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## Practice and Procedure

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# PRACTICE AND PROCEDURE

## I. DEFAULT JUDGMENT

### A. *Excusable Neglect*

In South Carolina, a trial court may vacate a default judgment upon finding excusable neglect and a meritorious defense.<sup>1</sup> With few exceptions,<sup>2</sup> however, the South Carolina Supreme Court has refused to find excusable neglect when default is attributed to a layperson's failure to forward a summons to his attorney in a timely manner.<sup>3</sup> In *Broughton v. Jaffee*,<sup>4</sup> the supreme court upheld a trial court's finding of excusable neglect on the part of a layperson. This decision reaffirms the court's adherence to a restrictive view of excusable neglect when considering a layperson's conduct.

*Broughton* arose from an automobile accident that resulted in the initiation of two separate suits against the defendant Jaffee,<sup>5</sup> each of which was commenced with the filing of a summons and complaint with the clerk of court. Although the summons and complaint for one of the actions were personally served on

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1. See, e.g., *Stewart v. Floyd*, 274 S.C. 437, 265 S.E.2d 254 (1980); *Thompson v. Wilder*, 272 S.C. 563, 253 S.E.2d 108 (1979).

2. See notes 15 & 16 and accompanying text *infra*.

3. See, *Stewart v. Floyd*, 274 S.C. 437, 265 S.E.2d 254 (1980) (defendant mistook service of second summons and complaint as identical to first and disregarded it); *Commercial Credit Corp. v. Knight*, 272 S.C. 435, 248 S.E.2d 589 (1978)(defendant mistook extension of time to pay debt to include extension of time to answer in action for same); *Little v. Orkin Exterminating Co.*, 270 S.C. 305, 241 S.E.2d 909 (1978)(defendant forwarded to counsel a summons and complaint which was subsequently lost in mail, but failed to confirm receipt by attorney); *Pressley v. Summer*, 266 S.C. 606, 225 S.E.2d 350 (1976)(defendant-insured unsuccessfully attempted to deliver personally summons and complaint to insurance agent at military camp); *Nicholson v. Mull*, 266 S.C. 559, 225 S.E.2d 186 (1976)(defendant did not understand legal import of summons and complaint and failed to consult counsel until after default was entered); *McInery v. Toler*, 260 S.C. 382, 196 S.E.2d 122 (1973)(defendant believed he had been mistakenly served because he had assigned his interest in disputed property to another). See note 14 and accompanying text *infra*.

4. 275 S.C. 541, 273 S.E.2d 767 (1981).

5. *J. Broughton v. Jaffee*; *V. Broughton v. Jaffee*. Record at 1.

the defendant and were timely answered by him,<sup>6</sup> it is disputed whether the defendant was simultaneously served with a summons and complaint in the other action.<sup>7</sup> Upon learning of the latter action, the defendant immediately entered a special appearance and filed a motion to dismiss that suit.<sup>8</sup> Although the trial court had previously issued an ex parte order of default, it vacated<sup>9</sup> the order pursuant to section 15-13-90 of the South Carolina Code.<sup>10</sup> On appeal, the supreme court held that the trial judge had not abused his discretion because the record supported a finding of excusable neglect and a meritorious defense.<sup>11</sup>

The court in *Broughton* found the following evidentiary support for the trial court's conclusion: (1) the care and attention defendant had given the companion case; (2) the attention defendant had given the instant case once aware that it was pending; and (3) the dispute surrounding the perfection of service.<sup>12</sup> The court summarily held that the record "amply sup-

6. *Id.*

7. On June 11, 1979, plaintiff filed an affidavit of personal service of process with the clerk of court. *Id.* Exhibit 1. Defendant, however, contested the alleged service by submitting a personal affidavit and the affidavits of two attorneys, one whom he had consulted on the same day process was served in the companion case. *Id.* at 9, 12 & 15. The trial judge found it "unnecessary" to determine whether service of process was in fact effected. *Id.*, Exhibit 7 at 2.

8. *Id.* Exhibit 7 at 2.

9. *Id.*

10. S.C. CODE ANN. § 15-13-90 (1976) states: "The court may, in its discretion and upon such terms as may be just, allow an answer or reply to be made or other act to be done after the time limited by this Code or by an order enlarge such time." Compare with S.C. CODE ANN. § 15-27-130 (1976), which provides in part: "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. . . ."

Section 15-27-130 specifically addresses the vacating of orders or judgments and may be more appropriate authority for allowing the defendant in *Broughton* to answer since an order of default had already been issued. Section 15-13-90 applies when an order of judgment of default has not yet been entered. The supreme court, however, has recently determined that the required showing for relief is "precisely the same" under either statute. *Commercial Credit Corp. v. Knight*, 272 S.C. 435, 436-37, 248 S.E.2d 589, 590 (1978). The court's use of section 15-13-90 in this case is therefore without practical significance and illustrates that it no longer recognizes a distinction between the two statutes.

11. 275 S.C. at 542, 273 S.E.2d at 768. Abuse of discretion is currently defined in South Carolina as: (1) an error of law; or (2) a factual conclusion without evidentiary support. *Stewart v. Floyd*, 274 S.C. at 440, 265 S.E.2d at 255 (1980).

12. 275 S.C. at 542, 273 S.E.2d at 768.

ported" the decision of the trial court.<sup>13</sup>

As a general rule, the South Carolina Supreme Court recognizes excusable neglect on the part of a layperson<sup>14</sup> only in instances of mitigating legal considerations unrelated to the layperson's conduct,<sup>15</sup> such as the service of a summons without a complaint.<sup>16</sup> *Broughton* is in accord with this restrictive approach. Although the court appears to have considered important the defendant's diligence both after discovering the default and in litigating the companion case, it found similar indicia of diligence inadequate to support a finding of excusable neglect in *Thermal Insulation Co. v. Town & Campus, Inc.*<sup>17</sup> Conse-

13. *Id.*

14. The issue of excusable neglect may also arise from an attorney's failure to file a timely answer on behalf of his client. Cases in which neglect has not been found excusable include: *McEachern v. Poston*, 273 S.C. 122, 254 S.E.2d 796 (1979), *Simon v. Flowers*, 231 S.C. 545, 99 S.E.2d 391 (1957) (attorney's involvement in other business and legal matters); *Hodges v. Fanning*, 266 S.C. 517, 224 S.E.2d 713 (1976) (mistake by attorney's personnel while the attorney was on vacation); *Gillespie v. Rowe*, 275 S.C. 98, 267 S.E.2d 535 (1980) (attorney's failure to obtain an alleged extension of time to answer in writing).

The court has, however, found excusable neglect for an attorney's misconception of legal procedure. *E.g.*, *Lee v. Peek*, 240 S.C. 203, 125 S.E.2d 353 (1962); *Holliday v. Holliday*, 235 S.C. 246, 111 S.E.2d 205 (1959); *Jenkins v. Jones*, 208 S.C. 421, 38 S.E.2d 255 (1946); *Savage v. Cannon*, 204 S.C. 473, 30 S.E.2d 70 (1944).

15. Since 1938, the court has found excusable neglect by a layperson in only three cases in which the summons was served with the complaint and in each instance, it relied on legal considerations unrelated to the conduct of the layperson. *Bledsoe v. Metts*, 258 S.C. 500, 189 S.E.2d 291 (1972) (defendant had instituted a separate action against the plaintiff arising from the same cause of action); *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970) (defendant-insured was an assigned risk and his failure to inform his insurance company that process had been served would deprive the insurer of any defense to liability); *Ballentine Welding Works v. Peden*, 188 S.C. 456, 199 S.E. 693 (1938) (defendant disregarded a summons and complaint alleging a debt which had previously been litigated and adjudged a forgery).

16. *See, e.g.*, *Williams v. Carpenter*, 273 S.C. 339, 256 S.E.2d 316 (1979); *Thompson v. Wilder*, 272 S.C. 563, 253 S.E.2d 108 (1979); *Jolley v. Jolley*, 265 S.C. 594, 220 S.E.2d 882 (1975); *Crawford v. Murphy*, 260 S.C. 411, 196 S.E.2d 503 (1973).

Although a summons may be served without a complaint pursuant to S.C. CODE ANN. § 15-13-230 (1976), the court has expressed its disfavor with the procedure. *See Thompson v. Wilder*, 272 S.C. at 566, 253 S.E.2d at 110 (1979); *Jolley v. Jolley*, 265 S.C. at 599, 220 S.E.2d at 884-85 (1975). This disfavor perhaps explains the court's willingness to find excusable neglect in this instance.

17. 271 S.C. 478, 248 S.E.2d 310 (1978). Defendant was simultaneously served with process in two actions by the same plaintiff and mistakenly assumed that both sets of papers had been forwarded to counsel. Ten days after default, defendant realized his mistake and immediately delivered the summons and complaint to his attorney. Although defendant had timely answered in one of the actions and had diligently sought to vacate the unintended default, the supreme court reversed the trial court's finding of excusable neglect.

quently, the decision in *Broughton* to uphold the trial court's finding of excusable neglect was probably based on the third consideration in the case — the dispute surrounding the perfection of service — rather than on the defendant's showing of diligence.<sup>18</sup>

*Broughton* does not appear to establish a diminished standard by which the court will measure a layperson's conduct.<sup>19</sup> To the contrary, the controlling consideration in the case appears to have been circumstances beyond the layperson's control. In the absence of similarly mitigating legal circumstances, *Broughton* is unlikely to be useful in convincing South Carolina courts to vacate default judgments because of the excusable neglect of laypersons.

Denise Antoine

### B. Notice of Damages-Assessment Hearings

The South Carolina Supreme Court ruled in 1978 that a defaulting defendant who subsequently makes an appearance has a right to limited participation in a hearing on the assessment of unliquidated and unverified damages.<sup>20</sup> This decision reflected the court's view that a defaulting party, by forfeiting his right to "otherwise answer or plead to the complaint,"<sup>21</sup> concedes liabil-

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18. The court in *Broughton*, by citing *Thermal* for the proposition that factual conclusions made by trial courts without evidentiary support constitute abuses of discretion, 275 S.C. at 542, 273 S.E.2d at 768, appears to emphasize by contrast the importance of the third consideration in *Broughton*, the dispute surrounding service.

19. Subsequent decisions indicate no change in the court's restrictive standard when considering a layperson's conduct. See, e.g., *Craps v. Mercury Constr. Co.*, 275 S.C. 546, 273 S.E.2d 770 (1981)(no excusable neglect for mistaken date of service of process); *McCall v. A-T-O, Inc.*, 276 S.C. 143, 276 S.E.2d 529 (1981)(no excusable neglect where corporate personnel mistakenly assumed summons and complaint had been forwarded to counsel); *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981)(no excusable neglect for defendant's confusion when manner of service differed from prior suits with same party); *Y.C. Ballenger Elec. Contractors, Inc. v. Reach-All Sales Co.*, 276 S.C. 394, 279 S.E.2d 127 (1981)(no excusable neglect for defendant's erroneous impression of time to file answer). For comparison with federal excusable neglect standards under FED. R. APP. P. 4(a)(failure to file timely notice of appeal), see generally, Annot., 26 A.L.R. FED 569 (1976).

20. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978).

21. *Id.* at 242, 246 S.E.2d at 882 (citing *Morgan v. Surinam Lumber Corp.*, 251 S.C. 61, 160 S.E.2d 191, 193 (1968)).

ity, but not the extent of liability.<sup>22</sup> Because the court did not at that time consider whether defendants are entitled to notice of damages-assessment hearings, the decision failed to put an end to excessive awards in default proceedings.<sup>23</sup> In 1981, in *Lewis v. Congress of Racial Equality*<sup>24</sup> and *Renney v. Dobbs House, Inc.*,<sup>25</sup> the court sought to curb excessive awards by recommending that default claimants give defaulting defendants four days notice of the time and place of damages-assessment hearings.<sup>26</sup>

In *Lewis*, the plaintiff brought an action against the Congress of Racial Equality (CORE) for invasion of privacy.<sup>27</sup> After an unsuccessful attempt to serve process on CORE through the New York City Sheriff's Department,<sup>28</sup> the plaintiff served process by registered mail.<sup>29</sup> CORE received process and knew of the pending action,<sup>30</sup> but failed to file a timely responsive pleading. The lower court granted the plaintiff a default judgment and awarded \$150,000 actual and \$100,000 punitive damages.<sup>31</sup> CORE subsequently filed a motion to vacate on the ground that its default was the result of mistake, inadvertence, surprise, or excusable neglect.<sup>32</sup> When the court refused to vacate the judg-

22. 271 S.C. at 242, 246 S.E.2d at 882. When damages are liquidated or verified, a defendant is deemed to have conceded the amount of liability. *Id.* at 242 n.1, 246 S.E.2d at 882 n.1.

23. *See, e.g., Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981); *Lewis v. Congress of Racial Equality*, 275 S.C. 556, 274 S.E.2d 287 (1981); *Southland Mobile Homes of S.C., Inc. v. Associates Fin. Serv.*, 274 S.C. 488, 265 S.E.2d 258 (1980); *Petty v. Weyerhaeuser Co.*, 272 S.C. 282, 251 S.E.2d 735 (1979).

24. 275 S.C. 556, 274 S.E.2d 287 (1981).

25. 275 S.C. 562, 274 S.E.2d 290 (1981).

26. 275 S.C. at 567-68, 274 S.E.2d at 293; 275 S.C. at 561, 274 S.E.2d at 289. The court stated that this notice should conform with S.C. CODE ANN. § 15-9-960 (1976), which provides that "[n]otice of a motion or other proceeding before a court or judge, when personally served, shall be given at least four days before the time appointed therefore." 275 S.C. at 567-68, 274 S.E.2d at 293; 275 S.C. at 561, 274 S.E.2d at 289.

27. Record at 4.

28. Neither the opinion nor the record disclosed the reason this service was unsuccessful.

29. 275 S.C. at 558, 274 S.E.2d at 288. S.C. CODE ANN. § 36-2-806 (1976) provides for service of process by registered mail.

30. 275 S.C. at 558, 274 S.E.2d at 288.

31. Record at 16.

32. CORE claimed process was lost and never came to the attention of any responsible member of the organization. Record at 10, 63. CORE made the motion to vacate judgment pursuant to S.C. CODE ANN. § 15-27-130 (1976), which provides as follows:

The court may, in its discretion and upon such terms as may be just, at

ment, CORE appealed.<sup>33</sup>

In *Renney*, the plaintiff sued Dobbs House, Inc., for fraudulent breach of contract and wrongful termination of employment.<sup>34</sup> The complaint was served on one of the defendant's employees at the defendant's place of business.<sup>35</sup> When the defendant failed to appear or file any responsive pleading, the court referred the matter to a Master for a default hearing.<sup>36</sup> The Master determined that notice to the defendant of the default hearing was not required. He therefore found the defendant to be in default and concluded that judgment should be entered against the defendant for \$200,000, the full amount requested by the plaintiff.<sup>37</sup> The court confirmed the Master's report in its entirety and entered judgment of \$200,000 against the defendant.<sup>38</sup> The defendant's attorney moved to vacate the judgment on the grounds of mistake, surprise, or excusable neglect and protested that the defendant was neither given notice of a default hearing nor allowed to contest the amount of damages.<sup>39</sup> Although the trial court vacated the judgment, the plaintiff ap-

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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. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code the court may, in like manner and upon like terms, permit an amendment of such proceedings so as to make it conformable thereto.

33. Record at 91, 92.

34. Record at 3.

35. Process was served on an assistant manager who turned the papers over to the city manager. The city manager, however, took no action on the papers for almost a month. 275 S.C. at 564, 274 S.E.2d at 291.

36. Record at 11.

37. *Id.* at 16-19.

38. *Id.* at 21.

39. The defendant contended that it had made an appearance sufficient to entitle it to notice of the hearing on damages pursuant to S.C. CODE ANN. § 15-9-970 (1976), which provides that "[w]hen a defendant shall not have demurred or answered, service of notice or papers in the ordinary proceedings in an action need not be made upon him . . . but shall be made upon him or his attorney if notice of appearance in the action has been given." The defendant had not made an appearance entitling it to notice since it had not contacted the plaintiffs prior to the hearing. The supreme court observed, however, that its decision in the case rendered the issue moot. 275 S.C. at 566, 274 S.E.2d at 292. Defendant alleged that plaintiffs failed to comply with S.C. CODE ANN. §§ 15-25-10 and 15-25-20 (1976) (proper time requirements for default) and failed to state a cause of action. Defendant also contended that it was denied due process and equal protection. Finally, defendant requested a new trial or rule *nisi* on the ground that the damages award was excessive. Record at 19-23.

pealed, asserting the defective service of process.

In neither *Lewis* nor *Renney* was the amount of the damages award challenged. Nevertheless, the South Carolina Supreme Court expressed great concern over a series of decisions including *Lewis* and *Renney*, in which unliquidated damages default claims yielded large awards.<sup>40</sup> The court found the awards in *Lewis* and *Renney* to be "so grossly out of proportion to the delicts alleged in the complaint[s]"<sup>41</sup> that it decided on its own initiative not to allow the awards to stand.<sup>42</sup>

In support of both decisions, the court noted that because the law favors a trial on the merits, courts should closely scrutinize default judgments to prevent harsh results.<sup>43</sup> Furthermore, a judge or jury's award of damages, even when a defendant is in default, must be based on a preponderance of the evidence presented at the damages-assessment hearing.<sup>44</sup> Although the court had held in *Howard v. Holiday Inns, Inc.*,<sup>45</sup> that a defaulting defendant who subsequently makes an appearance has a

40. In a line of cases decided after *Howard v. Holiday Inns, Inc.*, 271 S.C. 239, 246 S.E.2d 880 (1978), but before *Lewis* and *Renney*, the court encountered large default judgments that were awarded without the defendants' participation in the hearing. In none of the cases was the defendant notified of the hearing. *Southland Mobile Homes of S.C., Inc. v. Associates Fin. Serv.*, 274 S.C. 488, 265 S.E.2d 258 (1980); *Stewart v. Floyd*, 274 S.C. 437, 265 S.E.2d 254 (1980); *G.A.R. Leasing, Inc. v. Deforest*, 273 S.C. 141, 251 S.E.2d 50 (1979); *McEachern v. Poston*, 273 S.C. 122, 254 S.E.2d 796 (1979); *Thompson v. Wilder*, 272 S.C. 563, 253 S.E.2d 108 (1979); *Petty v. Weyerhaeuser Co.*, 272 S.C. 282, 251 S.E.2d 735 (1979).

The court stated in *Lewis* that the central problem in default judgments is the right to defend, but noted that in many cases the proper assessment of damages is also a concern. The court added that claims for liquidated damages raise few problems because the amount is a sum certain or is at least susceptible of easy computation. Additionally, the complaint will alert the defendant to the amount of the claim. 275 S.C. at 560, 274 S.E.2d at 289. The court was primarily concerned in *Lewis* and *Renney* with claims for unliquidated damages.

41. 275 S.C. at 560, 274 S.E.2d at 289. Although this quote appears in *Lewis*, the court made a similar statement in *Renney*. See 275 S.C. at 567, 274 S.E.2d at 292.

42. 275 S.C. at 567, 274 S.E.2d at 292; 275 S.C. at 560, 274 S.E.2d at 289.

43. 275 S.C. at 567, 274 S.E.2d at 292; 275 S.C. at 560, 274 S.E.2d at 289. The court stated that:

. . . [N]o rule. . . set[s] a definite boundary beyond which a court of equity cannot go as a matter of power, or will not go as a matter policy, in preventing the enforcement of an unconscionable judgment. . . . [A] court of equity may look behind a judgment at law in order to do justice between the parties. . . .

275 S.C. at 567, 274 S.E.2d at 293 (quoting 46 AM. JUR. 2d *Judgments* § 807 (1969)); 275 S.C. at 560-61, 274 S.E.2d at 289.

44. 275 S.C. at 567, 274 S.E.2d at 293; 275 S.C. at 561, 274 S.E.2d at 289.

45. 271 S.C. 238, 246 S.E.2d 880 (1978).



right to limited participation in the damages-assessment hearing,<sup>46</sup> the court suggested in both *Lewis* and *Renney* that the protection afforded defaulting defendants by *Holiday Inns* is insufficient. Referring to “problems growing out of such [damages-assessment] hearings,”<sup>47</sup> the court stated that “hereafter in all unliquidated damages default hearings, even when no appearance has been made, it is the better practice for claimant’s counsel to give to the defending party four days notice, as set out in § 15-9-960 of the Code, of the time and place of the hearing.”<sup>48</sup> The court further stated that when the defendant is not notified, the trial court should closely scrutinize the damages award to prevent unwarranted results.<sup>49</sup>

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46. 271 S.C. at 241-42, 246 S.E.2d at 882.

47. 275 S.C. at 567, 274 S.E.2d at 293; 275 S.C. at 561, 274 S.E.2d at 289.

48. 275 S.C. at 567-68, 274 S.E.2d at 293; 275 S.C. at 561, 274 S.E.2d at 289. The court observed that a defendant’s participation would give the judge and jury a broader understanding of the amount that should be awarded and would tend to insure a fairer verdict and judgment. 275 S.C. at 568, 274 S.E.2d at 293; 275 S.C. at 561, 274 S.E.2d at 289.

49. 275 S.C. at 567, 274 S.E.2d at 293; 275 S.C. at 560, 274 S.E.2d at 289-90.

Making some provision for notice of damages-assessment hearings is consistent with FED. R. Civ. P. 55(b)(2), which requires a claimant to give a defaulting defendant three days notice of the default hearing. The court’s recommendation in *Lewis* and *Renney* differs from the federal rule in suggesting that notice be given to a defendant who has not made an appearance. FED R. Civ. P. 55 requires notice only when a defendant has made an appearance. See generally 6 J. MOORE, FEDERAL PRACTICE 55.05[3] (2d ed. 1976); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2687 (1973). The law in other jurisdictions is unsettled on the requirement of notice of a damages-assessment hearing. See generally Annot., 15 A.L.R.2d 586 (1967 & Supp. 1980). Some courts have held that notice is not required in the absence of a statute or court rule. See, e.g., *Cleveland v. Cleveland*, 262 Ala. 90, 77 So.2d 343 (1955); *Grand Lodge Knights of Pythias v. Stroud*, 107 Fla. 152, 144 So. 324 (1932); *Hansman v. Gute*, 215 N.W.2d 339 (Iowa 1974). Other courts have held that no notice is required under the applicable state statute. See, e.g., *Weems v. Boilloit*, 259 Ark. 611, 535 S.W.2d 817 (1976); *Ramey v. Hewitt*, 188 A.2d 350 (D.C. 1963) (noting that the same result could not have been reached under FED. R. Civ. P. 55(b)(2)); *Acme Fast Freight, Inc. v. Bell*, 318 So.2d 212 (Fla. 1975) (citing *Stevenson v. Arnold*, 250 So.2d 270 (Fla. 1971) for proposition that neither common law nor applicable statute required notice); *Colucci v. Imperial*, 414 Pa. 289, 290 n.1, 200 A.2d 297, 298 n.1 (1964) (noting local rules in other counties required notice); *Lacy v. Levine*, 204 Va. 297, 130 S.E.2d 443 (1963), cert. denied, 375 U.S. 932 (1963). Finally, some jurisdictions have held that the applicable statutes require notice. See, e.g., *Stevenson v. Turner*, 94 Cal. App. 3d 315, 156 Cal. Rptr. 499 (1979); *Higbee v. Ambassador Taxi, Inc.*, 369 Mass. 967, 341 N.E.2d 258 (1976); *United Salt Corp. v. Grice*, \_\_\_ N.M. \_\_\_, 628 P.2d 310 (1981). Courts that have not required notice have based their decisions either on precedent and a desire not to impose rules by judicial fiat or on statutory construction. Courts that have required notice have based their decisions on construction of the applicable statutes.

The supreme court in *Lewis* and *Renney* urged, but did not require claimants to give notice of damages-assessment hearings to defaulting defendants.<sup>50</sup> Section 15-9-960 of the South Carolina Code generally requires a party to give at least four days notice of any proceeding.<sup>51</sup> According to that section, however, no notice is required unless the defending party has demurred, answered the complaint, or filed notice of appearance in the action.<sup>52</sup> Although the recommendation of notice in *Lewis* and *Renney*, even when a defendant has not answered, demurred, or filed notice of appearance, may exceed the scope of the statutory notice requirements, the court probably did not wish to contravene the statute's limited notice provisions by requiring notice to defaulting defendants. The court stated, however, that when a defendant is not given the opportunity to participate in a damages hearing, the judge should closely scrutinize the award. In addition, the court remanded both cases for a new trial on the damages issue and required that the defense counsel be given notice of the hearings.<sup>53</sup>

The supreme court's recommendation of notice in *Lewis* and *Renney*, coupled with the *Holiday Inns* participation rule, reflect a balancing of the policies of fairness and efficiency. By encouraging claimants to give defaulting defendants four days notice of damages-assessment hearings, the court may have increased the procedural protection afforded victims of default. Whether the recommendation and close scrutiny of awards will persuade claimants to give notice remains uncertain. If claimants fail to heed the notice recommendation, it will be left to the courts or the legislature to mandate four days notice to defaulting defendants in unliquidated damages default cases.

## II. IN PERSONAM JURISDICTION

In *McComb v. Tiburon Aircraft, Inc.*,<sup>54</sup> the South Carolina Supreme Court affirmed the exercise of in personam jurisdiction over a foreign corporation whose only contacts with the state

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50. 275 S.C. at 562, 274 S.E.2d 290; 275 S.C. at 556, 274 S.E.2d at 287.

51. S.C. CODE ANN. § 15-9-960 (1976).

52. S.C. CODE ANN. § 15-9-970 (1976).

53. 275 S.C. at 568, 274 S.E.2d at 293; 275 S.C. at 562, 274 S.E.2d at 290.

54. — S.C. —, 281 S.E.2d 482 (1981).

were based on an agency relationship. The court held that the undisputed facts established a *prima facie* case upon which to sustain a finding that agents of the defendant were responsible for tortious injury to South Carolina residents, thereby subjecting the defendants to the jurisdiction of South Carolina courts.<sup>55</sup>

In October 1979, Tiburon Aircraft, a New Mexico Corporation, purchased a Douglas DC-4 aircraft in Colorado Springs, Colorado. On November 5, 1979, Tiburon hired two charter pilots to fly the aircraft from Colorado Springs to Costa Rica where, upon completion of repairs, it was to be leased to a Costa Rican Corporation.<sup>56</sup> Although the pilots apparently delivered the plane as contracted, on November 19th or 20th, the FAA informed the president of Tiburon Aircraft, Mr. T.K. Edenfield, Jr., that the aircraft had crashed in South Carolina on a farm owned by J.T. and Clara Lee McCombs.<sup>57</sup> Mr. Edenfield then contacted the repair station in San Jose and was told that the plane had been stolen on the morning of November 19th.<sup>58</sup>

The McCombs, both residents of McCormick County, South Carolina, commenced action against Tiburon, in the McCormick County Court of Common Pleas pursuant to the procedure for service on nonresident operators of aircraft.<sup>59</sup> The defendant

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55. *Id.* at —, 281 S.E.2d at 482.

56. Record at 7-8. The plane was to be leased for the purpose of flying smoked fish from San Juan to Miami. *Id.*

57. The plane, transporting marijuana at the time, was flying low-level to avoid detection, struck some trees, crashed and caught fire. The crash cast the marijuana over the plaintiffs' land and the resulting rush of people trespassing to retrieve the marijuana caused damage to the land exceeding that caused by the crash and fire. Both pilots were killed in the crash. *Id.* at 4. It was undisputed that the deceased pilots were those hired by Tiburon to fly the plane to Costa Rica. — S.C. at —, 281 S.E.2d at 482.

58. Record at 8.

59. S.C. CODE ANN. § 15-9-390 (1976) provides:

Service of process upon the Director of the South Carolina Aeronautics Commission, as agent of the nonresident operator of any aircraft which has set down in South Carolina, shall be made by leaving a copy thereof, with a fee of four dollars, in the hands of the Director or his office and such service shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with the summons, complaint and other papers in the cause. The Director shall keep a record of all processes which shall show the day and hour of service upon him. When the certified return receipt shall be returned to the Director, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

filed a Notice of Special Appearance and moved to quash service for lack of jurisdiction.<sup>60</sup> The trial court found sufficient allegations to infer that the aircraft was operated by agents of the defendant and that Tiburon was subject to in personam jurisdiction in South Carolina under the theory of respondeat superior.<sup>61</sup>

On appeal, the South Carolina Supreme Court found that undisputed facts "made out a prima facie case upon which to sustain a finding that the plane was being operated by agents of Tiburon."<sup>62</sup> In addition, the court stated that the trial court properly weighed the veracity of the defendant's hearsay affidavit claiming termination of the agency relationship.<sup>63</sup> The court relied on *Moorer v. Underwood*<sup>64</sup>, which upheld the exercise of personal jurisdiction over an Illinois defendant because her affidavits supporting her motion to quash service failed to disclose facts sufficient to overcome the plaintiff's verified complaint alleging an agency relationship.

In his dissenting opinion, Justice Ness asserted that although the facts of the ownership and crash were undisputed

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60. Record at 1, 6. Tiburon and the McCombs filed affidavits in support of and against the motions respectively. The plaintiffs' affidavit contained admissions by the defendant's attorney that the defendant owned the plane. In addition, the plaintiffs' affidavit contained a statement made by Mr. Edenfield to agents of the National Transportation Safety Board admitting the pilots had been hired by Tiburon to fly the aircraft to Costa Rica. *Id.* at 10. By stipulation of counsel, plaintiffs interposed the report of the National Transportation Safety Board. *Id.* at 12. The defendant's affidavit contained an assertion by Mr. Edenfield that he was informed by the FAA repair station in San Jose that the plane had been stolen. *Id.* at 8. The court correctly concluded that the defendant's affidavit was hearsay, since the utterances relied on were not made while testifying at a proceeding and were offered to prove the nonexistence of the agency relation. See *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972); *FED. R. EVID.* 801(c).

61. Record at 13.

62. — S.C. at —, 281 S.E.2d at 482.

63. *Id.*

64. 194 S.C. 73, 9 S.E.2d 29 (1940). In *Moorer*, the defendant was visiting in Summerville, South Carolina. During her stay, her chauffeur drove her car to a theater and was involved in a collision resulting in damages to the plaintiff. The defendant moved to quash service for lack of jurisdiction supported by an affidavit which stated that the use of her car was unknown and unauthorized. Although *Moorer* is applicable to *McComb* by analogy, there are significant differences. The employer in *Moorer* was present in the state at the time of the accident and did not claim that the agency relationship had terminated nor that the car was stolen, but only that the driver's use of the car was unauthorized. *Id.* at 75-76, 9 S.E.2d at 29-30. Thus, the issue in *Moorer* was more one of the scope of employment rather than the existence of an agency relationship at the time of the accident.

and personal jurisdiction could be exercised under the long-arm statute, jurisdiction could be exercised only if it did not offend traditional notions of fair play and substantial justice.<sup>65</sup> Justice Ness further asserted that the failure to show a continuing agency relationship between the pilots and Tiburon at the time of the crash resulted in the plaintiffs' failure to carry their burden of establishing minimum contacts and, therefore, the exercise of jurisdiction violated due process.<sup>66</sup>

In South Carolina, the plaintiff has the burden of establishing that a nonresident defendant has sufficient minimum contacts with the state to justify an exercise of jurisdiction by South Carolina courts, especially when jurisdiction is challenged.<sup>67</sup> In this case, minimum contacts sufficient for jurisdiction depended on the existence of an agency relationship. The majority apparently took the position that once the plaintiffs established that an agency relationship had existed, they met their burden of proof of establishing minimum contacts and the burden then shifted to the defendants to prove termination of the relationship. Because the defendant's proof of termination was based on a hearsay affidavit, the court concluded that the defendant failed to sustain its burden.<sup>68</sup> While there appears to be little state court case law on point, the South Carolina Supreme Court's decision is consistent with federal common law.<sup>69</sup> Under federal law, the plaintiff's burden of establishing minimum contacts necessary for the assertion of jurisdiction is met by a threshold *prima facie* showing that the facts of the case confer jurisdiction under the state long-arm statute.<sup>70</sup> Once the plaintiff

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65. — S.C. —, —, 281 S.E.2d 482, 483 (1981)(Ness, J., dissenting)(citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). S.C. CODE ANN. § 36-2-803(1)(c)(1976), South Carolina's "long-arm" statute, allows state courts to exercise personal jurisdiction over a nonresident "who acts directly or by an agent as to a cause of action arising from the person's . . . commission of a tortious act in whole or in part in this state; . . ."

66. — S.C. at —, 281 S.E.2d at 484.

67. See *Surinam Lumber v. Surinam Timber Corp.*, 259 F. Supp. 206 (D.C.S.C. 1966); *Yarborough & Co. v. Schoolfield Furniture Indus.*, 275 S.C. 151, 268 S.E.2d 42 (1980). For a thorough discussion of *Yarborough*, see *Practice and Procedure, Annual Survey of South Carolina Law*, 33 S.C. L. REV. 103 (1981).

68. — S.C. at —, 281 S.E.2d at 482.

69. See generally J. MOORE, *FEDERAL PRACTICE*, 4.41-1[3] (2d ed. 1981).

70. See, e.g., *Edwards v. Ainsworth*, 377 F. Supp. 200 (S.D. Iowa 1974); *Socialist Workers Party v. Attorney General of the United States*, 375 F. Supp. 318 (S.D.N.Y. 1974).

makes the prima facie showing for jurisdiction, the burden shifts to the defendant to show an absence of minimum contacts.<sup>71</sup> The affidavits filed in support of a motion to quash service are construed against the proponent.<sup>72</sup> Since Tiburon's affidavit did not provide competent evidence of the theft of the aircraft, Tiburon failed to meet its burden of showing an absence of jurisdiction.<sup>73</sup>

While the supreme court's holding is reasonable on the facts in *McComb*, it is foreseeable that a court may be faced with an attempt to exercise jurisdiction over foreign corporations or other nonresidents whose only contact with the state is a tortious act committed by a former servant or agent. Once the plaintiff meets the threshold burden of showing a previous agency or master-servant relationship, the defendant will be in the difficult position of having to produce possibly nonexistent evidence of termination. Although *McComb* makes it certain that a plaintiff need sustain only a minimal burden of proof, the court leaves open the question of how far the defendant must go to carry its burden. It is clear, however, that the mere assertion by a nonresident defendant that the agency relationship has terminated will not be sufficient to defeat personal jurisdiction.

Cynthia M. Parsons

### III. CLASS ACTIONS

In *General Supplies, Inc. v. Southwire Co.*,<sup>74</sup> the South Carolina Supreme Court held that the remedy afforded under the state antitrust statute<sup>75</sup> was personal to the injured party.

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71. See, e.g., *Edwards v. Ainsworth*, 377 F. Supp. 200 (S.D. Iowa 1974).

72. See, e.g., *Cohan v. Municipal Leasing Systems*, 379 F. Supp. 1022 (N.D. Ill. 1974).

73. At trial, Tiburon will have the opportunity to discharge itself of liability. See *Moorer v. Underwood*, 194 S.C. 73, 9 S.E.2d 29 (1940). Even if Tiburon is unable to produce competent evidence of the theft of the aircraft, it will still have the valid defense that the pilots were outside their scope of employment, since an employer is liable for the wrongful acts of an employee only while the employee is acting within the scope of his employment. *Adams v. South Carolina Power Co.*, 200 S.C. 438, 21 S.E.2d 17 (1942).

74. 276 S.C. 55, 275 S.E.2d 579 (1981).

75. S.C. CODE ANN. § 39-3-30 (1976). This statute allows, in pertinent part, a party injured by any violation of the antitrust provision to recover damages "in any court of competent jurisdiction in this State, from any person operating such trust or combination, the full consideration or sum paid by him for any goods, wares, merchandise or

Thus, a suit claiming a violation of the antitrust statute could not be properly maintained under the South Carolina class action statute.<sup>76</sup> Since *General Supplies* is the first case in which the court has dealt with the relationship between these two statutes, this decision is important in that it precludes the class action as a vehicle for antitrust violations.<sup>77</sup>

Alleging that pricing and discounting disclosures made among four suppliers of copper building wire in South Carolina affected full and free competition in prices of wire shipped into South Carolina during a four-year period, General Supplies, a direct purchaser of wire from defendant Southwire, brought an antitrust suit on behalf of itself and all others who were direct or indirect purchasers of the wire during the time in question. Initially, all four defendants demurred to the complaint claiming, inter alia, that it could not be brought as a class action. General Supplies amended its complaint by limiting the class to direct purchasers only, expressing an intent to create a common fund, and alleging the existence of common questions of law and fact. Nevertheless, the trial court sustained the defendants' demurrers to the amended complaint.<sup>78</sup>

On appeal, the South Carolina Supreme Court read the antitrust statute in an extremely literal fashion and held that the remedy afforded was personal to the injured party.<sup>79</sup> The court relied on *Newberry Mills, Inc. v. Dawkins*<sup>80</sup> and *Wilder v. South Carolina State Highway Department*<sup>81</sup> as support for the general rule that actions at law for monetary damages may not be brought as class actions. Therefore, since an antitrust suit is an action for monetary damages, General Supplies could not properly maintain the suit as a class action.<sup>82</sup>

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articles the sale of which is controlled by such combination or trust."

76. S.C. CODE ANN. § 15-5-50 (1976).

77. 276 S.C. at 58, 275 S.E.2d at 580.

78. *Id.* The defendant cited both the lack of a common recovery and of a prior legal or organizational bond among the class members.

79. *Id.* See *supra* note 75. The court construed the language in section 39-3-30, ". . . paid by him . . .", to effectively preclude a class action under this statute.

80. 259 S.C. 7, 190 S.E.2d 503 (1972)(action brought to recover taxes paid under protest was an action at law for monetary damages and hence could not be properly maintained as a class action).

81. 228 S.C. 448, 90 S.E.2d 635 (1955)(class action inappropriate in an action to recover postage charges for license plates picked up directly by the plaintiff and others).

82. 276 S.C. at 58, 275 S.E.2d at 581.

Prior to *General Supplies*, however, precedent existed which would have allowed the court to uphold the suit as a class action. Specifically, in *Knowles v. Standard Savings and Loan Association*,<sup>83</sup> the plaintiff assumed a mortgage with the defendant upon the purchase of certain real estate. The cause of action arose as a result of the defendant's practice of charging one percent of the loan balance in addition to the nine percent per annum interest rate which the mortgage loans bore. The plaintiff brought a class action to recover the excessive amounts assessed against him and all similarly situated parties who had assumed a mortgage loan with the defendant.<sup>84</sup>

In upholding the maintenance of the suit as a class action, the court formulated a five-part test against which it measured the allegations in the complaint. First, the rights of the individual plaintiff and the class must entail common questions of law and fact. Second, the claims of the plaintiff must be typical of the claims of the class. Third, all members of the class must have a right to a common remedy. Fourth, the members of the class must be so numerous as to render it impracticable to bring them all before the court. Last, it must be shown that the individual plaintiff's action will adequately represent all members of the class.<sup>85</sup>

If the court had applied the *Knowles* test to the facts in *General Supplies*, each of the five requirements would have been satisfied. First, the rights of General Supplies and other class members clearly involved common questions of law and fact, since recovery was contingent on General Supplies' ability to prove that the pricing and discounting disclosures made among the defendants were in violation of the antitrust statute.<sup>86</sup> Second, the claim advanced by General Supplies, that it was damaged by having to pay increased costs for copper building wire because of the price-fixing activities of the defendants,

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83. 271 S.C. 217, 246 S.E.2d 879 (1978).

84. *Id.* at 219, 246 S.E.2d at 879.

85. *Id.* at 219, 246 S.E.2d at 879-80.

86. Although each class member may have sought a different amount in *General Supplies*, it should have been of little consequence since the same situation existed in *Knowles*. Furthermore, even though an argument could be made that in *Knowles* only a simple mathematical computation was required to determine damages, while *General Supplies* would have involved a more complex method, mere administrative convenience should not be used to preclude appropriate relief where it is due.



was typical of the claims of other class members.<sup>87</sup> Third, in seeking the recovery of surcharges, General Supplies gave class members a right to a common remedy, and would have been effective and appropriate to the entire class, as well as dispositive of the rights of each class member. Fourth, the members of the class involved, numbering over 1,000,<sup>88</sup> were clearly so numerous as to make it impracticable to bring them all before the court. Last, there was no indication that General Supplies would not have adequately represented all members of the class. Indeed, General Supplies' desire to establish the existence of a violation and recover the excesses paid would have made it a zealous representative of each class member's interests.

Nevertheless, the supreme court failed to apply or even acknowledge the *Knowles* test in *General Supplies*. By eliminating the availability of class actions in antitrust suits, the court's holding in *General Supplies* places South Carolina in opposition to the federal courts, which generally allow class actions under the federal antitrust statute.<sup>89</sup> The court's holding may be explained as an attempt to maintain harmony with the express legislative prohibition of class actions under the South Carolina Unfair Trade Practices Act.<sup>90</sup> In any event, the court's decision in *General Supplies* reduces the likelihood that those who have been harmed by antitrust violations will be able to bring suit unless their claims are sufficiently large to bear the risk of expensive litigation.

#### IV. NEW TRIAL ALLOWED ON A SINGLE ISSUE

Since 1958, the South Carolina Supreme Court has refused to allow an individual issue in a multiple issue action to be the subject of a new trial.<sup>91</sup> In 1981, however, in *Industrial Welding*

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87. Although factual variations may have existed between how General Supplies was damaged and how other class members were individually damaged, nothing in the court's opinion indicates that the claims of class members would, in any material respect, differ from that advanced by General Supplies.

88. Record at 17.

89. See, e.g., *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143 (Pa. 1979); *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (Tex. 1978); *In re Plywood Antitrust Litig.*, 76 F.R.D. 570 (La. 1976).

90. S.C. CODE ANN. § 39-5-140 (1976).

91. See *South Carolina Electric & Gas v. Aetna Ins. Co.*, 233 S.C. 557, 106 S.E.2d 276 (1958).

*Supplies v. Atlas Vending*,<sup>92</sup> the court reconsidered its position and, recognizing the severability of multiple issues in a single trial, ruled that a new trial may be granted on a single issue without necessarily being deemed a new trial on all issues.<sup>93</sup> The decision aligns South Carolina with the approved practice in most American jurisdictions.<sup>94</sup>

Appellant, Industrial Welding Supplies, contracted with respondent, Atlas Vending, to provide full carbon dioxide cylinders for use in the respondent's business. The respondent agreed to return the empty cylinders in exchange for more full ones. When the respondent discontinued the appellant's services, it refused to return the empty cylinders and the appellant brought an action to recover possession of the cylinders or their value. Although the appellant prevailed at trial on the issue of liability, it moved for a new trial on several issues, including the proper measure of damages. The trial judge denied the motion.<sup>95</sup> On appeal, the South Carolina Supreme Court ruled that the respondent was entitled to a new trial on the measure of damages, but limited the trial to that single issue.<sup>96</sup>

In adopting the rule that a new trial may be limited to a single issue, the supreme court partially overturned *South Caro-*

92. 276 S.C. 196, 277 S.E.2d 885 (1981).

93. *Id.* at 201, 277 S.E.2d at 887.

94. *See, e.g., Slavenburg v. Bautts*, 221 Kan. 590, 595, 561 P.2d 423, 428 (1977) ("Since the issue of liability has been litigated and decided by the jury the new trial should be limited to the issue of damages"); *Messick v. City of Hickory*, 211 N.C. 531, 191 S.E. 43, (1937) (court will generally grant partial new trial when reason for doing so is confined to one issue entirely separable from others); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48, (Okla. 1976) (allowing new trial on damages issue only when it is clear that error did not affect entire verdict); *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E.2d 877 (1964) (verdict may be set aside and new trial may be granted on single issue of damages). *See generally* Annot., 29 A.L.R.2d 1199 (1953).

95. The fact summary presented considerably simplifies a complicated procedural history, the details of which are unnecessary for the purposes of this survey. Nevertheless, it should be noted that the decision considered here is the second appeal of the case. Appellant first appealed successfully a ruling that its action was barred by the applicable statute of limitations. *See Industrial Welding Supplies, Inc. v. Atlas Vending Co.*, 272 S.C. 293, 251 S.E.2d 741 (1978). Moreover, the propriety of a new trial on the sole issue of damages was not the only issue in the second appeal. Appellant also successfully challenged the trial court's refusal to allow amendment of its complaint and the court's ruling that appellant had the burden of proof and duty of mitigation at trial. For greater detail, see 276 S.C. at 198-200, 277 S.E.2d at 886-87.

96. 276 S.C. at 201, 277 S.E.2d at 887.

*lina Electric & Gas v. Aetna Insurance Co.*,<sup>97</sup> a 1958 decision in which the court concluded that a new trial on a single issue is never proper.<sup>98</sup> In that case, the lower court had granted a new trial solely on the issue of damages after the jury had returned a verdict establishing the insurer's liability to the insured under a fire insurance policy. The South Carolina Supreme Court reversed, however, and stated that a new trial on a single issue "is not countenanced in the modern decisions of this court."<sup>99</sup> The court concluded that it would therefore be inappropriate to grant a new trial on the issue of damages alone.<sup>100</sup> Although the court in *Industrial Welding* stated that the decision in *South Carolina Electric & Gas* was correct on its facts, it concluded without explanation that the apparent adoption of an absolute prohibition of a new trial on a single issue was unwarranted by and contrary to the earlier South Carolina case upon which the court had relied.<sup>101</sup> The court, therefore, overruled that portion of *South Carolina Electric & Gas* which held that a new trial on a single issue must necessarily be deemed a new trial on all issues.<sup>102</sup>

*Industrial Welding* has established a three-part standard for determining when a new trial may be granted on a single

97. 233 S.C. 557, 106 S.E.2d 276 (1958).

98. *Id.* at 560-61, 106 S.E.2d at 277.

99. *Id.*

100. *Id.*

101. 276 S.C. at 201, 277 S.E.2d at 887. The court in *South Carolina Electric & Gas v. Aetna Ins. Co.* cited *Southern Ry. v. Madden*, 224 F.2d 320 (4th Cir. 1955); *Southern Ry. v. Neese*, 216 F.2d 772 (4th Cir. 1954); and *Nelson v. Charleston & Western Carolina Co. Ry.* 231 S.C. 351, 98 S.E.2d 798 (1957). In *Neese*, however, the Fourth Circuit reversed the lower court for failing to set aside a damages verdict and remanded the case for a new trial confined to the damages issue. 216 F.2d at 776. In *Madden*, the Fourth Circuit refused to allow a new trial solely on the issue of damages because to do so would have unjustly harmed the party against whom the issue of liability was resolved. The court distinguished *Neese* on the ground that in that case injustice would not have resulted from a new trial on the issue of damages only. However, the *Neese* court did not absolutely prohibit new trials on single issues. 224 F.2d at 321. In *Nelson*, the South Carolina Supreme Court reversed a judgment for excessive damages and remanded for a new trial without discussing single issue new trials. 231 S.C. at 363, 98 S.E.2d at 803.

102. 276 S.C. at 201, 277 S.E.2d at 887. The court briefly referred to the history of the prohibition of new trials limited to a single issue, noting that English common law courts forbade the practice because the verdict was deemed "a single and inextricable whole." *Id.* The court further observed, however, that the English practice ended with the Judicature Act and that a new trial upon a single issue is accepted procedure in most American jurisdictions. *Id.*

issue. A new trial on a single issue is appropriate only when (1) distinct jury issues are involved, (2) the issue for which a new trial is desired is separate from all other issues, and (3) the error requiring a new trial does not affect the determination of any other issue.<sup>103</sup> The court in *Industrial Welding*, noting with particularity that the respondent's liability had been conclusively determined, found the test satisfied and held it proper that the case be remanded for a new trial on the sole issue of damages.<sup>104</sup>

The court's decision in *Industrial Welding* is significant in two important respects. First, the new rule should better promote judicial economy by allowing the courts to hear on retrial only those issues left unresolved after appeal, rather than those issues for which the lower court's judgment has been affirmed. Second, allowing new trials on single issues spares the parties the time and expense of an entire trial when only one issue remains undetermined. The court's qualified overruling of *South Carolina Electric & Gas* reveals, however, that not every case is appropriate for retrial on a single issue, even when that issue is the proper measure of damages. Rather, in each case the moving party must demonstrate that a new trial on a single issue is appropriate under the *Industrial Welding* standard.

Blake A. Martin

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103. *Id.* at 201, 277 S.E.2d at 887.

104. *Id.*

