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I. NEW TRIAL NISI STANDARD CLARIFIED

In two recent cases, the South Carolina Supreme Court clarified the standards of law in decisions on new trials *nisi*. *O'Neal v. Bowles*[1] and *Allstate Insurance Co. v. Durham*[2] allowed the court to reiterate the guidelines for trial judges as well as the standard of review for new trial *nisi* decisions. The court did so in the tandem decisions, upholding the trial judge's decision on new trial *nisi* in one case[3] while reversing the trial bench in the other.[4]

In *O'Neal* the court held that "[t]he trial judge *alone* has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive."[5] The court held also that when the verdict amount is so grossly inadequate or excessive as to show that "passion, caprice, prejudice, or some other influence outside the evidence" motivated the jury, the trial judge must grant a new trial absolute.[6] The trial judge abuses discretion by failing to do so, and the appeals court must grant a new trial absolute.[7] *O'Neal* expressly overruled three state supreme court decisions[8] and five South Carolina Court of Appeals decisions[9] that were inconsistent with *O'Neal*. In *Durham* the court relied upon *O'Neal*, reiterating the standards set forth in that case.

In *O'Neal* Daniel O'Neal broke his ankle in a March 1987 motorcycle accident. Dr. Robert Bowles performed the operation repairing the leg.

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1. ___ S.C. ___, 431 S.E.2d 555 (1993).
2. ___ S.C. ___, 431 S.E.2d 557 (1993).
3. *O'Neal*, ___ S.C. at ___, 431 S.E.2d at 555.
4. *Durham*, ___ S.C. at ___, 431 S.E.2d at 557.
5. *O'Neal*, ___ S.C. at ___, 431 S.E.2d at 556 (citing Easler v. Hejaz Temple A.A.O.N.M.-S., 285 S.C. 348, 329 S.E.2d 753 (1985).
6. *Id.* at ___, 431 S.E.2d at 556.
7. *Id.* at ___, 431 S.E.2d at 556 (citing Mickle v. Blackman, 252 S.C. 202, 166 S.E.2d 172 (1969), *aff'd after remand*, 255 S.C. 136, 177 S.E.2d 548 (1970), and Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969)).
8. Reid v. Harbison Dev. Corp., 289 S.C. 319, 345 S.E.2d 492 (1986); Howard v. Holiday Inns, Inc., 276 S.C. 502, 280 S.E.2d 204 (1981); Hutson v. Continental Assurance Co., 269 S.C. 322, 237 S.E.2d 375 (1977).
9. Williams v. Robertson Gilchrist Constr. Co., 301 S.C. 153, 390 S.E.2d 483 (Ct. App. 1990); Simmons v. Williamson, 300 S.C. 323, 387 S.E.2d 698 (Ct. App. 1989) (per curiam); Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987); Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 361 S.E.2d 775 (Ct. App. 1987); Haskins v. Fairfield Elec. Cooperative, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984).

During the operation, Dr. Bowles severed a nerve in O'Neal's leg, requiring a second operation three months later to repair the severed nerve. O'Neal lost his job as a lieutenant with the Sullivan's Island Police Department in July 1987 after using all of his sick leave and vacation while recuperating. After an odyssey that took him to a technical school in Indiana, to a part-time job as a mechanic at a filling station, and to an Indiana county where he served as a volunteer deputy sheriff, the Sullivan's Island police rehired O'Neal as a patrolman first class. The position was a much lower rank than the one O'Neal formerly held. O'Neal sought $9,087.46 for medical expenses, $25,166 for lost wages beginning in July 1987, $9,579 for diminished wages, and damages for ten percent permanent impairment of his injured leg.[10] Instead of the minimum $43,832.46 that O'Neal sought, the jury entered a verdict for $12,500.[11] The judge denied O'Neal's motion for new trial *nisi additur*. The supreme court unanimously upheld the ruling.[12]

In *Durham* the court reversed when an insurer appealed the denial of its motion for new trial *nisi*. Allstate Insurance Company provided homeowners insurance to Lawrence and Linda McReynolds. Randall Durham did some plumbing work for the McReynolds in August 1988. In October 1988, a water line installed by Durham separated from a lavatory while the McReynolds were not home, flooding most of the house.[13]

Allstate paid $34,651.74 to repair the flooding damage and then sued Durham for that amount, resting its claim partly on breach of implied warranty. Durham counterclaimed, asserting that the McReynolds still owed him $343 for plumbing services. The jury returned a verdict of $343 for Durham on his counterclaim. Also, the jury awarded Allstate $160.20 on the implied warranty action,[14] which may have represented the estimated cost of repairing the plumbing in the McReynolds' home.[15] The judge denied Allstate's motion for a new trial *nisi additur*, and the supreme court unanimously reversed.[16]

In *O'Neal* the court re-established a standard for new trial *nisi* dating from the early part of this century by using language appearing in a 1910 case, *Bing v. Atlantic Coast Line Railway Co.*[17] However, the passion, prejudice, or caprice doctrine has its roots in 19th century South Carolina cases.[18] The

10. *O'Neal*, ___ S.C. at ___, 431 S.E.2d at 556.
11. *Id.* at ___, 431 S.E.2d at 556.
12. *Id.* at ___, 431 S.E.2d at 557.
13. *Durham*, ___ S.C. ___, 431 S.E.2d at 558.
14. *Id.* at ___, 431 S.E.2d at 558.
15. *Id.* at ___ n.1, 431 S.E.2d at 558 n.1.
16. *Id.* at ___, 431 S.E.2d at 558.
17. 86 S.C. 528, 68 S.E. 645 (1910)(per curiam). *Bing* is among the earliest of South Carolina cases holding that a new trial is appropriate when a verdict is so excessive as to indicate caprice, passion, or prejudice on the part of the jury.
18. South Carolina law has much earlier examples of judges refusing to grant a new trial when

O'Neal court made it clear through its choice of authority that its intent was exactly that: to re-establish what it considered a longstanding standard.[19] While none of the four cases cited in *O'Neal* was more than 25 years old,[20] the court drew upon authority dating from 1916.[21] Those cases and the line of authority they represent provide not just the basis but even the language for the holding in *O'Neal*.

As if to point out that courts in recent years have applied the proper standard of review to new trial *nisi* decisions, *O'Neal* cites *Easler*, a 1985 case. In *Easler* the plaintiff suffered a permanent neck injury during a secret society's hazing initiation ritual and was awarded $361,800.[22] The court stated that excessive verdicts fall into two categories, "those unduly liberal and those actuated by passion, caprice or prejudice."[23] The *Easler* court then set forth as well-established the standard espoused by the *O'Neal* court:

> Where the verdict is deemed excessive by the trial judge, in the sense that it indicates merely undue liberality on the part of the jury, the trial judge *alone* has the power, and with it the responsibility, of setting aside the verdict absolutely or reducing it by the granting of a new trial *nisi* . . . . It is only when the verdict is so grossly excessive and the amount awarded so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other consideration not found on the evidence that it becomes the duty of this court, as well as of the trial court, to set aside the verdict absolutely.[24]

By means of *Mickle*, a 1969 decision, the *O'Neal* court showed the lengthy line of authority supporting the standard it espoused. In *Mickle*, the plaintiff suffered permanent injuries in an auto accident and was awarded $750,000, at the time "probably the highest verdict in a personal injury case in the history of this State."[25] The state supreme court upheld the trial judge's refusal to grant the defendant's motion for new trial *nisi remittitur*. In

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they found the verdict excessive but believed the jury was within the bounds of the evidence. *See* Morgan v. Livingston, 31 S.C.L. (2 Rich.) 573 (1846); Stott v. Ryan, 5 S.C.L. (3 Brev.) 417 (1814).

19. The *O'Neal* court cited four cases: *Easler*; *Mickle*; *Zorn*; and *Boozer v. Boozer*, 300 S.C. 282, 387 S.E.2d 674 (Ct. App. 1988) (per curiam). Each case used the new trial *nisi* standard exactly as stated in *O'Neal* with little deviation even in the language used.

20. Decided January 22, 1969, *Zorn* was the oldest, coming less than three weeks before the court's February 10, 1969 ruling in *Mickle*.

21. For its application of the new trial *nisi* standard, *Mickle* cites Steele v. Atlantic Coast Line R., 103 S.C. 102, 87 S.E. 639 (1916).

22. *Easler*, 285 S.C. at 351, 329 S.E.2d at 755.

23. *Id.* at 356, 329 S.E.2d at 758.

24. *Id.* (citations omitted).

25. *Mickle*, 252 S.C. at 248, 166 S.E.2d at 195 (quoting the trial judge).

affirming the trial judge's decision, the *Mickle* court cited a 1916 case for its standard of review:

> This court has no jurisdiction to review matters of fact in an action at law; and, therefore, unless a verdict is wholly unsupported by evidence, or is so excessive as to justify the inference that it was capricious, or influenced by passion, prejudice, or other considerations not found in the evidence, . . . the responsibility for failure to reduce it must rest upon the trial judge.[26]

The *Mickle* and *Easler* decisions address excessive verdicts, as does *Zorn*, a case the *O'Neal* court cites as further support of the proposition offered in *Mickle*. To prevent misunderstanding, the *O'Neal* court cited with favor *Boozer*, which applied the same standard to inadequate verdicts:

> The denial of a motion for a new trial absolute or a new trial *nisi* for excessiveness of verdict is a matter within the sound discretion of the trial judge. . . . We have no power to review his ruling unless it rests on a basis of fact wholly unsupported by the evidence or is controlled by an error of law. Motions for a new trial based on inadequacy of verdict are governed by the same principles as govern motions for a new trial based on excessiveness of verdict.[27]

Without deviation, the cases cited in *O'Neal* held that the "caprice, prejudice, passion, or other improper considerations" standard of review governs motions for a new trial; *Boozer* does so by incorporation, not stating the standard explicitly but using as its authority *Toole v. Toole*[28] which employs the "caprice, passion or prejudice" standard.[29]

Having re-established the standard in *O'Neal*, the court in *Durham* relied on *O'Neal* and *Easler* as primary authorities. The *Durham* court cited *Toole* in a footnote to make clear that the same standard applies to excessive and inadequate verdicts.[30] The *Durham* court then applied the *O'Neal* standard, using virtually identical language and supplying emphasis in the same places as *O'Neal* when stating "the trial judge *alone* has the power to reduce the verdict by the granting of a new trial *nisi*" where the verdict is merely unduly liberal or conservative.[31]

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26. *Id.* at 251, 166 S.E.2d at 196 (quoting *Bing*, 103 S.C. at 117-18, 87 S.E. at 644) (omission in original).

27. *Boozer*, 300 S.C. at 283, 387 S.E.2d at 675 (citations omitted).

28. 260 S.C. 235, 195 S.E.2d 389 (1973).

29. *Id.* at 239-40, 195 S.E.2d at 390-91.

30. *See Durham*, ___ S.C. at ___, 431 S.E.2d at 558 n.2.

31. *Id.* at ___, 431 S.E.2d at 558.

Although the overruled decisions provided potential for confusion[32] - that both parties in both cases relied upon some of the overruled decisions is proof of that - the standard of review for new trial *nisi* was in the law in cogent form.[33] The court handed down no real changes in the law;[34] it simply took steps to put a drifting judiciary back on a well-established course.[35] Seven of the eight cases overruled can be grouped as misapplying the standard of review in one of two ways. The eighth is a rogue.

The problems apparently began in 1977 with *Hutson*. In that suit over the payment of credit disability insurance, the supreme court itself ordered a *remittitur* or, in the alternative, a new trial absolute. *O'Neal* and *Durham* state that the decision invaded the province of the trial judge. The *Hutson* court created a mix-and-match of new trial *nisi* and new trial absolute without requiring any finding of caprice, passion, or prejudice before the appellate court intervenes.[36] In *Hutson*, the supreme court ordered an offer of remittitur because of an error of law in the jury charge on damages. If the plaintiff were unwilling to accept that, then the court would have to order a new trial on all issues.

The decisions also overruled *Howard* for many of the same reasons as *Hutson*: in *Howard* the supreme court also ordered a *remittitur*, with a new trial on damages as an alternative.[37] Like *Hutson*, *Howard* invaded the trial judge's discretionary province on new trial *nisi*. *Reid* likewise violated the trial judge's discretionary powers. The *Reid* court overruled it because the court reversed the trial judge's decision to grant new trial *nisi*, instead ordering a new trial absolute, without finding that caprice, passion, or prejudice motivated the verdict.[38]

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32. The confusion seems to have been more reality than mere potential. In *O'Neal*, attorneys for O'Neal cited *Jones* and *Simmons*; counsel for Bowles cited *Jones*, *Simmons*, and *Haskins*. *See* Final Brief of Appellant at 10; Final Brief of Respondent at 9, 11, 14-16. In *Durham*, Allstate's attorneys also cited *Haskins* and *Jones*, while lawyers for Durham cited *Jones* and *Hutson*. *See* Brief of Appellant at 7-8; Brief of Respondent at 8-9.

33. For instance, both parties in both cases also cited cases used favorably by the courts in *O'Neal* and *Durham*. Durham's attorneys cited *Toole*, *Mickle*, and *Boozer*; counsel for Allstate likewise cited *Boozer* and *Mickle*. *See* Brief of Appellant at 7-9, Brief of Respondent at 7; Reply Brief of Appellant 9-4. Bowles' lawyers cited *Toole*, as did attorneys for O'Neal. *See* Final Brief of Appellant at 8-9; Respondent at 10.

34. The court in *O'Neal* did not purport to make any changes in the law, stating that because there was "inconsistent case law on this issue, we take this opportunity to set forth the correct standard of review for an appeal of a motion for new trial *nisi*." *O'Neal*, ___ S.C. at ___, 431 S.E.2d at 556.

35. As identified by the cases overruled in *O'Neal*, the drift that took courts away from the proper standard occurred in the last 16 years or so, starting in 1977 with *Hutson*.

36. *See Hutson*, 269 S.C. at 333-34, 237 S.E.2d at 380.

37. *Howard*, 276 S.C. at 505, 280 S.E.2d at 205-6.

38. *Reid*, 289 S.C. at 322, 345 S.E.2d at 493. The court agreed with the trial judge that the

In four other cases reversed by *O'Neal*,[39] the courts misstated when the trial judge may grant new trial *nisi*. In *Haskins*, the court used some of the magic words referred to in *Toole*,[40] even citing *Toole* as authority. Then the court proceeded to misapply the standard of review:

> A motion for a new trial may be granted in tort actions where the verdict is grossly inadequate; such motions are addressed to the sound discretion of the judge. The trial judge also has the power to grant a new trial nisi additur when he finds the verdict so grossly inadequate as to be the result of prejudice and passion or merely insufficient based on the evidence.[41]

Apparently, the *Haskins* court saw no conflict in giving the trial court discretion to grant new trial *nisi* motions under virtually all circumstances while reversing the trial judge for exercising that discretion by not granting a motion for new trial *nisi*.[42] The decisions in *Simmons*; *Bocook Outdoor Media, Inc.*; and *Jones* were overruled because, like *Haskins*, all held that a trial judge has the discretion to grant new trial *nisi* when the verdict is so grossly inadequate as to be the result of passion and prejudice or merely insufficient based on the evidence.[43] None of the courts clearly stated what level of inadequacy, still greater than the standard on which they granted trial judges discretion, sufficed to constitute an abuse of discretion.

The eighth case, *Williams*, is a rogue, fitting in neither of the categories just discussed. The *Williams* court stated that a judge has the discretion to grant new trial *nisi* "upon a finding that the verdict is so inadequate that it must be determined to be the result of the jury's disregard of the facts or the trial judge's instructions."[44] The court then muddied the waters further, totally removing the caprice, passion, or prejudice standard from the equation:

> We hold that in granting a motion for a new trial *nisi additur* it is not necessary for the trial judge in so many words to say or write in his order

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verdict was excessive, but where the court of appeals granted a new trial on actual damages only, the supreme court reversed and remanded, ordering the trial judge to grant a new trial on actual and punitive damages unless the plaintiffs agreed to a *remittitur*. *Id.* at 322-23, 345 S.E.2d at 493-94.

39. *See supra* note 9.

40. *Toole*, 260 S.C. at 239-40, 195 S.E.2d at 390-91. The *Toole* court stated that it could review whether the verdict was so grossly inadequate as to indicate caprice, prejudice, or passion on the part of the jury even though the appellant's attorney "did not use those magic words in making his motion for new trial." *Id.* at 240, 135 S.E.2d at 391.

41. *Haskins*, 283 S.C. at 236, 321 S.E.2d at 190 (citations omitted).

42. *See id.*

43. *See Bocook*, 294 S.C. at 180, 363 S.E.2d at 396; *Simmons*, 300 S.C. at 328-29, 387 S.E.2d at 701; *Jones*, 293 S.C. at 493, 361 S.E.2d at 777.

44. *Williams*, 301 S.C. at 155, 390 S.E.2d at 484.

> that the verdict was grossly inadequate. It is sufficient, in granting a motion for a new trial *nisi additur*, that the trial judge verbalize his conclusion that the jury in awarding damages disregarded the facts of the case or the judge's instruction.[45]

In the eight cases overruled, the court attempted to correct a trend of inconsistency in the review of new trial *nisi* decisions. Rather than relying on precedent, courts were creating new standards, often with bits and pieces of the *O'Neal* standard but usually some of the pieces did not quite fit.

The court clarified the standard of review but still failed to give significant guidance on making the new trial *nisi* decision at the trial level--or on appeal. While setting the standard at "passion, prejudice, or caprice," the court gave no indication of how to tell passion from mere undue liberality. Until the verdict amount reaches the magic passion, prejudice, or caprice level, trial judges operate within their discretion, but the judges have no real guidance as to where the bounds of that discretion lie. Apparently, the only way for trial judges to know that they correctly ordered a new trial *nisi* motion is to await appellate review.

This may make judges wary of entering the new trial *nisi* minefield, but there probably is no other way to deal with the issue. It may be impossible to set a standard. Establishing a mathematical formula runs the risk of being insensitive to the infinite variety of fact patterns in which the new trial *nisi* decision may arise. Because of that, the decision will remain fact-driven depending on factors beyond the verdict amount.

The results in *O'Neal* and *Durham* are not revolutionary, but they clarify a standard of review that was becoming fairly muddy in South Carolina law. Nonetheless, rulings on new trial *nisi* will be ad hoc, gut-level calls by trial judges. Like the explorers of old with maps marked "here be dragons" at the edge of the known world, trial judges facing new trial *nisi* rulings will know the edge is out there somewhere, but they will not know exactly where the edge is, when they move from discretion to abuse, until an appeals court tells them they fell off.

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II. COURT FURTHER EXAMINES PEREMPTORY STRIKES

In *State v. Geddis*[1] the South Carolina Supreme Court affirmed the conviction of Reginald Geddis. Geddis, a black man, challenged his

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45. *Id.* at 156, 390 S.E.2d at 485.

1. ___ S.C. ___, 437 S.E.2d 31 (1993).

conviction for criminal sexual conduct and kidnapping on the grounds that the solicitor violated the United States Supreme Court's ruling in *Batson v. Kentucky*[2] by using peremptory challenges in a racially discriminatory manner.[3] The *Geddis* ruling illustrates that the peremptory challenge retains some viability in South Carolina. Although *Batson* limits the use of the peremptory challenge, that limitation is not absolute.

During jury selection, the State used three of its peremptory challenges to strike black panel members. When defense counsel objected, the trial judge conducted a *Batson* hearing requiring the State to put forth racially neutral explanations for its use of the strikes. The appeal centered around the removal of Pamela Anderson, a twenty-three-year-old black woman.[4] Although the solicitor said that he struck Anderson to avoid putting young women on the jury, the solicitor did not challenge two twenty-year-old white women. The solicitor further explained that he saw the two white women watching the proceedings the previous day, and their evident interest overcame his reluctance to put them on the jury. At the conclusion of the hearing, the trial judge ruled that the solicitor's explanations were racially neutral.[5]

On appeal, the South Carolina Supreme Court followed the three-prong inquiry adopted in *State v. Green*[6] for analyzing *Batson* questions.[7] In *Green* the Court promulgated the following analysis:

> First, the defendant must make a prima facie showing that the Solicitor exercised such challenges on the basis of race. Second, if the requisite showing is made, the burden shifts to the Solicitor to articulate a race-neutral explanation for the strikes in question. Third, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination.[8]

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

3. *Geddis*, ___ S.C. at ___, 437 S.E.2d at 32.

4. Brief of Respondent at 3. The solicitor explained that he struck one black woman because she had been arrested for assault and battery with intent to kill and was unemployed. The solicitor then explained that he struck a black male because the man had several convictions for petit larceny and shoplifting. Defense counsel essentially accepted these challenges and they are not before the court on appeal. *Id.*

5. *Geddis*, ___ S.C. at ___, 437 S.E.2d at 32. The trial judge himself noted one of the white women, Ms. McFarland, watching an earlier trial. The trial judge considered that two black women were seated, one after the defense counsel used all of its strikes and the State had strikes remaining. In Respondent's Brief, the State points out that three black women were seated while the State had remaining strikes. Brief of Respondent at 5.

6. 306 S.C. 94, 409 S.E.2d 785 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1566 (1992).

7. *See Geddis*, ___ S.C. at ___, 437 S.E.2d at 32.

8. *Green*, 306 S.C. at 96, 409 S.E.2d at 787 (citing Hernandez v. New York, 500 U.S. 352 (1991)).

The defendant made a prima facie showing when the solicitor used his strikes against the black members of the panel. However, the majority found that the solicitor did not distinguish sufficiently between the white women and the black woman to account for the challenges made.[9] Further, the majority held that the defendant did not meet his burden of proving purposeful discrimination, even after examining the surrounding circumstances.[10]

Justice Finney wrote a strong dissent in which Justice Toal joined. The dissent began by examining the State's rationale for the strikes in light of surrounding circumstances. Then the dissent argued that a facially race-neutral reason may be rendered pretextual by selectively advancing that reason in a racially motivated manner. Under this analysis, by failing to apply its reason in a neutral manner the state invalidates its facially race-neutral reason. The striking of the black woman without the striking of the white women was not a neutral application of the race-neutral reason the State advanced. Further, the dissenters distinguished *Wilder* because the State did not show actual interest on the part of the women not struck in *Geddis*.[11] In *Wilder* the white woman who remained, even though she reported late for jury duty, stated to the court that she was there to serve the court.[12] In *Geddis* the only evidence that the white women had greater interest than the black woman was the solicitor's testimony and the trial judge's finding that one of the women was indeed present at a previous trial. The dissent stated that the solicitor's attempt to ascribe relevant motives to the white women from their mere presence at another trial did not constitute a race-neutral explanation. Therefore, believing that the defendant had met his burden of proof, the dissent would have reversed and remanded for a new trial.[13]

Geddis illustrates the division between two sets of desires of the court - protection of the Sixth[14] and Seventh Amendments'[15] guarantee of trial by an impartial jury and protection against invidious discrimination provided by the Fourteenth Amendment's Equal Protection Clause.[16] Although the

9. *Geddis*, ___ S.C. at ___, 437 S.E.2d at 33. The court found *State v. Wilder*, 306 S.C. 535, 413 S.E.2d 323 (1991), dispositive. In *Wilder*, the State explained strikes against two blacks on the grounds that they were late for court and that this tardiness signified a lack of respect for the court. However, the State did not challenge a white woman who reported late. The State explained that the woman's expressed desire to serve on the jury overcame the State's concern over her lateness. The court found this distinction sufficient to overcome the *Batson* challenge. *See Wilder*, 306 at 538, 413 S.E.2d 325.

10. *Geddis*, ___ S.C. at ___, 437 S.E.2d at 32-33.

11. *Id.* at ___, 437 S.E.2d at 33-34 (Finney, J., dissenting).

12. *Wilder*, 306 S.C. at 536 n.2, 413 S.E.2d at 324 n.2.

13. *Geddis*, ___ S.C. at ___, 437 S.E.2d at 34 (Finney, J., dissenting).

14. U.S. CONST. am. VI.

15. U.S. CONST. am. VII.

16. U.S. CONST. am. XIV, § 1, cl. 2.

Constitution does not guarantee the use of peremptory strikes,[17] courts long have held their use as a significant device in ensuring the "Sixth Amendment's guarantee of a fair and impartial jury."[18] Nonetheless, the court's desire to protect against invidious discrimination conflicts occasionally with the peremptory challenge.

A peremptory challenge may be used in a racially based manner, thus allowing invidious discrimination to occur in the courtroom. Therefore, the United States Supreme Court has limited the use of the peremptory challenge[19] to protect parties in a suit from discrimination in the selection of jurors[20] and to protect prospective jurors from being discriminated against.[21] Although the Supreme Court limited the use of the peremptory challenge, the Court declined "to formulate particular procedures to be followed upon . . . timely objection to . . . [peremptory] challenges."[22] Therefore, courts may implement *Batson* in various ways.

In *State v. Jones*[23] the South Carolina Supreme Court adopted a bright-line test for when a court should hold a *Batson* hearing, stating:

> In all future jury trials, therefore, we recommend that the trial court hold a *Batson* hearing whenever 1) the defendant requests such a hearing; 2) the defendant is a member of a cognizable racial group; *and* 3) the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire.[24]

However, two United States Supreme Court decisions affected this bright-line approach. In *Powers v. Ohio*[25] the Court ruled that the defendant's race was irrelevant in considering objections to peremptory challenges.[26] This holding obviated the requirements in the second and third prongs that the defendant be a member of a cognizable racial group and the same race as the challenged

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17. Batson v. Kentucky, 476 U.S. 79, 91 (1986) (citing Swain v. Alabama, 380 U.S. 202 (1965)).

18. Robert T. Prior, *The Peremptory Challenge: A Lost Cause?*, 44 MERCER L. REV. 579, 582 (1993).

19. *See* Georgia v. McCollum, ___ U.S. ___, 112 S.Ct. 2348 (1992) (applying *Batson* peremptory strikes by a criminal defendant); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (applying *Batson* in a civil case); *Batson*, 476 U.S. at 79.

20. *See* Prior, *supra* note 18, at 591 (quoting *McCollum*, ___ U.S. at ___, 112 S. Ct. at 2353 (quoting Powers v. Ohio, 499 U.S. 400, 406 (1991)).

21. *See id.* (quoting *McCollum*, ___ U.S. at ___, 112 S. Ct. at 2353).

22. *Batson*, 476 U.S. at 99 (footnote omitted).

23. 293 S.C. 54, 358 S.E.2d 701 (1987).

24. *Id.* at 57-58, 358 S.E.2d at 703.

25. 499 U.S. 400 (1991) (holding that a white defendant could challenge the prosecution's use of peremptory challenges to strike black venire members).

26. *Id.* at 416.

jurors. Further, in *Edmonson* the Court applied *Batson* to civil litigation, expanding the scope of *Batson* to all parties. Finally, the Supreme Court came full circle in *McCollum* by extending the *Batson* requirement to a criminal defendant.[27] At present, no party to litigation can use peremptory strikes in a racially motivated manner.

In *Green* the South Carolina Supreme Court promulgated its three-part *Batson* analysis. Because a party can meet the prima facie threshold easily, some have suggested that a party make a motion for a *Batson* hearing whenever a peremptory strike is made "upon a member of a cognizable racial group."[28] During the hearing, if the challenger to the strikes shows a prima facie case of discrimination and the striking party does not provide a rational race-neutral reason, "the process of selecting the jury shall start *de novo*."[29] On appeal, the proper remedy is to remand.[30]

In *Geddis* the South Carolina Supreme Court merely followed the dictates of *Batson* and its progeny. The trickiest question in *Geddis* is whether the solicitor's assertion that the two young white women were interested because they were present at another trial is a sufficiently race-neutral explanation for their not being struck along with the young black woman. However, this determination rests largely upon the trial judge's evaluation of the solicitor's credibility. Therefore, the appellate court gives the trial judge's determination "great deference."[31]

Only if the record does not support the trial judge's determination will the appellate courts overturn the finding.[32] In *Geddis* there was at least some support for the solicitor's rationale for striking the black juror and not striking the white jurors. The trial judge himself noted that one of the white jurors had

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27. *See* Georgia v. McCollum, ___ U.S. ___, ___, 112 S. Ct. 2348, 2359 (1992).

28. Tara S. Taggart, Case Note, *Prosecutor Must Meet Heightened Burden in Demonstrating Racially Neutral Explanation for Use of Peremptory Strikes*, 44 S.C. L. REV. 25, 29 (1992). In Hayes v. State 405 S.E.2d 660 (Ga. 1991), Justice Benham suggested:

> Rather than deciding on a case by case basis whether a party is entitled to a hearing based upon a *prima facie* showing of purposeful discrimination, the better course to follow would be to hold a *Batson* hearing on any party's request whenever the other party exercises peremptory challenges to remove members of a cognizable racial group from the venire.

Id. at 669 (Benham, J. concurring). Justice Benham developed this approach from *Jones*. *See id.* (Benham, J., concurring).

29. *Jones*, 293 at 58, 358 S.E.2d at 704 (footnote omitted).

30. *See Geddis*, ___ S.C. at ___, 437 S.E.2d at 33 (Finney, J., dissenting).

31. *Id.* at ___, 437 S.E.2d at 32-33 (citing State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1566 (1992)).

32. State v. Grate, ___ S.C. ___, ___, 423 S.E.2d 119, 120 (1992) (citing State V. Patterson, 307 S.C. 180, 414 S.E.2d 155 (1992); State v. Davis, 306 S.C. 246, 411 S.E.2d 200 (1991)).

attended a previous trial.[33] Therefore, although slight, some evidence existed in the record to support the trial judge's finding.

The dissent points correctly out that a reason racially neutral on its face "may be invalidated or rendered a sham by failing to apply the reason in a neutral manner."[34] Moreover, the solicitor's reason for striking the black woman was: "'I try to avoid putting women especially that young on my juries.'"[35] Initially it appears that the court should have invalidated the solicitor's race-neutral reason for the solicitor's not applying it neutrally. However, some evidence existed that there was a sufficient distinction between the white jurors and the black juror to satisfy the *Batson* inquiry. The dissent's most compelling point is that the white jurors said nothing on the record to support the solicitor's theory that they were more interested than the black juror.[36] While this point may distinguish *Geddis* from *Wilder*, it does not overcome the great deference that appellate courts afford the trial judge's determination. Although the white jurors in *Geddis* did not themselves speak to their interest, the solicitor must articulate a race-neutral reason for the peremptory strikes. The solicitor stated that the great interest the white jurors showed in watching another trial overcame his reluctance to place them on the jury.[37] Obviously, the trial judge believed the solicitor's statement.

In all *Batson* hearings, seldom will there be much evidence concerning whether the court should believe the counsel's explanation for peremptory strikes. The best evidence likely will be the "'demeanor of the attorney who exercises the challenge.'"[38] For this reason, giving great deference to the trial judge's determination of the credibility of the solicitor makes sense.

In his *Batson* concurrence, Justice Marshall stated his belief that peremptory challenges inject racial discrimination into the jury selection process. In Marshall's view, the only way to stop this discrimination would be to eliminate peremptory challenges altogether.[39] However, the Supreme Court has not decided to follow this course. Instead, the Court used an implicit balancing test to determine when to protect the right to an impartial jury and when to protect the right to be free from invidious discrimination.[40] In the case of racial discrimination, the court comes down firmly on the side of protecting the right of parties and jurors to be free from discrimination in

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33. *See Geddis*, ___ S.C. at ___, 437 S.E.2d at 32.

34. *Geddis*, ___ S.C. at ___, 437 S.E.2d at 33 (Finney, J., dissenting) (citing State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989)).

35. *Id.* at ___, 437 S.E.2d at 32.

36. *See id.* at ___, 437 S.E.2d at 34 (Finney, J., dissenting).

37. *Id.* at ___, 437 S.E.2d at 32.

38. State v. Green, 306 S.C. 94, 97, 409 S.E.2d 785, 787 (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991); *cert. denied*, ___ U.S. ___, 112 S. Ct. 1566 (1992)).

39. Batson v. Kentucky, 476 U.S. 98, 103 (1986) (Marshall, J., concurring).

40. Prior, *supra* note 18, at 594.

jury selection.[41] The Court essentially eliminated the true peremptory challenge in cases dealing with possible racial discrimination. The extent to which the Court will limit the use of peremptory challenges with regard to other classifications remains largely unanswered. The fear that Justice Burger expressed in his dissent in *Batson* that "defendants could object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry, or profession"[42] has not come to full fruition. However, the Supreme Court recently held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[43] Because race is a suspect classification, it receives strict constitutional scrutiny.[44] With the recently established exception of gender, courts do not give other classifications the same intense scrutiny.[45] Therefore, the peremptory challenge may well retain its vitality outside the realm of racial and gender discrimination.

Nonetheless, problems remain for the application of the Court's various *Batson*-related decisions. The usual lack of evidence of the striking party's intent, the possibility of a striking party developing race-neutral rationales to cover race-based peremptory challenges, and the possible injection of racial issues into the jury selection process[46] all are problems that courts and practitioners still face. Practitioners should remain aware of the possibility of a *Batson* challenge and should prepare to explain their race-neutral decisions to the court. Courts should give a *Batson* hearing whenever members of a cognizable racial group are struck from the panel of eligible jurors.

In *Geddis* the South Carolina Supreme Court merely followed the dictates of *Batson* and its progeny. Because the solicitor could articulate to the trial judge's satisfaction a race-neutral reason for striking the black female juror and then distinguish between her and the two white female jurors, the court had to affirm Geddis' conviction. Although the support in the record for the trial judge's decision was slight, it was present. Therefore, although the dissent presented a strong argument for remanding the case for a new trial, the majority correctly decided to affirm. Practitioners always should be ready to explain their race-neutral decisions in using peremptory strikes. Also,

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41. *See supra* notes 19-21 and accompanying text; *see also* Prior, *supra* note 18, at 594-95 ("In conducting this balance, the Court clearly expressed its judgment: with regard to racial stereotypes, the equal protection clause trumps the peremptory challenge.").

42. *Batson*, 476 U.S. at 124 (Burger, J., dissenting) (citations omitted).

43. J.E.B. v. Alabama, ___ U.S. ___, ___, 114 S.Ct. 1419, 1421 (1994).

44. Prior, *supra* note 18, at 596.

45. *See id.* at 596-97 ("Other classifications such as age, level of education, or occupation receive only low level scrutiny . . . .") (footnote omitted).

46. *See Batson*, 476 U.S. at 129 (1986) (Burger, J., dissenting).

practitioners should be ready to call for a *Batson* hearing whenever the other party uses peremptory strikes against a cognizable racial group. Finally, practitioners should be aware of the possibility of the expansion of the *Batson* holding to include other cognizable groups. While it's unlikely that the Court will extend *Batson* to eliminate peremptory challenges entirely, courts may allow the peremptory challenge to erode slowly until it is merely a shadow of its former self.

Shane E. Swanson

III. SUBJECT MATTER JURISDICTION RULING REMAINS IMMEDIATELY APPEALABLE

In *Woodard v. Westvaco Corp.*[1] the South Carolina Court of Appeals held that the proper procedure for raising lack of subject matter jurisdiction is a motion to dismiss for lack of subject matter jurisdiction.[2] The court further held that even if the motion is made in the form of a motion for summary judgment,[3] the circuit court should treat the motion as a motion to dismiss.[4] More importantly, the court reaffirmed the rule that the denial of such a motion is immediately appealable.[5] Before following South Carolina precedent,[6] the court questioned the procedural practice in light of the supreme court's recent holding in *Mid-State Distributors v. Century Importers*.[7] The court explained that, but for subsequent decisions of the supreme court on these interlocutory appeals,[8] it was prepared to apply the supreme court's reasoning in *Mid-State* to hold that the denial of the motion to dismiss

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1. ___ S.C. ___, 433 S.E.2d 890 (Ct. App. 1993), *cert. granted*, (Apr. 8, 1994).

2. S.C. R. CIV. P. 12(b)(1).

3. S.C. R. CIV. P. 56.

4. *See Woodard*, ___ S.C. at ___, 433 S.E.2d at 891-92 (citing Prakash v. American Univ., 727 F.2d 1174 (D.C. Cir. 1984)).

5. The court of appeals stated that the appeal presented two issues: "(1) Is an order denying a motion for summary judgment on the ground of lack of subject matter jurisdiction an appealable order? (2) Did the judge err as a matter of law in failing to rule that Woodard was a statutory employee?"

6. *See* Simms v. Phillips, 46 S.C. 149, 151, 24 S.E. 97, 98 (1896) (holding that a denial of a motion to dismiss for lack of subject matter jurisdiction is immediately appealable); *see also* Carter v. Florentine Corp., ___ S.C. ___, ___ n.1, 423 S.E.2d 112, 113 n.1 (1992) (citing *Simms*, 46 S.C. at 149, 24 S.E. at 97), *overruled by* Ballenger v. Bowen, 443 S.E.2d 379 (1994).

7. ___ S.C. ___, ___, 426 S.E.2d 777, 781 (1993) (holding that the denial of a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction is not immediately appealable).

8. *See* Timms v. Greene, ___ S.C. ___, ___, 427 S.E.2d 642, 642 (1993) (affirming the trial court's denial of a motion to dismiss for lack of subject matter jurisdiction); Duncan v. Provident Mut. Life Ins. Co., ___ S.C. ___, ___, 427 S.E.2d 657, 658 (1993) (disagreeing with the appellant's assertion that the trial court incorrectly denied the appellant's Rule 12(b)(1) motion).

for lack of subject matter jurisdiction was not immediately appealable.[9] These rulings compelled the court to reverse the trial court's denial of summary judgment and conclude that the judge should have dismissed the case.[10]

In *Woodard*, Woodard sued Westvaco seeking damages for personal injuries. Woodard was a driver for Southern Bulk Haulers, which had contracted to transport "black liquor"[11] for Westvaco.[12] Usually, Westvaco stored the black liquor on site in its own storage tanks. However, due to an outage, Westvaco contracted with Exxon to lease off-site storage tanks to avoid shutting down production.[13] While Woodard loaded the black liquor into the tanker truck, a pressurized hose broke, spraying him with hot liquid and knocking him from the top of his truck to the pavement.[14] Woodard based this suit on the resulting injuries.[15]

Westvaco moved for summary judgment claiming that because Woodard was a statutory employee,[16] Workers' Compensation law provided his exclusive remedy.[17] Therefore, Westvaco argued, the court lacked subject matter jurisdiction to hear the claim. The circuit court denied Westvaco's motion stating that, viewed in the light most favorable to Woodard, whether Woodard was a statutory employee was a genuine issue of material fact. The court of appeals reversed the trial court's denial of summary judgment and remanded.[18]

The court determined the appealability of an interlocutory order denying a motion to dismiss for lack of subject matter jurisdiction.[19] The court noted,

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9. *See Woodard*, ___ S.C. at ___, 433 S.E.2d at 892-94.

10. *See id.* at ___, 433 S.E.2d at 895.

11. Black liquor is a byproduct of Westvaco's manufacturing process from which the expensive manufacturing chemicals are recovered and reused. *Id.* at ___, 433 S.E.2d at 894.

12. *Id.* at ___, 433 S.E.2d at 891.

13. *Id.* at ___, 433 S.E.2d at 894.

14. *Woodard*, ___ S.C. at ___, 433 S.E.2d at 891.

15. *See id.* at ___, 433 S.E.2d at 891.

16. S.C. CODE ANN. § 42-1-400 (Law. Co-op. 1985), (*quoted in Woodard*, ___ S.C. at ___, 433 S.E.2d at 894, states:

> When any person . . . undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person . . . for the execution or performance . . . of the whole or any part of the work undertaken . . . , the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

17. S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1985) states:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee . . . as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

18. *Woodard*, ___ S.C. at ___, 433 S.E.2d at 891.

19. *Id.* at ___, 433 S.E.2d at 891. This article focuses on the appealability issue. Notably,

"The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b) (1), SCRCP, rather than a motion for summary judgment pursuant to Rule 56, SCRCP."[20] The reasoning involves the distinction between the two motions. "[S]ummary judgment is an adjudication of the merits of the case . . . ."[21] A motion to dismiss for lack of subject matter jurisdiction is "a question of law for the court. . . . Accordingly, the court should have decided the question of its own jurisdiction on the facts before it" as a matter of law.[22]

Further, the court concluded that an interlocutory order denying a motion to dismiss for lack of subject matter jurisdiction is immediately appealable.[23] The court reached this conclusion after explaining that the South Carolina rule, which permits immediate appeal,[24] is contrary to that employed in the federal court system and in North Carolina.[25] The supreme court's holding in *Mid-State*, recognizing that a denial of a motion to dismiss for lack of personal jurisdiction[26] is not immediately appealable,[27] occasioned the court's lengthy review of the law on this point. The court explained, "The reasoning in *Mid-State* is even more compelling when applied to the denial of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b) (1)."[28] The court explained the two rationales offered by the supreme court:

> (1) Denial of the motion to dismiss did not "involve the merits," which the Court defined as "an order which 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" The Court specifically overruled an 1886 case and an 1890 case, both of which had allowed an immediate appeal from motions to dismiss for lack of personal jurisdiction. The Court said these cases were outdated, because they were decided when the definition of "involving the merits"

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however, the court articulated the test for whether an activity is that of a statutory employee. As evidenced by the parties' briefs and the Petition for Certiorari, this test's application previously was disputed. *See infra* note 33.

20. *Id.* at ___, 433 S.E.2d at 891-92. Following *Prakash v. American University*, 727 F.2d 1174 (D.C. Cir 1984), the court stated that a court should treat a Rule 56 motion as a Rule 12(b) (1) motion. Woodard, ___ S.C. at ___, 433 S.E.2d at 892.

21. *Woodard*, ___ S.C. at ___, 433 S.E.2d at 892.

22. *Id.* at ___, 433 S.E.2d at 892 (citing Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963)).

23. *Id.* at ___, 433 S.E.2d at 894.

24. *See supra* note 6 and accompanying text.

25. *Woodard*, ___ S.C. at ___, 433 S.E.2d at 892. As noted by the court, South Carolina and North Carolina modelled their rules of procedure on the Federal Rules and adopted provisions identical to FED. R. CIV. P. 12(b) (1). *See id.* at ___, 433 S.E.2d at 892.9

26. S.C. R. CIV. P. 12(b) (2).

27. Mid-State Distrib. v. Century Importers, ___ S.C. ___, ___, 426 S.E.2d 777, 781 (1993).

28. *Woodard*, ___ S.C. at ___, 433 S.E.2d at 893.

> was much broader. (2) The Court also reasoned the denial did not prejudice the defendant, but rather simply required him to proceed to trial where he could later prevail on the jurisdictional issue. It stated the appellant had "not arrived at the end of the road."[29]

Despite the court's doubt as to the vitality of the South Carolina rule, the supreme court's posture compelled the court of appeals to follow the rule seemingly applied by the supreme court.[30] The supreme court has continued to hear interlocutory appeals of orders denying motions to dismiss for lack of subject matter jurisdiction.[31] Therefore, the court held that the denial of the motion in this case is immediately appealable.

Applying these procedural rules to the facts, the court found that Woodard was a statutory employee and that Workers' Compensation provided his exclusive remedy.[32] Undisputedly the "recovery, storage, and reprocessing of 'black liquor'" and the "maintenance and repair of manufacturing equipment" are "ordinary and necessary part[s] of Westvaco's paper manufacturing business. These activities are normally performed on site by Westvaco's employees."[33] Because doubts are resolved in favor of including workers and their employers under Workers' Compensation law.[34] The court analogized these facts with those of "the leading case of *Marchbanks v. Duke Power Co.*"[35] The court ruled that the trial court should have found as a

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29. *Id.* at ___, 433 S.E.2d at 893.

30. *See* S.C. CONST. art. V, § 9; American Fast Print Ltd. v. Design Prints, 288 S.C. 46, 47, 339 S.E.2d 516, 517 (Ct. App. 1986) (citing Bain v. Self Memorial Hosp., 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984).

31. *See* cases cited *supra* note 8.

32. *Woodard*, ___ S.C. at ___, 433 S.E.2d at 895 (citing Cook v. Mack's Transfer & Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986), *cert. denied*, 292 S.C. 230, 355 S.E.2d 861 (1987)).

33. *Id.* at ___, 433 S.E.2d at 895. The three factors considered to determine if the activity is that of a statutory employee are: "(1) whether the activity is an important part of the trade or business; (2) whether the activity is a necessary, essential, and integral part of the trade, business or occupation; and (3) whether the activity has been performed by employees of the principal employer." *Id.* at ___, 433 S.E.2d at 894 (citing Boone v. Huntington & Guerry Elec., ___ S.C. ___, 430 S.E.2d 507 (1993) (dictum); (Smith v. T.H. Snipes & Sons, Inc., 306 S.C. 289, 411 S.E.2d 439 (1991)). The court expressly stated that only one of these factors is required. *Id.* at ___, 433 S.E.2d at 894 (citing Bailey v. Owen Elec. Steel Co., 298 S.C. 36, 378 S.E.2d 63 (Ct. App. 1989), *rev'd on other grounds*, 301 S.C. 399, 392 S.E.2d 186 (1990) (per curiam)). Woodard's petition for certiorari is based on this issue. *See supra* note 5. Woodard claims that the test in *Boone* is cumulative. *See* Petition for Writ of Certiorari at 4.

34. Revels v. Hoechst Celanese Corp., 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct. App. 1990) (citing Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957)).

35. 190 S.C. 336, 2 S.E.2d 825 (1939) (holding that an employee of Duke Power's independent contractor was a statutory employee and, therefore, precluded from bringing a civil suit for on the job injuries). *Woodard*, ___ S.C. at ___, 433 S.E.2d at 895.

matter of law that Woodard was a statutory employee whose sole remedy "was to file a claim with the Workers' Compensation Commission."[36] Therefore, the circuit court had no jurisdiction to hear the action.[37]

The lengthy analysis included by the court of appeals in *Woodard* begs the question of how the supreme court would resolve the issue of the appealability of an interlocutory order denying a motion to dismiss for lack of subject matter jurisdiction.[38] The supreme court's ruling probably will result from its determination of whether the issues raised by motions to dismiss for lack of subject matter jurisdiction and personal jurisdiction are distinguishable. The motions have differences, such as whether one may waive jurisdiction and the timeliness required for a motion, and similarities, such as the necessity of a new trial upon reversal of such a motion.[39] However, in *Woodard* the opinion of the court of appeals suggests that no logical distinction between the reasoning of the rules regarding appealability of orders denying motions to dismiss for lack of subject matter jurisdiction and those regarding personal jurisdiction exists.

Depending on the supreme court's determination of whether these jurisdictional issues can be distinguished, there are at least two alternatives.[40] First, the court could apply stare decisis and continue to hold that such interlocutory orders are immediately appealable. Second, the court could follow federal and North Carolina precedents and apply the reasoning of *Mid-State,*[41] ruling that such interlocutory orders are not immediately appealable. The federal courts primarily follow a "final judgment rule,"[42] allowing appeals only after a final judgment, except where the order involves a "controlling question of law" from which an appeal "may materially advance the ultimate termination of the litigation."[43]

The first option provides for the theoretical stability inherent in stare decisis. Practically, "where substantial rights are determined by an interlocutory order or where protracted and costly proceedings are dependent on these orders, postponing review until there has been a final adjudication works an

36. *Id.* at ___, 433 S.E.2d at 895 (citing *Cook*, 291 S.C. at 84, 352 S.E.2d at 296).

37. *Id.* at ___, 433 S.E.2d at 895 (citing *Cook*, 291 S.C. at 84, 352 S.E.2d at 296).

38. Woodard petitioned the supreme court for certiorari, but not on the procedural question addressed in this survey. *See supra* note 5.

39. *See generally* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351 (1990) (discussing courts' general confusion and misdesignation of subject matter and personal jurisdiction).

40. The two alternatives will be discussed below, but an extensive review of the alternatives is beyond the scope of this survey.

41. *See supra* note 27 and accompanying text.

42. *See* Theodore D. Frank, Comment, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 294 (1966).

43. 28 U.S.C. § 1292(b) (1988).

undue hardship on the litigants."[44] In cases like *Woodard* this position protects defendants from having to mount a costly defense only to find that the suit was meaningless.

In support of this alternative, the current procedure is sufficient. If a motion to dismiss is made before trial, the court may: (1) rule on it immediately; (2) hold a hearing on the issue; or (3) reserve judgment until an appropriate ruling can be made.[45] Further, if the supreme court believes the appeal is inappropriate, it may refuse to hear the appeal.[46] These options provide the supreme court with the flexibility and the discretion to hear the cases it deems appropriate.

Arguably, the second alternative provides less flexibility to the appellate courts in determining which interlocutory appeals deserve immediate consideration. The North Carolina cases favorably cited by the court of appeals hold that the denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable.[47] In *Shaver*[48] the court dismissed the defendants' interlocutory appeal from the trial court's order denying their motion to dismiss for lack of subject matter jurisdiction. The court reasoned:

> The rule barring immediate appeals from such interlocutory orders serves to eliminate the unnecessary delay and expense of repeated fragmentary appeals and to present the whole case for determination in a single appeal from the final judgment; permitting parties to bring cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders would effectively procrastinate the administration of justice.[49]

While the North Carolina court seems concerned with providing judicial efficiency, its argument against fragmented appeals might justify further consideration. The court discusses "successive appeals from intermediate orders" as delaying the "administration of justice."[50] If successful, the appeals warranted review and prevented costly and potentially meaningless proceedings that would have ensued absent the interlocutory appeals. Furthermore, while the North Carolina court relies on this policy argument, the opinion appears equally based on the court's interpretation of the North

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44. Frank, *supra* note 42, at 293 (citing Central Trust Co. v. Grant Locomotive Works, 135 U.S. 207 (1890)); 6 JAMES W. MOORE ET AL., FEDERAL PRACTICE ¶ 54.19 (2d ed. 1953); WRIGHT, *supra* note 39, ¶ 101.

45. *See* S.C. R. CIV. P. 12(d).

46. *See* S.C. APP. CT. R. 226(b).

47. *See* Woodard v. Westvaco Corp., ___ S.C. ___, ___, 433 S.E.2d 890, 892 (Ct. App. 1993) (citing Teachy v. Coble Dairies, 293 S.E.2d 182 (N.C. 1982); Shaver v. North Carolina Monroe Constr. Co., 283 S.E.2d 526 (N.C. Ct. App. 1981)), *cert. granted*, (Apr. 8, 1994).

48. 283 S.E.2d 526 (N.C.App. 1981).

49. *Shaver*, 283 S.E.2d at 527.

50. *Id.*

Carolina statute describing the appropriateness of an immediate appeal.[51] Because South Carolina does not have a similar statute,[52] the weight of this public policy argument should be considered when contemplating such a rule.

While the federal approach might provide the flexibility an appellate court would desire, it might also require substantial procedural and statutory changes. Like the North Carolina approach, this alternative is also based on the final judgment rule.[53] In explaining the support behind the final judgment rule, one commentator stated that

> it effectuates, in general, an efficient utilization of judicial manpower and permits the initial stage of litigation to operate in a smooth, orderly fashion without disrupting appeals. By delaying review until there has been a final disposition of the case, the rule precludes the harassment and avoids the delay which incessant appeals from interlocutory orders entail. It also provides the appellate courts with an overview of the case instead of the limited perspective afforded by piecemeal appeals. . . . In the usual case, where the litigation period is short and the legal design is relatively simple, the advantages of the rule justify the slight harm caused by the delayed review. In addition, the rule lessens the burden on appellate dockets, while preventing the subversion of trial court authority and respect which frequent appellate intervention might produce.[54]

Despite the persuasive public policy argument for the final judgment rule, this alternative deserves further consideration. For example, this commentator appears concerned with potential harassment and delays. While a valid concern, South Carolina Appellate Court Rule 240 can police any delays resulting from an abuse of the process.[55]

Reading Judge Bell's opinion in *Woodard*, it seems that the court believes the rule on the appealability of 12(b) (1) motions should be consistent with *Mid-State*. However, Judge Bell's opinion possibly demonstrates that no logical distinction can be drawn between the denial of a motion to dismiss for lack of subject matter jurisdiction and for lack of personal jurisdiction. In this scenario, the opinion may suggest that the supreme court should reconsider the

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51. *See id.* at 527 (interpreting N.C. GEN. STAT. § 1-277(b) (1971)); *see also Teachy*, 293 S.E.2d at 184 (citing *Shaver*, 283 S.E.2d at 526).

52. *Cf.* S.C. CODE ANN. § 14-3-330 (Law. Co-op. 1976 & Supp. 1993).

53. *See* Goldston v. American Motors Corp., 392 S.E.2d 735 (N.C. 1990) (discussing North Carolina statutes setting forth the appeals process, which do not include the same jurisdictional finality requirement as the federal statutes).

54. Frank, *supra* note 42, at 292-93 (footnotes omitted); *see also* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975).

55. *See* S.C. APP. CT. R. 240 (authorizing the appellate courts to impose appropriate sanctions on attorneys or parties who file an appeal petition, motion, or return that is frivolous or filed for the sole purpose of delay).

Mid-State decision and conclude that the denials of both 12(b) (1) and 12(b) (2) motions are immediately appealable.

The court of appeals stated that courts should treat a motion for summary judgment for lack of subject matter jurisdiction as a motion to dismiss under Rule 12(b) (1).[56] Furthermore, the court held that an order denying a motion to dismiss for lack of subject matter jurisdiction was immediately appealable.[57] Because of the inconsistency between *Woodard* and *Mid-State*, the Supreme Court probably will develop a consistent rule for the appeals of interlocutory denials of 12(b)(1) and 12(b)(2) motions or will enumerate how these motions are distinguishable.

J. Hagood Tighe

56. *See* Woodard v. Westvaco Corp., ___ S.C. ___, ___, 433 S.E.2d 890, 892 (Ct. App. 1993) (citing Prakash v. American Univ., 727 F.2d 1174 (D.C. Cir. 1934)), *cert. granted*, (Apr. 8, 1994).

57. *See id.* at ___, 433 S.E.2d at 894.