The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS

Since Rule 608, SCACR, became effective in July 2000, this Court has received numerous comments from members of the South Carolina Bar and members of the public regarding this rule. Additionally, monthly reports have been received from judges appointed by the Chief Justice to monitor the implementation and operation of this rule. Based on the comments that have been received, the Court proposes to amend Rule 608 to read as shown in the attached.

The Court solicits the comments of the bench, bar and public regarding this proposal. Additionally, comments are specifically requested as to whether the alignment of the "Larger Counties" and "Counties Needing Assistance" in Section (f)(8) should be changed.

Persons desiring to submit comments regarding this matter may do so by filing an original and seven (7) copies of their written comments with the Supreme Court at P.O. Box 11330, Columbia, South Carolina 29211. Any written comments must be received by the Supreme Court by Thursday, March 1, 2001.

Columbia, South Carolina
January 23, 2001

PROPOSED

Rule 608
Appointment of Lawyers for Indigents

(a) Purpose. This rule provides a uniform method of appointing lawyers to serve as counsel or guardians ad litem (GALs) for indigent persons in the circuit and family courts.

(b) Terminology. The following terminology is used in this rule:

(1) Active Member: Any active member of the South Carolina Bar as defined by the Bylaws of the Bar. For the purpose of this rule, a person holding a limited certificate to practice law in South Carolina shall not be considered an active member.

(2) Appointment Year: The period from July 1 to June 30.

(3) Supreme Court: The Supreme Court of South Carolina.

(4) Larger Counties: Aiken, Beaufort, Charleston, Florence, Greenville, Horry, Lexington, Richland, Spartanburg and York.

(5) Counties Needing Assistance: Any county not listed above.

(6) Indigent: any person who is financially unable to employ counsel. In making a determination whether a person is indigent, all factors concerning the person's financial condition to include income, debts, assets and family situation should be considered. A presumption that the person is indigent shall be created if the person's net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register.[1] Net income shall mean gross income minus deductions required by law.

(7) Death Penalty Case: this includes any criminal case in which the solicitor has given notice of the intent to seek the death penalty and any post-conviction relief action challenging a death sentence.

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[1] The current Poverty Guidelines may be found at http://aspe.hhs.gov/poverty/00fedreg.htm.

(8) Family Member: a spouse, child, grandchild, parent, grandparent or other person with which the member maintains a close familial relationship.

(c) Lists.

(1) For each appointment year, the South Carolina Bar shall prepare two lists for each county:

(A) **Criminal List.** A list of all active members who have been certified by the Supreme Court to serve as lead counsel in death penalty cases who are eligible for appointment in the county, and all other active members who normally represent at least three (3) clients before the court of general sessions during a calendar year and are eligible for appointment in the county. The list shall indicate which members are death penalty certified, the date on which each member was admitted to practice law in South Carolina, and whether the member has completed or is exempt from the trial experiences required by Rule 403, SCACR. This list shall be used to appoint counsel for indigents in all criminal cases to include juvenile delinquency matters and post-conviction relief matters.

(B) **Civil List.** A list of all other active members eligible for appointment in the county. This list shall indicate the ~~number of years the member has been admitted to practice law in South Carolina~~ date on which each member was admitted to practice law in South Carolina, and whether the member has completed or is exempt from the trial experiences required by Rule 403, SCACR. This list shall be used for the appointment of counsel for indigents in all cases other than those specified in (A) above.

These lists shall be arranged alphabetically and shall be provided to the county clerk of court at least sixty (60) days prior to the beginning of the appointment year.

(2) Active members shall, at the time of payment of annual license fees to the South Carolina Bar, designate the county in which they primarily practice in South Carolina or, if they do not practice law in South Carolina, the county in which they reside in South Carolina; whether they are certified by the Supreme Court to serve as lead counsel in a death penalty case; and, if admitted after March 1, 1979, whether they have completed the trial experiences required by Rule 403, SCACR. If the member is not death penalty certified, the member shall indicate whether the member's name should be placed in the criminal or civil list based on the criteria given in (1) above.

(3) Active members shall notify the South Carolina Bar within thirty (30) days of any county changes. The Bar shall transfer the names of those members to the

appropriate list and notify the appropriate clerks of courts.

(4) If a member ceases to be an active member, the Bar shall delete that member's name from the list and notify the appropriate clerk of court.

(5) If a member becomes certified to serve as lead counsel in a death penalty case, the member shall, within thirty (30) days of the date of the certification, notify the South Carolina Bar. ~~The Bar shall transfer the name of the member to the appropriate list and notify the appropriate clerk of court.~~ If not already on the criminal list, the Bar shall transfer the member's name to the criminal list. The Bar shall notify the appropriate clerk of court of the certification and any transfer.

(6) If a member would, due to conflicts of interest, be prevented from accepting cases in the county to be designated in (c)(2), the member will designate a county other than those listed in (b)(4) in which the conflicts will not arise.

(d) Active Members Who Are Exempt From Appointment.

(1) The following active members shall be exempt from appointment:

(A) Members who are prohibited by federal or state law from taking such appointments. While not intended to be an exclusive list, this includes:

(i) Law Clerks and Staff Attorneys for the Judicial Department under Canon 5(D), Rule 506, SCACR.

(ii) Public Defenders who are prohibited by their Board from engaging in any private practice of law under S.C. Code Ann. § 17-3-60(e).

(iii) Appellate Defenders who are prohibited from engaging in the private practice of law by S.C. Code Ann. §§ 17-4-40 and -50.

~~(B) Members who are solicitors or assistant solicitors for a judicial circuit if those members do not engage in the private practice of law.~~

~~(C) Members who are employed by the Office of the South Carolina Attorney General or by the United States Attorney if those members do not engage in the private practice of law.~~

~~(D) Members who are employed by any court of this state or by any~~

~~Federal Court if those members do not engage in the private practice of law.~~

~~(E) Members who are employed by the South Carolina Administrative Law Division or by any Federal Administrative Law Judge if those members do not engage in the private practice of law.~~

~~(F)~~(B)Members who are engaged in providing legal assistance supported in whole or in part by the Legal Services Corporation established under 42 U.S.C. § 2996a if those members do not engage in the private practice of law outside that program.

~~(G)~~(C)Members who have been admitted to practice law in this State or another jurisdiction for thirty (30) years or have attained sixty-two (62) years of age. A member who will satisfy this criteria by the end of the appointment year is exempt from appointment for the entire appointment year.

~~(H)~~(D)Members who have neither an office nor a principal residence in this State, and who do not engage in the private practice of law in this State. ~~For the purposes of this exemption, a member shall not be considered to have engaged in the private practice of law by volunteering for an appointment under section (h)(1) or by representing an indigent as part of the pro bono program of the South Carolina Bar.~~

(E) Members who are full time employees of the United States to include members employed by the armed forces of the United States. To be exempt, these members may not engage in the private practice of law in this State.

(F) Members who are full time employees of the State of South Carolina, or a political subdivision of the State, to include counties, school districts, municipalities and public service districts. To be exempt, these members may not engage in the private practice of law in this State.

(G) Members who are full time care givers for a family member and do not derive any income from the practice of law in this State.

(2) For the purpose of determining if a member is exempt, members shall not be considered to have engaged in the private practice of law by volunteering for an appointment under section (h)(1), by representing an indigent as part of the pro bono program of the South Carolina Bar, or by providing legal services for themselves or a family member as long as the services are provided without compensation.

~~(2)~~(3) Active members shall claim an exemption at the time they file with the Bar

under section (c)(2) above. The claim for exemption must be accompanied by sufficient information to confirm that the lawyer is in fact eligible for exemption. ~~If, after reasonable inquiry, the Bar cannot determine whether the member is exempt, the Bar shall forward the matter to the Supreme Court to determine the status of the member.~~ The Bar shall determine if the member is exempt or non-exempt.

~~(3)~~(4) If an active member is non-exempt and becomes exempt, or is exempt and becomes non-exempt, the member shall notify the Bar of this change in status within thirty (30) days of the change. Any member claiming to have become exempt shall provide the Bar with sufficient information to confirm that the member is in fact eligible for exemption. The Bar shall add to, or delete from, the appropriate list the name of the member and notify the appropriate clerks of court of any additions or deletions.

(5) A member who is denied an exemption by the Bar may seek review of that determination by filing a petition with the Supreme Court within ten (10) days of receiving notice of the Bar's determination. The petition shall comply with the requirements of Rule 224, SCACR, to include the filing fee required by that rule.

(e) Active Members Who Have Not Completed the Trial Experiences Required by Rule 403, SCACR. An active member who has not completed the trial experiences required by Rule 403, SCACR, and who has been admitted to practice law in South Carolina for less than one (1) year, may only be appointed to serve as a GAL and shall not act as counsel in any case. An active member who has not completed the trial experiences required by Rule 403, SCACR, but has been admitted to practice law in South Carolina for one (1) year or more shall be fully eligible for appointment under this rule, and, at his or her expense, will be expected to associate another lawyer if necessary to carry out the appointment.

(f) Appointments and Relief from Appointments.

(1) **Lead Counsel in Death Penalty Cases.** The appointment of a lead counsel to represent an indigent defendant in a death penalty case ~~or an indigent death-sentenced inmate in a post-conviction relief action~~ shall be made from the list of members specified in (c)(1)(A) above who have been death penalty certified by the Supreme Court; provided, however, that lawyers who are not certified may be appointed as lead counsel in a post-conviction relief action for a death-sentenced inmate if they have previously represented a death-sentenced inmate in a state or federal post-conviction relief proceeding as provided by S.C. Code Ann. § 17-27-160. ~~The appointments for an indigent in any other case, to include second counsel in a capital case, shall be made from the list specified in (c)(1)(B).~~ A member who receives an appointment as lead counsel

under this section shall be exempt from being appointed to another death penalty case until six (6) months after the date of sentencing or, if the matter does not result in a sentence, the date when the case ends. Although a member may be temporarily exempt from further death penalty appointments, nothing shall prevent the member from volunteering for an appointment under (h)(1) below.

(2) **Other Criminal Cases.** The appointment of counsel in all other criminal cases, to include juvenile delinquency matters and post-conviction relief matters, shall be made from the criminal list specified in (c)(1)(A) above. A member who is death penalty certified may be appointed to a non-death penalty case.

(3) **All Other Cases.** The appointment of members as counsel or GALs in all other cases shall be made from the civil list specified in (c)(1)(B). In counties having more than fifty (50) names on the civil list, the Chief Judges for Administrative Purposes for the court of common pleas and the family court may, after consultation with the clerk of court and the local bar association, further divide the civil list into sublists to be used for particular categories of cases. In a county in which this is done, the county is not entitled to assistance from a Larger County as provided in (8) below until all of the members on the civil list have had eight (8) appointments.

~~(2)~~(4) Appointments shall begin with the name of the member whose name would follow that of the last person appointed alphabetically on the list for the preceding year and shall thereafter proceed alphabetically down the list. ~~Deviations from a purely alphabetical method of appointment shall not be allowed unless necessary to obtain a lawyer with sufficient experience to serve as second counsel in a capital case, when a reason for disqualification is known at the time the appointment is being made, or when a circuit or family court judge determines that there is good cause to allow a deviation.~~ While appointments should generally be made to the member whose name next appears on this list, the clerk of court or a judge may deviate from this alphabetical method of appointment if there is reason to do so. A reason for doing so may include, but is not limited to, the necessity to obtain a lawyer with sufficient experience to serve as second counsel in a capital case, when a reason for disqualification is known at the time the appointment is being made, or when a deviation is necessary to insure that counsel is competent to handle the matter. Once the end of the list is reached, appointments will be made from the beginning of the list.

~~(3)~~(5) Once appointments have been made, the clerk of court shall promptly mark the names of those members who have received appointments, and shall promptly provide those members with a copy of the order of appointment. The list shall indicate the total number of appointments the member has received during the appointment year.

Additionally, if a member is appointed as lead counsel in a death penalty case, the clerk shall mark the list to reflect the period of exemption provided by (1) above. Although a member may be temporarily exempt from further death penalty appointments, nothing shall prevent the member from volunteering for an appointment under (h)(1) below.

~~(4)~~(6) If a member is unable to serve for any reason, the member shall, within five (5) days of the date of the receipt of the order of appointment, file a motion to be relieved with the clerk of court. A member who becomes aware of a reason for being relieved after the expiration of the five (5) day period shall promptly file a motion to be relieved with the clerk of court. The Chief Judge for Administrative Purposes of the court before which the matter is pending shall then consider the request to be relieved and may relieve the member if the judge finds good cause to do so. ~~If the member has not substantially performed the responsibilities of the appointment before being relieved, the court shall direct that the member receive no credit for the appointment, and the clerk shall adjust the number of total appointments shown on the list for the member.~~ If relieved, the member shall not receive credit for the appointment unless the order relieving the member affirmatively finds that the member has substantially performed the responsibilities of the appointment prior to being relieved.

(7) A member will not receive more than one (1) appointment in any calendar month. Once all of the members on a list have received one (1) appointment in a calendar month, the county clerk of court will contact the clerk in the Larger County identified in (8) below. The clerk from the Larger County will provide the next names available for appointment from the list in that county and note that those members have received appointments from a County Needing Assistance. The clerk will provide sufficient names to cover the pending appointments for the remainder of the month. This limitation of one (1) appointment per calendar month shall not apply to the members on the civil list in any county which elects to divide its civil list as provided by (f)(3) above.

~~(5)~~(8) A member will be subject to no more than eight (8) appointments each appointment year. After each member on the list has received eight (8) appointments, the county clerk of court will contact the clerk in the Larger County identified at the end of this section. The clerk from the Larger County will provide the next names available for appointment from the list in that county and note that those members have received appointments from a County Needing Assistance. The clerk will provide sufficient names to cover the pending appointments. After members in the Larger County have received eight (8) appointments, the next closest Larger County will then provide names for appointments.

Larger County To Provide Assistance	**County Needing Assistance**
Greenville	Abbeville, Anderson, Laurens, Oconee, Pickens
Richland	Calhoun, Fairfield, Kershaw, Lancaster, Lee, Newberry, Orangeburg, Sumter, Chesterfield
Beaufort	Allendale, Colleton, Hampton, Jasper
Charleston	Berkeley, Dorchester, Georgetown
Spartanburg	Cherokee, Union
Florence	Clarendon, Darlington, Williamsburg
York	Chester
Horry	Dillon, Marion, Marlboro
Lexington	Edgefield, Greenwood, McCormick, Saluda
Aiken	Bamberg, Barnwell

(g) Minimizing Appointments.

(1) The unnecessary appointment of lawyers to serve as counsel or GALs places an undue burden on the lawyers of this State. Before making an appointment, a circuit or family court judge must insure that the person on whose behalf the appointment is being made is in fact indigent. Further, a lawyer should not be appointed as counsel for an indigent unless the indigent has a right to appointed counsel under the state or federal constitution, a statute, a court rule or the case law of this State. Finally, except where the appointment of a GAL is mandated by the state or federal constitution, statute, Rule 17, SCRCP, other court rule or the case law of this State, circuit and family court judges should cautiously exercise their discretionary authority to appoint a GAL under Rule 17, SCRCP.

(2) A lawyer should only be appointed as counsel under this rule when counsel is not available from some other source. For example, an appointment under the rule for a

criminal defendant should not be made when there is a public defender available to take the appointment.

(3) When available, the circuit and family courts should consider using non-lawyers as GALs. The family court in each county is expected to encourage and support the South Carolina Guardian Ad Litem Program, S.C. Code Ann. §§ 20-7-121 to -129. Effective use of this program will further reduce the burden placed on lawyers while insuring that competent GALs are provided for children in abuse and neglect cases.

(h) Volunteers and Substitute Counsel.

(1) Nothing in this rule shall prohibit a circuit or family court judge from appointing an active member, senior member or any other category of member of the South Carolina Bar who may lawfully provide the representation if the member volunteers to represent an indigent. A lawyer who volunteers for an appointment shall not receive credit for an appointment under this rule and a lawyer may volunteer for an appointment at any time regardless of whether the lawyer has completed the maximum number of appointments provided by (f)(8) above.

(2) Nothing in this rule shall prevent an appointed lawyer from obtaining a substitute counsel to take the appointment as long as the substitute counsel is eligible to take the appointment and the substitution is approved by the circuit or family court. If the substitution is approved, only the member who originally received the appointment shall receive credit for the appointment.

(i) Records. Any records maintained by the South Carolina Bar, the circuit court, the family court or a clerk of court relating to appointments under this rule shall be made available for review by any active member upon written request of that member.

The Supreme Court of South Carolina

In the Matter of Curtis
Everett Elmore, Esquire, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to assume responsibility for Mr. Elmore's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Elmore may have maintained.

IT IS ORDERED that Michael Stephen Chambers, Esquire, is hereby appointed to assume responsibility for Mr. Elmore's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Elmore may have maintained. Mr. Chambers shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Elmore's clients

and may make disbursements from Mr. Elmore's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Curtis Everett Elmore, Esquire, shall serve as notice to the bank or other financial institution that Michael Stephen Chambers, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Michael Stephen Chambers, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Elmore's mail and the authority to direct that Mr. Elmore's mail be delivered to Mr. Chambers' office.

s/James E. Moore J.
FOR THE COURT

Columbia, South Carolina

January 18, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

January 22, 2001

ADVANCE SHEET NO. 3

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ronald
Lawrence Nester, Sr., Respondent.

Opinion No.25234
Submitted December 7, 2000 - Filed January 16, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a public reprimand. We accept the Agreement and impose a public reprimand. The facts as admitted in the Agreement are as follows.

Facts

Respondent attached a voice activated tape recorder to the telephone at his residence. Over a period of several weeks, respondent recorded all telephone calls to and from his house without knowledge and

consent of the parties. This resulted in the recording of several conversations in which respondent was not a party.

Respondent failed to reveal the existence of these audio tapes during the discovery portion of domestic litigation between respondent and his estranged wife. Respondent submitted a "self-report" to Disciplinary Counsel in which he failed to disclose that he recorded conversations with anyone other than his wife.

Law

By his conduct, respondent has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6)(violating the oath of office taken upon admission to practice law in this state).

Respondent has also violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.4 (unlawfully obstructing another party's access to evidence); Rule 8.1 (knowingly making a false statement of material fact, failing to disclose a fact needed to correct a misapprehension, or failing to respond to a lawful demand for information regarding a disciplinary matter); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Conclusion

Respondent has fully acknowledged that his actions were in violation of the Rules of Professional Conduct. Moreover, he has not been previously sanctioned for misconduct. We therefore accept the Agreement

for Discipline by Consent and reprimand respondent for his conduct in this matter.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of L.
Michael Allsep, Respondent.

Opinion No. 25235
Submitted December 6, 2000 - Filed January 16, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Assistant Attorney General Tracey C. Green, both of Columbia, for the Office of Disciplinary Counsel.

L. Michael Allsep, Jr., of Clemson, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension from the practice of law for sixty (60) days. We accept the agreement. The facts as admitted in the agreement are as follows.

Facts

Respondent represented a client who was involved in foreclosure proceedings against real estate owned by third parties. The third parties filed for bankruptcy.

Respondent made numerous misrepresentations to his client, and to his client's son and daughter, regarding the status of the bankruptcy proceeding, including misrepresentations related to the filing of the Proof of Claim, the filing of a motion to lift the automatic stay, the scheduling of hearings, the execution of a consent agreement, and the receipt of payment from the bankruptcy trustees. Respondent also failed to file an objection to the Bankruptcy Plan which led to the plan being approved and his client's foreclosure rights being materially impaired. After the client terminated respondent's representation, respondent continued in his representation of the client by delivering a copy of a consent agreement to the third parties' lawyer.

Respondent also failed to disclose to his client the fact that at the same time that he was representing his client, the third parties' lawyer was personally representing respondent in an ongoing legal matter. Finally, respondent failed to respond to inquiries and requests for information from the Office of Disciplinary Counsel.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation, and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence in representing a client); Rule 1.4 (a lawyer shall keep clients reasonably informed about the status of their cases, promptly comply with clients' reasonable requests for information, and explain matters to clients to the extent reasonably necessary for them to make informed decisions regarding representation); Rule 1.7 (a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a

third person, or by the lawyer's own interests); Rule 1.16 (a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 4.1 (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact to a third person); Rule 8.1(b) (a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (misconduct to engage in conduct involving misrepresentation); and Rule 8.4(e) (misconduct to engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3) (knowingly failing to respond to a lawful demand from a disciplinary authority to include a request for a response); and Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for sixty (60) days. Respondent has also tendered his resignation to the South Carolina Bar. The resignation will be accepted at the conclusion of the sixty day suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alicia Boan, Respondent,

v.

John Blackwell and
Donald Blackwell, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 25236
Heard November 1, 2000 - Filed January 16, 2001

AFFIRMED AS MODIFIED

David L. Moore, Jr., of Love, Thornton, Arnold & Thomason, P.A., of Greenville, for petitioners.

Leonard J. Spooner, James G. Carpenter and Jennifer

J. Miller, of Greenville, for respondent.

JUSTICE PLEICONES: We granted certiorari to the Court of Appeals to consider the jury charge in this automobile negligence case. Boan v. Blackwell, Op. No. 99-UP-270 (S.C. Ct. App filed April 29, 1999). We now hold that "loss of enjoyment of life" and "pain and suffering" are separately compensable elements of damages, and overrule Boan v. Blackwell, supra, and Stroud v. Stroud, 299 S.C. 394, 385 S.E.2d 205 (Ct. App. 1989), to the extent they hold otherwise. Accordingly, we affirm the decision of the Court of Appeals as modified.

Petitioners admitted liability, and the only issue for the jury was the amount of damages to be awarded to respondent. In the course of charging the jury on damages, the trial judge stated:

> In determining the amount of compensation for personal injuries, it is proper to take into consideration past and present aspects of that injury. This would include, as I have told you, **physical and mental pain and suffering endured**, expenses incurred for necessary medical treatment, loss of time and income which resulted from the impairment of the ability to work, **the loss of enjoyment of life suffered as a result of the injury**, and any other losses which are reflected by the character of the injury. Now in this connection, I charge you that mental pain and suffering, sometimes called mental distress, is a proper element of actual damages where it is the natural and proximate consequence of a negligent act committed by another.
>
> Now an injured party may also recover for such future damages as it is reasonably certain will of necessity result from the injury received. The

> principal underlying compensation for future damages is that only one action can be brought, and, therefore, only one recovery had. It is proper to include in the estimate of future damages compensation for pain and suffering which will with reasonable certainty result.
> (emphasis added).

Petitioners objected to the charge, stating, "[Y]ou charged on both lost enjoyment of life and pain and suffering. Our courts have indicated that that is basically the same element of damages, and we don't believe they should be able to recover for it twice." The trial judge declined to act on petitioners' objection.

On appeal, the Court of Appeals held the single reference to "loss of enjoyment of life" in the damages charge "simply indicated to the jury what it could consider when assessing damages for pain and suffering." Boan v. Blackwell, supra. The court acknowledged its holding in Stroud v. Stroud, supra, that loss of enjoyment of life is merely a component of pain and suffering and not a separately compensable element of damages. After reviewing the entire charge in this case, however, the court found no violation of Stroud and consequently held there was no reversible error. Boan v. Blackwell, supra.

We granted certiorari, and now hold that where there is evidence of "loss of enjoyment of life," South Carolina juries should be charged that this loss is a compensable element, separate and apart from pain and suffering, of a damages award. Although this Court has never directly decided this issue, we have acknowledged "loss of enjoyment of life" as a basis for a damages award in previous cases. See Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969) (paraplegic's loss of social and business activities is compensable intangible injury); Cabler v. L. V. Hart, Inc., 251 S.C. 576, 164 S.E.2d 574 (1968) (proper to consider how pain, suffering, and disability "decrease and diminish the joys and pleasures of a normal life" in awarding damages); see also Vinson v. Jackson, 317 S.C. 166, 452 S.E.2d 16 (Ct. App. 1994), *rev'd*

on the other grounds, 327 S.C. 290, 491 S.E.2d 249 (1997); Gethers v. Bailey, 306 S.C. 179, 410 S.E.2d 586 (Ct. App. 1991); Gasque v. Heublein, Inc., 281 S.C. 278, 315 S.E.2d 556 (Ct. App. 1984).

In Stroud v. Stroud, supra, the Court of Appeals held, "[l]oss of enjoyment of life is not a separate species of damage deserving a distinct award, but instead is only an element of general damages for pain and suffering." Id. at 396, 385 S.E.2d at 206. We disagree, and find more persuasive the decisions of the United States District Court for the district of South Carolina which permit a separate recovery for loss of enjoyment of life. See McNeill v. United States, 519 F. Supp. 283 (D.S.C. 1981); see also, e.g., Schumacher v. Cooper, 850 F. Supp. 438 (D.S.C. 1994); Bates v. Merritt Seafood, Inc., 663 F. Supp. 915 (D.S.C. 1987); Kapuschinsky v. United States, 259 F. Supp. l (D.S.C. 1966).

An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence. See, e.g., Turner v. A B C Jalousie Co. of North Carolina, Inc., 251 S.C. 92, 160 S.E.2d 528 (1968)(physical and emotional injuries may be compensable even where there is no threat of physical violence).

On the other hand, damages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations.[1] See Overstreet v.

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[1]It is for this reason that "loss of enjoyment of life" damages are sometimes referred to as "hedonic damages." See, e.g., Crowe, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damages Be Recognized Independently of Pain and Suffering Damage?* 74 Iowa L. Rev.

Shoney's, Inc., 4 S.W.3d 694 (Tenn. Ct. App. 1999); Sawyer v. Midelfort, 595 N.W.2d 423 (Wis. 1999); K. M. Leasing, Inc. v. Butler, 749 So. 2d 310 (Miss. Ct. App. 1999). For example, an award for the diminishment of pleasure resulting from the loss of use of one of the senses, or for a paraplegic's loss of the ability to participate in certain physical activities, falls under the rubric of hedonic damages. In our view, "loss of enjoyment of life" damages compensate the individual not only for the subjective knowledge that one can no longer enjoy all of life's pursuits, but also for the objective loss of the ability to engage in these activities.

We hold that, where supported by the evidence, the jury shall be charged that the injured person is entitled to recover damages for loss of enjoyment of life. In our view, a separate charge on hedonic damages will minimize the risk that a jury will under- or over-compensate an injured person for her noneconomic losses. While there are cases in which it is difficult to segregate the various components of these types of damages, we conclude that a separate charge will clarify for the jurors the issues they should consider in awarding money for injuries which are not readily reducible to specific amounts. In situations where the differences may be difficult to discern, defendants may request the submission of a special interrogatory. See Rule 49, SCRCP.

We agree with the Court of Appeals that there was no error in the charge given in this trial. Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

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

1275 (1990).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Catherine Anderson, Respondent/Petitioner,

v.

Baptist Medical Center
and Palmetto Hospital
Trust Fund, Petitioners/Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25237
Heard November 15, 2000 - Filed January 16, 2001

AFFIRMED

Vernon F. Dunbar, of Turner Padget, Graham & Laney, of Columbia, for petitioners/respondents.

Frank A. Barton, of West Columbia, for

respondent/petitioner.

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JUSTICE BURNETT: This case involves cross-appeals from an opinion of the Court of Appeals affirming in part, reversing in part, and remanding an order of the Workers' Compensation Commission. We affirm.

FACTS

The instant case concerns a September 1, 1995 fall at Baptist Medical Center (BMC)[1] where Respondent/Petitioner Catherine Anderson (Anderson) was employed. The case is factually complicated by Anderson's involvement in two previous accidents: a 1988 on-the-job injury and a 1993 automobile accident.

In 1988, while working in a clerical position at Providence Hospital, Anderson injured her lower back and legs. She was treated conservatively by Dr. James Bethea, the carrier-approved orthopedic surgeon, for four years. Anderson left Providence Hospital and took a similar position with BMC in December of 1989. During this time period, Anderson received counseling and began taking anti-depressants. After four years of continued back pain, Anderson eventually sought treatment from Dr. Gal Margalit, who referred her to Dr. John Williams, a neurosurgeon in Augusta, Georgia. In July of 1992, Dr. Williams performed surgery on Anderson for a herniated disk.

In 1993, Anderson was involved in a serious, non-work-related automobile accident in which she injured her neck, head, and teeth, and aggravated prior back, shoulder, and knee injuries. Dr. Margalit referred Anderson to Dr. Robert Peele, who performed surgery on June 10, 1995 on Anderson's left knee related to the automobile accident. Anderson also

[1]We refer to Petitioners/Respondents collectively as BMC.

began seeing Dr. Sale Estefano, a psychiatrist, after her automobile accident. Dr. Estefano diagnosed Anderson with post-traumatic stress disorder with severe depression, panic disorder without agoraphobia, and adjustment reaction with depressed mood.

After a hearing on June 15, 1995, Anderson was awarded workers' compensation benefits for the 1988 accident at Providence Hospital with a 42% impairment to her back. At the time of this hearing, she was out of work due to the recent knee surgery related to her automobile accident. However, immediately prior to the surgery, she had been working approximately thirty hours per week. Her claim for psychological injuries was not addressed by the hearing commissioner, and an appeal was not perfected.

After Anderson recovered from her knee surgery, she resumed her work schedule of approximately thirty hours per week. On September 1, 1995, less than three months after her knee surgery and workers' compensation hearing, Anderson fell at work, precipitating the instant case. Anderson claimed injury to her "left knee, right knee, left arm and shoulder, right hand and arm, back, neck, psychological injury, and all other areas of the body directly/indirectly effected [sic]." BMC admitted injury to Anderson's left knee only. The Hearing Commissioner found Anderson sustained an injury by accident to her left knee only and "failed to prove by a preponderance of the evidence that she sustained an aggravation of her pre-existing right knee, back, and right and left arm injuries." The Commissioner also found Anderson "failed to prove that she sustained a mental injury or an aggravation of a pre-existing mental injury/condition as a result of her admitted accidental injury." Furthermore, the Commissioner rejected Anderson's argument that fringe benefits should be included in the average weekly wage calculation. The Full Commission affirmed and adopted the Hearing Commissioner's order in its entirety. The Circuit Court also affirmed. In an unpublished opinion, the Court of Appeals affirmed on all issues except Anderson's claim of psychological injury, which it reversed

and remanded. Anderson v. Baptist Medical Center and Palmetto Hospital Trust Fund, Op. No. 99-UP-335 (S.C. Ct. App. filed June 1, 1999). The parties filed cross-appeals.

ISSUES

I. Did the Court of Appeals err in reversing the Commission's finding Anderson did not aggravate her pre-existing psychological condition when she fell?

II. Did the Court of Appeals err in holding no statement of maximum medical improvement was necessary regarding Anderson's left shoulder and back?

III. Should fringe benefits be included in calculating average weekly wage?

DISCUSSION

I. Psychological Injury

BMC argues the Court of Appeals erred in reversing the Commission's finding Anderson did not aggravate her pre-existing psychological condition as a result of the September 1, 1995 fall. We disagree.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering

the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960).

Mental injuries are compensable if they are induced either by physical injury or by unusual or extraordinary conditions of employment. Getsinger v. Owens-Corning Fiberglas Corp., 335 S.C. 77, 81, 515 S.E.2d 104, 106 (Ct. App. 1999) (citing Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963) and Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991)). The right of a claimant to compensation for aggravation of a pre-existing condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949). Aggravation of pre-existing psychiatric problems is compensable if that aggravation is caused by a work-related physical injury. Toler v. Black & Decker, 518 S.E.2d 547, 551 (N.C. Ct. App. 1999); see Adams v. Texfi Industries, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) (decisions of North Carolina courts interpreting that state's workers' compensation statute are entitled to weight because the South Carolina statute was fashioned after North Carolina's).

At the hearing on BMC's stop payment motion, Anderson testified her depression had worsened since her fall at BMC and her dosage of Prozac had been doubled. Anderson's husband corroborated her testimony. Anderson's treating psychiatrist, Dr. Sale Estefano, stated in a letter dated May 2, 1996 that he was treating Anderson for her fall of September 1, 1995, which "aggravated her pre-existing psychiatric diagnosis." These contentions are, if not supported, at least not contradicted by the notes of Dr. Robert Peele, the carrier-approved treating physician. Dr. Peele noted on September 25, 1995 Anderson "will see Dr. Estefano for

depression. Certainly another factor here." On November 6, 1995, Dr. Peele stated that Anderson could return to work from his perspective, but since Dr. Estefano had her out of work for psychological problems, "that will be Dr. Estefano's call." On December 26, 1995, Dr. Peele noted Anderson had a "difficult combination of problems orthopaedically and psychologically."

The Court of Appeals correctly reversed the Commission's finding Anderson's psychological condition was not aggravated by her September 1, 1995 fall. Although Anderson was receiving treatment for depression prior to this accident, the only substantial evidence in the record clearly shows her condition was aggravated by the work-related fall.

II. Maximum Medical Improvement

Anderson argues the Court of Appeals erred in holding no statement of maximum medical improvement (MMI) was necessary with regard to injuries to Anderson's left shoulder and back.[2] We disagree.

Barbara Griffin, BMC's workers' compensation nurse, testified that Dr. Peele was authorized to treat Anderson's left shoulder, knee, and back as a consequence of the September 1, 1995 fall. However, BMC only admitted injury to Anderson's left knee. Dr. Peele's letter attached to BMC's stop payment application certified he believed Anderson had "most probably reached maximum medical improvement relative to her left knee" and gave her an 11% impairment rating to her left lower extremity. He made no mention of Anderson's left shoulder or back.

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[2]At the time of the hearing, Regulation 67-507 required an employer to attach "a medical certificate of the authorized health care provider stating the claimant has reached maximum medical improvement" to its application to terminate compensation. S.C. Code Ann. Reg. 67-507(3)(a), repealed by State Register Vol. 21, Issue No. 6, Part 2, effective June 27, 1997.

Anderson argues the Commission erred in determining she reached MMI with regard to injuries to her left shoulder and back. However, the Commission did not find Anderson reached MMI as to those injuries. Rather, it found Anderson "sustained an accidental injury only to her left knee" and "failed to prove by a preponderance of the evidence that she sustained an aggravation of her pre-existing right knee, back, and right and left arm injuries."

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of this Court to weigh the evidence as found by the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105(1999).

The Court of Appeals correctly affirmed because substantial evidence supports the Commission's decision in this case.

III. Average Weekly Wage Calculation

Anderson argues the $95.02 per week BMC paid for her medical, disability, and life insurance should be included in the calculation of her average weekly wage. We disagree.

This is a question of statutory construction. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992). Construction of a statute by an agency charged with its

administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995). The Workers' Compensation Act is entitled to a liberal construction in furtherance of the beneficial purposes for which it was designed. Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973).

The Act defines "average weekly wage" to mean "the earnings of the injured employee in the employment in which he was working at the time of the injury. . . ." S.C. Code Ann. § 42-1-40 (1985 & Supp. 1999). The definition goes on to state: "Whenever allowances of any character made to an employee in lieu of wages are a specified part of a wage contract they are deemed a part of his earnings." Id. Thus, before an allowance will be included in the average weekly wage calculation, it must (1) be made in lieu of wages, and (2) be a specified part of a wage contract.

This Court has not had occasion to address the definition of "average weekly wage." The Court of Appeals has held that compensation should be determined based on the employee's net taxable income. Thus, the average weekly wage should be calculated based only on "the actual sum paid to the employee as his wages, not the totality of payments including reimbursements." Stephen v. Avins Const. Co., 324 S.C. 334, 347, 478 S.E.2d 74, 81 (Ct. App. 1996). The Court of Appeals has also held that mileage deductions taken by the employee on his federal income tax form were not includable in the employee's income for purposes of computing workers' compensation benefits. Wright v. Wright, 306 S.C. 331, 334, 411 S.E.2d 829, 830-31 (Ct. App. 1991). Relying primarily on Stephen, the Court of Appeals held in this case that fringe benefits should not be considered in calculating the average weekly wage.

The Court of Appeals' holding is consistent with the majority view. See Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 93.01[2][b] (2000). In the leading case of Morrison-

Knudsen Constr. Co. v. Director, Office of Workers' Comp. Programs, 461 U.S. 624 (1983), the United States Supreme Court held that employer contributions to union trust funds for health and welfare, pensions, and training are not "wages" for the purpose of calculating benefits under the District of Columbia Act.[3] However, the definition at issue in Morrison-Knudsen was very different from that in our Act.

Seven other states have statutes containing the language at issue in this case.[4] Of the seven, four have addressed issues similar to the one before us. In Kirk v. State of North Carolina Dep't of Correction, 465 S.E.2d 301 (N.C. Ct. App. 1995), the North Carolina Court of Appeals, whose interpretation of workers' compensation law is given great weight in this state, held the employer's contributions to the employee's health insurance plan should not be included in the employee's average weekly wage because there was no evidence health insurance contributions were made "in lieu of wages." The Supreme Court of Tennessee reached the same result, noting any broadening of the definition of average weekly wage should come from the legislature, not the courts. Pollard v. Knox County, 886 S.W.2d 759 (Tenn. 1994). In Gajan v. Bradlick Co., 355 S.E.2d 899, 901 (Va. Ct. App. 1987), the Virginia court held that even where insurance was specifically bargained for as part of the employment contract, payment of premiums was

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[3]Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(13) (1978). The 1984 amendment to this section defined wages with reference to the Internal Revenue Code and specifically excluded fringe benefits from the definition. 33 U.S.C. § 902(13) (1986).

[4]These are Alabama, Indiana, Mississippi, North Carolina, South Dakota, Tennessee, and Virginia. See Ala. Code § 25-5-1(6) (1992); Ind. Code § 22-3-6-1(d)(3) (1997 & Supp. 2000); Miss. Code Ann. § 71-3-31 (1972); N.C. Gen. Stat. § 97-2(5) (1999); S.D. Codified Laws § 62-1-1(6) (1993 & Supp. 2000); Tenn. Code Ann. § 50-6-102(2)(D) (1999); Va. Code Ann. § 65.2-101(2) (1995 & Supp. 2000).

still not "in lieu of wages."

The only state with a similar statute to reach a different result is Alabama, where the supreme court held in Ex parte Murray, 490 So.2d 1238 (Ala. 1986), that fringe benefits such as insurance should be included in the calculation of the claimant's average weekly wage. The Murray court noted, however, that it was undisputed that fringe benefits in that case were not provided gratuitously to the employee and were a specified part of the wage contract. Id. at 1240. The Alabama Workers' Compensation Act, amended in 1992, now defines "wages" to include fringe benefits when the employer does not continue those benefits during the period for which compensation is paid. Ala. Code § 25-5-1(6) (1992).

We agree with the Court of Appeals and those courts holding fringe benefits should not be included in the average weekly wage. Anderson has produced no evidence that BMC pays her insurance premiums "in lieu of wages" or that they are "a specified part of [her] wage contract," as required by the statute. She relies entirely on generalized statements about the importance of insurance benefits in today's job market. Furthermore, insurance premiums are not "wages" or "earnings" under the plain and ordinary meaning of the terms. For example, Anderson does not claim to include the company-paid insurance premiums as income on her tax returns. Finally, including fringe benefits such as insurance in the calculation of average weekly wage would dramatically alter the practice in this state. We defer to the Commission's longstanding interpretation of the Workers' Compensation Act in this regard. See Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995) (construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons). We agree with the Virginia Court of Appeals that even a liberal construction of the Workers' Compensation Act "does not authorize the amendment, alteration or extension of its provisions beyond its obvious meaning." Gajan, 355 S.E.2d at 902. Any such significant change in the

definition of average weekly wage is the prerogative of the legislature.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony L. Munoz and
Patricia A. Munoz, Petitioners,

v.

Green Tree Financial
Corp. a/k/a Green Tree
Acceptance Corp. and
Gerald Sealey d/b/a Tri-
State Builders, Defendants,

Of whom

Green Tree Financial
Corp. is Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS

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

Opinion No. 25238
Heard April 6, 2000 - Filed January 22, 2001

AFFIRMED

Mary Leigh Arnold, of Mt. Pleasant; and Bradford P. Simpson, of Suggs & Kelly Lawyers, P.A., of Columbia, for petitioners.

Herbert W. Hamilton and W. Keith Martens, both of Kennedy, Covington, Lobdell & Hickman, L.L.P., of Rock Hill, for respondent.

Helen Fennell and Danny Collins, both of Columbia, for amicus curiae South Carolina Dept. of Consumer Affairs.

John T. Moore, William C. Hubbard, and B. Rush Smith, III, all of Nelson, Mullins, Riley & Scarborough, L.L.P., of Columbia; and Alan S. Kaplinsky and Martin C. Bryce, Jr., both of Ballard, Spahr, Andrew & Ingersoll, L.L.P., of Philadelphia, for amici curiae South Carolina Bankers Assoc., American Bankers Assoc., American Financial Services Assoc., and Consumer Bankers Assoc.

Timothy Eble, of Ness, Motley, Loadholt, Richardson & Poole, of Mt. Pleasant; and Victoria Nugent and F. Paul Bland, Jr., both of Washington, D.C., for amicus curiae Trial Lawyers for Public Justice.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' unpublished decision reversing the denial of a motion to compel arbitration. We affirm.

FACTS

On December 28, 1993, petitioners (the Munozes) signed an installment contract and security agreement with Gerald Sealy (Builder) to finance home improvements in the amount of $15,000 secured by a mortgage on their home. Builder assigned the agreement the same day to respondent Green Tree Financial Corporation (Creditor).

In December 1996, the Munozes commenced this action against Creditor and Builder. The Munozes claimed they had been "grossly overcharged for materials and work performed" and alleged several causes of action including an unconscionable consumer credit transaction, violations of the South Carolina Consumer Protection Code, negligent misrepresentation, fraud, and unfair trade practices.

Creditor moved to compel arbitration pursuant to the arbitration clause in the agreement which provides:

> All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. . . . Notwithstanding anything hereunto the contrary, we retain an option to use judicial or non judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.

(underscoring added).

The trial judge found this arbitration clause was unconscionable, essentially because it was part of an adhesion contract, it lacked mutuality, and it did not comply with statutory provisions of South Carolina law specifically relating to consumer transactions and arbitration clauses. He concluded the arbitration clause was unenforceable and denied the motion to compel arbitration. Creditor appealed.

On appeal, the Court of Appeals reversed finding that a contract of adhesion is not per se unconscionable, mutuality is not required, and the Federal Arbitration Act (FAA) preempts state law because the transaction involved interstate commerce.

ISSUES

1. Does the FAA apply? If so, what is its effect?

2. Is the arbitration clause unconscionable as an adhesion contract?

3. Is the arbitration clause invalid for lack of mutuality?

DISCUSSION

1. The FAA

a. Does the FAA apply?

The trial judge ruled the arbitration agreement violated the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 (Supp. 1999).[1] The Court of Appeals reversed holding the FAA applies to this agreement and therefore preempts our state Arbitration Act. The Munozes contend this was error. We disagree.

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[1]This section requires notice that a contract is subject to arbitration be "typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract."

Title 9 U.S.C. § 2 of the FAA provides in pertinent part:

> [A] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Unless the parties have contracted to the contrary,[2] the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the

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[2]As the United States Supreme Court recognized in Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468 (1989), the parties are free to enter into a contract providing for arbitration under rules established by state law rather than under rules established by the FAA. The FAA preempts state laws that invalidate the parties' agreement to arbitrate "[b]ut it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself." *Id.* at 478. Such a result would be inimical to the FAA's primary purpose of ensuring that arbitration agreements are enforced according to their terms. *Id.; see also* Ford v. NYLcare Health Plans of the Gulf Coast, Inc., 141 F.3d 243 (5th Cir. 1998); Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205 (9th Cir. 1998); Ackerberg v. Johnson, 892 F.2d 1328 (8th Cir. 1989).

In Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996), we found an arbitration agreement that did not comply with the technical notice requirements of § 15-48-10(a) was nonetheless valid because the FAA included no such notice requirement. We did not address the impact of the parties' agreement that the state Arbitration Act would apply. We now clarify that the result in Soil Remediation hinged on the fact that application of state law would have rendered the arbitration agreement completely unenforceable under § 15-48-10(a) which provides that a contract failing to comply with statutory notice requirements shall not be subject to arbitration. State law was therefore preempted to the extent it would have invalidated the arbitration agreement. The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved.

parties contemplated an interstate transaction. Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996).[3]

Here, the arbitration agreement, which applies to "this contract and the relationships which result from this contract," provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms. Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989).

Further, the transaction in this case in fact involves interstate commerce. Both the Munozes and Builder are domiciled in South Carolina. Builder, however, assigned all its rights under the agreement to Creditor, a Delaware corporation with its principal place of business in Minnesota. Creditor actually prepared the agreement in Minnesota and forwarded it to Builder in South Carolina. The proceeds of the loan were disbursed from a bank in Minnesota. Although the Munozes may not have contemplated an interstate transaction, their contractual relationship with Creditor in fact involves interstate commerce and therefore the FAA applies.

b. Effect of the FAA

General contract principles of state law apply to arbitration clauses governed by the FAA. Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 685 (1996); Allied-Bruce, 513 U.S. at 281; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *see also* Keystone, Inc. v. Triad Systems Corp., 971 P.2d 1240 (Mont. 1998) (applying general state law to arbitration clause governed by FAA). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. Perry v. Thomas, 482 U.S. 483, 492 n. 9 (1987). A state law that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies. Allied-Bruce, 513 U.S. at 281. Accordingly, our state Arbitration Act, which applies specifically and exclusively to arbitration

[3]We overrule Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994), to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied.

agreements, is preempted in this case. Soil Remediation Co. v. Nu-Way Envtl., Inc., *supra*.

In addition to our state Arbitration Act, the Munozes assert various statutory provisions of our state Consumer Protection Code[4] invalidate the arbitration clause. We find this argument without merit.

Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). An arbitration clause may be invalidated under a state law only if that law governs the enforceability of all contracts generally. Perry v. Thomas, *supra*. The Consumer Protection Code does not govern contracts generally but applies only to certain consumer transactions. While the requirements of the Consumer Protection Code may be raised on the merits of the contract's enforceability as a consumer credit transaction, these requirements do not apply to determine the validity of the arbitration clause itself.

Further, we quote from the United States Supreme Court's most recent decision regarding application of the FAA:

> We have . . . rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants. . . .[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions.

Green Tree Fin. Corp. v. Randolph, 69 U.S.L.W. 4023, 4026 (filed December 11, 2000) (internal quotations and citations omitted). Although the Supreme Court's decision involved a federal statutory claim and is not directly applicable here, we are guided by the same liberal policy favoring arbitration. Accordingly, we find the arbitration clause in this case is not invalid under

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[4]S.C. Code Ann. § 37-1-101 et seq. (1989 & Supp. 1999).

our state Consumer Protection Code.

2. Adhesion contract

The Munozes contend the arbitration clause is unconscionable because it is part of an adhesion contract and they were not advised it was included in the contract.

Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Under state law, an adhesion contract is not per se unconscionable. Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them); Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998) (fact that a contract is one of adhesion does not render it unconscionable).[5] Further, a person who can read is bound to read an agreement before signing it. Hood v. Life & Cas. Ins. Co. of Tennessee, 173 S.C. 139, 175 S.E. 76 (1934).[6] We find the arbitration clause is not unconscionable as an adhesion contract.

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[5]Similarly, federal substantive law under the FAA holds an arbitration clause is not invalid simply because it is part of an adhesion contract. Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282 (9th Cir. 1988). Inequality of bargaining power alone will not invalidate an arbitration agreement. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999).

[6]This rule is consistent with federal cases holding that arbitration agreements governed by the FAA will not be set aside on the ground the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it. Adams v. Merill Lynch, Pierce, Fenner & Smith, 888 F.2d 696 (10th Cir. 1989); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282 (9th Cir. 1988).

3. Mutuality

The Munozes contend the arbitration clause lacks mutuality and is therefore invalid because it allows Creditor to seek foreclosure on the mortgage given by the Munozes and denies the Munozes the right to litigate any counterclaim in the foreclosure action.

We find the doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the remedy for a breach of contract but only the forum in which the remedy for the breach is determined. Ex parte McNaughton, 728 So.2d 592, 598 (Ala. 1998). The Munozes have not been deprived of a remedy -- they simply must seek their remedy through arbitration rather than through the judicial system. Moreover, under state law, a lack of mutuality of remedy does not invalidate a contract. Lackey v. Green Tree, *supra*.[7]

The Munozes further complain that in light of the allegation they were unaware they were giving a mortgage on their home, it is unconscionable to compel arbitration on their claims while Creditor may pursue foreclosure in the courts. We note, however, that although the arbitration clause requires the Munozes to arbitrate any counterclaim they may have, there is nothing prohibiting them from litigating in court any defense to foreclosure which would include the alleged invalidity of their mortgage. *See, e.g.,* Livingston Holding Co. v. Avinger, 183 S.C. 1, 189 S.E. 806 (1937) (defense that mortgage obtained by duress or fraud raised as defense in foreclosure action); Whittle v. Jones, 79 S.C. 205, 60 S.E. 522 (1908) (defense that mortgage void on ground of fraud and misrepresentation raised as defense in foreclosure action). Accordingly, we find no reason to invalidate the arbitration clause on

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[7]This rule has been adopted by the majority of courts. *See, e.g.*, Sablosky v. Edward S. Gordon Co., 535 N.E.2d 643 (N.Y. 1989) (collecting cases); Restatement Second of Contracts, § 363 comment c (no requirement of mutuality of remedy). Our conclusion is also consistent with federal cases holding an arbitration agreement governed by the FAA need not equally bind each party to arbitration if consideration has been given beyond the agreement to arbitrate. Harris v. Green Tree, 183 F.3d at 180 (holding valid exact arbitration agreement in question here); Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995).

this ground.

CONCLUSION

The decision of the Court of Appeals reversing the denial of the motion to compel arbitration is

AFFIRMED.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice Edward B. Cottingham, concur.

The Supreme Court of South Carolina

O R D E R

An order was issued on December 7, 2000, stating Rule 32, Rules for Lawyer Disciplinary Enforcement, Rule 413, South Carolina Appellate Court Rules, was amended to read as follows.

> A lawyer who has been suspended for a definite period of six months or less may be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel, an affidavit stating that the lawyer is currently in good standing with the Commission on Continuing Legal Education and Specialization, has fully complied with the requirements of the suspension order, and has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the attorney appointed pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the appointed attorney under Rule 31(f), RLDE.

The order should have stated that the <u>first sentence</u> of Rule 32, RLDE, Rule 413, SCACR, was being amended. The final three sentences of the rule remain as enacted by order of this Court dated July 21, 1999. The rule now reads as follows:

> A lawyer who has been suspended for a definite

period of six months or less may be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel, an affidavit stating that the lawyer is currently in good standing with the Commission on Continuing Legal Education and Specialization, has fully complied with the requirements of the suspension order, and has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the attorney appointed pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the appointed attorney under Rule 31(f), RLDE. The affidavit may be served and filed no earlier than 30 days prior to the end of the period of suspension. The affidavit filed with the Supreme Court shall be accompanied by proof of service showing service on disciplinary counsel. If reinstated, the Court shall issue an order of reinstatement. The order shall be public.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 17, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Triple E, Inc.,

Respondent,

v.

Hendrix and Dail, Inc.,

Appellant.

Appeal From Williamsburg County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 3285
Heard December 12, 2000 - Filed January 16, 2001

AFFIRMED

Arthur K. Aiken, of Hammer, Hammer, Carrigg & Potterfield; Rebecca M. Monroy, of Collins & Lacy, of Columbia; and William P. Hatfield, of The Hyman Law Firm, of Florence, for appellant.

W. E. Jenkinson, III, and Jennifer R. Kellahan, both of Jenkinson & Jenkinson, of Kingstree, for respondent.

GOOLSBY, J.: Triple E filed this action against Hendrix and Dail, Inc. (H&D), alleging breach of express warranty, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, negligent misrepresentation and negligence. The jury returned a verdict of $47,025 for Triple E. H&D appeals. We affirm.

FACTS

Triple E is a family farm operated primarily by Marty Easler. In the early 1990s, Triple E's principal crop was tobacco. In 1994, Triple E purchased 8,000 pounds of Chlor-O-Pic.[1] Chlor-O-Pic is a chemical fumigant used to suppress black shank disease. Black shank disease is a soil-boring fungal disease that destroys tobacco crops.

Easler purchased Chlor-O-Pic after seeing full and half-page advertisements in the Carolina Farmer, a trade magazine. The advertisements pictured a pair of dice and stated: "Why gamble on your crop when you can insure it with Chlor-O-Pic?" The ads further stated: "Proven control . . . University tests prove that for consistent, effective control of Granville Wilt and Black Shank, you need 42 pounds of active ingredient . . . at 3 gallons per acre. . . . Chlor-O-Pic gives you season long control with application in fall, winter or spring."

Easler used Chlor-O-Pic to treat approximately 143 acres of his tobacco crop. Easler testified he applied the Chlor-O-Pic using the correct machinery, with the correct application procedures, and in the correct amount. Nevertheless, Triple E's crop developed black shank. Triple E eventually lost ten acres, or an estimated 3,000 pounds of tobacco per acre, to black shank.

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[1] Chlor-O-Pic is a tradename under which the pesticide chloropicrin is sold.

At a trial held in 1994, Easler called J. K. McCord as an expert witness in agricultural chemicals.[2] When asked about H&D's ad for Chlor-O-Pic, McCord testified the ad was "vulgar" because it was misleading by using the term "proven control." McCord testified chloropicrin was a good product for suppression, but if applied as described in the ads, it could not control black shank throughout a growing season, contrary to the ad's claims. McCord testified a farmer needed to apply chloropicrin as directed in the ads, but also needed to supplement it with sufficient quantities of Ridomil twice during the season. McCord testified Easler told him he had applied a small amount of Ridomil once during the season, but McCord testified that the amount Easler used was insufficient to combat black shank.

Easler testified that in the farming world, the word control "is a real strong word" meaning prevention. Easler testified he believed the ad to mean that Chlor-O-Pic would prevent his crop from getting black shank. Easler testified he relied on the ad's claims when purchasing Chlor-O-Pic from H&D and that he placed great reliance on the ad because the Carolina Farmer was a trade publication. He stated that the ad's use of the words or phrases "control," "season long control," and "why gamble . . . when you can insure . . ." all led him to believe that Chlor-O-Pic would prevent black shank the entire growing season.

At the close of Triple E's case, H&D moved for a directed verdict on all causes of action. The trial judge denied the motion and submitted the case to the jury. The jury found for Triple E on all causes of action and returned a general verdict in the amount of $47,025. The trial judge denied H&D's post-trial motion for judgment notwithstanding the verdict.

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[2] McCord viewed Easler's damaged tobacco fields and determined they contained a moderate incident of black shank.

Standard of Review

In an action at law, on appeal of a case tried by a jury, this court will correct errors of law and will not disturb a factual finding of the jury unless a review of the record discloses no evidence to reasonably support the jury's findings.[3] In reviewing motions for a directed verdict and for judgment notwithstanding the verdict, it is the duty of this court to view the evidence and all inferences that may reasonably be drawn therefrom in the light most favorable to the nonmoving party.[4] If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury.[5]

Additionally, this court may review an order on appeal under the "two issue" rule when the jury returns a general verdict involving two or more issues. If the jury's verdict is supported as to at least one issue, the verdict will not be reversed on appeal.[6]

LAW/ANALYSIS

H&D argues the trial judge erred in finding a question of fact existed as to whether the advertisements in the Carolina Farmer constituted an express warranty. We disagree.

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[3] Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

[4] Woodward v. Todd, 270 S.C. 82, 240 S.E.2d 641 (1978).

[5] Easler v. Pappas, 252 S.C. 398, 166 S.E.2d 808 (1969).

[6] Anderson v. South Carolina Dep't of Highways & Pub. Transp., 322 S.C. 417, 472 S.E.2d 253 (1996)(stating under one of the applications of the "two issue" rule, the appellate court will find it unnecessary to address all the grounds appealed where one requires affirmance).

This action is governed by the Uniform Commercial Code (UCC), codified in Chapter 36 of our code.[7] Section 36-2-313 of the UCC states in relevant part:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise, including those on containers or labels, made by the seller to the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> . . .
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.[8]

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[7] See S.C. Code Ann. § 36-2-102 (1976) (stating the UCC applies to transactions in goods); Id. § 36-2-105(1) (defining goods as all things movable at the time of identification to the contract for sale).

[8] S.C. Code Ann. § 36-2-313. See also Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 105, 439 S.E.2d 283, 284 (Ct. App. 1993) ("A warranty is created when the seller makes an affirmation with respect to the

Whether an affirmation creates an express warranty or is merely the seller's opinion or puffing is ordinarily a question of fact for the jury.[9]

Although we have found no South Carolina case in which an advertisement created an express warranty, in Odom v. Ford Motor Company[10] our supreme court stated: "There are cases where recovery has been allowed on the theory of express warranty . . . where the purchaser of an article relied on representations made by the manufacturer in advertising material."[11] Moreover, other jurisdictions have held that affirmations made in advertisements can give rise to express warranties.[12]

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thing to be sold with the intention that the buyer shall rely on it in making the purchase.") (citation omitted).

[9] See Marshall and Williams Co. v. General Fibers and Fabrics, Inc., 270 S.C. 247, 250, 241 S.E.2d 888, 889 (1978) ("Our sole concern is whether there was any evidence from which the jury might conclude that there was an express warranty which was breached."); 67A Am. Jur. 2d Sales § 729 (1985).

[10] 230 S.C. 320, 95 S.E.2d 601 (1956).

[11] Id. at 328, 95 S.E.2d at 605.

[12] See Gherna v. Ford Motor Co., 55 Cal. Rptr. 94 (Dist. Ct. App. 1966) (stating advertisement can give rise to an express warranty); Torres v. Northwest Eng'g Co., 949 P.2d 1004 (Haw. Ct. App. 1997) (recognizing that an advertisement can create an express warranty); Scheuler v. Aamco Transmissions, Inc., 571 P.2d 48 (Kan. Ct. App. 1977) (holding that an advertisement can create an express warranty); Courtney v. Bassano, 733 A.2d 973 (Me. 1999) (advertisement stating table was "all original" created express warranty); Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257 (Mo. Ct. App. 1976) (holding that advertisement can create an express warranty); Daughtrey v. Ashe, 413 S.E.2d 336 (Va. 1992) (noting that any description of the goods, other than the seller's opinion, constitutes a basis of the bargain and is therefore an express warranty); Arrow Transp. Co. v. A. O. Smith Co., 454 P.2d 387 (Wash. 1969) (recognizing that an advertisement can create an express

In the present case, Triple E presented evidence that the assertions expressed in the advertisement met the definition of an express warranty. Easler and McCord testified the words "proven control" constituted an affirmative statement in the farming community. The ads stated that Chlor-O-Pic would provide "season long control," a fact disputed by Triple E's expert. Easler testified he saw the ads and relied on them in purchasing Chlor-O-Pic. Finally, Mr. McLawhorn, an agent of H&D, admitted they intended the slogan "Why gamble on your crops when you can insure it with Chlor-O-Pic?" to convey the message as stated.

Viewing the evidence in the light most favorable to Triple E, we find sufficient evidence in the record to support the trial judge's conclusion that the issue of the express warranty was one for the jury. Because the jury verdict is supported as to this issue, we decline to address the jury's verdict on the remaining causes of action.

H&D next argues that Triple E's recovery is limited by H&D's exclusion of consequential and incidental damages.

Under South Carolina Code section 36-2-719,[13] parties may contractually modify or limit the recovery of consequential or incidental damages, provided the limitation is not unconscionable. Accordingly, where a proper exclusion of consequential and incidental damages is contractually agreed to, a plaintiff's remedy is limited to his or her actual damages as defined in South Carolina Code section 36-2-714(2).

South Carolina Code section 36-2-714(2) states:

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warranty); see also R. D. Hursh, Annotation, *Statements in Advertisements as Affecting Manufacturer's or Seller's Liability for Injury Caused by Product Sold*, 75 A.L.R.2d 112 (1961); 67A Am. Jur. 2d Sales § 728 (1985).

[13] S.C. Code Ann. § 36-2-719 (1976).

> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.[14]

H&D contend that because the parties contractually agreed to exclude consequential and incidental damages under section 36-2-714, Triple E is entitled to recover only the cost of the Chlor-O-Pic. We disagree.

In Hill v. BASF Wyandotte Corporation,[15] our supreme court rejected a similar argument, stating:

> This formula [under section 36-2-714(2)] is most appropriate where the nonconforming good can be repaired or replaced and value (both as warranted and as accepted) can be defined with certainty.
>
> A herbicide failure is a latent defect in the product. There is no reasonable way a farmer can determine in advance whether a herbicide will perform as warranted. Discovery of the problem must await the development of the crop at which time it is usually too late to correct.
>
> . . .
>
> It has consistently been held by this Court that the measure of actual damages, in cases similar to this, is the value the crop would have had if the product had conformed to the warranty less the value of the crop

[14] Id. § 36-2-714(2).

[15] 280 S.C. 174, 311 S.E.2d 734 (1984).

> actually produced, less the expense of preparing for market the portion of the probable crop prevented from maturing.
>
> . . .
>
> If the measure of damages we have adopted includes an element of lost profits, such inclusion is merely coincidental as the measure covers the direct loss resulting in the ordinary course of events from the alleged breach of the warranty.[16]

Thus, under Hill, Triple E was entitled to recover the value of the damaged crop.

AFFIRMED.

CURETON and CONNOR, JJ., concur.

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[16] Id. at 177-78, 311 S.E.2d at 735-36 (citations omitted) (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

First Palmetto Savings Bank, F.S.B.,

Appellant,

v.

Pradipkumar I. Patel, and Branch Banking & Trust Company of South Carolina ("BB&T") and Bhupendra G. Patel,

Defendants,

of Whom

Branch Banking and Trust Company of South Carolina ("BB&T") and Bhupendra R. Patel are,

Respondents.

Appeal From Sumter County
Linwood S. Evans, Jr., Master-in-Equity

Opinion No. 3286
Submitted December 11, 2000 - Filed January 16, 2001

REVERSED and REMANDED

Thomas E. Player, Jr., of Player & McMillian; and J. Kennedy DuBose, Jr., of DuBose & Cushman, of Camden, for appellant.

James O. Spence, of Dooley, Dooley & Spence, of Lexington; and B. Michael Brackett, of Rogers, Townsend & Thomas, of Columbia, for respondents.

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GOOLSBY, J.: In this foreclosure action the master-in-equity set aside the satisfaction of a mortgage held by Bhupendra Patel, restoring it to first priority, and granted foreclosure. First Palmetto Savings Bank appeals. We reverse and remand.[1]

FACTUAL/PROCEDURAL BACKGROUND

On May 1, 1989, Bhupendra Patel sold the Sumter Tourist Lodge (the Property) to Nagarbhai K. Patel.[2] In consideration, Nagarbhai executed a promissory note in favor of Bhupendra in the amount of $260,000.00, secured by a wrap-around mortgage on the Property. The wrap mortgage was subordinate to a mortgage given by Bhupendra to Fred and E.W. Gee. Nagarbhai subsequently sold the Property to his son, Pradipkumar Patel. With Bhupendra's consent, Pradipkumar assumed payments on the note and the wrap mortgage Nagarbhai had given to Bhupendra.

On February 24, 1988, Bhupendra borrowed $100,000.00 from the National Bank of South Carolina (NBSC). As security for the loan, Bhupendra executed and delivered to NBSC a promissory note together with a subordination and collateral assignment of the wrap mortgage. To further secure the debt, Pradipkumar, then the owner of the Property, executed a real estate mortgage conveying a lien to NBSC.

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Bhupendra Patel and Nagarbhai Patel are not related.

Ken Hamilton served as the closing attorney for Bhupendra, as borrower, and NBSC, as lender. Hamilton witnessed the execution of the subordination and collateral assignment of the wrap mortgage and recorded the document in the public records. Following this transaction, the first mortgage lien on the Property was held by Fred and E.W. Gee; the second, by NBSC pursuant to the mortgage executed by Pradipkumar; and the third, by Bhupendra, subject to the subordination and collateral assignment to NBSC.

In January 1994, Bhupendra satisfied the obligation to Fred and E.W. Gee. That mortgage was subsequently marked paid and cancelled of record. Bhupendra also repaid the loan from NBSC, satisfying the mortgage given by Pradipkumar to secure the debt. Bhupendra, however, neglected to contact NBSC concerning the reassignment of the wrap mortgage he had assigned as collateral. Following the January 1994, repayments, the wrap mortgage from Nagarbhai to Bhupendra was the first and senior lien on the Property.

In March 1996, Pradipkumar arranged to receive a loan from First Palmetto Savings Bank (First Palmetto). As security for the loan, First Palmetto required a primary lien on the Property. Ken Hamilton served as the closing attorney for the transaction. Hamilton's title search revealed the outstanding wrap mortgage from Nagarbhai to Bhupendra, which had been assigned to NBSC. Hamilton contacted NBSC and requested that it determine the status of the mortgage, which Pradipkumar asserted had been satisfied some time earlier. Neither Hamilton nor NBSC discovered that it was a collateral rather than absolute assignment.

On April 30, 1996, without the knowledge or consent of Bhupendra, an officer of NBSC executed a Satisfaction of Lost or Destroyed Mortgage declaring the wrap mortgage paid in full and authorizing the Register of Mesne Conveyances to cancel it from the records.[3] Pradipkumar refinanced the mortgage with a loan of $200,000.00 from First Palmetto in October 1996. Hamilton again served as the closing attorney.

In February1998, First Palmetto brought a foreclosure action against Pradipkumar, asserting its mortgage was the primary lien on the Property. Bhupendra filed an answer in

[3] Bhupendra became aware that his mortgage had been wrongly satisfied in 1997 when he applied for a loan from Branch Banking & Trust Company of South Carolina (BB&T) intending to use the mortgage as collateral. NBSC admitted at trial that it did not have the authority to satisfy the mortgage.

the action and asserted counterclaims and crossclaims to set aside NBSC's mistaken satisfaction of the wrap mortgage, restore it to first priority, and foreclose.

The action was referred to the master-in-equity for final judgment with any appeal to be directly to the South Carolina Supreme Court. The master concluded:

> [A]ttorney Hamilton was attorney and agent for [First Palmetto] and . . . had knowledge of the true facts regarding the nature of Bhupendra Patel's subordination and assignment of mortgage from the former transaction, or obtained sufficient knowledge of facts during the course of the second and third loan closing transactions to have placed him on inquiry notice to further investigate the nature of the assignment. Therefore, attorney Hamilton's knowledge is imputed to [First Palmetto] and [First Palmetto] is not an innocent third party who would be prejudiced by the restoration of Defendant Bhupendra Patel's mortgage to its rightful priority.

The master then canceled the mistaken satisfaction, restored and reinstated Bhupendra's wrap mortgage to first priority, and granted foreclosure. The master also found that Bhupendra's failure to seek re-assignment of the wrap mortgage was not the proximate cause of the mistaken satisfaction. This appeal followed.

LAW/ANALYSIS

An action to foreclose a real estate mortgage is one in equity.[4] As such, this court may find facts in accordance with its own view of the preponderance of the evidence.[5]

First Palmetto initially argues the master erred in imputing to it knowledge obtained by Hamilton in the February, 1988 loan closing concerning the collateral nature of the wrap mortgage. We agree.

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[4] Dockside Ass'n v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (1987); MI Co. v. McLean, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997).

[5] Townes Associates, Ltd. v. Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

Equitable principles may be applied to cancel a mortgage satisfaction.[6] Specifically, "'when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other parties.'"[7] Thus, a mortgage that has been mistakenly satisfied may be reinstated only where there is no third party who, without notice of the mistake, subsequently and in good faith acquires an interest in the property.[8]

The master found that as a result of Hamilton's involvement in the February, 1988 loan closing he obtained knowledge of the true collateral nature of the assignment. The master then found that this knowledge was imputed to First Palmetto as a result of the principal-agent relationship formed in March, 1996.

Generally a principal is charged with the knowledge an agent acquired prior to the formation of the agency only when it is clearly shown that the knowledge was in the mind of the agent while acting for the principal or where he acquired it so recently as to raise the presumption he still retained it in his mind.[9] Because Hamilton's representation of First Palmetto occurred eight years after his participation in the 1988 transaction, any presumption of retention must fail. Accordingly, any knowledge that Hamilton may have acquired in 1988 cannot be imputed to First Palmetto unless it is clearly shown that the information was in Hamilton's mind while he served as First Palmetto's agent.

Hamilton testified that he remembered little of the 1988 transaction. His file concerning the transaction was listed under Pradipkumar's name rather than Bhupendra's.

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[6] MI Co., 325 S.C. at 624, 482 S.E.2d at 601.

[7] Young v. Pitts, 155 S.C. 414, 420, 152 S.E. 640, 642 (1930) (quoting Lumber Exchange Bank v. Miller, 40 N.Y.S. 1073 (N.Y. Sup. Ct. 1896)).

[8] MI Co., 325 S.C. at 624, 482 S.E.2d at 602.

[9] Aiken Petroleum Co. v. National Petroleum Underwriters, etc., 207 S.C. 236, 36 S.E.2d 380 (1945); Pee Dee State Bank v. Prosser, 295 S.C. 229, 367 S.E.2d 708 (Ct. App. 1988), *overruled in part on other grounds*, United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994).

Although the subordination and assignment agreement was stamped with Hamilton's address, he could not remember if he had prepared it. When asked on cross examination whether he believed that the assignment was absolute when he contacted NBSC, Hamilton responded: "I do not know. All I know is that N.B.S.C. held the mortgage at that time, because that is what the public records indicate and that is why we asked N.B.S.C. to assign estoppel." Hamilton later stated: "The only thing that I apparently concerned myself [sic] or my office did was the fact that N.B.S.C. held an Assignment of Mortgage and that N.B.S.C. would have to do a satisfaction."

Hamilton admitted that when checking the public record for his title opinion in 1996, he would have discovered that he had been involved with the subordination and assignment agreement. He further testified that when he was preparing for the 1996 closing between Pradipkumar and First Palmetto, he would have probably recognized the name and may have checked the 1988 file to see the identity of the parties and the property involved. He stated, however, that he doubted he would have checked the file specifically with the wrap mortgage in mind. He explained that it would have been highly unlikely for him to remember the details of the 1988 transaction when he closed the loans for First Palmetto.

We find no evidence that at the time of the 1996 closings Hamilton had present in his mind the knowledge that the assignment of the wrap mortgage was collateral rather than absolute. Additionally, we find no evidence from the document itself that would have or should have brought the details of the 1988 transaction to the forefront of Hamilton's mind. The subordination and collateral assignment agreement appears on its face to be an absolute assignment of the mortgage. The agreement contains no language that the mortgage would be reassigned upon payment of debts owed to NBSC. Although Hamilton may have remembered that he had been involved with the recording of the subordination and assignment agreement, he denied checking his 1988 file with the wrap mortgage in mind. We find nothing so peculiar about the subordination and assignment agreement that would have mandated Hamilton check his 1988 file before proceeding with the 1996 closing. We, therefore, hold that the master erred in imputing knowledge of the collateral nature of the assignment to First Palmetto.

Accordingly, we reverse the cancellation of the mortgage satisfaction and the reinstatement of the wrap mortgage to first priority.[10] We remand the case for foreclosure of the mortgages in accordance with this opinion.

REVERSED AND REMANDED.

CURETON and CONNOR, JJ., concur.

[10] Because we reverse on this issue, we need not reach First Palmetto's remaining arguments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

John Thomas Robinson,

Appellant.

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

Opinion No. 3287
Submitted October 4, 2000 - Filed January 22, 2001

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy

Attorney General Robert E. Bogan, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

PER CURIAM: John Thomas Robinson was indicted for possession of crack cocaine with intent to distribute and possession of crack cocaine with intent to distribute within proximity of a public playground or park. A jury found Robinson guilty. He was sentenced to twenty years and a fine of $25,000 for possession with intent to distribute crack cocaine, and a concurrent fifteen year term for the related proximity charge.

FACTS

Calvin's Detail Shop (Calvin's) was the focal point of a six-month drug investigation by the Rock Hill Police Department and the Federal Bureau of Investigations. On the evening of October 13, 1998, Rock Hill Police Officers Floyd and Lubben conducted surveillance of Calvin's. Both officers saw Robinson get out of a vehicle, enter Calvin's and exit on foot a short time later. The officers approached Robinson on the sidewalk. When Officer Floyd identified himself, Robinson charged him and threw his hands up in the air. Officer Lubben saw a black plastic bag fly from Robinson's left hand. The black plastic bag contained seven rocks of crack cocaine, having a total weight of 0.9 grams. Robinson was arrested and charged with possession with intent to distribute and the related proximity charge.

At the conclusion of the State's case, Robinson moved for a directed verdict arguing the State had presented no evidence of an intent to distribute. The trial judge denied the motion. Robinson appeals both convictions.

DISCUSSION

Counsel for Robinson initially filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), asserting there was no meritorious grounds for

appeal and requesting permission to withdraw from further representation. In addition, Robinson filed a pro se brief. This Court denied counsel's request to withdraw and directed the parties to brief the directed verdict issue raised by Robinson in his pro se brief. We find all other issues contained in counsel's initial Anders brief and Robinson's pro se brief to be without merit.

Robinson argues the trial court erred in denying his motion for a directed verdict of acquittal on the charge of possession with intent to distribute because the amount seized was less than the statutory amount triggering the permissible inference of an intent to distribute, and no other evidence of intent was presented. See S.C.Code Ann. § 44-53-375(B) (Supp. 1999). We disagree.

On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). When reviewing the denial of a directed verdict motion in a criminal case we determine if there is "any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused." State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186, (1997), cert. denied, 522 U.S. 923 (1997). If so, this Court must find that the case was properly submitted to the jury. Id. On appeal from the denial of a motion for a directed verdict this Court must view the evidence in a light most favorable to the State. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

S.C. Code Ann. § 44-53-375(B) (Supp. 1999) creates a permissive inference that possession of more than one gram of crack cocaine constitutes possession with intent to distribute. However, a conviction of possession with intent to distribute does not hinge upon the amount involved. State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987); State v. Simpson, 275 S.C. 426, 272 S.E.2d 431 (1980). Furthermore, the statute does not mandate a reverse inference or presumption for amounts less than one gram.

During the trial, the State presented expert testimony from police officers that it was not typical for a simple user of crack cocaine to possess seven rocks of crack cocaine at one time. Two police officers testified users typically

possess one rock, or at most, two. One officer stated he would not expect a dealer to have scales or individual baggies in his possession, but he would expect to find the crack cocaine wrapped as it was in this case.

Based upon this testimony, we conclude there is sufficient evidence of Robinson's intent to distribute to withstand the directed verdict.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is

AFFIRMED.

HUFF, HOWARD, and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In Re: Estate of Larry Mitchell Nimmons.

Bob Jones University, Roy Barton as Personal Representative, and John T. Nimmons, III, of whom Bob Jones University and Roy Barton as Personal Representative are,

Appellants,

v.

Sandra M. Strandell, Larry M. Nimmons, Jr. and Christopher Nimmons,

Respondents.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3288
Heard January 8, 2001 - Filed January 22, 2001

AFFIRMED

S. Allan Hill, of Temple, Mann, Briggs & Hill, of Greenville, for appellants.

James R. Gilreath, of The Gilreath Law Firm, of

Greenville, for respondents.

ANDERSON, J.: Bob Jones University and Roy Barton, the personal representative of the estate of Larry Mitchell Nimmons ("Appellants"), appeal the decision of the Probate Court, later affirmed by the Circuit Court, which held the proceeds of a life insurance policy passed by intestacy to Nimmons' children. We affirm.

FACTS/PROCEDURAL BACKGROUND

Nimmons died on September 6, 1997. His will, executed on January 15, 1991, was admitted to probate. In the will, Nimmons nominated the Director of Financial Affairs of Bob Jones University as the personal representative of his estate. Barton, Bob Jones' Chief Financial Officer, was appointed to the position. Item II of the will directed the payment of all estate, inheritance, succession, death or similar taxes, other than generation-skipping taxes, be paid out of the residuary estate. Item III provided:

> I give and bequeath all of my personal and household effects of every kind, including, but not limited to, furniture, appliances, furnishings, pictures, silverware, china, glass, vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property to Bob Jones University, Greenville, South Carolina[,] to be used in a scholarship fund for needy students, with the understanding that if any of my children or grandchildren choose to attend Bob Jones University at any time, they may apply the interest in the said fund to their expenses of room, board, tuition, books, or other fees to Bob Jones University. These benefits shall continue to inure to each of my children and grandchildren until each reaches the age of twenty-five. I hereby declare that I have considered my children, and have decided to dispose of my estate as stated herein due to numerous circumstances.

The will did not include a residuary clause or any other devise.

Nimmons had a life insurance policy in the amount of $156,000. His estate was named the beneficiary. His estate also included various items of personal property valued at $4,753.71 and $246.97 in cash.

Three of Nimmons' four children ("the Children") brought this action for construction of the will. The Children asserted the cash, the proceeds from the life insurance policy, and any asset that could be identified and located, except personal and household effects, should pass to them by way of intestacy. They additionally requested the court bar Bob Jones University from paying from the residuary estate its attorneys' fees incurred in this action. The Children also sought a court order requiring Appellants to provide them with a list of assets removed from the house Nimmons rented at the time of his death.

The Children filed a motion in limine, asking the court exclude extrinsic evidence at the hearing on the petition to construe the will. As support for their motion, the Children asserted Appellants were in default because they did not timely answer the petition for construction of the will. They additionally argued extrinsic evidence was not admissible to prove intent under the circumstances of this case.

The Probate Court conducted a hearing on the motion in limine. The court set aside the entry of default. It found, however, the will did not contain any latent ambiguity that would allow the court to consider testimony or other evidence regarding Nimmons' intent. Accordingly, the court held Appellants were precluded from introducing extrinsic evidence regarding Nimmons' intent in making his will.

At a subsequent hearing, the Probate Court allowed Appellants to proffer the extrinsic evidence it previously excluded. Marvin Hembry, one of the witnesses to the will, testified Nimmons told him he was leaving his estate to Bob Jones because someone at the university had treated him well. Hembry stated Nimmons did not mention his children at all.

As well, Appellants proffered the testimony of Charles Hofstra. Hofstra was the attorney who drafted the will. In his testimony, Hofstra averred his understanding was that because Nimmons had no real estate and Bob Jones University was to be the recipient of the entire estate, no residuary clause was needed. He explained he thought Item III would cover the entire estate.

In its final order, the Probate Court reiterated the will contained no latent ambiguity that would allow the court to consider extrinsic evidence of Nimmons' intent. It held the life insurance proceeds did not fall within the general classification of property described in Item III of the will. It concluded that as the will disposed of only part of the estate and had no residuary clause, there was a partial intestacy. Therefore, the proceeds of the life insurance would pass by intestacy to Nimmons' four children. The court additionally ordered Barton to furnish the Children with a detailed list of the property removed from the house in which Nimmons lived at the time of his death. Appellants appealed to the Circuit Court, which affirmed the Probate Court's decision. This appeal followed.

STANDARD OF REVIEW

This is an action at law. NationsBank of South Carolina v. Greenwood, 321 S.C. 386, 468 S.E.2d 658 (Ct. App. 1996) (holding an action to construe a will is an action at law). If a proceeding in the Probate Court is in the nature of an action at law, review by the Circuit Court and this Court extends merely to the correction of errors of law. See Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (stating appellate review of an action at law is limited to correcting errors of law). The factual findings of the Probate Court will not be disturbed on appeal unless a review of the record reveals there is no evidence reasonably supporting the court's findings. Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993).

ISSUE

Did the Probate Court err by concluding Nimmons' will did not contain any ambiguity, thus precluding the introduction of

extrinsic evidence regarding Nimmons' intent when drafting the document?

LAW/ANALYSIS

Appellants argue the Probate Court erred in ruling no ambiguity exists in Nimmons' will. We disagree.

The cardinal rule of will construction is the determination of the testator's intent. Matter of Clark, 308 S.C. 328, 417 S.E.2d 856 (1992). In construing the language of a will, the reviewing tribunal must give the words contained in the document their ordinary and plain meaning unless it is clear the testator intended a different sense or such meaning would lead to an inconsistency with the testator's declared intention. In re Estate of Fabian, 326 S.C. 349, 483 S.E.2d 474 (Ct. App. 1997). In construing a will, a court's first reference is always to the will's language itself. Fenzel v. Floyd, 289 S.C. 495, 347 S.E.2d 105 (Ct. App. 1986). Where the will's terms or provisions are ambiguous, the court may resort to extrinsic evidence to resolve the ambiguity. Id.

There are two types of ambiguities found in construing wills:

> Ambiguities ... are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the ... instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the ... instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.

Fabian, 326 S.C. at 353, 483 S.E.2d at 476 (quoting Jennings v. Talbert, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907)).

A court may admit extrinsic evidence to determine whether a latent ambiguity exists. Id. Once the court finds a latent ambiguity, extrinsic evidence

is also permitted to help the court determine the testator's intent. Id.

Appellants assert the distinction between latent and patent ambiguities is no longer viable. We find no indication this distinction has been abandoned by our courts. We hold the law as set forth in In re Estate of Fabian is still valid in this state. Furthermore, Appellants concede that any ambiguity in the will would be latent. Accordingly, their argument concerning the existence of a distinction between latent and patent ambiguities is irrelevant to our determination of whether the Probate Court erred in failing to consider extrinsic evidence of Nimmons' intent.

Appellants contend the will is internally inconsistent and therefore ambiguous because Item II directs payment of estate taxes from the residuary estate when there is no residuary clause. A "residuary estate," however, is not the equivalent of a "residuary clause." Compare Black's Law Dictionary 1309 (6th ed. 1990) ("residuary clause" is a "[c]lause in [a] will by which that part of property is disposed of which remains after satisfying bequests and devises.") with Cornelson v. Vance, 220 S.C. 47, 54, 66 S.E.2d 421, 424 (1951) (defining "residuary estate" as "[A]ll property owned by [the decedent] at the time of … death, other than that passing under the Will ….") . A testator may have a "residuary estate" even though the will contains no "residuary clause." When a testator fails to include a residuary clause in the will, the law provides for the distribution of that portion of the estate not disposed of by will as intestate property. See S.C. Code Ann. § 62-2-101 (1987) ("Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed [by the sections concerning intestate succession]."); Cornelson, 220 S.C. at 58, 66 S.E.2d at 426 (stating that if the testator does not choose to devise property by express provision in the testator's will, the testator may dispose of assets by use of a residuary clause — when no such clause exists, disposition will be accomplished via the laws of intestacy). Although the law engages a presumption against intestacy, this presumption may be overcome by the facts and plain language of the testator's will. Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943); In re Estate of Blankenship, 336 S.C. 103, 518 S.E.2d 615 (Ct. App. 1999).

The proceeds of the life insurance policy are clearly not within the classification of "personal and household effects of every kind, including, but not limited to, furniture, appliances, furnishings, pictures, silverware, china, glass, vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property" devised in Item III, which is the only devise in the will. Nimmons made no attempt to avoid a partial intestacy through a residuary clause. We find no indication Nimmons intended to disinherit his children.

The Probate Court permitted Appellants to proffer witness testimony concerning the drafting of Nimmons' will. This evidence was extrinsic. We find no evidence of a latent ambiguity from the profferred testimony.

Because we find no ambiguity in the will when considering the proffered evidence, we hold the Probate Court's failure to consider extrinsic evidence in determining the existence of a latent ambiguity was harmless. See McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (ruling appellant seeking reversal must show both error and prejudice).

Lastly, this Court cannot hold the failure to specifically devise the proceeds of the life insurance or to include a residuary clause in the will was merely a "scrivener's error." Cf. Fenzel v. Floyd, 289 S.C. 495, 347 S.E.2d 105 (Ct. App. 1986) (holding extrinsic evidence is also admissible to prove and correct a scrivener's error). "Courts cannot make wills nor can they conjecture as to the intention of the [testator]." Cornelson, 220 S.C. at 58, 66 S.E.2d at 426.

CONCLUSION

We find no latent ambiguity in the will. The Probate Court did not err in refusing to consider extrinsic evidence of Nimmons' intent. Additionally, we hold the Probate Court did not commit reversible error by failing to evaluate Appellant's extrinsic evidence for purposes of discovering the existence of any latent ambiguity in Nimmons' will. Considering only the plain language of the will, we hold the proceeds of the life insurance policy are not "personal and

household effects," as devised in Item III. The insurance proceeds, therefore, are part of the residuary estate. Because the will does not include a residuary clause, the residuary estate passes by intestacy. Accordingly, the Probate Court did not err in ruling the proceeds of the life insurance policy passed by intestacy to Nimmons' children.

AFFIRMED.

HEARN, C.J. and STILWELL, J., concur.