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PRACTICE AND PROCEDURE

I. CONTINUOUS TREATMENT EXCEPTION REJECTED

In *Dillon County School District No. Two v. Lewis Sheet Metal Works, Inc.*[1] the South Carolina Court of Appeals rejected the continuous treatment exception to the general rule governing the accrual of a cause of action.[2] The case involved a suit by appellant Dillon County School District Number Two (School District) for the recovery of losses resulting from the defective design and construction of a roof to a school building. The court held that the six-year statute of limitations[3] began to run "when the School District either discovered or could have discovered by the exercise of reasonable diligence that the roof to its building was defective."[4] This decision should warn practitioners not to delay filing suit beyond the applicable statute of

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1. 286 S.C. 207, 332 S.E.2d 555 (Ct. App.), *cert. granted*, 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed*, 288 S.C. 468, 343 S.E.2d 613 (1986).

2. As a general rule, "the statute of limitations commences upon the occurrence of the essential facts constituting the cause of action, regardless of whether these facts are discovered by the client." Moorehead v. Miller, 102 F.R.D. 834, 837 (D.V.I. 1984)(sometimes referred to as the occurrence rule). The continuous treatment exception acts to toll or defer accrual by holding that "when a course of treatment by a professional which includes wrongful acts and omissions has been continuous and is related to the original condition or complaint, the claim accures at the end of the treatment." County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 890, 358 N.Y.S.2d 998, 1001 (1974)(citing Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962)).

3. A six-year accrual period is prescribed by S.C. CODE ANN §§ 15-3-510, -530(5) (1976 & Supp. 1985).

4. 286 S.C. at 214, 332 S.E.2d at 559. The discovery rule, applied here by the court, has emerged as "the predominant doctrine of accrual despite 140 years of precedent with the occurrence rule." *Moorehead*, 102 F.R.D. at 837. The discovery rule was applied first in South Carolina by the federal district court in Gattis v. Chavez, 413 F. Supp. 33 (D.S.C. 1976). The following year, the South Carolina Legislature codified the rule by providing that "[e]xcept as to actions initiated under § 15-3-545 of the 1976 Code, all actions initiated under Item 5 of § 15-3-530 as amended, shall be commenced with six years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. CODE ANN. § 15-3-535 (Supp. 1985). In Brown v. Sandwood Dev. Corp., 277 S.C. 581, 291 S.E.2d 375 (1982), the South Carolina Supreme Court ruled that construction and design defects were within the scope of the rule. *See* Snell v. Columbia Gun Exch., 276 S.C. 301, 278 S.E.2d 333 (1981); Mills v. Killian, 273 S.C. 66, 254 S.E.2d 556 (1979)(rule extended to cases involving legal malpractice).

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limitations period merely because of an opposing party's continuous treatment of a defect or injury since these efforts alone will not toll the statute in South Carolina.[5]

In 1970, Dargan Construction Company, serving as general contractor, began construction on a building to house Dillon County High School.[6] Although the roof was completed in 1970, several leaks had already been reported before the building was completed in January 1971. Over the next nine years, the leaks remained a persistent problem despite the continuous efforts of Dargan; G.M.K., Incorporated, the architect; and Lewis Sheet Metal Works, Dargan's subcontractor, to repair the roof.[7]

The School District filed suit on June 29, 1981, and each respondent asserted the statute of limitations as a defense. The circuit court granted the respondents' motions for summary judgment. The court of appeals agreed with the lower court's conclusion that the six-year statute of limitations began to run in November 1972[8] and affirmed the grant of summary judgment to respondents Bonitz, King, Celotex, and Grace.[9]

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5. If, however, a party's efforts to repair a defect are coupled with assurances to an injured party that the defects can be corrected, the former may be equitably estopped from asserting the statute of limitations as a defense in South Carolina. 286 S.C. at 218, 332 S.E.2d at 561 (citing City of Bedford v. James Leffel & Co., 558 F.2d 216, 218 (4th Cir. 1977)); *see* A. J. Aberman, Inc. v. Funk Bldg. Corp., 278 Pa. Super. 385, 420 A.2d 594 (1980); School Bd. v. GAF Corp., 413 So. 2d 1208 (Fla. App. 1982). *See generally* 51 AM. JUR. 2D *Limitations of Actions* § 431 (1970); 53 C.J.S. *Limitations of Actions* § 25 (1948).

6. The six other respondents included Lewis Sheet Metal Works, who was responsible for installing the roofing membrane, metal flashing, and roof balance; G.M.K., Incorporated, the project's architect; Bonitz Insulation Company, who installed the metal roof work and the roof's concrete deck and accoustical ceiling; King, the project's engineer; W.R. Grace & Company, who provided the roof's decking material; and Celotex Corporation, the manufacturer of roofing materials. 286 S.C. at 210, 332 S.E.2d at 556.

7. *Id.* at 211, 332 S.E.2d at 556-57. From the latter part of 1970 until early 1981, numerous meetings were held and extensive correspondence ensued between G.M.K., Dargan, Lewis, and School District representatives on how to deal with the leaking roof. Despite repeated efforts by Dargan and Lewis to repair the roof, more leaks continued to develop. *Id.*

8. 286 S.C. at 216-17, 332 S.E.2d at 560. "Like the circuit court, we are satisfied that by November, 1972, when the architect for the project referred to the roofing problem as a 'continual problem' and suggested possibly involving the county attorney, the School District either knew or reasonably should have known its problem with the roof was a serious one." *Id.* at 216, 332 S.E.2d at 560.

9. 286 S.C. at 217, 332 S.E.2d at 560. The court of appeals reversed and remanded with respect to G.M.K., Dargan, and Lewis, holding that a jury question exists regarding whether these three respondents should be equitably estopped from asserting the statute of limitations for having "invited the very delay they now assert as a defense . . . ." *Id.*

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The court gave two reasons for rejecting the continuous treatment exception. First, the court noted that the discovery rule is applicable by statute in South Carolina and that no jurisdiction has yet applied the continuous treatment exception where the discovery rule is in effect.[10] The court agreed with Judge Hemphill's statement in *Gattis v. Chavez*[11] that the continuous treatment exception is "on the whole . . . simply an aberrant form of the traditional rule which some courts seem to have adopted either to do justice in a specific case or to present the appearance of having effected a compromise between two antithetical rules."[12] Second, the court reasoned that an unacceptable consequence of the continuous treatment doctrine is that "a cause of action for breach of warranty or negligent performance . . . would never accrue so long as the defendants periodically did some repair work, however ineffectual."[13]

An important point never clearly addressed by the court in this decision is that the continuous treatment exception previously had been applied almost exclusively to claims for professional malpractice.[14] While the doctrine has usually been applied in suits brought against physicians, a growing number of courts have applied the doctrine in malpractice actions involving other professionals,[15] including one action against an architect.[16] The

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at 219, 332 S.E.2d at 562; *see supra* notes 5 and 6.

10. 286 S.C. at 217, 332 S.E.2d at 560; *see supra* note 4.

11. 413 F. Supp. 33 (D.S.C. 1976).

12. *Id.* at 39.

13. 286 S.C. at 217, 332 S.E.2d at 560 (quoting with approval Cluett, Peabody & Co. v. Campbell, Rea, Hayes & Large, 492 F. Supp. 67, 77 (M.D. Pa. 1980)). *Contra* Davis v. City of New York, 38 N.Y.2d 257, 342 N.E.2d 516, 379 N.Y.S.2d 721 (1975)(if services performed are merely intermittent, this doctrine will not apply).

14. Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737 (2d Cir. 1979). "The concept is . . . a narrow one proceeding from the sensible propositions that a lay patient is entitled to rely upon the professional skill of his physician, and need not be expected to interrupt a continuing course of treatment by bringing suit." *Id.* at 744. The doctrine has been applied outside the area of professional malpractice in only a few decisions. Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088 (N.D.N.Y. 1977)(extended doctrine to cover manufacturers of medical devices); Colpan Realty Corp. v. Great Am. Ins. Co., 83 Misc. 2d 730, 373 N.Y.S.2d 802 (1975)(action by insured against insurer for latter's repeated refusal to defend). "*Colpan* and *Holdridge* hold, on the particular facts presented, that sufficiently close analogies to the attorney-client and physician-patient relationship existed to justify application of the concept." *Triangle Underwriters*, 604 F.2d at 745 n.15.

15. Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1098 (N.D.N.Y. 1977); *see, e.g.*, Wilkin v. Dana R. Pickup & Co., 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (1973)(ac-

court of appeals, therefore, joined the vast majority of other courts in refusing to apply the doctrine to nonprofessionals and departed from a growing trend in refusing to apply the doctrine to the architect, G.M.K.

The import of this decision for South Carolina practitioners is the court's explicit rejection of the continuous treatment doctrine, even as applied to professionals. A significant result of the decision is that in South Carolina a party may be required to interrupt the corrective efforts of another party by serving a summons on the latter when the accrual of a cause of action approaches. Whether this result is truly commensurate with the policies underlying statutes of limitations is questionable.[17] Whether the adoption and broad reading of the continuous treatment exception, urged by the School District, offers a satisfactory answer to this dilemma is also speculative. If the doctrine is accepted, expanded, and refined in other jurisdictions in the future, however, it may prove to be more than "simply an aberrant form of the traditional rule" of accrual,[18] and its merits might be reexamined by the courts of this state.

J. Mark Jones

II. STATUTES OF LIMITATIONS TOLLED AGAINST OUT-OF-STATE DEFENDANTS REGARDLESS OF AVAILABILITY OF OTHER METHODS OF SERVICE

In two recent opinions, the South Carolina Supreme Court

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countants); Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (1968)(attorneys). *See generally* Annotation, *When Statute of Limitations Begins to Run upon Action Against Attorney for Malpractice*, 32 A.L.R.4TH 260 (1984); Annotation, *Application of Statute of Limitations to Damage Actions Against Public Accountants for Negligence in Performance of Professional Services*, 26 A.L.R.3D 1438 (1969).

16. County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 358 N.Y.S.2d 998 (1974). *Contra* Sears, Roebuck & Co. v. Enco Assocs., 83 Misc. 2d 552, 370 N.Y.S.2d 338 (1975). *See generally* Annotation, *When Statute of Limitation Begins to Run on Negligent Design Claim Against Architect*, 90 A.L.R.3D 507 (1979).

17. Some frequently cited policy considerations underlying statutes of limitations are the following: "they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." 51 AM. JUR. 2D *Limitation of Actions* § 18 (1970). The argument could be made that the result in this case stimulates litigation by punishing patience.

18. 286 S.C. at 217, 332 S.E.2d at 560 (quoting Gattis v. Chavez, 413 F. Supp. 33, 39 (D.S.C. 1976)).

addressed the question of whether statutes of limitation are tolled against an out-of-state defendant, even when the defendant is amenable to suit within the state.[19] In *Cutino v. Ramsey*[20] the court ruled that the time limitation for bringing a tort action was tolled even though the out-of-state defendant had been subject to service through the Chief Highway Commissioner.[21] In *Harris v. Dunlap*[22] the court held that the availability of long-arm jurisdiction in a contract action did not prevent the tolling of the statute of limitation while the defendant was out of state.[23] These decisions place South Carolina in the minority of jurisdictions to rule on the question.[24]

The *Cutino* action arose from an automobile accident in South Carolina. Both parties were citizens at the time of the

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19. South Carolina Code § 15-3-30 provides for the tolling of statutes of limitation when potential defendants are out of state:

> If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

S.C. CODE ANN. § 15-3-30 (1976). The tolling statute applies not only to residents who leave the state, but also to persons who have never been residents. Macri v. Flaherty, 115 F. Supp. 739 (D.S.C. 1953). The tolling provision acts only to keep alive plaintiff's case against an absent defendant and does not apply when the plaintiff is the party who departs the state. Maccaw v. Crawley, 59 S.C. 342, 37 S.E. 934 (1901).

20. 285 S.C. 74, 328 S.E.2d 72 (1985). The issue was before the court on certification from the United States District Court pursuant to S.C. SUP. CT. R. 46.

21. The statute provides a six-year limit for "[a]n action upon a contract, obligation, or liability, express or implied . . . ." S.C. CODE ANN. § 15-3-530(1) (1976). Substituted service on the Chief Highway Commissioner as "true and lawful attorney" for service of process in actions arising from automobile accidents is provided for by S.C. CODE ANN. § 15-9-350 (1976).

22. 285 S.C. 226, 328 S.E.2d 908 (1985).

23. *Id.* at 228, 328 S.E.2d at 909. Long-arm jurisdiction is provided for by South Carolina Code § 36-2-803:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's (a) transacting any business in this State; (b) contracting to supply services or things in the State; (c) commission of a tortious act in whole or in part in this State; . . . .

S.C. CODE ANN. § 36-2-803 (1976).

24. For a classification of jurisdictions, see Annotation, *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3D 1158 (1974 & Supp. 1985) and 51 AM. JUR. 2D *Limitation of Actions* § 162 n.1 (1970 & Supp. 1985).

mishap, but the defendant permanently moved his residence to another state six months later. Plaintiffs filed their action in federal court within the six-year period specified by section 15-3-530,[25] but were unable to secure personal service of the defendant in his out-of-state residence. After the period of limitation expired, the plaintiffs served the defendant through the Chief Highway Commissioner. The defendant answered that the statute of limitation barred the action because personal jurisdiction had not been obtained within the statutory period. The plaintiffs argued that the limitation period had tolled from the time of the defendant's departure from South Carolina. On certification of the tolling question, the supreme court held that statutory provisions for substituted service contain no express exception to the tolling statute.[26] In the absence of such language, the tolling provisions must be interpreted as applicable despite the availability of substituted service on the out-of-state defendant.[27]

In *Harris* the plaintiff's contract cause of action was almost nine years old when suit was brought in circuit court. The defendant had resided in another state for sixteen years. The trial court found that the defendant had sufficient minimum contacts with South Carolina to justify jurisdiction and rejected his statute of limitation plea. The trial court held the statute tolled during the defendant's absence from South Carolina.[28] On appeal the supreme court affirmed, stating that "amenability to personal service under the long-arm statute does not render the tolling statute inapplicable."[29] The court then rejected the defendant's contention that application of the tolling statute denied him equal protection of the statutory limitation period. The court found that the added difficulty of locating and personally serving foreign defendants before the period of limitation expired constituted a rational basis for distinguishing between in-

25. S.C. CODE ANN. § 15-3-530 (1976). Federal courts generally apply state limitation and tolling statutes even when a federal cause of action is the subject of suit. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980).

26. 285 S.C. at 77, 328 S.E.2d at 73.

27. *Id.*

28. 285 S.C. at 227, 328 S.E.2d at 908.

29. *Id.* at 228, 328 S.E.2d at 909. The court based its decision upon the same lack of specific statutory exceptions to the tolling provisions that it found significant in the *Cutino* case.

state and out-of-state defendants.[30] In-state defendants are subject to service by publication when they cannot be located, but out-of-state defendants are not.[31]

Cutino and *Harris* demonstrate that out-of-state defendants who are amenable to suit under long-arm and related statutes will not be able to enjoy the repose of actions available to in-state defendants under the statutes of limitation.[32] Most jurisdictions have held that tolling statutes do not apply when the

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30. *Id.* Those jurisdictions that continue to give effect to tolling statutes despite modern substituted service and long-arm provisions generally have rejected the equal protection argument. *See* Vostack v. Axt, 510 F. Supp. 217 (S.D. Ohio 1981)(applying Ohio law). The *Axt* court found that a "rational basis" standard was the appropriate test to apply in judging the constitutionality of differing effects of statutes of limitations on resident and nonresident defendants. *Id.* at 222; *see also* Vaughn v. Dietz, 430 S.W.2d 487 (Tex. 1968). *But see* Wright v. Keiser, 568 P.2d 1262 (Okla. 1977), where the court in a 5-4 decision struck down the Oklahoma tolling statute as having no rational basis given modern extensions of personal jurisdiction. *Wright*, however, rested upon interpretation of the Oklahoma Constitution, rather than the fourteenth amendment of the United States Constitution. While the United States Supreme Court has not ruled on the equal protection argument, it has implicitly accepted the differential treatment of out-of-state defendants under tolling statutes. *See* Bauserman v. Blunt, 147 U.S. 647 (1893). The Court has approved a Wisconsin tolling statute that operated when the defendant was out of state and the plaintiff was in Wisconsin, but not when the plaintiff was also out of state. Chemung Canal Bank v. Lowery, 93 U.S. 72 (1876)(applying U.S. CONST. art. II, § 4, rather than the fourteenth amendment). In the recent decision of G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982), the Court considered a New Jersey tolling statute that operated against foreign corporations that had no in-state representative for service of process. Corporations that had an in-state representative enjoyed the benefits of the statute of limitation. The Court rejected the equal protection argument, holding that there was a rational basis for the distinction, since service requirements were different for the two classes of corporations. *Id.* at 410.

31. 285 S.C. at 229, 328 S.E.2d at 909. Service by publication is governed by S.C. CODE ANN. § 15-9-710 (1976). Generally, out-of-state residents can be served by publication only when there is in rem jurisdiction based on property in the state or in certain domestic proceedings.

32. The repose provided by statutory limitations on the time within which actions can be brought is not a fundamental right of constitutional proportions. Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945). The failure of the equal protection argument suggests that the running of a limitation period will not constitute an effective defense for out-of-state defendants. The equitable defense of laches, however, might be employed by those defendants who can show injury, prejudice, or disadvantage arising from an unjustified delay on the part of plaintiff in bringing the action, Grossman v. Grossman, 242 S.C. 298, 130 S.E.2d 850 (1963), or where there was a demonstrably negligent failure to act for an unreasonable length of time, Gray v. S.C. Pub. Serv. Auth., 284 S.C. 234, 325 S.E.2d 547 (1985). Laches, like the statute of limitation, is an affirmative defense, S.C.R. CIV. P. 8(c), and can be raised in a legal action, S.C.R. CIV. P. 12(b). *See, e.g.*, Miller v. British Am. Assurance Co., 238 S.C. 94, 119 S.E.2d 527 (1961). In light of the court's strict construction of the tolling statute, a more liberal readiness to find prejudice in long-delayed suits may balance the unfavorable position of out-of-state defendants.

out-of-state defendant is subject to the state's jurisdiction.[33]

Robert H. Putnam, Jr.

III. STATUTE AWARDING ATTORNEY'S FEES TO PREVAILING PLAINTIFF IN MECHANICS' LIEN ACTION DECLARED UNCONSTITUTIONAL

In *Southeastern Home Building & Refurbishing, Inc. v. Platt*[34] sections 29-5-10[35] and 29-5-20[36] of the South Carolina Code, which awarded attorney's fees to a prevailing plaintiff but not to a prevailing defendant in a mechanics' lien action, were declared unconstitutional by the South Carolina Supreme Court. The statutes were struck down as violative of the equal protection clauses of both the United States and South Carolina Constitutions.

Southeastern Home Building & Refurbishing, Inc., the appellant, brought a mechanics' lien action against respondents V.F. Platt, Jr., and VFQ Associates, seeking a money judgment and attorney's fees. The dispute arose when Southeastern erected a fence on the respondent's property pursuant to a contract with the subtenant, Coastal Country Jamboree. V.F. Platt,

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33. *See, e.g.*, Lipe v. Javelin Tire Co., 96 Idaho 723, 536 P.2d 291 (1975)(overruling prior decision and noting possibility of locating and serving out-of-state defendant with reasonably diligent efforts); Jarchow v. Eder, 433 P.2d 942 (Okla. 1967)(tolling unnecessary when plaintiff has a remedy available; holding otherwise is to adopt in effect a new limitation period); Bergman v. Turpin, 206 Va. 539, 145 S.E.2d 135 (1965)(would allow suits to be postponed indefinitely and prevent defendant's knowing that he is potentially liable).

34. 283 S.C. 602, 325 S.E.2d 328 (1985).

35. Section 29-5-10 states in pertinent part:

> Any person to whom a debt is due for labor performed or furnished . . . shall have a lien upon such building or structure . . . to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this chapter, including a reasonable attorney's fee . . . .

S.C. CODE ANN. § 29-5-10 (1976 & Supp. 1985).

36. Section 29-5-20 provides:

> Every laborer, mechanic, subcontractor or person furnishing material for the improvement of real estate when such improvement has been authorized by the owner shall have a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the cost of the action and a reasonable attorney's fee which shall be determined by the court in which the action is brought . . . .

S.C. CODE ANN. § 29-5-20 (1976).

Jr., the property owner, and V.F.Q. Associates, the tenant, alleged that the fence was erected without their consent. Respondents moved for partial summary judgment on the ground that sections 29-5-10 and 29-5-20, which provided for attorney's fees to a prevailing plaintiff only, violated the equal protection guarantees of the United States and South Carolina Constitutions. The court granted the motion and, on appeal, the supreme court affirmed the lower court's decision.

The court noted that granting attorney's fees to successful plaintiffs while denying fees to prevailing defendants in mechanics' lien actions created a classification of otherwise similarly situated parties to a private contract. The court further stated that the provisions' validity under the equal protection clause depended upon "whether the legislative classification is rationally related to the object of the statute."[37]

The appellant in *Southeastern Home Building* cited two state goals to justify the statute's award of attorney's fees to the prevailing plaintiff. The court rejected appellant's first argument, that mechanics' lien claims should be given priority because of work performed and materials furnished, concluding that awarding attorney's fees only to prevailing claimants had no reasonable relationship to the goal asserted.[38] The court reasoned that "authorizing fee awards to prevailing defendants, as well as plaintiffs, would not chill the laborer's right to seek relief in court."[39] The appellants also argued that the statutes were justified since they eased "the burden [placed] on the pocketbooks of laborers and materialmen."[40] The court noted that this goal, although admirable, was insufficient to "justify placing an unfair burden on landowners and other defendants."[41]

In addition, the appellant contended that a complainant's role as plaintiff and his corresponding burden of proof war-

37. 283 S.C. at 603, 325 S.E.2d at 329.

38. *Id.* at 603-04, 325 S.E.2d at 329.

39. *Id.* at 603, 325 S.E.2d at 329.

40. *Id.* at 604, 325 S.E.2d at 329.

41. *Id.* The Supreme Court of Delaware in Gaster v. Coldiron, 297 A.2d 384 (Del. 1972), also rejected this same argument and took judicial notice "that mechanics lien actions are rarely, if ever, filed by laborers; they are filed by material men [sic], contractors, or subcontractors." *Id.* at 386. Therefore, the policy of protecting laborers does not justify "discriminating between plaintiff and defendant. . . in favor of a contractor, subcontractor, or material supplier." *Id.*

ranted the disparate treatment.[42] In response to this argument, the court stated that "[a] party's position as either the plaintiff or defendant does not alone justify superior treatment."[43] Therefore, determining that all arguments asserted by the appellant lacked merit, the supreme court found the attorney's fees provisions to be unconstitutional denials of equal protection to defendants.

In rendering its decision, the court in *Southeastern Home Building* distinguished those cases which awarded attorney's fees solely to prevailing plaintiffs when the defendant had acted in bad faith. The court noted that in those cases, unlike the instant case, there was a strong governmental policy to discourage bad faith dealings. This policy justified the award of attorney's fees to a plaintiff and supported the denial of fees to a defendant who had acted fraudulently or in bad faith.

The court cited *Bradley v. Hullander*[44] which held that statutes authorizing the award of attorney's fees to the prevailing plaintiff in a securities fraud action were not in violation of the South Carolina or United States Constitution. The statute in *Bradley* did not violate the equal protection clause because it bore a reasonable relationship to a legitimate state policy.[45] The *Bradley* court stated that "[i]f the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause."[46] Unfortunately, the court in *Bradley* did not elaborate on what constitutes legitimate state policies.[47]

The decision in *Southeastern Home Building* places South

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42. 283 S.C. at 604, 325 S.E.2d at 329.

43. *Id.*

44. 277 S.C. 327, 287 S.E.2d 140 (1982).

45. 277 S.C. at 330, 287 S.E.2d at 141 (citing Missouri, Kan. & Tex. R.R. v. Cade, 233 U.S. 642 (1914)); *see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

46. 277 S.C. at 330, 287 S.E.2d at 141 (quoting *Missouri, Kan. & Tex. R.R.*, 233 U.S. at 650).

47. The court in *Southeastern Home Building* cited Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979), as an example of a case in which the purposes of the statutory classification did not justify discriminating against one class of litigants. The court in *Ramey* struck down the South Carolina Motor Vehicle Guest Statute [S.C. CODE ANN. § 15-1-290 (1976)] as violative of equal protection because the statute required nonpaying guests to "prove more than simple negligence as a basis for recovery." *Id.* at 681, 258 S.E.2d at 883.

Carolina with other jurisdictions which have rejected the award of attorney's fees solely to a prevailing plaintiff, absent a legitimate state policy.[48] Statutes awarding attorney's fees to a prevailing party rather than a prevailing plaintiff have withstood equal protection challenges since they do not create a classification based strictly on a party's status as defendant or plaintiff. It is apparent from *Southeastern Home Building* that a status-based classification will be upheld only when a strong governmental policy exists to support the denial of equal protection.

Roxanne Bell Mayer

IV. Departing from Standard Jury Size and Allowing Jurors to Question Witnesses Is Within Judicial Discretion

In *DeBenedetto v. Goodyear Tire and Rubber Co.*[49] the appellants assigned error to the departure from standard jury size and to the practice of allowing jurors to question witnesses.[50] Finding both practices within judicial discretion, the Fourth Circuit Court of Appeals refused to find prejudice in either assignment of error and affirmed a jury verdict for defendant Goodyear Tire and Rubber Company.

The jury for this products liability action was originally composed of eight members, none of whom were designated as alternates.[51] One jury member, however, was excused when counsel disclosed a conflict of interest.[52] Goodyear's motion for a

48. *See* Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982 (1907); Davidson v. Jennings, 27 Colo. 187, 60 P. 354 (1900); Gaster v. Coldiron, 297 A.2d 384 (Del. 1972); Crim v. Drake, 86 Fla. 470, 98 So. 349 (1923); Manowsky v. Stephan, 233 Ill. 409, 84 N.E. 365 (1908).

49. 754 F.2d 512 (4th Cir. 1985).

50. *Id.* at 514. Appellants also cited a third reversible error: refusal to allow the publication of interrogatories to and answers from the defendant. Additionally, counsel argued that they were deprived of a fair trial because the defendant did not produce a certain document during discovery and because the defendant exceeded the record in its closing argument. *Id.*

51. 754 F.2d at 514.

52. On the afternoon of the first day, counsel for Goodyear informed the court that one juror's husband had been represented by the law firm that represented Goodyear. The juror was not excused at that time, but on the following day counsel for the appellant revealed that the juror was represented presently by a member of counsel's firm. Record at 91-97.

mistrial based on the number of jurors was denied, and the trial continued with a seven-member jury. All seven jurors deliberated and reached a verdict for Goodyear.[53] Appellant claimed that the departure from the standard jury size of six or twelve members without written consent was error per se.[54]

A departure from the authorized jury sizes is permitted only by "written stipulation or one clearly recorded."[55] In *DeBenedetto*, although there was no written stipulation, the court of appeals found there had been a "clearly recorded" agreement on the jury size.[56] When the intended procedure was explained to the appellants, they made no objection. Furthermore, at no other time did counsel for the appellants question the jury composition. The Fourth Circuit found that this silence constituted the "clearly recorded" agreement.[57]

In reaching its decision, the *DeBenedetto* court relied upon the policy behind the "clearly recorded" agreement requirement: "If there is to be a departure from established procedures, misunderstandings by lawyers . . . can be avoided only if the departure is by a written stipulation or one clearly recorded."[58] Nothing in the record indicated that anyone believed that the seventh juror was an alternate. Counsel made no objection. Furthermore, on appeal counsel did not argue that they misunderstood the status of the seventh juror. Therefore, based upon these facts, silent assent met the "clearly recorded" requirement.

The second assignment of error was based on the trial court's decision to allow jurors to question witnesses. After counsel examined the witnesses, the jurors were permitted to direct questions to the trial judge. The judge instructed the witness to respond only if he decided the question was proper. Counsel was given the chance to requestion each witness after all questions from the jury were answered.[59] The jury asked over ninety-four

53. 754 F.2d at 514.

54. The District of South Carolina has adopted a local rule which states: "In all civil cases tried in the United States District Courts for the District of South Carolina, the issues may be submitted to juries of six (6) or twelve (12) jurors, at the discretion of the trial judge." *Id.*

55. Kuykendall v. Southern Ry., 652 F.2d 391, 392 (4th Cir. 1981).

56. 754 F.2d at 515.

57. *Id.*

58. *Id.* (quoting *Kuykendall*, 652 F.2d at 392).

59. *Id.* at 515.

questions to fourteen different witnesses during the course of a ten-day trial.[60] The court of appeals warned that the "practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial to verdict."[61] The court held, however, that this practice is a matter within the trial court's discretion and that no party was prejudiced by any questions asked.[62]

This holding is in line with a majority of courts that recognize that jury questioning is primarily within the trial judge's discretion since he has the best opportunity to evaluate the effects of juror questioning during the course of any trial. Although juror questioning in this case appears to have far exceeded the norm,[63] this fact may be explained by the highly technical nature of the evidence. Since *DeBenedetto* was a products liability action that concerned a tire failure, both parties had produced expert witnesses who had examined the tire. Plaintiff's expert asserted that the tire contained a manufacturing defect. Goodyear's expert claimed the tire sustained road impact damage. Asked to determine the cause of the tire failure, many jurors directed their questions to the experts in an attempt to understand the tire manufacturing process.[64]

Perhaps in a less complicated trial, the extent of juror examination allowed in *DeBenedetto* would amount to abuse of discretion.[65] Additionally, the court noted that attorneys for the appellants never objected to the questioning during the course of the trial. Although the court did not decide the issue on this ground alone, the language in the opinion indicates that the court did consider this factor when determining prejudice.[66]

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60. Brief of Appellant at 22.

61. 754 F.2d at 516.

62. *Id.* at 517.

63. *See* United States v. Callahan, 588 F.2d 1078 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); United States v. Witt, 215 F.2d 580 (2d Cir.), *cert. denied sub nom.* Talanker v. United States, 348 U.S. 887 (1954). For a South Carolina Supreme Court case addressing this issue, see State v. Barrett, 278 S.C. 414, 297 S.E.2d 794 (1982), *cert. denied.*, 460 U.S. 1045 (1983), which found no reversible error in the practice of juror questioning. *See generally* Annotation, *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R.3D 872 (1970).

64. Jurors asked the parties' expert witnesses approximately 45 questions. Brief of Appellant at 40.

65. *See* State v. Martinez, 7 Utah 2d 387, 326 P.2d 102 (1958)(holding that the trial judge exceeded his discretion by allowing jurors to ask over 50 questions).

66. The court states: "First, as an important point in the ultimate decision on this

Therefore, when faced with situations where jury size is altered or where jurors are allowed to question witnesses, practitioners should be aware that a timely response is crucial in preserving future objection.

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V. ACTION FOR PARENTAL REPAYMENT OF PAST SUPPORT WITHIN CIRCUIT COURT JURISDICTION

In *Lighty v. South Carolina Department of Social Services*[67] the South Carolina Supreme Court continued to define the boundaries between family court and circuit court jurisdiction. Having indicated in *Moseley v. Mosier*[68] and *South Carolina Department of Social Services v. Fingerlin*[69] that family courts have exclusive jurisdiction in domestic matters, the supreme court in *Lighty* resolved the question of whether an action to establish a parent's liability for repayment of past support furnished to a child was a domestic matter. The court held that the action was one for debt, sounding in contract, and that jurisdiction rests with the circuit court.[70]

The Department of Social Services (DSS) petitioned the family court for an order requiring the mother of a child to reimburse it for Aid to Families with Dependent Children (AFDC)[71] moneys that DSS had paid to the child's custodial aunt. As a condition for receiving assistance, the aunt had assigned to DSS any rights to past, present, or future support she might have against the mother.[72] DSS petitioned in its status of

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issue, we note that appellants did not object during the trial either to the policy of allowing questions by jurors or to any specific juror question." 754 F.2d at 515.

67. 285 S.C. 508, 330 S.E.2d 529 (1985).

68. 279 S.C. 348, 306 S.E.2d 624 (1983).

69. 285 S.C. 73, 328 S.E.2d 71 (1985).

70. A similar result was reached in Hackett v. Haynes, 70 A.D.2d 1051, 417 N.Y.S.2d 533 (App. Div. 1979). *But see* Toy v. Cherico, 367 A.2d 651 (Del. Super. Ct. 1976). The approach taken by the *Toy* court is essentially the one taken by the dissenting justice in *Lighty*. *See infra* note 79.

71. AFDC is a program established by Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-615 (1982), in which the federal and state governments cooperate to provide assistance to children who are deprived of support of at least one parent and whose custodian does not have the means to provide sufficient support.

72. Assignment is required as a condition for receiving assistance by 42 U.S.C. §

assignee, contending that the action was one for child support.[73] The mother demurred, arguing that the action was one for debt over which the family court had no subject matter jurisdiction.[74] In overruling the demurrer, the trial court held that jurisdiction is determined pursuant to the family court's powers over child support matters.[75]

The supreme court reversed, finding that the face of the petition presented no allegations vesting jurisdiction in the family court.[76] Although the action sought recoupment of child support and child support is a family court matter, the court looked to the underlying nature of the action to determine jurisdiction. The majority found that the suit was one for debt arising out of a contract and stated that it was "not unlike an action against one spouse for necessaries provided to the other spouse."[77] Therefore, under the specific facts presented, the case was found to be outside the jurisdiction of the family court.

The opinion found it "significant" that no request for ongoing support was made by DSS,[78] thereby suggesting one possible avenue for pleading that might allow a kind of ancillary jurisdiction over collection actions. Moreover, the case contained no allegations of a previous family court order granting custody to the aunt or requiring the mother to provide support.[79] Such alle-

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601(a)(26)(A) (1982) and 45 C.F.R. § 232.11(a)(1) (1984). *See, e.g.*, Warlick v. Public Welfare Div., 29 Or. App. 21, 562 P.2d 223 (1977).

73. Record at 3.

74. Brief of Appellant at 7-8.

75. Record at 13. The trial court cited S.C. CODE ANN. § 14-21-810(b)(17) (Supp. 1981) in its order, although the section had been repealed and replaced by S.C. CODE ANN. § 20-7-420(30) (1976), which states: "The family court shall have exclusive jurisdiction . . . (30) To make any order necessary to carry out and enforce the provisions of this chapter, and to hear and determine any questions of support . . . ." The court found that a "question of support" was involved in the action, not an adjudication of a debt. Record at 13. The court's citation error did not effect the outcome of the appeal.

76. 285 S.C. at 510, 330 S.E.2d at 531.

77. *Id.*, 330 S.E.2d at 530 (citing Richland Memorial Hosp. v. Burton, 282 S.C. 159, 318 S.E.2d 12 (1984)). In *Burton* the hospital brought suit to collect charges from the husband of a deceased patient for services provided to her. The court found that the common-law necessaries doctrine allowed the action, which was filed in circuit court. The implication of the quoted statement is that a necessaries action might lie for support provided to children as well as spouses.

78. 285 S.C. at 510, 330 S.E.2d at 530.

79. *Id.* Justice Ness dissented on grounds that the action was one which has its roots in the common-law and statutory duty to support one's child. This duty, existing apart from a contract for support or a court order, is a *domestic* obligation. Thus, Justice Ness

gations might have provided family court jurisdiction.

By petitioning as assignee of the aunt, DSS limited itself to whatever remedy the aunt may have had against the mother.[80] If DSS had petitioned in its own right under the Uniform Reciprocal Enforcement of Support Act (URESA),[81] the jurisdictional analysis might have been different. The family court has exclusive jurisdiction over URESA actions,[82] including a proceeding by the state to secure reimbursement for support furnished.[83] Although URESA was "designed to improve and extend enforcement of [support] obligations against obligors in other states,"[84] the provisions of the act also apply in actions within the state when the person owing support and the child to whom it is owed are in different counties.[85]

These possibilities suggest that, under certain circumstances, DSS may be able to obtain family court jurisdiction over a collection action such as the one in *Lighty*. Although *Lighty* appears to restrict family court jurisdiction when determining a parent's liability for past support, the holding is a narrow one and its scope should be limited to cases involving similar pleadings.

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found the source of the obligation to be domestic and DSS's reimbursement action to be within the exclusive province of the family courts. *Id.* at 511-12, 330 S.E.2d at 531-32 (Ness, J., dissenting).

80. While the record does not show an express contract between the mother and the aunt, the court suggests that a contract will be implied under the necessaries doctrine. *Id.* at 510, 330 S.E.2d at 530. Therefore, even if DSS had petitioned in its own right as a supplier of necessaries to the child, its remedy would be limited to the implied contract.

81. S.C. CODE ANN. §§ 20-7-960 to -1170 (1976 & Supp. 1985).

82. S.C. CODE ANN. § 20-7-420(1) (1976).

83. S.C. CODE ANN. § 20-7-1000 (1976) provides: "If a state, political subdivision, or an agency thereof furnishes support to an individual obligee it has the same right to initiate a proceeding under this subarticle as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continuing support." DSS argued that this section should be construed as implicitly granting jurisdiction to the family courts to hear the *Lighty* action on the ground that the section clearly would give a sister state agency the opportunity to present just such a collection action in this state's family court. Brief of Appellee at 3. DSS contended that denying the same right to it would be illogical. The court in State *ex rel.* Department of Welfare v. Smith, 275 S.E.2d 918 (W. Va. 1981), agreed with this argument.

84. Baugh v. Baugh, 280 S.C. 59, 61, 309 S.E.2d 756, 757 (1983).

85. S.C. CODE ANN. § 20-7-1120 (1976) states: "This subarticle applies if both the obligee and the obligor are in this State but in different counties."