form of mail addressed to the person to be served and requiring a signed receipt; or

. . .

(2) . . . When service is made pursuant to paragraph (c) of subsection (1) . . . proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

33. Record at 27. The Special Referee found that Southern Brokers had knowledge of the lawsuit through communications with the co-defendant, Richard L. Haddox. The Special Referee found that Southern Brokers "knew the name of plaintiff's attorney, knew that the envelope contained or probably contained legal process concerning the lawsuit, and that it wilfully and deliberately refused to accept the summons and complaint in an attempt to avoid the process of this Court." *Id.* This finding was not challenged by Southern Brokers.

34. *Id.* at 11.

35. *Id.* at 36.

36. 277 S.C. at 494, 289 S.E.2d at 645. The court's determination that jurisdiction was acquired by effective service of process on Southern Brokers rendered it unnecessary for it to consider whether the record showed that jurisdiction had been acquired. Without the statutorily required return receipt, the record obviously did not show that jurisdiction had been acquired. However, the court did conclude that the service of process and not the proof of service gives jurisdiction to a court. The court stated the following:

Accordingly, the court might, even now, allow proof of service to be amended and supplied so as to reflect that which truly happened. Inasmuch as the agreed statement of facts admits that the Defendant refused the Summons and Complaint, an amendment, though permissible and proper, is not necessary. If the Defendant suffers material prejudice, it is not because of the inadequacy of proof. The injury suffered is the result of a self-inflicted wound.

*Id.* at 492, 289 S.E.2d at 643-44.

fused to be a party to the litigation.<sup>37</sup> The court ruled that "it can hardly be logically argued that one may avoid the process of the court by merely refusing to accept a letter known to contain a summons and complaint."<sup>38</sup>

The purpose of the service of the summons and complaint is to give proper notice to the defendant of the pendency of the lawsuit.<sup>39</sup> The court did not accept Southern Brokers' contention that the statutory requirements for service of process must always be strictly followed to have effective service. While overlooking the general law supporting this proposition,<sup>40</sup> the court's break with tradition in *Patel* is neither unjustified nor unprecedented. In a factually similar case, the Delaware Supreme Court upheld service, stating:

It is clear from the record that plaintiff's failure to fully comply with the requirements of the statute was caused by defendant's refusal to receive the letters and sign the receipt. Such refusal made it impossible for the plaintiff to file a return receipt with his declaration. It would create an intolerable situation if the defendant could, by his own willful act or refusal to act, prevent the plaintiff from maintaining his action. It is a situation the Court cannot recognize.<sup>41</sup>

The South Carolina Supreme Court did not address the issue of whether a non-resident defendant would be subject to long arm statute jurisdiction despite his refusal to accept deliv-

37. *Id.* at 494, 289 S.E.2d at 645.

38. *Id.* at 493, 289 S.E.2d at 644.

39. *See Metropolitan Life Ins. v. Still*, 140 S.C. 18, 138 S.E. 401 (1927); 62 AM. JUR. 2d *Process* § 67 (1972).

40. *See* 62 AM. JUR. 2d *Process* § 42 (1972). "Provisions thus prescribing the manner of service and the prescribed procedure must be strictly pursued. Unless the specified requirements are complied with, there is no valid service." *Id.*

41. *Creadick v. Keller*, 160 A. 909 (Del. 1932). *See also* *Merriott v. Whitsell*, 476 S.W.2d 230, 231 (Ark. 1972) (defendant "cannot defeat the jurisdiction by the simple expedient of refusing to accept a registered letter"); *Cherry v. Hoffernan*, 182 So. 427, 429 (1938) ("If defendant chooses to flout the notice and refuse to accept it, he will not be permitted to say in the next breath that he has not been served"); *Thomas Organ Co. v. Universal Music Co.*, 261 So.2d 323, 327 (La. Ct. App. 1972) ("To allow a defendant to defeat service of process by refusing to accept a registered letter or to allow a member of his family to receive it for him ineffectually would make a mockery [of the longarm statute] and render it completely ineffective."). For a discussion of the validity of service by mail which fails to reach the defendant, *see generally* Note, *Constitutional Law: The Validity of Service of Process by Mail when there is No Return Receipt: The Outer Limits of the Due Process*, 25 OKLA. L. REV. 566 (1975).



ery of a certified letter known to contain a summons and complaint absent proof of such knowledge. Lacking such proof, the court cannot assume that the notification purpose of the summons and complaint has been achieved. Actual notification is not required, however, since due process only requires that the method of service be reasonably calculated to give the defendant actual notice of the lawsuit.<sup>42</sup> Apparently adopting this position, the court stated that the plaintiff complied with the long arm statute and that the defendant refused to recognize South Carolina law.<sup>43</sup> Additionally, the court cited with approval several cases upholding attempted service by mail which did not adduce that the defendants knew the contents of the mail they refused to accept.<sup>44</sup> It seems unlikely, therefore, that a defendant's claim of ignorance would alter the result reached in *Patel*.

David L. Morrison

### III. POST CONVICTION RELIEF: AN EXCEPTION TO THE RULE AGAINST SUCCESSIVE APPLICATIONS

In *Case v. State*,<sup>45</sup> the South Carolina Supreme Court held that the defendant's application for post conviction relief warranted a hearing despite its successiveness.<sup>46</sup> This case represents a departure from the court's earlier tendency to strictly interpret post-conviction procedure regulations<sup>47</sup> and carves out

42. See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); 62 AM. JUR. 2d *Process* § 67 (1972).

43. 277 S.C. at 494-95, 289 S.E.2d at 645. The court continued, "the mailman was not required to ram [the summons and complaint] down the defendant's throat." *Id.* at 495, 289 S.E.2d at 645.

44. See *supra* note 41 and accompanying text.

45. 277 S.C. 474, 289 S.E.2d 413 (1982).

46. S.C. CODE ANN. § 17-27-90 (1976) provides:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Applications which violate the requirements of this statute are said to be "successive."

47. See generally *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980); *Hunter v.*

an exception to Rule 3 of the Uniform Post-Conviction Procedure Act.<sup>48</sup>

Appellant David Earl Case entered a guilty plea to a charge of housebreaking and received a sentence of three years. The execution of the sentence was delayed, and four days later Case was again arrested for housebreaking. He pled guilty and was sentenced to an additional five year term.<sup>49</sup>

Without benefit of counsel, Case appealed the conviction to the South Carolina Supreme Court, but the appeal was dismissed. He then filed an application for post-conviction relief in which he alleged bribery and incompetence of counsel<sup>50</sup> prior to entering his guilty plea.<sup>51</sup> The court dismissed this application because it lacked "specificity."<sup>52</sup>

Case did not appeal the dismissal of his first application, but filed a second application for post-conviction relief, alleging ineffective assistance of counsel and an involuntary guilty plea. The State made return to the application, and the court appointed an attorney to represent Case. In a subsequent hearing, the second application was deemed successive<sup>53</sup> and was dismissed.<sup>54</sup> Case appealed the dismissal of his second application,

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State, 271 S.C. 48, 244 S.E.2d 530 (1978).

48. Rule 3 of the Uniform Post-Conviction Procedure Act was adopted by the supreme court pursuant to the 1962 Code § 17-611 (now § 17-27-110) and became effective October 1, 1969. The text of Rule 3 is as follows:

Under Section 8 of the Act [§ 17-27-90 of the Code of Laws of South Carolina, 1976], successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in the previous application.

49. Record at 2-4.

50. S.C. CODE ANN. § 17-27-20 (1976) allows a convicted person to apply for post-conviction relief if the claimant asserts that the conviction was in violation of the United States Constitution. The sixth amendment of the United States Constitution, as incorporated by the fourteenth amendment, requires that a person accused of a criminal offense be provided legal counsel. South Carolina has recognized that due process of law requires *effective* assistance of legal counsel. *State v. Cowart*, 251 S.C. 360, 162 S.E.2d 535 (1968).

51. Record at ii.

52. Mere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial, under § 17-27-20 of the S.C. Code. The convicted person must allege specific instances of incompetence or ineffectiveness of counsel, and the "lack of effective counsel must be of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice." *Coardes v. State*, 262 S.C. 493, 494, 206 S.E.2d 264, 265 (1974).

53. See *supra* note 46.

54. Record at ii-iii.

and the South Carolina Supreme Court reversed and remanded for a hearing on the merits.<sup>55</sup>

In explaining why it decided to allow Case a hearing, the court tersely stated that the decision was based on "the unique combination of facts in this case"<sup>56</sup> and cited *Rogers v. State*,<sup>57</sup> *Delaney v. State*,<sup>58</sup> and Rule 5 of the Uniform Post-Conviction Procedure Act.<sup>59</sup> The court's reliance on *Rogers* and *Delaney* is understandable; however, Rule 5 provides support for the court's decision only if Rule 3 is interpreted liberally.

Case claimed that he was entitled to post-conviction relief because his conviction violated his rights under the United States Constitution.<sup>60</sup> In *Rogers*, the South Carolina Supreme Court held that ineffective assistance of counsel is a due process violation which provides grounds for post-conviction relief. In *Delaney*, the court held that the appellant was entitled to a post-conviction evidentiary hearing because his allegations could not have been refuted on the basis of the record before the lower court.<sup>61</sup> Similarly, Case's claim that he was denied effective assistance of counsel because he was unaware of his right to appeal<sup>62</sup> could not be refuted by the trial record. Case's additional allegations of ineffective assistance of counsel either could not be refuted on the basis of the existing record<sup>63</sup> or tended to be

55. 277 S.C. at 474, 289 S.E.2d at 413.

56. *Id.* at 475, 289 S.E.2d at 413.

57. 261 S.C. 288, 199 S.E.2d 761 (1973).

58. 269 S.C. 555, 238 S.E.2d 679 (1977).

59. Rule 5 of the Uniform Post-Conviction Procedures Act provides as follows:

After return is made by the State, if the application presents questions of law or issues of fact requiring a hearing, the court shall appoint counsel promptly to assist the applicant if he is an indigent person. Counsel shall be given a reasonable time to confer with the applicant and to amend the application as filed if desired. Counsel shall have the duty to ascertain from the applicant whether he has included all grounds known to the applicant as a basis for attacking the judgment and sentence and to amend the application to include any claims not already included.

S.C. CODE ANN. §§ 17-27-10 to -120 (1976).

60. See *supra* note 50.

61. *But see* Coardes v. State, 262 S.C. 493, 206 S.E.2d 264 (1974), in which the court refused a post-conviction evidentiary hearing for an applicant whose factual basis for relief was overwhelmingly refuted by the trial record.

62. *Delaney* claimed he did not know he had a right to appeal his conviction, whereas Case alleged he was unaware of his right to appeal the dismissal of his first post-conviction application. Record at 28.

63. Record at 15-16.

supported by the record.<sup>64</sup>

The record clearly shows that Case's first application was too vague to present "questions of law or issues of fact requiring a hearing."<sup>65</sup> Under a strict reading of Rule 5 of the Post-Conviction Procedure Rules,<sup>66</sup> the State is not required to appoint counsel for an indigent applicant. Furthermore, under a narrow reading of Rule 3,<sup>67</sup> Case's second application would not have been allowed. Perhaps in recognition of Case's deficiencies as a lawyer or perhaps because of the "unique combination of facts in this case," the court made an exception to the rule against successive applications.<sup>68</sup> After Case submitted an application which presented questions of fact requiring a hearing, Rule 5 was triggered, and he received assistance of counsel as if he had never filed a previous application.

The impact of the court's holding in *Case* is not clear. Certainly, there will be an increased number of instances in which a convict may be allowed to file more than one application for post-conviction relief, but an elevation of the procedural due process<sup>69</sup> afforded to some post-conviction applicants will not result in the collapse of the orderly administration of post-conviction appeals envisioned by the South Carolina Attorney Gen-

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64. For example, Case claimed that the efforts of his counsel were lacking in competency and in diligence because his lawyer had only conferred with him once before the trial and had refused to investigate the circumstances of the arrest to determine whether Case had a viable defense. Record at 15. Some evidence of Case's allegation is supplied by the transcript of the guilty plea. When the judge asked the defense attorney to tell him about the defendant's side of the issue he replied, "Your Honor, I realize that you probably know more about Mr. Case than I do at this point." Record at 3.

65. Record at ii.

66. See *supra* note 59.

67. See *supra* note 48.

68. Even the State recognizes that the rule against successive applications is not without exception, as clearly specified in § 17-27-90. The State argued, however, that a claimant should not be able to avoid including all of his grounds for relief in his application simply because he is ignorant of the law. Most petitioners for post-conviction relief are laymen untrained in the law; the State argued that if ignorance of the law allows filing of successive applications, then the State must provide counsel for every indigent applying for post-conviction relief or permit innumerable applications from one applicant. Brief of Respondent at 10.

69. Effective October 1, 1982, the Supreme Court of South Carolina will no longer hear all applications for post-conviction relief. The petitioner must file a Petition for Writ of Certiorari. This reduces an applicant's chances of getting an evidentiary hearing and increases the importance of having assistance of counsel in drafting the relief application. S.C. CODE ANN. §§ 17-27-10 to -120 (1976 & Supp. 1982).

eral.<sup>70</sup> Applicants who are allowed to submit successive applications for post-conviction relief will continue to be a narrowly defined group. *Case* only indicates that when an indigent person has been convicted of a crime and submits a second application for post-conviction relief alleging ineffective assistance of counsel and the allegations cannot be refuted on the basis of the record before the court,<sup>71</sup> the court may allow the applicant a hearing on the merits of the claim despite the "successiveness" of the application.

*Daniel F. Norfleet*

#### IV. CITATION FOR CONTEMPT WHILE COMPLYING WITH THE ORDER OF ANOTHER STATE'S COURT.

In *Curlee v. Howle*,<sup>72</sup> the South Carolina Supreme Court held that a trial judge may properly impose a conditional one year jail sentence upon an individual found to be in civil contempt, even though the sentence was imposed without a jury trial. The lower court properly held the appellant (Howle) in contempt for failing to return the parties' children to his ex-wife (Curlee) pursuant to a 1978 family court order granting visitation rights. Although Howle argued that his refusal was not contemptuous because a Nevada court had granted him temporary custody of the children,<sup>73</sup> the supreme court applied the common law rule that when a party willfully disobeys a court order, he may be held in contempt of court.<sup>74</sup> This decision is consistent with holdings in other jurisdictions which state that allowing the contemnor to choose between a compensatory fine and imprisonment is a proper sanction for civil contempt.<sup>75</sup> *Curlee* is unique, however, in that its interpretation of willful disobedience includes seeking and complying with a conflicting order from a different court.

70. Brief for Respondent at 10.

71. The result of this case may be that trial judges will make more of an effort to ascertain whether the indigent defendant was provided with adequate counsel especially when the defendant has entered a guilty plea.

72. 277 S.C. 377, 287 S.E.2d 915 (1982).

73. *Id.* at 382, 287 S.E.2d at 917.

74. *Id.* at 382, 287 S.E.2d at 918 (citing *Bigham v. Bigham*, 264 S.C. 101, 212 S.E.2d 594 (1975); *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970)).

75. See generally 27B C.J.S. *Divorce* § 316(g)(2)(1959).

Curlee and Howle were divorced in South Carolina in 1973, and the family court awarded Curlee custody of the parties' two children. A 1978 court order<sup>76</sup> gave Howle specific visitation rights which allowed the children to visit him for three weeks each summer at his home in Reno, Nevada. In 1979, while the children were in Nevada, Howle successfully petitioned a Nevada court for temporary custody with the belief that, if successful, he would not have to comply with the South Carolina order requiring him to return the children to their custodial parent.<sup>77</sup> Curlee petitioned the South Carolina family court for a Rule to Show Cause why Howle should not be held in contempt for refusing to return the children. The family court held Howle in contempt and sentenced him to one year in prison, but allowed him an opportunity to "purge himself of contempt" by paying Curlee the expenses she incurred in finding her children.<sup>78</sup> Howle appealed the contempt citation to the South Carolina Supreme Court.

In affirming the lower court's finding of contempt, the supreme court stated that the court's role in overseeing the "due administration of justice" gave the judiciary inherent power to punish for contempt.<sup>79</sup> The court also stated that before affirming a contempt holding, it must be presented with a "clear and specific" record upon which the contempt holding is based.<sup>80</sup> Although the appellant attempted to justify his noncompliance by arguing that he had petitioned the Nevada court for custody because he "was fearful of his children's emotional and psychological conditions,"<sup>81</sup> the supreme court found that the appellant

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76. Although the opinion dates this order in 1973, 277 S.C. at 380, 287 S.E.2d at 916, the record reflects that the order was actually entered in 1978. Record at 7-8.

77. 277 S.C. at 380-81, 287 S.E.2d at 917.

78. *Id.* at 381, 287 S.E.2d at 917.

79. *Id.* at 382, 287 S.E.2d at 917 (citing *State ex rel. McLeod v. Hite*, 272 S.C. 303, 251 S.E.2d 746 (1979); *State v. Goff*, 228 S.C. 17, 88 S.E.2d 788 (1955)).

80. 277 S.C. at 382, 287 S.E.2d at 918 (citing *Bigham v. Bigham*, 264 S.C. 101, 212 S.E.2d 594 (1975); *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970)).

81. 277 S.C. at 381, 287 S.E.2d at 917. The record reveals the following testimony: In June of 1979, Dr. Rick Weiher, a Nevada child psychologist, evaluated the children and determined that Glenn, the oldest child, was experiencing a significant traumatic disorder. Dr. Weiher felt that the children should not return to South Carolina, but that they should remain in Nevada with their father. Record at 53-54. The respondent's husband, Paul Curlee, testified that findings by a South Carolina psychiatrist contradicted those of Dr. Weiher. *Id.* at 89.

The appellant testified that the children showed signs of neglect, such as uncut

had no right to rely on the conflicting Nevada court order. In a footnote, the court stated that the appellant's "proper procedure was to petition in the South Carolina family court for a change of custody."<sup>82</sup> The court also rejected appellant's contention that its holding in *Cannon v. Cannon*<sup>83</sup> militated against the contempt charge. The court distinguished *Cannon* on the grounds that there was no court order in that case to be disobeyed, only a separation agreement between the parties.<sup>84</sup>

Although the opinion does not explicitly state the court's view, the supreme court apparently thought that proof of disobedience of a court order establishes a prima facie case of contempt which the contemnor must then disprove. Howle may have had good reasons for wishing to retain custody of his children, but these reasons together with a Nevada court order were no defense for his actions.<sup>85</sup>

While not cited by the court, *Jackson v. Jackson*<sup>86</sup> is an earlier South Carolina opinion which lends support to the result reached in *Curlee*. In *Jackson*, a South Carolina family court issued an ex parte order on March 21, 1961, awarding custody of the parties' child to the mother. On April 25, 1961, the father was held in contempt of court for failing to comply with an order to deliver custody of the child to the mother's parents. The court issued the contempt citation even though an Illinois probate court had signed letters of guardianship on April 20, 1961 appointing the father's mother the guardian of the child. On appeal, the South Carolina Supreme Court affirmed the contempt

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figernails, dirty hair, and slight malnutrition. *Id.* at 62. The children, particularly Glenn, demonstrated symptoms suggestive of psychological abuse and mistreatment. *Id.* at 64. Howle stated that he was convinced that the children's mother used guilt to control their behavior. He also testified that in November of 1978, the respondent told him that she was going to attempt to alienate the children from him. *Id.* at 65.

82. In note 2 the court refers to Family Court Rule 15, effective 1979, as the basis for Howle's proper procedure at the time the controversy arose. 277 S.C. at 383, 287 S.E.2d at 918. The court indicates that since 1980, Family Court Rule 9 requires someone in appellant's position to return to the South Carolina Family Court which handed down the original judgment to obtain a change in custody provisions. This rule states in part: "The court has jurisdiction of the parties and control of all subsequent proceedings from the time of service of the summons and a copy of the petition. . . ." Fam. Ct. R. 9 (Supp. 1982).

83. 260 S.C. 204, 195 S.E.2d 176 (1973).

84. 277 S.C. at 382-83, 287 S.E.2d at 918.

85. *Id.* at 383, 287 S.E.2d at 917-18.

86. 241 S.C. 1, 126 S.E.2d 855 (1962).

holding.<sup>87</sup> *Jackson* and *Curlee* show that whenever the court finds willful disobedience of a court order in domestic proceedings, even if the disobedience is in compliance with an order issued by a court of another state, it will uphold contempt charges against the noncomplying party, provided that jurisdiction over the action remains in a South Carolina court.<sup>88</sup>

After upholding the lower court's finding of contempt, the supreme court addressed the validity of the conditional sentence. Although the appellant did not specifically raise the issue on appeal, the supreme court considered "whether a judge may impose a conditional sentence of more than six months without allowing the contemnor a jury trial."<sup>89</sup> Holding that a trial judge may impose such a sentence, the court noted that although the Federal Constitution requires a jury trial in prosecutions for serious criminal contempt,<sup>90</sup> the same protection does not extend to cases of civil contempt.<sup>91</sup> The court cited *Shillitani v. United States*<sup>92</sup> as support for this assertion.

Under *Shillitani*, whether contempt is civil or criminal is determined by focusing on the goal sought by imposition of the sentence.<sup>93</sup> Adopting this test, the *Curlee* court determined that "[w]hile any imprisonment has punitive and deterrent effects, it must be viewed as remedial if the Court conditions the release upon the willingness to obey the Court's order."<sup>94</sup> Howle's jail sentence was conditioned upon his refusal to pay the respondent's expenses, and was therefore remedial rather than punitive.<sup>95</sup> The court found that the sentence was imposed for civil

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87. *Id.* at 16, 126 S.E.2d at 836.

88. In a footnote, the court noted that under 28 U.S.C. § 1738A, effective in 1981, child custody determinations should be awarded full faith and credit in every other state. 277 S.C. at 382, 287 S.E.2d at 917 n.1. Under the provisions of this statute, the Nevada Court would not have been able to grant the appellant's petition, and the conflict of orders would not have existed. This statute will probably eliminate the potential for similar conflicts in the future.

89. 277 S.C. at 383, 287 S.E.2d at 918.

90. *Id.*, 287 S.E.2d at 918 (citing *Bloom v. Illinois*, 391 U.S. 194 (1968); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974)).

91. 277 S.C. at 384, 287 S.E.2d at 918.

92. 384 U.S. 364 (1966).

93. *Id.* at 368-69.

94. 277 S.C. at 384, 287 S.E.2d at 919.

95. *Id.* at 385-86, 287 S.E.2d at 919. The lower court also ordered the appellant to reimburse the respondent's parents for expenses they incurred in accompanying respondent to Nevada. The supreme court reversed this portion of the lower court order on two



contempt; hence, it was proper under *Shillitani*.

In *Curlee*, the supreme court held that trial courts may enter a finding of contempt if a party to a previous proceeding willfully disobeys a court order entered in that proceeding. Willful disobedience includes petitioning in a more favorable forum for a contradictory court order and then complying with that order. In addition, the trial judge may sentence a contemnor to a jail term longer than six months without a jury trial, provided the contemnor is given a remedial sentence as an alternative. Although *Curlee* involves a child custody situation, the court implied that its holding will apply to any contempt case.

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grounds. First, there was no showing that the expenses were necessary. Second, the court noted that "compensatory contempt awards should be limited to the complainant's expenses only." *Id.* at 387, 287 S.E.2d at 920.