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PRACTICE AND PROCEDURE

I. COURT'S APPROACH TO *BATSON* DECISION REMAINS INCONSISTENT

In *State v. Elmore*[1] the South Carolina Supreme Court held that the solicitor's exercise of peremptory challenges to strike black jurors did not violate the United States Supreme Court's opinion in *Batson v. Kentucky*.[2] *Elmore* is the latest in a series of decisions by the South Carolina Supreme court that addresses the issue of racial discrimination in peremptory challenges.[3] Analysis of *Elmore* indicates that the court has not yet established a consistent method of dealing with *Batson* claims.[4]

After exhaustive proceedings in the lower courts,[5] a jury convicted Edward Lee Elmore of murder, burglary, and criminal sexual conduct. In a separate sentencing trial, another jury sentenced him to death. Elmore appealed the sentence and contended that the solicitor violated *Batson* by striking two black prospective jurors.[6]

In *Batson* the United States Supreme Court held that the Fourteenth Amendment's Equal Protection Clause prohibits prosecutors from striking jurors solely because of their race.[7] The Court established

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1. 300 S.C. 130, 386 S.E.2d 769 (1989), *cert. denied*, 110 S. Ct. 2633 (1990).

2. 476 U.S. 79 (1986).

3. *See* State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989); State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988), *cert. denied*, 109 S. Ct. 3174 (1989); State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987); State v. Smith, 293 S.C. 22, 358 S.E.2d 389 (1987).

4. *See* Case Comment, *State's Use of Peremptory Strikes Made More Difficult to Challenge on Grounds of Racial Discrimination*, 41 S.C.L. REV. 39 (1988) (critical analysis of State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988), *cert. denied*, 109 S. Ct. 3174 (1989)).

5. The supreme court reversed Elmore's original convictions and sentence. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Subsequently, the court affirmed his second conviction and sentence. State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985). Nevertheless, the United States Supreme Court vacated and remanded his case for reconsideration in light of Skipper v. South Carolina, 476 U.S. 1 (1986). In a third sentencing trial, a jury once again sentenced Elmore to death. State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989), *cert. denied*, 110 S. Ct. 2633 (1990).

6. The final jury consisted of eleven whites and one black. The solicitor accepted the first black presented and seated another black as an alternate. Elmore also raised four other issues on appeal: (1) error in refusal to disqualify a juror for cause, (2) error in refusal to replace a juror with an alternate juror, (3) error in refusal to allow introduction of evidence that Elmore's case was inadequately investigated, and (4) error in allowing certain portions of the solicitor's closing argument. *Elmore*, 300 S.C. at 132, 386 S.E.2d at 770.

7. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).

the rule that, upon a prima facie showing of discrimination,[8] the state has the burden of "com[ing] forward with a neutral explanation for challenging black jurors."[9] The Court declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges"[10] and relied instead upon the state and federal trial courts to apply the standard.[11]

The trial judge in *Elmore* determined that the defendant had not established a prima facie showing of discrimination.[12] Relying on *Batson*, Elmore argued that evidence of several strikes against potential jurors in the venire is sufficient for the trial court to conclude that a criminal defendant has established a prima facie showing of discrimination.[13] Case law, however, supported the trial judge's determination that the number of strikes alone does not constitute prima facie discrimination.[14] Accordingly, the supreme court found that the trial judge had not abused his discretion.[15]

In a dissenting opinion, Justice Finney presented Elmore's strongest argument that showed prima facie discrimination.[16] Justice Finney wrote that the solicitor's disparate questioning of potential jurors established a case of prima facie discrimination. In particular, he noted that the solicitor subjected black jurors to more rigorous questioning than white jurors.[17] To support his assertion, Justice Finney compared

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8. A defendant can establish prima facie discrimination in the following way: (1) "show[ing] that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race"; (2) by relying on the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate' "; and (3) by showing that "these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

9. *Id.* at 97.

10. *Id.* at 99.

11. *Id.* at 99 n.24.

12. 300 S.C. at 132, 386 S.E.2d at 770.

13. Brief of Appellant at 2.

14. *See, e.g.*, State v. Smith, 293 S.C. 22, 358 S.E.2d 389 (1987) (court found no abuse of discretion when state exercised two of five strikes to remove two black jurors and final jury contained four black jurors); *see also* United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990) (peremptory challenge of two of six blacks does not strongly suggest discrimination); United States v. Fuller, 887 F.2d 144, 146-47 (8th Cir. 1989) (cannot rely solely on the exclusion of two out of five potential black jurors), *cert. denied*, 110 S. Ct. 2592 (1990); United States v. Ingram, 839 F.2d 1327, 1330 (8th Cir. 1988) (striking black juror alone does not establish a prima facie case under *Batson*); United States v. Montgomery, 819 F.2d 847, 850-51 (8th Cir. 1987) (no prima facie case when government used two of six peremptory strikes to eliminate half of black veniremen).

15. *Elmore*, 300 S.C. at 132, 386 S.E.2d at 770.

16. *Id.* at 135, 386 S.E.2d at 771-75 (Finney, J., dissenting).

17. *Id.*, 386 S.E.2d at 771.

the volume (in pages of trial transcript) and the context of questions asked of black jurors with those of white jurors.[18]

The majority dismissed Justice Finney's argument stating: "The *voir dire* of the 41 persons drawn must be viewed in its entirety. It must not be considered with focus upon three isolated examples."[19] Although striking black jurors alone is insufficient to establish prima facie discrimination, the additional consideration of disparate questioning seems to meet the "inference" of discrimination mandated by *Batson*.[20] Why then did the supreme court not find prima facie discrimination in *Elmore*?

If the court had found prima facie discrimination in the solicitor's questions, then in future cases, if solicitors asked too many questions of a black juror, this might establish prima facie discrimination. Moreover, if solicitors ask too few questions, they might be accused of "desultory or half-hearted questioning which can indicate the government's intent to strike black people regardless of their answers."[21] Must solicitors subject all jurors to the same questions, whether they feel it is necessary or not, simply to avoid a *Batson* claim? In United *States v. Grandison* the Fourth Circuit stated:

> We refuse to require the government to ask follow-up questions to every stricken venireman during voir dire in order to defeat a *Batson* challenge. A balance must be struck between fair jury selection procedures and the need to move promptly toward trial. The decision not to ask follow-up questions is a matter of trial strategy; failure to do so is not dispositive of the thoughtfulness of the prosecution's exercise of its peremptory strikes.[22]

The Fourth Circuit's reasoning can also apply to situations in which solicitors ask follow-up questions to jurors about whom they are unsure. Solicitors should not have to ask the same follow-up questions to all jurors. Such a requirement would be inefficient and overly burdensome.

Although the trial judge decided that Elmore had not established prima facie discrimination, he still required the solicitor to present a racially neutral explanation for his strikes.[23] The solicitor's primary reason for the strikes was his reliance upon the advice of two black law

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18. *Id.* at 137-42, 386 S.E.2d at 773-75.

19. *Id.* at 132, 386 S.E.2d at 770.

20. *See supra* note 8 and accompanying text.

21. United States v. Grandison, 885 F.2d 143, 147 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 2178 (1990).

22. *Id.*

23. *Elmore*, 300 S.C. at 133, 386 S.E.2d at 770.

enforcement officials,[24] although it is not clear what advice these two officials gave to the solicitor.[25] Despite the apparent insufficiency of the solicitor's reason for striking the black jurors, the supreme court did not question it in the majority opinion. Justice Finney pointed out in dissent, "Allowing the solicitor to articulate the advice of others as the basis of a neutral explanation leaves the Equal Protection Clause devoid of substance."[26]

The solicitor gave his second reason for the challenges, the black jurors' beliefs on the death penalty, only after being prompted by the trial judge.[27] A juror's opposition to the death penalty may be a valid race-neutral reason to strike that juror, but only if the solicitor applies the criteria consistently to both blacks and whites.[28] The supreme court articulated this standard in *State v. Oglesby*[29] when it found that, even though the reason for striking blacks was neutral, the inconsistent application of the reason negated its validity.[30]

Elmore argued that because the solicitor had not challenged two white jurors with similar views he negated the race-neutral reason.[31] The court, however, stated that "the Solicitor presented a racially neutral explanation for challenging the two black jurors, to wit, their vacillating responses to his questions regarding the death penalty."[32] The court never questioned that a juror's opposition to the death penalty constituted a sufficient race-neutral reason. The critical issue was whether the solicitor applied the criteria evenly to both races.

The supreme court's opinion in *Elmore* provides little guidance for solicitors faced with a *Batson* challenge, which is virtually automatic whenever a black defendant is on trial. The court surprisingly accepted the solicitor's argument that he had relied on the advice of others. There remains no standard method in South Carolina for dealing with *Batson* claims.

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24. *See id.* at 137, 386 S.E.2d at 772.

25. Neither the supreme court's opinion nor the trial record reveals exactly the advice given.

26. 300 S.C. at 137, 386 S.E.2d at 773 (Finney, J. dissenting).

27. Brief of Respondent at 2.

28. *See* Case Comment, *supra* note 4, at 45-46 (analysis of this issue in State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988), *cert. denied*, 109 S. Ct. 3174 (1989)).

29. 298 S.C. 279, 379 S.E.2d 891 (1989).

30. *Id.* at 281, 379 S.E.2d at 892 (state struck three black females because they were patients of doctor, then allowed a white patient to serve on the jury).

31. Brief of Respondent at 6.

32. *Elmore*, 300 S.C. at 133, 386 S.E.2d at 770.

II. TECHNICALLY DEFECTIVE SUMMONS MAY CONFER JURISDICTION ABSENT SHOWING OF PREJUDICE

In *Wham v. Shearson-Lehman Bros.*[33] the South Carolina Court of Appeals held that omission of certain language recommended in the South Carolina Rules of Civil Procedure (SCRCP) for inclusion in a summons[34] does not render a challenged summons defective unless the defendant can show prejudice.

Shearson-Lehman Brothers, Inc. (Shearson) failed to answer Wham's complaint within the period prescribed by the SCRCP. Thirty-eight days after service of the complaint, the Anderson County Clerk of Court entered a default judgment against Shearson. At Wham's request, the master in equity scheduled a default hearing and notified Shearson.[35]

Shearson appeared and moved to quash the summons and to set aside the clerk's entry of a default judgment. The company alternatively asked the master to stay the proceedings and compel arbitration. Shearson conceded its neglect when it failed to request an extension from Wham, but argued that the master should excuse it. Shearson had been burdened with work from the October 1987 stock market crash and increased litigation as a result of the company's merger with E. F. Hutton. The master, however, denied Shearson's motion to quash the summons, and refused to set aside the default judgment because the the company did not sustain its burden of proof on excusable neglect. The master also denied Shearson's motion to compel arbitration.[36]

The South Carolina Court of Appeals addressed two of the three issues that Shearson raised on appeal. Shearson alleged that Wham's summons was fatally defective. Wham had notified Shearson in its summons that if the company should fail to answer in a timely manner, "the plaintiff in this action will apply to the court for the relief

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33. 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). The South Carolina Supreme Court adopted the *Wham* opinion in Jordan v. Darrah, 300 S.C. 401, 388 S.E.2d 639 (1990) (trial judge had found the summons irregular and the supreme court found it sufficient based on *Wham*).

34. S.C.R. CIV. P. 4(b). The rule provides that:

> The summons shall be signed by the plaintiff or his attorney, contain the name of the state and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, *and shall notify him that in case of his failure to do so judgement [sic] by default will be rendered against him* for the relief demanded in the complaint.

Id. (emphasis added).

35. *Wham*, 298 S.C. at 463, 381 S.E.2d at 500.

36. *Id.*

demanded in the complaint."[37] In the summons Wham failed to instruct Shearson that in the event of default, a judgment would be entered against the company, and Shearson argued that this simple omission defeated the complaint because rule 4(b) instructs counsel to include a notice of default judgment.[38] In Shearson's view, therefore, a nonconforming summons would be insufficient to confer jurisdiction over a defendant.

The court of appeals rejected the argument that a party must follow the language in rule 4(b). The court instead looked at whether the summons misled the defendant. In *Wham* the court ruled that the "summons [was] sufficiently accurate to provide proper notice to Shearson Lehman . . . that judgment by default will be taken against Shearson Lehman should it fail to appear and defend the action."[39]

SCRCP 4(i) permits a party to amend a summons "unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued."[40] When the court found that the summons did not mislead Shearson, it applied the rule 4(i) test. It is appropriate for the court to require the defendant to show prejudice when the defaulting party is represented by counsel and the possibility that the defendant will be confused is minimal. The *Wham* court ruled that the defendant was aware of its duty to respond. The court noted that "the omission of the language from the

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37. *Id.*, 381 S.E.2d at 500-01. The language in Wham's complaint was similar to that found in an early edition of a South Carolina form book. *See* H. LIGHTSEY, JR. & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE, app. B, form II at 7 (S.C. Bar 1985 & Supp. 1988). This form book was revised to include the language that a "judgment by default will be rendered against you for the relief demanded in the complaint" after at least one trial court held that notice of a *default judgment* was mandatory and the failure to include sufficient language rendered the summons irregular. *See id.* at Supp. 14.

38. *See* S.C.R. CIV. P. 4(b).

39. 298 S.C. at 464, 381 S.E.2d at 501. For a similar analysis see 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 31-32 (1987) (discussing summons form under Federal Rule of Civil Procedure 4(b), which is substantially identical to South Carolina rule 4(b)). South Carolina common law historically has followed the same reasoning. In Chamberlain v. Bittersohn, 48 F. 42 (C.C.S.C. 1891) the court granted the plaintiff leave to amend an irregular summons. The court held that the defendant was not surprised because the complaint was attached to the summons and the defendant knew "exactly the nature of the wrong with which he [was] charged. He cannot have been misled or injured by the erroneous assertion that, on his failure to answer, judgment would be taken against him." *Id.* at 43.

40. S.C.R. CIV. P. 4(i). The rule provides that:

> At any time in its discretion and upon terms as it deems just, the court may, by written order, allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Id. As early as 1847, amendment of process was granted to correct clerical error. *See* Wilson v. Pyles, 32 S.C.L. (1 Strob.) 357 (1847).

summons was harmless . . . [and] had nothing whatever to do with Shearson Lehman's failure to appear and defend the action and it neither confused nor misled Shearson Lehman."[41]

A summons must provide adequate notice to a defendant of the pending lawsuit and that he is required to make an appearance.[42] The court recognized that Wham's summons met these requirements when it ruled that as long as Shearson could respond properly to the process, the summons fulfilled its purpose.[43]

The court did not need to reach the question whether the specifications of rule 4(b) are mandatory. In South Carolina "[a] general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."[44] When a defendant requests relief from the court, the court may grant relief only if the court has jurisdiction and the defendant has made a general appearance.[45] When Shearson asked the master to set aside the entry of default judgment, it made a general appearance. Therefore, Shearson waived its right to object to the defective summons. By reaching the summons question, the court resolved the tension between the seemingly inconsistent provisions of SCRCP 4(b) and 4(i). This is the correct result. If the requirements of rule 4(b) had been deemed compulsory, the amendment provisions of rule 4(i) would not be necessary.

The court of appeals remanded *Wham* on the grounds that the master erroneously applied the strict excusable neglect standard of

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41. 298 S.C. at 463, 381 S.E.2d at 501 (problems within Shearson's legal department and not the language in the summons caused defendant's failure to respond).

42. *See, e.g.*, Crawford v. Murphy, 260 S.C. 411, 415, 196 S.E.2d 503, 504 (1973); Rochester v. Holiday Magic, Inc., 253 S.C. 147, 153, 169 S.E.2d 387, 390 (1969); Beard-Laney, Inc. v. Darby, 208 S.C. 313, 318, 38 S.E.2d 1, 3 (1946); *see also* 4A C. WRIGHT & A. MILLER, *supra* note 39, at 31-32 (treatment of notice requirement under the Federal Rules of Civil Procedure).

43. The South Carolina Supreme Court has held that a summons which indicated a copy of the complaint was forthcoming was confusing and misleading because the defendants "had the right to assume . . . that they did not have to answer the complaint in the action until a copy thereof was served upon them." Crawford v. Murphy, 260 S.C. 411, 415, 196 S.E.2d 503, 504 (1973). The supreme court also has quashed a summons because an "[e]rror on the part of the plaintiff's counsel in serving a summons which did not comply with the statute was obviously a factor contributing to the default." Brown v. Weathers, 251 S.C. 67, 72-73, 160 S.E.2d 133, 135 (1968).

44. Stickland v. Consolidated Energy Prods. Co., 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980).

45. *See, e.g.*, Payne v. Holiday Towers, Inc., 283 S.C. 210, 213-14, 321 S.E.2d 179, 181 (Ct. App. 1984) (general appearance submits party to the jurisdiction of the court); *Stickland*, 274 S.C. at 556, 265 S.E.2d at 683 (general appearance constituted waiver of claim and defects in service of summons).

SCRCP 60(b) to Shearson's motion to vacate the entry of default.[46] The court acknowledged that the excusable neglect standard should be applied only when a default judgment is rendered by judicial order. The court reiterated the South Carolina practice that to obtain relief from an entry of default judgment, the defaulting party needs only to make a showing of "good cause" pursuant to SCRCP 55(c).[47] A trial judge may interpret liberally rule 55(c) because "it [is] clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default."[48] To determine if Shearson had good cause, the court of appeals in *Wham* instructed the master to consider the following factors: "(1) the timing of Shearson Lehman's motion for relief; (2) whether Shearson Lehman has a meritorious defense; and (3) the degree of prejudice to Wham if relief is granted."[49]

The court of appeals declined to address Shearson's alternative motion to stay the proceedings and compel arbitration. Interestingly, the court remarked that a party must raise an arbitration agreement as an affirmative defense and the failure to do so could result in a waiver of the right to arbitrate. The court's observation that a party must raise arbitration as an affirmative defense, however, may be contrary to recent cases which hold that "[w]aiver is not easily presumed in light of the strong federal policy favoring arbitration."[50]

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46. S.C.R. Civ. P. 60(b). The rule in pertinent part provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . ." *Id.*

47. S.C.R. Civ. P. 55(c). The rule provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." *Id.*

48. Ricks v. Weinrauch, 293 S.C. 372, 375, 360 S.E.2d 535, 536 (Ct. App. 1987) (citation omitted).

49. *Wham*, 298 S.C. at 465, 381 S.E.2d at 502.

50. Rodriguez Font v. Paine Webber, Inc., 649 F. Supp. 462, 466 (D.P.R. 1986) (citation omitted); *see also* Fraser v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 817 F.2d 250, 252 (4th Cir. 1987) (party that objects to arbitration must show that delay has caused actual prejudice); Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2d Cir. 1985) (participation in litigation results in waiver of right to arbitrate only when prejudice to other party is demonstrated); Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1511 (S.D.N.Y. 1985) (mere delay in asserting right to arbitrate will not justify a finding of waiver absent a showing of prejudice).

III. Federal Interest Rate Applies When Awarding Postjudgment Interest in Federal Diversity Actions

In *Forest Sales Corp. v. Bedingfield*[51] the Fourth Circuit Court of Appeals held that the federal interest rate,[52] rather than the rate set by state statute,[53] applies to awards of postjudgment interest in federal diversity actions. This decision is consistent with the purpose of the Federal Courts Improvement Act of 1982[54] and with decisions from courts in other jurisdictions that have addressed this issue.[55]

In 1982 Forest Sales Corporation sued Walter Bedingfield and Rufus McLarty (collectively "Bedingfield") for the balance owed on a trade account that Bedingfield personally guaranteed, and for interest and attorney's fees. In 1985 Bedingfield confessed judgment for the principal amount of nearly $100,000. The court awarded Forest prejudgment attorney's fees of $30,000 and prejudgment interest.[56]

In September 1987 Forest moved for postjudgment interest and attorney's fees. Bedingfield requested a ruling on whether the appropriate rate for postjudgment interest should be determined by state or by federal law. A federal magistrate held that postjudgment interest should be paid at the federal rate.[57] The district court affirmed the magistrate's order in October 1988. On appeal, the Fourth Circuit affirmed the district court's holding that postjudgment interest should be paid at the rate established by federal law.[58]

The court rejected two arguments advanced by Forest. First, Forest argued that the state statute applied because, according to the *Erie* doctrine,[59] federal courts should interpret federal statutes narrowly when the federal statute conflicts with state substantive law. Second, Forest argued that if Congress had intended the 1982 amendment to the statute that governed federal postjudgment interest[60] to apply to

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51. 881 F.2d 111 (4th Cir. 1989).

52. 28 U.S.C. § 1961 (1988).

53. S.C. Code Ann. § 34-31-20(B) (Law. Co-op. 1987).

54. *See* Pub. L. No. 97-164, § 302(e), 96 Stat. 25, 55-56 (1982).

55. *See* Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 622-25 (5th Cir. 1988); Travelers Ins. Co. v. Transport Ins. Co., 846 F.2d 1048, 1053-54 (7th Cir. 1988); Northrop Corp. v. Triad Int'l Mktg., 842 F.2d 1154, 1155-56 (9th Cir. 1988); Everaard v. Hartford Accident and Indem. Co., 842 F.2d 1186, 1193-94 (10th Cir. 1988); Bailey v. Chattem, Inc., 838 F.2d 149, 155 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988); G.M. Brod & Co. v. United States Home Corp., 759 F.2d 1526, 1542 (10th Cir. 1988); Weitz Co. v. Mo-Kan Carpet, Inc., 723 F.2d 1382, 1385-87 (8th Cir. 1983).

56. *Forest*, 881 F.2d at 111 (4th Cir. 1989).

57. *Id.*

58. *Id.* at 113.

59. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

60. 28 U.S.C. § 1961(a) (1988). Prior to the 1982 amendment this statute read: "In-

diversity cases, it would have stated that explicitly.[61] The Fourth Circuit rejected these arguments based on the Eight Circuit's analysis in *Weitz Co. v. Mo-Kan Carpet, Inc.*[62] and the Fifth Circuit's analysis in *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*[63]

The *Forest* court noted that "*Weitz* provides a detailed rationale for ruling that *Erie* does not require that state law determine postjudgment interest . . . ."[64] The court then quoted the *Weitz* court's analysis: "[postjudgment interest] is . . . easily susceptible of characterization as 'procedural,' since it has to do exclusively with events that occur after a dispute gets to court."[65] The *Forest* court agreed with the *Weitz* court that when the rights at issue are capable of rational classification as either procedural or substantive, "Congress has full power to legislate, even as to cases that get into the federal courts only because of diversity of citizenship."[66] Although the *Weitz* court discussed Congress' power to regulate procedure in the federal courts,[67] the *Forest* court examined the substantive instead of the procedural part of the *Weitz* court's analysis. Consequently, the *Forest* opinion, though in line with *Weitz*, is less thorough.

In another line of analysis, the *Forest* court, again quoting *Weitz*, indicated as follows:

> The same result follows if the *Erie* question is analyzed under the 'primary private activity' standard. . . . On this view, in diversity cases state law will govern those issues that relate to the parties' primary out-of-court conduct. The theory is that people plan their busi-

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terest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law." 28 U.S.C. § 1961 (1948) (amended 1982). The 1982 amendment changed the wording of the original statute by providing that postjudgment interest was to be calculated "at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment" rather than at the rate allowed by state law. *Id.* (1982).

61. *Forest Sales Corp.*, 881 F.2d at 112.

62. 723 F.2d 1382 (8th Cir. 1983).

63. 848 F.2d 613 (5th Cir. 1988).

64. *Forest*, 881 F.2d at 112.

65. *Id.* (quoting *Weitz*, 723 F.2d at 1386).

66. *Id.*

67. Prior to concluding that postjudgment interest "is therefore a subject with respect to which Congress has full power to legislate," *Weitz Co.*, 723 F.2d at 1386, the *Weitz* court not only did a *Hanna v. Plumer* substantive procedural analysis, but also examined Congress' constitutional power to pass a law fixing a rate of interest on judgments entered by federal courts. *Id.*; *see* Hanna v. Plumer, 380 U.S. 460 (1965). *Hanna* is the leading authority on how a court determines which law, state or federal, should be applied in diversity cases. *Hanna* stands for the proposition that federal courts sitting in diversity should apply state substantive law and federal procedural law.

> ness conduct, in most instances, against a background of substantive rules of law created by state statutes or court decisions. A rule specifying the rate of interest that a judgment will bear is clearly outside this category.[68]

The *Forest* court's rationale on this point, adopted from *Weitz*, is probably unnecessary. Rather than doing a partial *Erie* analysis or a "primary private activity" analysis, the court should have either adopted the *Weitz* opinion in full or should have performed its own analysis, following the procedure recently set forth by the United States Supreme Court in *Stewart Organization, Inc. v. Ricoh Corp.*[69]

In *Stewart* the Supreme Court held that a district court sitting in diversity "must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers."[70] Under a *Stewart* analysis the court must first determine whether a statute is "sufficiently broad to control the issue before the Court."[71] If the court decides this requirement is satisfied,

> it proceeds to inquire whether the statute represents a valid exercise of Congress' authority under the Constitution. If Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; "[f]ederal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power."[72]

Applying this analysis to *Forest*, it appears that section 1961(a) is "sufficiently broad" to control the issue of the proper interest rate.[73] The statute clearly addresses the rate of postjudgment interest to be paid on judgments in diversity cases.

The statute's legislative history does not indicate that Congress in-

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68. *Forest Sales Corp.*, 881 F.2d at 112-13 (quoting *Weitz*, 723 F.2d at 1386). The "primary private activity" standard refers to the standard, adopted by Justice Harlan's concurring opinion in *Hanna*, to govern choice of law in diversity actions. *Hanna*, 380 U.S. at 474-75.

69. 487 U.S. 22 (1988). The *Stewart* case, like *Weitz* and *Forest*, addressed the issue of when a federal statute should be applied to a state cause of action heard by a federal court sitting in diversity. The *Stewart* court's analysis is similar to that in *Weitz*. The advantage that would have been gained if the *Forest* court had based its opinion on *Stewart* stems solely from the fact that *Stewart* is a Supreme Court decision which provides a clear process to follow to determine the applicability of a federal statute in diversity cases.

70. *Id.* at 27.

71. *Id.* at 26 (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980)).

72. *Id.* at 27 (quoting Prima Print Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (citations omitted)).

73. *See supra* note 60.

tended to exclude diversity actions. In fact, a Senate Report on the Federal Courts Improvement Act of 1982, indicates that section 1961(a) "eliminates an economic incentive which exists today for a losing defendant to appeal a judgment and accumulate interest on the judgment award at the commercial rate during the pendency of the appeal."[74] This legislative purpose is served by applying the statue not only to federal question cases, but also to diversity cases. Thus, both the statutory language and the legislative history indicate that the statute applies in *Forest*.

Because the court of appeals concluded that the statute applied to the issue in *Forest*, the court's next step in a *Stewart* analysis would be to determine whether the law is a constitutional exercise of Congressional power.[75] The constitutional authority of Congress to enact section 1961(a) has not been seriously questioned. The United States Supreme Court made clear in *Hanna v. Plumer*[76] that:

> [T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[77]

Section 1961(a) may be classified as a procedural rule.[78] Thus, it may be subject to congressional control because "Congress has undoubted power to regulate the practice and procedure of federal courts . . . ."[79]

Although the *Forest* court correctly concluded that the federal interest rate applies to awards of postjudgment interest in diversity actions, a different approach may have provided a better analysis. Rather than relying on the analyses of other circuit courts, the *Forest* court

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74. S. REP. No. 275, 97th Cong., 2nd Sess. 11-21 (1982). Under preamendment law, the interest rate on any money judgment recovered in a district court was calculated at the rate allowed by state law. *See* 28 U.S.C. § 1961 (1952). Rates set by states frequently fell below the federal interest rates enticing defendants to invest funds owed to the plaintiff while the case was on appeal. S. REP. No. 275, 97th Cong., 2nd Sess. 11-12 (1982).

75. *See Stewart*, 487 U.S. at 32.

76. 380 U.S. 460 (1965).

77. *Id.* at 472.

78. A rule is a procedural rule if it "really regulates procedure,— the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). A second reason "postjudgment interest is better characterized as procedural [is] because it confers no right in and of itself. Rather, it merely follows and operates on the substance of determined rights." Nissho-Iwai Co., v. Occidental Crude Sales, Inc., 848 F.2d 613, 623 (5th Cir. 1988).

79. *Sibbach*, 312 U.S. at 9.

might have applied the Supreme Court's recently articulated two-step analysis to determine whether to apply a federal statute in a diversity case.

Tracy Askew Meyers

IV. *BATSON* RESTRICTIONS ON PEREMPTORY CHALLENGES DO NOT APPLY TO CIVIL CASES BETWEEN PRIVATE LITIGANTS

In 1986 the United States Supreme Court held in *Batson v. Kentucky*[80] that the prosecutor in a criminal case could not exercise peremptory challenges to potential jurors in a racially discriminatory manner. In *Chavous v. Brown*[81] the South Carolina Supreme Court refused to extend this limitation to civil actions between private parties.

The issue arose in a suit resulting from an automobile collision between a black plaintiff and a white defendant. Of the seventy-five potential jurors on the petit jury list, fifteen were black and sixty were white. The final panel of twenty contained four blacks. When the defendant's attorney used his peremptory challenges to remove all four blacks, the plaintiff's counsel objected to the challenges and requested a *Batson* hearing, alleging that the challenges were racially motivated. Defendant's counsel then offered his reasons for striking the four blacks. The trial judge overruled the plaintiff's objection and held that *Batson* did not apply to a civil case. The trial judge further held that even if *Batson* did apply, the defendant's reasons were racially neutral and satisfied the equal protection requirements of *Batson*. The jury returned a verdict for the white defendants.[82]

The plaintiff appealed, claiming that the trial judge's failure to sustain his objection to the strikes had resulted in a violation of the equal protection clause of the United States Constitution.[83] On appeal

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80. 476 U.S. 79 (1986). *Batson* held that the Equal Protection Clause of the Fourteenth Amendment prohibits a state prosecutor in a criminal case from exercising peremptory challenges to strike prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89. The South Carolina Supreme Court consequently formulated a "bright line test" to determine when a *Batson* hearing is necessary. Once a criminal defendant makes the necessary showing, the burden shifts to the prosecutor to provide a racially neutral explanation for the challenge. *See* State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987).

81. — S.C. —, 396 S.E.2d 98 (1990).

82. Chavous v. Brown, 299 S.C. 398, 399, 385 S.E.2d 206, 207 (Ct. App. 1989), *rev'd*, — S.C. —, 396 S.E.2d 98 (1990).

83. U.S. CONST. amend. XIV, § 1. It provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

the court of appeals reversed the trial court, holding that *Batson* applies to a civil case between two private litigants, that the plaintiff had established a prima facie case that the defendant had exercised his peremptory challenges in a racially discriminatory manner, and that the defendant had not demonstrated that his reasons for striking the jurors were racially neutral.[84] The South Carolina Supreme Court reversed the court of appeals, holding that *Batson* did not apply to this civil action because there was no state action sufficient to constitute an equal protection violation.[85]

The supreme court used a two-part analysis under *Lugar v. Edmonson Oil Co.*[86] "to determine whether the alleged discriminatory conduct is fairly attributable to the State for equal protection purposes."[87] The supreme court found that the first step of the *Lugar* analysis, that the deprivation must arise from the exercise of some state-created right or privilege,[88] was satisfied because the right to exercise a peremptory challenge arises from the South Carolina Code.[89] The court, however, concluded that the second part of the *Lugar* test had not been met. The second part of the test requires that "the party charged with discrimination must be a person who may fairly be considered a state actor either because he is a state official, or he acted together with or obtained significant aid from state officials, or his conduct is otherwise chargeable to the State."[90]

In concluding that no state action existed, the supreme court determined that neither the private attorney's exercise of his peremptory challenges nor the trial judge's refusal to sustain the plaintiff's objection constituted state action for equal protection purposes. Although the court characterized the issue as "whether the exercise of peremptory strikes by a private attorney in a civil case qualifies as state action,"[91] the court focused primarily on the trial judge's role in permitting peremptory strikes. Viewing the trial judge's involvement as ministerial rather than discretionary, the court found no exercise of the state's coercive power, and, consequently, no state action.[92] On this

84. *Chavous*, 299 S.C. at 406, 385 S.E.2d at 211.

85. ___ S.C. at ___, 396 S.E.2d at 98. The court expressly reserved the question for cases in which the state is a party to a civil suit. *Id.* at ___ n.2, 396 S.E.2d at 98 n.2.

86. 457 U.S. 922 (1982).

87. ___ S.C. at ___, 396 S.E.2d at 99.

88. *Id.* at ___, 396 S.E.2d at 99 (citing *Lugar*, 457 U.S. at 937).

89. *See* S.C. CODE ANN. § 14-7-1050 (Law. Co-op. Supp. 1989).

90. ___ S.C. at ___, 396 S.E.2d at 99 (citing *Lugar*, 457 U.S. at 937).

91. *Id.*

92. *Id.* (citing Blum v. Yaretsky, 457 U.S. 991 (1982)). In *Blum* the United States Supreme Court stated:

> [O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such

point the court rejected the argument based on *Shelley v. Kraemer*[93] "[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment."[94] The supreme court distinguished *Shelley* by pointing out that in *Chavous* "[t]here is no active intervention of the court's discretionary power in the seating of otherwise qualified jurors" and that "there is no court approval of the basis of the strike needed to obtain the juror's excusal."[95] The court added, however, that its "conclusion regarding state action would be decidedly different if the trial court excused a juror *for cause* solely because of his or her race."[96]

The South Carolina Supreme Court rejected the court of appeals' conclusion, made in light of *Tulsa Professional Collection Services, Inc. v. Pope*,[97] that the trial judge's "involvement in the [jury] selection process is substantial enough to be considered 'state action' subject to the mandates of the Fourteenth Amendment."[98] The South Carolina Supreme Court, while conceding that *Chavous* also involved a judicial proceeding, distinguished *Tulsa Professional Collection Services* by pointing out that in that case the probate court was involved only because the party seeking to assert a right under the applicable statute had to instigate certain probate court proceedings. The supreme court reasoned that, by contrast, when a private attorney exercises a peremptory strike, "the trial judge's function is merely to administer the exercise of a statutory right."[99] The supreme court felt that the trial judge's role was similar to a court's function in adminis-

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> significant encouragement, either overt or covert, that the choice must in law be deemed that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.

Blum, 457 U.S. at 1004-05 (citations omitted).

93. 334 U.S. 1 (1948).

94. __ S.C. at __, 396 S.E.2d at 100 (Finney, J., dissenting) (quoting *Shelley*, 334 U.S. at 14).

95. *Id.* at __, 396 S.E.2d at 99. Indeed, in framing the issue for decision, the court referred to hornbook law from *Shelley* that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* at __ n.1, 396 S.E.2d at 98 n.1 (quoting *Shelley*, 334 U.S. at 13).

96. *Id.* (emphasis in original).

97. 485 U.S. 478 (1988) (probate court's involvement in probate proceedings was so "pervasive and substantial" that it constituted state action).

98. Chavous v. Brown, 299 S.C. 398, 402, 385 S.E.2d 206, 209 (Ct. App. 1989) (citing *Tulsa Professional Collection Servs.*, 485 U.S. at 487). The court of appeals listed the various ways a trial judge is "inextricably involved" in the process: "The judge conducts *voir dire*. He may excuse jurors from sitting on a particular case. Ultimately, he determines constitutional challenges to the jury." *Id.*

99. __ S.C. at __, 396 S.E.2d at 100.

tering a self-executing statute of limitations, a function that the United States Supreme Court held in *Tulsa Professional Collection Services* was not state action.[100]

Finally, the South Carolina Supreme Court rejected the view that without "something more" a private attorney who exercises peremptory challenges pursuant to a statute becomes a state actor.[101] The court buttressed its position by citing *Polk County v. Dodson*,[102] a case in which the United States Supreme Court held that a public defender representing an indigent defendant was not a state actor.

The supreme court referred to a disagreement among the federal circuits about whether a trial judge's action in these circumstances constitutes state action.[103] The court of appeals, in finding state action, quoted favorably from the Eleventh Circuit's conclusion in *Fludd v. Dykes*:

> The trial judge's decision—to proceed to trial, over the party's objection, with a jury selected from the venire on the basis of race—is the one that harms the objecting party. In overruling the objection, which informed the court that the peremptory challenger may be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes.[104]

The supreme court, on the other hand, agreed with the position taken by the Fifth Circuit in its en banc rehearing in *Edmonson v. Leesville Concrete Co.*[105] that the trial judge's action in these circumstances is not state action for equal protection analysis.

The supreme court distinguished between the ministerial acts and

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100. 485 U.S. at 485-86. *See also* Evans v. Abney, 396 U.S. 435, 445 (1970) (no state action in allowing a reversion clause within a will to operate, closing down a city pool recently opened to blacks).

101. ___ S.C. at ___, 396 S.E.2d at 100 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982)).

102. 454 U.S. 312 (1981). *Cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353-55 (1974) (action of a regulated industry is not state action).

103. *Compare* Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir.) (no state action) (en banc), *cert. granted*, 111 S. Ct. 41 (1990), *with* Fludd v. Dykes, 863 F.2d 822 (11th Cir.)(held to be state action), *reh'g denied*, 873 F.2d 300 (11th Cir.), *cert. denied*, 110 S. Ct. 201 (1989).

104. 299 S.C. at 401 n.2, 385 S.E.2d at 208 n.2 (quoting *Fludd*, 863 F.2d 822, 828 (11th Cir.), *reh'g denied*, 873 F.2d 300 (11th Cir.), *cert. denied*, 110 S. Ct. 201 (1989). The *Fludd* court, in turn, based its decision on the United States Supreme Court's decision in Neal v. Delaware, 103 U.S. 370, 397 (1880): "[A] State acts by its legislative, its executive, *or its judicial authorities.*" *Id.* (quoting *Ex parte* Virginia, 100 U.S. 339, 347 (1879) (emphasis in original)).

105. 895 F.2d 218 (5th Cir.) (en banc), *cert. granted*, 111 S. Ct. 41 (1990). The *Edmonson* decision contains excellent presentations of both viewpoints on this issue.

the discretionary acts of a trial judge when it determined whether the trial judge's acts should be attributed to the state.[106] Perhaps this dichotomy is just a shorthand reference for the distinction between judicial actions which require affirmative judicial involvement as in *Shelley*, and actions which require merely that the judge not hinder a self-executing process, as in *Tulsa Professional Services*. Although the supreme court cited *Shelley* for the proposition that the fourteenth amendment does not prohibit private disciminatory conduct,[107] arguably *Shelley* commands an opposite result in this case. In *Shelley* the United States Supreme Court held that private litigants could not utilize judicial processes to enforce racially restrictive covenants.[108] Likewise, although private counsel committed the allegedly racially motivated behavior in *Chavous*, the state's judicial system gave it force. On the other hand, *Shelley* is distinguishable because the plaintiff in that case requested the court to enforce a racially restrictive covenant by taking steps to restrain the purchasers of the property from taking possession and to enter judgment divesting title from the purchaser and vesting it again in the seller or in some third party of the court's choice.[109] The trial court's action in *Chavous*, by contrast, is more like the "mere acquiescence" spoken of in *Blum v. Yaretsky*.[110] If *Shelley* stands for the proposition that private litigants are not permitted to use state-created judicial processes to further private discriminatory practices, however, this distinction may be without legal significance, unless *Shelley* has been limited by *Tulsa Professional Collection Services*.

Because the South Carolina Supreme Court disposed of this case on the basis of lack of state action, it was unnecessary to deal with several considerations raised by the court of appeals. First, the court of appeals noted that *Batson* dealt with peremptory challenges in the context of a criminal case rather than in a civil case.[111] Because the prosecutor is a state agent in a criminal case, the prosecutor's exercise of peremptory challenges constitutes state action, as *Batson* demonstrates. The court of appeals recognized that in a civil case, however, the fact that neither party is identified with the state makes it more difficult to show that the state, rather than a private individual, was the source of the discrimination.[112] Indeed, the distinction between a criminal case and a civil case was a significant factor in the trial court's

106. ___ S.C. at ___, 396 S.E.2d at 100.
107. *Id.* at ___ n.1, 396 S.E.2d at 98 n.1.
108. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).
109. *Id.* at 6.
110. 457 U.S. 991, 1004 (1982).
111. *Chavous*, 299 S.C. at 402, 385 S.E.2d at 209.
112. *Id.* at 401, 385 S.E.2d at 208.

decision to overrule the plaintiff's objection.[113] The court of appeals, however, reasoned:

> There is no underlying distinction between the function a criminal jury and a civil jury. One is not more important than the other. Justice under the law for all parties is the goal of any trial. Racial injustice has no more place in the courtroom on the days the court is conducting civil trials than it does on the days it conducts criminal trials.[114]

Certainly both civil and criminal trials have the same general goal of "[j]ustice under the law for all parties."[115] But in a criminal trial because a nameless, impersonal state is prosecuting a personal defendant, the law resolves questions in favor of the defendant. In a civil action, however, to the extent the law favors one side, it automatically places the other litigant at a comparative disadvantage.[116] A system that grants one civil litigant, by virtue of membership in a cognizable racial group, an unrestricted use of peremptory challenges while denying this privilege to the other side, would call into question the concept of equal justice under law and would tend to "undermine public confidence in the fairness of our system of justice."[117]

The court of appeals candidly recognized that critics would claim that the decision would destroy the peremptory challenge.[118] The *Batson* Court also foresaw criticism about the diminished vitality of the peremptory: "[T]his Court has . . . repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of

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113. Record at 14.

114. *Chavous*, 299 S.C at 402, 385 S.E.2d at 209. The court viewed this conclusion as a matter of logic and cited no legal authority. For a case holding that no distinction exists between civil and criminal trials for Fourteenth Amendment purposes, see Clark v. City of Bridgeport, 645 F. Supp. 890, 894-96 (D. Conn. 1986).

115. *Chavous*, 299 S.C. at 402, 385 S.E.2d at 209.

116. *See* Edmonson v. Leesville Concrete Co., 895 F.2d 218, 225-26 (5th Cir.) (en banc), *cert. granted*, 111 S. Ct. 41 (1990).

117. Batson v. Kentucky, 476 U.S. 79, 87 (1986). *Batson* condemns the assumption that members of a minority will be unable to render an impartial criminal judgment about one of their racial peers. On the other hand, Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989), quoted favorably by the South Carolina Court of Appeals in *Chavous*, speaks of an advantage to litigants who have their racial peers on the jury, and "the disadvantage that might result from having no racial peers on the jury." *Id.* at 825. *Cf.* Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988) (Gee, J., dissenting) ("To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *Id.* at 1316), *rev'd en banc*, 895 F.2d 218 (5th Cir.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. May 30, 1990) (No. 89-7743).

118. *Chavous*, 299 S.C. at 405, 385 S.E.2d at 211.

impartial jury and fair trial."[119] *Batson* seems to require that courts resolve any conflict between the constitutional right to a fair trial and the venerable practice of peremptory challenges in favor of the constitutional right.[120]

A consideration which neither the supreme court nor the court of appeals addressed is the policy underlying *Batson* that racial discrimination in jury selection violates the equal protection rights not only of the person on trial, but also of the excluded juror. In the introductory part of its analysis in *Batson*, the United States Supreme Court spoke of a history of "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."[121] Again, however, because the South Carolina Supreme Court disposed of this case on the issue of state action, it did not discuss this policy consideration.

Ordinarily, these various policy considerations require a skillful accommodation of the important goals of eliminating racial bias in jury selection, ensuring fair treatment of all civil litigants, and maintaining public confidence in the judicial processes. Nevertheless, traditional equal protection analysis requires state action, a factor that the South Carolina Supreme Court held to be absent in this case. Because of the conflict among the federal circuits and the importance of the issues involved, however, it is likely that the United States Supreme Court will provide a clear answer to this question when it hears *Edmonson v. Leesville Concrete Co.*.

Kendall R. Walker

V. Reasonable Refusal to Continue Deposition Not Subject to Sanctions

In *Dunn v. Dunn*[122] the South Carolina Supreme Court reversed a

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119. Batson v. Kentucky, 476 U.S. 79, 108 (1986) (Marshall, J., concurring). By contrast, in a strong dissent Chief Justice Burger argued that courts have long considered the peremptory challenge " 'one of the most important of the rights' in our justice system." *Id.* at 121 (Burger, C.J., dissenting) (citations omitted).

120. *See id.* at 98-99.

121. *Id.* at 86.

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply "is unrelated to his fitness as a juror."

Id. at 87 (citations omitted).

122. 298 S.C. 499, 381 S.E.2d 734 (1989).

family court decision to impose sanctions on a party for failure to continue a deposition. The supreme court held that the lower court's decision was unreasonable and without factual support. The *Dunn* opinion demonstrates the importance of a court's proper use of its discretion when deciding whether a party's refusal to proceed with a deposition may be justified under rule 37(b) of the South Carolina Rules of Civil Procedure.[123]

In *Dunn* the parties were engaged in a divorce proceeding. During her deposition, Mrs. Dunn refused to answer questions regarding an extramarital sexual relationship. Consequently, Mr. Dunn's attorney recessed the deposition and moved for an order requiring Mrs. Dunn to answer. During the hearing on this motion, the family court judge granted the order in the presence of both attorneys and instructed Mr. Dunn's attorney to draw the order.[124]

Mrs. Dunn and her attorney agreed to resume the deposition upon the express condition that a copy of the signed order be made available to them before proceeding with the deposition. Mr. Dunn's attorney came to the deposition without the order and stated that the order would arrive shortly. Mrs. Dunn, on the advice of her attorney, refused to resume the deposition until the order arrived. Meanwhile, Mrs. Dunn's attorney offered to proceed with the depositions of Mrs. Dunn's parents, which were also scheduled for that afternoon. Mr. Dunn's attorney refused to alter the deposition schedule or to wait and left without taking any of the other scheduled depositions.[125]

Mr. Dunn's attorney then moved for sanctions against Mrs. Dunn under rule 37(b) of the South Carolina Rules of Civil Procedure. The family court judge ordered a sanction of $500 in attorney's fees upon Mrs. Dunn because he found her refusal to resume the deposition unreasonable.[126]

Rule 37(b) of the South Carolina Rules of Civil Procedure instructs courts to impose sanctions when a party fails to comply with a discovery order, unless the court finds that the failure was substantially justified or the circumstances make an award of expenses un-

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123. *See* S.C.R. Civ. P. 37(b)(2)(E) which governs sanctions by the court for failure to comply with an order compelling discovery. The rule states: "[T]he court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

124. *Dunn*, 298 S.C. at 500-01, 381 S.E.2d at 734-35.

125. *Id.* at 501, 381 S.E.2d at 735.

126. *Id.* The family court imposed the sanction because Mrs. Dunn's attorney knew that the judge had signed the order. *See id.*

just.[127] A trial judge's decisions on discovery issues will not be disturbed on appeal unless the judge clearly abuses his discretion,[128] and this results in prejudice to the opposing party's rights, and is therefore, an error of law.[129]

In *Dunn* the South Carolina Supreme Court held that the family court's imposition of sanctions was a clear abuse of discretion for two reasons. First, the family court did not investigate whether the attorneys had agreed to provide Mrs. Dunn with a copy of the order prior to resuming the deposition. The supreme court, after reviewing the record, determined that the attorneys indeed had made an agreement.[130] Second, the supreme court stated that "[t]o penalize [the] Wife for reasonably relying upon the advice of her attorney, offered in good faith, under these circumstances is clearly unjust."[131]

Thus, the *Dunn* opinion defines a circumstance that excuses a party from failing to obey an order compelling discovery. If the attorneys agree that a written order to compel discovery will be available before resuming a deposition, a client's reliance on counsel's advice not to continue until the order arrives is reasonable and not subject to sanctions under rule 37(b) of the South Carolina Rules of Civil Procedure.

Susan E. Ziel

VI. Judge Does Not Have to Instruct Jury About Parole Eligibility

In *State v. Smith*[132] a divided South Carolina Supreme Court upheld the validity of the trial judge's supplemental charge in response to a jury question about parole and the meaning of "life in prison."[133] This holding seems to contradict the court's earlier decision in *State v. Norris*.[134] In *Norris* the court established a two-part instruction for trial judges to give in response to an inquiry from the jury about parole

127. S.C.R. Civ. P. 37(b)(2)(E).

128. Hook v. Rothstein, 281 S.C. 541, 555, 316 S.E.2d 690, 699 (Ct. App.), *cert. denied*, 283 S.C. 64, 320 S.E.2d 35 (1984).

129. Darden v. Witham, 263 S.C. 183, 195, 209 S.E.2d 42, 47 (1974).

130. *Dunn*, 298 S.C. at 502, 381 S.E.2d at 735.

131. *Id.* at 503, 381 S.E.2d at 736.

132. 298 S.C. 482, 381 S.E.2d 724 (1989), *cert. denied*, 110 S. Ct. 1536 (1990).

133. During deliberations, the jury sent a note with the question: "What does life in prison mean (the term specifically regarding parole)?" The trial judge then instructed the jury that "life imprisonment is to be understood in its ordinary and plain meaning." *Id.* at 489, 381 S.E.2d at 727.

134. 285 S.C. 86, 328 S.E.2d 339 (1985).

eligibility. First, the judge should instruct the jury that "it shall not consider parole eligibility in reaching its decision,"[135] and second, "the terms 'life imprisonment' and 'death sentence' should be understood in their ordinary and plain meaning."[136] In *Smith* the trial judge disregarded the first part of the *Norris* instruction. Nevertheless, the supreme court held the instruction to be valid.[137]

A jury convicted appellant Andrew Smith for the murder of an elderly couple and sentenced him to death.[138] On appeal, the court addressed the issue of whether the trial judge's failure to give the complete *Norris* charge prejudiced Smith.[139] The supreme court determined that the charge was not prejudicial and that to hold otherwise would "place form above substance."[140] Justices Chandler and Finney, in strong dissents, emphatically disagreed with the majority's reasoning.[141]

The *Norris* rule evolved from a series of decisions by the supreme court. In *State v. Atkinson*[142] the supreme court held that the trial judge properly responded to a jury inquiry about whether the defendant would be eligible for parole or pardon if sentenced to life in prison. The judge instructed the jury that parole should be of no concern to them and then briefly referred to the purpose of the parole board to clarify his point.[143] The supreme court, however, hinted that the judge might have given a clearer instruction, and thus set the stage for *Norris*.[144]

In *State v. Brooks*[145] the supreme court stated that "[a] jury

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135. *Id.* at 95, 328 S.E.2d at 344.

136. *Id.*

137. *Smith*, 298 S.C. at 487, 381 S.E.2d at 727.

138. The court first affirmed Smith's sentence in State v. Smith, 286 S.C. 406, 334 S.E.2d 277 (1985), *cert. denied*, 475 U.S. 1031 (1986). Upon application for post conviction relief, the circuit court vacated the death penalty and ordered a new sentencing proceeding. Once again, Smith received a death sentence.

139. The action consolidated Smith's direct appeal with the sentence review mandated by S.C. CODE ANN. § 16-3-25 (Law. Co-op. 1985).

140. *Smith*, 298 S.C. at 488, 381 S.E.2d at 727 (1989).

141. *Id.* at 488-90, 381 S.E.2d at 727-28 (Chandler, C.J., dissenting)(Justice Chandler, with Justice Finney concurring, argued that the partial *Norris* charge failed to deal with what the reasonable juror knows, that historically life-term defendants have been eligible for parole).

142. 253 S.C. 531, 172 S.E.2d 111 (1970), *vacated in part*, 408 U.S. 936 (1972).

143. *Id.* at 534, 172 S.E.2d at 112.

144. The court hinted that the trial judge could have given a better instruction and cited a North Carolina Supreme Court decision, State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955). The instruction in *Conner* included further language that "life imprisonment means exactly what the statute says: 'imprisonment for life in the State's prison . . . .'" *Id.* at 471-72, 85 S.E.2d at 587.

145. 271 S.C. 355, 247 S.E.2d 436 (1978).

should be neither invited nor permitted to speculate upon the possible effects of parole upon a conviction."[146] The court held that the trial judge's instruction that referred to the accused's parole eligibility constituted reversible error.[147]

In *State v. Butler*[148] the court expressly outlined the circumstances in which a judge should address the jury about the parole issue. Initially, a trial judge is not required to specifically instruct the jury not to consider the possibility of parole. If the jury later inquires about parole, however, the judge must then give instructions in accordance with *Atkinson*.[149] Thus, the court established the first-part of the *Norris* instruction.

Although the court alluded to the second part of the *Norris* instruction in *Atkinson*,[150] the rule has its roots in *State v. Plath*.[151] In *Plath* the court stated that it was improper for the jury to legislate or execute a plan of punishment and that the matter of parole should be determined by a state agency, not the jury. "[T]he jury shall understand the terms 'life imprisonment' and 'death sentence' in their ordinary and plain meaning without elaboration."[152] Thus, in a capital case, the jury simply decides the type of sentence and does not concern itself with whether or how the sentence will be executed. The second part of the *Norris* instruction, in theory, prevents the jury from allowing the possibility of parole to influence their decision on whether the accused should die or receive a life imprisonment sentence.

In *Norris* the supreme court, following *Brooks*, *Butler*, and *Plath*, dictated a seemingly concrete rule. In response to an inquiry from the jury about the possibility of parole, the trial judge must give a two-part instruction. First, the court must instruct the jury that it shall not consider parole eligibility in reaching its decision, and second, the terms "life imprisonment" and "death sentence" should be understood in their ordinary and plain meaning.[153] The *Atkinson* instruction, standing alone, apparently was no longer sufficient.

The court followed its rule in two subsequent decisions: *State v. Johnson*[154] and *State v. Plemmons*.[155] During deliberations in *Johnson*

146. *Id.* at 359, 247 S.E.2d at 438.
147. *Id.* at 360, 247 S.E.2d at 439.
148. 277 S.C. 543, 290 S.E.2d 420 (1982).
149. *Id.* at 548, 290 S.E.2d at 422.
150. 253 S.C. 531, 534, 172 S.E.2d 111, 112 (1970).
151. 281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 467 U.S. 1265 (1984).
152. *Id.* at 14, 313 S.E.2d at 627.
153. State v. Norris, 285 S.C. 86, 95, 328 S.E.2d 339, 344 (1985).
154. 293 S.C. 321, 360 S.E.2d 317 (1987).
155. 296 S.C. 76, 370 S.E.2d 871 (1988).

the jury asked if it could recommend a life sentence without parole.[156] Undoubtedly, the jury would sentence the accused to death if it did not receive assurance that he would really stay in prison for life. The trial judge instructed the jury only that "the possibility of parole is of no concern of yours, [sic] and you should not consider whether or not the Defendant will or will not be paroled."[157] The jury sentenced the defendant to death. The supreme court held that the instruction was reversible error because the trial judge failed to give the second part of the *Norris* charge.[158]

Plemmons presented nearly identical circumstances. The trial judge again did not give the second part of the *Norris* instruction, and the jury sentenced the accused to death. The court held that the trial judge's instruction was reversible error.[159] The *Norris* two-part instruction appeared to be a firmly established rule.

The facts in *State v. Smith* were similar to *Johnson* and *Plemmons*.[160] In *Smith*, however, the trial judge only instructed the jury that "life imprisonment is to be understood in its ordinary and plain meaning."[161] The trial judge disregarded the first part of the *Norris* instruction, but the court upheld the decision. The supreme court distinguished *Smith* by noting that neither *Johnson* nor *Plemmons* contained the instruction used by the trial judge in *Smith*.[162] It seems the supreme court abolished the first part of the *Norris* rule. Apparently the second part of the test, now standing alone, will suffice.

The intent of this new application of *Norris*, however, is not readily apparent in *Smith*. If the court's goal was to eliminate the possible prejudicial effect of allowing the jury to consider parole when it decides to sentence a man to death or to life imprisonment, then *Smith* does not further this goal. The court reasoned that "the only logical conclusion available to the reasonable juror if instructed that 'life imprisonment is to be understood in its ordinary and plain meaning' was that the accused would not be eligible for parole."[163]

That may be one conclusion, but, as Justice Chandler, noted it

156. 293 S.C. at 327, 360 S.E.2d at 321.

157. *Id.*

158. *Id.*

159. *Plemmons*, 296 S.C. at 79, 370 S.E.2d at 872.

160. In all three cases the juries returned with questions about the possibility of parole if the accused was sentenced to life.

161. *Smith*, 298 S.C. at 487, 381 S.E.2d at 727.

162. *Id.* The judges' instructions in *Johnson* and *Plemmons* contained only the first part of the *Norris* instruction, whereas the instruction given in *Smith* contained the second part.

163. *Id.*

certainly is not the only logical conclusion.[164] It is virtually common knowledge today that persons sentenced to life may become eligible for parole. The term "life imprisonment" is a misnomer and the public is aware of this. The reasonable juror is just as likely to conclude that the ordinary meaning of "life imprisonment" is that the accused may be paroled.

The *Norris* instruction contains an inherent contradiction when it is read as a whole. Consider a hypothetical scenario in which a jury is given responsibility to decide the defendant's fate in a capital case. After some deliberation they inquire of the court: "If we sentence this person to life in prison, could he be paroled?" This question provides some insight into the workings of a capital sentencing jury. First, the jury clearly is aware of the possibility of parole. Second, it is important to them and will have some bearing on their decision. Third, the ordinary meaning of "life imprisonment" is not necessarily its literal meaning, as the supreme court in *Smith* advocates. If it was, the jury would not have asked the question in the first place.

In response to the question the judge would instruct the jury, according to *Norris*: "Ladies and gentlemen, you are not to consider parole." They are not told that the possibility of parole does not exist and this may in fact confirm their belief that it does. The judge then tells them they are to give the term "life imprisonment" its ordinary and plain meaning. The possibility of parole is common knowledge to a juror. The juror may wonder whether this is the "ordinary meaning" of life imprisonment to which the judge referred. He fully realizes the possibility of parole, but is told not to consider it. Conversely, he is to consider "life imprisonment' in its ordinary sense, fully realizing that, ordinarily, prisoners-for-life come up for parole. The court's instructions have not addressed the jurors' concerns and may have compounded their confusion.

The United States Supreme Court addressed this issue in *California v. Ramos*.[165] A jury convicted the defendant in *Ramos* of capital crimes and sentenced him to death. At the penalty phase of the trial, the judge instructed the jury that, under state law, "a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole."[166] On appeal the accused contended that the charge (referred to as the Briggs Instruction) unconstitutionally invited the

164. *Id.* at 489, 381 S.E.2d at 728 (Chandler, C.J., dissenting).

165. 463 U.S. 992 (1983), *remanded*, People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984), *cert. denied*, 471 U.S. 1119 (1985).

166. *Id.* at 994.

jury to consider the commutation power in its sentencing decision.[167] The Court held that the Briggs Instruction did not violate the Eighth and Fourteenth Amendments.[168]

The Court recognized that the Briggs Instruction might tend to focus the jury's attention on the possibility that the system may return the defendant to society, thus inviting them to "assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society."[169] The defendant argued that, due to the speculative nature of inviting the jury to predict his future behavior, the instruction violated his constitutional rights. The Court relied on its earlier holding in *Jurek v. Texas*[170] and held that a jury may consider a defendant's future dangerousness when it determines what punishment to impose. The United States Supreme Court, therefore, condoned juries contemplating the possibility of parole.

The Court also addressed whether the Briggs Instruction detracted from the individualized sentencing determination mandated by the Court in *Woodson v. North Carolina*.[171] Again the Court relied on *Jurek* and concluded that the charge only further ensured that "the jury will have before it information regarding the individual characteristics of the defendant and his offense."[172] The matter is simply one consideration that enters into the weighing process conducted by the jury.[173] Thus, the Court implied that speculation about the future conduct of the accused is not only valid, but perhaps necessary to conduct a completely individualized sentencing procedure.

The Supreme Court also recognized and addressed the misleading potential of the term "life imprisonment without parole" contained in the Briggs Instruction. The Court noted that, although jurors may generally be aware of the possibility of parole, the statement is misleading. It implies that the sentence is permanent, and that is simply false.[174] The analogy to the South Carolina cases is obvious. The *Smith* court held that the charge was sufficient because the only reasonable conclusion for the jury was that the defendant would not receive parole. Re-

167. *Id.* at 998 n.8.

168. *Id.* at 1013. The Court, however, explicitly noted that its decision did not override contrary state courts that hold that it is improper for the jury to consider the possibility of commutation, pardon, or parole. *Id.* at 1013 n.30.

169. *Id.* at 1001.

170. *Id.* at 1002-03 (citing Jurek v. Texas, 429 U.S. 875 (1976)).

171. 428 U.S. 280 (1976).

172. *Ramos*, 463 U.S. at 1006 (citing Jurek v. Texas, 429 U.S. 875 (1976)), *cert. denied*, 471 U.S. 1119 (1985).

173. *Id.* at 1008 n.22.

174. *Id.* at 1004 n.19.

gardless of whether the jury believed this or not, the implication was false. Accordingly, the South Carolina Supreme Court's approach is inherently unsettling.

The Supreme Court approved of the fact that the Briggs Instruction both corrected an inaccurate and misleading statement and supplied the jury with correct information about a possible alternative consequence of its decision.[175] In *State v. Brooks*[176] the South Carolina Supreme Court invalidated the trial judge's charge because it improperly informed the jury of the accused's parole eligibility. The trial judge concluded his instruction with: "I tell you that, Mr. Foreman and ladies and gentlemen, because that's the way it is and you're entitled to know it in making your deliberations."[177] The United States Supreme Court would have agreed with the trial judge.[178]

The South Carolina Supreme Court's approach hinges on the interpretation that the legislature mandated a division of responsibility between the jury and the authorities appointed to carry out the sentence.[179] This goal certainly has merit and is sanctioned by the United States Supreme Court.[180] Nevertheless, the court's forced application of this goal on the parole eligibility issue is unrealistic. It is very difficult to charge a jury that parole eligibility is irrelevant to their decision. In *State v. Johnson*[181] the court noted that the jury should base its decision on the circumstances of the crime and the characteristics of the defendant.[182] The United States Supreme Court has held that the jury's consideration of whether the system should return the accused to society is a "characteristic of the defendant."[183] This is a more realistic approach. Perhaps the South Carolina Supreme Court is leaning in this direction.

State v. Atkins[184] provides some insight into where the court is heading. In *Atkins* the trial judge gave the jury no instruction at all in his initial charge about parole eligibility. The appellant asserted that,

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175. *Id.* at 1009.

176. 271 S.C. 355, 247 S.E.2d 436 (1978).

177. *Id.* at 358, 247 S.E.2d at 438.

178. *See Ramos*, 463 U.S. at 992.

179. State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970), *vacated in part*, 408 U.S. 936 (1972). " 'The Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed.' " *Id.* (quoting State v. White, 27 N.J. 158, 177-78, 142 A.2d 65, 76 (1958)).

180. *See Ramos*, 463 U.S. at 1013 n.30.

181. 293 S.C. 321, 360 S.E.2d 317 (1987).

182. *Id.* at 327, 360 S.E.2d at 321.

183. *Ramos*, 463 U.S. at 1002-05.

184. 293 S.C. 294, 360 S.E.2d 302 (1987), *vacated sub nom.* Patterson v. South Carolina, 110 S. Ct. 709 (1990).

given the circumstances of the case, the trial judge should have given an instruction on the law governing parole considerations.[185] The supreme court then established two rules applicable to initial charges. The first rule applied to all death penalty cases proceeding to trial after *Atkins* and stated that, if requested by the defendant, the trial judge shall charge the jury that the term " 'life imprisonment' is to be understood in its ordinary and plain meaning."[186] The second rule marks a drastic change in the court's approach. The rule applies to all death penalty cases proceeding to trial after *Atkins* that the Omnibus Criminal Justice Improvements Act of 1986 controls.[187] If requested by the defendant, the trial judge may give, in lieu of the "life imprisonment" language of the first rule, an instruction that completely explains the statutory scheme of parole eligibility when a death sentence is imposed.[188] This second rule is quite remarkable considering the prior line of cases. It gives the defendant a choice. If the defendant feels that the jury would consider twenty or thirty years just punishment in lieu of death, then the defendant can opt for the second instruction. Alternatively, if he feels that the jury would only accept "life imprisonment" in its literal sense over death, then the defendant can opt for the first rule and hope that the jury takes the instruction literally. Either way, the court has veered from an unrealistic approach and perhaps has recognized the logic of the United States Supreme Court in *California v. Ramos*.[189]

Unfortunately, *Atkins* addressed only the initial charge given to the jury about parole eligibility.[190] Considering the subsequent holdings in *Plemmons*[191] and *Smith*,[192] the court did not intend to expand *Atkins* to the situation in which the jury returns and specifically asks

185. *Id.* at 300, 360 S.E.2d at 305.

186. *Id.*

187. S.C. CODE ANN. § 24-13-730 (Law. Co-op. 1976).

188. The instruction states, in part:

> When the state seeks the death penalty and a statutory aggravating circumstance is specifically found beyond a reasonable doubt, and a recommendation of death is not made, the trial court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. When a statutory aggravating circumstance is not found beyond a reasonable doubt, the defendant shall be sentenced to life imprisonment and shall not be eligible for parole until the service of twenty years.

Atkins, 293 S.C. at 300, 360 S.E.2d at 306.

189. 463 U.S. 992 (1983).

190. Although this is not expressly stated in the opinion, it is clearly evident because the court decided *Johnson* and *Atkins* on the same day, and *Johnson* applies only when the jury returns with a specific question about parole eligibility.

191. 296 S.C. 76, 370 S.E.2d 871 (1988).

192. 298 S.C. 482, 381 S.E.2d 724 (1989), *cert. denied*, 110 U.S. 1536 (1990).

about parole. Thus, two troublesome scenarios are possible. First, the case does not come under the revised statute, the defendant chooses the first initial charge of *Atkins*[193] or no specific charge at all, and the jury returns with a question on parole eligibility. Second, the case falls under the revised statute, the defendant chooses the first charge of *Atkins*[194] or no charge at all, and the jury returns with a question on parole eligibility.

In the second scenario, the defendant may argue that the jury's belief that he would be released on parole after a "short" period caused them to sentence him to death to avoid this social injustice. This is not, however, a valid argument about the prejudicial effect of the judge's response to the jury's question, regardless of which part of the *Norris* instruction the judge's response may contain. The defendant forfeited his chance to inform the jury about the statutory requirements for parole, and the law should estop him from making any argument that this unduly prejudiced him.

The first scenario resembles *Smith* and impacts those cases pending under the old statute. The accused has no option to inform the jury of the statutory parole scheme. The defendant's argument is this: If the jury had known he would have been in prison for at least twenty years, they would not have sentenced him to death. As noted, the court apparently is unwilling to rectify this situation.

Another argument available to the accused is that any knowledge the jury had of the possibility of parole prejudiced him because the jury felt he could not be returned to society.[195] The only way the court could avoid this is to intentionally mislead the jury into believing that no possibility of parole existed. Although the supreme court may have tolerated an ambiguous instruction in the past, it certainly would not sanction an outright fraud upon the jury just to achieve a perceived legislative intent. Thus, *Atkins* has resolved the parole eligibility issue for capital sentencing cases under the Omnibus Criminal Justice Act.

Smith merely technically violated the *Norris* rule. Nonetheless, the case highlights the impossible task faced by the court in its effort to adhere to legislative intent. *Atkins* was the first evidence that the court had realized the futility of its efforts and was willing to follow a more realistic approach. *Smith* presented an ideal opportunity to expose the inadequacies of *Norris* and establish a new rule based on *At-*

193. "[T]he trial judge shall charge the jury that the term 'life imprisonment' is to be understood in its ordinary and plain meaning." State v. Atkins, 293 S.C. 294, 300, 360 S.E.2d 302, 305 (1987), *vacated sub nom.* Patterson v. South Carolina, 110 S. Ct. 709 (1990).

194. *Id.*

195. This was precisely the argument that the defendant made in *Smith*. *See* 298 S.C. at 487, 381 S.E.2d at 727.

kins. The supreme court failed to take this opportunity.

Stephen E. Bondura

VII. Bill of Peace Superseded by Rules of Civil Procedure; Prejudice Requirement for Rule 37 Dismissal of Action

In *Baughman v. AT&T*[196] the South Carolina Supreme Court held that the South Carolina Rules of Civil Procedure (SCRCP) supersede the common law bill of peace[197] procedure. The *Baughman* court also decided that prejudice against the adverse party is a necessary element to grant a rule 37 sanction of dismissal.[198]

Baughman v. AT&T resulted from four complaints, originally brought by 271 plaintiffs against defendants, American Telephone and Telegraph Company and AT&T Nassau Metals Corporation (Nassau). The plaintiffs claimed personal injury losses, property damage, and loss of consortium due to alleged air and water pollution from Nassau's Gaston plant. Plaintiffs alleged that smoke and odors from Nassau's plant caused them physical injuries and had diminished the value, use, and enjoyment of their property.[199] Although neither the plaintiffs nor Nassau applied for a bill of peace, and although Nassau actively opposed the procedure,[200] retired South Carolina Supreme Court Chief Justice C. Bruce Littlejohn, appointed as Special Presiding Judge, consolidated the plaintiffs' cases for a single nonjury trial by invoking a bill of peace.[201]

The bill of peace procedure existed at common law in South Carolina prior to the adoption of the SCRCP.[202] South Carolina, however, adopted a restrictive bill of peace procedure to apply in actions in eq-

196. 298 S.C. 127, 378 S.E.2d 599 (1989).

197. The bill of peace was originally an equitable procedure that enabled courts to claim jurisdiction over multiple parties to suppress litigation and to prevent multiplicity of suits. J. Story, Equity Jurisprudence 184 (1972). Prior to the merger of the courts of law and equity, parties faced with a threat of multiplicity of litigation had an inadequate remedy at law because common law rules discouraged joinder of parties and because the procedures were not suited to address the rights of unknown, unnamed, or nonparticipating persons whose interests might be decided in the litigation. *See* 7A C. Wright & A. Miller, Federal Practice & Procedure § 1751 (1986); Chafee, *Bills of Peace With Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).

198. 298 S.C. at 129-30, 378 S.E.2d at 601.

199. Record at 1.

200. *Id.* at 2-3.

201. *Id.* at 8.

202. *See* Aetna Casualty & Sur. Co. v. Yonce, 181 S.C. 369, 377-78, 187 S.E. 536, 539-40 (1936) (general discussion of bills in equity).

uity but not in actions at law.[203] The supreme court's *Baughman* opinion resolves the conflict between the SCRCP and the common law bill of peace.

The SCRCP "govern[s] the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . ."[204] Rule 81 provides that "the procedure [in South Carolina trial courts] shall conform to these rules insofar as practicable."[205]

The common law bill of peace applied in equity cases requires multiple parties who share a community of interest. A class action under rule 23 is the modern procedure for multiple parties to sue who share common questions of law or fact.[206] The drafters of rule 23 found the seeds of the class action in the bill of peace.[207]

Under rule 42 the trial court may consolidate actions into a "joint hearing or trial of any or all matters in issue in the action" when the matters have a "common question of law or fact . . . ."[208] "In furtherance of convenience or to avoid prejudice" the court "may order a separate trial of any claim . . . or of any separate issue . . . ."[209] Therefore, rule 42 enables the courts effectively to manage multi-party cases.

Thus, the stated purpose of the SCRCP, to govern procedure in the trial courts, coupled with the authority given to trial courts under the SCRCP, indicates that the SCRCP preempts similar pre-Code procedures. Although the supreme court's opinion in *Baughman* held that the bill of peace is no longer a viable procedure in South Carolina, it also gives strength to the argument that other pre-Code procedures have been replaced.

In *Baughman* the court also held that the bill of peace procedure was inadequate because it violated Nassau's right to a trial by jury.[210] Article 1, section 14 of the South Carolina Constitution provides that "[t]he right of trial by jury shall be preserved inviolate."[211] The right to a jury trial depends on the main purpose of the suit.[212]

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203. *See Id.* at 377-79, 187 S.E. at 539-40; *see also* Pacific Mut. Life Ins. Co. v. Parker, 71 F.2d 872, 876 (4th Cir. 1934); Hellams v. Switzer, 24 S.C. 39, 44 (1885).

204. S.C.R. CIV. P. 1.

205. *Id.* 81.

206. *See id.* 23.

207. *See* Yeazell, *From Group Litigation To Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1099 (1980); *see* 7A C. WRIGHT & A. MILLER, *supra* note 197, at § 1751.

208. S.C.R. CIV. P. 42(a).

209. *Id.* 42(b).

210. *See Baughman*, 298 S.C. at 129, 378 S.E.2d at 600-01.

211. S.C. CONST. art. I, § 14.

212. *See* Collins Music Co. v. Lightsey, 285 S.C. 108, 110, 328 S.E.2d 477, 478 (1985) (party sought both money damages and equitable relief but court stated that the party's primary form of relief sought was an injunction; therefore, no jury trial).

In *Baughman* the plaintiffs' primary claims were for damages although injunctive relief from the allegedly polluted emissions was also sought. The effect of the *Baughman* court's decision to allow a jury trial is that in nuisance cases, in which the plaintiff seeks an injunction but also claims significant damages, the court will grant the plaintiff a jury trial.

Rule 38(d) provides that "[a] demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a)."[213] A defendant can, under rule 38(d), rely on the plaintiff's demand for a jury trial.[214] In *Baughman* the supreme court ruled that plaintiffs were entitled to a jury trial on their damage claims, and, therefore, defendant Nassau was also entitled to a jury trial.[215] The *Baughman* ruling is the first interpretation of rule 38(d) by the supreme court.

In *Baughman* the court also held that dismissal of an action for failure to comply with a discovery order is too severe a sanction when that failure has not prejudiced the adverse party.[216]

Thirty-eight of the plaintiffs in *Baughman* failed to answer the defendant's second set of interrogatories. *Nassau* moved to compel the plaintiffs to answer and requested sanctions for the plaintiffs' failure to respond. Judge Littlejohn, pursuant to rule 37(b)(2), granted Nassau's motion for sanctions and dismissed with prejudice the claims of the plaintiffs who had not responded.[217]

Rule 37, sections (b) and (d) provide for the sanction of dismissal when one party has failed to respond to interrogatories or to a court order.[218] In *Societe Internationale Pour Participations Industrielles et*

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213. S.C.R. Civ. P. 38(d).

214. Cram v. Sun Ins. Office, Ltd., 375 F.2d 670, 675 (4th Cir. 1967) (court interpreted rule 38 to allow a party to rely on demand for jury trial by opposing party); *see also In re* N-500L Cases, 691 F.2d 15, 22 (1st Cir. 1982); DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 832 (9th Cir. 1963) *cert. denied*, 376 U.S. 950 (1964); DeGioia v. United States Lines Co., 304 F.2d 421, 424-25 (2d Cir. 1962).

215. 298 S.C. at 129, 378 S.E.2d at 600-01.

216. *Id.* at 130, 378 S.E.2d at 601.

217. Record at 4-6.

218. Rule 37(d) provides, "If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . . ." S.C.R. Civ. P. 37(d). Rule 37(b) provides:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient

Commerciales v. Rogers[219] the United States Supreme Court thoroughly discussed the authority of the trial court to dismiss an action for failure to comply with an order. The Court stated that "whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37,"[220] and that simply failing to comply with an order may be sufficient to invoke the sanction.[221] The Court further noted that "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[222] Finally, the Court concluded that "Rule 37 should not be construed to authorize dismissal . . . because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."[223]

On the other hand, in *National Hockey League v. Metropolitan Hockey Club, Inc.*[224] the United States Supreme Court held that,

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.[225]

The Court concluded that the extreme sanction of dismissal was appropriate because of the respondents' "flagrant bad faith" and their counsel's "callous disregard" in failing to answer written interrogatories in a timely manner.[226]

In *Baughman* the South Carolina Supreme Court reversed the dismissal of the plaintiffs' complaint because the defendant had not been prejudiced by the failure of the thirty-eight plaintiffs to respond. South Carolina law places the burden of proof on the plaintiffs to show that their noncompliance did not prejudice the defendant.[227] In certain

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party . . . .

Id. 37(b).

219. 357 U.S. 197 (1958).

220. *Id.* at 207.

221. *Id.* at 207-08.

222. *Id.* at 209.

223. *Id.* at 212.

224. 427 U.S. 639 (1976).

225. *Id.* at 643.

226. *Id.*

227. Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless

circumstances, however, the failure to answer interrogatories may not prejudice the opposing party.[228] In *Baughman* the court found no prejudice because the information received by Nassau from depositions and answers was similar to the type of information found in the interrogatories.

The basis for dismissal under rule 37, however, is not centered on the lack of finding prejudice, but, rather, on the willfulness, bad faith, or fault of the party who has not complied with the court's order.[229]

In *Baughman* the South Carolina Supreme Court reversed the dismissal without stating that the lower court had committed a clear abuse of discretion. The supreme court has adopted the rule that an abuse of discretion means that a judge's ruling was based on an error of law or is without evidentiary support.[230] Furthermore, South Carolina adopted the rule that the reviewing court "may not substitute [its] judgment for [the lower court's] simply because [it] might have reached a different conclusion had [it] been in his place . . . ."[231] Finally, South Carolina adopted the rule that "[t]he burden always rests upon the appellant to show an abuse of discretion; and in determining whether an abuse of discretion occurred, the case must be considered in the light of its underlying circumstances."[232]

The court's holding in *Baughman* may signify several different results: (1) the reviewing court does not have to find an abuse of discretion by the trial court to reverse the court on discovery matters; (2) an abuse of discretion may be read implicitly into a decision by virtue of the reversal; (3) dismissal of a case for failure to answer interrogatories when the adverse party is not prejudiced is an error of law; (4) dismissal of a case for failure to comply with a court order when the adverse party is not prejudiced is an error of law; (5) in a complex suit the evidentiary support for a dismissal is inadequate when the adverse party is not prejudiced; or (6) some combination of the above.

One clear conclusion of the *Baughman* holding is that it is an error of law to dismiss a case for failure to answer interrogatories when the opposing party is not prejudiced. Because the plaintiffs in *Baughman* not only failed to answer the interrogatories, but also failed to comply

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the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." *Id.*

228. *See* Board of Educ. of Evanston v. Admiral Heating and Ventilating, Inc., 104 F.R.D. 23 (N.D. Ill. 1984).

229. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

230. Fontaine v. Peitz, 291 S.C. 536, 538-39, 354 S.E.2d 565, 566-67 (1987).

231. Wallace v. Timmons, 237 S.C. 411, 421, 117 S.E.2d 567, 572 (1961).

232. Em-Co Metal Prods., Inc. v. Great Atl. and Pac. Tea Co., 280 S.C. 107, 110, 311 S.E.2d 83, 85 (Ct. App. 1984) (citations omitted).

with a court order, it may be that to dismiss a case without prejudice to the adverse party is an error of law when a party fails to comply with a court order.

The *Baughman* decision seems less clear when compared to the standard followed by the United States Supreme Court. In *National Hockey League*[233] the Court stated:

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing . . . . We think that the lenity evidenced in the opinion of the Court of Appeals, while certainly a significant factor in considering the imposition of sanctions under Rule 37, cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule.[234]

The Supreme Court reversed the Court of Appeals and reinstated the dismissal, concluding that "the extreme sanction of dismissal was appropriate in this case by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities."[235] Although the Supreme Court in *National Hockey* did not discuss the question of prejudice to the adverse party as a requirement, the standard for the sanction appears to be based upon the culpability of the sanctioned party and not the effect upon the adverse party. Furthermore, rule 37 does not seem to impose such a "prejudice" element.

Until a South Carolina court articulates a clear standard for dismissal, prejudice to the adverse party will remain a prerequisite to dismissal. It is unclear whether the prejudice element applies to a dismissal for failure to comply with a court order or merely for failure to answer interrogatories. Because the power of the trial court to dispense justice in an orderly manner is an underlying part or the SCRCP, a strong argument can be made that under certain circumstances the ultimate sanction of dismissal is appropriate for failure to comply with a court order, even in the absence of prejudice to the adverse party.

Michael W. Hogue

233. 427 U.S. 639 (1976).
234. *Id.* at 642.
235. *Id.* at 643.

VIII. CITIZENS' EXCUSABLE NEGLECT USED TO IMPOSE DUTY ON GOVERNMENT

In *Thompson v. Hammond*[236] the South Carolina Supreme Court granted relief to a group of Horry County landowners who opposed a public road closing. The South Carolina Court of Appeals had affirmed the circuit court's judgment that ordered the closing. The supreme court granted certiorari and applied rule 60(b)(1)[237] of the South Carolina Rules of Civil Procedure. The court decided that the landowners had a meritorious defense and that the judgment had been taken against them because of "excusable neglect."[238] The supreme court granted the landowners a new trial.

Sidney Thompson petitioned the circuit court to close a public landing on the Intracoastal Waterway and a section of the public road that lead to the landing that adjoined his property. Thompson alleged that Horry County had abandoned the landing and adjacent road. He personally served notice of his petition on Horry County. He served by publication all others who claimed an interest in the property.[239]

A landowner whose property abuts the public road, but not the disputed area, read Thompson's legal advertisement and contacted Thompson's attorney to inform him that individuals who owned property along the road opposed the petition. The lawyer promised to tell Thompson of the landowners' opposition and to notify the landowners of Thompson's response.[240] When the landowner did not receive any reply from the lawyer, he circulated a petition to oppose the closing

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236. 299 S.C. 116, 382 S.E.2d 900 (1989).

237. Rule 60(b)(1) provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ." S.C.R. CIV. P. 60(b)(1). Rule 60(b) is essentially the same as former South Carolina Code section 15-27-130. *See* S.C. CODE ANN. § 15-27-130 (Law. Co-op. 1976); S.C.R. CIV. P. 60(b) reporters' notes. Significantly, the new rule, drawn from federal rule 60(b), deletes the pronoun "his" which referred to the party against whom the judgment was taken and this appeared in section 15-27-130 in front of the phrase "mistake, inadvertence, surprise or excusable neglect." The new language, thus, allows for relief even when a third party causes the complained-of error. *See id.*

238. *See Thompson*, 299 S.C. at 119, 382 S.E.2d at 902-03.

239. *Id.* at 117, 382 S.E.2d at 901-02. South Carolina Code sections 57-9-10 to -40 govern the abandonment or closing of streets, roads or highways. The Code provides for a petition and notice, but not for a public hearing. A petitioner must serve notice on adjacent landowners, and may notify all other interested parties by publication. S.C. CODE ANN. §§ 57-9-10 to -40 (Law. Co-op. 1976).

Although in *Thompson* the landowners' property did not abut the landing and immediately adjoining road, the landowners had standing as defendants because the court considered "the best interest of all concerned." *Id.*

240. *See Thompson*, 299 S.C. at 117-18, 382 S.E.2d at 902.

and gathered eighteen signatures. He then forwarded the petition to his county councilman, Alton Duncan. The county council voted to oppose the road closing and, more importantly, notified the landowners of its decision. In reliance on the county's representations, the landowners took no further steps to protect their interests.[241]

Two days before the scheduled judicial hearing, however, the county voted not to oppose the closing at a nonpublic session at which Councilman Duncan was not present.[242] The supreme court noted that "[n]either Mr. Duncan nor the landowners were notified of the County's change in position or the date of the hearing."[243]

At the hearing, the county attorney informed the court that the county did not oppose the petition to close the public road. No landowners appeared to oppose Thompson's petition. Based on testimony presented by Thompson and his neighbor, Mr. Hammond, the circuit court ordered the public road closed and the land divided between the petitioners. Approximately two months later, the landowners learned of the closing and moved for relief pursuant to rule 60(b).[244] Thompson and Hammond already had established boundary lines and received deeds to the property.[245]

Under rule 60(b)(1), before the landowners could obtain relief from the final judgment of the circuit court,[246] they had to establish (1) that the judgment was taken against them by mistake, inadvertence, surprise, or excusable neglect[247] and (2) that they had a meritorious defense.[248] These requirements were once virtually insurmountable hurdles, but gradually the courts have eased the burden on petitioners to allow judges to decide cases on the merits rather than dismiss them on technicalities.[249]

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241. *Id.* at 118, 382 S.E.2d at 901-902.

242. *Id.*

243. *Id.*, 382 S.E.2d at 902.

244. *See id.* The county also moved for relief pursuant to rule 60(b)(1). The county claimed that it made a mistake in not notifying the landowners of its change in position. Both the court of appeals and the supreme court held that the authorized statements of its attorney at the hearing bound the county. *Id.* at 119, 382 S.E.2d at 902; Thompson v. Hammond, 294 S.C. 95, 98, 362 S.E.2d 879, 880-81 (Ct. App. 1987).

245. *Thompson*, 294 S.C. at 97, 362 S.E.2d at 880 (court of appeals' decision).

246. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989).

247. *See* H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 398-402 (1985).

248. *See id.* at 402-03. A meritorious defense was a requirement under Code section 15-27-130 prior to the adoption of the South Carolina Rules of Civil Procedure. The court of appeals has held that the adoption of the Rules of Civil Procedure has not changed this requirement. *See* Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988).

249. *See* H. LIGHTSEY & J. FLANAGAN, *supra* note 247, at 399. For an example of the historical view, see McDaniel v. Addison, 53 S.C. 222, 230, 31 S.E. 226, 229 (1898):

In addressing the first requirement of rule 60(b), the landowners relied on *Graham v. Town of Loris*[250] for the proposition that a client's neglect is excusable when an attorney abandons the client without reasonable notice to him of the imminent hearing date.[251] The *Graham* court found excusable neglect when the town attorney willfully abandoned his client without reasonable notice. In *Graham* the court held that "[c]onscience require[d] [the] Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client."[252]

Thompson argued *Graham* was not relevant, however, because in *Graham* the town was the attorney's client. In *Thompson* the landowners were third parties who merely assumed that the county would defend the matter. Thompson alleged that because the landowners could have taken steps to protect themselves, but failed to do so, they were guilty of culpable neglect.[253]

The court of appeals agreed with Thompson and held that the landowners' reliance on the county was not justified and the landowners, therefore, had not shown excusable neglect. The court of appeals declared that the county

> had no special duty to give the protesting landowners additional notice of its position. Even if there had been such a duty, a failure of the County to advise the protesting landowners of the position it would take in court would not be a ground for vacating the judgment. . . . [The landowners] had a duty to give the case their personal attention, keeping themselves informed of its progress. . . . They claim to have relied upon the County to protect their private interests, but they have shown no basis in law to justify such reliance. Horry County had no duty to protect or represent them in the litigation nor did it undertake to do so. . . . If they were misled, it is due to their own fault or to their ignorance, for which the law provides no remedy.[254]

> The law has, in the plainest terms, prescribed certain requirements, one of which is that a failure to answer the complaint within 20 days entitles the plaintiff to a judgment by default; and, if a defendant fails to comply with this plain and simple requirement, he must take the consequences, even though they may result in what some persons would call manifest injustice.

Id. The court of appeals adopted a more modern viewpoint in Roberts v. Peterson, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987) ("It is the general rule in this country that when an employee hands suit papers to his/her employer and the employer fails to properly answer the suit papers, the courts grant relief to the defaulting defendant in the interest of trying cases on their merits.").

250. 272 S.C. 442, 248 S.E.2d 594 (1978).

251. Brief of Appellant at 12.

252. *Graham*, 272 S.C. at 452-53, 248 S.E.2d at 599.

253. *See* Thompson v. Hammond, 294 S.C. 95, 98, 362 S.E.2d 879, 880-81 (Ct. App. 1987).

254. *Id.* at 98-99, 362 S.E.2d at 880-81 (citations omitted).

The South Carolina Supreme Court, however, stated that although the landowners did not hire an attorney or file an answer, they did take steps to protect themselves. The court noted that the County Council assured the landowners that it would oppose the road closing. Moreover, the court emphasized that the county did not notify the landowners of its change in position. Thus, based on the totality of the circumstances, the supreme court concluded that the landowners demonstrated excusable neglect.[255]

Turning to the question of a meritorious defense, the supreme court found the landowners had demonstrated the existence of a real controversy on the issue of whether the county had abandoned the road. The county, in fact, had maintained the road within two years prior to the litigation and had used the landing to replenish water supplies for its fire trucks.[256] Based on these facts, the supreme court concluded that the landowners had presented a meritorious defense.[257]

The supreme court also found that the trial judge had committed reversible error because he based his conclusions on evidence not properly before the court. The day before the hearing, the trial judge made an *ex parte* viewing of the property.[258] At the hearing, the judge, noting the poor state of repair of the landing, expressed his opinion that the county voted to abandon the road to avoid liability should someone be injured there.[259] The court held that not only was the judge's *ex parte* viewing itself improper, but that the judge used his conclusions to deny relief under rule 60(b)(1) because, in the trial judge's opinion, the landowners could have no meritorious defense.[260]

A broad reading of *Thompson* and its "totality of the circumstances" test would place a duty on any defendant not to make representations on which other parties might rely to their detriment. The supreme court expressed concern with this possibility and precluded the application of *Thompson* to private litigants: "It should be noted that this is a peculiar case because the road involved was a public, not

255. Thompson v. Hammond, 299 S.C. 116, 120-21, 382 S.E.2d 900, 903 (1989).

256. *Id.* at 120, 382 S.E.2d at 903.

257. *Id.* The court noted that a meritorious defense "need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts . . . ." *Id.* (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978)).

258. *Id.* at 118, 382 S.E.2d at 902.

259. *Id.* at 118-19, 382 S.E.2d at 902.

260. *Id.* at 121, 382 S.E.2d at 903-04. Thompson argued that the trial judge never reached the meritorious defense issue because the appellants failed to establish excusable neglect. In a separate dissent, Justice Chandler agreed with the respondent. *See id.* at 122 n.3, 382 S.E.2d at 904 n.3 (Chandler, J. dissenting). Justice Chandler also noted that the trial judge's factual findings were supported by the evidence. *Id.* at 122, 382 S.E.2d at 904.

private, road and, therefore, was the responsibility of the County. This is not the usual situation where the subject of the litigation is the responsibility of the individual plaintiff or defendant."[261]

Thompson is unique and its holding should be confined to the facts. The case suggests that whenever a governmental entity appears as a party to a controversy it must give notice to interested constituents, not only of its position, but also of any change in that position.

Deborah P. Morgan

IX. Logical Relationship Test for Computing Counterclaims Adopted

In *North Carolina Federal Savings and Loan Association v. DAV Corp.*[262] the South Carolina Supreme Court adopted the logical relationship test for determining whether counterclaims are compulsory under rule 13(a) of the South Carolina Rules of Civil Procedure.

North Carolina Federal Savings and Loan Association (North Carolina Federal) commenced this foreclosure action on a note and mortgage that Parasol Inn Joint Venture gave to finance a real estate project located in Horry County, South Carolina. The Parasol Inn Joint Venture consisted of DAV Corporation, NCF Financial Corporation (a wholly owned subsidiary of North Carolina Federal), and Parasol Development Corporation. DAV counterclaimed against North Carolina Federal and demanded a jury trial on these claims.[263] The trial judge refused this demand. Thus, DAV appealed to the South Carolina Court of Appeals.

The South Carolina Court of Appeals used two different tests to find that DAV asserted permissive counterclaims.[264] First, the counter-

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261. *Id.* at 120-21, 382 S.E.2d at 903.

262. 298 S.C. 514, 381 S.E.2d 903 (1989).

263. *Id.* DAV made the following counterclaims:

> (1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs; (2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action; (3) breach of fiduciary duty to co-joint venturers; (4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed; (5) violation of the Unfair Trade Practices Act by breaching the oral agreement; (6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

Id. at 517, 381 S.E.2d at 904-05.

264. A party waives his right to a jury trial when he asserts a permissive counterclaim. Conversely, a party does not waive his right to a jury trial when he asserts a compulsory counterclaim in an equity action. *See id.* at 517, 381 S.E.2d at 905.

claim is compulsory if the issues of fact and law raised by the claim and counterclaim are substantially the same. Second, the counterclaim is compulsory if any logical relation exists between the claim and counterclaim. The court of appeals found that DAV's counterclaims did not satify either of these tests.[265] The South Carolina Supreme Court relied solely on the logical relationship test to conclude, however, that all but one of DAV's six counterclaims were compulsory.[266]

Prior to South Carolina's adoption of rule pleading in 1985, statutes controlled counterclaims under the code pleading system.[267] Under the code pleading provision, a defendant could counterclaim if the claim (1) arose out of the "contract or transaction set forth in the complaint,"[268] (2) was "connected with the subject of the action,"[269] or (3) arose "out of the same state of facts" as the complaint.[270] Furthermore, the defendant could assert any counterclaim independent of the complaint's cause of action only if the action "arises on the contract" and the counterclaim existed at the time the plaintiff filed suit.[271] Rule 13(a) of the South Carolina Rules of Civil Procedure now requires an opposing party to assert a counterclaim "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[272] This language is identical to rule 13(a) of the Federal Rules of Civil Procedure.[273]

The courts have developed four tests to determine whether a counterclaim is compulsory.[274] First, a counterclaim is compulsory

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265. North Carolina Fed. Sav. and Loan Ass'n. v. DAV Corp., 294 S.C. 27, 362 S.E.2d 308 (Ct. App. 1987), *rev'd in part, aff'd in part*, 298 S.C. 514, 381 S.E.2d 903 (1989).

266. North Carolina Fed. Sav. and Loan Ass'n, 298 S.C. at 518, 381 S.E.2d at 905.

267. S.C. CODE ANN. §§ 15-15-30, -50 (Law. Co-op. 1976) (the legislature repealed both statutes on July 1, 1985).

268. H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 250 (1985).

269. *Id.*

270. *Id.*

271. *Id.*

272. S.C.R. CIV. P. 13(a). The rule states:

> 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. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought the suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule 13.

273. FED. R. CIV. P. 13(a).

274. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1410, at 52-55

when it presents issues of fact and law substantially similar to those contained in the claim.[275] This test is not useful because the issues in any particular case usually are unclear until the the parties complete their pleadings and begin discovery.[276]

Second, a counterclaim is compulsory when the doctrine of res judicata bars a subsequent suit on the defendant's claim.[277] This test effectively is worthless because the courts generally hold that in the absence of a compulsory counterclaim rule, a party is never barred by res judicata from suing independently later.[278]

Third, a counterclaim is compulsory when it involves substantially the same evidence as the original claim.[279] Although this test is effective in some circumstances, some counterclaims may be compulsory even though they do not meet this test.[280] For example, if a party seeks to void an insurance policy because of fraud and another party asserts a counterclaim for injuries that the policy covers, the counterclaim would not be compulsory because the evidence for fraud would be different from the evidence for the injury claim. This test requires the use of one or more companion tests to address all of the compulsory counterclaim issues.[281]

Fourth, a counterclalim is compulsory when it has a logical relationship with the original claim.[282] Most states,[283] including South Carolina,[284] have adopted this test. The South Carolina Supreme Court noted that the logical relationship test is "widely accepted because of its flexibility."[285] The logical relationship test also promotes judicial economy because it allows rule 13 to apply to any counterclaim that could profitably be tried with the main claim.[286] On the other hand, use of the logical relationship test could result in unnecessary litigation

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(1976). The Fourth Circuit does not apply any single test, but uses all four to determine whether a counterclaim is compulsory or permissive. *See* Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1043 (4th Cir. 1976).

275. 6 C. WRIGHT & A. MILLER, *supra* note 274, § 1410, at 52.

276. *Id.* at 58.

277. *Id.* at 59.

278. *Id.*

279. *Id.* at 60.

280. *Id.*

281. *Id.*

282. *Id.* at 61.

283. *Id.* at 65.

284. North Carolina Fed. Sav. and Loan v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989).

285. *Id.*, 381 S.E.2d at 905; *see also* 6 C. WRIGHT & A. MILLER, *supra* note 274, § 1410 at 61 ("The hallmark of this approach is its flexibility.").

286. 6 C. WRIGHT & A. MILLER, *supra* note 274, § 1410 at 65.

due to the case-by-case nature of the analysis.[287]

Many courts have expanded the logical relationship test. In *Revere Copper and Brass, Inc. v. Aetna Casualty and Surety Co.*[288] the Fifth Circuit held that a claim is logically related to the main claim "if it arises out of the same aggregate of operative facts as the original claim."[289] Likewise, in *Great Lakes Rubber Corp. v. Herbert Cooper Co.*[290] the Third Circuit held that:

> [T]he phrase 'logical relationship' is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action. Indeed the doctrine of *res judicata* compels the counterclaimant to assert his claim in the same suit for it would be barred if asserted separately, subsequently.[291]

Although the South Carolina Supreme Court did not elaborate on their reasons for adopting the logical relationship test, their holding provides an operational test for determining whether a counterclaim is compulsory. The logical relationship test allows courts to apply rule 13(a) broadly. Thus, the courts can adjudicate a greater number of counterclaims with the related claims.

For the practitioner, South Carolina's adoption of the logical relationship test provides an established rule for determining that a counterclaim is compulsory. Because of the wide scope of the test, the cautious practitioner should assert any possible counterclaim that is logically related to the adverse party's claim in order to avoid a subsequent bar by res judicata.

Michael Don Stokes

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287. *See* Bose Corp. v. Consumers Union of the United States, Inc., 384 F. Supp. 600, 603 (D. Mass. 1974) (quoting 6 C. WRIGHT & A. MILLER, *supra* note 274, § 1410 at 47).

288. 426 F.2d 709 (5th Cir. 1970).

289. *Id.* at 715.

290. 286 F.2d 631 (3d Cir. 1961).

291. *Id.* at 634.

X. LATE-DISCOVERED JUROR MISCONDUCT NOT A BAR TO A NEW TRIAL: PARTY MAY AMEND MOTION FOR NEW TRIAL UNDER RULES 59 AND 60(b)

In *Gray v. Bryant*[292] the South Carolina Supreme Court held that a party may amend a motion to seek a new trial after the ten-day period for filing a new trial motion has expired.[293] This rule applies when a party seeks to include the allegation of juror disqualification based on a juror's predisposition when the party could not have discovered the evidence within the ten-day filing period.[294]

In *Gray* the jury returned a verdict for the respondent, Dr. Bryant. The appellant filed a timely motion for a new trial and asserted five errors that were unrelated to juror disqualification. On the day the jury decided the case, however, one juror sent a letter to a newspaper that praised physicians and strongly criticized people who sue them.[295] After the newspaper published the juror's letter, the appellant sought to amend his original motion for a new trial on the grounds that during *voir dire* the juror did not reveal that she was both (1) unable to decide the case fairly and impartially because of her prejudice toward people who sue physicians, and (2) that she was a former patient of the respondent, Dr. Bryant.[296]

Rule 59 of the South Carolina Rules of Civil Procedure does not provide a procedure to amend a motion for a new trial or to add new grounds after the expiration of the ten-day period.[297] The supreme court, however, relied on the 1953 case *Smith v. Quattlebaum*[298] and held that courts must read rule 59 in conjunction with rule 60(b), which is the newly discovered evidence exception.[299] The *Gray* court

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292. 298 S.C. 285, 379 S.E.2d 894 (1989).

293. Rule 59 of the South Carolina Rules of Civil Procedure requires a party to make a motion for a new trial no later than ten days after the entry of judgment. The rule states that "[t]he motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." S.C.R. CIV. P. 59(b).

294. *Gray*, 298 S.C. at 287-88, 379 S.E.2d at 895-96.

295. Record at 96.

296. Although the juror's letter revealed prejudice and bias, Dr. Bryant's prior treatment of the juror was first revealed to appellant's counsel at the motion hearing. *See id.* at 70-71.

297. *See* S.C.R. CIV. P. 59.

298. 223 S.C. 384, 76 S.E.2d 154 (1953).

299. *Gray*, 298 S.C. at 286-87, 354 S.E.2d at 895-96. Rule 60(b) of the South Carolina Rules of Civil Procedure reads, in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

explained that in *Smith* the South Carolina Supreme Court applied a newly discovered evidence exception to give the trial court jurisdiction to consider a motion for a new trial based on an after-discovered relationship of a juror to the plaintiff.[300] The *Gray* court applied the same principle to rule 60(b) and held that a party may amend his motion for a new trial after he discovers evidence which he could not have discovered within the ten-day time limit, which is established in rule 59(b).

After the court decided that the trial court properly allowed the appellant to amend the motion for a new trial, the court considered whether the trial court's denial of the motion was in error. The court relied on *Thompson v. O'Rourke*[301] and identified three conditions that a party must meet before the court can grant a new trial based on the disqualification of a juror. The court stated that the *Thompson* test requires a "party seeking a new trial . . . [to] show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict."[302] The court also explained that when a seated juror does not respond fully to *voir dire* questioning "[r]elief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of a parties' [sic] peremptory challenges."[303]

The second and third elements of the *Thompson* test were met easily in *Gray* because the plaintiff could not have discovered the evidence prior to the verdict.[304] To establish the first element the court noted that the juror concealed both that she was a patient of Dr. Bryant and that she had a predisposition that could have prevented her from impartially deciding the case.[305] Because "these facts could have supported a challenge for cause or could have been a material factor in the use of the appellant's peremptory challenges," the appellant satisfied the fact of disqualification element.[306] Thus, the court remanded the case for a new trial.[307]

Other courts have used similar tests when deciding whether a party is entitled to a new trial because of juror disqualification. The

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59(b); . . . The motion shall be made within a reasonable time . . . .
S.C.R. CIV. P. 60(b).

300. *Gray*, 298 S.C. at 287, 379 S.E.2d at 895.

301. 288 S.C. 13, 339 S.E.2d 505 (1986).

302. *Gray*, 298 S.C. at 288, 379 S.E.2d at 896.

303. *Id.*, 379 S.E.2d at 896 (quoting *Thompson*, 288 S.C. at 15, 339 S.E.2d at 506).

304. *Id.* at 287, 379 S.E.2d at 896.

305. *Id.* at 286, 379 S.E.2d at 895.

306. *Id.* at 288, 379 S.E.2d at 896.

307. *Id.*

courts' decisions apparently turn on whether the juror's conduct is so egregious that he could not have reached a decision fairly and impartially. In *McDonough Power Equipment v. Greenwood*[308] the United States Supreme Court held that "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."[309] Furthermore, to obtain a new trial because of juror misconduct "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause."[310] The Court, therefore, did not mandate a new trial because the juror's improper response to a *voir dire* question resulted from confusion and not bias.[311]

In *Warner v. Transamerica Insurance Co.*[312] the Eighth Circuit declined to grant a new trial based on "a vague, uncertain, and indirect fifteen year old business relationship and a short casual conversation" between a juror and the plaintiff, because the juror had not failed to disclose "pertinent information."[313]

The *Warner* court established a three-part test to determine the propriety of granting rule 60(b) relief based on newly-discovered evidence. Under *Warner* a party must shown "(1) that the evidence was actually 'newly discovered' . . . (2) that the movant exercised due diligence; and (3) that the evidence is material, not merely impeaching or cumulative, and that a new trial would probably produce a different result."[314] Although the *Warner* court's test is not identical to the one established by the South Carolina Supreme Court in *Gray*, it is based

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308. 464 U.S. 548 (1984).

309. *Id.*

310. *Id.* at 556. In this personal injury case, the plaintiff's attorney asked prospective jurors whether they or members of their families had been injured in an accident. *Id.* at 550. The person who became the jury foreman did not reveal that his son had been injured in the explosion of a truck tire, but he did not believe that his son's broken leg was comparable to the plaintiff's injury. The Supreme Court noted that the question had confused many of the jurors and that "[t]o invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* at 555-56.

311. *Id.* at 556.

312. 739 F.2d 1347 (8th Cir. 1984).

313. *Id.* Transamerica alleged that a juror failed to disclose an indirect business relationship with the plaintiff, Jerry Warner, during *voir dire* questioning. Specifically, Warner, a bank vice-president, made loans to a business owned by the juror's brother. The juror also worked for his brother's business for a period of time. The juror, however, "testified that he had never had any direct dealings with either the bank or with Warner personally since his brother did almost all of the banking business." *Id.* at 1352. The court held that these facts did not "constitute the type of exceptional circumstances contemplated by Rule 60(b)." *Id.* at 1353.

314. *Id.*

on the same policy rationale, and, therefore, should produce a similar result.

In *McCoy v. Goldston*[315] the Sixth Circuit stated that "deliberate concealment or purposefully incorrect responses during *voir dire* suffice to show a prejudicial impairment of the right to the exercise of peremptory challenges."[316] Furthermore, "a prejudicial impairment of the right to the exercise of peremptory challenges also is established if the undisclosed information is indicative of probable bias concerning either a material aspect of the litigation or its outcome."[317] The court held that "a new trial must be granted where the undisclosed information would have resulted in the juror's disqualification for cause."[318]

In *Johnson v. Knapp*,[319] a case factually similar to *Gray*, the plaintiffs moved for a new trial under rule 59 of the Federal Rules of Civil Procedure after the filing period had expired. The court, however, regarded the plaintiffs' motion for a new trial as a motion to set aside the judgment pursuant to rule 60(b), under which the plaintiffs' motion was timely.[320]

The plaintiffs based their motion on a letter that a member of the jury panel wrote and addressed to the defendant's trial counsel. In the letter the juror complimented the attorney on his performance.[321] The plaintiffs also introduced newspaper articles that the juror had enclosed with the letter to the defendant's attorney, which the plaintiffs claimed had given the juror a "preconceived idea that a cataract opera-

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315. 652 F.2d 654 (6th Cir. 1981).

316. *Id.* at 658. The case is overruled by McDonough Power Equip. v. Greenwood, 464 U.S. 548 (1984), to the extent the case held that a court shall presume bias if a juror commits perjury on *voir dire*. Urseth v. City of Dayton, 680 F. Supp. 1084, 1091 (S.D. Ohio 1987). The plaintiffs claimed at trial "that police officers had violated their civil rights and alleged false arrest, false imprisonment, malicious prosecution, and assault and battery." *McCoy*, 652 F.2d at 656. During *voir dire* the district court questioned the jurors about past experiences that they, their close friends, and their relatives had with law enforcement agencies or police departments. *Id.*

Plaintiffs' counsel did not discover that the jury forewoman concealed her son's parole-officer training until after the plaintiffs filed a motion for a new trial under rule 59. After their counsel learned of the son's employment, the plaintiffs filed a "Supplemental Motion for Relief From Judgment," under rule 60(b), which alleged that the juror's "silence during *voir dire* abrogated the plaintiff's right to peremptorily challenge her." *Id.* The district court denied the motion for an evidentiary hearing or a new trial and stated that the concealment of the information was probably inadvertent and was not prejudicial. *Id.* at 657. The Sixth Circuit held that the plaintiffs' motion for relief from the judgment established a prima facie case of impropriety. *Id.*

317. 652 F.2d at 659 (citations omitted).

318. *Id.*

319. 74 F.R.D. 505 (S.D.N.Y. 1976).

320. *Id.* at 506.

321. *Id.* at 507.

tion was a simple, comical operation . . . ."[322]

The court held that these were not "exceptional circumstances warranting a divergence from the general rule that a juror's statement may not be used to impeach that juror's verdict."[323] Although the juror's letter indicated a potential bias, the court did not find it as significant as the court found the letter in *Gray*. This policy judgment is a close call, and each court seems to base its decision on its impression of how the facts in the case affect the sometimes-conflicting goals of judicial finality and the right to a fair trial.

Throughout the opinion in *Gray* the supreme court struggled to reach an equitable result while not departing drastically from the letter of the Rules. Although the *Gray* court quoted the portion of rule 60(b) that gives a court authority to grant relief "upon such terms as are just,"[324] it also noted that the plaintiff made the motion to amend within a reasonable time "and, in fact, before the trial court had ruled on the original motion."[325] Thus, the court implies that if the trial court had already ruled on the original motion, the result in the case would have been different. Thus a party who has discovered previously unknown evidence, which is injurious to him, must have made a motion for relief from a judgment in order to introduce the new evidence.

The decision is a fair and equitable one, even though the court leaves open the possibility of a different result if the appellant has not already moved for a new trial or if the trial court has already ruled upon the motion. In the absence of a rule that clarifies this issue, the procedural obstacles which prevent a litigant from receiving a fair trial may still exist.

Stephen Edward Spelman

322. *Id.* The articles referred to "the high jinks of one Dr. Charlie, a 'get-em-out-fast cataract surgeon' with a show business-eye's-view of his profession . . . ." *Id.*

323. *Id.*

324. *Gray*, 298 S.C. at 287, 379 S.E.2d at 895.

325. *Id.*, 379 S.E.2d at 896.

XI. EXCEPTIONS IN VIOLATION OF SUPREME COURT RULES JEOPARDIZE APPEAL

In *Burke v. Davidson*[326] the South Carolina Court of Appeals accepted an appeal even though the appellant's two exceptions "fail[ed] to satisfy the requirements of Rule 4, Section 6 of the Supreme Court Rules" because neither exception contained a complete assignment of error.[327] *Burke v. Davidson* demonstrates the court of appeals' Liberal allowance of exceptions on appeal even when an exception violates rule 4, section 6 of the Supreme Court Rules and is in conflict with South Carolina Supreme Court precedent.

A collision between a bicycle and an automobile on a Beaufort, South Carolina sidewalk created the controversy in *Burke*. Burke was riding his bicycle at the time he collided with Davidson's automobile as Davidson pulled out from a private driveway. Over Burke's objection the trial court instructed the jury that a Beaufort city ordinance makes it "unlawful for any person . . . to ride a bicycle at any time on any of the sidewalks of the city."[328] The jury found for Davidson.

Burke's appeal was based on two exceptions. The first exception was that "[t]he [trial] court erred in failing to rule on the applicable law governing this case prior to the submission of the same to the jury . . . ."[329] In his second exception Burke claimed that "[t]he court erred in charging city ordinance [sic] Section 8-5001 of the City of Beaufort."[330] An examination of the enforcement of Supreme Court rule 4, section 6 suggests that the court of appeals may have erred in allowing this appeal.

Rule 4, section 6 of the Supreme Court Rules governs exceptions. It provides that,

> Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should not be long or argumentative in form.[331]

The Supreme Court Rules apply to both the South Carolina Supreme

326. 298 S.C. 370, 380 S.E.2d 839 (Ct. App. 1989).
327. *Id.* at 371, 380 S.E.2d at 839.
328. *Id.*, 380 S.E.2d at 839-40.
329. *Id.* at 370, 380 S.E.2d at 839.
330. *Id.* at 371, 380 S.E.2d at 839.
331. S.C. SUP. CT. R. 4, § 6.

Court and the South Carolina Court of Appeals.[332]

A properly framed exception requires three elements. First, the exception must specify an error made by the trial court. Second, the specification of error must identify the point at which the error occurred and why it occurred. Finally, the assignment of error must not be too vague or general.[333]

As early as 1913 the South Carolina Supreme Court required exceptions to "be short, clear, and concise, specifying the errors complained of without circumlocution, argumentation, or repetition . . . ."[334] Since its 1913 statement on the proper form for exceptions, the supreme court repeatedly has refused to consider exceptions on appeal that are vague,[335] that fail to concisely state a proposition of law or fact,[336] that fail to make a complete assignment of error,[337] and that engage in useless repetition.[338] The court also often criticizes exceptions that require the court to search the whole record, to review all the evidence, or to retry the case.[339]

The supreme court only rarely has allowed appeals based upon exceptions in violation of rule 4, section 6. One example is *State v. Griggs*,[340] in which the court allowed an appeal based upon an exception in violation of rule 4, section 6 because the defendant was being prosecuted for murder. The supreme court also has been willing to waive noncompliance with the rule and considers it an exception if it contains a meritorious assignment of prejudicial error.[341] Despite these

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332. S.C. Ct. App. R. (adopted Supreme Court Rules for the court of appeals).

333. *See* Continuing Legal Educ. Comm'n, S.C. Bar, South Carolina Appellate Practice Handbook pt. IV, §§ (iv)-(vi), at 30-31 (1985).

334. Simpson v. Cox, 95 S.C. 382, 387, 79 S.E. 102, 103 (1913).

335. *See* Graham v. Kerns, 278 S.C. 197, 294 S.E.2d 38 (1982); Silas v. Brown, 266 S.C. 505, 224 S.E.2d 672 (1976); Phillips Refrigeration Co. v. Commercial Credit Co., 256 S.C. 500, 183 S.E.2d 330 (1976); Wren v. Kirkland Distrib. Co., 250 S.C. 178, 156 S.E.2d 865 (1967); Solley v. Weaver, 247 S.C. 129, 146 S.E.2d 164 (1966); Altman v. Midland Steel Corp., 245 S.C. 91, 138 S.E.2d 832 (1964); Shell v. Brown, 243 S.C. 380, 134 S.E.2d 214 (1963); Polson v. Burr, 235 S.C. 216, 110 S.E.2d 855 (1959).

336. *See, e.g.*, Sloan Constr. Co. v. South Carolina Bd. of Health and Envtl. Control, 285 S.C. 523, 331 S.E.2d 345 (1985); Larry's Wheel and Rim, Inc. v. Citizens & S. Nat'l Bank, 271 S.C. 198, 246 S.E.2d 860 (1978).

337. *See, e.g.*, Charleston Housewrecking Co. v. Canadian Universal Ins. Co., 282 S.C. 443, 319 S.E.2d 338 (1984); Nolf v. Patton, 114 S.C. 323, 103 S.E. 528 (1920).

338. *See, e.g.*, Newsom v. Poe Mfg. Co., 102 S.C. 77, 86 S.E. 195 (1915).

339. *See, e.g.*, Williams v. Regula, 266 S.C. 228, 222 S.E.2d 7 (1976); Boyer v. Loftin-Woodard, Inc., 247 S.C. 167, 146 S.E.2d 606 (1966); Solley v. Weaver, 247 S.C. 129, 146 S.E.2d 164 (1966).

340. 184 S.C. 304, 311, 192 S.E. 360, 363 (1937).

341. *See* Allen v. Hatchell, 242 S.C. 458, 467, 131 S.E.2d 516, 521 (1963); Wallace v. Timmons, 232 S.C. 311, 315, 101 S.E.2d 844, 845 (1958); Brady v. Brady, 222 S.C. 242, 246, 72 S.E.2d 193, 194 (1952); Jackson v. Carter, 128 S.C. 79, 86-87, 121 S.E. 559, 562

rare occurrences, the supreme court generally has required that exceptions be distinctly stated so that "the court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue."[342]

The South Carolina Court of Appeals tests for violations of rule 4, section 6 by determining "whether, despite the improperly framed exception, the issue sought to be raised is reasonably clear to [the] court and the adverse party."[343] The court of appeals advocates liberal construction of an exception's language unless the statement "has misled the [opposing party] to his prejudice."[344] Thus, "the Court [of Appeals] is concerned with the substance of the appeal and not the technical differences in the issues raised by the exceptions."[345]

Since 1984 the court of appeals has had many opportunities to dismiss exceptions for failure to state a complete assignment of error. In each case in which the court elected not to dismiss, the opinion notes that they would have been justified in dismissing the appellant's exceptions, but they elected to look beyond the improperly framed exceptions to consider those issues that were reasonably clear from the appellant's argument and that were ruled on by the trial court.[346] In *Burke v. Davidson* the court allowed Burke's second exception because "[t]he issue it raise[d] [was] reasonably clear from [Burke's] argument, and the issue was expressly ruled on by the trial court."[347]

The South Carolina Supreme Court recently reversed a court of appeals' decision concerning exceptions in violation of Supreme Court rule 4, section 6. In *Connolly v. People's Life Insurance Co.*[348] the supreme court held that "[t]he exceptions [did] not state why the . . . cause of action should have been dismissed [or] why the [law] should

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(1924).

342. *Brady*, 222 S.C. at 245, 72 S.E.2d at 194; *see also* Boyer v. Loftin-Woodard, Inc., 247 S.C. 167, 170-71, 146 S.E.2d 606, 607 (1966); Shell v. Brown, 243 S.C. 380, 382-83, 134 S.E.2d 214, 214 (1963); Winter v. United States Fidelity & Guar. Co., 240 S.C. 561, 568, 126 S.E.2d 724, 727 (1962); Fruehauf Trailer Co. v. McElmurray, 236 S.C. 141, 143, 113 S.E.2d 756, 758 (1960); Hewitt v. Reserve Life Ins. Co., 235 S.C. 201, 203, 110 S.E.2d 852, 853 (1959).

343. Bartles v. Livingston, 282 S.C. 448, 464, 319 S.E.2d 707, 716 (Ct. App. 1984) (citation omitted).

344. *Id.*, 319 S.E.2d at 717 (citation omitted).

345. *Id.*

346. *See, e.g.*, Southern Welding Works, Inc. v. K & S Constr. Co., 286 S.C. 158, 160, 332 S.E.2d 102, 104 (Ct. App. 1985); Smith v. Harris-Teeter Supermarkets, Inc., 285 S.C. 445, 447, 330 S.E.2d 316, 317 (Ct. App. 1985); Ramage v. Ramage, 283 S.C. 239, 243-44, 322 S.E.2d 22, 25 (Ct. App. 1984).

347. 298 S.C. at 371, 380 S.E.2d at 839.

348. 299 S.C. 348, 384 S.E.2d 738 (1989).

not have been charged."[349] Without this information "the court is left to 'grope in the dark', searching the entire record to ascertain the issue being raised."[350] Based on *Connolly* it appears that the supreme court will continue to strictly enforce rule 4, section 6 despite the court of appeals' more liberal approach. Accordingly, the decision reached by the court in *Burke* may not be similarly reached by the South Carolina Supreme Court.

The Supreme Court Rules, however, still require properly framed exceptions. Thus, the exception should specify in a clear and concise manner what the lower court did in error and why it was erroneous. The absence of these necessary elements may jeopardize an otherwise meritorious appeal.

Susan E. Ziel

XII. Personal Jurisdiction over Foreign Corporate Defendant Upheld

In *Colite Industries, Inc. v. G.W. Murphy Construction Co.*[351] the South Carolina Supreme Court reversed a trial court's decision to dismiss the action for lack of personal jurisdiction. The supreme court held that the foreign corporate defendant could be subjected to the jurisdiction of the state's courts because (1) the South Carolina long arm statute reached the defendant, and (2) the corporation's contacts were sufficient to satisfy the due process requirements.[352]

G.W. Murphy Construction Co. (Murphy), the foreign corporate defendant, has its primary place of business in Hawaii. Murphy was connected with a construction project at the Honolulu airport. The South Carolina plaintiff, Colite Industries, Inc. (Colite), responded to Murphy's newspaper ad that invited subcontractor's bids. Murphy hired Colite to supply signs for the airport project. The Murphy-Colite agreement specified that all "questions regarding the contract [should] be decided according to the laws of Hawaii; it also specifically incorporate[d] by reference the applicable laws of *any* state."[353]

Colite completed its performance under the contract over a ten-

349. *Id.* at 352, 384 S.E.2d at 740.

350. *Id.* (quoting Solley v. Weaver, 247 S.C. 129, 146 S.E.2d 164 (1966)).

351. 297 S.C. 426, 377 S.E.2d 321 (1989).

352. *Id.* at 428-29, 377 S.E.2d at 322-23.

353. *Id.* at 427-28, 377 S.E.2d at 322. Arguably, the clause that incorporated the laws of any state is irrelevant in the context of personal jurisdiction questions. The clause, however, bound Murphy, and the court viewed it as an important factor to determine the existence of jurisdiction.

month period. During that time Murphy twice sent representatives to Colite's Lexington County, South Carolina facility to review the work in progress.[354] Shortly after the completion of its contract, Colite sued Murphy and alleged that the company had failed to pay for the services. The trial court dismissed the breach of contract action for lack of personal jurisdiction.[355] On appeal, the South Carolina Supreme Court stated that jurisdiction may be asserted over a foreign corporate defendant by a South Carolina plaintiff only if (1) the South Carolina long arm statute applies[356] and (2) the assertion does not exceed constitutional due process limitations.[357] The court held that the plaintiff could exercise personal jurisdiction under South Carolina's long arm statute because the cause of action arose from the defendant's "entry into a contract to be performed in whole or in part in [South Carolina]."[358] The court stated that when the parties know in advance that a part of a resident plaintiff's performance will take place in South Carolina, the long arm statute is satisfied.[359] Murphy made two trips to South Carolina to check on Colite's progress and, thus, could not dispute that it knew where the contract would be performed.[360]

The court reviewed four factors to decide whether the exercise of jurisdiction would offend due process. These factors are (1) the duration of the defendant's activity in the state, (2) the character and circumstances of the defendant's acts, (3) the burdens on the parties, and (4) the state's interest in the exercise of jurisdiction.[361] The court ruled that the first two factors favored jurisdiction because the defendants performed the contract over a ten-month period in which the defendant's agents visited South Carolina twice and, thus, made the defendant's contact deliberate.[362] Additionally, the court noted that the contract incorporated by reference the applicable laws of any state so that Murphy "could reasonably have anticipated being haled into court in South Carolina."[363] The court ruled that factors three and four also supported the exercise of jurisdiction.[364] It determined that no significantly greater inconvenience would result by trying the case in South

354. *Id.* at 428, 377 S.E.2d at 322.

355. *Id.* at 426, 377 S.E.2d at 321.

356. S.C. CODE ANN. § 36-2-803 (Law. Co-op. 1976).

357. *Colite Indus., Inc.*, 297 S.C. at 428, 377 S.E.2d at 322.

358. *Id.* (quoting S.C. CODE ANN. § 36-2-803(1)(g) (Law. Co-op. 1976)).

359. *Id.* The supreme court's *Colite* opinion establishes a prior knowledge element for the first time.

360. *Id.*

361. *Id.* at 429, 377 S.E.2d at 322.

362. *Id.*

363. *Id.* (the court offered no analysis for this holding).

364. *Id.*, 377 S.E.2d at 322-23.

Carolina rather than in Hawaii. The court also noted that South Carolina had a manifest interest to provide a forum for its citizens.[365]

The South Carolina personal jurisdiction test, however, does not follow the United States Supreme Court.[366] In 1985 the federal law evolved into its current state with the Court's decision in *Burger King v. Rudzewicz*.[367] The defendant Rudzewicz, a Michigan accountant, initially contacted Burger King, a Florida corporation, to a franchise in his home state. The parties entered into a franchise agreement, and the contract recited a term of twenty years and stated that Florida law would control any disputes. Subsequently, Burger King initiated a lawsuit in a Florida federal court to recover Rudzewicz's delinquent franchise payments. The defendant sought to dismiss the action based on lack of personal jurisdiction.[368] The majority upheld the district court's exercise of jurisdiction and established a new two-pronged approach to personal jurisdiction due process questions. Under *Burger King* jurisdiction over the person exists when the defendant has at least minimum contacts with the forum state and the exercise of jurisdiction in that state is reasonable.[369] The two prongs have become known as the power branch and the reasonableness branch.[370]

The Court stated that the power branch may be satisfied when the element of purposeful direction of activities is present[371] and the litigation results from those activities.[372] Thus, litigation in the forum state should have been reasonably anticipated by the foreign defendant.[373]

The Court cited five factors in *Burger King* that contribute to the determination of reasonableness. These factors are (1) the burden on the defendant, (2) the adjudication interest of the forum state, (3) the plaintiff's interest to obtain convenient and effective relief, (4) both states' interest in efficient dispute resolution, and (5) the states' interest to further substantive social policies.[374] The decision also indicated

365. *Id.*

366. The Supreme Court has considered the due process limits of personal jurisdiction a number of times since 1945. *See* Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C.L. REV. 729, 731-87 (1988) (provides a detailed discussion of the line of Supreme Court decisions between 1945 and 1987 on the due process considerations of personal jurisdiction).

367. 471 U.S. 462 (1985).

368. *Id.* at 464-69.

369. *Id.* at 476.

370. *See* Stravitz, *supra* note 366, at 777.

371. *See id.* at 778. "[Justice Brennan] apparently used 'directed' rather than 'availed' because 'directed' is more inclusive." *Id.*

372. Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985).

373. *Id.* at 474.

374. *Id.* at 477. These factors were first stated in World-Wide Volkswagon v. Woodsen, 444 U.S. 286 (1980), but the Court did not rely on them.

that a strong showing of reasonableness may establish jurisdiction even when a defendant's contacts with the forum state would be insufficient.[375]

The Supreme Court applied this two-pronged analysis in the recent case of *Asahi Metal Industry, Co. v. Superior Court.*[376] In that case, a majority of the Justices concluded that the Japanese corporate defendant had sufficient minimum contacts with California. The Court held, however, that the California courts' exercise of personal jurisdiction violated due process because the plaintiff failed to establish the reasonableness of jurisdiction[377] Thus, the Court has established the importance of reasonableness in the federal personal jurisdiction due process calculation.

In South Carolina the supreme court has upheld personal jurisdiction in cases in which the defendants had fewer contacts with the state than Murphy did in *Colite.*[378] The significance of *Colite*, however, is the antiquated analysis recited in the opinion. The court did not mention either *Burger King* or *Asahi* in the decision. Furthermore, while the court did cite *International Shoe Co. v. Washington*[379] and *World-Wide Volkswagen v. Woodsen,*[380] it applied a test that is unique to South Carolina to decide the due process issue.[381] Although the test's four factors incorporate an analysis of minimum contacts and reasonableness,[382] an application of these factors to a particular scenario could yield a different result than the Supreme Court's *Burger King* analysis.

In *Burger King* the Supreme Court held that a single act which creates a "substantial connection" with a forum state is sufficient contact to establish personal jurisdiction.[383] The first factor of the South Carolina test, however, looks at the duration of the defendant's acts in the state and, thus, is significantly more favorable to foreign defend-

375. *Burger King*, 471 U.S. at 477.

376. 480 U.S. 102 (1987).

377. *Id.*

378. *See, e.g.*, Hammond v. Cummins Engine Co., 287 S.C. 200, 336 S.E.2d 867 (1985); Atlantic Soft Drink Co. v. South Carolina Nat'l Bank, 287 S.C. 228, 336 S.E.2d 876 (1985); Parker v. Williams & Madjanik, Inc., 270 S.C. 570, 243 S.E.2d 451 (1978).

379. 326 U.S. 310 (1945) (established the "minimum contacts" standard).

380. 444 U.S. 286 (1980) (added "foreseeability" to the evaluation of minimum contacts).

381. The first three factors of the court's test originated in Boney v. Trans-State Dredging Co., 237 S.C. 54, 115 S.E.2d 508 (1960). The fourth emerged in Parker v. Williams & Madjanik, Inc., 270 S.C. 570, 243 S.E.2d 451 (1978).

382. The first two factors require the court to evaluate a defendant's contacts with South Carolina, and the last two factors require the court to evaluate whether it is reasonable to use South Carolina as a forum.

383. *Burger King*, 471 U.S. at 475 n.18 (citing McGee v. International Life Ins. Co., 355 U.S. 220 (1957)).

ants. The effect of the first factor can be balanced by the second factor, which takes into account the character and circumstances of the defendant's acts in the state. The court, however, failed to indicate in *Colite* whether the courts should use a balancing approach, and actually implied that it did not contemplate courts balancing the first two factors.[384] Furthermore, factors three and four of the state test account for only three of the five reasonableness considerations the Supreme Court required in *Burger King*. The *Colite* court failed to address the shared interest of the states in efficient dispute resolution and the furtherance of substantive social policies.

The ultimate decision of the court in *Colite* is a good one based on the particular facts of the case. The due process analysis used by the court, however, does not adequately express the current state of jurisdictional jurisprudence. Thus, this case will be confusing to practitioners.

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384. *See Colite Indus., Inc.*, 297 S.C. at 429, 377 S.E.2d at 322. "A single transaction is sufficient to confer jurisdiction if [the four] factors are met." *Id.*