No. 04-2505

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LAVONNA EDDY, VERNON EDDY,

KATHY LANDER AND MARK LANDER,

Plaintiffs-Appellants,

v.

WAFFLE HOUSE, INC.

Defendant-Appellee.

PETITION FOR REHEARING EN BANC

Petition for Rehearing En Banc of the Opinion Entered April 6, 2007, Affirming the Final Judgment of the United States District Court for the District of South Carolina, No. CA-03-2183-2-18 (David C. Norton, District Judge)

Respectfully Submitted,

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CERTIFICATION OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether the majority decision creates a conflict between decisions within the Fourth Circuit regarding when a plaintiff becomes a "virtual representative", whose trial binds other litigants, even though the other litigants wanted to represent their own interests but were dismissed as parties and denied the chance to present their claims to a jury of their choosing. Because prior Fourth Circuit case law held that a party would not be deemed a virtual representative absent tacit approval by the trial court (which did not occur here) and a determination that the party was legally accountable to the absent litigants, the majority decision has created a conflict within the Circuit.

2. Whether the majority decision is in conflict with the law in other circuits regarding when litigants in a later trial are bound by jury determinations made in litigation brought by a trial witness (and former co-plaintiff) in a separate trial and when a plaintiff may be deemed a "virtual representative" of litigants who were involuntarily dismissed from the case and denied the ability to have their claims adjudicated before a jury of their choosing. Because the law in the other circuits holds consistently that a party will not considered the virtual representative of

another except in the most extraordinary circumstances, which circumstances do not exist here, the majority decision has created a conflict with the circuits.

3. Whether the Panel decision creates a conflict with the laws in other circuits by barring the use of hearsay evidence for the purpose of proving a defendant had notice that its employees were engaged in unlawful discrimination under the public accommodation laws, and not for the purpose of proving the truth of the matter asserted in the hearsay evidence. As the opinions from other circuits permit the use of hearsay evidence for the purpose of proving notice, the majority decision has created a conflict.

Mary E. Kohart, Esq.

I. COURSE OF PROCEEDINGS AND FACTUAL AND PROCEDURAL BACKGROUND

Appellants Vernon Eddy, Lavonna Eddy, Kathy Lander, and Mark Lander, who are each Americans of African descent, stopped at a Waffle House in Walterboro, South Carolina for a meal while they were driving home to Georgia. Kathy Lander waited temporarily outside the Waffle House as her husband Mark, her aunt and uncle, Vernon and Ann, and their granddaughter, Lavonna, entered the restaurant to order. As Mark Lander walked towards the area where Vernon, Ann and Lavonna had taken seats, a Waffle House waitress said to him "we don't serve niggers in here". Shocked, Mark reported the comments to those at the table and they all gathered their belongings to leave the restaurant. As they were leaving, Kathy Lander entered the restaurant and they reported to her what the waitress had said to Mark. The Landers and Eddys also noticed that they were the only white patrons at the restaurant.

Kathy Lander immediately contacted Waffle House on her cell telephone, using the hot line number posted in the restaurant. She stood inside the restaurant as she spoke into her telephone and described what had occurred so that the restaurant employees would hear and know about her complaint. As she made her complaint, the restaurant employees stood by watching and listening, but made no statement denying what Mark had heard or asserting their desire to serve African-

American patrons or asking the Landers and Eddys to stay and enjoy a meal on the same terms and conditions offered by Waffle House to its Caucasian patrons.

The four African-American plaintiffs (Ann Eddy died before this case came to trial) joined together in a single complaint and sought to have their claims litigated in a single trial. However, on Waffle House's motion, the trial court entered judgment against Vernon Eddy, Lavonna Eddy and Kathy Lander because they did not actually hear the Waffle House waitress say the racist remark. Thereafter, Mark Lander's claims were tried to a jury, which reached a general verdict in favor of Waffle House.

On appeal, the Panel concluded, unanimously, that the three dismissed plaintiffs were entitled to a jury trial on their claims that Waffle House discriminated against them in violation of the public accommodation laws. However, the Panel's vindication of their rights was rendered academic when a majority of the Panel concluded that all three victims of racial discrimination were barred from presenting their case to a jury because the fourth victim, Mark Eddy, had not prevailed at his trial. The majority concluded that because the four plaintiffs had the same attorney and made claims arising out of the same alleged discriminatory event, all were bound by the jury verdict reached in Mark Lander's trial.

The majority's decision alters the collateral estoppel doctrine in this Circuit so that it conflicts not only with earlier panel decisions, but with the law in other Circuits. Similarly, the Panel's decision on the use of hearsay evidence to show notice in discrimination cases conflicts with the law in other Circuits.

II. STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

A. The Panel Decision Creates A Conflict Between Panel Decisions In This Circuit

The Panel's ruling represents a broad extension of the law of collateral estoppel by finding that Mark Lander, who has no familial or legal relationship at all to Lavonna Eddy or Vernon Eddy, and is the husband of Kathy Lander, served as their virtual representative at his trial. The majority's novel application and extension of collateral estoppel law results in Mr. Lander's co-plaintiffs being bound by the result in his case even though they asked for, and were refused, the right to select a jury of their peers and present their own cases to the jury.

The majority's decision represents a major change in the law: it raises Mark Lander, retroactively and without his consent, effectively to the status of a representative plaintiff in a class action lawsuit, such that the trial on his claims bound persons who were not parties to the case. Similarly, the plaintiffs involuntarily bound by the results of the Lander trial find themselves in the role of absent class members, without first enjoying the due process protections attendant

to the selection of a class representative, such as the ability to opt out of the action and avoid being bound by the result, and a judicial consideration of whether Mr. Lander and his counsel adequately represented the absent plaintiffs.

Fourth Circuit law prior to the majority decision was clear: Mark Lander was **not** the "virtual representative" of his wife and in-laws for purposes of this litigation because the two prerequisites for virtual representation did not exist. The tacit approval by the trial court that Mr. Lander agreed to serve in that role and a finding that the Mr. Lander was accountable to the absent plaintiffs for the result in the litigation were not present in this case. *John Martin, et. al. v. American Bancorporation Retirement Plan*, 407 F.3d 643 (4th Cir. 2005), citing *Klugh v. United States,* 818 F.2d 294, 300 (4th Cir. 1987)("The doctrine of virtual representation" is unavailable "where the parties to the first suit are not accountable to the nonparties who file a subsequent suit. In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court".)

The majority contends it found this Court's thirty year old decision in *Street v. Surdyka,* 492 F.2d 368, 374-75 (4th Cir. 1974), to be "persuasive, even f not controlling" authority. *Slip Op.* at 7. In *Street,* the plaintiff sued a police officer and two cadets for wrongful arrest. The district court gave summary judgment to the two cadets before trial and the case proceeded to a jury trial, which Street lost.

On appeal, this Court opined that the district court may have erred in granting summary judgment to the cadets but that the summary judgment decision would stand because Street's own testimony at trial established that he had no viable claim against the cadets to take to trial.

Reliance on *Street* thus begs the question that needed to be answered in this case. The *Street* case becomes relevant only **after** the determination of whether Mark Lander is the virtual representative of his wife and in-laws. As noted, *Street* addresses whether the Court of Appeals can affirm a pre-trial award of summary judgment against a plaintiff based on that plaintiff's own admissions during trial. It did not discuss whether a jury verdict could bind non-party in a later case. It did not discuss whether the *Street* plaintiff could be deemed a"virtual representative" for purposes of collateral estoppel[1]. And it did not discuss whether plaintiff Street's testimony, even though rejected by the jury hearing his claims, could be used by a second injured party to support the claims he is making on his own behalf.

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[1] While the *Street* decision has been cited frequently over the years by the Courts in this and other circuits, we have located no instance where it has been relied upon to resolve (or even implicate) issues of collateral estoppel or virtual representation.

B. The Panel Decision Creates A Conflict Between This And Other Circuits

The majority's decision puts the law of this Circuit in conflict with the law of other circuits. The majority concludes that Mr. Lander is a virtual representative of the other plaintiffs by conflating the fact that the other plaintiffs have identified relationships with Mr. Lander outside of the litigation: one is his wife; one is his uncle-in-law; one is his 'first cousin once removed-in-law'. In addition, all were represented by the same lawyers and joined together in filing their complaint, even though they could have filed separately. We have found no other circuit decision where any one of or combination of the factors described above – consanguinity, lawyer identity, or filing a single complaint – has merited the conclusion that one plaintiff is the virtual representative of the other plaintiffs. To the contrary, the decisions in other circuits focus on whether the actual record before the court established that the putative virtual representative in fact controlled both his litigation and the second litigation brought by the other plaintiffs. *See, e.g, Marshak v. Treatwell,* 240 F.3d 184, 195-96 (3d Cir. 2001)(the fact that a non party testified in an early case involving trademark infringement and would have benefited if the mark had been cancelled is not sufficient to show he controlled the earlier action for issue preclusion purposes). *Pollard v. Cockrell*, 578 F.2d 1002, 1008-1009 (5th Cir. 1978)(even though plaintiffs in state litigation and federal litigation were massage parlors represented by the same attorney, seeking the same

relief against enforcement of the same ordinances, plaintiff is not a virtual representative of other entities in which it has no ownership or control. Rather, the collateral estoppel doctrine is limited primarily to "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee").

The majority is not correct that its decision puts the Fourth Circuit in accord with the Ninth Circuit. While the majority relies on Ninth Circuit's decision in *Jackson v. Hayakawa*, 605 F. 2d. 1121 (9th Cir. 1979), *cert. denied,* 445 U.S. 952 (1980), the Ninth Circuit itself has questioned whether the holding in *Jackson* remains good law following the Supreme Court's decision in *Richards v. Jefferson County,* 517 U.S. 793 (1996). *See Headwaters Inc., et al. v. U.S. Forest Service,* 399 F.3d 1047 (2005)(citing *Richards v. Jefferson County,* 517 U.S. 793 1996)).

In any event, *Jackson* is simply not on point. The *Jackson* plaintiffs were members of an earlier putative class action and sought to escape the res judicata and collateral estoppel effect of the judgments reached in that earlier class action. These plaintiffs argued that they should not be bound by the judgment in the class action because, while the earlier action had been treated by the court and litigants as a class action, the trial court had never been formally certified the class. Plaintiffs' argument was rejected by the Ninth Circuit on the basis that the earlier case had been filed as a class action and treated as a class action, and that the

failure formally to certify the class was meaningless. Here, of course, the plaintiffs were not members of a class action: in fact, in this case the plaintiffs attempted to participate as parties and were refused the opportunity. The *Jackson* case therefore simply does not apply.

The majority's decision also rests on a conclusion that, because the one jury did not accept Mark Lander's testimony as sufficient, that testimony cannot be used at any other trial to satisfy the burden of proof required of other plaintiffs who claim they were injured by defendant's misconduct. This conclusion places the majority's decision in direct conflict with the law of other circuits. For example, in *Humphreys v. Tann*, 487 F. 2d 666 (6th Cir. 1973), the plaintiff's decedent was a passenger on a TWA airplane that collided with a passenger airplane owned by defendant Tann, killing all passengers on both. A number of individual suits were filed arising out of this accident which were ultimately consolidated for pretrial proceedings by the Multi-District Litigation ("MDL") Panel. Humphrey's attorney participated in conferences and pretrial proceedings within the MDL. The first case to go to trial resulted in Tann's exoneration and a jury finding that the accident was caused by TWA's negligence. Tann then attempted to obtain summary judgment in the remaining cases against it, including one filed by Humphrey, based on the argument that the first jury verdict in its favor collaterally estopped all other litigants from adjudicating the issue again. Tann argued the

other plaintiffs had been virtually represented by the first plaintiff because they had coordinated activities in the MDL and had the same interests in the outcome of the litigation. The Sixth Circuit rejected this argument. Humphreys was not a party to the earlier litigation finding that Tann was not negligent and he could not be bound by it, regardless of the extent to which his lawyer and the lawyer in the first case may have coordinated their efforts.

Similarly here, Waffle House prevailed in the first trial involving the Walterboro incident and seeks to use that victory to defeat the claims of three other plaintiffs whose claims have not been tried. Under the majority's decision, Waffle House is allowed to use that victory against any plaintiff whose claim depends upon Mark Lander's testimony. In other circuits, however, Mr. Lander could testify for other plaintiff's even though his testimony had been rejected by the jury in his own trial. Indeed, in other circuits this presumably happens routinely. Pharmaceutical companies routinely litigate in separate trial brought by separate plaintiffs the same questions, using the same witnesses and documents, regarding whether they acted properly in the marketing and sale of their products. The fact that some jurors reject their arguments and some adopt them does not change the issues that are litigated by those plaintiffs whose claims have not yet been tried. The fact that the plaintiffs here have a family relationship and were traveling

together when the racial incident occurred does not offer any apparent, or principled, reason to treat this case differently.

C. The Majority's Decision Is In Conflict With The Law of Other Circuits Regarding The Use Of Hearsay To Prove Defendant Knew Of Discrimination In Its Restaurants.

The majority decision also affirmed the trial court's evidentiary ruling precluding the admission of Mr. Lander's evidence that Waffle House had notice before the event in Walterboro that its employees were violating the public accommodations laws in the restaurants. As pointed out in Judge Michael's dissent, other courts in other circuits, as well as this circuit, have routinely permitted plaintiffs to show that defendants had prior notice of problems at the workplace even though such evidence would be hearsay. *See Slip op.* at 18 (Michael, J. dissenting) (citing *Benedi v. McNeil-P.P.C., Inc.,* 66 F.3d 1378, 1385-86 (4th Cir. 1995); *United States v. Chavis*, 772 F.2d 100, 105 (5th Cir. 1985); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 688-89 (11th Cir. 1984)).

In addition, the majority erred in its determination that the district court's evidentiary rulings were not an abuse of discretion. To the contrary, Mr. Lander's notice evidence colored a significant issue in the case: whether Waffle House's post complaint investigation was an adequate investigation of the plaintiffs' complaint. The fact that Waffle House was battling allegations like the Landers and Eddys around the country in other restaurants was directly relevant to whether

the investigation of the Landers complaint was intended not to investigate, but to exonerate and cover up. And, had the evidence of prior complaints been available to show Waffle House's notice of the drumbeat of racial problems happening in this restaurants, coupled with some of the suspicious circumstances surrounding the nature of the investigation conducted at Walterboro, would have allowed Mr. Lander to argue that the Waffle House investigator was, in truth, a spin-doctor. That spin doctor's job was not to ferret out and sanction racial misconduct by Waffle employees but to go to the sites where discrimination complaints arose to create purportedly contemporary written recollections from employees that, in this case, suggested (as Waffle House's counsel argued repeatedly during trial) that the Landers' and Eddys' version of events was invented out of whole cloth, or the result of Mr. Lander's sudden delusional decision, for the first time in his life, to complain he was the victim of racial discrimination. As a consequence, had Mr. Lander been given the opportunity to present his notice evidence, and thus his theory regarding the nature of Waffle House's investigation and how it removed evidence that might have supported his version of events, the jury might then have found in his favor. Query, then, whether Waffle House would continue to agree that, upon this Court's decision that the trial court improperly dismissed the three other plaintiffs, the Lander jury also resolved the issue of whether Kathy Lander,

Vernon Eddy and Lavonna Eddy were discriminated against in the Walterboro Waffle House.

III. CONCLUSION

Our judicial system has long honored a deep-rooted historic tradition that everyone should have his own day in court. From this tradition flows the idea that "'a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.'" *Richards v. Jefferson County*, 517 U.S. 793, 798, 135 L. Ed. 2d 76, 116 S. Ct. 1761 (1996) (quoting *Martin v. Wilks*, 490 U.S. 755, 762, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (1989)). While the Courts have from time to time recognized narrow exceptions to this principle, the majority decision reached here is the first time this Circuit has found an exception contrary to the law in other circuits without first making a determination as a matter of fact (and not presumption based on family relationship) that the absent plaintiffs – Kathy Lander, Vernon Eddy and Lavonna Eddy were adequately represented by, and wanted to be represented by, their virtual representative.

For these reasons, Appellants respectfully requests that the en banc Court vacate the majority's decision and rehear this appeal.

Dated: April 20, 2007

Respectfully Submitted,

By:Mary E. Kohart

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CERTIFICATE OF COUNSEL

I certify that this brief complies with the page limitation set forth in FRAP 35(b)(2) and the Rules of the Fourth Circuit. This brief is not more than 15 pages, exclusive of the items listed in FRAP 32(a)(7)(B)(iii). It is typed in 14 point Times New Roman font and proportionally spaced.

_____
Mary E. Kohart

April 20, 2007.

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April 20, 2007.