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PRACTICE AND PROCEDURE

I. "MARY CARTER" AGREEMENTS SUBJECT TO JURY DISCLOSURE

In *Poston v. Barnes*[1] the South Carolina Supreme Court held that "any settlement device which does not fully release a defendant, while purporting to do so, is subject to disclosure to the jury."[2] The decision followed and expanded the majority rule that "Mary Carter" agreements may be introduced into evidence.

This action arose from an automobile accident that occurred as Poston, a high school student, was travelling in a van owned by Florence County School District #2. As the van passed through an intersection, Barnes failed to stop for a stop sign and collided with the van. As a result of this impact, Poston was thrown out of the van.[3] He filed suit against Barnes and Florence County School District for damages. While the suit was pending, Barnes and her insurance carrier entered into a settlement agreement with Poston entitled "Agreement and Covenant Not to Execute or Proceed Against Norwell Barnes."[4] The agreement provided that Barnes would remain a party defendant but would pay Poston $180,000 over a period of years. Poston agreed not to execute on any judgment against Barnes for any amount in excess of $500 above the $180,000 settlement.[5] Poston stipulated that the school district would be entitled to a setoff for the present value of the settlement.[6]

The covenant was fully disclosed to the school district's attorney, who moved that the document be introduced into evidence; the motion was denied. The jury returned a verdict for

1. 294 S.C. 261, 363 S.E.2d 888 (1987).

2. *Id.* at 265, 363 S.E.2d at 890.

3. *Id.* at 262, 363 S.E.2d at 889.

4. The court defined a covenant not to execute as "a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement." *Id.* at 264, 363 S.E.2d at 890 (citations omitted). The court noted that a covenant not to execute is similar to a covenant not to sue in that neither operates to release other joint tortfeasors. *Id.* (citations omitted).

5. *Id.* at 263, 363 S.E.2d at 889.

6. *Id.*

$375,000 against the defendants.[7] The school district appealed,[8] alleging that the trial court erred in refusing to admit the covenant into evidence.[9] The supreme court reversed, holding that the covenant should have been allowed into evidence "to insure that an equitable verdict was reached."[10]

On appeal, the school district argued that the trial court's refusal to disclose the covenant to the jury made Barnes a "sham" defendant, thereby resulting in a prejudicial verdict.[11] It argued specifically that the covenant constituted a "Mary Carter" agreement, so named after the agreement considered in *Booth v. Mary Carter Paint Co.*[12] The term "Mary Carter" agreement was defined by the Florida District Court of Appeals in *Maule Industries v. Rountree*:[13]

> The term . . . now appears to be used rather generally to apply to any agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the nonagreeing defendant or defendants.[14]

The prevailing view is that a "Mary Carter" agreement must be

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7. Since Barnes and the school district were sued as cotortfeasors, they would have been jointly and severally liable.

8. The supreme court's decision also addresses other alleged errors by the trial court. This article is limited to the covenant not to execute issue.

9. Since the school district was entitled to a setoff for the present value of the settlement, the lower court judge found that no prejudice would result. Brief of Respondent at 11.

10. 294 S.C. at 265, 363 S.E.2d at 890.

11. The school district argued that nondisclosure of the covenant to the jury would have the following effects: first, it would "permit insurance carriers to avoid full payment of their coverage obligations"; second, it would "permit plaintiffs to finance and prolong their litigation against nonagreeing defendants"; and third, it would "permit deception of the jury, thereby allowing the jury, unwittingly, to saddle the nonagreeing defendants with liability for the debts of the agreeing defendant, an inequitous and undesirable shifting of liability." Brief of Appellant at 18-19.

12. 202 So. 2d 8 (Fla. Dist. Ct. App. 1967), *overruled*, Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973). The agreement in *Mary Carter Paint Co.* was structured as follows: In the event of a verdict against the defendants for less than $37,500, the agreeing defendants would contribute the difference between the verdict and that sum, but the total amount of that contribution could not exceed $12,500. If a verdict was returned in excess of $37,500, the agreeing defendants would pay nothing. 202 So. 2d at 10.

13. 264 So. 2d 445 (Fla. Dist. Ct. App. 1972), *modified*, 284 So. 2d 389 (Fla. 1973).

14. 264 So. 2d at 446 n.1.

disclosed to the jury.[15]

Even though the court held that the covenant between Poston and Barnes could be disclosed to the jury, it declined to construe the covenant as a "Mary Carter" agreement.[16] The court's decision, however, was based solely on *Ward v. Ochoa*,[17] a case that expressly addressed and disapproved "Mary Carter" agreements.[18] Relying on the policy argument in *Ward*, the court concluded: "The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion."[19]

This decision will ensure that the jury is entitled to all information necessary to determine an equitable verdict. The jury will be apprised of all remuneration available to the plaintiff, and the sources of such remuneration. As a result, the jury will have an opportunity to weigh differently the testimony and conduct of the agreeing defendant as related to the nonagreeing defendants.[20]

While full disclosure to the jury will correct several of the problems created for the nonagreeing defendant, full disclosure itself may create potential problems. If parties to the agreement know in advance that the agreement will be introduced into evi-

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15. *See, e.g.*, Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 514, 639 S.W.2d 726, 728 (1982); Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); Gatto v. Walgreen Drug Co., 61 Ill. 2d 513, 523-24, 337 N.E.2d 23, 29 (1975); General Motors Corp. v. Lahocki, 286 Md. 714, 729-30, 410 A.2d 1039, 1046-47 (1980); Grillo v. Burke's Paint Co., 275 Or. 421, 426-27, 551 P.2d 449, 452 (1976).

16. 294 S.C. 261, 265 n.3, 363 S.E.2d 888, 890 n.3. The covenant does not meet the classic definition of a "Mary Carter" agreement. *See supra* notes 12-14 and accompanying text. Barnes was absolutely bound to pay the structured settlement as agreed, regardless of the verdict reached by the jury. She was not entitled to any reduction or refund based on the verdict. As a result, there was no financial inducement for Barnes to cooperate with the plaintiff.

17. 284 So. 2d 385 (Fla. 1973).

18. The *Ward* court held that "[i]f the agreement shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants, such agreement should be admitted into evidence." *Id.* at 387.

19. 294 S.C. at 265, 363 S.E.2d at 890 (quoting *Ward*, 284 So. 2d at 387).

20. The defendant school district did not argue that codefendant Barnes cooperated with Poston. Brief of Respondent at 15. Nonetheless, secret agreements could provide an incentive for collusive nonadversarial proceedings between the plaintiff and agreeing defendant. *See* Note, *The* Mary Carter *Agreement - Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1398-1403 (1974).

dence, the possible result would be an agreement filled with self-serving recitals.[21] This problem may be avoided, however, if the court edits the agreement by striking prejudicial and self-serving statements, thereby presenting the jury with only the basic framework of the agreement.[22]

The *Poston* court expressly stated that its decision "does not change or alter existing procedure under which a covenant not to sue shall not be disclosed to the jury but may only be considered by the trial judge."[23] A cotortfeasor who enters into a covenant not to sue with the plaintiff will not be a party to the litigation.[24] In contrast, a codefendant who enters into a "Mary Carter" or similar settlement agreement remains a party to the action, thereby raising the allegation that he is in fact a "sham" defendant.

Poston is a warning to practitioners that settlement agreements with one codefendant will be scrutinized carefully. The court's holding is broad: "*[A]ny* settlement device which does not fully release a defendant, while purporting to do so, is subject to disclosure to the jury."[25]

Sharon S. Roach

II. PRIVITY REQUIREMENT LIMITED IN RES JUDICATA AND COLLATERAL ESTOPPEL CASES

In *Wyndham v. Lewis*[26] the South Carolina Court of Appeals limited the privity requirement in cases involving either res judicata or collateral estoppel. This recent definitional trend makes it more difficult for courts in civil cases to find that a second suit is precluded on either of these grounds.

In order for the principles of res judicata or collateral estoppel to apply,[27] two separate lawsuits must be at issue.[28] In

21. Note, *supra* note 20, at 1411.

22. *Id.* at 1413. *See also* Bechtel Jewelers v. Insurance Co. of N. Am., 455 So. 2d 383 (Fla. 1984).

23. 294 S.C. at 265 n.2, 363 S.E.2d at 890 n.2.

24. *See* Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971).

25. 294 S.C. at 265, 363 S.E.2d at 890 (emphasis added).

26. 292 S.C. 6, 354 S.E.2d 578 (Ct. App. 1987).

27. The doctrines of res judicata and collateral estoppel will be used interchangeably here with respect toward the privity prerequisite. For a distinction between the two, as well as background concerning their historical beginnings in South Carolina, see Stew-

Wyndham, the first suit considered by the court, involved allegations of trespass and waste regarding a particular parcel of land. Lewis, the plaintiff in the first action, alleged that he controlled the property in question. The defendant, James Wyndham, counterclaimed on the basis of trespass, contending that his (James') mother held a fee simple absolute title to the land. The circuit court ruled in favor of Lewis.[29]

Two years later, Essie Wyndham, James' mother, sought to quiet title to the same parcel of land. Lewis objected to this second suit, claiming that according to the principles of res judicata and collateral estoppel, Essie was barred from bringing the subsequent action. The trial judge prohibited Essie from initiating the second suit because she and James were in privity with one another. The trial court further held that the effect of the former adjudication concerning the land was binding upon Essie and James.[30] The issue in this case is whether Essie Wyndham had a full and fair opportunity to be heard in the first suit and, if not, whether a sufficient privity relationship existed between Essie and her son that would preclude her from relitigating the initial suit.

In order to meet the requirements of due process, a litigant must be given adequate notice[31] and an opportunity to be heard. The facts in *Wyndham* indicate that Essie never received notice or opportunity. She did not learn of the initial suit until after the trial court's decision became final.[32]

According to *Walker v. Williams*,[33] an established decision of the South Carolina Supreme Court, "a party cannot be af-

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art, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C.L. REV. 451 (1976).

28. Res judicata and collateral estoppel are two methods by which an adjudication in one action may affect a subsequent lawsuit. The underlying concept which supports these principles is aimed at avoiding multiple litigation when parties have earlier received a full and fair opportunity to litigate. Therefore, the potential for invoking these doctrines becomes pertinent only if a second suit, involving similar parties or issues to a previous suit, is initiated. J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE 1099 (4th ed. 1985).

29. 292 S.C. at 7, 354 S.E.2d at 579.

30. *Id.*

31. For an analysis of what constitutes sufficient notice in the due process context, see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (due process requires notice to be reasonably calculated under all the circumstances to apprise interested parties of the action and afford them an opportunity to present their objections).

32. 292 S.C. at 7, 354 S.E.2d at 579.

33. 212 S.C. 32, 46 S.E.2d 249 (1948).

fected by a proceeding in court to which he was not a party, and in which he had no opportunity of being heard."[34] Furthermore, it was held in *Rabil v. Farris*[35] that "no estoppel is created by a judgment against one not a party or privy to the record by *participation* in the trial of the action."[36] In *Richburg v. Baughman*[37] the court, allowing a father to bring a second suit against a truck driver against whom his daughter had filed an original suit, stated that the father should be permitted to initiate the second action because he "had never gotten his day in court."[38]

Since Essie Wyndham was never provided a full and fair opportunity to be heard, as required by procedural due process,[39] she deserves her "day in court." On the other hand, this lack of opportunity to be heard may be overlooked if a privity relationship is found to exist between Essie and her son James, such that James adequately represented his mother's interests in the initial litigation.

Reversing the trial court's decision, the court of appeals found that there was absolutely no privity relationship between Essie and James Wyndham. In doing so, the court relied on the recent South Carolina Supreme Court's holding in *Richburg*. In *Richburg* the court held that privity could not be inferred from the mere existence of a familial relationship: " 'Privity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation."[40] The court further noted that "[p]rivity does not typically arise from the relationship between parent and child."[41] Therefore, it is a logical inference from *Richburg* that

34. *Id.* at 37, 46 S.E.2d at 251.

35. 213 N.C. 414, 196 S.E. 321 (1938).

36. *Id.* at 416, 196 S.E. at 322 (emphasis added).

37. 290 S.C. 431, 351 S.E.2d 164 (1986).

38. *Id.* at 434, 351 S.E.2d at 166.

39. It is necessary, under both the doctrine of collateral estoppel and the doctrine of res judicata, that the party against whom estoppel is asserted has had his or her legal interests *fully protected* in the first trial. "There can be no such privity between persons as to produce collateral estoppel unless the result can be defended on principles of fundamental fairness in the due process sense." 46 AM. JUR. 2D *Judgments* § 532 (1969).

40. 290 S.C. at 434, 351 S.E.2d at 166 (1986).

41. *Id.* (citing Sayre v. Crews, 184 F. 2d 723 (5th Cir. 1950)); Arsenault v. Carrier, 390 A.2d 1048 (Me. 1978); Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969)).

the mother-son relationship existing between James Wyndham (the defendant in the first action) and Essie Wyndham (the plaintiff in the second action) was not in and of itself sufficient to create a privity relationship required as a prerequisite to the estoppel doctrines.

The *Wyndham* court also found support for its decision in the North Carolina case of *Rabil v. Harris*.[42] In *Rabil* the court held that "[t]he term 'privity' means mutual or successive relationship to the same rights or property."[43] The supreme court also made reference to its definition of privity previously adopted in *First National Bank of Greenville v. United States Fidelity & Guaranty Co.*[44]: "[P]rivity involves a person so identified in interest with another that he *represents the same legal right*."[45]

The court of appeals refused to find that James Wyndham represented the property interests of his mother in the initial suit. It reasoned that even though the interests of James and Essie Wyndham were almost identical, the fact that James did not claim his interest "through"[46] his mother prevented the existence of privity between them. Upon further analysis of the two cases, one might observe that the privity issue may not be so easily dismissed.[47]

It appears upon close scrutiny of the circumstances in this case that a favorable verdict for James in the first suit would have benefitted Essie. James claimed, as a defense to the original trespass action, that his mother held a fee simple absolute title to the land. It follows that had the court decided in James' favor, the court effectively would have decided that Essie, in

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42. 213 N.C. at 414, 196 S.E. 321 (1938).

43. *Id.* at 416, 196 S.E. at 322.

44. 207 S.C. 15, 35 S.E.2d 47 (1945).

45. *Id.* at 26-27, 35 S.E.2d at 58 (emphasis added).

46. "One whose interest is almost identical with that of a party, but who does not claim *through* him, is not in privity with him." 50 C.J.S. *Judgments* § 788 (1969) (emphasis added).

47. In addition to the reasons for the court's conclusion that no privity relationship was involved between Essie and her son, other factors also may have been considered. For example, no mention was made as to whom financed the original litigation, whether Essie and her son had an estranged relationship (indicating he was not acting in her behalf) or a close relationship (possibly indicating the existence of a fraudulent scheme), what amount of time each party spent on the land, whether time was spent together or alone, and so forth.

fact, held a fee simple absolute title to the land. In that instance, Essie could have used the binding effect of the court's judgment to prohibit Lewis from any further intrusion onto her land. Therefore, upon first consideration of these circumstances, it is difficult to imagine that Essie and her son represented unique interests.[48]

It is generally accepted, however, that

> [p]rivity is not established . . . from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action.[49]

It is not enough that Essie may have benefitted from the first suit brought by her son if she was not given a fair opportunity to litigate her interests, either through personal involvement or through her son's representation as mandated by case law. Because the facts of this case do not generate support for either of these two propositions, Essie may not be precluded from bringing her action against Lewis for trespass.

Therefore, it appears that the court's decision in *Wyndham* is wholly supported by case law and the principles that form the basis of the estoppel doctrines. Any other outcome would be contrary to the underlying purposes of res judicata and collateral estoppel: the avoidance of multiple litigation only in those cases in which parties previously have been given an adequate opportunity to be heard.

Jeanne M. Nystrom

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48. On the other hand, one must also realize that if a general verdict had been reached in the initial lawsuit, it would have prevented Essie Wyndham from using an outcome found in favor of James to her own advantage. That is, when a general verdict is rendered in favor of a defending party, it cannot be determined whether that party won the case upon the affirmative defense argued or whether his or her opponent simply failed to meet the requisite burden of proof and, therefore, lost on the merits. Thus, the benefit to Essie of using a decision found in favor of James in the first lawsuit would not be possible unless a special verdict was issued, specifically stating that James prevailed in the lawsuit because his mother possessed a fee simple absolute title to the land.

49. 46 AM. JUR. 2D, *supra* note 39.

III. COURT INTERPRETS RULE 12(b)(6)

In *Brown v. Leverette*[50] the South Carolina Supreme Court faced a novel question, the interpretation of the final sentence of Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The provision in question is as follows:

> [I]f on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, *matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*[51]

In July 1979 Beverly Brown was injured when the automobile in which she was a passenger allegedly hit a pothole on an unpaved road in Lexington County. The Browns (Appellants) filed a joint action in June 1985 against Dennis Leverette, Floyd Hodge, and "John Doe" (Respondents) in their individual capacities for the wife's personal injuries and the husband's loss of consortium. The complaint alleged that Respondents were charged with the duty of maintaining the road in Lexington County and that their negligent performance of this duty caused the accident and resulting injuries.[52]

Appellants previously had filed a civil action in June 1981 against the county of Lexington; however, the action was barred by the one-year statue of limitations contained in South Carolina Code section 57-17-830.[53] The Appellants then brought this action against the Respondents. Respondents moved to dismiss the second complaint under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the following grounds: (1) the Respondents had no duty to maintain the roads; (2) the statute of

50. 291 S.C. 364, 353 S.E.2d 697 (1987).
51. S.C.R. CIV. P. 12(b)(6) (emphasis added).
52. 291 S.C. 364, 353 S.E.2d 697 (1987).
53. S.C. CODE ANN. § 57-17-830 (Law. Co-op. 1976).

limitations barred the suit; and (3) res judicata and collateral estoppel precluded the action.[54]

Respondents submitted affidavits in support of the motion. These affidavits stated that at the time of the accident, Leverette was not employed in any capacity by Lexington County and that Hodge was not a motor grader operator in the vicinity of the accident.[55] The trial court ruled in favor of Respondents and dismissed the complaint pursuant to Rule 12(b)(6).[56]

Appellants contended that the trial court erred in considering affidavits in ruling on Leverette's Rule 12(b)(6) motion. A trial court is limited to consulting the complaint in ruling on a motion for failure to state a cause of action.[57] If matters outside the pleadings are considered, the court must convert the Rule 12(b)(6) motion into a motion for summary judgment. The trial court ruled upon the respondents' motion to dismiss pursuant to Rule 12(b)(6) but did not convert the motion into a motion for summary judgment.[58] Although the lower court's order did not state that it considered the affidavits, the supreme court noted that the trial court necessarily examined the affidavits to reach its conclusion.[59] The supreme court reversed the lower court and held:

> [Rule 12(b)(6)] states plainly that the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings *if* the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).[60]

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure follows the accepted interpretation of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Clearly, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a motion to dismiss for

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54. 291 S.C. at 366, 353 S.E.2d at 698.

55. Reply Brief of Respondent at 1.

56. 291 S.C. at 367, 353 S.E.2d at 698.

57. Tele-Communications of Key West v. United States, 757 F.2d 1330, 1335 (D.C. Cir. 1985); Hill v. Watford, 276 S.C. 344, 278 S.E.2d 347 (1981).

58. 291 S.C. at 367, 353 S.E.2d at 699.

59. The trial court concluded its order by stating that the defendants had no duty to maintain the road. 291 S.C. at 367, 353 S.E.2d at 699.

60. *Id.*, 353 S.E.2d at 698-699 (emphasis in original).

failure to state a claim upon which relief can be granted must be converted into a motion for summary judgment whenever matters outside the pleading are presented to and accepted by the court.[61]

The court has complete discretion to accept matters outside the pleading on a 12(b)(6) motion,[62] but once the court accepts extraneous matters, it must convert the motion to a motion for summary judgment. A few courts have limited this mandatory process to the acceptance of items specifically enumerated in Rule 56(c) of the Federal Rules of Civil Procedure:[63] depositions, answers to interrogatories, admissions on file, and affidavits.[64] Most courts, however, view "matters outside the pleading" as any written or oral evidence.[65] Memoranda of points and authorities, briefs, and oral arguments are not considered "matters outside the pleading" under Rule 12(b)(6).[66]

Once a court converts a motion to dismiss into a motion for summary judgment, the court must give the parties notice of the change in the motion's status and must adhere to the requirements of Rule 56. The notice provisions of the rule protect against surprise and provide an opportunity to defend.[67] Parties

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61. *See* Carter v. Stanton, 405 U.S. 669 (1972); Milburn v. United States, 734 F.2d 762 (11th Cir. 1984); Garaux v. Pulley, 739 F.2d 437 (9th Cir. 1984); Prospero Assocs. v. Burroughs Corp., 714 F.2d 1022 (10th Cir. 1983); *In re* Bristol Indus., 690 F.2d 26 (2d Cir. 1982); Plante v. Shivar, 540 F.2d 1233 (4th Cir. 1976); Johnson v. RAC Corp., 491 F.2d 510 (4th Cir. 1974).

62. *See* Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982); Ware v. Associated Milk Producers, Inc., 614 F.2d 413 (5th Cir. 1980); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (1969).

63. FED. R. CIV. P. 56.

64. *See* Sardo v. McGrath, 196 F.2d 20 (D.C. Cir. 1952); 5 C. WRIGHT & A. MILLER, *supra* note 62, § 1366.

65. Concordia v. Bendekovic, 693 F.2d 1073 (11th Cir. 1982). *See* O'Brien v. Di Grazia, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); United States v. Lewisburg Area School Dist., 539 F.2d 301 (3d Cir. 1976); Smith v. United States, 362 F.2d 366 (9th Cir. 1966); Kotarski v. Aetna Casualty & Sur. Co., 244 F. Supp. 547 (E.D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1965); 5 C. WRIGHT & A. MILLER, *supra* note 62, § 1366.

66. *See* Concordia v. Bendekovic, 693 F.2d 1073 (11th Cir. 1982); Richardson v. Rivers, 335 F.2d 996 (D.C. Cir. 1964); Sardo v. McGrath, 196 F.2d 20 (D.C. Cir. 1952); Baltimore & O. R. Co. v. American Fidelity & Casualty Co., 34 F.R.D. 148 (D.C. Pa. 1963); Patitucci v. United States, 178 F. Supp. 507 (D.C. Pa. 1959); 5 C. WRIGHT & A. MILLER, *supra* note 62, § 1366 (1969).

67. *See* Milburn v. United States, 734 F.2d 762 (11th Cir. 1984); Garaux v. Pulley, 739 F.2d 437 (9th Cir. 1984); *but see* Prospero Assocs. v. Burroughs Corp., 714 F.2d 1022, 1024 (10th Cir. 1983) (exception to notice requirement).

are entitled to ten days notice if a motion for failure to state a claim is converted to a motion for summary judgment.[68] As a general rule, noncompliance with the notice provisions of Rule 56(c) deprives the court of authority to grant summary judgment.[69]

The parties also must be given a reasonable opportunity to present all evidence pertinent to a Rule 56 motion.[70] In a 12(b)(6) motion, the moving party must show that there are no facts that support a legal theory of recovery. Summary judgment under Rule 56 requires the moving party to show that there exists no genuine issue as to any material fact and that he is entitled to the judgment as a matter of law.

In this case of first impression, the South Carolina Supreme Court's interpretation of the last sentence of Rule 12(b)(6) clearly follows the accepted interpretation of its counterpart in the Federal Rules of Civil Procedure. The court's analysis of the provision parallels that of other jurisdictions and provides a clear, definite, and justified precedent. Attorneys must be aware that submitting affidavits with motions to dismiss for failure to state a claim, if accepted, requires the court to convert the motion into a motion for summary judgment. The rule also requires the court to give proper notification of the conversion to the parties.

Julian Hennig, III

IV. RIGHT TO JURY TRIAL WAIVED BY FAILING TO MAKE A TIMELY DEMAND

In *King v. Shorter*[71] the South Carolina Court of Appeals adopted the majority approach[72] in determining when a party

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68. *See* Garaux v. Pulley, 739 F.2d 437 (9th Cir. 1984); *In re* Bristol Indus., 690 F.2d 26 (2d Cir. 1982); Hickey v. Arkla Indus., 615 F.2d 239, 240 (4th Cir. 1980).

69. *See* Garaux v. Pulley, 739 F.2d 437 (9th Cir. 1984); Prospero Assocs. v. Burroughs Corp., 714 F.2d 1022, 1024 (10th Cir. 1983); Torres v. First State Bank, 550 F.2d 1255 (10th Cir. 1977); Adams v. Campbell County School Dist., 483 F.2d 1351 (10th Cir. 1973).

70. 2A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 12.09[3] (2d ed. 1985).

71. 291 S.C. 501, 354 S.E.2d 402 (Ct. App. 1987).

72. *See, e.g.*, Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1970); Bulk Oil (USA), Inc. v. Sun Oil Trading Co., 584 F. Supp. 36 (S.D.N.Y. 1983); Steinhardt Novelty Co. v. Arkay Infants Wear, Inc., 10 F.R.D. 321 (E.D.N.Y. 1950); Waldo Theatre

has waived his right to a jury trial under Rule 38 of the new South Carolina Rules of Civil Procedure (Rule 38).[73] In construing this rule, the court held that the right to trial by jury is waived[74] with respect to an issue if not demanded within ten days after the "last pleading directed to such issue."[75] The court further held that a party is not entitled to a jury trial for issues raised in amended or supplemental pleadings unless these claims constitute new factual issues.[76]

In *King* the plaintiff sued Shorter to recover monetary damages[77] because the plaintiff had coendorsed and paid a note for Shorter. Shorter filed his original answer and counterclaimed, asserting fraud, breach of trust, and malpractice. Shorter subsequently amended his answer and added a counterclaim for outrage. Shorter made no demand for a jury trial on either of these occasions.[78] Almost five months after filing his original answer, Shorter again amended his answer, adding a cause of action for unfair trade practices. He then demanded a trial by jury within ten days after he served his second amended answer.[79]

At trial Shorter claimed that he was entitled to a jury trial at least as to the unfair trade practices claim raised in his second amended answer. Additionally, Shorter claimed that he was entitled to a jury trial on all issues raised in his original and amended answers.[80]

In affirming the trial court, the court of appeals denied Shorter's demand for a jury trial on any of the issues raised. Rule 38 prescribes procedures for demanding a jury trial and

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Corp. v. Dondis, 1 F.R.D. 685 (D.C. Me. 1941). *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2320 (1971); Annotation, *Rule 38 of Federal Rules of Civil Procedure: Waived Right to Jury Trial as Revived by Amended or Supplemental Pleadings*, 18 A.L.R. FED. 754 (1974).

73. S.C.R. CIV. P. 38. The South Carolina Rules of Civil Procedure went into effect on July 1, 1985. S.C.R. CIV. P. 38(b) replaced S.C. CODE ANN. § 15-23-60 (Law. Co-op. 1976). Under § 15-23-60, a party had a right to a jury trial in an action for the recovery of money without demanding it.

74. S.C.R. CIV. P. 38(d).

75. *Id.* at 38(b).

76. 291 S.C. at 503, 354 S.E.2d at 403.

77. Under former S.C. CODE ANN. § 15-23-60 (Law. Co-op. 1976), Shorter automatically would have been entitled to a jury trial, in most cases, on all issues without demand. *See supra* note 73.

78. 291 S.C. at 502, 354 S.E.2d at 403.

79. Record at 35, 45.

80. *Id.* at 51.

reads in pertinent part:

> Rule 38(b). Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand . . . not later than 10 days after the service of the last pleading directed to such issue.
> Rule 38(d). Waiver. The failure of a party to serve a demand . . . constitutes a waiver by him of trial by jury.[81]

In stating that Rule 38 is substantially the same as Rule 38 of the Federal Rules Civil Procedure (Federal Rule 38),[82] the court relied on *Trixler Brokerage Co. v. Ralston Purina Co.*[83] The *King* court stated a party's "entitlement to a jury trial on the issues presented by an amended pleading, when no prior demand for a jury trial has been made, turns on whether the amended pleadings create new issues of fact."[84] The court concluded that the unfair trade practice claim involved essentially the same factual considerations that were raised by Shorter's prior pleadings.[85] Therefore, Shorter was denied a trial by jury for all issues raised.

The court of appeals did not specifically address the question of why the right to trial by jury was waived with respect to the counterclaims and defenses raised in the original and first amended answer that were restated in the second amended answer. A literal reading of Rule 38 would seem to dictate that a demand is timely if made "not later than 10 days after service of the *last* pleading directed to such issue."[86] An amended or supplemental pleading that restates previously raised issues would seem to be the "last pleading directed to such issue." Therefore, a demand for a trial by jury made within ten days after the service of the amended pleading would be timely.

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81. S.C.R. CIV. P. 38(b). This rule refers only to those issues which are triable of right by a jury. Hence, a party cannot demand a jury for a purely equitable matter, and, furthermore, a party does not waive his right by later raising an issue at law in an amended pleading. Bereslavsley v. Kloeb, 162 F.2d 862 (6th Cir. 1947).

82. FED. R. CIV. P. 38.

83. 505 F.2d 1045 (9th Cir. 1974). In *Trixler* the plaintiff did not timely demand a jury trial on his first five claims in his original complaint. He did make a timely demand with respect to his sixth and seventh claims raised in an amended complaint. The court, however, denied a jury trial as to all issues because the new claims did not constitute new "factual" issues but were merely new theories of recovery. *Id.*

84. 291 S.C. at 503, 354 S.E.2d at 403.

85. *Id.*

86. S.C.R. CIV. P. 38(b) (emphasis added).

Courts almost uniformly have interpreted Federal Rule 38 in conformity with the *King* holding.[87] In *Trixler* the Ninth Circuit reasoned that an "issue" for Federal Rule 38(b) purposes is framed when there has been an allegation and a responsive denial.[88] Furthermore, the "last pleading directed to such issue" is the original responsive denial.[89] Therefore, if a jury trial is not demanded within ten days after the original responsive denial, the right is waived. Amended or supplemental pleadings, which merely restate the issues already framed, do not revive the right to a jury trial.[90]

The court of appeals did address the question of whether the issue raised in the second amended answer constituted a new issue. If the court had categorized this claim as a new issue, Shorter would have had the right to demand a jury trial for the new issue only.[91] In determining whether a new issue was presented, the court followed the majority trend[92] and the holding in *Trixler*.[93] The *Trixler* court stated that a new issue for Federal Rule 38(b) purposes means a new issue of fact,[94] not a new theory of recovery.[95] Therefore, a new issue is raised by an amended pleading when a new factual consideration is presented by the pleading, not when a new theory of recovery is created based on facts that are already in issue.[96]

The interpretation of Rule 38 seems somewhat incongruent with the liberal interpretations given to the Federal Rules of

87. *See* Annotation, *supra* note 72. *But see* Curry v. Pyramid Life Ins. Co., 271 F.2d 1 (8th Cir. 1959). The *Curry* court, however, has been criticized for erroneously applying Rule 38. 9 C. WRIGHT & A. MILLER, *supra* note 72, § 2320.

88. 505 F.2d at 1050.

89. *See* sources cited *supra* note 72.

90. *See, e.g.*, Britt v. Knight Publishing, 42 F.R.D. 593 (D.S.C. 1967); *cf.* Mulkin v. Dukinsky, 14 F.R.D. 38 (S.D.N.Y. 1953) (court ruled that under FED. R. CIV. P. 6(b) it had the power to relieve plaintiff of the failure to serve a timely demand where plaintiff was confused about the last pleading directed to such issue due to a stipulation in an amended pleading).

91. *E.g.*, Lunza v. Drexel Co., 271 F. Supp. 684 (S.D.N.Y. 1967).

92. *See* cases cited *supra* note 72.

93. 291 S.C. at 503, 354 S.E.2d at 403.

94. 505 F.2d at 1050.

95. *Id. But see* Cataldo v. E.I. DuPont de Nemours & Co., 253 F. Supp. 235 (S.D.N.Y. 1966) (allowing a jury trial in an issue raised in an amended complaint that amounted to a new theory of recovery and did not raise new factual issues).

96. Under the Federal Rules of Civil Procedure, pleadings are to be liberally construed. Hence, most issues are framed by the original pleadings. *See Trixler*, 505 F.2d at 1050.

Civil Procedure in general.[97] The strict construction of Rule 38, however, is deliberate on the part of the courts to foster the goals of judicial economy in the hopes of reducing the size of the already overcrowded jury dockets.[98] Through a strict construction, courts are attempting to limit, but not deny, access to jury trials. Additionally, courts' disregard of noncompliance with Rule 38 would delay disposition of cases by creating confusion in trial dockets, would prejudice opposing parties by injecting an element of uncertainty into trial strategy and preparation,[99] and would defeat the purpose of securing "just, speedy, and inexpensive determination"[100] of every suit.[101]

The *King* decision is a warning from the South Carolina courts that a timely demand must be made after the original responsive denial to an issue or the right to a jury trial is waived.[102] The right to demand a jury trial is not revived by amended or supplemental pleadings unless the pleadings raise new factual issues. Even then, this right extends only to the new issue. The strict construction of Rule 38, which denies access to jury trials to those who even inadvertently fail to make a timely demand,[103] limits the number of cases on the jury docket. As long as overcrowding on the jury docket exists, the courts un-

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97. Examples of this are FED. R. CIV. P. 8 (pleadings) and FED. R. CIV. P. 15 (amendment).

98. For a discussion of the inefficient jury system and a possible solution, see Kasunie, *One Day/One Trial: A Major Improvement in the Jury System*, 67 JUDICATURE 78 (Aug. 1983).

99. Shorter knew the case was on the nonjury docket on September 27, 1985, and was given notice on November 25, 1985, of the sounding of the nonjury roster to be held on December 2, 1985. Even so, Shorter waited until December 3, 1985, to formerly demand a jury trial. King filed his complaint on May 17, 1985. Brief of Appellant at 2, 3.

100. FED. R. CIV. P. 1.

101. *See* Bank Bldg. & Equip. Corp. v. Mack Local, 677, 87 F.R.D. 553 (E.D. Penn. 1980).

102. The court did not address this issue, but S.C.R. CIV. P. 39(b) provides relief from the strict interpretation of S.C.R. CIV. P. 38(b). Rule 39(b) provides the following: "[N]otwithstanding the failure of a party to demand a jury trial . . . the court in its discretion upon motion may order a trial by a jury on any or all issues."

103. *See, e.g.*, Bush v. Allstate Ins. Co., 425 F.2d 393 (5th Cir. 1970).

doubtedly will continue to construe Rule 38 in the same manner.

Alan M. Lipsitz

V. FOREIGN CORPORATION MAY COMMENCE ACTION UNDER SOUTH CAROLINA LAW PROVIDED IT QUALIFIES TO DO BUSINESS IN THE STATE PRIOR TO JUDGMENT

In *Cost of Wisconsin, Inc. v. Shaw*[104] the South Carolina Supreme Court addressed the novel issue of whether a foreign corporation may maintain an action in South Carolina by qualifying to conduct business in this state after commencement of the action but prior to a judgment. Section 33-23-140(B) of the South Carolina Code states that "[a] foreign corporation . . . shall not *maintain* any action, suit, or proceeding in this State *unless and until* such corporation shall have been authorized to do business in this State."[105] The court interpreted the word "maintain" in such a way as to allow an unqualified foreign corporation to commence an action under this statute as long as it becomes qualified to do business in the state prior to the judgment.[106]

Although not authorized to do business in this state under section 33-23-10[107] of the South Carolina Code, Cost of Wisconsin, Inc. (Cost), a foreign corporation, performed construction work in South Carolina for Theme Golf, Inc. (Theme Golf). When Theme Golf failed to pay, Cost filed a mechanic's lien and on December 17, 1984, filed an action to foreclose on this lien.[108] During the pendency of the action, Cost qualified to conduct business in South Carolina.[109]

Theme Golf moved to dismiss the action, asserting that Cost did not have standing to maintain a suit in South Carolina because section 33-23-140(B) requires a corporation to be authorized to do business in South Carolina prior to the filing of an action.[110] The court denied the motion, and the jury returned

104. 292 S.C. 435, 357 S.E.2d 20 (1987).
105. S.C. CODE ANN. §33-23-140(B) (Law. Co-op. 1987) (emphasis added).
106. 292 S.C. at 436, 357 S.E.2d at 20-21.
107. S.C. CODE ANN. §33-23-10 (Law. Co-op. 1987).
108. Brief of Respondent at 1.
109. *Id.* at 2.
110. *Id.* at 1.

a verdict against Theme Golf. Theme Golf appealed, contending that section 33-23-140(B)[111] requires a foreign corporation to be qualified before it can commence an action.

This is a case of first impression in South Carolina. The court held that the phrase "shall not maintain . . . unless and until" of section 33-23-140(B) allowed Cost to proceed with its suit in state court even though it was not authorized to do business in South Carolina at the time it filed the action. In so holding, the supreme court clearly has followed the majority rule.

A majority of the courts have held that although a statute provides that failure to comply with the terms of the statute prevents a delinquent corporation from prosecuting, maintaining, or defending a suit, compliance after the action has begun is sufficient to enable the corporation to maintain or continue the action.[112] Courts of other jurisdictions interpret the words "maintain" and "prosecute," as used in statutes similar to South Carolina's section 33-23-140(B),[113] as being different in meaning from the words "institute," "commence," or "begin."[114] These courts reason that an action must be commenced before it can be maintained.[115]

Almost all jurisdictions that have addressed this issue have held that a foreign corporation's failure to qualify to do business in the state does not preclude the corporation from maintaining an action, provided that the corporation qualifies to do business prior to entry of judgment.[116] A few courts, however, basing their opinions on the ground that a restriction against maintaining an

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111. S.C. CODE ANN. §33-23-140(B) (Law. Co-op. 1987).

112. Annotation, *Compliance After Commencement of Action as Affecting Application of Statute Denying Access to Courts or Invalidating Contracts Where Corporation Fails to Comply With Regulatory Statute*, 6 A.L.R.3D 326, 329 (1966).

113. S.C. CODE ANN. §33-23-140(B) (Law. Co-op. 1987).

114. Annotation, *supra* note 112, at 329.

115. *Id.* at 330.

116. *See* Empire Excavating Co. v. Maret Dev. Corp., 370 F. Supp. 824 (W.D. Pa. 1974); Vornado, Inc. v. Corning Glass Works, 255 F. Supp. 216 (D.N.J. 1966), *aff'd*, 388 F.2d 117 (3rd Cir. 1968); Capin v. S & H Packing Co., 130 Ariz. 441, 636 P.2d 1223 (Ct. App. 1981); York & York Constr. Co. v. Alexander, 296 A.2d 710 (D.C. Ct. App. 1972); Inn Operations, Inc. v. River Hills Motor Inn. Co., 261 Iowa 72, 152 N.W.2d 808 (1967); Menley & James Laboratories, Ltd. v. Vornado, Inc., 90 N.J. Super. 404, 217 A.2d 889 (1966); E. R. Moore Co. v. Ochiltree, 16 Ohio Misc. 45, 239 N.E.2d 242 (1968); Tiffany Agency of Modeling, Inc. v. Butler, 110 R.I. 568, 295 A.2d 47 (1972); Troyan v. Snelling & Snelling, Inc., 524 S.W.2d 432 (Tex. Civ. App. 1975); Video Eng'g Co. v. Foto-Video Elecs., Inc., 207 Va. 1027, 154 S.E.2d 7 (1967).

action implies a restraint against beginning it, have held that compliance after commencement of the action is insufficient.[117]

The South Carolina Supreme Court has adopted the prevailing majority view. Allowing a foreign corporation to become qualified after commencement of the action is an equitable and fair interpretation of the South Carolina statute.

Julian Hennig, III

VI. DISTRICT COURT RETAINS JURISDICTION OVER THE AWARDING OF ATTORNEY'S FEES AFTER FILING NOTICE OF APPEAL

In *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*[118] the Fourth Circuit Court of Appeals held that even after a notice of appeal has been filed, the district court retains jurisdiction to determine the propriety and amount of an award of attorney's fees. This decision is consistent with the view embraced by the majority of the other judicial circuits.[119]

The dispute arose when Langham-Hill Petroleum, Inc. (Langham-Hill), citing Southern Fuel Co.'s (Southern) failure to perform its obligations under a fixed-price contract for the purchase of oil, sued for breach of contract. Earlier, Southern had informed Langham-Hill that due to recent repercussions of aberrant actions by Saudi Arabia in the world oil market, it would seek to avoid its obligations by invoking the *force majuere* clause of the parties' contract. On April 18, 1986, the United States District Court for the District of Maryland granted Langham-Hill's motion for summary judgment. On May 5, 1986, Southern timely filed a notice of appeal. The next day, Langham-Hill petitioned the district court to award attorney's fees and costs against Southern under Rule 11 of the Federal

117. *See* E. C. Vogt, Inc. v. Ganley Bros. Co., 185 Minn. 442, 242 N.W. 338 (1932); Parker v. Lin-Co Producing Co., 197 So. 2d 228 (Miss. 1967); Parke, Davis & Co. v. Mullett, 245 Mo. 168, 149 S.W. 461 (1912); Annotation, *supra* note 112, at 338.

118. 813 F.2d 1327 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 99 (1987).

119. *See, e.g.*, Garcia v. Burlington N. R.R., 818 F.2d 713 (10th Cir. 1987); Thomas v. Capital Sec. Servs., 812 F.2d 984 (5th Cir. 1987); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 274 (1986); Masalosalo *ex rel.* Masalosalo v. Stonewall Ins. Co., 718 F.2d 955 (9th Cir. 1983). *See also* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3915 (1976 & Supp. 1987).

Rules of Civil Procedure (Rule 11).[120] After the district court granted Langham-Hill attorney's fees, Southern appealed, and both rulings were consolidated into one appeal.[121]

On appeal Southern argued that once it had filed its notice of appeal from the summary judgment, the district court no longer retained jurisdiction over the issue of attorney's fees. In holding that the district court had proper jurisdiction to determine attorney's fees, the court of appeals overruled its prior reasoning in *Wright v. Jackson*.[122] In *Wright* the court held that the district court is divested of jurisdiction over attorney's fees after notice of appeal has been filed if the "measure of a party's obstinancy depends on the merits of the case."[123] Arguably, *Wright* allowed the district court to retain jurisdiction over attorney's fees when that determination was divorced from the merits. The court pointed out that since *Wright*, the United States Supreme Court tangentially had decided the same issue in *White v. New Hampshire Department of Employment Security*.[124] In *White*, the Court held that motions for attorney's fees are not motions to amend judgment and, thus, are not subject to the ten-day limitation of Rule 59(e) of the Federal Rules of Civil Procedure.[125] The Court emphasized that "the district court . . . can avoid piecemeal appeals by promptly hearing and deciding claims to attorney's fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits."[126] This statement, as the *Langham* court and a legion of the other circuits correctly perceived,[127] necessarily assumes that after notice of appeal has been filed, the district court retains jurisdiction over the disposition of attorney's fees.

Conceptually, the *Langham* court concurred with the con-

120. When an attorney signs a pleading, motion, or other paper, he certifies that the action is well founded in fact and law. FED. R. CIV. P. 11. Rule 11 provides that appropriate sanctions, including the opposition's expenses and attorney's fees, may be imposed upon an attorney who violates Rule 11.

121. 813 F.2d at 1329.

122. 522 F.2d 955 (4th Cir. 1975).

123. *Id.* at 958.

124. 455 U.S. 445 (1982).

125. FED. R. CIV. P. 59(e) provides: "A motion to attack or amend a judgment shall be served not later than 10 days after entry of the judgment."

126. 455 U.S. at 454.

127. *See* cases cited *supra* note 119.

clusions in *White* that the issues involved in deciding attorney's fees are "collateral to the main cause of action"[128] and, thus, distinct from any discussion of the merits of the case. Moreover, awards of attorney's fees "are not compensation for the injury giving rise to an action"[129] and, therefore, are not an element of "relief."[130]

Interestingly, *White* involved the award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976,[131] a statute that provides "fees only to a 'prevailing party.' "[132] This statutory standard obviates consideration of the merits, for as the *White* Court pointed out, "[r]egardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.' "[133] On a pragmatic level, the *Langham* court endorsed the fears expressed in *White* that if the district court's jurisdiction of attorney's fees were dependent on the jurisdiction of the merits, "litigants would request attorney's fees in every motion they argued out of fear that the motion would become the final judgment of the case thus precluding later requests."[134]

While granting the district courts this residual jurisdiction, the court offered guidelines to ensure timely disposition of the attorney's fees issue. The court was confident that, in their discretion, trial judges would deny fees when "a post-judgement [sic] motion unfairly surprises or prejudices the affected party."[135] Finally, the court encouraged prompt ruling on fee awards at the lower level and consolidation of appeals from fee awards and appeals from final judgments on the merits.[136]

The decision's logic depends on an underlying determination of when a judgment is final. As the Fourth Circuit previ-

128. 455 U.S. at 451.
129. *Id.* at 452.
130. *Id.*
131. 42 U.S.C. § 1988 (1982).
132. 455 U.S. at 451.
133. *Id.* at 451-52.
134. 813 F.2d at 1331.
135. *Id.*
136. *Id.*

ously noted in *Bernstein ex rel. Bernstein v. Menard*,[137] *White* indicated that an undecided determination of attorney's fees did not affect a judgment's finality.[138] Finality established, the next step was whether, after a final judgment was appealed, the district court retained jurisdiction to award attorney's fees and costs. The *Wright* approach was that the district court retained postappeal jurisdiction of attorney's fees only when its determination did not depend on the merits of the case. When consideration of attorney's fees necessarily involved concomitant evaluation of the merits, the district court must rule on them "while the merits are before it."[139] The chief value of following *White*, as *Langham* did, is the procedural certainty it provides with a clear-cut rule.[140] A *Wright*-type rule would involve time-consuming forays into the fine points of the nexus between the merits of each case and the award of attorney's fees.[141]

Yet, there are serious problems accompanying the fashioning of a uniform rule: courts create clarity by discarding certain cloths of efficiency and fairness. In most cases, determination of attorney's fees necessarily involves a determination of the merits. Indeed, the calculus for computing statutory fees commonly includes consideration of the merits.[142] This is especially true in a Rule 11 request, the precise situation in *Langham*. A Rule 11 sanction is proper when a party asserts claims that are "neither supported by fact nor warranted by existing law,"[143] *viz.*, the merits. If, for example, the appeal from the merits and the appeal from the attorney's fees award are not consolidated at the appellate stage, "there may be . . . unnecessary duplication at the appeals level."[144] In reality, however, duplication may exist

137. 728 F.2d 252 (4th Cir. 1984).

138. *Id.* at 253.

139. 522 F.2d 955, 958 (4th Cir. 1975). The court stated that this fee assessment must be made either prior to appeal or on remand after the merits have been settled. *Id.*

140. 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 119, § 3915.

141. *Id.* at 322 (uniform rule on finality would "forestall the need to engage in substantial litigation to distinguish cases in which attorney's fees are collateral from those in which they are not"); *see also* International Ass'n of Bridge Structural, Ornamental, & Reinforcing Ironworkers' Local Union 75 v. Madison Indus., 733 F.2d 656 (9th Cir. 1984).

142. Such variables include the complexity of the legal questions involved in the merits and the skill thereby required. *See, e.g.*, Johnson v. Georgia Highway Express, Inc. 488 F.2d 714 (5th Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973).

143. *Langham*, 813 F.2d at 1330.

144. 5 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 119, at 314.

even when there is consolidation, given the chronologically unique nature of each determination.

Another scenario of inefficiency could have occurred under the facts of the *Langham* case itself. The court of appeals conceivably could decide a first appeal from summary judgment at the same time the district court was considering the merits of the case in the context of an award of attorney's fees. If the court of appeals reversed, chaos and waste would ensue from the fact that two courts simultaneously reached opposite results.[145]

Finally, the court ignores one fairness consideration in *Langham*. If the judgment is final and appealable, although the propriety and amount of an attorney's fees award has not been addressed, the losing party is put in a position of "uncertainty and consequent unfairness . . . when she must decide whether to appeal without complete knowledge of the scope of liability."[146]

The court in *Langham* states a uniform rule which provides that although a judgment is final and appealable despite the nondisposition of attorney's fees, the district court retains jurisdiction to hear and rule on the fee issue. The decision satisfies the unstated policy of certainty in judgments.[147] By establishing this baseline rule, however, the *Langham* court overlooks the vital dependency that many fee awards have on the merits of each case, a reality implicit in the *Wright* approach.[148] Nevertheless, given the tremendous influx of statutory provisions for attorney's fees,[149] the decision is helpful to the practitioner.

David Garrison Hill

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145. This reality is adumbrated in Masalosalo *ex rel.* Masalosalo v. Stonewall Ins. Co., 718 F.2d 955 (9th Cir. 1983) (Choy, J., dissenting).

146. Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 243 (1984).

147. *See generally* Green, *supra* note 146 (arguing that the better rule is that judgment is not final until resolution of fee issues, yet acknowledging the need for a uniform rule).

148. *E.g.*, Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 293 (7th Cir. 1985) (distinctions between nature of fee awards "altogether too metaphysical").

149. Over one hundred federal statutes provide for the recovery of attorney's fees. *See* Green, *supra* note 146, at 217-18 (quoting 6 FED. ATTORNEY FEE AWARDS REP., No. 5, at 2-3 (Aug. 1983)).

VII. THE RIGHT TO TRIAL BY JURY EXPANDED IN SOUTH CAROLINA

Adoption of the South Carolina Rules of Civil Procedure in 1985 did not directly affect the right to a jury trial; however, adoption of the compulsory counterclaim rule, a procedural change, had an impact on that right.[150] A recent line of supreme court cases has addressed the resulting uncertainties.

Prior to 1985 the plaintiff, by his choice of a legal or equitable cause of action,[151] exercised much control over the mode of trial. In cases in which the plaintiff asserted both legal and equitable claims, a jury trial was unlikely. The courts either determined that the primary cause of action was an equitable one or had the discretion to try the equitable claim first. In either case, the equitable "clean up" doctrine could be used to try the entire case without a jury.[152]

Although a defendant could file a motion forcing election of remedies, the choice of which to pursue was the plaintiff's.[153] In addition, the defendant's introduction of a legal counterclaim did not affect the parties' right to a jury trial; in fact, he waived his right to a jury trial merely by asserting a counterclaim.[154]

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150. S.C.R. CIV. P. 13. (S.C.R. CIV. P. 38 merely preserved the right. Prior to the adoption of the new rules of civil procedure, the right to a jury trial was preserved by S.C. CODE ANN. §15-23-60 (Law. Co-op. 1976) (repealed 1985).

151. H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 10, 189 (1985).

152. *Id.* at 189.

153. Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987); Landvest Assocs. v. Owens, 276 S.C. 22, 274 S.E.2d 433 (1981); Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967). The applicability of this rule under the new rules of civil procedure was recently affirmed by the court of appeals in Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). Under the new procedural rules, a plaintiff may plead inconsistent claims. Previously, state law focused primarily on inconsistencies in causes of action as requiring an election. Because pleading inconsistent causes of action is no longer discouraged, the *Ethridge* court reasoned that the plaintiff should not be compelled to elect between causes of action at the pleading stage. *Id.* at 120, 348 S.E.2d at 379. A case could now go to the jury on all causes of action; however, in order to prevent double recovery, the plaintiff must elect a remedy before judgment is entered. *Id.* at 121, 348 S.E.2d at 379.

This modification, however, is not applicable when "the complaint joins legal and equitable causes of action requiring different modes of trial and involving substantially different remedies and proof of damages." *Id.* at 122, 348 S.E.2d at 380. In such situations, a traditional application of the doctrine is appropriate with the exception that the time of election is within the trial judge's discretion. *Id.* Thus, the doctrine may prevent a plaintiff from having his legal claims tried to a jury.

154. John D. Hollingsworth on Wheels, Inc. v. Arkon Corp., 273 S.C. 461, 257 S.E.2d

The Supreme Court of South Carolina has addressed the right to jury trial in light of the recent procedural changes. In *C&S Real Estate Services v. Massengale*[155] the court held that a defendant, in an equitable action, was entitled to a jury trial when he raised a legal, compulsory counterclaim. In *Johnson v. South Carolina National Bank*[156] the court addressed the plaintiff's right to a jury trial when he asserted an equitable claim and the defendant introduced a legal, compulsory counterclaim. As a result of the holdings in these two cases, when a defendant raises a legal, compulsory counterclaim, either party now is entitled to a jury trial.[157] Additionally, the court makes it clear in *Johnson* that when common issues of fact exist, the legal claim must be tried first.[158] This also represents a significant change. Previously, the trial judge could determine the dispositive claim first.[159] This was usually the equitable claim; collateral estoppel then generally precluded the necessity of a jury trial on the legal issue.

The implications of these decisions are uncertain. Interpreted broadly, these cases hint that the right to a jury trial may arise whenever legal claims are raised and that the legal claims are to be tried to the jury first. Thus, these cases suggest that a jury trial is more likely when the complaint raises both legal and equitable claims.

Massengale was the first case to address the effect of the compulsory counterclaim rule on the right to a jury trial.[160] The plaintiff sought to foreclose a mortgage; since the complaint was essentially an equitable one, no right to a jury trial arose.[161] The appellant, defendant in the original action, sought a jury trial on all of her counterclaims.[162] The trial court determined that one of the counterclaims was compulsory and that Massengale was entitled to jury trial on it.[163] The five remaining counterclaims,

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165 (1979). *See also* S.C. CODE ANN. § 15-15-30 (Law. Co-op. 1976) (repealed 1985).

155. 290 S.C. 299, 350 S.E.2d 191 (1986).

156. 292 S.C. 51, 354 S.E.2d 895 (1987).

157. *Id.* at 56, 354 S.E.2d at 897.

158. *Id.*

159. Miller v. British Am. Assurance Co., 238 S.C. 94, 119 S.E.2d 527 (1961).

160. 299 S.C. at 302, 350 S.E.2d at 193.

161. *Id.* at 300, 350 S.E.2d at 192.

162. *Id.*

163. *Id.* at 301, 350 S.E.2d at 193.

however, were either permissive or equitable, and the defendant was not entitled to a jury trial with respect to them.[164]

In the absence of a compulsory counterclaim requirement, the courts presumed that the defendant waived his right to a jury trial by electing to bring a legal counterclaim.[165] Under the new rules, a defendant is required to plead as a counterclaim any claim arising out of the same transaction as the original claim.[166] Since the compulsory assertion of a legal counterclaim cannot be viewed as a waiver of a constitutional right, the rationale for the prior case law no longer holds. The supreme court resolved this anomaly by holding that a defendant will now be entitled to a jury trial when he raises a legal, compulsory counterclaim.[167]

Cognizant of the questions raised by the adoption of Rule 13, the court, in dicta, outlined the following procedure for determining when a party will be entitled to a jury trial:

> (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
> (2) If both are at law, the issues are triable by a jury.
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
> (4) *If the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim.* In that case, the proper procedure is as follows:
>
> (a) The trial judge should, pursuant to Rule 42(b), order separate trials of legal and equitable claims.
>
> (b) The judge must then determine which issues are

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164. *Id.*

165. John D. Hollingsworth on Wheels, Inc. v. Arkon Corp., 273 S.C. at 463, 257 S.E.2d at 166 (1979).

166. S.C.R.Civ. P. 13(a) provides:

> Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction . . . .

Id.

167. 290 S.C. at 301, 350 S.E.2d at 193. *Cf.* North Carolina Fed. Sav. & Loan Ass'n v. DAV Corp., 294 S.C. 27, 362 S.E.2d 308 (Ct. App. 1987). Subsequent to *C&S* and *Johnson*, the court of appeals restricted the right to a jury trial by narrowly defining compulsory counterclaim. Thus, in *DAV Corp.* the court denied the defendant's demand for a jury trial because the court considered his counterclaim permissive.

to be tried first.

(c) If there are factual issues common to both claims, absent the "most imperative circumstances," . . . the "at law" claim must be tried first. The clerk of court shall immediately place the "at law" action at the top of the trial roster.

(d) If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.[168]

Five months after its decision in *Massengale*, the court again addressed issues relating to the effect of Rule 13(a). In *Johnson*[169] the court held that either party could demand a jury trial when the defendant raised a legal and compulsory counterclaim. Furthermore, the court reaffirmed its position that legal issues must be tried first when there are issues common to both the legal and equitable claims.[170]

Johnson involved a suit against a bank for rescission of a guaranty agreement. The plaintiffs originally sought an equitable remedy, as well as money damages for outrage, invasion of legal right, and breach of fiduciary duty.[171] The defendant forced the plaintiffs to elect between the legal and equitable remedies.[172] In his order forcing election, the trial judge stated that if it is the plaintiffs' choice to proceed on the equitable cause of action, "the other causes of action for outrageous conduct and fiduciary duty may be maintained in the same complaint."[173] The plaintiffs elected to proceed on the theory of rescission, and the defendant moved for an order transferring the case to the nonjury roster.[174] Thereafter, the plaintiffs appealed the judge's

168. 290 S.C. at 301-02, 350 S.E.2d at 193 (quoting Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959)) (citation omitted) (emphasis added).

169. 292 S.C. 51, 354 S.E.2d 895 (1987).

170. *Id.* at 55, 354 S.E.2d at 897.

171. *Id.* at 52, 354 S.E.2d at 898.

172. Johnson v. South Carolina Nat'l Bank, 285 S.C. 80, 328 S.E.2d 75 (1985), *rev'd*, 292 S.C. 51, 354 S.E.2d 895 (1987).

173. 285 S.C. at 81, 328 S.E.2d at 76. The trial judge apparently forced the plaintiff to elect between legal and equitable remedies in accordance with the doctrine of election of remedies. Once the plaintiff chose to pursue an equitable remedy, the judge allowed her to maintain the legal issues in the same complaint. Plaintiff would have forfeited her right to a jury trial on the legal issues, and the trial judge would have decided those issues as incident to the equitable claim.

174. *Id.* at 81, 328 S.E.2d at 76.

order granting that motion.[175]

The court then considered the issue of whether plaintiffs were entitled to a jury trial and held that because the main purpose of the complaint was equitable, the plaintiffs were not.[176] On remand the plaintiffs refiled their complaint, and the defendant then filed a compulsory counterclaim at law for damages under the guaranty agreement.[177] The plaintiff, in turn, demanded a jury trial on the counterclaim, but the circuit court struck the plaintiff's motion.[178] On appeal, the court held that (1) when a counterclaim is compulsory and legal, either party is entitled to a jury trial and (2) when there are factual issues common to both the equitable and legal claims, the "legal issues are to be determined first, and then the findings of the jury are binding on the sitting judge, as trier of the equitable claims."[179]

It is important to note that the plaintiffs-counter defendants originally chose to pursue an equitable remedy.[180] The court could have accepted the argument that the plaintiffs had already waived their right to a jury trial by electing an equitable remedy.[181] Instead, the court held that the plaintiff was entitled to a jury trial on the compulsory, legal counterclaim generated by the equitable claim.[182]

The logical question that follows *Massengale* and *Johnson* is whether the next extension of this analysis allows different modes of trial when legal and equitable claims are joined by the plaintiff. A broad interpretation of *Johnson* indicates such rights may exist.

Presently in South Carolina, a plaintiff is not necessarily entitled to a jury trial when both legal and equitable claims are included in the complaint. Two methods are currently available for dealing with this situation: (1) an equitable clean-up and (2) the election of remedies. Each of these methods results in a very conservative view of the right to trial by jury.

Arguably, a third alternative now exists: whenever there are

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175. *Id.* at 82, 328 S.E.2d at 77.
176. *Id.*
177. 292 S.C. at 52-53, 354 S.E.2d at 896.
178. *Id.* at 55, 354 S.E.2d at 897.
179. *Id.*
180. *Id.* at 52, 354 S.E.2d at 895.
181. *Id.* at 54, 354 S.E.2d at 896.
182. *Id.* at 53, 354 S.E.2d at 896.

legal and equitable issues in a single proceeding, whether in the complaint or a compulsory counterclaim, both parties are entitled to a trial by jury of the legal issues. The supreme court's decision in *Johnson* to allow either plaintiff or defendant the right to a jury trial on a legal, compulsory counterclaim leads to the conclusion that this right must exist whenever a legal claim is raised by necessity. Whether the court intends to apply *Johnson* this broadly is uncertain.

There are persuasive reasons for extending the right to a jury trial in South Carolina. Underlying policy reasons include encouraging the joinder and resolution of all claims in one action, a stated purpose of the new rules.[183] Additionally, litigants will have greater procedural flexibility. Just as the defendant is forced to bring a compulsory counterclaim in order to promote judicial efficiency, a plaintiff also is under pressure to assert all possible related claims. The fortuitous existence of a compulsory, legal counterclaim should not dictate whether or not the right to trial by jury exists.

The development of the right to a jury trial in the federal system is interesting for purposes of analysis, particularly in view of the fact that South Carolina's new rules are modeled on the Federal Rules of Civil Procedure.[184] The federal courts once adhered to a view of the right to a jury trial similar to that previously held by South Carolina courts; procedural changes incorporated in the Federal Rules and the merger of law and equity, however, prompted changes.[185] First, in *Beacon Theaters v. Westover*,[186] the United States Supreme Court held that the joinder of legal and equitable claims in the same action cannot

183. H. LIGHTSEY & J. FLANAGAN, *supra* note 151, at 190 (1985).

184. *Id.* at 4. In Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978), the state supreme court held that the right to a jury trial did not arise in a shareholder's derivative action that raised legal claims. Since the action historically was conceived of as an equitable one, the state constitution does not require the right to trial by jury. In the federal system, on the other hand, the Supreme Court held in Ross v. Bernhard, 396 U.S. 531 (1970), that the right to a jury trial did arise in shareholder's derivative action raising legal claims. The South Carolina Supreme Court held in *Pelfrey* that *Ross* was not binding on state courts since the seventh amendment to the United States Constitution, which concerns the right to a jury trial, had never been made binding on state courts.

185. *See* J. MOORE, MOORE'S FEDERAL PRACTICE AND PROCEDURE ¶ 38.16 (1987); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302 (1971).

186. 359 U.S. 500 (1959).

deprive a party of his right to a jury trial.[187] Thus, when legal and equitable issues are included in a single action, neither trying the issues of fact as incidental to the equitable issues nor trying the common issues to the court first, may operate to infringe upon the right to a jury trial.[188]

In *Dairy Queen v. Wood*[189] the United States Supreme Court held that when a complaint raises both legal and equitable claims, the right arises with respect to the legal claims. Additionally, the Court reiterated its position that when common issues of fact exist, the legal claims must be tried first.[190]

The South Carolina Supreme Court has expanded the right to a jury trial. An underlying reason for this expansion is the erosion of the doctrine of waiver. Because South Carolina's new compulsory counterclaim rule may force a defendant to bring a legal counterclaim,[191] a defendant cannot be considered to have waived his constitutional right to a jury trial. Moreover, rejecting the argument that a plaintiff waives his right to a jury when he raises only equitable issues in his complaint, the court held that the plaintiff has the right to a jury trial when the defendant brings a legal, compulsory counterclaim.[192] In either case, the right should not be infringed upon by the doctrine of preclusion.[193]

A logical extension of this reasoning may result in a right to trial by jury whenever a legal claim exists by necessity. Thus, when the complaint raises both legal and equitable claims, a right to trial by jury may arise.

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187. *Id. See* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

188. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959). *See also Ross*, 396 U.S. at 537-38; *Dairy Queen*, 369 U.S. at 473.

189. 369 U.S. 469 (1962). *See also Ross*, 396 U.S. 531 (extending the right to shareholder's derivative action raising both legal and equitable claims in the complaint).

190. 369 U.S. at 479.

191. 290 S.C. at 301, 350 S.E.2d at 193.

192. 292 S.C. at 54, 354 S.E.2d at 896.

193. *Id.* at 55, 354 S.E.2d at 897.

VIII. THE SIGNIFICANCE OF PRIOR CASE DETERMINATION IN COMBINED LEGAL AND EQUITABLE CLAIMS — DIVERGENCE IN THE FOURTH CIRCUIT

In an apparent shift away from established principles,[194] the Fourth Circuit determined that the doctrine of collateral estoppel need not involve a prior suit but can be applied using a decision from a second cause of action decided in that same suit.

Ritter v. Mount St. Mary's College[195] establishes the proposition that collateral estoppel precludes litigation of factual issues before a jury that were determined at a bench trial in a federal district court, even though the plaintiff's initial loss of the opportunity to litigate those issues before a jury resulted from judicial error. This decision by the Fourth Circuit is diametrically opposed to a Seventh Circuit ruling made only two weeks later in *Hussein v. Oshkosh Motor Truck Co.*[196] The Seventh Circuit refused to invoke collateral estoppel in a case strikingly similar to *Ritter*.

Both *Ritter* and *Hussein* involved combined legal and equitable claims for which the plaintiffs sought redress. In both cases the court dismissed the legal claims, and a judge, sitting as factfinder, decided the equitable claims. The court of appeals reversed, respectively, the dismissals of the legal claims, and Ritter and Hussein sought rehearing by a jury. The Fourth Circuit denied Ritter a jury trial based on collateral estoppel.[197] The Seventh Circuit determined, however, that collateral estoppel did not apply and remanded Hussein's suit for a retrial by a jury.[198]

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194. *See, e.g.*, 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶¶ 0.441-0.448 (2d ed. 1988 & 1987-88 Supp.). See also J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 14.9 658 (1985), which states

> [T]he law of collateral estoppel is ground in notions that the finality of judgments must be preserved and that judicial economy demands that cases not be retried continually. . . . Thus, issue preclusion operates to simply dispute resolution by considering the original court's determination on specific issues to be binding; any subsequent litigation between the parties, even on different claims, will be limited to only those issues being presented for the first time.

Id. at 658 (footnotes omitted).

195. 814 F.2d 986 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 260 (1987).

196. 816 F.2d 348 (7th Cir. 1987).

197. 814 F.2d at 988.

198. 816 F.2d at 350.

Mrs. Ritter alleged sex and age discrimination against her employer, Mount St. Mary's College, under Title VII of the Civil Rights Act of 1964 (Title VII),[199] the Equal Pay Act of 1964 (EPA),[200] and the Age Discrimination in Employment Act (ADEA).[201] Both the EPA claim and the ADEA claim would have allowed a jury trial on the issues. The district court, however, dismissed these legal claims and conducted a bench trial on the equitable claim under Title VII. The court decided in favor of the college; Ritter appealed. On appeal the Fourth Circuit Court of Appeals set aside the dismissal of Ritter's EPA and ADEA claims as erroneous and remanded them for further consideration, while upholding the Title VII determination. In examining the issues presented on remand, the lower court determined that the claims of discrimination in the EPA claim and ADEA claim were substantially decided in the Title VII claim. Using the basis of collateral estoppel as its determinant, the court granted summary judgment on both claims despite Ritter's request to vacate the Title VII judgment and rehear the case before a jury. She contended that since judicial error caused the denial of a jury trial, her claim now should properly be presented before a jury. On subsequent appeal, the court disagreed and stated:

> The appellant also argues that, because collateral estoppel is "collateral," it should only serve to preclude the relitigation of issues determined in a *prior* suit, and because the issue presented in this case involves the use of estoppel within the same suit, the doctrine of collateral estoppel should not apply.
>
> It is indeed true that the doctrine of collateral estoppel was designed to bar the relitigation of issues determined in a prior suit. The "prior suit" notion merely reflects, however, the usual circumstance under which the issue of whether to apply collateral estoppel arises. The prior suit "requirement" protects no interests that are relevant to this suit.[202]

The Seventh Circuit distinctly disagreed with this idea. In *Hussein*, the plaintiff alleged racial discrimination against his employer, Oshkosh Motor Truck Co., and sought relief under Ti-

199. 42 U.S.C. § 2000e (1982).
200. 29 U.S.C. § 206(d) (1982).
201. *Id.* §§ 621-34.
202. 814 F.2d at 991-92 (emphasis in original).

tle VII of the Civil Rights Act of 1964,[203] and section 1981 of the Civil Rights Act of 1866.[204] In a bench trial, the lower court dismissed his legal claim under section 1981 and decided against him on his Title VII claim. The court of appeals upheld the Title VII decision, reversed the dismissal of the section 1981 claim, and remanded the case for determination by a jury by stating:

> We cannot sanction an application of collateral estoppel which would permit findings made by a court in an equitable proceeding to bar further litigation of a legal issue that had been properly joined with the equitable issue when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim.[205]

The Seventh Circuit's well-reasoned opinion stands in stark contrast to the opinion set forth by the Fourth Circuit.

Courts recognize and accept the concept of collateral estoppel as a means of preserving final judgments while contributing to judicial economy.[206] Its use arises in cases that involve issues which have been previously decided and ended in a valid and final judgment when that determination is essential to the judgment.[207] By allowing a prior decision to stand in a subsequent action, the court spends less of its time relitigating matters already determined.

The United States Supreme Court has dealt with the concept of collateral estoppel on many occasions.[208] The recent case

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203. 42 U.S.C. § 2000e.

204. *Id.* § 1981.

205. 816 F.2d at 356-57.

206. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 194, at 658.

207. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

208. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (offensive use of collateral estoppel); Brown v. Felsen, 442 U.S. 127 (1979) (Court stated in dicta that although res judicata was inapplicable, collateral estoppel might be appropriate in bankruptcy proceeding that followed a state court collection decision); Montana v. United States, 440 U.S. 147 (1979) (United States is collaterally estopped from challenging prior judgment of Montana Supreme Court); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971) (recognized concepts of judicial economy and protection from relitigation of identical issue settled in a prior suit); Dairy Queen v. Wood, 369 U.S. 469 (1962) (when right to jury trial may be collaterally estopped, court should, when possible, examine legal issues prior to equitable claims); Commissioner v. Sunnen, 333 U.S. 591 (1948) (Court created narrowly-focused standard in applying collateral

of *Parklane Hosiery Co. v. Shore*[209] discussed the offensive use of collateral estoppel. In that case the Court determined that a prior decision in a nonjury trial could be the basis for collateral estoppel of a later suit involving the same issues even though the second suit would have allowed the issues to be decided by a jury. The Court grappled with the apparent denial of the appellant's seventh amendment right to a jury trial. Its decision, however, "foreclose[d] the petitioners from relitigating the factual issues determined against them in the [prior] action, [and] nothing in the Seventh Amendment dictates a different result."[210]

In *Montana v. United States* the Court stated that

> [a] fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies."[211]

Collateral estoppel has been applied in many South Carolina decisions. The court of appeals defined collateral estoppel in *Patterson v. Goldsmith* as "preclud[ing] a party and his privy from relitigating an issue which was outcome determinative in previous litigation."[212] The South Carolina Supreme Court in *Cannon v. Cannon*[213] acknowledged the expense of relitigation and recognized the legislative intent to use collateral estoppel in certain instances as an answer to that expense.[214]

Other courts also have joined in the use of collateral estoppel to promote judicial economy.[215] For example, the Ninth Circuit in *Wood v. Santa Barbara Chamber of Commerce,* stated that "[t]he doctrines of collateral estoppel and res judicata ordi-

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estoppel).

209. 439 U.S. 322 (1979).

210. *Id.* at 337.

211. 440 U.S. 147, 153 (1979) (quoting Southern Pac. Ry. Co. v. United States, 168 U.S. 1, 48-49 (1897)).

212. 292 S.C. 619, 623-24, 358 S.E.2d 163, 166 (1987).

213. 278 S.C. 346, 349, 295 S.E.2d 875, 877 (1982).

214. *Id.* at 349, 295 S.E.2d at 877.

215. *See, e.g.*, Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984); Church of Scientology v. Linberg, 529 F. Supp. 945 (C.D. Cal. 1981); J. Aron & Co. v. Service Transp. Co., 515 F. Supp. 428 (D. Md. 1981).

narily provide adequate assurance that one court's resolution of a controversy will be respected by other courts."[216] The common thread tying all these decisions together is the concept of a "prior suit"[217] or a decision by "other courts."[218] In order to use a previous determination of issues to collaterally estop the relitigation of those issues, the judgment asserted must be valid and final.[219]

The *Hussein* court recognized the need for a valid and final judgment before collateral estoppel could prevent litigation of the plaintiff's legal claim.[220] The fact that the equitable claim on which the employer relied was part of the same case before the court indicated that the issue was not finally decided; the case was still open for appeal. For that reason, the court concluded that the issue could not fairly be used to deprive Hussein of a jury determination of his legal claims. Conversely, the *Ritter* court used its decision in the same case on the equitable claim to preclude determination of the plaintiff's legal claim by a jury, thereby depriving her of her seventh amendment right to jury trial.

The United States Supreme Court discussed the importance of preserving the right to a jury trial in *Beacon Theatres v. Westover*.[221] In *Beacon* a lower court, in trying the plaintiff's equitable claim, prevented a full jury trial of a legal counterclaim and crossclaim. The Supreme Court granted certiorari because " '[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury

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216. 705 F.2d 155, 1524 (9th Cir. 1983).

217. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) ("prior judgment"); *id.* at 331 ("the second action"); Beacon Theatres v. Westover, 359 U.S. 500, 504 (1959) ("subsequent trial"); United States v. Stauffer Chem. Co., 684 F.2d 1174, 1177 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1964) ("prior lawsuit"); J. Aron & Co. v. Service Transp. Co., 515 F. Supp. 428, 434 (D. Md. 1981) ("second suit"); Church of Scientology v. Linberg, 529 F. Supp. 945, 962 (C.D. Ca. 1981) ("prior decision"); Patterson v. Goldsmith, 292 S.C. 619, 623, 358 S.E.2d 163, 166 (1987) ("previous litigation"); Cannon v. Cannon, 278 S.C. 346, 349, 295 S.E.2d 875, 877 (1982) ("separate action"); Garret v. Snedigar, 293 S.C. 176, 186, 359 S.E.2d 283, 288 (Ct. App. 1987) ("former proceeding").

218. *See, e.g.*, 705 F.2d at 1524.

219. *See supra* note 207.

220. 816 F.2d at 356.

221. 359 U.S. 500, 503-04 (1959) (suit for declaratory judgment to settle key issues of a potential antitrust suit, counterclaim raised matters that allowed for treble damages and a jury trial).

trial should be scrutinized with the utmost care.' "[222] The Court acknowledged the trial court's discretion in deciding which claims, legal or equitable, should be tried first. The Court cautioned, however, that the discretion is very narrowly limited, since the "right to a jury trial is a constitutional one,"[223] and whenever possible, the court's discretion must "be exercised to preserve jury trial."[224]

In *Ritter* the plaintiff was denied a jury trial. The Fourth Circuit court trivialized her loss of a jury determination of her claim. Comparing Mrs. Ritter's claim to the claim set forth in *Parklane*, the court stated that "[t]he fact that the judge in this case was in error in dismissing the legal claims, whereas in *Parklane* the estoppel arose form a prior, separate suit, is irrelevant."[225] The difference between *Parklane* and *Ritter*, however, is in the presence or lack of a final, valid judgment. Mrs. Ritter's claim was still open for appeal; the prior suit referred to in *Parklane* was final in every sense of the word. The Seventh Circuit in *Hussein* recognized this distinction and refused to allow a judgment that was open for appeal to dictate the outcome of a separate claim that involved the same issues.

Allowing an appealable judgment on an equitable claim to preclude litigation of a legal claim before a jury could lead to inaccurate or defective decisions. In some cases, it will also lead to a result that frustrates judicial economy. For instance, what might happen if, in the interest of judicial economy, a second cause of action relied upon the decision of a first cause of action, which is later reversed? The judicial economy sought would be lost. Not only would the first cause of action need to be reheard, but the second claim would also need to be relitigated. The judge-made rule of collateral estoppel was created to eliminate such a problem by requiring that any prior decision relied upon be final.

The result set forth in *Ritter* is a difficult one to square with previous treatments of the doctrine of collateral estoppel. A clarification from the Fourth Circuit, or from a future Supreme Court analysis of the divergent opinions among the circuits, will

222. *Id.* at 501 (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).
223. *Id.* at 510.
224. *Id.*
225. 814 F.2d at 991.

be necessary before this decision can be accepted as reliable case law.

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IX. JUDGMENT CREDITORS DENIED INTEREST DURING PENDENCY OF APPEAL

Three recent South Carolina cases have dealt with the accrual of interest during the pendency of an appeal. Two South Carolina Supreme Court cases, *Sears v. Fowler*[226] and *Barth v. Barth*,[227] agree that a judgment creditor is not entitled to interest during pendency of an appeal when the verdict is later upheld.[228] A subsequent court of appeals decision, *Republic Textile Equipment Co. v. Aetna Insurance Co.*,[229] agreed with the supreme court's opinions, although the court of appeals referred to the controversy by a different name.

In *Sears* a judgment creditor appealed from a judgment in her favor, claiming that the judgment was inadequate. The court, however, reversed the lower court's award of interest during the pendency of the appeal. In *Barth* the family court awarded the plaintiff a sum that she considered inadequate. The court of appeals awarded her interest on the judgment during the pendency of her appeal. The supreme court reversed.

Republic Textile purported to deal with prejudgment interest. The term "prejudgment interest" as used by the South Carolina Court of Appeals in *Republic Textile* is a misnomer. In that case, a judgment had been rendered. The controversy lay in whether interest should accrue from the date of the initial judgment or from the date of the final outcome on appeal. In that respect, although the court of appeals called it by a different name, the subject is the same as in *Sears* and *Barth*.

The current South Carolina Code sets a legal rate of interest on judgments: "All money decrees and judgments of courts enrolled or entered shall draw interest according to law. The legal interest shall be at the rate of fourteen percent per annum."[230]

226. 293 S.C. 43, 358 S.E.2d 574 (1987).
227. 293 S.C. 305, 360 S.E.2d 309 (1987).
228. *See* 293 S.C. at 310, 360 S.E.2d at 311; 293 S.C. at 46, 358 S.E.2d at 575.
229. 293 S.C. 381, 360 S.E.2d 540 (Ct. App. 1987).
230. S.C. CODE ANN. § 34-31-20(B) (Law. Co-op. 1987).

Even though the statutory language implies mandatory application, "the statute does not automatically apply in every case."[231] For instance, the statute does not apply when parties contract for a different rate.[232] Additionally, the statute does not explicitly address "the question of interest continuing to run on a judgment during the pendency of appeal."[233] The court in *Barth* interpreted this to mean that "the General Assembly did not consider in this statute, the running of interest on an appeal by an unsuccessful judgment creditor."[234] The current statute, as interpreted by the supreme court, does not extend through the period when a judgment creditor appeals an insufficient judgment.

Although certainly not a unique situation, this particular problem has not been litigated extensively. Under former law in South Carolina, interest ran from the date of the first decree.[235] If the decree was appealed, the date from which interest ran remained the date of the first decree. Under the common law, "judgments did not bear interest."[236]

The United States Supreme Court faced this problem in *Bates v. Dresser*.[237] In that case interest was allowed from the date of the decree in the district court through the date that the judgment creditor appealed. The reason cited by the Court was that the judgment creditor's appeal interposed a delay.[238]

When the delay in receiving a judgment from a judgment debtor is caused by the judgment creditor's own actions, it is inconsistent with notions of fairness to reward that delay when, on appeal, the initial judgment is upheld. If, however, the delay is caused by the judgment debtor, the problem becomes very dif-

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231. 293 S.C. at 45, 358 S.E.2d at 575.

232. *Id.*

233. 293 S.C. at 309, 360 S.E.2d at 310.

234. *Id.* at 309, 360 S.E.2d at 311.

235. "In all money decrees and judgments of courts enrolled or entered; in all cases of accounts stated, in all cases where any sum or sums of money shall be ascertained, and being due, shall draw interest, the legal interest shall be at the rate of seven percent per annum." Brown v. Rogers, 76 S.C. 180, 181, 56 S.E. 680, 681 (1907) (quoting S.C. CODE OF CIV. P. § 1660 (1902)).

236. 293 S.C. at 45, 358 S.E.2d 575.

237. 251 U.S. 524 (1920) (bill in equity brought by the receiver of a national bank charging its former president and directors with loss of assets through theft by an employee).

238. *Id.* at 532.

ferent. No longer is it a question of the judgment creditor's delay. Denial of interest in that instance also would be unfair. When both judgment debtor and judgment creditor appeal, the problem is compounded.

Further discussion of the importance of the delay factor was set forth by the Missouri Court of Appeals in *State v. City of St. Louis*.[239] The court stressed that delay in finality of the judgment was caused by the judgment creditor's own act. Since the judgment creditor deliberately prolonged the proceeding, the court would not reward him for that delay with additional interest on the judgment.[240] The Supreme Court of Missouri in *Jesser v. Mayfair Hotel, Inc.*[241] reiterated that analysis and clarified it, stating that "[w]here a judgment creditor appeals on the grounds of inadequacy from a recovery in his favor, and the judgment is affirmed, he is not entitled to interest pending the appeal."[242]

Although there is a split of opinion among states addressing this issue,[243] the concern over delay seems to be the common rationale on which the majority of cases are based: "The reason most frequently given for the majority's position is that the purpose of postjudgment interest is to penalize nonpayment of a judgment by a judgment debtor."[244]

The South Carolina Supreme Court follows this majority approach.[245] In *Sears* only the judgment creditor appealed; in

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239. 234 Mo. App. 209, 115 S.W.2d 513 (1938).

240. *Id.* at 213, 115 S.W.2d at 515.

> But where it is the judgment creditor himself who is dissatisfied, and he appeals upon the ground of what he conceives to be the inadequacy of the judgment which was rendered in his favor, then if the judgment is affirmed he is held not to be entitled to interest on the judgment pending the disposition of the appeal, since it was by his own act that the proceeding was delayed and prolonged until such time as judicial sanction of the correctness of the judgment finally culminated in its affirmance by the appellate court.

Id.

241. 360 S.W.2d 652 (Mo. 1962).

242. *Id.* at 665.

243. 293 S.C. at 309, 360 S.E.2d at 311; 293 S.C. at 45, 358 S.E.2d at 575.

244. 293 S.C. at 45, 358 S.E.2d at 575.

245. *See id.* at 46, 358 S.E. at 575. "A judgment creditor who appeals based on the insufficiency of the verdict is not entitled to interest during the pendency of the appeal when the verdict is later upheld." *Id.* "[I]nterest does not accrue during appeal when the appeal is made by the judgment creditor on the basis of a claim of inadequacy and the finding is upheld." 293 S.C. at 310, 360 S.E.2d at 311.

Barth and *Republic Textile* both judgment debtor and judgment creditor appealed. These decisions appear to be a fair determination by the court to deal with a difficult problem.

Pamella A. Seay

X. SOUTH CAROLINA COURTS MAY ASSERT SUBJECT MATTER JURISDICTION OVER REHABILITATORS OF FOREIGN DELINQUENT INSURERS

In *Smalls v. Weed*[246] the South Carolina Court of Appeals faced the issue of whether the Insurers' Supervision, Rehabilitation, and Liquidation Act[247] deprived South Carolina courts of subject matter jurisdiction over rehabilitators of foreign delinquent insurers. Determining that South Carolina's version of the Uniform Insurers Liquidation Act[248] did not preclude the assertion of subject matter jurisdiction, the court upheld the trial court's order denying defendant Weed's motion to dismiss. The decision represents a straight-forward application of well-settled rules of statutory construction, and the result reflects the reluctance most courts display when asked to refrain from exercising jurisdiction.

In February 1983 Smalls procured an insurance policy from Cherokee Insurance Company, a Tennessee insurer, to insure a log skidder against, among other things, fire. Smalls' skidder subsequently was destroyed by fire. On July 17, 1984, nearly three months after Smalls' loss, a Tennessee court entered an order placing Cherokee in rehabilitation. Three days later

246. 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987) (per curiam).

247. S.C. CODE ANN. §§ 38-5-1810 to -2500 (Law. Co-op. 1976). In an attempt to better organize the statutory provisions dealing with insurance matters, the South Carolina General Assembly recodified Title 38 effective January 1, 1988. *See* 1987 S.C. Acts 155. The Insurers' Supervision, Rehabilitation, and Liquidation Act was transcribed to Chapter 27 and now appears as S.C. CODE ANN. §§ 38-27-10 to -1000 (Law. Co-op. Supp. 1987). The provisions construed in resolving the controversy between Smalls and Weed were not altered. Thus, for the remainder of this discussion, the relevant sections will be cited as they appear as a result of 1987 S.C. Acts 155.

248. S.C. CODE ANN. §§ 38-27-10 to -1000 (Law. Co-op. Supp. 1987). It is interesting to note that although the court of appeals refers to these sections as "South Carolina's version of the Uniform Insurer's Liquidation Act," 293 S.C. at 366, 360 S.E.2d at 532, the National Conference of Commissioners on Uniform State Laws does not consider South Carolina to be among the states that have adopted the act. *See* UNIF. INSURERS LIQUIDATION ACT, 13 U.L.A. 321 (1986 & Supp. 1988).

Smalls filed a proof of loss regarding the skidder. On November 5, 1984, Weed, the court-appointed rehabilitator, rejected Smalls' claim.

Smalls then brought suit in South Carolina against Weed as Cherokee's rehabilitator, alleging breach of contract, bad faith refusal to pay insurance benefits, and intentional infliction of emotional distress. Smalls served Weed with the summons and complaint by service upon the South Carolina Insurance Commissioner.[249] Weed appeared specially, presenting numerous grounds for dismissal. The trial court rejected Weed's arguments and asserted its jurisdiction over him as Cherokee's rehabilitator.[250]

The court of appeals affirmed the trial court's decision, holding that Weed had waived his right to question the court's jurisdiction over his person.[251] The court reasoned that Weed had implicitly acknowledged the jurisdiction of the court by raising issues that only a court with jurisdiction over the parties would have authority to decide.[252] The court recognized that special appearances had been eliminated by the adoption of the South Carolina Rules of Civil Procedure but found that the "new rules" had no impact upon its reasoning.[253]

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249. Every insurer, before being licensed in South Carolina, must appoint the South Carolina Insurance Commissioner as its attorney for the purpose of receiving service of process. S.C. CODE ANN. § 38-5-70 (Law. Co-op. Supp. 1987). In fact, service made against a foreign insurer in any other way is invalid. *See id.*; Livingston v. South Carolina Farm Bureau Mut. Ins. Co., 254 S.C. 161, 174 S.E.2d 163 (1970). As Cherokee's rehabilitator, Weed held title to all of the insurer's assets. *See* TENN. CODE ANN. § 56-9-115(b) (1980); *see also* S.C. CODE ANN. §§ 38-27-320, -330 (Law. Co-op. Supp. 1987). Thus, as the trial court ruled, because service on the Insurance Commissioner was effective against Cherokee, it was also effective against Weed, Cherokee's rehabilitator. Record at 17.

250. Record at 17.

251. Smalls v. Weed, 291 S.C. 258, 353 S.E.2d 154 (Ct. App. 1987) (per curiam).

252. *Id.* at 261, 353 S.E.2d at 156.

253. *Id.* The South Carolina Rules of Civil Procedure took effect on July 1, 1985, governing all proceedings in civil actions brought after that date "and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice." S.C.R. CIV. P. 86(a). Weed's motion to dismiss was heard on July 10, 1985, and thus the "new rules" should have governed unless the court thought their application would have been unjust or unfeasible. Neither the trial court nor the court of appeals even implied that applying the "new rules" would have been unfair. Had the court of appeals correctly applied Rule 12(b), Weed could not have been found to have waived his right to object to the court's jurisdiction over his person because "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." S.C.R. CIV. P. 12(b). It is proper

On Weed's appeal, the South Carolina Supreme Court remanded the case to the court of appeals.[254] The supreme court ordered the lower court to consider whether the Insurers' Supervision, Rehabilitation, and Liquidation Act[255] deprived the trial court of subject matter jurisdiction.[256]

On remand the court of appeals again affirmed the trial court's decision.[257] The court found no statutory provision that would deprive South Carolina courts of subject matter jurisdiction against rehabilitators.[258] The opinion points out that the legislature clearly provided for "one procedure in actions involving a rehabilitator, and for a different procedure against a liquidator."[259] The provision governing actions by and against rehabilitators[260] merely provides for a stay of ninety days in the case of actions pending when an order of rehabilitation is filed; it does not, the court posited, prohibit actions against rehabilitators.[261] The court noted the contrasting provision for actions by and against liquidators[262] and then cited "the primary rule of [statutory] construction," which requires that legislative intent prevail if it can be discovered.[263] Having previously cited "the general rule [that] statutes which deprive a court of jurisdiction are to be strictly construed,"[264] the court concluded that the legislature had intended that an action such as Smalls'

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to assert the lack of the court's jurisdiction over the person or subject matter by motion before serving a responsive pleading. *Id.* Thus, the court of appeals should have addressed the merits of Weed's objection to the trial court's exercise of jurisdiction. Its decision that Weed "waived" this jurisdictional objection is precisely what the "new rules" were designed to prevent. *See* S.C.R. CIV. P. 12 reporter's notes ("Rule 12(b) . . . eliminates the necessity of the awkward 'special appearance to object to jurisdiction' . . . ."). Nevertheless, the trial court's ruling should have been affirmed because Weed, standing in Cherokee's shoes as its rehabilitator, clearly had the requisite minimum contacts with South Carolina. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

254. Smalls v. Weed, 292 S.C. 408, 356 S.E.2d 843 (1987).

255. S.C. CODE ANN. §§ 38-27-10 to -1000 (Law. Co-op. Supp. 1987).

256. 292 S.C. 408, 356 S.E.2d 843.

257. Smalls v. Weed, 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987) (per curiam).

258. *Id.* at 371, 360 S.E.2d at 535.

259. *Id.* at 370, 360 S.E.2d at 534.

260. S.C. CODE ANN. § 38-27-340 (Law. Co-op. Supp. 1987).

261. 293 S.C. at 369, 360 S.E.2d at 533.

262. S.C. CODE ANN. § 38-27-430 (Law. Co-op. Supp. 1987).

263. 293 S.C. at 370, 360 S.E.2d at 534.

264. *Id.* at 368, 360 S.E.2d at 533.

might be brought.[265]

The reasoning embraced by the court of appeals is sound. The rules of statutory construction applied by the court are well settled and widely accepted.[266] Weed probably would prevail in a state whose statutory provisions more closely parallel the Uniform Insurers Liquidation Act.[267] Weed's position, however, failed to recognize the differences in South Carolina's corresponding act.[268] The court of appeals ably interpreted South Carolina's version and accordingly rejected Weed's argument.

Robert Wilson, III

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265. *Id.* at 370-71, 360 S.E.2d at 534.

266. *See, e.g.*, 82 C.J.S. *Statutes* § 321 (1953) ("fundamental rule of construction . . . is that the court shall . . . ascertain and give effect . . . to the intention or purpose of the legislature"); 73 AM. JUR. 2D *Statutes* § 145 (1974) (legislative intent is controlling factor).

267. The Uniform Insurers Liquidation Act (UILA) gives resident claimants, with disputed claims against delinquent insurers domiciled in a reciprocal state, two options: either prove the claim in the domiciliary state or *if* ancillary proceedings have been commenced in the resident's state, in those proceedings. *See* UNIF. INSURERS LIQUIDATION ACT § 5, 13 U.L.A. 346 (1986). The procedure is the same whether the insurance company is in rehabilitation or in liquidation. *See id.* § 1(2), 13 U.L.A. 328. Thus, because ancillary proceedings had not commenced in South Carolina, under the UILA Smalls would have been forced to sue Weed in Tennessee, Cherokee's domiciliary state. When the South Carolina General Assembly enacted section 5 of the UILA, it made only one change. *Compare* UNIF. INSURERS LIQUIDATION ACT § 5, 13 U.L.A. 345 (1986) (beginning "In a delinquency proceeding") *with* S.C. CODE ANN. § 38-27-970 (Law. Co-op. Supp. 1987) (beginning "In a liquidation proceeding"). Thus, in South Carolina, resident claimants are only limited to the two options found in the UILA when the insurer is in liquidation. Perhaps this important difference helps explain why the National Conference of Commissioners on Uniform State Laws does not consider South Carolina to be among the states that have adopted the UILA. *See supra* note 248.

268. *See supra* note 267.