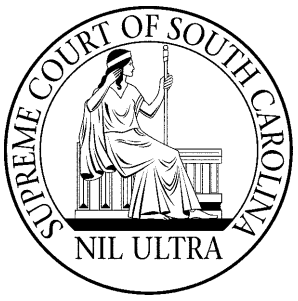

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6

February 7, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Danny Whaley, Respondent,

v.

CSX Transportation, Inc., Appellant.

Appeal from Hampton County
J. Cordell Maddox, Jr., Circuit Court Judge
Perry M. Buckner, Circuit Court Judge

Opinion No. 25935
Heard October 6, 2004 – Filed February 2, 2005

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

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Marvin D. Infinger and Lydia Blessing Applegate, both of Haynsworth Sinkler Boyd, of Charleston; and Victor E. Schwartz, Leah Lorber, and Cary Silverman, all of Shook Hardy & Bacon, of Washington, D.C., for Amici Curiae The American Tort Reform Association and The South Carolina Chamber of Commerce.

Wendy J. Keefer, of Barnwell Whaley Patterson & Helms, of Charleston; Robert W. Buffington of Haynsworth Sinkler Boyd, of Columbia, for Amici Curiae Concerned Citizens for Responsible Government in Hampton County and South Carolina Defense Trial Attorneys Association.

Stephen G. Morrison and Jacob A. Sommer, both of Nelson Mullins Riley & Scarborough, of Columbia; and Hugh F. Young, Jr., of Products Liability Advisory Council, Inc., of Reston, for Amicus Curiae Product Liability Advisory Council, Inc.

CHIEF JUSTICE TOAL: Danny Whaley (Whaley), a locomotive engineer, filed a complaint against his former employer, CSX Transportation, Inc. (CSX), alleging that, due to CSX's negligence, he was injured as a result of exposure to excessive heat in a locomotive cab. The jury awarded Whaley actual damages in the amount of $1,000,000. CSX appealed, and after certifying this case for review pursuant to Rule 204(b), SCACR, we affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

On May 24, 2000, Whaley reported to work at CSX's Maxwell Yard in Greenwood, South Carolina, to operate a familiar route from Greenwood to Laurens and then back.[1] On the way to Laurens, Whaley became disoriented and began experiencing stomach cramps, nausea, and diarrhea. He also noticed that he was not sweating, even though it was very hot in the locomotive cab. When he arrived in Laurens, Whaley went inside the depot office to cool off in the air conditioning. He tried drinking water but stopped because it made his stomach cramp.

[1] The route was thirty miles each way, and with time spent switching cars and waiting, it took approximately twelve hours to complete a round trip.

Before Whaley began the return trip to Greenwood, he realized that because of his symptoms, he would not be able to make the trip. He returned to the depot and called 911.

EMS arrived, and after learning that Whaley had not been drinking fluids and was experiencing dizziness, the paramedic administered fluids through an IV. The paramedic then recommended that Whaley be taken to the emergency room "to be checked out." Upon arrival at the emergency room, Whaley's temperature was either 99.1 or 99.7 degrees.[2] The emergency room physician determined that Whaley suffered heat exhaustion, dehydration, and acute abdominal pain. Whaley was kept in the emergency room for approximately two hours for observation and then was released.

After that day, May 24, 2000, Whaley remained out of work for two weeks. On June 7, with his family doctor's permission, Whaley returned to work. Whaley testified that he still felt bad at the time, but he had to work or he would not get paid.

He worked June 7 and 8, and then took the next three days off because he was still not feeling well. The following Monday, June 12, Whaley returned to work, but the very next day, June 13, would be his last day working for CSX. He testified that, even though he did not feel well all day, he was able to complete his duties.

On June 14, 2000, Whaley went to a previously scheduled appointment with his family doctor, Dr. Hatfield, who told Whaley not to go back to work until doctors could determine why Whaley felt so badly and why he was unable to sweat upon exertion. Dr. Hatfield referred Whaley to a number of specialists. Dr. James, a cardiologist, testified that he found no cardiac abnormalities and thought, instead, that Whaley had a viral illness and, accordingly, referred him to an infectious disease specialist. Dr. Holman, an

[2] The temperature on the emergency room record appears as 99.1, but the emergency room doctor testified that Whaley had a temperature of 99.7.

internal medicine specialist, testified that Whaley's symptoms were consistent with a viral illness, heat exhaustion, or dehydration.[3]

After he was examined by the specialists, Whaley testified that he concluded "[t]here was nothing anybody could do." Because of his inability to perspire upon exertion, Whaley never returned to work. Since then, he has been limited in his physical activity, but has still been able to enjoy hobbies such as fishing and hunting. In January 2003, however, Whaley began experiencing dizziness and shortness of breath. As a result, doctors installed a pacemaker.

Whaley filed a complaint against CSX in Hampton County on February 14, 2001, asserting claims under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, and the Locomotive Inspection Act (LIA), 49 U.S.C. § 20701 *et seq.*, and alleging, in sum, that CSX was negligent for failing to provide him with a safe place to work. On November 1, 2002, CSX filed a motion to transfer venue to Greenwood County, which was denied. The case proceeded to trial in Hampton County, and the jury returned a verdict for Whaley in the amount of $1,000,000. CSX's post-trial motions were denied.

On appeal, CSX raises the following issues for review:

I. Did the trial court err in denying CSX's motion to transfer venue?

II. Did the trial court err in denying CSX's motion for JNOV?

III. Were Whaley's claims preempted by federal law?

IV. Did the trial court err in allowing medical experts to testify on Whaley's behalf about causation?

[3] Whaley also saw Dr. Rodillo, who administered a stress test. The results of this test are not part of the record. In addition, Whaley mentioned the name of a fourth specialist, Dr. Smith, whom he saw shortly after his alleged injury, but the record does provide the details of this treatment.

V. Did the trial court err in admitting evidence concerning injuries to other CSX employees, other employee complaints, and equipment on other CSX locomotives?

LAW/ANALYSIS

I. VENUE

A. RESIDENCY

CSX argues that venue was improper in Hampton County because CSX does not "reside" in Hampton County. We agree.

Venue is the place or geographical location of trial. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994); *see also In re Asbestosis Cases*, 276 S.C. 579, 581, 281 S.E.2d 112, 115 (1981) (noting that "venue" refers to the county where the action should be brought). The venue statute in South Carolina provides, in part, that an action "shall be tried in the county in which the defendant resides at the time of the commencement of the action." S.C. Code Ann. § 15-7-30 (1976). A defendant's right to be tried in the county of its residence is a substantial right. *Blizzard v. Miller*, 306 S.C. 373, 375, 412 S.E.2d 406, 406 (1991).

The question of where a defendant resides is a question of law. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 92, 529 S.E.2d 11, 13 (2000). When the facts concerning a defendant's residence are uncontradicted, the trial court must, as a matter of law, change venue to the county where the defendant resides. *Blizzard*, 306 S.C. at 375, 412 S.E.2d at 406-07.

Early decisions by this Court established that, for purposes of venue, a foreign corporation resides in any county where it has an office and agent for the transaction of business. *Sanders v. Allis Chalmers Mfg. Co.*, 235 S.C. 259, 111 S.E.2d 201 (1959); *Hancock v. S. Cotton Oil Co.*, 211 S.C. 432, 45 S.E.2d 850 (1947); *Coker v. Sinclair Refining Co.*, 203 S.C. 13, 25 S.E.2d 894 (1943); *Shelton v. S. Kraft Corp.*, 194 S.C. 81, 10 S.E.2d 341 (1940); *Tucker v. Ingram*, 187 S.C. 525, 198 S.E. 25 (1938); *Campbell v. Mut.*

Benefit Health Corp. & Accident Ass'n, 161 S.C. 49, 159 S.E. 490 (1931); *see also Hayes v. Seaboard Air Line Ry.*, 98 S.C. 6, 81 S.E. 1102 (1914) (holding that a foreign railroad corporation resides in the county where it "owns a line of railway" and "maintains offices and agents . . . for the transaction of its business"). Domestic corporations, on the other hand, have been held to reside (1) in any county where the corporation maintains an agent and transacts its corporate business *or* (2) in the county where the corporation maintains its principal place of business. *See McGrath v. Piedmont Mut. Ins. Co.*, 74 S.C. 69, 72, 54 S.E. 218, 218-19 (1906); *Tobin v. Chester & L. Narrowgauge R.R. Co.*, 47 S.C. 387, 25 S.E. 283 (1896) (holding that a domestic railroad corporation resides in the county "where its line is located, and where it maintains a public office for the transaction of its business, and an agent upon whom process may be served").

In 1941, however, this Court expanded the definition of venue for *domestic* corporations. In *Miller v. Boyle Constr. Co.*, this Court held that venue is proper in any county where a domestic corporation "owns property and transacts business." 198 S.C. 166, 172, 17 S.E.2d 312, 314-15 (1941). In support of its decision, the Court relied upon language in a 1927 statute concerning service of process on and jurisdiction over domestic corporations:

> in the case of *domestic* corporations[,] service … shall be effective and confer jurisdiction over any domestic corporation in any county where such domestic corporation shall *own property and transact business* regardless of whether or not such domestic corporation maintains an office or has agents in that county.

Id. at 172, 17 S.E.2d at 315 (emphases added). Although the statute pertained to service and jurisdiction—not venue—the Court decided that the statute "governed and controlled" the question of where a domestic corporation resides for purposes of venue. *Id.* As a result, counties where a domestic corporation owned property and transacted business became an additional place where venue could be found proper.

Six years later, the Court had the opportunity to extend the "owns property and transacts business" test to *foreign* corporations, but the Court declined to do so. *See Hancock v. Southern Cotton Oil Co.*, 211 S.C. 432,

437, 45 S.E.2d 850, 853 (1947) (holding that foreign corporations reside in any county where they maintain an agent and office for the transaction of business). In *Hancock*, the Court squarely considered whether the rule established in *Miller*—that *domestic* corporations reside in any county where they own property and transact business—applied to *foreign* corporations, and the Court held that it did not. The Court declined to extend the rule to foreign corporations because the 1927 service statute, which formed the basis of the Court's decision in *Miller*, dealt only with domestic corporations, not foreign corporations. If the legislature had intended for the statute to apply to foreign corporations, the Court reasoned, then the statute would have been written accordingly. The Court was unwilling, therefore, to use the statute to define venue as proper in any county where a foreign corporation owned property and transacted business. Consequently, the Court maintained the long-standing rule that a foreign corporation resides in any county where the corporation maintains an agent and office for the transaction of business. *Id.* at 438, 45 S.E.2d at 854.

Eventually, in 1964, the statute concerning service and jurisdiction was amended to include foreign corporations. The amended statute provided, in part, the following:

> in the case of *domestic or foreign corporations*, service as effected under the terms of this section shall be effective and confer jurisdiction over any domestic or foreign corporation in any county *where such domestic or foreign corporation shall own property and transact business, regardless of whether or not such domestic or foreign corporation maintains an office or has agents in that county*.

S.C. Code Ann. § 10-421 (Supp. 1975)[4] (emphases added). Now that the service statute included both domestic and foreign corporations, the question then became whether the Court would use the statute to expand the definition of venue for foreign corporations, to include any county where a foreign corporation owned property and transacted business.

[4] This statute was subsequently codified at S.C. Code Ann. § 15-9-210 (1976).

Soon after the service statute was amended, the Court answered this question, holding that venue was proper in a county where a *foreign* corporation owned property and transacted business. *Lott v. Claussens, Inc.*, 251 S.C. 478, 480, 163 S.E.2d 615, 616-17 (1968). The Court reached this decision by relying exclusively on the 1964 service statute, without a single citation to the venue statute or precedent.

Finally, in 1980, this Court definitively established that, for a corporate defendant, venue is proper in any county where such corporate defendant—foreign or domestic—owns property and transacts business, regardless of whether the corporation maintains an office and agent in that county. *In re Asbestosis Cases*, 274 S.C. 421, 433, 266 S.E.2d 773, 778 (1980). In that case, the Court began its analysis with the proposition that venue for corporations may be predicated on *either* the venue statute, S.C. Code Ann. § 15-7-30 (1976), *or* the service of process statute, S.C. Code Ann. § 15-9-210 (1976). Because the Court reasoned that both statutes addressed the venue issue, the Court read the two statutes together.

The venue statute, S.C. Code Ann. § 15-7-30, entitled "Actions which must be tried in county where defendant resides," provided, in part, the following:

> [an] action shall be tried in the county in which the defendant resides at the time of the commencement of the action. If there be more than one defendant then the action may be tried in any county in which one or more of the defendants to such actions resides at the time of the commencement of the action. If none of the parties shall reside in the State the action may be tried in any county which the plaintiff shall designate in his complaint. This section is subject however to the power of the court to change the place of trial in certain cases as provided by law.

The service of process statute, S.C. Code Ann. § 15-9-210, entitled, "Service on corporations generally," provided, in part, the following:

> service as effected under the terms of this section shall be effective and *confer jurisdiction* over any domestic or foreign

> corporation in any county where such domestic or foreign corporation shall *own property and transact business*, regardless of whether or not such domestic or foreign corporation maintains an office or has agents in that county.

(Emphases added).

Because the venue statute did not define the term "resides," the Court, as it had done in prior decisions, looked to the service statute for guidance. The Court explained its analysis in the following way:

> [b]oth 15-7-30 and 15-9-210 obviously deal with the same general subject matter.[5] With [this] principle in mind, it is logical to interpret "resides" as used in section 15-7-30 to include, for the purpose of determining proper venue, those counties in which any corporate defendant "shall own property and transact business" as provided in section 15-9-210.

In re Asbestosis Cases, 274 S.C. at 426, 266 S.E.2d at 775. Accordingly, without relying on precedent, the Court held that because the defendant corporation did not own property or transact business in Barnwell County, venue was not proper in that county, and the case was remanded for transfer to Greenville County, where the defendant had its only place of business. *Id.* at 433, 266 S.E.2d at 778.

A year later, the Court delineated the three locations where a corporation's residence may be established for purposes of venue:

[5] Throughout the opinion, the Court intertwined the concepts of service, jurisdiction, and venue. For example, the Court viewed the 1964 amendment to the *service* statute—which provided that service on a domestic or foreign corporation was proper and conferred jurisdiction in any county where the corporation owned property and transacted business—as an amendment that expanded the law of *venue*. *Id.* at 426, 266 S.E.2d 775.

(1) county where a domestic corporation has its principal place of business, *Lucas v. Atlantic Greyhound Federal Credit Union . . .*; or

(2) county where a domestic or foreign corporation maintains an office and agent for the transaction of business, *Lucas v. Atlantic Greyhound Federal Credit Union . . .*; *Shelton v. Southern Kraft Corp.*, 195 S.C. 81, 10 S.E.2d 341 (1940); or

(3) county where a domestic or foreign corporation owns property or transacts business (§ 15-9-210), Code of Laws of South Carolina (1976).

In re Asbestosis Cases, 276 S.C. 579, 582, 281 S.E.2d 112, 114 (1981). Notably, the Court cited case law in support of the "office and agent" test and statutory law in support of the "owns property and transacts business" test. *Id.*

Soon after the Court published the *In re Asbestosis Cases* decisions, the legislature rewrote section 15-9-210, the service statute. The revised service statute no longer included the phrase "own property and transact business" and no longer referred to jurisdiction. *See* S.C. Code Ann. § 15-9-210 (Supp. 1981). Moreover, the revised service statute dealt only with domestic corporations; provisions regarding service on foreign corporations were moved to another section of the Code. *See* § 15-9-240 (Supp. 1981). As a result of these significant revisions, there is no longer a statutory basis for laying venue in a county where a corporation "owns property and transacts business."

Although the statutory basis for the "owns property and transacts business" test no longer exists, South Carolina appellate courts have continued to cite the test. *See Dove v. Gold Kist, Inc.*, 314 S.C at 239, 442 S.E.2d at 600-01; *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 335, 479 S.E.2d 67, 70 (Ct. App. 1996). Only one case, however, has actually applied the test to reach its holding. *See Thomas & Howard Co., Inc. v. Wetterau,*

Inc., 291 S.C. 237, 239, 353 S.E.2d 141, 142 (1987) (holding that a corporation resides in county where it owns property and transacts business).

In the present case, the trial court[6] relied upon this Court's decisions in *Thomas & Howard* and the two *In re Asbestosis Cases* to support his decision to deny CSX's motion to change venue, finding that CSX was a resident of Hampton County because it owned property and transacted business in Hampton County. In so ruling, the trial court also relied, in part, on dicta from this Court's most recent case concerning venue, *Breland v. Love Chevrolet*, 339 S.C. at 94, 529 S.E.2d at 13. In *Breland*, this Court held that a denial of a motion to change venue was not immediately appealable. *Id.* at 96, 529 S.E.2d at 14. In dicta, however, the Court stated, "it is clear that [the defendant's] *substantial and continuous contacts* with Hampton County will sustain the trials court's decision [to deny the motion to change venue]." *Id.* at 94, 529 S.E.2d at 13 (emphasis added). Relying on this language, the trial court in the present case found that the Supreme Court "clearly indicated that the foreign corporation's *substantial and continuous contacts* with a particular county support[ed] venue." (Emphasis added).

We hold that the trial court erred in finding that CSX resides in Hampton County. First, we find that the trial court improperly relied upon dicta in *Breland*. As the trial judge in the present case acknowledged, the merits of the defendant's motion to change venue was not before this Court. Moreover, we did not hold that "substantial and continuous contacts" in a particular county satisfies the "owns property and transacts business" test. Therefore, the dicta in *Breland* does not support the trial court's ruling.

Second, we hold that the "owns property and transacts business" test is no longer a viable test for determining whether venue is proper. To begin,

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[6] Pre-trial rulings in this case on the venue issue were made by Circuit Court Judge J. Cordell Maddox, Jr. The case was tried to a jury before Circuit Court Judge Perry M. Buckner, who made the evidentiary rulings and post-verdict rulings. We have referred to these judges collectively as "the trial court" or "the trial judge." Judge Maddox and Judge Buckner are skilled and experienced trial judges who did not have the benefit of our rulings here when they conscientiously applied precedent as it then existed.

the test was improperly created by the Court reading two statutes, in tandem, that addressed separate and distinct concepts. *See In re Asbestosis Cases*, 274 S.C. at 426, 266 S.E.2d at 775. Section 15-9-210 addressed service of process and jurisdiction, while section 15-7-30 addressed—and still does today—venue. Venue is the place or geographical location of trial. *Dove*, 314 S.C. at 238, 442 S.E.2d at 600; *see also In re Asbestosis Cases*, 276 S.C. at 581, 281 S.E.2d at 114. Jurisdiction, on the other hand, is the power of a court to decide a case. *Black's Law Dictionary* 855 (7th ed. 1999); *see also Dove*, 314 S.C. at 237-38, 442 S.E.2d at 600 (defining subject matter jurisdiction as the court's power to hear and determine a particular class of cases). Proper service of process on a defendant, therefore, confers personal jurisdiction over the defendant. *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). Consequently, a court may have personal jurisdiction over a properly served defendant by effecting personal service in a particular geographical location without venue being proper in the place of service. Therefore, because these statutes do not address the same concepts, the Court improperly used the language from the service statute to define the term "resides" in the venue statute.

Even if we were to find that the Court properly used the "owns property and transacts business" language from the service statute to define "resides," we no longer support a test that, derived from statute, no longer exists in that statute. Again, when rewriting section 15-9-210, the legislature removed the "owns property and transacts business" language. As a result, this Court can no longer point to a statute, as it did in prior decisions, including the two *In re Asbestosis Cases* decisions and the earlier decision in *Lott v. Claussens, Inc.*, to find venue proper in a county where a corporate defendant owns property and transacts business. Therefore, in our decision today, we are unwilling to uphold the "owns property and transacts business" test.

Finally, as recently as 1994, this Court has continued to recognize that venue is proper where a corporate defendant maintains an office and agent for the transaction of business. *Dove*, 314 S.C. at 238, 442 S.E.2d at 600; *Stewart v. Nichols*, 282 S.C. 402, 404, 318 S.E.2d 369, 370 (1984). In *Dove*, we were unwilling to find that venue was proper in Richland County on the sole basis that the defendant corporation maintained a retail outlet in the county. *Dove*, 314 S.C. at 239, 442 S.E.2d at 601. Instead, the Court was

concerned with whether the defendant maintained an *agent* in Richland County, and, therefore, remanded the case to the trial court to make such a determination. *Id.*

Accordingly, we hold that for purposes of venue, a defendant corporation resides in any county where it (1) maintains its principal place of business or (2) maintains an office and agent for the transaction of business.

CSX is incorporated under Virginia law, and its principal place of business is in Florida. Although CSX owns property and transacts business in Hampton County, it does not maintain an office and agent for the transaction of business there. Therefore, the trial court erred in finding that venue was proper in Hampton County.

B. CONVENIENCE AND JUSTICE

CSX argues that even if it did reside in Hampton County, its motion to change venue should have been granted based on the convenience of witnesses and the ends of justice.[7] We agree.

1. Discretionary authority

A trial judge may change the place of trial "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." S.C. Code Ann. § 15-7-100(3) (1976). Unlike the determination of residency, which is a question of law, it is within the trial judge's discretion to determine whether to grant a motion to change venue based on the

[7] Although we hold that venue was improper in Hampton County because CSX did not "reside" there, we address the alternative basis upon which venue was improper—the convenience of witnesses and the ends of justice—because we seek to issue a comprehensive decision that clarifies the law of venue. Moreover, because the incidents and parties involved in the underlying lawsuit had no rational connection to the county in which this case was tried, we cannot ignore a trial court ruling that fails to base venue on principles of convenience and justice, particularly when such rulings may undermine the public's confidence in our judicial system.

convenience of the witnesses and the ends of justice. *Varnadoe v. Hicks*, 264 S.C. 216, 219, 213 S.E.2d 736, 737 (1975).

In the present case, the trial judge found that he lacked the discretionary authority to transfer the case based on subsection 2 of South Carolina's long-arm statute.[8] Subsection 2 provides that when jurisdiction is based solely on the long-arm statute, a trial judge is not permitted to transfer venue for the convenience of witnesses and the ends of justice.[9] S.C. Code Ann. § 36-2-803(2) (1976). Because the trial judge found that personal jurisdiction in this case was based solely on the long-arm statute, he found that he was without authority to transfer the case. We disagree.

The trial court's jurisdiction was not based solely on the long-arm statute's bare threshold level of minimum contacts. Another statutory basis for jurisdiction existed under S.C. Code Ann. § 36-2-802 (1976), which provides that "[a] court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, *doing business*, or maintaining his or her principal place of business in, this State as to any cause of action." (Emphasis added). Evidence in the record demonstrates that CSX conducts

[8] The long-arm statute confers personal jurisdiction over a nonresident defendant for specific conduct occurring in this state. S.C. Code § 36-2-803(1) (1976).

[9] We note that South Carolina is the only state that prohibits nonresident defendants—defendants who are brought into a South Carolina court solely on the basis of the long-arm statute—from transferring venue for the convenience of witnesses and the ends of justice. *See* Timothy Clardy, *Nonresident Defendants Don't Deserve Convenience or Justice in South Carolina*, 55 S.C. L. Rev. 443 (2004) (arguing that section 2 of the long-arm statute violates the Equal Protection Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution). We do not, however, consider the constitutionality of subsection 2 of the long-arm statute.

business in this state, owns property in this state, and has an agent for service of process in this state.[10]

Because we find that CSX was "doing business" in this state, we hold that the trial court erred in ruling that jurisdiction was based solely on the long-arm statute. Consequently, the trial judge erred in ruling that he did not have the discretionary authority to transfer the case based on the convenience of the witnesses and the ends of justice.

2. Merits

Even though the trial judge found that he did not have the authority to transfer the case based on convenience of the witnesses and the ends of justice, the judge addressed the merits of the motion, found that CSX did not make a *prima facie* showing that the witnesses would be inconvenienced by a trial in Hampton County, and, accordingly, ruled that CSX's motion, if considered on the merits, would be denied.

Either party may make a motion to change venue based on convenience of the witnesses and the ends of justice. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 334, 479 S.E.2d 67, 70 (Ct. App. 1996). The moving party has the burden of making a *prima facie* showing that both the convenience of the witnesses and the ends of justice would be promoted. *Mixson v. Agricultural Helicopters, Inc.*, 260 S.C. 532, 197 S.E.2d 663 (1973). The showing must be based on "competent evidence," not mere "beliefs, opinions, and conclusions of the witnesses." *Id.* Once such a showing has been made, the burden shifts to the party opposing the motion to overcome at least one of the two requirements. *Id.*

At the motion hearing, CSX presented evidence showing that almost every witness identified by each of the parties lived either in Greenwood County or the contiguous counties of Laurens and Abbeville.[11] With the

[10] In fact, in its amended answer to the complaint, CSX admitted that it "does business in South Carolina."

[11] This evidence was presented in the form of answers to interrogatories.

exception of a medical expert retained by Whaley to review his condition in preparation for trial, none of the witnesses were residents of Hampton County.[12] In addition, the alleged injuries occurred either in Greenwood or Laurens Counties, not Hampton County. Finally, CSX submitted deposition excerpts from two of Whaley's treating physicians who testified that it would be inconvenient for them to travel from Greenwood to Hampton County for trial.[13]

Based on this evidence, we find that CSX made a *prima facie* showing that Hampton County was not a convenient place for trial. Moreover, we hold that the ends of justice were not promoted by having this case tried in Hampton County. *See Varnadoe v. Hicks*, 264 S.C. 216, 213 S.E.2d 736 (1975) (convenience of the witnesses is a factor the court may consider in deciding whether a change of venue would promote the ends of justice); *Holden v. Beach*, 228 S.C. 234, 89 S.E.2d 433 (1955) (the ends of justice are promoted by having a jury from the same area as the witnesses evaluate witness credibility).

Therefore, we hold that the trial judge erred in ruling that CSX failed to make a *prima facie* showing that the convenience of witnesses and the ends of justice would be promoted by a change of venue.

II. JNOV

CSX argues that Whaley did not present a sufficient amount of evidence from which a reasonable and fair-minded juror could have found

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[12] In fact, at trial, Whaley presented the testimony of eleven witnesses by video deposition, instead of by live testimony, in Hampton County.

[13] At oral argument before this Court, Whaley's counsel was asked the following question: "Why was this suit brought in Hampton County?" Counsel answered, "It was brought there because we're the lawyers." Later, counsel modified his answer, stating that the suit was brought in Hampton County because "we're the lawyer and they [CSX] are residents there." In either case, the location of a lawyer's office should not enter into the analysis of whether a defendant resides in a particular county for purposes of venue.

that CSX violated the Federal Employer's Liability Act (FELA) or the Locomotive Inspection Act (LIA). Accordingly, CSX argues, the trial court erred in denying CSX's motion for JNOV on these two claims. We agree that the trial court erred in denying the motion on the LIA claim, but we disagree that the court erred in denying the motion on the FELA claim.

A. FELA claim

When deciding whether to grant a motion for JNOV in a FELA action, a state court must apply the federal standard. *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 91, 588 S.E.2d 87, 90 (2003). The federal standard for sufficiency of evidence, which applies to both trial and appellate courts, is the following:

> the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed. . . . Assessed in this way, the evidence must then be "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party. . . ." A "mere scintilla of evidence" is not sufficient to withstand the challenge.

Id. at 91-92, 588 S.E.2d at 90 (internal citations omitted). Therefore, the non-moving party must present "more than a scintilla of evidence to establish his claim." *Id.* at 92, 588 S.E.2d at 90.

Under FELA, railroad carriers are liable to their employees for injury resulting, in whole or in part, from the employer's negligence. 45 U.S.C. § 51 (2000). Moreover, a railroad has a non-delegable duty to provide its employees with a safe place to work.[14] *Rogers*, 356 S.C. at 92, 588 S.E.2d at 90 (citations omitted). This duty, however, extends only to foreseeable dangers. *Id.* To recover, a plaintiff must prove the common law elements of negligence: duty, breach, causation, and damages. *Id.* at 91, 588 S.E.2d at 90.

[14] We note that FELA does not impose a duty on railroads to provide employees with air-conditioned locomotives. *Norfolk Southern Ry. Co. v. Denson*, 774 So.2d 549, 556 (Ala. 2000).

Viewing the evidence and its inferences in the light most favorable to Whaley, we find that Whaley presented more than a scintilla of evidence to support a verdict in his favor on the FELA claim. At trial, Whaley presented the testimony of Tony Smith, general chairman for the Eastern Lines General Committee of Adjustment on CSX, who admitted that locomotive cabs become very hot during the summer months. In addition, Larry Koster, chief mechanical officer for CSX, testified that CSX was aware that extreme heat and airflow were issues in locomotives. Finally, Gregory Martin, chief mechanical officer for engineering and quality assurance for CSX, testified that CSX had studied the issue of excessive heat in locomotive cabs.

Based on this testimony, we find that Whaley presented more than a scintilla of evidence to establish that CSX knew or, in the exercise of ordinary care, should have known that the conditions inside its locomotives could constitute an unsafe work environment. Therefore, we hold that Whaley presented enough evidence from which a fair-minded juror could differ on whether CSX was negligent and whether that negligence contributed to Whaley's injury.

B. LIA claim

We find, however, that the trial court erred in denying the JNOV motion on the LIA claim. Under the LIA, railroad carriers must ensure that their locomotives and all parts and appurtenances "are in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701 (2000). In addition, LIA regulations require that locomotives "be provided with proper ventilation." 49 C.F.R. 229.119(d) (2003). But "a carrier cannot be held liable under the [LIA] for failure to install equipment on a locomotive unless the omitted equipment (1) is required by applicable federal regulations; or (2) constitutes an integral or essential part of a completed locomotive." *Mosco v. Baltimore & Ohio R.R.*, 817 F.2d 1088, 1091 (4th Cir. 1987).

In this case, Whaley argues that the locomotives he operated lacked proper ventilation. But he did not present any evidence that the locomotives and their parts were not in proper condition. Moreover, he did not present any evidence that CSX failed to install equipment that was required under

federal regulations or that constituted an integral or essential part of the locomotive. Because Whaley did not present even a scintilla of evidence to establish a claim under the LIA, we hold that a fair, impartial, and reasonable juror could not have returned a verdict in Whaley's favor on the LIA claim.

Consequently, we hold that the trial court erred in denying CSX's motion for JNOV on the LIA claim but properly denied the motion on the FELA claim.

III. PREEMPTION

CSX argues that the FELA and LIA claims are precluded and preempted under federal law.[15] We agree that the LIA claim is preempted but hold that the FELA claim is not.

The United States Supreme Court has held that the LIA's predecessor, the Boiler Inspection Act, was intended to "occupy the field" of locomotive regulation. *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 613 (1924). As a result, any state regulation of locomotives, e.g., to promote health and comfort or safety, is precluded and preempted by federal law. *Id.* at 612-13; *see also General Motors Corp. v. Kilgore*, 853 So.2d 171 (Ala. 2002) (holding that the LIA preempts state common law claims brought in wrongful death action).

In the present case, we hold that Whaley's claim under the LIA is preempted by federal law. Federal law does not require that CSX install fans or air conditioners in its locomotives. To uphold the jury's verdict would support a finding of liability despite CSX's compliance with all applicable statutes and regulations and would force CSX to alter its locomotives in a way that would conflict with the uniformity and consistency that the LIA is designed to provide. As a result, CSX would be forced to install cooling devices on all locomotives to protect itself against future lawsuits in South

[15] CSX raised this argument several times throughout the trial, and the trial judge ruled that the argument failed as a matter of law. Because CSX will likely raise this preemption argument on remand, we address the merits of this argument in the interest of judicial economy.

Carolina. Therefore, we hold that Whaley's claim under the LIA is preempted.

But Whaley's negligence claim—that his employer did not provide a safe place to work—is not preempted by federal law. A claim under FELA gives rise to an ordinary negligence action, which is governed by state law. Therefore, to the extent Whaley had a viable claim, he could have brought it under the FELA only.

IV. EXPERT TESTIMONY

CSX argues that the trial court erred in allowing Whaley to present expert testimony that heat exposure caused Whaley's current inability to sweat. Moreover, CSX argues that the evidence did not meet the standard for admissibility, was unreliable, lacked proper foundation, and was based on facts not in evidence.

After reviewing the record, we find that this issue is not preserved for review. *See Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) (to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court).

CSX argues that the trial court erred in allowing Drs. Shealy, Waheed, and Collins to testify as to causation. But there is no evidence in the record that CSX objected, at all, to the testimony of Drs. Shealy and Waheed during trial. CSX did, however, object to Dr. Collins's testimony, on the basis that it did not meet the standard of reliability. But this objection was apparently raised and ruled upon in a side bar, and the contents of the side bar are not part of the record.[16] Moreover, when counsel attempted to put the contents of the side bar on the record, the trial judge interrupted to explain that the objection had been overruled in the side bar, not because the judge thought the testimony met the standard of reliability, but because counsel failed to lay a foundation for the objection. Therefore, the trial court did not rule upon the

[16] The record does contain the contents of a side bar in which CSX objected to Dr. Collins's testimony based on hearsay, not based on the grounds raised in this appeal.

issue now raised by CSX in this appeal. For these reasons, we find that this issue is not preserved for review.

V. OTHER EVIDENCE

CSX argues that the trial court erred in admitting evidence of other employee complaints about the temperature in locomotives. CSX also argues that the trial court erred in admitting evidence about fans, air conditioners, and white-painted roofs on other locomotives. We agree.

Evidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between them tending to prove or disprove some fact in dispute. *Brewer v. Morris*, 269 S.C. 607, 610, 239 S.E.2d 318, 319 (1977). This rule, which governs the admissibility of prior accidents, transactions, or happenings, is based on "relevancy, logic, and common sense." *Id.* Because evidence of other accidents may be highly prejudicial, "[a] plaintiff must present a factual foundation for the court to determine that the other accidents were 'substantially similar' to the accident at issue." *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. The admission of evidence is within the trial judge's discretion and his decision will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

In the present case, the trial judge permitted Whaley to submit evidence that, between 1984 and 2000, CSX had received ninety-seven employee complaints about heat. In addition, the trial judge permitted Whaley to introduce evidence that, between 1993 and 2000, eighteen CSX employees

had suffered heat stroke. Finally, the judge allowed Whaley to introduce letters written to CSX by union officials complaining about heat.

We hold that this evidence should not have been admitted. Whaley did not establish that the reported complaints and injuries stemmed from the same or similar circumstances as his injuries. Because Whaley did not establish that the other employees were injured under similar circumstances, much less under substantially similar circumstances, the trial judge erred in admitting the evidence.

The trial judge also allowed Whaley to introduce evidence that some CSX locomotive cabs are equipped with fans or air conditioners, and that the tops of some cabs are painted white. We find that this evidence was not relevant to Whaley's claim that the locomotives in which he was injured were unsafe to operate or were not properly ventilated. Moreover, based on our holding that the LIA claim is preempted, the evidence should not have been admitted to show that CSX was liable for failing to install particular cooling devices.

Therefore, we hold that the trial judge erred in allowing Whaley to introduce this evidence.

CONCLUSION

In sum, we reverse the trial court's ruling denying CSX's motion to change venue. CSX does not reside in Hampton County for purposes of venue, and therefore the case should not have been tried in Hampton County. Moreover, the case should have been transferred to Greenwood County on the basis of the convenience of witnesses and the ends of justice.

In addition, we reverse the trial court's ruling denying CSX's motion for JNOV on the LIA claim. But we affirm the trial court ruling denying CSX's motion for JNOV on the FELA claim. As a result, Whaley may proceed with the FELA claim upon re-trial.

Finally, we reverse the trial court's ruling admitting certain evidence regarding other employee complaints and regarding fans, air conditioners, and white-painted roofs on other locomotives.

This case is therefore remanded to Greenwood County to be tried in accordance with this opinion.[17]

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

[17] The concurrence makes the technical procedural point that the case should be remanded to Hampton County, instead of Greenwood County, without prejudice to CSX's right to renew its motion to change venue. First, in remanding this case, we direct the remittitur to be sent to the trial court in Hampton County, where, by order of this Court, the case will be transferred to Greenwood County. Second, in light of today's opinion, we do not think it is necessary for CSX to renew its motion to change venue, as suggested in the concurring opinion.

JUSTICE PLEICONES: I agree with the majority that the trial court erred in denying CSX's motion for a change of venue pursuant to S.C. Code Ann. § 15-7-30 (1976). Having found this statute controls, I would not reach the other venue issues. I therefore join Part I A of the majority, but decline to join Part I B.

I also join the majority's decision in Part II affirming the trial court's denial of CSX's JNOV motion as it related to the FELA claim and reversing as to the LIA claim. Therefore, I find it unnecessary to reach CSX's curious preemption argument as to the LIA cause of action. Moreover, like the LIA claim, the FELA claim was brought pursuant to a federal act, and does not require us to decide whether these statutes preempt a state law claim. I therefore decline to join Part III. While I join the majority's disposition of the evidentiary issues in Parts IV and V, I do so with the understanding that some of these evidentiary objections may be renewed at the next trial.

For the reasons given above, I concur in the majority's decision to remand the FELA claim for a new trial.[18]

[18] In my view, the case must be remanded to Hampton County, without prejudice to CSX's right to renew its motion to change venue. See State v. Hunter, 82 S.C. 152, 63 S.E. 685 (1909) (remittitur returned to county where appeal from venue order originated).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Greenwood County Council, Petitioner,

v.

Emmett F. Brooks, Former Interim Clerk of Court for Greenwood County, and Ingram Moon, Interim Clerk of Court for Greenwood County, Respondents.

ORIGINAL JURISDICTION

Opinion No. 25936
Heard November 30, 2004 – Filed February 7, 2005

Charles M. Watson, Jr., of Watson Law Firm, of Greenwood, for Petitioner.

Jon Eric Newlon, of The McCravy & Newton Law Firm, P.A., of Greenwood, for Respondents.

JUSTICE WALLER: This case was filed in the original jurisdiction of the Court seeking a declaratory judgment determining whether the Greenwood County Council (County) had the authority to reduce the salary of an Interim Clerk of Court. We find the County did not have the authority to reduce the salary of an Interim Clerk of Court.

FACTS

In 1999, Louise Davis (Davis), with twenty-eight (28) years experience in the Clerk's Office, was appointed the Interim Clerk of Court for County. Davis notified the County Manager that she expected the same pay as her predecessor and the County complied. In November 2000, Davis was elected as Clerk of Court. On June 30, 2003, Davis retired. She was earning $46,592.00 at the time of her retirement. On the same day, the County passed its budget for the fiscal year 2003-2004 and reduced the salary for the Clerk of Court position to $35,000.

On August 6, 2003, Governor Mark Sanford appointed Emmett Brooks (Brooks) as the Clerk of Court to serve the remainder of Davis' term until January 1, 2005.[1] Apparently, Governor Sanford, unaware of the salary reduction in the County's budget, informed Brooks that he would receive the same salary that Davis had received before she retired. After accepting the appointment, Brooks was informed the salary would be only $35,000.

The County brought this action seeking a determination of whether it had the authority to reduce the Clerk of Court's salary. Brooks answered and counterclaimed. Brooks and the County subsequently settled and as part of the agreement, Brooks resigned. In July 2004, the Governor appointed the current Interim Clerk of Court, Ingram Moon (Moon), and the Court ordered Moon added as a party to this action.[2]

ISSUE

Did the County have the authority to reduce the salary of the Interim Clerks of Court?

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[1]Probate Judge Frank Addy served the brief interim between Davis' retirement and the Governor's appointment.

[2]Moon won in November's general election and her elected term of office begins in January 2005.

DISCUSSION

The County contends it was not prohibited from reducing the salary of the Interim Clerks of Court. Two code sections are applicable to this issue. S.C. Code Ann. § 8-21-300 (Supp. 2003) provides, in pertinent part: "The clerks of court and registers of deeds of the several counties shall receive such salaries for performance of their duties as may be fixed by the governing body of the county, which shall not be diminished during their terms of office . . . " (emphasis added).

Additionally, S.C. Code Ann. § 4-9-30(7) (Supp. 2003) provides the county with the authority:

> to develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government. This employment and discharge authority does not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government. . . .The salary of those officials elected by the people may be increased but may not be reduced during the terms for which they are elected . . .

(emphasis added).

Section 4-9-30(7) prohibits the reduction of a salary "during the term for which the official is elected" and § 8-21-300 prohibits a salary reduction during an elected official's "term of office."[3]

There are no South Carolina cases addressing whether the salary of an interim official appointed to fill an unexpired term can be reduced. However, there have been several Attorney General Opinions which have concluded that the salary may not be reduced during the unexpired term of the office. 1985 Op. Atty. Gen., No. 85-107.[4] Furthermore, several cases from other jurisdictions have also addressed similar prohibitions and held that the phrase "terms of office" means the unexpired term of the previously elected official. Lee v. Peach Cty. Bd. Of Comm'rs, 497 S.E.2d 562 (Ga. 1998); McKesson v. Lowery, 335 P.2d 662 (Ca. 1959).

One of the purposes behind legislation which prohibits salary changes during an elected official's term is to establish certainty as to the salary and to prevent elected officials from using undue influence to secure salary increases. McKesson, 335 P.2d at 663. Further, increases should be enacted for the benefit of the office and not for the immediate benefit of the particular person holding that office. State v. Oklahoma Corp. Comm'n, 971 P.2d 868, 871 n 4 (Okla. 1998)(internal citations omitted). The salary

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[3] The County contends that the enactment of § 4-9-30(7) in 1987 repealed by implication § 8-21-300 and that Clerks of Court now are covered only by § 4-9-30(7). Repeal by implication is not favored and can be found only where no reasonable construction can be given to two statutes, other than that they are in irreconcilable conflict with each other. Johnston v. City of Myrtle Beach, 283 S.C. 288, 290, 321 S.E.2d 627, 628 (Ct. App. 1984). We find these two statutes are not irreconcilable and thus § 4-9-30 was not repealed by implication when § 8-21-300 was enacted.

[4]In fact, the Attorney General has issued several opinions in this case concluding that County impermissibly reduced the salary for the Interim Clerk of Court. 2003 WL 22682936; 2003 WL 22422699; and 2003 WL 22682935 (S.C.A.G.).

pertaining to an office is an incident to the office itself and not to the individual who holds the office. Gaffney v. Mallory, 186 S. C. 337, 341, 195 S. E. 840, 844 (1938). Based upon the foregoing, we conclude that sections 4-9-30 and 8-21-300 prohibit County from reducing an elected official's salary during the terms for which they are elected.

Accordingly, we hold that County did not have the authority to reduce the salary for an Interim Clerk of Court.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Kenneth G. Goode, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Myrtle Beach Associate
Municipal Court
Judge Phillip W. Hudson, Respondent.

Opinion No. 25937
Submitted January 4, 2005 – Filed February 7, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for The Office of Disciplinary Counsel.

Thomas C. Brittain, of Myrtle Beach, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b)(3), RJDE, Rule 502, SCACR.[1] In addition,

[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30,

respondent agrees not to seek or accept any judicial position in South Carolina without permission of the Court. The facts as set forth in the agreement are as follows.

FACTS

Respondent was a part-time associate municipal court judge for the City of Myrtle Beach. In addition, respondent was a part-time instructor at Horry-Georgetown Technical College. On March 12, 2004, a Myrtle Beach Police Officer issued two traffic tickets to one of respondent's students. Traffic court for the charges was scheduled for March 23, 2004.

Respondent admits he engaged in ex parte communication with the student about the tickets. As a result of these communications, respondent marked certain court records falsely to show the disposition of one ticket as "dismiss per officer" and the other as "dismissed proof." As a further result of respondent's ex parte communications with the student, the student paid respondent $252.00 in two payments on April 1 and April 3, 2004. The student thought the payments were for traffic fines. These payments were made in cash outside the proper procedure for remitting payment of fines.

Respondent did not issue a receipt to the student, did not remit the money to the municipal court, and, instead, commingled the money with his own. Respondent represents it was his intention to remit the money to the municipal court but that he was unable to do so prior to being contacted by Disciplinary Counsel on April 7, 2004.

On at least five prior occasions, respondent accepted money from citizens in his official capacity without properly accounting for it. On these occasions, he converted the money to other purposes.

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603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

Respondent acknowledges he received a painting from a litigant's husband on the same day the litigant appeared in court before him; respondent suspended the litigant's $796.00 fine. Respondent represented he believed the painting was a gift to the municipal court, not to himself. The painting remained in respondent's office. ODC can neither confirm nor dispute respondent's representation.

On May 31, 2003, two defendants appeared before respondent for a bond hearing on charges of leaving the scene of an accident involving death. Respondent set a $25,000 surety bond for each defendant.

Respondent engaged in an ex parte conversation with counsel for one defendant after the hearing. As a result of the ex parte conversation, respondent changed both defendants' bonds to personal recognizance without holding another hearing or notifying the victim's family members. Respondent represents he believed the family members had been notified by the Victim's Advocate.

Respondent's term of office expired during the pendency of the disciplinary matters referenced herein. He was not reappointed.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3B(7) (judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending proceeding); Canon 3B(8) (judge shall

dispose of all judicial matters promptly, efficiently, and fairly); Canon 4 (judge shall conduct extra-judicial activities as to minimize the risk of conflict with judicial obligations); and Canon 4D(5) (judge shall not accept gift where circumstances might suggest intent to influence judge). By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.[2] Hereafter, respondent shall neither seek nor accept any judicial office, whether by appointment or election, in this state. See Rule 7(b)(7) and (8), RJDE, Rule 502, SCACR. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[2] As previously noted, a public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Majid Nasser-Moghaddassi, Respondent,

v.

Farideh Gerami Moghaddassi, Appellant.

Appeal From Greenville County
Amy C. Sutherland, Family Court Judge

Opinion No. 3932
Heard January 11, 2005 – Filed January 31, 2005

AFFIRMED

Jeffrey Falkner Wilkes, of Greenville, for Appellant.

Kimberly Fisher Dunham, of Greenville, for Respondent.

ANDERSON, J.: In this domestic relations action, Mrs. Farideh Gerami Moghaddassi (Mother) appeals the family court order awarding

custody of the couple's children to Mr. Majid Nasser-Moghaddassi (Father). Additionally, Mother appeals the distribution of the marital estate and the award of the marital residence to Father. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The Moghaddassis, who were married in February of 1983, have three minor children: a daughter who was sixteen at the time of the final hearing, a son who was thirteen, and another daughter who was seven. Mother and Father are both natives of Iran and were both educated in England. They have been in the United States since 1986, when Father, an engineer, found employment here.

According to Father's trial testimony, the parties argued frequently. When their oldest daughter was nearing her teenage years, Father and Mother's arguments progressed into physical altercations. Father recounted one instance where Mother became upset because their daughter and her friends were in a room without adult supervision, while Father and Mother were in another part of the house:

> My wife. . . . she started pushing me around that, You're not doing anything as a father. She's up to no good in there and there's a boy in the room.
>
> I said, Hey, they are all teenagers, they are friends. But she pushed me around, pushed me around and got physical with me and she hit me with a—a children's recorder on the floor she picked up and she hit me in the wrist. And it was very painful. I went down on my knees and she hit me in the head. . . .

As a result of the incident, Mother was charged with criminal domestic violence and spent several days in jail. Father related another episode: "we had a little argument and that was—when that was over, I was sitting and working with the computer and suddenly she approached me from the back and poured hot coffee on my head." He further averred that when angry,

Mother would scratch his face, and that she has broken his eyeglasses on five occasions. Frequently, the children were present during these encounters.

The relationships between the children and their mother are strained. Father stated that his wife would call their sixteen-year-old daughter "bitch, prostitute, . . . whore" in front of her friends. Additionally, Father testified to seeing his wife abusing their daughter, "[p]hysically pulling her hair, pushing her around." During the year preceding trial the oldest daughter refused to see her mother. According to Father, Mother mistreated the younger children as well, including "slapping around, pushing" their son.

A Guardian ad Litem (GAL or guardian) was appointed to represent the interests of the three minor children. She prepared a report which discusses her interviews with, among other persons, the parties' children. The report describes the children's accounts of Mother's behavior:

> The oldest child . . . . relayed to me that her parents have had lots of fights. Her mother always insults her father. She also related that her mother always instigates and starts the fights with her father. . . . She describes her mother as yelling and cursing. . . . She also related to me that her mother has continually called her a whore, has hit her and her father on many occasions.
>
> . . . She does not want to see her mother at all.
>
> . . . [T]he thirteen year old son . . . . relayed to me that his mother always starts the fights. That he has had to call the Police two times. He related how recently his mother hit his father with the broom and was clawing at him. . . . He described his mother to me as "mom is abusive". He described an incident where the mother hit him with a metal pole and pushed him onto some stairs. . . .
>
> I then spoke with . . . the six year old. . . . She said her mother fus[s]ed a lot at her dad and broke his glasses and hit him a lot with the broom, a flashlight and rock. . . . She told me that

she was scared of her mother, she hits everybody in the family. . .
.

Father initiated divorce proceedings. The family court: (1) granted a divorce on one year's separation; (2) awarded custody of the three minor children to Father; (3) ordered Father to pay $1,300 per month in permanent, periodic alimony; (4) apportioned the marital estate 60% to Father, 40% to Mother; and (5) distributed the marital residence to Father as part of his share of the marital estate. The issues before this Court relate to custody of the children and division of the marital assets.

STANDARD OF REVIEW

In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (citing Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992)). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (ruling that because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the family court's findings where matters of credibility are involved). An appellate court "should be reluctant to substitute its own evaluation of the evidence on child custody for that of the trial court." Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). Our broad scope of review does not relieve appellant of her burden to convince this Court the family court committed error. Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979).

ISSUES

I. Was the Guardian ad Litem's recommendation the product of an independent, balanced, and impartial investigation, well documented and supported by the facts?

II. Did the family court err in ordering Mother to pay a portion of the Guardian ad Litem fees?

III. Was the distribution of the marital estate fair and equitable in light of the facts of this case?

IV. Did the family court err in awarding Father title to the marital residence?

V. Does the evidence support the family court's denial of an award of personal property to Mother?

VI. Did the family court err by not awarding Mother attorney's fees and costs?

LAW/ANALYSIS

Mother asserts six exceptions to the family court order. We disagree with Mother's contentions and affirm the family court's decision.

I. The GAL's Recommendation

Mother first argues the GAL's recommendation was not the product of an independent, balanced, and impartial investigation. We disagree.

The paramount and controlling factor in every custody dispute is the best interests of the children. Shirley v. Shirley, 342 S.C. 324, 330, 536

S.E.2d 427, 430 (Ct. App. 2000); Paparella v. Paparella, 340 S.C.186, 189, 531 S.E.2d 297, 299 (Ct. App. 2000). In Shirley, we articulated the South Carolina rule governing custody cases:

> In all custody controversies, the controlling considerations are the child's welfare and best interests. In reaching a determination as to custody, the family court should consider how the custody decision will impact all areas of the child's life, including physical, psychological, spiritual, educational, familial, emotional, and recreational aspects. Additionally, the court must assess each party's character, fitness, and attitude as they impact the child.

342 S.C. at 330, 536 S.E.2d at 430 (citations omitted). When determining the best interests of a child,

> the family court should consider several factors, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including the guardian, expert witnesses, and the children); and the age, health, and sex of the children. Rather than merely adopting the recommendation of the guardian, the court, by its own review of all the evidence, should consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child as well as all psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life.

Pirayesh v. Pirayesh, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004) (emphasis added) (citations omitted).

In the landmark opinion, Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001), our supreme court reviewed the historical development of the role of the GAL in South Carolina:

> A guardian ad litem, as the later phrase suggests, is a guardian for litigation. Traditionally, GALs were lawyers appointed by the court to appear in a lawsuit on behalf of a minor or incompetent. Over time, the role of the guardian was defined by statute as well as by common law. Lay persons as well as lawyers were appointed by the court in cases to protect those the court or legislature deemed could not protect themselves. . . .
>
> The GAL functions as a representative of the court, appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view. Fleming v. Asbill, 326 S.C. 49, 483 S.E.2d 751 (1997); Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996). Standard setting for GALs in this "new" role has been very ad hoc. The legislature has set standards for a GAL appointed in abuse and neglect cases. However, there has been no comprehensive or coherent approach for the setting of standards for the use of GALs in private custody disputes. . . .

Patel at 287-88, 555 S.E.2d at 389 (footnote omitted). Due to the new role guardians play, and "[w]hile a more complete approach [was] being examined by the three branches of government," the Patel court "set forth some base line standards":

> In connection with developing a recommendation to the family court, a GAL shall: (1) conduct an **independent, balanced, and impartial** investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case; (2) advocate for the child's best interest by making specific and clear recommendations, when necessary, for evaluation, services, and treatment for the child and the child's family; (3) attend all court hearings and provide accurate, current information directly to the

> court; (4) maintain a complete file with notes rather than relying upon court files; and (5) present to the court and all other parties clear and comprehensive written reports, including but not limited to a final report regarding the child's best interest, which includes conclusions and recommendations and the facts upon which the reports are based. . . .

Id. at 288-89, 555 S.E.2d 390.

The facts that spawned the Patel prophylactic involved the conduct of a GAL who the court found had failed to conduct "an objective, balanced investigation." Id. at 286, 555 S.E.2d at 388. The guardian "did not keep notes of her observations during her investigation and failed to produce a written report." Id. More significantly, she spent more time speaking with the husband than the wife and taped a conversation between the parties without the wife's knowledge. Id. Therefore, the court concluded the guardian "did not afford each party a balanced opportunity to interact with her. Her method of evaluation created a high potential for bias towards Husband." Id. at 286, 555 S.E.2d at 389. With the interim standards as a guide, the court remanded the custody decision for a new hearing. Id. at 289, 555 S.E.2d at 390.

In 2002, the legislature responded to Patel's invitation for action by passing S.C. Code Ann. §§ 20-7-1545 through -1557. As the Patel court observed, several statutes dealing with GALs were already in existence. See 347 S.C. at 287, 555 S.E.2d at 389 ("The legislature has enacted some statutes regarding GALs. In the context of children, the legislature has enacted S.C. Code Ann. § 20-7-121 (Supp. 2000) (creating a GAL program for children in abuse and neglect proceedings); Section 2[0]-7-1570 (mandating the appointment of a GAL for children involved in a termination of parental rights proceeding); Section 20-7-952 (requiring a GAL in a paternity action); and Section 20-7-1732 (requiring the appointment of a GAL for children involved in an adoption proceeding)."). The 2002 act provides comprehensive, coherent guidance for guardians in private custody disputes, guidance that was lacking in pre-Patel days. In essence, the statute codifies the Patel standards. See Pirayesh v. Pirayesh, 359 S.C. 284, 293,

596 S.E.2d 505, 510 (Ct. App. 2004) (noting § 20-7-1549 codifies the Patel guidelines "with more specificity"). However, §§ 20-7-1545 through –1557 only apply to guardians appointed on or after January 15, 2003, the date the act took effect. The guardian in the instant case was appointed on May 23, 2001. Consequently, Patel and its progeny control.

Since Patel, the appellate entities of this State have twice addressed the independence and objectivity of an appointed guardian. Pirayesh v. Pirayesh, 359 S.C. 284, 596 S.E.2d 505 (Ct. App. 2004), was "different from Patel in that Wife's argument stem[med], not from the guardian's incomplete investigation of her, but rather from the guardian's allegedly superficial investigation of Husband's parenting abilities." Id. at 294, 596 S.E.2d at 511. We opined that "the requirements set forth in Patel were meant not only to protect the parents who are the subjects of the guardian's investigation but also to ensure that the fate of a child's living arrangements does not rest in the hands of a guardian whose investigation is biased or otherwise incomplete." Id.

Factually, the Pirayesh court found the guardian had conducted a "superficial investigation" of the husband. Id. at 295, 596 S.E.2d at 511. While she "visited Wife's home several times to interview her and the children," there was "no indication that she ever interviewed Husband and the children while they visited his home in Charlotte." Id. Further, the GAL's recommendation that the children be placed with the husband "was largely based upon the concerns of the children's counselor regarding counseling appointments they had missed and a psychological evaluation that had still not been scheduled for the parties' daughter." Id. Yet, evidence suggested both parties were responsible for these acts of omission. Id. Additionally, the guardian incorrectly testified that one child had nine unexcused absences while in Wife's care, when actually she had only five excused absences. Id. "While this mistake by the guardian appeared to be inadvertent, the guardian was adamant during her testimony that the daughter had four additional unexcused absences." Id. (footnote omitted). Concomitantly, we agreed with the wife that "the guardian's recommendation did not result from a fair and impartial investigation" under Patel, and we remanded for a new custody hearing. Id. at 296-97, 596 S.E.2d at 511-12.

Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004), afforded the South Carolina Supreme Court an opportunity to apply Patel. The parties were divorced, and the father had custody of their minor child. Id. at 379, 602 S.E.2d at 34. When the father decided to relocate from South Carolina to Michigan, the mother and her parents petitioned the family court for a permanent restraining order. Id. The family court "concluded it to be in Child's best interests to allow Father to move to Michigan with Child." Id. Mother appealed, contending the guardian failed to adhere to the Patel standards. Mother's argument was rebuffed by the court's conclusion that "the guardian meticulously conducted an independent, balanced, and impartial investigation." Id. at 387, 602 S.E.2d at 38. Unlike Patel, where the guardian's investigation "overwhelmingly favored the husband," the guardian in Latimer "showed no bias or prejudice in the investigation." Id. at 388, 602 S.E.2d at 38. Rather, she submitted two reports and visited the mother on several occasions, commenting that the mother's residence was "'very adequate,'" and that "Mother did a good job with Child, takes good care of her and her husband seemed 'very genteel.'" Id. Finally, although the father lived in Michigan, the GAL observed him and the child on two occasions, and she requested that the father send a portfolio of information regarding the town in which he lived, his residence, and the local schools. Id. Therefore, the family court's custody decision was upheld. Id.

Here, the family court found the GAL "conducted an extremely thorough investigation of this matter." The GAL compiled two separate reports to assist the court in its custody decision. She interviewed sixteen individuals, including the parties, their children, the maternal grandmother, counselors, neighbors, teachers, and fellow employees. Among other documents, the guardian reviewed counseling records, school files, psychological evaluations, and police reports. She visited both homes, and she orchestrated counseling for the parties and the children.

The GAL spent time with both parents and all three children. However, Mother claims the guardian did not observe the children while in the care of both parents. The fragmented Record on Appeal does not provide a full picture as to the reasons behind this alleged failure. The only evidence

that the GAL did not see the children in Mother's care is a page of the trial transcript which is provided out of sequence, and, therefore, out of context. Mother states, "She called me and she said that she's coming to the house." "She" is never identified because the preceding nine pages of trial testimony are omitted. Even so, it appears from this testimony that on one occasion the GAL scheduled an appointment to observe the children with Mother, but, in Mother's words, the children "refused to come." Furthermore, the cross-examination of the guardian conducted by Mother's counsel is not part of the record. Consequently, we are **not** persuaded that the guardian's investigation fell short of the balanced and impartial standard of Patel.

We find that, unlike in Patel, the guardian in this case gave a balanced opportunity for both sides to interact with her, and her method of evaluation **did not** create a potential for bias in favor of Father. She fairly and thoroughly served as an advocate for the children's interest.

Further, the evidence in the record supports the findings of the GAL. The relationships between Mother and her three children are negativistic. As stated by the family court, Mother "attempts to rule by harangue rather than reason; by vituperation rather than nurture." Mother offered no testimony or other evidence supporting her proposition the GAL's recommendation unjustly favored the husband. After reviewing the record, we are convinced that the guardian's investigation was independent, balanced, and impartial. Therefore, we affirm the grant of custody to Father.

II. The GAL's Fee

Mother argues the family court erred in ordering her to pay a percentage of the GAL fees. We disagree.

An award of GAL fees lies within the sound discretion of the family court judge and will not be disturbed on appeal absent an abuse of that discretion. Shirley v. Shirley, 342 S.C. 324, 341, 536 S.E.2d 427, 436 (Ct. App. 2000). In the present case, in which we have determined the GAL conducted an independent, balanced, and impartial investigation, it is not an abuse of discretion to require Mother to bear the cost for 22%, or a total of

$1,543, of the GAL fees. This requirement is fair and should not create a hardship, considering that the court awarded Mother alimony, did not require her to pay child support, and provided that she could pay the GAL fee at a rate of $50 per month. Accordingly, we affirm the ruling of the family court.

III. Distribution of the Marital Estate

Mother challenges the family court's overall distribution of the marital estate, alleging the distribution was neither fair nor equitable. We disagree.

"The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership." Mallet v. Mallet, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996). "Upon dissolution of the marriage, marital property should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." Morris v. Morris, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999). In making an equitable distribution of marital property, the family court must, among other things: (1) identify the marital property, both real and personal, to be divided between the parties; (2) determine the fair market value of the identified property; (3) apportion the marital estate according to the contributions, both direct and indirect, of each party to the acquisition of the property during the marriage, their respective assets and incomes, and any special equities they may have in marital assets; and (4) provide for an equitable division of the marital estate, including the manner in which the distribution is to take place. Noll v. Noll, 297 S.C. 190, 375 S.E.2d 338 (Ct. App. 1988).

The family court valued the marital estate at $83,609. The valuation included all marital assets: equity in the marital home, $78,530; time-share in Hilton Head, $10,900; Mazda automobile, $3,000; Toyota automobile, $3,000; household furnishings, $5,000; jewelry, $3,550; 401K, $7,796; and marital debt, $28,167. The family court found that "Husband's direct contributions to the acquisition of property is far greater than the Wife's." Therefore, the estate was apportioned 60% to Father, 40% to Mother. Finally, the court distributed the assets as follows: Father received the marital residence, the Mazda, half of the household furnishings, and all of the

couple's outstanding debt, for a total distribution of $55,863; Mother received the Hilton Head time-share, the Toyota, the jewelry, the 401K, and half of the household furnishings, for a total distribution of $27,746. Father was then ordered to pay Mother $5,697 to accomplish the appropriate 60/40 apportionment. We find this division of the marital estate to be fair and equitable given the facts of this case. Accordingly, we affirm the equitable distribution effectuated by the family court.

IV. Award of the Marital Residence

Mother argues the family court erroneously awarded the marital residence to Father and that she should have been given the house as an incident of support. We disagree.

When evaluating the efficacy of a disposition of the marital residence, distinction must be drawn between an award that is incident to support—either child or spousal—and an assignment that is part of the equitable distribution of the parties' assets. A review of South Carolina case law demonstrates that awards incident to support may be made only where compelling circumstances exist, while title to the residence may be given to one of the parties in compliance with the ordinary rules of equitable distribution.

South Carolina recognizes that use of the marital home may be granted as an incident of support. See Whitfield v. Hanks, 278 S.C. 165, 293 S.E.2d 314 (1982); Tucker v. Tucker, 282 S.C. 261, 264, 317 S.E.2d 764, 767 (Ct. App. 1984) ("An award of possession of the marital home is an incident of support and not a division of property."). In Johnson v. Johnson, 285 S.C. 308, 311, 329 S.E.2d 443, 445 (Ct. App. 1985), we stated that "[b]eginning with the pronouncement in [Whitfield], . . . our appellate courts have struggled to develop guidelines to aid the family court in determining the appropriate disposition to be made of the marital home." Id. (citing Tucker v. Tucker, 282 S.C. 261, 317 S.E.2d 764 (1984); Thompson v. Brunson, 283 S.C. 221, 321 S.E.2d 622 (Ct. App. 1984); Shafer v. Shafer, 283 S.C. 205, 320 S.E.2d 730 (Ct. App. 1984); Jones v. Jones, 281 S.C. 96, 314 S.E.2d 33 (Ct. App. 1984); Smith v. Smith, 280 S.C. 257, 312 S.E.2d 560 (Ct. App.

1984)). The Johnson court amalgamated these attempts and provided the following instruction:

> First, the family court must begin with the premise that division and distribution of the marital home should be accomplished at the time of entry of the judgment of divorce. . . . the family court's objective should be to dissolve the marriage, sever all entangling legal relations and place the parties in a position from which they can begin anew. . . .
>
> Second, the court must carefully consider the claim of a party that the interests of that party or the children are so predominant, when balanced against the interest of the other, that an award of exclusive possession of the marital home is compelled. In Thompson v. Brunson, supra, and Shafer v. Shafer, supra, we noted some of the interests which may be considered compelling: (1) adequate shelter for minors; (2) suitable housing for a handicapped or infirm spouse; and (3) the inability of the occupying spouse to otherwise obtain adequate housing.
>
> In this same context, the court must consider the interests of the non-occupying spouse. An award of exclusive possession to one party requires that the other defer the realization of the value of his share of the marital home. Such a requirement is usually a burden. Therefore, before the family court imposes such a burden, it should consider the size and expansiveness of the home in relation to the expected use and the cost of maintaining the home in comparison to the benefits received. Further, the court must consider the potential duration of the exclusive possession. The family court may not award exclusive possession of the marital home for an unlimited period of time. In the exercise of sound discretion, the court must make the award for a reasonable time based on the circumstances warranting the award in the first instance. See Thompson v. Brunson, 321 S.E.2d at 625.

> Finally, the family court must make some provision in its order for eventual distribution of the marital home and state the terms upon which such distribution will be made.

Johnson, 285 S.C. at 311-312, 329 S.E.2d at 445-46.

Chastain v. Chastain, 289 S.C. 281, 346 S.E.2d 33 (Ct. App. 1986), illustrates when an award of exclusive use of the marital home is proper. In Chastain, the court granted the wife custody of the parties' children, one of whom suffered from Down's syndrome. Wife additionally was given "exclusive use and possession of the marital home . . . until either she marries or the parties' mentally retarded son dies[.]" Id. at 282, 346 S.E.2d at 34. We concluded that, under these facts, "special circumstances exist." Id. The boy's life expectancy was between twenty and forty years, and the house was located in a secluded neighborhood in which the boy was looked after by the neighbors. Therefore, we found no abuse of discretion in the trial judge's award. Id. See also Harlan v. Harlan, 300 S.C. 537, 389 S.E.2d 165 (Ct. App. 1990) (upholding the family court's award of the marital residence, as an incident of support, to wife who was awarded custody of the parties' four children on the basis of need for adequate shelter, and providing that husband could petition for modification after the two oldest children reached the age of majority).

Gambrell v. Gambrell, 295 S.C. 457, 369 S.E.2d 662 (Ct. App. 1988), and Morris v. Morris, 335 S.C. 525, 517 S.E.2d 720 (Ct. App. 1999), are cases where awarding exclusive use of the parties' home was not appropriate because the requisite special circumstances were not shown. In Gambrell, the court of appeals, affirming the trial court, declined to award wife exclusive possession of the parties' residence because she "established no compelling circumstances as to her needs when balanced against the husband's to warrant her receiving exclusive possession of the marital home." Id. at 462, 369 S.E.2d at 664 (citation omitted).

In Morris, wife appealed the family court's decision not to award her exclusive use of the marital home as an incident of support. Affirming, we

noted the only two assets of significant value were the house and a retirement account. Thus, awarding wife with exclusive use of the residence would have left husband with "no liquid assets with which to establish his new life, apart from the income he earns." Morris at 534, 517 S.E.2d at 725. Moreover, we found that after considering the alimony and child support wife would be receiving, along with an anticipated increase in her earning potential, it would be possible for wife to purchase husband's equity and thereby keep the house. Id. at 534-35, 517 S.E.2d at 725. Consequently, we affirmed the family court's decision not to award exclusive use of the home to wife. Id.

Separate and distinct from cases where possession of the marital home is awarded as incident to support are cases where the residence is given to one party as part of his or her equitable share of the entire marital estate.

In Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989), "the [trial] judge awarded the wife title to the marital home, specifically allowing that this would serve as part of her equitable distribution award." Id. at 360, 384 S.E.2d at 745. Husband appealed, arguing the court could not award her title to the house as part of the equitable distribution. Our supreme court held, "Appellant incorrectly contends that this was error and that title to a marital home can only be awarded as an incident of support, and then only if compelling circumstances exits." Id. The court explained:

> In order to effect an equitable apportionment, the family court may require the sale of marital property and a division of the proceeds. S.C. Code Ann. § 20-7-476 (Supp. 1987). The court should first attempt an "in-kind" distribution of the assets. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). A family court may grant a spouse title to the marital home as part of the equitable distribution. Brown v. Brown, 279 S.C. 116, 302 S.E.2d 860 (1983).
>
> Here, the wife received the marital home as her share of the total marital estate, not as an incident of support. Part of the reason she was awarded the home was to compensate her for the

> $23,000 she was entitled to as a result of contributions to the husband's dental practice. Since we have ruled above that she was not entitled to this $23,000, as it was based only on goodwill, we must also remand the award of the marital home for reconsideration. Accordingly, while the husband is incorrect in arguing that the court could not award the wife title, we must nonetheless remand because of our decision on the goodwill issue.

Id. at 360-61, 384 S.E.2d at 745.

Craig v. Craig, 358 S.C. 548, 595 S.E.2d 837 (Ct. App. 2004), cert. granted (Aug. 23, 2004) is our most recent proclamation on the award of a residence as part of the equitable distribution of the marital estate. In Craig, the family court did not award wife the marital home; instead, it required her to either buy out her Husband's share of the equity, or sell the residence. Relying on Donahue, we disagreed and awarded the home to the wife as part of her division of the marital estate. We noted that S.C. Code Ann. § 20-7-472 (Supp. 2003) provides that the court, in making apportionment, "'must give weight in such proportion as it finds appropriate to all of the following factors . . . (10) the desirability of awarding the family home as part of equitable distribution.'" 358 S.C. at 558, 595 S.E.2d at 842. Ultimately, we determined it was "not equitable for the home to be sold and Wife required to move from the marital home." Id. The parties had a marital estate valued at approximately $2,450,000. We redistributed the assets of the estate to give the wife the marital home while maintaining the apportionment of 50% of the estate to each party as ordered by the family court. Id. at 558-58, 595 S.E.2d at 843.

An award of exclusive use of the marital home as incident of support must be supported by compelling circumstances, which include the need for adequate shelter for minors, the necessity of suitable housing for a handicapped spouse, and a spouse's inability to otherwise obtain accommodations. The policy behind this requirement that specific, compelling circumstances be shown is sound. By awarding possession of the residence as an incident of support, the court leaves intact one of the cords of

marriage. Often, the parties' marital home will be their most valuable asset. The parties will be in a better position to begin new lives if the ligature of joint ownership of the home is severed; both parties will have their share of the equity, and they will not get entangled over such things as maintaining and eventually selling the house. However, these policy reasons are not so compelling to preclude an award of exclusive possession in the narrow circumstances outlined in Johnson. Thus, the need for adequate housing—especially where children are involved—may outweigh the parties' interests in settling their affairs and obtaining their portion of equity in the home. In these situations, an award of exclusive use of the house may be appropriate.

Contrastively, the disposition of the residence in the context of equitable distribution of the marital estate is largely within the discretion of the family court. Although the court is generally required to attempt an in-kind distribution of assets, an in-kind distribution of the marital home is not feasible. Accordingly, the court may either award the home to one of the parties, or order the home sold and the proceeds distributed. Because the court's apportionment determines the ultimate share of the estate each party will receive, whether the house is awarded to one party or is sold has no effect on the value of the property allocated to each spouse. Consequently, the policy reasons supporting the hurdles set forth in Johnson are not present when the residence is awarded to one party as part of his or her equitable share of the estate. Equity is unaffected—the party either gets the house or the value of his or her share of the equity—and the "disputes and irritants do not linger," because disposition of the home is final. See Johnson, 285 S.C. at 311, 329 S.E.2d at 445 ("If possible, all issues between the parties should be resolved . . . so that disputes and irritants do not linger and present further incentives to litigation.").

We hold the family court did not abuse its discretion by awarding Father the home as part of his equitable distribution of the estate. First, we reject Mother's contention that the award to Father delays her realization of equity in the house, thereby imposing a burden upon her. Mother's 40% interest in the equity was recognized and accounted for in the family court's distribution of the assets. Of the $83,609 estate, Mother was awarded cash

and property valued at $33,443, or 40% of the estate. She has been awarded her share of the equity in the marital residence.

Furthermore, Mother's citations to Johnson and Morris are inapplicable as those cases address awards of exclusive use of the marital home as incident of support. Father was not awarded use of the residence as incident of support; he was awarded title to the house as part of his share of the marital estate. Donahue and Craig control, and those cases establish that a judge may award the marital home as part of the distribution of the estate.

Finally, we reject Mother's assertion that she should have been given use of the home as an incident of support. The compelling circumstances involving shelter for children do not apply because Mother was not awarded custody of the children. Similarly, we do not find that Mother is handicapped, or is otherwise unable to find suitable housing. At the time of the hearing she resided in an apartment, and her then-monthly income of $702 is now being supplemented by the family court's award of $1,300 per month in alimony to her. She has not made a sufficient showing to justify an award of use of the house as an incident of support.

V. Award of Personal Property

Mother argues the family court erred in failing to award her separate personal property. We disagree. Mother did not offer a marital asset addendum or other evidence concerning the identity or value of the personal household property she now claims. The family court evenly apportioned the household furnishings and granted Mother the full amount of her jewelry. We can find no abuse of discretion requiring an alteration of this award.

VI. Attorney's Fees

Lastly, Mother alleges the family court erred in failing to award attorney's fees. We disagree.

The award of attorney's fees is at the sound discretion of the family court. See Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988). In

deciding whether to award attorney's fees, the family court should consider: (1) the parties' ability to pay their own fees; (2) the beneficial results obtained by counsel; (3) the respective financial conditions of the parties; and (4) the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 415 S.E.2d 812 (1992); Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000). Our supreme court has identified the following factors for determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

In this matter, both parties succeeded on some aspects of their respective claims. Father received custody and sole financial responsibility for the support of the three minor children. Further, the parties' fiscal situations are comparable. After factoring in Father's alimony obligation, both parties' monthly expenses outweigh their monthly income. Therefore, we find the family court did not abuse its discretion in deciding each party would bear his or her own attorney's fees and costs. As a result, we affirm the court's determination.

CONCLUSION

We hold the guardian in the instant case conducted a fair and unbiased investigation, and we affirm the family court's award of custody. Further, we find no abuse of discretion in the allocation of responsibility for the GAL's fees. We approve the family court's order in regard to equitable distribution of the marital property and the award of the residence to Father as part of his share of the estate. The court adequately allocated the parties' personal property and properly denied attorney's fees. Accordingly, the decision of the family court is hereby

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Bernard Crawford, **Appellant.**

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3933
Heard January 11, 2005 – Filed January 31, 2005

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

ANDERSON, J.: Bernard Crawford (Appellant) was convicted of criminal conspiracy and sentenced to five years in prison. He appeals, arguing the trial judge erred in denying his motion for a directed verdict. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On the night of August 20, 2002, John Crawford (John) awoke his son, Jonathan Crawford (Jonathan), and demanded Jonathan take him to get something to eat. John is Appellant's brother, and Jonathan is John's son, Appellant's nephew. Jonathan testified at Appellant's trial that his father was drunk and irate. Jonathan acquiesced, and on their way to a fast-food restaurant, John and Jonathan picked up Appellant, who had been walking along the side of the road. According to Jonathan's testimony, the three of them proceeded to a fast-food restaurant. John then directed Jonathan to drive to an apartment complex, but suddenly demanded that Jonathan stop the vehicle so he could urinate behind a building. Jonathan stopped the car at Sunbelt Rentals. Shortly after John exited the vehicle, Jonathan heard glass break from the direction of Sunbelt Rentals.

In his statement to police, Jonathan averred Appellant exited the vehicle upon hearing the glass break. He saw John and Appellant carrying stolen saws from the store to the car. According to his sworn statement, John and Appellant loaded the saws into the car and demanded Jonathan drive away.

Officer Jenkins witnessed the vehicle, with its headlights off, pulling out of the parking lot of Sunbelt Rentals. The officer, who had been traveling in the opposite direction of the Crawfords, turned around to follow Jonathan's vehicle. Jonathan sped up, and the officer activated his blue lights. Officer Jenkins testified that it appeared as though objects were being thrown out of the sunroof. In his statement, Jonathan claimed that upon seeing the police car, Appellant handed John the saws from the backseat, and John threw the saws out of the vehicle's passenger side window. Appellant

ran from police once the vehicle was stopped. Bolt cutters, gloves, and newly purchased flashlights were found in the vehicle.

The police charged Jonathan, John, and Appellant with conspiracy, burglary, and grand larceny. All charges against Jonathan subsequently were dropped. John pled guilty to all the charges and was sentenced to a total of fifteen years in prison. At Appellant's trial, John claimed full responsibility for the crimes: "[n]either one of them . . . had really anything to do with it. . . . [I]f he would have helped me or somebody would have helped me, I wouldn't have gotten caught." According to John, neither Jonathan nor Appellant knew his intention to break into Sunbelt Rentals.

Jonathan's trial testimony differs substantially from the statement he gave to police. In court, Jonathan proclaimed: ". . . I don't know if Bernard Crawford got out of the car between the time that he ran in the building and came back." He stated further: "I had tunnel vision. I didn't look around and look back. I didn't see anything 'til my father put the saws in the back seat and jumped in the front seat and said, 'Let's go.'" Jonathan testified that John slapped him and may have slapped at Appellant as well. John yelled at them both demanding they obey his orders. Jonathan remembered Appellant telling John: "you basically just got us in trouble, you know, for your stupidity."

When the State rested its case, Appellant moved for a directed verdict as to all charges. The trial court denied the motion, concluding that substantial evidence was extant in the record from which the jury could infer that the State had proven the elements of each of the offenses, focusing particularly on Jonathan's previous statement to police about Appellant's involvement. The jury found Appellant guilty of criminal conspiracy and acquitted him of the remaining charges. The trial court sentenced Appellant to five years in prison.

STANDARD OF REVIEW

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Cherry, Op. No. 25902 (S.C. Sup. Ct. filed Nov. 29, 2004) (Shearouse Adv. Sh. No. 46 at 28); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Rosemond, 356 S.C. 426, 589 S.E.2d 757 (2003); State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003); see also State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001) (stating judge should deny motion for directed verdict if there is any direct or substantial circumstantial evidence which reasonably tends to prove accused's guilt, or from which his guilt may be fairly and logically deduced). On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); State v. McCluney, 357 S.C. 560, 593 S.E.2d 509 (Ct. App. 2004); State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct. App. 2003). The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002).

LAW/ANALYSIS

Appellant claims the trial court erred in denying his motion for a directed verdict because the State failed to introduce substantial evidence he was guilty of conspiracy. We disagree.

I. Prior Inconsistent Statement as Substantive Evidence

State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), established that testimony of prior inconsistent statements may be used as "substantive evidence when the declarant testifies at trial and is subject to cross examination." Id. at 581, 300 S.E.2d at 69; accord State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Ferguson, 300 S.C. 408, 388 S.E.2d 642 (1990); State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct. App. 1986). In this case, Jonathan gave a statement to police following his arrest asserting that Appellant participated in the grand larceny and burglary. However, at trial Jonathan testified that he was unsure whether Appellant exited the vehicle, and that Appellant objected to John's actions once John was back in the car. The contradiction between Jonathan's sworn statement to police and his later testimony in court is a matter of weight for the jury to decide. Copeland at 582, 300 S.E.2d at 69. The later testimony does not obviate the efficacy of the first statement made closer in time to the event in question. Id.

II. Flight Evidence

Once Jonathan stopped the car, Officer Jenkins instructed John, Jonathan, and Appellant to remain in the vehicle until backup arrived. With another officer present, Officer Jenkins had each individual step out of the car, one at a time. He provided the following description of the arrests:

> A. The last person I pulled out was Bernard, which was the subject seated in the passenger side rear. I had him exit and also patted him down for weapons.
>
> Q. All right. And at that point what happened?
>
> A. As soon as I began patting Bernard down for weapons, he jerked away from me and took off running down Ebenezer.

After a short chase, Officer Jenkins returned to John and Jonathan to place them under arrest. Additional law enforcement personnel soon arrived and Officer Jenkins resumed the search for Appellant. He explained:

> A. . . . [W]e got a call of a subject around some apartments on Ebenezer Avenue . . .
>
> . . . .
>
> At that time, I did proceed to that area and I did locate Bernard Crawford hiding in the bushes in the front. It was myself and an officer from Winthrop.
>
> Q. All right. And at that time were you able to apprehend him?
>
> A. No, I was not. I ordered him out from the bushes. At that time I was at the rear of the bushes. He exited out through the front of the bushes, ran and jumped over another fence and continued on.

Eventually, Appellant was apprehended.

"Flight from prosecution is admissible as evidence of guilt." State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36-37 (Ct. App. 2003); see also State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (stating flight is "at least some evidence" of defendant's guilt); State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916) (declaring the flight of one charged with crime has always been held to be some evidence tending to prove guilt). Evidence of flight has been held to constitute evidence of defendant's guilty knowledge and intent. See State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); Town of Hartsville v. Munger, 93 S.C. 527, 77 S.E. 219 (1913); State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995); see also State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding evidence of flight admissible to show guilty knowledge, intent, and that defendant sought

to avoid apprehension); State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent.") (internal quotation marks omitted); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003) (noting that circumstances of defendant's flight from police after they attempted traffic stop allowed reasonable inference of guilty conduct). Flight, when unexplained, is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee. See State v. Williams, 350 S.C. 172, 564 S.E.2d 688 (Ct. App. 2002) (citing 29 Am. Jur. 2d Evidence § 532 (1994)).

The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Beckham, 334 S.C. at 315, 513 S.E.2d at 612. It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Id. (citing Commonwealth v. Jones, 457 Pa. 563, 319 A.2d 142 (1974)). Flight or evasion of arrest is a circumstance to go to the jury. See Beckham, 334 S.C. at 315, 513 S.E.2d at 612; State v. Turnage, 107 S.C. 478, 93 S.E. 182 (1917); see also State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981) (recognizing that evidence of flight is proper and that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight); Grant, 275 S.C. at 408, 272 S.E.2d at 171 (stating that while a jury charge on flight as evidence of guilt is improper, admission of evidence and argument by counsel concerning it are allowed).

Testimony established that Appellant fled the scene when police attempted to arrest him. In South Carolina, Appellant's flight constitutes evidence of his guilt.

III. Criminal Conspiracy

Criminal conspiracy is statutorily defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003);

accord State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003); State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002) cert. denied, State v. Horne, 324 S.C. 372, 478 S.E.2d 289 (Ct. App. 1996); cf. LaMotte v. Punch Line of Columbia, 296 S.C. 66, 370 S.E.2d 711 (1988) (comparing civil conspiracy, which is a combination of two or more persons joining for the purpose of injuring plaintiff and causing special damage to plaintiff, with criminal conspiracy).

This statutory pronouncement is declaratory of the common law definition of conspiracy. See State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (1963) (observing the predecessor to § 16-17-410 was declaratory of the common law definition). The crime of conspiracy has long been recognized in this state. See, e.g., State v. De Witt, 20 S.C.L. (2 Hill) 282 (1834) (affirming conspiracy as a viable common law offense and discussing the breadth of its applicability).

Historically, conspiracy was a misdemeanor. See State v. Ferguson, 221 S.C. 300, 306, 70 S.E.2d 355, 358 (1952) ("Conspiracy is a common-law offense and is a misdemeanor."). Currently, conspiracy is a felony and carries a maximum sentence of $5,000 or five years imprisonment. S.C. Code Ann. § 16-17-410 (2003). "A person who is convicted of the crime of conspiracy must not be given a greater fine or sentence than he would receive if he carried out the unlawful act contemplated by the conspiracy and had been convicted of the unlawful act contemplated by the conspiracy . . . ." Id.

The gravamen of the offense of conspiracy is the agreement, or combination. State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982); see also State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) ("The essence of a conspiracy is the agreement."). "In criminal conspiracy it is not necessary to prove an overt act. The gist of the crime is the unlawful combination. The crime is then complete, even though nothing further is done." Ferguson at 303, 70 S.E.2d at 356 (citing State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906)).

A formal or express agreement need not be established. Horne at 381, 478 S.E.2d at 293. "A tacit, mutual understanding, resulting in the willful

and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end." Id. (citation omitted). Professor McAninch explains: "The mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy." William Shepard McAninch & W. Gaston Fairey, The Criminal Law of South Carolina, 476 (4th ed. 2002). In State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906), our supreme court placed its approbation on the following explanation of conspiracy given by the trial judge:

> "[S]uppose, Mr. Foreman, that you and the gentleman on your left would go out in the streets of Orangeburg and commit an assault and battery on some other person, that would be an unlawful act, but it would not be a conspiracy, unless there was an agreement between you to do the act before doing it. It is an agreement to do an unlawful act that is the gist of the whole matter."

Id. at 339, 53 S.E. at 487.

In State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995), the defendant appealed his conviction for conspiracy to distribute crack cocaine. One witness testified that on the night in question, several individuals, including the defendant, were present where drug transactions were taking place. Id. at 32, 467 S.E.2d at 125. We reversed the conviction, holding:

> [T]o prove conspiracy, it is not enough that a group of people separately intend to distribute drugs in a single area, nor enough that their activities occasionally or sporadically place them in contact with each other. What is needed is proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

Id. at 32-33, 467 S.E.2d at 125 (internal quotation marks and citation omitted); see also State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993) (holding it is not enough for the offense of conspiracy that a group of people

separately intend to distribute drugs in a single area, nor that their activities occasionally or sporadically place them in contact with each other).

Because it takes at least two persons to enter into an agreement, there must be at least two members of a conspiracy. See State v. Jackson, 7 S.C. (7 Rich.) 283 (1876). "Yet they need not all be indicted or named. Indeed, an indictment charging that the named defendant and 'other persons unknown . . . did . . . conspire' was approved in State v. Hightower, 221 S.C. 91, 94, 69, S.E.2d 363, 366 (1952)[.]" McAninch & Fairey 481. In Hightower, there was "ample evidence that the conspirators, though unknown, did exist." McAninch & Fairey 481.

A conspiracy to commit a crime does not merge with the completed offense. State v. Rutledge, 232 S.C. 223, 101 S.E.2d 289 (1957); see also Ferguson at 303-04, 70 S.E.2d at 356-57 (observing that a conspiracy does not merge with a completed crime, "but is a distinct offense in itself and punishable as such, notwithstanding that the object of the conspiracy has been accomplished).

State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967) recognized the existence of Wharton's Rule in South Carolina, but denied its application under the facts of Wells. Wharton's Rule states that where

> co-operation or concert between two or more persons is essential to the commission of a substantive crime and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, it is held that the persons necessarily involved cannot be charged with conspiracy to commit the substantive offense and also with the substantive crime itself.

Id. at 256, 153 S.E.2d at 907-08; see also Ferguson at 303, 70 S.E.2d at 356 ("It is true that in some cases where concerted action is necessary, as for example in certain sexual offenses, it is not permitted to charge one in the same indictment with a conspiracy and also with the substantive crime."). Thus,

> if the substantive offense requires by definition the concerted action of two persons, as for example the crime of adultery, then those persons cannot be convicted of conspiracy to commit the offense because this would merely be a subterfuge to increase the legislatively authorized punishment for the substantive offense.

McAninch & Fairey 482.

Once an agreement has been reached, the crime of conspiracy has been committed; no further act need take place. "Conspiracy is an inchoate offense, and is a crime in and of itself." 15A C.J.S. Conspiracy § 98 (2002) (footnotes omitted); see Black's Law Dictionary 1108 (7th ed. 1999) (defining "inchoate offense" as "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment."). "Prohibition of conspiracy serves two distinct purposes: the punishment of group behavior and the control of inchoate activities." 15A C.J.S. Conspiracy § 98.

> The basis of conspiratorial liability is not to punish the agreement per se, but, rather, like other inchoate crimes, to punish the firm purpose to commit a substantive crime, while hopefully preventing the actual commission thereof.

Id.; see also McAninch & Fairey 474 ("The basic rationale of conspiracy seems to be that the combination of two or more persons makes it more likely that the criminal objective will be achieved, because the co-conspirators may offer each other encouragement and support, thereby rendering it less likely that the project will be abandoned.").

"It need not be shown that either the object or the means agreed upon is an indictable offense in order to establish a criminal conspiracy. It is sufficient if the one or the other is unlawful." Fleming at 274, 133 S.E.2d at 805. Ameker demonstrates the breadth of activity that can give rise to an indictment for conspiracy. 73 S.C. 330, 53 S.E. 484 (1906). In Ameker, the defendant was convicted of "unlawfully, feloniously, and willfully conspir[ing] . . . for the purpose of hindering, preventing, and obstructing

certain citizens . . . [who were] engaging in social intercourse and peaceable pastimes, such as are commonly enjoyed at picnics. . .” Id. at 332-33, 53 S.C. at 484-85. The action arose when a group of picnickers was disturbed by the defendant and several co-conspirators. “Abe Ameker began playing his banjo, while Cleveland Hooker danced and cursed. . . . One of the defendants had a paddle in his hand, and the inevitable pistol was also in hand.” Id. at 337, 53 S.E. at 486. One man was struck with the boat paddle, and knives and guns were drawn before the engagement subsided. Id. The court upheld Ameker’s conviction.

Our supreme court, in State v. Amerson, noted that “a single conspiracy may be established by completely different aggregations of proof so that there appears to be several conspiracies.” 311 S.C. at 319, 428 S.E.2d at 873 (1993) (citation omitted). Consequently, “a multi-pronged flexible ‘totality of the circumstances’ test is applied to determine whether there were two conspiracies or merely one.” Id. The test considers:

> (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.

Id.

Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. Horne, 324 S.C. at 382, 478 S.E.2d at 294 (citing State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981)).

Generally, the conspiracy is proven by overt acts committed in furtherance of the conspiracy. Amerson, 311 S.C. at 319-20, 428 S.E.2d at 873. However, overt acts are not necessary for a conspiracy conviction. “It

is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone." Horne, 324 S.C. at 381, 478 S.E.2d at 294 (citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989)). Indeed, State v. Miller, 223 S.C. 128, 74 S.E.2d 582 (1953), notes: "Often proof of conspiracy is necessarily by circumstantial evidence alone." Id. at 133, 74 S.E.2d at 585 (citation omitted). Because the actus reus of conspiracy is the agreement, the evidence must prove the agreement, not the object thereof. McAninch observes, "The agreement might be difficult to establish by direct evidence if none of the co-conspirators will talk. Consequently, the cases in this jurisdiction, as well as others, which hold that the agreement can be established by circumstantial evidence are legion." McAninch & Fairey 476 (citations omitted). The State "is permitted great latitude in the introduction of circumstantial evidence to establish the existence of a conspiratorial agreement." State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993).

State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980), exemplifies the sufficiency of circumstantial evidence to convict on conspiracy. Oliver was indicted along with two other individuals for conspiracy to commit housebreaking and grand larceny. Id. at 79, 267 S.E.2d at 530. The defendants were accused and convicted of breaking into two houses. Upon conviction, Oliver appealed, asserting the evidence was insufficient and his motion for a directed verdict should have been granted. Id. at 79-80, 267 S.E.2d at 530. Evidence showed Oliver's codefendant, Willie Williams, rented a U-Haul truck a few weeks before the crimes. On the day of the break-ins, Williams purchased gasoline in the U-Haul truck approximately forty or fifty miles from the crime scene, and a receipt for the gas purchase was found near one of the houses. A neighbor of one of the homes observed the U-Haul parked in the neighborhood. A filling station attendant and the neighbor both testified to seeing three men wearing dark clothes in the truck. Similar shoe tracks were found at both houses, "indicating that the same individuals entered both places." Id. at 81, 267 S.E.2d at 531. Finally, a law enforcement officer arrested the defendants approximately three miles from the scene of one of the homes. The defendants were in the U-Haul truck and matched the descriptions given by the station attendant and neighbor. The court found this evidence "reasonably tended to establish the guilt of

appellants, and the trial judge properly denied their motions for a directed verdict." Id. at 82, 267 S.E.2d at 531. The court stated:

> Although there is no direct evidence that appellants and their codefendant had a mutual understanding to commit housebreaking and larceny, the facts and circumstances are susceptible to the reasonable inference that they did in fact conspire to commit the unlawful acts.

Id. at 80, 267 S.E.2d at 530.

State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998), involved the sufficiency of evidence for a criminal conspiracy conviction. The appellant, Kelsey, and several other individuals spent the day of July 11, 1994, building pipe bombs. That night, they picked up the victim and took her to a party. Several hours later the defendants offered to take the victim home. The court described the events leading to the victim's death:

> Defendants and [victim] then got into Lee's car, ostensibly to take [victim] home. Lee was driving, Kelsey was in the passenger seat, and Payne and [the victim] were in the backseat. Although [the victim] had given them directions to her house, Lee detoured in the opposite direction. . . . Lee turned around and saw that Payne had [victim] in a "strangle hold type position." Lee continued to drive. A few minutes later, Lee "heard two quick, empty thud type sounds." . . . Kelsey testified that he had also turned around and saw that [victim's] body was limp, her face was pale, and her lips were blue.
>
> Lee once again drove away from the bridge. He got approximately 100 feet down the road when Payne told him to stop the car. Defendants pulled [victim] out of the car and carried her into the woods and up an embankment where they placed her on the ground. Lee returned to the car. Payne and Kelsey remained by [victim]'s body.

> Kelsey testified that while he was standing over [victim]'s body, Payne instructed him to place a pipe bomb into [victim]'s mouth. Kelsey complied. Payne then lit the fuse, and the two ran. A few seconds later, the bomb exploded. Defendants returned to Kirchner's house where they fell asleep.

Id. at 59-61, 502 S.E.2d 67-68.

The court upheld the conspiracy conviction under the following analysis:

> In State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989), the defendant argued that the trial court erred in denying his motion for a directed verdict on a conspiracy charge. We disagreed, finding that the following facts tended to prove the defendant's guilt: evidence that defendant knew codefendant; defendant was seen running from the area where the victim's body was found; bloodhounds had tracked the victim's scent to the codefendant's house; and defendant had given a written statement stating that he agreed to be a lookout for codefendant.
>
> In this case, evidence indicated that Kelsey was instrumental in constructing the pipe bombs at Kirchner's house; that Kelsey was with Lee and Payne on the night of the murder; that Kelsey helped Payne carry [victim] into the woods; that Kelsey and Payne were alone together in the woods with [victim]'s body; and that Kelsey placed the pipe bomb into [victim]'s mouth. We therefore find the evidence was sufficient to submit the conspiracy charge to the jury.

Id. at 63-64, 502 S.E.2d at 70.

In State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002), cert. denied, Follin was convicted of aiding and abetting embezzlement, obtaining goods and services by false pretenses, and conspiracy. One of her issues on

appeal was that her motion for a directed verdict should have been granted on the conspiracy charge. The facts underlying Follin involved "the diversion of nearly $2.5 million from Sumter County School District 17 (District 17) by Adolph Joseph Klein, the Assistant Superintendent in charge of Financial Affairs for District 17." Id. at 240, 573 S.E.2d at 814. Follin was a travel agent and owner of Follin Travel who handled the travel arrangements for District 17. From 1987 to 1997, Klein diverted nearly $1.5 million in personal travel expenses for himself and his friends and family by booking luxury vacations through Follin, which were paid for by District 17. The Follin court explained,

> In 1995, Klein learned that if travel plans made one week were cancelled before the Friday of that same week, no payment would be required on the trip, the invoice would be voided, and the invoice number would no longer appear in Follin's computerized accounting system. He began using invoices to get District 17 to pay for his junket travel. Klein would request an invoice from Follin for what appeared to be legitimate travel for a school group or a District 17 employee. Klein would then request that Follin void the invoice prior to the Friday of that week. Follin would cancel the trip in her computer and stamp "void" on her copy of the invoice. However, Klein submitted his clean copy of the invoice to District 17 for payment. Klein called these invoices "special invoices" for the junket travel. After the check was issued to Follin on the special invoice, Klein would attach a note to the check identifying for Follin the invoice number to which she should apply the check. The invoice number did not match the number on the special invoice submitted to District 17 for payment but matched the invoice number of another of Klein's junket trips.

Id. at 240-41, 573 S.E.2d at 814-15. When District officials began investigating Klein's travel expenses, Follin attempted to cover up the scheme by asserting the District had a refund credit.

We found sufficient evidence to support the denial of a directed verdict on criminal conspiracy:

> Viewing the evidence in the light most favorable to the State, Klein would not have been able to proceed with his travel scheme without Follin's assistance. Despite the fact that there was not a spoken agreement between the two to defraud District 17, the uncontradicted evidence showed that Follin knowingly assisted Klein by creating false records indicating District 17 had a credit. Klein testified that he and Follin conspired through their actions. Although the agreement was not written or verbalized, evidence was presented that an arrangement was reached between Klein and Follin to defraud District 17. Because there was evidence that reasonably tended to prove Follin conspired with Klein, the trial judge properly denied Follin's motion for a directed verdict as to this charge.

Id. at 267, 573 S.E.2d at 829-30. See also State v. Clark, 286 S.C. 432, 334 S.E.2d 121 (1985) (finding "ample evidence . . . to support appellant's conviction of conspiracy" to housebreak where appellant was found near the crime scene; was apprehended as he drove away with his headlights off; originally denied knowing his codefendant, who was later determined to be his cousin; and admitted his codefendant told him of the larceny plans, but denied any participation in them).

In the instant case, sufficient evidence exists to support the trial judge's denial of Appellant's motion for a directed verdict. Appellant was in the vehicle immediately after the burglary was perpetrated, and he fled when Jonathan stopped the car. Jonathan's statement contradicts his trial testimony, and it was the responsibility of the jury to weigh both his statement and his testimony. According to his statement, Jonathan witnessed Appellant (1) carrying stolen saws from the store to the car; (2) loading saws into the car; and (3) handing John the saws from the backseat. Furthermore, the police found bolt cutters, gloves, and flashlights in the vehicle—items that could give rise to an inference that John, Jonathan, and Appellant planned the burglary. Additionally, though Jonathan testified that they

proceeded through the drive-through at the restaurant rather than eating inside, the police did not find any trash from the fast-food restaurant in the vehicle. As in Oliver, although this evidence does not constitute direct evidence of an agreement, the facts and circumstances are susceptible to the reasonable inference that Appellant conspired to commit the unlawful acts. Ample evidence exists from which a jury could infer either an express plan, or a tacit, mutual understanding to commit the burglary. Accordingly, the trial judge's ruling is affirmed.

IV. Coercion/Duress

In State v. Robinson, 294 S.C. 120, 363 S.E.2d 104 (1987), the South Carolina Supreme Court explained the defense of coercion:

> To excuse a criminal act, the degree of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Coercion is no defense if there is any reasonable way, other than committing the crime, to escape the threat of harm. The fear of injury must be reasonable.

Id. at 121-22, 363 S.E.2d at 104 (citations omitted). Similarly, in State v. Benjamin, 345 S.C. 470, 549 S.E.2d 258 (2001), our supreme court provided the following definition of duress:

> To establish duress which will excuse a criminal act, the degree of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Coercion is no defense if there is any reasonable way, other than committing the crime, to escape the threat of harm. The fear of injury must be reasonable.

Id. at 474 n.3, 549 S.E.2d at 260 n.3. "Coercion and duress envision a third person compelling another by threat of immediate physical violence to commit a crime against someone else or someone else's property." State v.

Holliday, 333 S.C. 585, 588, 510 S.E.2d 436, 438 (Ct. App. 1998) (citations omitted).

Our review of this record convinces us that the evidence in regard to coercion and duress is de minimis. Additionally, the issues of coercion and duress were factual issues to be decided by the trial jury.

CONCLUSION

For the reasons stated herein, the trial court's decision is

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Raymond Capers Dixon, Robert Marshall Dixon and Kirsten Dixon, **Appellants,**

v.

Clinton Karl Ford, Jimmy F. Hughes, Jr., d/b/a J&D Pest Control, **Defendants,**

Of whom Clinton Karl Ford is the **Respondent.**

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 3934
Heard January 11, 2005 – Filed January 31, 2005

REVERSED AND REMANDED

Kenneth R. Young, Jr. and Edgar R. Donald, Jr., both of Sumter, for Appellants.

M. M. Weinberg, Jr., of Sumter, for Respondent.

ANDERSON, J.: Raymond Capers Dixon, Robert Marshall Dixon, and Kirsten Dixon (the Dixons) purchased a house from Clinton Ford. After the sale, the Dixons discovered substantial termite damage to the house. The Dixons initiated this action, and a verdict was rendered for Ford. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

Ford acquired a house at 9 Loring Mill Road as investment property, which he eventually decided to renovate and sell. A pest control company inspected the home prior to the renovations and provided an undated CL-100 report in July 1999. South Carolina Code of Laws regulation 27-1085(k) requires a current CL-100, one completed within the last thirty days, at any real estate closing.

In March 2000, the Dixons purchased 9 Loring Mill Road from Ford. Ford furnished the July 1999 CL-100 report at the closing. Importantly, the original CL-100 report identified the existence of termite damage and stated: "this damaged area has will been [sic] repaired by another contractor." The word "will" is written in small font above and between the words "has" and "been." The CL-100 provided at closing is identical except that the word "will" is scratched over so that the report reads: "this damaged area has been repaired."

The real estate contract contained the following "as is" clause:

> 19. CONDITION OF PROPERTY: (A) . . . Buyer acknowledges the Seller, except as provided in subparagraphs (B)-(G) of this section, gives no guarantee or warranty of any kind, expressed or implied, as to the physical condition of the property or to the conditions of or existence of improvements, services, appliances or system thereto, or as to merchantability or

> fitness for a particular purpose as to the property or improvements thereof, and any implied warranty is hereby disclaimed by the Seller. . . . (D) Seller shall, at their expense, have the property inspected and shall obtain a Wood Infestation Report (CL100) from a licensed and bonded pest control operator that the residential dwelling and attached garage is free and clear from termites, fungus, excess moisture in the crawl space, wet or dry rot, and other wood destroying organisms. . . . If any infestation or structural damage is found, Seller agrees to have it corrected, at Seller's expense.

After purchase, the Dixons discovered substantial uncorrected termite damage. Robert Dixon testified that he and his brother first came upon the dilapidation while preparing to install a new heat pump:

> I started to remove some of the lapboard that was right there by the electrical panel box and that's when the electrical panel box fell down and just was dangling there by the wires and that's when I called my brother over there and said, "David, I think we've got a real problem here." And we pulled off more of the boards and sure enough as I suspected the electrical panel box was supposed to been . . . of course it was supposed to been put into the studs and secured that way. The studs were completely termite riddled. As we tore off more we realized that more of it was done. We got to the corner of the house on the back porch and then we realized that the whole corner of the two . . . the two by fours there was holding up the corner had completely been eaten away with termites and my brother and I looked at each other and said what are we going to do now because it looks like the roof is going to fall in.

The Dixons found similar damage to the floors and other areas of the house and responded by filing a suit against Ford and the pest control company that issued the CL-100. Summary judgment was granted to the pest control company, leaving Ford as the sole defendant, and fraud as the only remaining cause of action. The case went to trial, and the jury found in favor of Ford. The Dixons filed post-trial motions for judgment non obstante

veredicto and alternatively for a new trial. These motions were based on the grounds that the court (1) gave an erroneous jury charge, and (2) allowed irrelevant and prejudicial testimony into evidence. Both motions were denied, and the Dixons appeal.

LAW/ANALYSIS

I. The Contested Jury Charge

The Dixons argue the court improperly charged the jury that they had no right to rely on the wood infestation report supplied at closing. We agree.

A. Efficacy of the Charge

After explaining the elements of fraud, the court charged the jury:

> A fraudulent act is characterized by dishonesty in fact, unfair dealing or unlawful appropriation of another's property by design. One cannot rely upon a misstatement of facts if the truth is easily within the reach of another. **I would also tell you that a purchaser of a home . . . an infested home has no right to rely on favorable answers on the wood infestation report given the purchaser at the closing where the purchaser elected to close or failed to comply with a recommendation on the report that he investigate for structural damages.**

(Emphasis added).

"When instructing the jury, the trial judge is required to charge only the current and correct law of South Carolina." Cohens v. Atkins, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct. App. 1999); see also Brown v. Smalls, 325 S.C. 547, 554-555, 481 S.E.2d 444, 448 (Ct. App. 1997) ("Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence."). However, when reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Daves v. Cleary,

355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). If the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Id. "To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well." Cohens, 333 S.C. at 349, 509 S.E.2d at 289; see also Daves at 224, 584 S.E.2d at 427 (stating a circuit court's refusal to give a properly requested charge is reversible error only where the requesting party can demonstrate prejudice from the refusal).

The language charged by the court came from Nine v. Henderson, 313 S.C. 309, 312-13, 437 S.E.2d 182, 184 (Ct. App. 1993). Specifically, the verbiage emanates from a parenthetical explanation of Bostick v. Orkin Exterminating Co., Inc., 806 F.2d 504 (4th Cir. 1986). The trial court, in the case sub judice, defended the controverted charge, explaining:

> The quote is directly from the case of Nine v. Henderson, . . . with the exception that that dealt with powder post beetles which I thought was a comment on the facts and I took that comment about powder post beetles out of it and I also took that part out of that particular language that said a South Carolina regulation because there's no testimony in the record regarding the South Carolina regulation. But other than that that is a direct quote from that case . . . .

The Nine court's citation to Bostick, and the sentence it supports, reads in full:

> We also agree, however, with the trial court that Nine, **under the circumstances here**, had no reasonable right to rely on Henderson's representations regarding the extent of termite damage to the building in question. See Bostick v. Orkin Exterminating Co., Inc., 806 F.2d 504, 508-09 (4th Cir. 1986) (construing South Carolina law and holding a purchaser of a home infested by powder post beetles had no right to rely on favorable answers on a wood infestation report given the purchaser at the closing where the purchaser elected to close and

> failed to comply with a recommendation in the report and a South Carolina regulation that he investigate for structural damage).

Nine, 313 S.C. at 312-13, 437 S.E.2d at 184 (emphasis added).

A close reading of both Nine and Bostick reveals that the charge given in the instant case is a misstatement of the applicable law and should not have been charged. In Nine, the dispositive question on appeal related to whether Nine, the buyer of a house, had a right to rely on the seller's representation regarding termite infestation on the property he was purchasing. 313 S.C. at 310, 437 S.E.2d at 183. Nine "knew from the very start the property had termite problems." Id. at 313, 437 S.E.2d at 184. For example, during negotiations, the seller "disclosed to Nine that a termite inspection done the previous May revealed the presence of termites in the eaves of the house and in the window sills and doors of the garage." Id. at 311, 437 S.E.2d at 183. Prior to closing, Nine rented and occupied the house, and he "personally repaired the termite-damaged eaves on the side of the house and repaired some additional damage that he discovered along the front of the house." Id.

The Nine court explicated:

> At the closing, which Nine attended accompanied by his attorney, Henderson furnished Nine with three wood infestation reports. These reports were made the day after the parties signed the contract of sale by the same termite inspector who made the May inspection. They separately detailed inspections that the termite inspector made of the three improvements located on the subject property. They also set forth the inspector's conclusions regarding the presence of termites and other wood-destroying insects in each of the buildings.
>
> The report relating to the house expressly noted there had been a previous infestation of termites and there was evidence of prior termite treatment. . . . The report cautioned "[t]here is possible hidden old termite damage to the inside walls." A graph attached to the report concerning the house advised of

> "subterranean termites," "probable hidden damage," and "possible hidden termite damage in walls."
>
> The report relating to the cottage also cautioned "[t]here is possible hidden termite damage behind the kitchen cabinets from previous infestation and along [the] baseboard by window." A graph attached to this report advised of "subterranean termites," "probable hidden damage," and "probable hidden old termite damage behind [the] kitchen cabinets and baseboard."
>
> All three reports counseled Nine:
>
> > If there is evidence of active or past infestation of termites . . . , it must be assumed that there is some damage to the building caused by this infestation.
> >
> > . . . .
> >
> > . . . [Y]ou may wish to call a qualified . . . expert in the building trade to ascertain their [sic] opinion as to whether there is structural damage to this property.

Id. at 309, 437 S.E.2d at 183-84 (alterations in original).

Based on these facts, the court concluded: "By choosing not to postpone the closing and electing instead to proceed with it, [buyer] ignored, if not outright rejected, advice to have a qualified person ascertain whether the improvements on the property had sustained structural damage. . . ." Nine at 313, 437 S.E.2d at 184.

In Bostick, an extermination company prepared a wood infestation report stating there were "visible damaged structural members" caused by a beetle infestation, but that there was "no visible structural damage." Bostick, 806 F.2d at 505. Subsequently, the home purchaser discovered extensive structural damage and filed suit against the extermination company. Yet, disclaimers on the report stated structure that was not visible or accessible was not inspected. Id. at 506. Additionally, the court observed South Carolina regulations governing wood infestation reports provide that a report

"cannot be viewed as a structural damage report." Id. at 507 (quoting S.C. Code Ann. Reg. § 27-1085(k)). The regulation reads, "If visual evidence of wood-destroying organisms or damage is noted in this report, further investigation for structural damage by qualified building experts is recommended." Id. The court found that Bostick's case was built upon the cornerstone that he had relied on the report as a record of structural damage. Id. at 508-09. This was impermissible under the regulations, and, therefore, his fraud action failed. Id.

The charge, "[A purchaser of] an infested home has no right to rely on favorable answers on the wood infestation report given the purchaser at the closing where the purchaser elected to close," is an inaccurate statement of South Carolina law. Nine held that under the circumstances presented in that case the buyer had no right to rely and cited Bostick—another case in which the particular facts nullified the right to rely—as support. However, our courts have not pronounced a per se rule holding, as a matter of law, that the purchaser of an infested home may not rely on a CL-100 report given at closing. To the contrary, as the Nine opinion recites, "[T]he question of whether reliance is justified in a given situation requires an evaluation of the circumstances involved, including the positions and relations of the parties." 313 S.C. at 312, 437 S.E.2d at 184 (citing Elders v. Parker, 286 S.C. 228, 332 S.E.2d 563 (Ct. App. 1985)). The charge given by the trial court took from the jury its responsibility to evaluate the Dixons' actions and to determine whether they were justified in relying on the CL-100.

Further, Nine and Bostick are factually inapposite to the Dixons' case. Nine received wood infestation reports showing damage and elected to go forward with the claims. Bostick sought to sue the exterminator for fraud, but he relied on the report in a manner the court ruled was impermissible because of disclaimers and state regulations. The Dixons, in contrast, were given a clear CL-100, which may have been tampered with. Charging the Nine language instructed that the Dixons could not have relied on the report if it suggested an investigation for structural damage and the purchaser did not comply. The issue in this case was not that the Dixons knew of damage and did not diligently investigate its extent; instead, the Dixons were informed that the damaged areas had been repaired. Ford and the Dixons contractually agreed that Ford would (1) be responsible for procuring an

independent third party to certify that the house is free from termite infestation and damage, and (2) correct any infestation or damage at his own expense. Whether the Dixons were justified in their reliance under the facts of this case is a question for the jury, and it was error for the court to give the charge.

B. Impact of the "As Is" Clause

MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980), establishes that an "as is" clause does not preclude a suit for fraud. MacFarlane involved an action for fraud in the sale of a house that suffered from termite and water damage. The contract included an "as is" clause. The trial court granted summary judgment to sellers on the basis that the sellers "as a matter of law had no duty to disclose any matter to the Plaintiffs." Id. at 392, 264 S.E.2d at 839. Reversing, our supreme court announced:

> The "as is" clause of the contract does not constitute an absolute defense to an action for fraud and deceit. The inclusion of "as is" clauses is usually an effort on the part of the seller to assure application of the caveat emptor rule. . . .
>
> In years gone by, the tendency of the law was to let the buyer beware in real estate transactions. The more recent trend at the law is to hold the seller to a more strict accountability.

Id. at 395-96, 264 S.E.2d at 840.

Furthermore, the "as is" clause in this case provided that no guarantee or warranty was given "**except as provided in subparagraphs (B)-(G)**[.]" In subparagraph (D), Ford agreed to procure a clean CL-100 and to correct any infestation or damage at his expense. Consequently, the "as is" clause does not protect Ford from the Dixons' claim of fraud.

C. Prejudice Resulting from the Erroneous Charge

Notwithstanding the impropriety of the charge, to warrant reversal, the charge must have prejudiced the Dixons. See Cohens v. Atkins, 333 S.C.

345, 349, 509 S.E.2d 286, 289 (Ct. App. 1999). We find that the charge given substantially prejudiced the Dixons' case.

In order to prevail on their claim for fraud, the Dixons had to prove all nine of the elements of fraud in South Carolina. See Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 473, 581 S.E.2d 496, 503-04 (Ct. App. 2003) cert. denied ("The elements of an action for fraud based on a representation include: (1) a representation; (2) falsity; (3) its materiality; (4) knowledge of the falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance upon the truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury."). By giving the erroneous charge, the court effectively determined that the Dixons had no right to rely as a matter of law; therefore, they were precluded from proving one of the essential elements of fraud. The erroneous charge here is the quintessential prejudicial charge because it established, as a legal conclusion, that the Dixons could not prevail on an element of their cause of action. Pellucidly, the charge prejudiced the Dixons, and the case must be remanded for retrial.

D. Preservation of the Objection to the Charge

Ford seeks to circumvent the erroneous charge by arguing the issue was not preserved because the objection was not on the grounds that the charge did not match the facts. However, after the charge, the Dixons' counsel did object to the offending language:

> **The Court:** Additions or exceptions to the charges, Mr. Young?
>
> **Mr. Young:** Yes, sir. . . . . You gave a charge that in effect commented on the termite letter and whether or not if a buyer proceeded with an infected house or that they did so at their own peril just about and that's the essence of what you're saying and they had to follow the directions on the letter to get a structural engineer to that effect, the letter that was in this particular case was in fact a clear letter because the letter was presented at closing showed that the work had been completed by another

> contractor therefore any damage that was found would have been corrected as what Mr. Stoddard said that it was a clear letter, my clients thought it was a clear letter, that's the reason they proceeded with closing. . . .

When the court defended the language as originating from Nine, counsel argued that in Nine, the purchaser "made an informed decision knowing that the wood infestation report showed [infestation]. They still went through with the closing. That's not what we have here." The court referred to language from the report in this case, noting the report did not consider structural damage. Counsel rejoined, "But it was repaired. That's under repairs." This colloquy reveals that the Dixons' counsel did raise the salient issue: the language from Nine does not fit the facts and issues raised in this case. Accordingly, the issue was raised to the trial court and preserved for our review.

Ford contends that the subject matter of an objection regarding a jury instruction is not preserved where an objection is made prior to the charge and not renewed after the charge is given but prior to the jury's retiring to deliberate. To support this proposition, he refers the court to Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 119, 512 S.E.2d 510, 522 (Ct. App. 1998). However, the Dixons did object after the jury was charged, but prior to the jury beginning its deliberations. Thus, this argument is inappropriate.

Nonetheless, we take this opportunity to remind the bar that Rule 51, SCRCP, does not require that the objection to a charge be renewed after the charge is given and prior to the jury's retiring to deliberate. Instead, it only requires an objection on the record, opportunity for discussion, and a specific ruling by the trial court on the jury charge issue. Keaton ex rel. Foster v. Greenville Hospital System, 334 S.C. 488, 494-95, 514 S.E.2d 570, 573-74 (1999), addresses whether an objection to a jury charge was properly preserved. In Keaton, the plaintiff did not object to the pertinent jury charge prior to the initial jury charge reading. The court charged the jury, but accidentally left out the charge at issue. The defendants then objected to the court's omission of the charge; the judge agreed that the charge should have been given. At this point, the plaintiff objected to the charge for the first

time. The court overruled the objection, brought the jury back into the courtroom, and read the charge. The Keaton court explained:

> [Plaintiff's] on the record explanation of his objection to the hindsight jury charge along with the trial judge's ruling on that issue is sufficient to preserve the objection for appeal. The objection is preserved despite [plaintiff] not objecting to the charge after it was read to the jury. Our recent decision of State v. Johnson, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998), observed that the majority and dissenting opinions in State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996), were "being read to hold that where a party's jury charge objections or requests are denied on-the-record after a pre-charge conference, the party must renew those objections or requests subsequent to the courts instructions to the jury. The majority opinion in Whipple, however, did not establish such a rule." Id. Johnson clarified the confusion in Whipple by stating, "where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at [the] conclusion of the court's instructions." Id. . . . Like the petitioner in Johnson, [plaintiff] objected on the record and the trial judge specifically ruled on the objection.

334 S.C. at 494-95, 514 S.E.2d at 573.

II. Testimony of William Brunson

The Dixons argue the testimony of William Brunson should not have been admitted because it was irrelevant and overly prejudicial. We decline to address this issue.

CONCLUSION

For the reasons discussed above, the decision of the trial court is

REVERSED AND REMANDED FOR A NEW TRIAL.

STILWELL and SHORT, JJ., concur.