Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E

February 2, 2001

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the commission in writing of the seat for which the prospective candidate intends to apply. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6092

The commission will not accept applications after **12:00 noon on Monday, March 5, 2001.**

A vacancy will exist in the office of Judge of the Circuit Court for the Ninth Judicial Circuit, Seat 1, upon the retirement of the Honorable Daniel E. Martin, Sr. on June 30, 2001.

A vacancy will exist in the office of Judge of the Circuit Court for the Tenth Judicial Circuit, Seat 1, upon the retirement of the Honorable H. Dean Hall on June 30, 2001.

A vacancy will exist in the office of Judge of the Circuit Court for the Fifteenth Judicial Circuit, Seat 1, upon the retirement of the Honorable Sidney T. Floyd on June 30, 2001.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/judmerit.htm.

* * *

The Supreme Court of South Carolina

In the Matter of James
Vincent Dunbar, Jr.
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. Dunbar's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Dunbar may have maintained.

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

and may make disbursements from Mr. Dunbar'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 James Vincent Dunbar, Jr., Esquire, shall serve as notice to the bank or other financial institution that Joe Earle Berry, Jr., 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 Joe Earle Berry, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Dunbar's mail and the authority to direct that Mr. Dunbar's mail be delivered to Mr. Berry's office.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

January 29, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

February 5, 2001

ADVANCE SHEET NO. 5

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

John A. Kiriakides and
Louise Kiriakides, Respondents,

v.

Atlas Food Systems &
Services, Inc., Marica
Enterprises, Ltd.,
Marica, Inc., and Alex
Kiriakides, Jr., Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Frank S. Holleman, III, Special Referee

Opinion No. 25244
Heard September 19, 2000 - Filed January 29, 2001

AFFIRMED IN RESULT AS MODIFIED, AND REMANDED

Deborah H. Sheffield, of Columbia, Ellis M. Johnston, II, of Haynsworth Sinkler & Boyd, of Greenville, and David Holmes, of Greenville, for petitioners.

Wilburn Brewer, Thomas L. Stephenson, and Charles W. Emory, Jr., all of Nexsen, Pruet, Jacobs & Pollard, L.L.P., of Columbia, and George J. Conits, of Greenville, for respondents.

CHIEF JUSTICE TOAL: We granted a writ of certiorari to review the Court of Appeals' opinion in Kiriakides v. Atlas Food Systems, 338 S.C. 572, 527 S.E.2d 371 (Ct. App. 2000). We affirm in result, as modified.

FACTS

This is a case in which respondents, minority shareholders in a closely held family corporation, claim the majority shareholders have acted in a manner which is fraudulent, oppressive and unfairly prejudicial.[1] They seek a buyout of their shares under South Carolina's judicial dissolution statutes. A rather detailed recitation of the facts is necessary to an understanding of the plaintiffs' claims.

Respondents are 72-year-old John Kiriakides and his 74-year-old sister Louise Kiriakides. John and Louise are the minority shareholders in the family business, Atlas Food Systems & Services, Inc. (Atlas). Petitioners are their older brother, 88-year-old Alex Kiriakides, Jr., and the family business and its subsidiaries, Marica Enterprises, Ltd. (MEL),[2] and Marica, Inc. (Marica).[3]

Atlas is a food vending service which provides refreshments to factories and other businesses. The business began prior to World War II but slowed down while Alex was away during the war. After the war, Alex, John, and their father Alex, Sr., began working together to build the family business.[4] Alex, Sr. died

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[1] See S.C. Code Ann. §§ 33-14-300 & 33-14-310 (1990).

[2] MEL is a limited partnership used for estate planning.

[3] Marica is a wholly owned subsidiary of Atlas and is primarily an investment arm of the corporation.

[4] There is much dispute between the parties as to who did precisely what, but these matters are not dispositive of the issues on appeal. Suffice to say that,

in 1949. Atlas was incorporated in 1956. Currently, Alex is the majority stockholder, owning 57.68%; John owns 37.7%, and Louise owns 3%.

Throughout Atlas' history, Alex has been in charge of the financial and corporate affairs of the family business; he has had overall control and is Chairman of the Board of Directors. John is also on the three member Board. In 1986, John became President of Atlas, after years of running client relations and field operations. Two of Alex' children are also employed by Atlas, his son Alex III, and his daughter Mary Ann.[5] Alex III is (since John's departure as discussed below) President and is on the Board; Mary Ann is a CPA who performs accounting and financial functions; their brother Michael worked for Atlas in the past, but is no longer employed there.[6]

For years, Atlas operated as a prototypical closely held family corporation. Troubles developed, however, in 1995, when a rift began between Alex and John. The initial dispute arose over property owned by John and Alex in Greenville. Alex convinced John to transfer his interest in the property to his son Alex III for a price less than it was worth. John signed the deed prepared by Alex believing he was conveying only a small portion of his interest in the property to Alex III. After discovering his entire interest had been transferred to Alex III, John became distrustful of Alex and began requesting documents and records concerning the family business. The relationship between the two became very strained.[7] Several subsequent incidents served to heighten the tension.

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by the 1950's, Alex, John and their brother George, now deceased, were operating the family business.

[5] Neither John nor Louise have any children; Alex has four children: Alex III, Michael, Mary Ann and Cathryn.

[6] Louise worked for several years in the counting room but has not worked for the company since the 1970's. She served as Secretary until 1988.

[7] Alex ultimately entered into an exchange of properties to settle this dispute, and John signed a release. This incident, therefore, was not relied upon by the referee with regard to his findings of fraud or his buyout order. Although this incident is not an issue before this Court, it is conveyed to relate the factual background giving rise to the parties' dispute.

In December 1995, the Board and shareholders of Atlas decided to convert Atlas from a subchapter C corporation to a subchapter S corporation. However, in March 1996, Alex, without bringing a vote, unilaterally determined the company would remain a C corporation. Later, in mid-1996, a dispute arose over Atlas' contract to purchase a piece of commercial property. Notwithstanding the contract, John, Alex III and William Freitag (Senior Vice President of Finance and Administration) decided not to go through with the sale. Alex however, without consulting or advising John, elected to go through with the sale. When John learned of Alex' decision, he became extremely upset and allegedly advised Alex III he was quitting his job as President.[8] The next day, Alex III made plans with managers to continue operations in John's absence; John, however, went to the Atlas office in Greenville and visited Atlas offices in Columbia, Orangeburg and Charleston.

The following Monday, John went to work at Atlas doing "business as usual." He was told later that day (by Alex' son Michael) that management was planning John would no longer be President of Atlas. John circulated a memo indicating he intended to remain President; Alex III replied in a memo prepared with the aid of his father, refusing to allow John to continue as president of the company. The following day, Alex refused to allow John to stay on as president of Atlas, and designated Alex III as President. John was offered, but refused a position as a consultant.

In September 1996, Atlas offered to purchase John's interest in Atlas, MEL and K Enterprises,[9] for one million dollars, plus the cancellation of $800,000 obligations owed by John. John refused this offer, believing it too low.[10] John filed this suit in November 1996, seeking to obtain corporate records. The complaint was subsequently amended, naming Louise as a plaintiff , and adding

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[8] The referee found John subsequently made it clear he had no intentions of quitting.

[9] K Enterprises is a general partnership created in 1982 to invest profits in government exempt bonds. It is owned by Alex (49%), John (32%), Alex III (12%), and Louise (7%).

[10] In March, 1998, Atlas offered to buy the interests of John and Louise for four million dollars, less obligations of $825,000. John was advised by a tax attorney in 1995 that his stock in Atlas was worth about ten million dollars.

claims for fraud under the judicial dissolution statute. The complaint sought an accounting, a buyout of John and Louise's shares, and damages for fraud. The trial was bifurcated on the issues of liability and damages.

After a five day hearing, the referee found Alex had engaged in fraud in numerous respects, and found Atlas had engaged in conduct which was fraudulent, oppressive and unfairly prejudicial toward John and Louise. The referee held a buyout was the appropriate remedy under S.C. Code Ann. § 33-14-300(2)(ii) and § 33-14-310(d)(4).[11] The referee found that, at the bifurcated damages hearing, it would be determined whether John and Louise had suffered any damages from the fraud in this regard.[12] The Court of Appeals affirmed in result.

ISSUES

1. Did the Court of Appeals apply the correct standard of review to the referee's findings of fraud?

2. Did the Court of Appeals properly affirm the referee's finding that 21% of the Marica stock had been transferred to K Enterprises?

3. Did the referee properly find Atlas had engaged in oppressive behavior under the South Carolina judicial dissolution statute?

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[11] Section 33-14-310(d)(4) permits a court to order a buyout of shares rather than dissolving the corporation.

[12] The referee also ordered an accounting a) with respect to distributions made to Louise based upon her ownership of 271 shares of stock when she, in fact, owns 301 shares, and b) with respect to 21% of Marica stock, the ownership of which Alex caused to be attributed to his sons when, in fact, it was transferred to K Enterprises. The referee held John and Louise are entitled to an accounting for distributions made to shareholders in 1988 and thereafter, and for payments to Marica shareholders in 1986 and thereafter, and for any payments in connection with the note signed by Michael and Alex III. To the extent the Court of Appeals' opinion may be read as ordering a broader accounting than that ordered by the referee, its opinion is modified.

LAW / ANALYSIS

1. STANDARD OF REVIEW / FINDINGS OF FRAUD

Atlas contends the Court of Appeals applied an improper standard of review to the referee's findings of fraud. We disagree.

An appellate court's scope of review in cases of fraud, where the proof must be by clear, cogent and convincing evidence, is limited to determining whether there is any evidence reasonably supporting the circuit court's findings. Burns v. Wannamaker, 286 S.C. 336, 333 S.E.2d 358 (Ct. App.1985) *aff'd as modified* 288 S.C. 398, 343 S.E.2d 27 (1986). See also Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (in an action at law tried without a jury, the findings of fact of the judge will not be disturbed unless found to be without evidence which reasonably supports them). Cf. Cook v. Metropolitan Life Insurance Co., 186 S.C. 77, 194 S.E. 636 (1938) (in law action for fraud and deceit, the question of fraud was for the trier of fact if more than one reasonable inference could be drawn from the evidence). It is not for the appellate court to weigh the evidence to determine whether it is sufficient to meet the burden of proof. 5A C.J.S. Appeal & Error § 1656(2) n. 71 at 447 (1958). See Southeastern PVC Pipe, Mfg. v. Rothrock Construction Co., 280 S.C. 498, 313 S.E.2d 50 (Ct App. 1984).

Alex challenges the sufficiency of the evidence that he committed fraud regarding the transfer of the 21% of Marica stock, Louise's ownership of 271 shares of Atlas stock, and the handling of Louise's 1990 distribution.

Contrary to Alex' contention, it is not the province of this Court to re-weigh the evidence to determine whether it is clear, cogent and convincing but, rather, we must determine whether there is evidence supporting the lower court's findings. We find evidentiary support in the record for each of the referee's findings of fraud. Townes Associates, Ltd. v. City of Greenville, supra; Burns v. Wannamaker, supra. Accordingly, the referee's findings of fraud are affirmed.[13]

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[13] For a more detailed analysis of the fraud issues, the reader is referred to the Court of Appeals' opinion at 338 S.C. at 585-591, 527 S.E.2d at 376-81. We concur with the Court of Appeals' treatment of the fraud issues.

2. TRANSFER OF MARICA STOCK

Atlas contends the referee erred in finding 21% of Marica[14] stock was transferred to K Enterprises; it claims John and Louise have no standing to challenge the transfer, and the referee had no jurisdiction to find the stock was transferred as K Enterprises is not a party to the action. We disagree.

Citing Todd v. Zaldo, 304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991), Atlas contends John and Louise have no standing as a cause of action for recovery of corporate assets belongs to the corporation, not the individual shareholders. As noted by the Court of Appeals, however, K Enterprises is a partnership, not a corporation, such that Todd v. Zaldo is inapplicable.[15] We find John and Louise clearly have standing to contest the improper attribution of the 21% stock to Alex III and Michael.

Atlas also asserts the referee was without jurisdiction to make a finding regarding the ownership of K Enterprises because a) Alex III and Michael were necessary parties, and b) K Enterprises may not legally hold stock under the terms of the partnership agreement. We disagree.

Alex III and Michael were not necessary parties because John and Louise did not seek any remedy against them; they merely sought damages from Atlas and Alex for the fraudulent transfer of the shares. Moreover, Alex III and Michael were originally parties but were dismissed by consent of all parties. See Rule 12(h)(2), SCRCP (defense of failure to join indispensable parties is waived if not raised at trial). Finally, Atlas' claim that K Enterprises may not legally

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[14] In 1986, Atlas changed from a subchapter C corporation to a subchapter S corporation, necessitating a transfer, for tax purposes, of 21% of its ownership of Marica. At trial, Atlas' records attributed this 21% ownership change as going to Alex III and Michael. John and Louise contended they neither consented to nor had knowledge of this transfer. The referee found that Alex had fraudulently caused the 21% to be attributed to Alex III and Michael when, in fact, it had been transferred to K Enterprises.

[15] Moreover, even if Todd were applicable, John and Louise have standing to assert the loss of their personal percentage of partnership assets in K Enterprises as a result of the stock being attributed to Alex III and Michael. Todd (individual stockholder may bring an action for loss of his personal assets).

hold stock is without merit. Contrary to Atlas' contention, nothing in the partnership agreement prohibits K Enterprises from holding stock; it specifically permits that the partnership may undertake any additional activities as decided by a majority interest.

Accordingly, the referee properly found the 21% of Marica stock, which was being improperly attributed to Alex' children, was actually transferred to K Enterprises.

3. BUYOUT DUE TO OPPRESSIVE CONDUCT

a. Oppression Under S.C. Code Ann. § 33-14-300

The referee found that, taken together, the majority's actions were "illegal, fraudulent, oppressive or unfairly prejudicial," justifying a buyout of John and Louise's interests under S.C. Code Ann. § 33-14-300(2)(ii) and § 33-14-310(d)(4).[16] Accordingly, the referee held a buyout was in order under S.C. Code Ann. § 33-14-300(2)(ii) and 33-14-310(d)4).

The Court of Appeals affirmed the referee's holdings. In making this ruling, the Court of Appeals defined the statutory terms "oppressive" and "unfairly prejudicial" as follows:

> 1) A visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely; or

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[16] Section 33-14-300(2)(ii) permits a court to order dissolution if it is established by a shareholder that "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation)." Section § 33-14-310(d)(4) permits a court to make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

2) A breach of the fiduciary duty of good faith and fair dealing; or

3) Whether the reasonable expectations of the minority shareholders have been frustrated by the actions of the majority; or

4) A lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or

5) A deprivation by majority shareholders of participation in management by minority shareholders.

Atlas contends the Court of Appeals' definitions of oppressive, unfairly prejudicial conduct are beyond the scope of our judicial dissolution statute. We agree. In our view, the Court of Appeals' broad view of oppression is contrary to the legislative intent and is an unwarranted expansion of section 33-14-300.

South Carolina's judicial dissolution statute was amended in 1963 in recognition of the growing trend toward protecting minority shareholders from abuses by those in the majority. Section § 33-14-300(2)(ii) now permits a court to order dissolution if it is established by a shareholder that "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation)."[17] The official comment to section 33-14-

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[17] Prior to 1963, dissolution could be based only upon illegal, fraudulent or oppressive conduct. In an attempt to afford minority shareholders greater protection, the legislature amended the statute in 1963 to include "unfairly prejudicial" conduct. See 1963 S.C. Acts 282 § 89; S.C. Code § 12-22.15(a)(4)(1970). The statute, as amended, "broadens the scope of actionable conduct by providing the frozen-out minority shareholder a right of action based on conduct by the majority shareholders which might not rise to the level of fraud." Joshua Henderson, Buyout Remedy for Oppressed Minority Shareholders, 47 S.C. L. Rev. 195, 199 (Autumn 1995) (hereinafter Henderson). This trend arose due to the nationwide epidemic of unfair treatment of minority shareholders. See Harry J. Haynsworth, The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension, 35 Clev. St. L. Rev. 25 (1986-87); F.H. O'Neal, Oppression of Minority Stockholders: Protecting

300 provides:

> The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion in the application of a general standard to concrete circumstances. The court should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation.

Section 33-14-300 cmt. 2(b). Although the terms "oppressive" and "unfairly prejudicial" are not defined in section 33-14-300, the comment to S.C.Code Ann. § 33-18-400 (1990), which allows shareholders in a statutory close corporation to petition for relief on the grounds of oppressive, fraudulent, or unfairly prejudicial conduct provides:

> No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants.[18]

Minority Rights, 35 Clev. St. L. Rev. 121 (1986-87). In the latter article, Prof. O'Neal observed:

> Unfair treatment of holders of minority interests in family companies and other closely held corporations by persons in control of those corporations is so widespread that it is a national business scandal.
>
> The amount of litigation growing out of minority shareholder oppression--actual, fancied or fabricated--has grown tremendously in recent years, and the flood of litigation shows no sign of abating.

Id. at 121.

[18] The courts of this state have only peripherally addressed the meaning of "oppressive" or "unfairly prejudicial" conduct. In one of the earliest cases, Towles v. S.C. Produce Ass'n, 187 S.C. 290, 197 S.E. 305 (1908), the Court found the failure to pay dividends for three years did not warrant dissolution under the

Given the Legislature's deliberate exclusion of a set definition of oppressive and unfairly prejudicial conduct, we find the Court of Appeals' enunciation of rigid tests is contrary to the legislative intent.

Under the Court of Appeals' holding, a finding of fraudulent/oppressive conduct may be based upon any **one** of its alternative definitions. We do not believe the Legislature intended such a result. In particular, we do not believe the Legislature intended a court to judicially order a corporate dissolution **solely** upon the basis that a party's "reasonable expectations" have been frustrated by majority shareholders. To examine the "reasonable expectations" of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33-14-300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.

In adopting the "reasonable expectations" approach, the Court of Appeals cited the North Carolina case of Meiselman v. Meiselman, 307 S.E.2d 551 (N.C. 1983).[19] In Meiselman, a minority shareholder in a family-owned close

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statute since the lack of dividends had been in an attempt to rehabilitate a weak financial corporation. The Towles court noted, however, "this statute was intended to afford minority stockholders a method of relief against mismanagement of a corporation by majority stockholders, or the suspension of dividends for the purpose of freezing out minority stockholders, or depressing the market value of the stock of the corporation. . ." 187 S.C. at 295, 197 S.E. at 307. In Segall v. Shore, 269 S.C. 31, 236 S.E.2d 316 (1977), the defendants had misappropriated over $1,000,000 of corporate profits in spite of an earlier opinion of this Court directing them to restore profits and account. The master found, and this Court upheld, that the defendants had acted oppressively and unfairly. In Roper v. Dynamique Concepts, Inc., 447 S.E.2d 218 (Ct. App. 1994), the Court of Appeals held the issuance of additional shares of stock as a last ditch effort to raise capital for a financially troubled corporation was sufficient to overcome a claim of oppression, since the shares had been issued in good faith.

[19] Meiselman has been referred to as a "leading case" in adoption of this approach. See Dean F. Hodge O'Neal, O'Neal's Close Corporations, § 9.30 at 144

corporation was "frozen out" of the family corporation in much the same fashion as John and Louise claim they have been frozen out of Atlas. The minority shareholder brought an action requesting a buyout of his interests under N.C.G.S. § 55-125.1(a)(4), which permits a North Carolina court to liquidate assets when it is "**reasonably necessary for the protection of the rights or interests of the complaining shareholders**." (Emphasis supplied).

In holding the minority shareholder was entitled to relief, the Meiselman court noted that the trial court had focused on the conduct of the majority shareholder, using standards of "oppression," "overreaching," "unfair advantage," and the like. 307 S.E.2d at 567. The Court found this was error because the North Carolina statute in question required the trial court to focus on the plaintiff's "rights and interests"– his "reasonable expectations"– in the corporate defendants, and determine whether those rights or interests were in need of protection. Id.[20] The focus in Meiselman, based upon the language of the North Carolina statute, was upon the **interests** of the minority shareholder, as opposed to the **conduct** of the majority.

Unlike the North Carolina statute in Meiselman, section 33-14-300 does not place the focus upon the "rights or interests" of the complaining shareholder but, rather, specifically places the focus upon the **actions** of the majority, i.e., whether they "have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder." Given the language of our statute, a "reasonable expectations" approach is simply inconsistent with our statute.

(3d Ed. 1991) (hereinafter O'Neal); see also Robert S. McLean, Minority Shareholders' Rights in the Close Corporation Under New North Carolina Business Corporation Act, 68 N.C. L. Rev. 1109, 1114 (1989).

[20] As in North Carolina, California also places the emphasis on the interests of the minority, as opposed to the actions of the majority. See Cal. Corp. Code § 1800 (*cited* in O'Neal, supra, § 9.29 at 131, n. 8). See also Kemp v. Beatley Inc., 473 N.E.2d 1173 (N.Y. 1984) (interpreting McKinney's Business Corporation Law § 1104-a which allows court to liquidate assets if a) it is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment or b) it is reasonably necessary to protect rights and interests of shareholders).

We recognize that a number of leading authorities, such as Dean Haynsworth, advocate a "reasonable expectations" approach to oppressive conduct:

> The third definition of oppression, initially derived from English case law and long advocated by close corporation experts like Dean F. Hodge O'Neal, is **conduct which frustrates the reasonable expectations of the investors**. . . . It has gained widespread acceptance in recent years, particularly in cases involving close corporations where all the shareholders expect to be employed by the corporation and to be actively involved in its management and one of the shareholders is fired and then 'frozen out' from any compensation or participation in management.

Harry J. Haynsworth, Special Problems of Closely Held Corporations, C688 ALI-ABA 1, 53 (1991)(emphasis supplied; internal citations omitted).

Although several jurisdictions have adopted "reasonable expectations" as a guide to the meaning of "oppression,"[21] it has been noted by one commentator that "no court has adopted the reasonable expectations test without the assistance of a statute." Ralph A. Peeples, The Use and Misuse of the Business Judgment Rule in the Close Corporation, 60 Notre Dame L. Rev. 456, 505 (1985) (hereinafter Peeples).[22] One criticism of the "reasonable expectations" approach is that it "ignores the expectations of the parties other than the dissatisfied shareholder." See Lerner v. Lerner Corp., 750 A.2d 709, 722 (Md. 2000) (citing Robert W. Hillman, The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relevant Permanence of Partnerships and Close Corporations., 67 Minn. L. Rev. 1, 75-78 (1982)). One recent commentator has suggested that a pure "reasonable expectations" approach overprotects the

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[21] See O'Neal, supra at § 9.30, pp. 142-143, *citing* Stefano v. Coppock, 705 P.2d 443, 446 (Alaska 1985); Fox v. 7L Bar Ranch Co., 645 P.2d 929 (Mont. 1982); Bavlik v. Sylvester, 411 N.W.2d 383 (N.D. 1987); Masinter v. WEBCO, 262 S.E.2d 433, 442 (W.Va. 1980).

[22] Peeples notes, "[t]he most unique feature of the reasonable expectations analysis is the lack of a bad faith requirement. At most, the plaintiff is required to show that he or she was not at fault, not that the defendant acted in bad faith." 60 Notre Dame L. Rev. at 504.

minority's interests. Douglas K. Moll, Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective, 53 Vand. L. Rev. 749, 826 (April 2000)(hereinafter Moll). Similarly, it has been suggested that the reasonable expectations approach is "based on false premises, invites fraud, and is an unnecessary invasion of the rights of the majority." J.C. Bruno, Reasonable Expectations:– A Primer on An Oppressive Standard, 71 Mich. B. J. 434 (May 1992).[23] See also Sandra K. Miller, How Should U.K. and U.S. Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct Be Reformed?, 36 Am. Bus. L.J. 579, 632 (Summer 1999)(suggesting the "vague and uncertain reasonable expectation test undermines the institution of stare decisis and fails to foster judicial accountability.").

We find adoption of the "reasonable expectations" standard is inconsistent with section 33-14-300, which places an emphasis not upon the minority's expectations but, rather, on the actions of the majority. We decline to adopt such an expansive approach to oppressive conduct in the absence of a legislative mandate.[24] We find, consistent with the Legislature's comment to section 33-18-400, that the terms "oppressive" and "unfairly prejudicial" are elastic terms whose meaning varies with the circumstances presented in a particular case. As noted by one commentator:

> While business corporation statutes may attempt to provide certainty and clarity in the law to enhance the attractiveness of doing business, the definition of oppression has been left to judicial construction on a case-by-case basis. Such an approach has been suggested by the Model Close Corporation Supplement which expressly indicates that no attempt has been made to statutorily

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[23] Bruno theorizes that adoption of the reasonable expectations standard 1) will create instability and uncertainty in the field of corporate law: 2) increase litigation as every minority shareholder will assert reasonable expectations were frustrated, 3) discourage majority or wholly owned corporations from raising capital through offerings to minority interests,and 4) is unnecessary as present safeguards are adequate. Id.

[24] If the legislature wishes to afford such expansive rights to minority shareholders, it may amend the statute to include language similar to the statutes in North Carolina, California, and New York. Accord Steinke v. SC Dep't of Labor, 336 S.C. 373, 520 S.E.2d 142 (1999).

> define oppression, fraud or prejudicial conduct, leaving these "elastic terms" to judicial interpretation. . . . The judicial construction of the definition of oppressive conduct is well-suited to the diversified, fact-specific disputes among shareholders of closely-held corporations. However, the judicial development of a meaningful standard for defining oppressive conduct, apart from fraud or mismanagement, is a difficult task.

Sandra K. Miller, Should the Definition of Oppressive Conduct by the Majority Shareholders Exclude a Consideration of Ethical Conduct And Business Purpose, 97 Dick. L. Rev. 227, 229-230 (Winter 1993). We find a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior, to be the proper inquiry under S.C. Code § 33-14-300.[25] Accordingly, the Court of Appeals' opinion is modified to the extent it adopted a "reasonable expectations" approach.

b. Oppression Under Circumstances of This Case

The question remains whether the conduct of Atlas toward John and Louise was "oppressive" and "unfairly prejudicial" under the factual circumstances presented. We find this case presents a classic example of a majority "freeze-out," and that the referee properly found Atlas had engaged in conduct which was fraudulent, oppressive and unfairly prejudicial. Accordingly, the referee properly ordered a buyout of their shares pursuant to S.C. Code Ann. § 33-14-310(d)(4).

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[25] We agree with Professor Miller's suggestion that the best approach to the statutory definition of oppressive conduct may well be a case-by-case analysis, augmented by factors or typical patterns of majority conduct which tend to be indicative of oppression, such as exclusion from management, withholding of dividends, paying excessive salaries to majority shareholders, and analogous activities. Sandra K. Miller, How Should U.K. and U.S. Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct Be Reformed?, 36 Am. Bus. L.J. 579 , 585-586 (Summer 1999). In this regard, we note that we do not hold that a court may never consider the parties' reasonable expectations, or the other items enumerated by the Court of Appeals, as **factors** in assessing oppressive conduct; such factors, however, are not to be utilized as the sole test of oppression under South Carolina law.

The particular problems encountered by those in the close corporation setting was noted in Meiselman, 307 S.E.2d at 559 (citing J.A.C. Hetherington, Special Characteristics, Problems, and Needs of the Close Corporation, 1969 U.Ill.L.F. 1, 21 (1969)):

> The right of the majority to control the enterprise achieves a meaning and has an impact in close corporations that it has in no other major form of business organization under our law. Only in the close corporation does the power to manage carry with it the de facto power to allocate the benefits of ownership arbitrarily among the shareholders and to discriminate against a minority whose investment is imprisoned in the enterprise. The essential basis of this power in the close corporation is the inability of those so excluded from the benefits of proprietorship to withdraw their investment at will.

This unequal balance of power often leads to a "squeeze out" or "freeze out"[26] of the minority by the majority shareholders. See F. Hodge O'Neal, Oppression of Minority Shareholders: Protecting Minority Rights, 35 Clev. St. L. Rev. 121, 125 (1986/1987) (hereinafter O'Neal's Oppression); Anthony and Borass, Betrayed, Belittled . . . But Triumphant: Claims of Shareholders in Closely Held Corporations, 22 Wm. Mitchell L. Rev. 1173, 1175 (1996). In the close corporation, a shareholder

> [F]aces a potential danger the shareholder of a public corporation generally avoids – the possibility of harm to the fair value of the shareholder's investment. At its extreme, this harm manifests itself as the classic freeze out where the minority shareholder faces a trapped investment and an indefinite exclusion form participation in business returns. The position of the close corporation shareholder, therefore, is uniquely precarious.

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[26] "Freeze out" is often used as a synonym for "squeeze out." The term squeeze out means the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants. 2 F. Hodge O'Neal & Robert B. Thompson, O'Neal's Oppression of Minority Shareholders, § 1.01 at 1 (2d ed. 1999).

Moll, 53 Vand. L. Rev. at 790-91. Common freeze out techniques include the termination of a minority shareholder's employment, the refusal to declare dividends,[27] the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder. Often, these tactics are used in combination.[28] Moll, 53 Vand. L. Rev. at 757-758. In a public corporation, the minority shareholder can escape such abuses by selling his shares; there is no such market, however, for the stock of a close corporation. Id.[29] "The primary vulnerability of a minority shareholder is the specter of being 'locked in,' that is, having a perpetual investment in an entity without any expectation of ever receiving a return on that investment." Charles Murdock, The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation

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[27] Majority freeze out schemes which withhold dividends "are designed to compel the minority to relinquish stock at inadequate prices. When the minority stockholder agrees to sell out at less than fair value, the majority has won." Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975)(internal citations omitted). See also Robert B. Thompson, The Shareholder's Cause of Action for Oppression, 48 Bus. Law, 699, 703-4 (1993) (noting that in a classic "freeze out," the majority first denies the minority any return and then proposes to buy the shares at a very low price).

[28] A host of factors is identified in 1 F. Hodge O'Neal and Robert B. Thompson, O'Neal's Oppression of Minority Shareholders, Chap. 3 (2d ed. 1999), including, but not limited to, dividend withholding, eliminating minority shareholders from directorate and excluding them from employment, siphoning off corporate earnings via high compensation, leases and loans favorable to majority shareholders, failure to enforce contracts for the benefit of the corporation, appropriation or corporate assets, contracts or credit for personal use, usurping corporate opportunities, transactions between a parent corporation and a subsidiary, withholding information from minority shareholders.

[29] Effectively, the minority shareholder's capital investment is "held hostage by those in control of the corporation because there is no marketplace in which the minority may sell their shares." Sandra L. Schlafge, Comment, Pedro v. Pedro: Consequences for Closely Held Corporations and the At-Will Doctrine in Minnesota, 76 Minn. L. Rev. 1071, 1076 (1992).

of Minority Shares, 65 Notre Dame L. Rev. 425, 477 (1990).

The present case presents a classic situation of minority "freeze out." The referee considered the following factors: 1) Alex' unilateral action to deprive Louise of the benefits of ownership in her shares in Atlas, and subsequent reduction in her distributions based upon the reduced number of shares,[30] 2) Alex' conduct in depriving John and Louise of the 21% interest of Marica stock, 3) the fact that there is no prospect of John and Louise receiving any financial benefit from their ownership of Atlas shares,[31] 4) the fact that Alex and his family continue to receive substantial benefit from their ownership in Atlas, 5) the fact that Atlas has substantial cash and liquid assets, very little debt and that, notwithstanding its ability to declare dividends, it has indicated it would not do so in the foreseeable future, 6) the fact that Alex, majority shareholder in total control of Atlas, is totally estranged from John and Louise, 7) Atlas' extremely low buyout offers to John and Louise, and 8) the fact that Atlas is not appropriate for a public stock offering at the present time.[32]

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[30] As detailed more fully in the Court of Appeals' opinion, Atlas made a 1990 distribution to Louise based upon her ownership of 271 shares of Atlas stock when the referee found Louise, in fact, owns 301 shares of stock.

[31] The referee considered a number of factors in determining they would receive no financial benefit including salary, retirement benefits, John's lack of status as President, the fact that John would no longer receive loans from the company since he lost his employment, the loss of fringe benefits, the fact that John and Louise were paying their own attorney's fees, and the fact that a sale of Atlas was not contemplated. The referee then weighed these factors against the benefits still received by Alex and his family.

[32] The referee ruled Atlas could not rely upon the "Business Judgment Rule" to justify its treatment of John and Louise. The Business Judgment Rule immunizes management from liability in corporate transactions undertaken by management where there is a reasonable basis to indicate the transaction was made in good faith. BLACK'S LAW DICTIONARY 181 (5th Ed. 1979). See Goddard v. Fairways Dev. Gen. Partnership, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1992)(in dispute between directors of homeowners association and aggrieved homeowners, conduct of directors should be judged by business judgment rule, and absent showing of bad faith, dishonesty, or incompetence, judgment of directors will not be set aside by judicial action). Given the ample

These factors, when coupled with the referee's findings of fraud, present a textbook example of a "freeze out" situation. Short of a buyout of their shares, it is unlikely John and Louise will ever receive any benefit from their ownership interests in Atlas. We find the referee properly concluded the totality of the circumstances demonstrated that the majority had acted "oppressively" and "unfairly prejudicially" to John and Louise. Accordingly, we affirm the referee's finding that a buyout of John and Louise's shares is the appropriate remedy under the circumstances of this case.

We are constrained to note that this case cries out for settlement between the parties. In fact, both parties conceded both in brief and at oral argument before this Court that a buyout is in order; it is at this point simply a matter of price. It is patent from the record before us that Atlas has an abundance of cash and liquid assets which would permit a buyout. Given the parties' ages and the need for a resolution of this matter, we simply cannot fathom why an amicable settlement cannot be reached between the parties.

CONCLUSION

Under South Carolina's judicial dissolution statute, the Court of Appeals erred in attempting to define oppressive and unfairly prejudicial conduct. Further, we reject the "reasonable expectations" approach adopted by the Court of Appeals. Under section 33-14-300, the proper focus is not on the reasonable expectations of the minority but, rather, on the conduct of the majority. Such an inquiry is to be performed on a case-by-case basis, with an inquiry of all the circumstances and an examination of the many factors hereinabove recited. We believe such an inquiry is in keeping with the Legislature's intention in enacting sections 33-14-300 and 33-14-310.

Under the factual circumstances presented here, we find the majority's conduct clearly constitutes oppressive and unfairly prejudicial conduct entitling John and Louise to a buyout of their shares. Accordingly, the Court of Appeals' opinion is affirmed in result as modified and the case remanded to the referee to determine a valuation of the John and Louise's shares, and to ascertain any

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evidence demonstrating a lack of good faith in this case, we find the Business Judgment Rule has no application here.

damages suffered as a result of Alex' fraud.[33]

AFFIRMED IN RESULT AS MODIFIED AND REMANDED.

MOORE, BURNETT, JJ., and Acting Justices Henry F. Floyd and George T. Gregory, Jr., concur.

[33]Atlas asserts the Court of Appeals erred in dismissing its counterclaim for the $133,932 negative balance in John's MEL account. In brief, John concedes the negative balance "is, indeed, on the books and may be rightly taken into account in future valuation proceedings." Accordingly, as John concedes the debt is owed there is nothing for this Court to review. The referee may consider this fact during the valuation proceeding.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Linda Garvin, Respondent,

v.

Bi-Lo, Inc., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25245
Heard November 2, 2000 - Filed February 5, 2001

REVERSED

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, of Charleston, for respondent.

C. Mitchell Brown and Steven A. McKelvey, Jr., of Nelson, Mullins, Riley & Scarborough, of Columbia, Rivers S. Stilwell, of Nelson, Mullins, Riley & Scarborough, of Greenville, and Heather K. Coleman of Martin Law Firm, of Charleston, for petitioner.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Garvin v. Bi-Lo, 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). We reverse.

FACTS

The pertinent facts, as set forth by the Court of Appeals, are as follows:

> Garvin was shopping at Bi-Lo # 284 in Monck's Corner when she saw a display of canned items advertised at four for $1.00. The items were stacked in the boxes they had been shipped in, with the tops of the boxes cut off. There were approximately twenty-four cans in each box. According to Garvin, she reached up and took two cans off the top and placed them in her shopping cart. She then reached back to get two more cans, but before she touched them, approximately fifteen cans came tumbling down. Some of the cans hit Garvin in the face, cutting her above her lip. A store employee gave her ice to stop the bleeding.

337 S.C. at 438-39, 523 S.E.2d at 482. Garvin filed suit against Bi-Lo alleging, *inter alia*, Bi-Lo had negligently created a condition which was dangerous to its invitees. Bi-Lo was granted summary judgment on the ground that a) Bi-Lo had no notice of a problem with cans falling, and b) there was no evidence Bi-Lo committed a negligent act which caused the cans to fall. The Court of Appeals reversed, finding a genuine issue of material fact as to whether or not Bi-Lo had negligently stacked the cans.

ISSUE

> Did the Court of Appeals err in reversing the trial court's grant of summary judgment in favor of Bi-Lo?

DISCUSSION

Bi-Lo contends the allegations upon which Garvin bases her claim of negligence are insufficient to create a jury question as to whether the display created a dangerous condition. We agree.

A merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in reasonably safe condition. Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969). To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum Inc., 296 S.C. 204, 371 S.E.2d 530 (1988); Pennington v. Zayre Corp, 252 S.C. 176, 165 S.E.2d 695 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957); Cook v. Food Lion, Inc., 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1998).

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Etheridge v. Richland County School Dist. One, 341 S.C. 307, 534 S.E.2d 275 (2000). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. Id.

The evidence relied upon by Garvin is as follows: 1) the cans were stacked in their original boxes at the end of an aisle, 2) the cans were stacked above Garvin's height of 5'2" tall, and 3) the cans were put on sale at four for one dollar. This evidence is insufficient, as a matter of law, to demonstrate the store created a dangerous condition. Absent evidence of some defective manner of stacking the boxes, or that Bi-Lo was on notice that the stacked cans had become rickety, there is simply no evidence from which a jury could find a dangerous condition was created by Bi-Lo. Cf. Chaslon v. Waldbaum, Inc., 697 N.Y.S.2d 342 (A.D. 1999) (in absence of any evidence display was defective or that defect in display was cause of bottle falling, which caused plaintiff's accident, store was entitled to summary judgment). To accept Garvin's contention would render Bi-Lo an insurer of its customers' safety. This is simply not the law in South Carolina. See Felder v. K-Mart, 297 S.C. 446, 377 S.E.2d 332 (1989) (merchant is not an insurer of the safety of his customers but rather owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition).[1]

[1] A merchant is not required to maintain the premises in such condition that no accident could happen to a patron using them. Denton v. Winn-Dixie

Accordingly, in the absence of evidence Bi-Lo created a dangerous condition, there is no genuine issue of material fact such that summary judgment was properly granted by the trial court. The Court of Appeals' opinion is

REVERSED.

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

Greenville, Inc., 312 S.C. 119, 439 S.E.2d 292 (Ct. App. 1993).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Gregory Braxton, Appellant.

Appeal From Barnwell County
Gary E. Clary, Circuit Court Judge

Opinion No. 25246
Heard December 5, 2000 - Filed February 5, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, 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 Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for respondent.

JUSTICE BURNETT: Appellant was indicted on charges of murder, kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime. He was convicted of murder and possession of a weapon during the commission of a violent crime, but acquitted on the remaining charges. Appellant was sentenced to life imprisonment for murder and five years, consecutive, for the weapon possession charge. We affirm.

FACTS

Melissa Griffith (the victim) was last seen at Country Folks, the convenience store where she worked. When the victim did not arrive home as expected, police went to Country Folks. Although the store's front door was locked, the alarm had not been activated. A paper bag containing $1700 was missing; however, the cash register drawer containing $150 was sitting on a stool behind the counter. There were no signs of a struggle. Neither the victim nor her car were present.

Later the same evening, the victim's car was located in a cornfield 1½ miles away from Country Folks. The victim was outside the vehicle. She had been shot four times. Tennis shoe tracks led from the car.

A bloodhound followed the tracks to appellant's home. Police searched appellant's home and found a pair of tennis shoes which were consistent in size and design with the tracks near the victim's car, but were not positively identified as having made the tracks. A witness testified appellant stated, "[m]an, you can't arrest me just because my shoes match."

During the search, police found a nine millimeter Ruger pistol, wrapped in a t-shirt, in vines beside appellant's home. Before the police located the pistol, appellant declared, "that's not my gun." An expert witness testified the cartridge casings found at the victim's car were fired from the nine millimeter Ruger found in appellant's yard. Appellant's brother testified the t-shirt wrapped around the Ruger belonged to appellant.

Appellant's friend, Tony Berry, testified the evening before the murder, he, appellant, appellant's brother Stephen, and their brother Ricco were playing cards. Appellant and Stephen began arguing. When appellant "went in the back room in the back part of the house and reached down," Berry ran out of the house. Berry testified he knew appellant had a nine millimeter gun and he thought appellant was going to get it. Berry returned a short while later; he did not see a gun.

The victim's husband, Anthony Griffith, testified about an incident which occurred at Country Folks one month before the victim's murder. Griffith testified he was helping his wife at Country Folks when appellant entered the store. Appellant asked for a package of cigarettes. According to Griffith, when his wife heard appellant's voice, she dropped a handful of change into the cash register. When she refused to sell appellant cigarettes, appellant and the victim argued. Griffith's wife went to the telephone. Thereafter, Griffith and appellant argued. Appellant left. Griffith stated his wife appeared "very upset, angry, and scared" when appellant asked her for cigarettes.

ISSUE

Did the trial judge err by improperly admitting two instances of bad act evidence?

DISCUSSION

Appellant argues the trial court erred in allowing Berry to testify about the argument between he and his brother the night before the murder. In addition, he contends the trial judge erred by allowing Griffith to testify he and the victim argued a month before her murder. Appellant characterizes both Berry and Griffith's testimony as bad act evidence. We disagree.

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible, unless constitutionally,

statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The evidence of the prior bad acts must be clear and convincing to be admissible. State v. King, supra. The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. Id. Further, even though the evidence is clear and convincing and falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; State v. King, supra.

That portion of Berry's testimony stating he knew appellant possessed a nine millimeter pistol was relevant as it tended to identify appellant as the possessor of the murder weapon, a nine millimeter pistol. Rule 401, SCRE (definition of relevant evidence). The identity of the user of the murder weapon was the critical issue at trial. Accordingly, the probative value of this portion of Berry's testimony substantially outweighed any claim of undue prejudice. Rule 403, SCRE.

However, Berry could have testified he knew appellant possessed a nine millimeter pistol without describing the argument between appellant and his brother. Testimony regarding the argument was irrelevant to identification of appellant as the possessor of the murder weapon as Berry testified he did not see appellant with a gun at the time of the argument.

Clearly, the State wanted Berry to testify about the argument between appellant and his brother on the evening before the murder to establish appellant was a violent person and quick to draw his pistol. This testimony regarding appellant's character was inadmissible. Rule 404(a), SCRE (evidence of a person's character or character trait is inadmissible for

the purpose of establishing the person acted in conformity with that particular character or trait on a particular occasion).[1]

Nonetheless, the testimony regarding appellant's violence and willingness to produce a pistol was cumulative to other evidence offered at trial. For instance, Stephen also testified he and appellant argued and appellant drew a pistol on the evening before the murder. Similarly, appellant's cousin testified appellant took the Ruger from him several months before the murder. When he asked appellant to return the pistol, appellant put the gun to his cousin's face and told him he would shoot him. Accordingly, while we conclude Berry's testimony about the incident was inadmissible character evidence, its admission was harmless error. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (the admission of improper evidence is harmless where it is cumulative to other evidence).[2]

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[1]Rule 404(a)(1), SCRE, however, allows character trait evidence if offered by the accused or offered by the State to rebut the accused's character trait evidence. See State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990) (when the accused offers evidence of his good character regarding specific character traits relative to the crime charged, the State may cross-examine as to particular bad acts or conduct relating to the traits focused on by the accused).

[2]Appellant relies on State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990), to support his claim there was no connection between his possession of a weapon the night before the murder and the crimes for which he was on trial. In Douglas, the defendant admitted ownership of the murder weapon, a pistol, but claimed he had loaned it to someone before the shooting. Three witnesses testified, hours before the shooting, they had been "horseplaying" with appellant when he produced a pistol, cocked it, and threatened to kill them. The State argued this bad act testimony was relevant to the defendant's state of mind at the time of the shooting. This Court disagreed, finding there was no logical connection between appellant's state of mind while "horseplaying" with his friends and his state of mind at the time of the shooting the unrelated victim.

We further conclude the trial judge did not err in admitting Griffith's testimony. Contrary to appellant's assertion, Griffith's testimony did not refer to any bad act by appellant. It merely revealed appellant and the victim argued, apparently about her refusal to sell him cigarettes. Although the incident suggests there was a prior disagreement between appellant and the victim, there is no indication the prior disagreement was the result of a bad act committed by appellant.

In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide. State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996) (evidence of controversial telephone calls and loud altercations between victim and defendant were admissible to establish strained nature of parties' relationship); State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957) (evidence defendant shot victim six or seven weeks prior to murder was admissible); State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908) (evidence of previous quarrels and ill feeling between the victim and defendant arising out of child custody controversy was admissible); 22A C.J.S. Criminal Law § 721 (1989) (evidence of relations existing between accused and victim prior to crime are admissible). Prior disputes between the victim and defendant may be relevant to establish the accused's motive for committing the crime and motive may have bearing on the identity of the accused as the perpetrator of the crime. State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (testimony regarding prior disputes between white defendant and family of black victim, one of which involved defendant's flying the Confederate flag on Independence Day, was relevant to motive and admissible); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) (testimony concerning a verbal altercation between victim and defendant prior to the murder was admissible as evidence of accused's motive and related to defendant's identity as perpetrator).

Douglas is easily distinguishable from the present case. Unlike the testimony in Douglas, Berry offered no testimony appellant committed a bad act. He merely testified appellant and his brother argued.

Griffith's testimony was properly admitted as evidence of a prior dispute and ill feelings between the victim and appellant and was relevant to establish appellant's motive to commit the crime and his identity as the perpetrator. State v. Williams, supra. Moreover, the probative value of this testimony substantially outweighed any danger of undue prejudice to appellant.

Accordingly, appellant's convictions and sentences are **AFFIRMED.**

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, ... Respondent,

v.

Sally Caulder Parker and Timothy Kirby, ... Appellants.

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 3290
Heard November 8, 2000 - Filed January 29, 2001

VACATED

Assistant Appellate Defender Katherine Carruth Link, of SC Office of Appellate Defense, of Columbia, for appellants.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General Robert Bogan, all of Columbia; and Solicitor Jay E. Hodge, Jr., of Darlington, for respondent.

CURETON, J.: In this criminal action, Timothy Kirby and Sally C. Parker appeal from their grand larceny convictions on the ground that the trial court lacked the requisite subject matter jurisdiction.[1] We agree and vacate the convictions.

FACTS AND PROCEDURAL HISTORY

The Marlboro County grand jury indicted Kirby and Parker on a single count of armed robbery for perpetrating a sham robbery of Boulevard Express, a local convenience store, on November 2, 1997. The crime netted the pair $1,192.00 in currency and two pistols. Kirby was also indicted for contributing to the delinquency of a minor because he arranged to have Sedrick Alford, a juvenile acquaintance, participate in the crime.

On the day in question, Kirby approached Alford and asked if he would like to make some money. Alford agreed and the pair traveled to Boulevard Express at approximately 5:00 p.m. Kirby left Alford at a nearby fast-food restaurant while he entered the convenience store. Therein, Kirby spoke with Parker as she worked. Kirby revealed to Alford the plan to stage an armed robbery of the store later that evening while Parker was still working. The plan called for Alford to enter the store alone wearing a mask and carrying a pistol, both provided by Kirby, and demand money and a pistol from Parker, who would fully cooperate.

Alford carried out the plan at approximately 7:00 p.m. Parker aided Alford during the sham robbery by retrieving money from the store's safe and voluntarily showing him where the store's firearms were secreted behind the sales counter. Alford received $60 and a new pair of tennis shoes for his participation in the crime.

While investigating the apparent armed robbery, police received a tip

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[1] Kirby was also found guilty of contributing to the delinquency of a minor, but that conviction is not a part of this appeal.

which implicated Alford. On November 3, 1997, Alford was questioned by police and freely confessed his involvement in the sham robbery. He also revealed Kirby and Parker's involvement.

Based on Alford's confession, the police interviewed Parker. Although she admitted to having recognized Alford during the robbery, she denied any participation in it and claimed to have concealed Alford's identity from police in order to protect him. She did not testify at trial. Kirby testified and denied any involvement in the crime.

At the end of the state's case, the trial court directed a verdict for the defendants stating:

> [this] is clearly a grand larceny case. I grant your motion as to armed robbery. I grant it as to robbery. But I will charge a *less[e]r included offense* of larceny which is the taking of the property of another with the intent of depriving the owner permanently thereof in the amount greater than $1,000. (emphasis added).

No one objected to the ruling. The jury found the pair guilty of grand larceny. This appeal followed.

LAW/ANALYSIS

Parker and Kirby argue the trial court lacked subject matter jurisdiction to convict them of grand larceny because it is not a lesser-included offense of the charged offense of armed robbery. We agree.

I.

Issues involving subject matter jurisdiction may be raised at any time, including for the first time on appeal. Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999). Therefore, we consider the trial court's jurisdiction to try Parker and Kirby for grand larceny despite the lack of a ruling by the trial court

on the issue.

A trial court acquires subject matter jurisdiction to hear a criminal case by way of a legally sufficient indictment or a valid waiver thereof. State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999). The scope of the jurisdiction conferred by an indictment is limited to the charged offense and any lesser-included offenses. State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999). Distinct offenses may be charged in separate counts of the same indictment. State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996)(citing State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955)). However, two separate offenses cannot, ordinarily, be charged in a single-count indictment unless one is a lesser-included offense of the other. State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974).

An indictment sufficiently charges a particular offense when "it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend." Locke v. State, 341 S.C. 54, 56, 533 S.E.2d 324, 325 (2000) (citing Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998)).[2] An indictment must: (1) enumerate all the elements of the charged offense, regardless of whether it is a statutory or common law offense, and (2) recite the factual circumstances under which the offense occurred. See S.C. Code Ann. § 17-19-20 (1985); State v. Evans, 322 S.C. 78, 470 S.E.2d 97 (1996). Our supreme court has instructed us to apply "the indictment sufficiency test[] . . . with a practical eye" to determine if the

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[2] See also Carter v. State, 329 S.C. 355, 362-63, 495 S.E.2d 773, 777 (1998) ("An indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon."); Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) ("The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.").

defendant was prejudiced by the content of the indictment. State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 587 (1981), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The indictment sub judice appears to be sufficient as the textual portion of the indictment sets forth the elements of both armed robbery and grand larceny[3] while also providing an adequate factual basis for the offenses.[4] However, separate offenses cannot be charged in a single-count indictment unless one is a lesser-included offense of the other. Fennell, 263 S.C. at 219, 209 S.E.2d at 434. Scrutinizing the indictment with a practical eye, we conclude Kirby and Parker were prejudiced because they faced the charge of armed robbery at trial, but were forced at the end of the State's case to face the separate offense of grand larceny.

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[3] Compare S.C. Code Ann. § 16-11-330(A) (Supp. 2000) ("A person who commits robbery while armed with a pistol . . . or while alleging, either by action or words, he was armed while using a representation of a deadly weapon . . . is guilty of a felony . . . .") and State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995) ("Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.") with S.C. Code Ann. § 16-13-30 (Supp. 2000) ("Larceny of goods, chattels, instruments, or other personalty valued in excess of one thousand dollars is grand larceny.") and State v. Keith, 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985) ("[L]arceny is the 'felonious taking and carrying away of the goods of another' against the owner's will or without his consent.") (quoting State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979)).

[4] In pertinent part, the indictment charged that Parker and Kirby "did in Marlboro County on or about November 2, 1997, . . . while armed with a deadly weapon feloniously take from the person or presence of the victim, Blvd Express, by means of force or intimidation goods or monies of said victim, such goods or monies being described as follows: $1,192.00 and two pistols."

II.

Because grand larceny was neither sufficiently charged by the single-count indictment nor waived by the defendants, the only possible source of jurisdiction upon which the trial court could have continued to try Parker and Kirby is grand larceny's status as a lesser-included offense of armed robbery. "The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." State v. McFadden, Op. No. 25202 (S.C. Sup. Ct. filed November 4, 2000)(Shearouse Adv. Sh. No. 39 at 3); see also Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). If, under any circumstances, a person can commit the greater offense without being guilty of the purported lesser offense, then the latter is not a lesser-included offense. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000).

In State v. Lawson, our supreme court, citing State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979), vacated Lawson's grand larceny sentence, recognizing Lawson's larceny as a lesser-included offense of robbery.[5] Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983). See also State v. Pressley, 288 S.C. 128, 341 S.E.2d 626 (1986)(declining to overrule or modify Lawson). The Court in Brown recognized larceny as an element of common law robbery. This suggests that the Court in Lawson compared the common law elements of robbery and grand larceny to determine the latter's status as a lesser-included offense. However, statutory enactments involving larceny after the publication of Lawson have affected the status of grand larceny as a lesser-included offense of armed robbery.

"At common law every simple larceny, whatever the value of the property stolen, was a felony . . . ." State v. Gray, 14 Rich. 174, 175 (1867). However, common law larceny recognized two separate punishments based on the value of the goods stolen. Id. "If the value of the property was not above twelve pence, the theft constituted the offence known as petit larceny" and the

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[5] Lawson was convicted of robbery, grand larceny, and aggravated assault.

convicted offender would be sentenced to either a term of imprisonment or a whipping. Id. A theft greater than twelve pence was considered grand larceny "and was punished with death, though with benefit of clergy." Id. Thus, the common law regarded the petit/grand larceny distinction as merely a sentencing mechanism rather than an element of the offense. See 36 C.J. Larceny §224 (1924) (recognizing petit and grand larceny as merely two separate "degrees" of larceny, not elements of the offense).

Common law petit larceny became a statutory offense after the enactment of an 1866 statute which reclassified the offense as a misdemeanor and established a twenty dollar threshold. Id. It has remained a statutory offense since 1866 and has changed little to this day.[6] The enactment of the petit larceny statute did not impliedly convert grand larceny into a similar statutory crime. See State v. Prince, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) ("Common law offenses are not abrogated simply because there is a statutory offense proscribing similar conduct. Rather, it is presumed that no change in common law is intended unless the Legislature explicitly indicates such an intention by language in the statute.")(citations omitted).

Grand larceny remained a common law offense until 1993 when the legislature amended the petit larceny statute to add a statutory definition of grand larceny.[7] "Larceny of goods . . . valued in excess of one thousand dollars

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[6] See S.C. Code Ann. § 16-13-30 (A) (Supp. 2000) ("Simple larceny of any article . . . [with] a value of *one thousand dollars* or less is petit larceny, a misdemeanor . . . ."); S.C. Code Ann. § 16-13-30 (1976) ("Any simple larceny of any article . . . [with] the value of less than *two hundred dollars* shall be a misdemeanor . . . .") (emphasis added); Gray, 14 Rich. 174 (recognizing the abolition of common law petit larceny with the 1866 enactment of a statute which defined petit larceny as simple larceny of goods below the value of $20).

[7] See Truett v. Georgeson, 273 S.C. 661, 258 S.E.2d 499 (1979) (recognizing a charge of common law grand larceny as the basis of an action for malicious prosecution); Ballew v. State, 262 S.C. 393, 204 S.E.2d 736 (1974)

is grand larceny" and a felony. S.C. Code Ann. § 16-13-30 (B) (Supp. 2000); see also Coakley v. Tidewater Constr. Corp., 194 S.C. 284, 9 S.E.2d 724 (1940) (requiring a clear legislative intent to change the common law). As our Legislature has created the statutory offense of grand larceny, we must now look to the elements contained in the statute, rather than the common law offense to determine if grand larceny is a lesser-included offense of armed robbery. We conclude that because grand larceny has the element of "in excess of one thousand dollars" it is not a lesser-included offense of armed robbery, which has no monetary element.[8]

For the aforementioned reasons, the convictions are

VACATED.

CONNOR, J., concurs; GOOLSBY, J., dissents.

(characterizing grand larceny as a common law offense); Copeland v. Manning, 234 S.C. 510, 109 S.E.2d 361 (1959) (recognizing common law grand larceny as separate and distinct from the statutory offense of breaking and entering with intent to steal); State v. Haynie, 221 S.C. 45, 47, 68 S.E.2d 628, 629 (1952) ("Grand larceny is not defined by statute in this State, but the elements of the crime are well-established by the common law . . . ."); State v. Huffstetler, 213 S.C. 319, 49 S.E.2d 585 (1948) (distinguishing the felony of grand larceny from the statutory misdemeanor of petit larceny).

[8] See comparison of the two offenses in footnote four.

GOOLSBY, J. (dissenting):

I respectfully dissent.

Were this court free to pass upon the issue presented in this case, I would be inclined to agree with the majority that grand larceny is not a lesser-included offense of armed robbery. Our supreme court, however, has already held that grand larceny is a lesser-included offense of armed robbery,[9] and its ruling is binding upon this court.[10]

To reach the issue, the majority finds that the supreme court's prior opinions interpret the common law crime of grand larceny and finds that this court is free to interpret the 1993 "codification" of grand larceny. I disagree, as I do not believe that South Carolina Code section 16-13-30 abrogates the common law crime of larceny/grand larceny.[11] Rather, I read section 16-13-30 as primarily a sentencing statute. As noted by Professor McAninch, the larceny statute "does very little to define the offense; the statute is primarily concerned with providing penalties for the different categories of the offense, depending

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[9] State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989); State v. Pressley, 288 S.C. 128, 341 S.E.2d 626 (1986); State v. Harkness, 288 S.C. 136, 341 S.E.2d 631 (1986); State v. Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983); State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979); Young v. State, 259 S.C. 383, 192 S.E.2d 212 (1972).

[10] S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

[11] See 73 Am. Jur. 2d Statutes § 185 (1974) ("The fact that a statute contains a partial codification of a particular rule or principle of the common law does not necessarily abrogate the remainder of the common-law rule . . . ."); see also Frost v. Geernaert, 246 Cal. Rptr. 440, 442 (Dist. Ct. App. 1988) ("[T]here is a presumption a statute does not, by implication, repeal the common law.").

upon the value of the property taken."[12]

Because the larceny statute does not replace this state's continued use of the common law, we are bound by the supreme court's precedent until it is otherwise overruled.

As to the fact that the indictment in this case may be duplicitous, I simply note no objection was made either prior to trial or when the trial court instructed the defendant that it was charging grand larceny.[13]

I would affirm the conviction.

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[12] W. McAninch & W. Fairey, The Criminal Law of South Carolina 246 (1995).

[13] See 42 C.J.S. Indictments and Informations § 248 (1991) ("It is generally considered that duplicity in an indictment or information may be waived and is waived by a failure to raise the objection in apt time . . . ."); S.C. Code Ann. § 17-19-90 (1985) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angela Sims and Anthony Sims,

Appellants,

v.

Derrick Giles,

Respondent.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3291
Heard January 8, 2001 - Filed January 29, 2001

REVERSED and REMANDED

Percy Beauford, of Moncks Corner, for Appellants.

James A. Atkins, of Clawson & Staubes, of Charleston, for Respondent.

ANDERSON, J.: This is a premises liability case. An electric company meter reader was injured while on the property of a customer. The

trial court directed a verdict in favor of the customer concluding the meter reader was a licensee on the property as opposed to an invitee. The meter reader appeals. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

At the time of her accident, Angela Sims was employed by the South Carolina Electric & Gas Company ("SCE&G") as a meter reader. On April 18, 1995, because of a backlog, Sims was reading meters on a route she had ridden on as a passenger but was otherwise unfamiliar with the route. One of the houses on this route was owned by Derrick Giles. His meter was located on the back of his residence and only accessible through a wrought iron gate leading into his backyard. When Sims attempted to open the gate, it somehow came off its hinges and crashed on top of her.

In approximately July of 1994, Giles began wedging a stick, which he painted the same color orange as the fence, behind his cast iron gate to hold it shut. Due to settling, the gate no longer functioned the same as when it was originally installed. The stick propped behind the gate stopped it from opening and blowing in the wind.

To open the gate, a person must reach through the bars and knock the stick over. Without the stick in place, the gate swings freely with no problem and with little effort. It swings inward on pin-type hinges and typically lifts up slightly as it opens. Randall Langston, one of the regular meter readers on this route, testified he had no trouble with the gate after he started using the proper technique for opening it. However, if too much force is applied to the gate, as happened on at least one occasion with Langston, then it would fall off its hinges.

After discovering the gate off its hinges at some point prior to Sims' accident, Giles called SCE&G and gave instructions on how to open the gate. He explained the technique of reaching through the gate and knocking the stick aside. Information to this effect was entered on a hand-held computer carried

by SCE&G meter readers called a "data cap." The data cap contains all necessary information while in the field, including addresses, meter locations at those addresses, and other special instructions, which range from telephone numbers of customers to reports of bad dogs or locked gates. While on the route each month, the data cap beeps until the meter reader reads and acknowledges any special instructions or warnings at a particular address by pressing a button.

Sims declared the data cap advised to "kick on board, gate will fall open." She professed she only saw a two-by-four under the bottom of the gate. She did not see the stick holding the gate shut. Sims propped the data cap between her legs and kicked the two-by-four. After her second kick, the board shifted. Sims caught her boot under the gate. She fell to the ground and the gate crashed on top of her.

Sims and her husband filed actions for negligence, loss of consortium, and negligent infliction of emotional distress. At the conclusion of the Sims' case, Giles moved for a directed verdict on the issue of liability. After hearing arguments on the motion, the trial judge found Sims, acting in her capacity as a meter reader, was a licensee. Based on this classification, the trial judge ruled that, as a matter of law, there was no evidence of negligence on the part of Giles. The trial judge directed a verdict in favor of Giles on all causes of action. The Simses appeal the directed verdict on their causes of action.

STANDARD OF REVIEW

In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Futch v. McAllister Towing, 335 S.C. 598, 518 S.E.2d 591 (1999); Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). See also Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1993)(illustrating an appellate court must apply the same standard when reviewing the trial judge's decision on such motions). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d

126 (1999); Arthurs v. Aiken County, 338 S.C. 253, 525 S.E.2d 542 (Ct. App. 1999). If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 508 S.E.2d 848 (1998); Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (Ct. App. 1997). See also Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993)(directed verdict should not be granted unless only one reasonable inference can be drawn from the evidence).

In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence. Long v. Norris & Assocs., Ltd., Op. No. 3243 (S.C. Ct. App. filed September 25, 2000)(Shearouse Adv. Sh. No. 36 at 28); Jones v. General Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998). The trial court can only be reversed by this Court when there is no evidence to support the ruling below. Swinton Creek Nursery, 334 S.C. at 477, 514 S.E.2d at 130; Arthurs, 338 S.C. at 261, 525 S.E.2d at 546. When reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party. Collins, 332 S.C. at 296, 504 S.E.2d at 350. Rather, it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in the opposing party's favor. Jones, 331 S.C. at 356, 503 S.E.2d at 176. See also First State Sav. & Loan v. Phelps, 299 S.C. 441, 385 S.E.2d 821 (1989)(in reviewing granting of directed verdict, court should determine elements of action alleged and whether any evidence existed on each element).

ISSUE

Was Sims, in her capacity as a meter reader for SCE&G, a licensee or an invitee while on premises owned by Giles, a customer of SCE&G?

LAW/ANALYSIS

Sims argues she, while properly on Giles' property in her capacity as a meter reader for SCE&G, was an invitee. She contends the trial court committed reversible error in classifying her status as a licensee. We agree.

A. Premises Liability

South Carolina recognizes four general classifications of persons who come on premises: adult trespassers, invitees, licensees, and children. Different standards of care apply depending on whether the visitor is considered an "invitee," i.e., an invited (express or implied) business guest; a "licensee," i.e., a person not invited, but whose presence is suffered; a "trespasser," i.e., a person whose presence is neither invited nor suffered; or a child. See Joseph F. Singleton, Liability of Owner or Possessor of Land, 21 S.C. L. Rev. 291 (1969). See also Larimore v. Carolina Power & Light, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000)("The level of care owed is dependent upon the class of the person present.").

In premises liability cases, the invitee is offered the utmost duty of care by the landowner and a trespasser is generally offered the least. Since meter readers enter premises with some form of acquiescence or permission arising through the landowner's contract with SCE&G, they are not trespassers. See Smiley v. Southern R.R., 184 S.C. 130, 191 S.E. 895 (1937)(if owner or possessor consents or acquiesces in constant trespasses, an implicit invitation requiring such care as is individually owed to a licensee may be found); Snow v. City of Columbia, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991)("The unwarrantable entry on land in the peaceable possession of another is a trespass . . . . The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, . . . he commits a trespass by the very act of breaking the enclosure.")(citation omitted). In fact, the contention that a meter reader is not specifically invited onto the premises and is thus a trespasser has been rejected. See 62 Am. Jur. 2d Premises Liability § 453 (1990). Sims is not a child; therefore, the only issue presented,

which is novel in South Carolina, is whether Sims, in her capacity as a SCE&G meter reader, should be considered an invitee or a licensee.

B. Invitees

"An invitee is a person who enters onto the property of another at the express or implied invitation of the property owner." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997). "Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception." Restatement (Second) of Torts § 332 cmt. a (1965). The visitor is considered an invitee especially when he is upon a matter of mutual interest or advantage to the property owner. Parker v. Stevenson Oil Co., 245 S.C. 275, 140 S.E.2d 177 (1965); Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994).

"Phrased somewhat differently, it may be said that a person is an invitee on the land of another if he enters by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." 62 Am. Jur. 2d Premises Liability § 87 (1990). See also Larimore, 340 S.C. at 444, 531 S.E.2d at 538 ("Because Larimore, [who was hired by the property owner to add vinyl siding to his home,] was a business visitor invited to enter or remain on the property for a purpose directly or indirectly connected with [the property owner], Larimore was an invitee.").

"Invitees include patrons of stores, patients in a physician's office, persons visiting a filling station to use the restroom or vending machine or to ask directions, and workmen invited to work on the premises." F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 112-13 (2d ed. 1997)(footnotes omitted).

The law recognizes two types of invitees: the public invitee and the business visitor. "A public invitee is one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public." Goode, 329 S.C. at 441, 494 S.E.2d at 831; Restatement (Second) of Torts § 332(2) (1965). See also Creech v. South Carolina Wildlife and Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)(discussing the duty owed a public invitee who was injured when she fell off a public dock; landowner may be liable for an injury arising from an "open and obvious" danger if the landowner should have anticipated the harm that occurred).

A business visitor, on the other hand, is an invitee whose purpose for being on the property is directly or indirectly connected with business dealings with the owner. Goode, 329 S.C. at 441, 494 S.E.2d at 831. See also Parker, 245 S.C. at 280, 140 S.E.2d at 179 (the term "invitee" in premises liability cases usually means the same thing as a business visitor and refers to one who enters upon the premises of another at the express or implied invitation of the occupant, especially when he is there about a matter of mutual interest or advantage); Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 65 (Ct. App. 1996)("Business visitors are considered invitees as long as their purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land."); Restatement (Second) of Torts § 332(3) (1965)("A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."). However, "[t]he class of persons qualifying as business visitors is not limited to those coming upon the land for a purpose directly or indirectly connected with the business conducted thereon by the possessor, but includes as well those coming upon the land for a purpose connected with their own business, which itself is directly or indirectly connected with a purpose for which the possessor uses the land." 62 Am. Jur. 2d Premises Liability § 88 (1990)(emphasis added).

The business visitor is generally divided into two classes. The first class of business visitor "includes persons who are invited to come upon the land for a purpose connected with the business for which the land is held open to the public, as where a person enters a shop to make a purchase, or to look at goods

on display." Restatement (Second) of Torts § 332 cmt. e (1965). "The second class includes those who come upon land not open to the public, for a purpose connected with business which the possessor conducts upon the land, or for a purpose connected with their own business which is connected with any purpose, business or otherwise, for which the possessor uses the land." Id. "Thus a truck driver from a provision store who enters to deliver goods to a private residence is a business visitor; and so is a workman who comes to make alterations or repairs on land used for residence purposes." Id.

The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty. Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000). The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge. Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991). The degree of care required is commensurate with the particular circumstances involved, including the age and capacity of the invitee. Henderson v. St. Francis Cmty. Hosp., 303 S.C. 177, 399 S.E.2d 767 (1990).

In addressing this issue, our Supreme Court specifically adopted the Restatement (Second) of Torts § 343A (1965) in Callander v. Charleston Doughnut Corp., 305 S.C. at 126, 406 S.E.2d at 362.[1] Section 343A provides:

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[1]Callander was distinguished by Larimore, 340 S.C. at 445, 531 S.E.2d at 539, based on a landowner's knowledge of a potentially dangerous defect on his property. Unlike the property owner in Larimore, the shop owner in Callander had actual notice of a defective stool and the fact that his elderly customers frequently backed into the stools to sit down. Thus, a jury question arose in Callander whether the doughnut shop owner should have anticipated the harm resulting from an elderly customer backing to sit down on a broken stool, which, in fact, happened.

§ 343 A. Known or Obvious Dangers

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

This duty is an active or affirmative duty. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977); Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999), cert. granted, March 21, 2000. It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him. Hughes, 269 S.C. at 397, 237 S.E.2d at 756; Garvin, 337 S.C. at 444, 523 S.E.2d at 485. It is not necessary that the precise manner in which the injuries were sustained be foreseeable. Hughes, 269 S.C. at 397, 237 S.E.2d at 757; Orr v. First Nat'l Stores, Inc., 280 A.2d 785 (Me. 1971). Rather, "[i]t is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range …. It was, therefore, a jury question whether the defendant had provided reasonably safe premises . . . for the use of the . . . invitee. Hughes, 269 S.C. at 397-98, 237 S.E.2d at 757 (quoting Orr, 280 A.2d at 794).

C. Licensees

A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent. Neil v. Byrum, 288 S.C. 472, 343 S.E.2d 615 (1986); Restatement (Second) of Torts § 330 (1965). Cf. Bryant v. City of North Charleston, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991)(since Neil defines standard of care owed licensee, not public invitee, there was no error by

trial judge not to charge Neil to jury where 80-year old woman tripped and fell over barricade placed over depression on public sidewalk). When a licensee enters onto the property of another, the primary benefit is to the licensee, not the property owner. Hoover v. Broome, 324 S.C. 531, 479 S.E.2d 62 (Ct. App. 1996); Landry v. Hilton Head Plantation Prop. Owner's Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994). A licensee is a person whose presence is tolerated, a person not necessarily invited on the premises, but one who is privileged to enter or remain on the premises only by the property owner's express or implied consent. Frankel v. Kurtz, 239 F. Supp. 713 (W.D.S.C. 1965).

The most common example of a licensee is the social guest. See F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 111 (2d ed. 1997). See also Frankel, 239 F. Supp. at 717 ("A social guest is a licensee"; as such, he enters the premises by virtue of the possessor's consent). "An injured person has been held to be a licensee where he entered premises to seek a favor, to make inquiries or ask directions, to do volunteer work, to use recreational facilities without asking specific permission, to recover an item of personal property left on the premises, to obtain some article of value given to the licensee by the occupant, or while chasing his dog." 62 Am. Jur. 2d Premises Liability § 111 (1990)(footnotes omitted). In Neil v. Byrum, our Supreme Court explained:

> The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him except:
>
> > (a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land.
> >
> > (b) To use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to

> him, and which he may reasonably be expected to discover.

Neil, 288 S.C. at 473, 343 S.E.2d at 616 (emphasis in original)(quoting Frankel, 239 F. Supp. at 717).

Therefore, "[s]ince a licensee is there for his own benefit, he can be said to accept the premises as they are and demand no greater safety than his host provides himself." Hubbard & Felix, supra, at 111 (emphasis in original).

D. Status of a Meter Reader

Although the duty of care a business owes its customers or other persons has been established, South Carolina has not addressed the specific issue of whether a meter reader or other public works employee is a licensee or an invitee. The basic distinction between a licensee and an invitee is that an invitee confers a benefit on the landowner. Crocker v. Barr, 305 S.C. 406, 409 S.E.2d 368 (1991); Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994). See also Hubbard & Felix, supra, at 110-11 (the licensee "is there for his own purpose rather than to benefit the owner/occupier."). Further, while on premises conferring some benefit to the landowner, the invitee is entitled to a higher duty of care. Unlike a licensee, an invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there. Landry, 317 S.C. at 203, 452 S.E.2d at 621; Bryant v. City of North Charleston, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991); Restatement (Second) of Torts § 341A cmt. a (1965).

When a SCE&G meter reader enters a customer's property, the meter reader does so in furtherance of the contract to supply power between the landowner and SCE&G. The landowner benefits by his consumption of the power and SCE&G, in turn, benefits by knowing the rate of the landowner's use of power.

In essence, SCE&G is a private utility company engaged in the business of supplying power to landowners. In furtherance of that business, SCE&G enters into a contract with the landowner to supply power to the particular location. Under the totality of the relationship, the meter reader is a business invitee. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 61, at 429 (5th ed. 1984)("Where it can be found that the public employee comes for a purpose which has some connection with business transacted on the premises by the occupier, he is almost invariably treated as an invitee. . . . It is no doubt possible to spell out pecuniary benefit to the occupier in the case of . . . a city water meter reader."). Stated another way, "[a] public utility employee who comes upon premises for the purpose of reading a meter or checking, installing, or maintaining the utility equipment is generally accorded the status of an invitee, and accordingly the person in occupation or control of the premises owes him a duty of exercising reasonable care to keep the premises reasonably safe for the contemplated use." 62 Am. Jur. 2d Premises Liability § 452 (1990).

"The contention that a meter reader is not specifically invited onto the premises and is therefore only a licensee has been rejected." Id. § 453. Even in South Carolina, "[p]ublic employees like water meter readers are generally regarded as invitees." F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 113 (2d ed. 1997).

We recently discussed the issue of the duty of care owed a worker performing his duties on the landowner's property in Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000). As Larimore was walking around a house inspecting the exterior vinyl siding he installed, he was injured when he stepped on a narrow trench that had been improperly compacted by CP&L employees. This Court found that "[b]ecause Larimore, [the vinyl siding subcontractor/installer], was a business visitor invited to enter or remain on the property for a purpose directly or indirectly connected with [the landowner], Larimore was an invitee." Id. at 444, 531 S.E.2d at 538. However, despite determining Larimore was a business invitee, we decided the case in favor of the landowner on other grounds. The Court noted a landowner is not

an insurer of safety. Because Larimore failed to appeal the trial court's ruling the danger was open and obvious, that ruling was the law of the case.

Likewise, in Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979), our Supreme Court classified a construction worker as an invitee. Wilson was injured while installing a roof on a building that was built too close to overhead power lines. He was electrocuted and fell from the roof. In concluding there was ample evidence to support the jury's finding the landowner was negligent and reckless, the Court observed it was "not disputed that Wilson was, as a business invitee, entitled to at least a warning of any unsafe conditions of which the landowner knew or should have known, and of which the invitee was, reasonably, not aware." Id. at 615, 258 S.E.2d at 104 (emphasis added).

E. Law From Other Jurisdictions

Other jurisdictions have found that "[i]n actions for personal injury to meter readers or similar public service employees coming upon premises in connection with the utilities supplied thereto, the courts have usually treated the employee as an invitee of the person responsible for the maintenance of the premises and accordingly have imposed the ordinary duty of a landowner to an invitee, that is, the exercise of reasonable care to keep the premises reasonably safe for the contemplated use, or at least to warn of dangers not open and obvious." J.D. Perovich, Annotation, Liability of Owner or Operator of Premises for Injury to Meter Reader or Similar Employee of Public Service Corporation Coming to Premises in Course of Duties, 28 A.L.R.3d 1344, 1346 (1969)(footnotes omitted). For example, in Indiana, "[m]eter readers are considered invitees." Ross v. Lowe, 619 N.E.2d 911, 914 (Ind. 1993)(utility meter reader brought action against landowner for injuries sustained when he was attacked by family dog, which was locked in landowner's house by his 12-year old daughter with only screen door, which the dog crashed through and knocked down meter reader; jury question whether negligence of daughter is imputed to parents).

Generally, utility workers and other repairmen on premises are classified as invitees because of their relationship with the landowner. These invitees have permission to be on premises because of a contractual relationship between the parties. In addition to meter readers and repairmen on premises, other workers performing services under a contractual relationship are considered invitees. "It has generally been held, either expressly or impliedly, that a garbage or trash man, while performing services for the owner, is an invitee, to whom the duty of exercising reasonable and ordinary care is owed by the owner or occupant in the operation and maintenance of its place of business or premises to avoid injuring him, but where he exceeds the scope of his invitation or performs an act which is not covered by his invitation, recovery has been denied by the court." Robert L. Simpson, Annotation, Premises Liability: Liability of Owner or Occupant to Garbage or Trash Man Coming on Premises in Course of Duty, 36 A.L.R.3d 610, 612-13 (1971)(footnotes omitted).

Georgia has classified meter readers as invitees when they are on premises in the capacity of their job as a meter reader. In Sheffield Co. v. Phillips, 24 S.E.2d 834 (Ga. Ct. App. 1943), H.H. Phillips, an employee of the Georgia Power Company, was reading an electric meter at a store building owned by the Sheffield Company because the regular meter reader was on vacation. The meter was located near the rear door to the building on the inside rear wall of the first floor. This door was used by the public as a back entrance and as a throughway for bringing merchandise into the building and into the basement. Inside this entrance, the company maintained a freight elevator; however, no signs were at this entrance indicating the existence of the elevator. Because merchandise was stacked in his way, Phillips had to stand within a few steps on the inside of the doorway while reading the meter. Phillips was not aware this was the first floor resting place of the elevator. As he was reading the meter, the elevator lowered to the first floor without warning, struck Phillips, and injured him.

The Court of Appeals of Georgia ruled Phillips was an invitee and decided "[t]here is no merit in the contention that [Phillips] was a mere licensee on the premises." Id. at 838. The court based its conclusion, in part, on contractual

grounds.[2] Georgia Power Company supplied power to Sheffield and needed meter readers to determine proper billing. The power supply contract created an "implied invitation" to enter the land. Id. The Sheffield court emphasized:

> The plaintiff was an invitee on the premises of the defendant at the time he was injured. His employer, the power company, furnished the electric current to the defendant under a contract. The plaintiff was on the premises of the defendant at the time he was injured in order to read the meter on the premises. The reading of the meter was in furtherance of the contract between the defendant and the power company for the latter to furnish current to the defendant, and it was to the interest of the defendant, as well as to that of the power company, that the meter be read so as to determine the amount of current used by the defendant.

Sheffield Co., 24 S.E.2d at 838.

Georgia was not the first jurisdiction that classified public works employees as invitees. Prior decisions from other jurisdictions reflect, in part, that an express or implied invitation arises from the contractual relationship between the parties. See, e.g., Finnegan v. Fall River Gas-Works Co., 34 N.E. 523 (Mass. 1893).

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[2]The Sheffield court additionally relied on Ga. Code Ann. § 105-401 (1933), now Ga. Code Ann § 51-3-1 (2000), which reads:

> Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

Ga. Code Ann § 51-3-1 (2000).

In Washington Gas Light Co. v. Eckloff, 4 App. D.C. 174 (D.C. Cir. 1894), a municipal water meter inspector was injured when gas from one of The Washington Gas Light Company's pipes leaked and gas accumulated in the pit where the water meter was located. Eckloff smelled gas but was told by the gas company superintendent that the smell was not real gas but only "dead gas." Nevertheless, when Eckloff lit a candle to read the meter, he caused an explosion of the collected gas. The Court of Appeals for the District of Columbia found no error in the instruction to the jury concerning the requisite standard of care owed an invitee. The judge charged the jury as follows:

> The first question which you should be informed about is what degree of care it was incumbent upon this defendant to observe in keeping their premises safe.
>
> I may say generally that it is bound to observe precisely the same degree of care that devolves upon each one of you with respect to your private dwelling; no more and no less. . . . .

Washington Gas Light Co., 4 App. D.C. at 182.

The Supreme Court of Errors of Connecticut, in Bradley v. Sobolewsky, 99 A. 1067 (Conn. 1917), dealt with the theory of "express license." Edwin Bradley, an employee of the New Haven Gaslight Company, was sent by his employer to Vincent Sobolewsky's home to check a gas range which was supposedly out of order. Unfortunately, Bradley was sent to the wrong house and, as he approached the back door via a path leading from the front gate, he was attacked by Sobolewsky's dog. The trial judge ruled in favor of Sobolewsky finding Bradley was committing a trespass when he was bitten by the dog.

The appellate court reversed and ordered a new trial concluding Bradley was not a trespasser but was on the premises by virtue of an "express license." Id. at 1068. Sobolewsky had signed a service contract with the gas company which allowed its employees access for the purpose of examining its gas piping and apparatus. The court determined:

> We think it is clear that the plaintiff was at the time of the injury acting as the agent of the gas company authorized to examine gas apparatus on the defendant's premises. It is true that the authority afterwards appeared to have been given to him as the result of a mistake; but the mistake was made by the company in directing the plaintiff to the wrong place, and not by the plaintiff in going to a place to which he was not authorized to go. In going to the defendant's premises, he went precisely where the gas company told him to go and for a purpose for which the defendant had agreed that the authorized agent of the company might come.

Bradley, 99 A. at 1068. Even though Bradley was incorrect in entering Sobolewsky's yard for the express purpose of repairing a gas range, he otherwise had the implied invitation to come on the premises anyway.

The duty of care owed invitees can flow from any person or entity that has control over the property. In Kennedy v. Heisen, 182 Ill. App. 200 (Ill. App. Ct. 1913), Thomas Kennedy, a water inspector, was killed when he entered the engine room of Charles Heisen's building and stepped on a large belt which carried him beneath the floor and into the fly wheel. Heisen had leased the premises to Anderson & Co. for ten years and, as part of the lease, required Anderson & Co. to install their own water meter. As required by Chicago regulations, a city water inspector had to examine the property and install a meter. Heisen knew an inspector would be sent to inspect the premises before the City Commissioner of Public Works would grant a permit to tap the water main and install a meter. The Appellate Court of Illinois amplified:

> The question whether the circumstances make a case of invitation in the technical sense of that word as used in many adjudged cases, or only a case of mere license is not free from difficulty. The difficulty is not in ascertaining what is the law, but in applying it to the facts of the case. When a person is a mere licensee he has no cause of action on account of an injury received through the negligence of the licensor in the place he is permitted to enter. In Campbell on Negligence, quoted by Mr. Justice Harlan in Bennett

> v. Lousiville & N.R. Co., 102 U.S. [577], 585 [(1880)], it is said: "The principle appears to be that invitation is to be inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or comfort of the person using it." Here there was a common interest in the work between Heisen and the deceased and it was to their mutual advantage that the inspection be made–to Heisen's because such inspection was required in part performance of the covenants of his lease; to the advantage of the deceased because the making of such inspection was in the performance of the duties of his employment. It is immaterial that the request to the superintendent of the water bureau to have the premises inspected was made not by Heisen but by Anderson. Heisen knew that an inspector would be sent to inspect the premises before a permit to install a new connection with the water main would be granted. The employer of the deceased was bound to make the inspection and properly sent the deceased to perform that duty, and this prevents the case from being that of one who is a mere licensee. Holmes v. N.E. R.R. Co., L.R. 4 Exch. 254.
>
> The deceased did not enter defendant's building under license or authority given by the law . . . . We think that there was, in the sense in which the word is used in many of the adjudged cases, an invitation of the deceased by the defendant to go into his building to inspect the water pipes and connections, and that deceased went into said premises by the implied invitation of the defendant and not as a mere licensee.

Kennedy, 182 Ill. App. at 202-03.

The party in control of the premises, however, is not an insurer of the worker's safety. In Barry v. Stop & Shop, Inc., 140 N.E.2d 198 (Mass. 1957), David Barry, a water department employee, was, at the request of Stop and Shop, investigating flooding in the cellar of the store when an overhead trap door fell and hit Barry on the head. Generally, a landowner must warn a water

department employee of known dangers of this sort. Yet, the Barry court found there was no liability on the part of Stop & Shop because "[e]verything connected with the situation was open and obvious. A warning by the defendant would not give the plaintiff more than he could learn at a glance." Id. at 199.

Other similarly situated workers on premises have been afforded the status of an invitee. The Supreme Court of Appeals of West Virginia, in Cowan v. One Hour Valet, Inc., 157 S.E.2d 843 (W. Va. 1967), followed Georgia's holding in Sheffield Co. v. Phillips, 24 S.E.2d 834 (Ga. Ct. App. 1943).[3] Leslie

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[3]West Virginia, however, has recently abandoned the common law distinctions between licensees and invitees on premises. In Mallet v. Pickens, 522 S.E.2d 436 (W. Va. 1999), the Supreme Court of Appeals of West Virginia decided to follow the "modern trend" of only maintaining a distinction between trespassers and others:

> [O]ur research reveals that at least 25 jurisdictions have abolished or largely abandoned the licensee/invitee distinction. Among these 25 jurisdictions that have broken with past tradition, at least 17 have eliminated or fundamentally altered the distinction. Another eight of the 25 have eliminated even the trespasser distinction. And, of those retaining the old scheme, judges in at least five of those states have authored vigorous dissents or concurrences arguing for change.

Mallet, 522 S.E.2d at 444-45 (footnotes omitted)(South Carolina is not one of the 25 jurisdictions cited by the court). Expressly, the court stated:

> Today we hold that the common law distinction between licensees and invitees is hereby abolished; landowners or possessors now owe any non-trespassing entrant a duty of reasonable care under the circumstances. We retain our traditional rule with regard to a trespasser, that being that a landowner or possessor need only refrain from willful or wanton injury. Though our decision might

Cowan, an inspector and tester of electric equipment and meters, entered the premises of One Hour Valet in connection with his duties. Cowan was injured when he fell through the floor in a back room of the dry cleaning business. In citing Sheffield and other cases, the court found:

> The status of the appellant was clearly that of an invitee. He was charged with the duties of inspecting the electrical equipment and checking the meters. In such cases it is held that such inspector or a person with such duties has the status of an invitee because he was entering the premises in the performance of his duties. . . . [W]here a person has some business with the landowner there is an implied invitation to enter.

Cowan, 157 S.E.2d at 849 (citations omitted)(emphasis added). Additionally, the court made clear "the appellant was not only an invitee of the tenant but was an invitee of the landlord because it is clear from the evidence in this case that one of the reasons for his inspection and checking of the electrical meters located in the back room of the building owned by the appellees was to avoid and correct any situation that may have existed that would create a fire hazard to the building." Id. The court further noted Cowan "was not only an invitee of the appellees but was there on the premises for the benefit of the appellees or landowner." Id. (emphasis added).

The party in control of the premises is generally obligated to exercise the appropriate level of care to keep the premises safe for other persons performing work on the premises. In Pennsylvania, a subcontractor on a construction job owes to employees of other subcontractors, on the same site, the care due a business visitor from a possessor of land. See McKenzie v. Cost Bros., Inc., 409 A.2d 362 (Pa. 1979).

> seem a radical departure from past cases, in its basic philosophy it is not.

Mallet, 522 S.E.2d at 446.

This principle was elucidated in Duffy v. Fischbach & Moore, Inc., 126 A.2d 413 (Pa. 1956). James Duffy, an employee of a subcontractor hired to install telephones in a newly erected building, was injured when he tripped over an extension cord placed in a poorly lit hallway by employees of the carpenter subcontractors. Duffy filed an action against the Peterson Company, the carpenter subcontractors, and Fischbach & Moore, the electrical subcontractors.

In affirming a judgment for Duffy, the Supreme Court of Pennsylvania cited the Restatement of Torts § 332, which defines business visitors as "those who come upon the land for a purpose which is connected with their own business which itself is directly or indirectly connected with any purpose, business or otherwise, for which the possessor used the land." This language is similar to the Restatement (Second) of Torts § 332(3) (1965), which reads: "A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." The court enunciated:

> All individual sub-contractors engaged in a common enterprise owe to each other the duty of care required to business visitors. . . . The Western Electric Company, employer of the plaintiff, was on the premises of the Alcoa Building furthering its work which was connected with the business purpose for which Fischbach & Moore and the Peterson Company were also there, namely, the building of the Alcoa skyscraper. The duty which Fischbach & Moore and the Peterson Company owed to the employees of the [general contractor], they owed equally as well to the employees of their fellow sub-contractors who in turn, owed a similar duty to [the general contractor] and others engaged in the same building operation.

Duffy, 126 A.2d at 416.

In Massey v. F.H. McGraw & Co., 233 F.2d 905 (6th Cir. 1956), Paul Massey, an inspector with a Kentucky architectural firm, was injured while performing an on-site inspection of the contractor's work. A rung on a ladder

made with scrap wood by the contractor broke as Massey was descending into a ditch to inspect some water pipe welds. The Sixth Circuit Court of Appeals found the inspector was an invitee, "rather than a mere licensee." Id. at 907. The court further illuminated:

> The presence of the [inspector] was not wholly disconnected from any benefit or service to the [contractor], . . . but was for the mutual benefit of both parties. Accordingly, the [contractor] owed to the [inspector] a duty to use ordinary care to have the premises and appliances in a reasonably safe condition for use in a manner consistent with the purpose of the invitation.

Massey, 233 F.2d at 907 (citations omitted).

The case of Fred Howland, Inc. v. Morris, 196 So. 472 (Fla. 1940), is enlightening. Walter Morris, a city of Miami building inspector, was injured while taking an inspection tour of a partially completed building when he fell through the floor. The concrete floor had not been poured, so the inspector could only stand on the floor's "pan," one of a series of forms which would eventually hold the concrete. The Supreme Court of Florida concluded the inspector was a business invitee:

> A building inspector, while his presence is in part a necessity, is present also by virtue of an implied contractual relationship with the city, wherein the city grants a permit to build, provided the city, through its authorized agents, is allowed to make detailed inspections of the component parts of the building as they are assembled. The inspector is on the premises for a purpose connected with the business in which the owner or occupant is engaged or which he permits to be conducted on the premises, and there is a mutuality of interest in the subject to which the inspector's presence relates. . . . .
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> . . . .

> . . . "Invitation of the owner or occupant is implied by law where the person goes on the premises for the benefit, real or supposed, of the owner or occupant, or in a matter of mutual interest, or in the usual course of business, or for the performance of some duty. And the owner or person in possession of the premises owes it as a duty to those who come on the premises by invitation, express or implied, to exercise reasonable or ordinary care to keep and maintain his premises in safe condition."

Fred Howland, Inc., 196 So. at 476 (citations omitted)(emphasis added). See also Helton v. Norbom, 492 So. 2d 729 (Fla. Dist. Ct. App. 1986)(citing Fred Howland, Inc., for the proposition that an implied contractual relationship between a city supplying services to an apartment complex will establish a city inspector's status as a business invitee).

In Painter v. Hudson Trust Co., 126 A. 636 (N.J. 1924), Wid Painter, a foreman employed by the New York Telephone Company, was injured when an iron ventilator fell from the wall of an old building owned by the Hudson Trust Company and struck Painter. Hudson had just finished moving into a new building and its old building was to be demolished. Painter, after connecting the phone lines to the new facility, was charged with cutting the lines into the old building. The trial judge charged the jury that Painter was merely a licensee and, therefore, any contributory negligence on the part of Painter in knocking the ventilator with his ladder could bar his recovery completely. However, the jury disregarded any contributory negligence and returned a verdict in favor of Painter.

The Supreme Court of New Jersey affirmed the jury verdict but criticized the jury charge. The court declared Painter was an invitee because his work conferred some benefit on Hudson. The court expounded:

> [T]he charge erroneously limited the obligation of the defendant to that of a mere licensor, while, under the undisputed facts of the case, the duty imposed upon it with regard to affording protection to the plaintiff, while engaged in his work, was that imposed upon

> a person who invites another upon his premises to perform some act for his benefit. The defendant company had asked the telephone company to install a telephone service in the new unit; and this included, as we think, the removal of the old service from the building that was about to be torn down. It was in compliance with this request that the plaintiff was present at the place of the accident. Being an invitee, it is quite immaterial whether the ventilator fell because of the ladder being pushed against it or for some other reason; for, clearly, if the attachment of the ventilator to the wall had become so insecure that it was a menace to the safety of anybody engaged in removing the old telephone service, the defendant company was plainly negligent in permitting such a condition to exist.

Painter, 126 A. at 637.

The Appellate Court of Indiana was faced with a situation where the invitee status was inferred in Rink v. Lowry, 77 N.E. 967 (Ind. App. 1906). Jean Lowry was employed as a telephone repairman who was sent by the New Telephone Company to fix the phone batteries at the Rink Flats. The batteries were located in the bottom of the building's elevator shaft. Lowry asked Mallory Miller, a janitor who had general control of the building, and Homer Johnson, the elevator operator, not to use the elevator while he was working. The elevator, nevertheless, was used and Lowry was injured when the elevator counterweights came down on top of him. The defendants argued Lowry was a licensee because he was there solely for the benefit of the telephone company. The court found Lowry was fixing the phones for the mutual benefit of the landowner as well as the telephone company. "The invitation may be inferred from the facts proven"; therefore, the "Appellee was not a mere licensee." Id. at 970.

In some cases, a worker on premises loses an invitee status when the worker exceeds the scope of the work. "If the invitee goes outside of the area of his invitation, he becomes a trespasser or a licensee, depending upon whether

he goes there without the consent of the possessor, or with such consent." Restatement (Second) of Torts § 332 cmt. l (1965).

The loss of invitee status is usually a question for the jury. In Philibert v. Benjamin Ansehl Co., 119 S.W.2d 797 (Mo. 1938), Benjamin Philibert, employed by the Southwestern Bell Telephone Company in St. Louis, was injured when a shelf of about 400 cartons of empty jars fell on him. Philibert was installing a private telephone exchange in defendant's new facility. For the installation, he needed a wooden box constructed to cover pipes that were sticking through the floor where the phone bank was to be installed. When Philibert was in the factory room portion of the building talking to the employee responsible for constructing the box, the shelf fell on him.

The issue examined by the Supreme Court of Missouri was whether Philibert, when he went into the factory section of the building, retained his status as an invitee. The defendant claimed Philibert could not recover because he was, when injured, at a place to which he was not actually or impliedly invited. The court determined "the question of whether plaintiff exceeded the scope of his invitation by going to the factory room to see about the box was one for the jury." Id. at 801.

CONCLUSION

We hold meter readers enter premises in furtherance of a mutual benefit to the landowner as well as the utility company. We rule that, because Sims was a business visitor invited to enter or remain on the property for a purpose directly or indirectly connected with the business of and for the mutual benefit of Giles, Sims was an invitee. We adopt the widespread contractual analysis of establishing either an implied or express invitation for a meter reader to come on premises. Our holding conforms with the common understanding of jurisdictions that have retained the distinctions between invitee and licensee status. Accordingly, the order of the Circuit Court is

REVERSED and REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joshua Davis,

Respondent,

v.

Orangeburg-Calhoun Law Enforcement Commission,

Appellant.

Appeal From Orangeburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3292
Heard September 13, 2000 - Filed January 29, 2001

REVERSED

Kathryn Thomas and D.L. (Dirk) Aydlette, III, both of Gignilliat, Savitz & Bettis, of Columbia, for appellant.

J. Lewis Cromer, of Cromer & Mabry; and Benjamin A. Dunn, II, of Dunn, Dunn & Mitchell, both of Columbia, for respondent.

HOWARD, J.: In this wrongful discharge action, the Orangeburg-Calhoun Law Enforcement Commission ("OCLEC") appeals from a jury verdict in favor of Joshua Davis. We reverse.

FACTS

On May 2, 1985,Orangeburg County, Calhoun County, and the City of Orangeburg formed the Orangeburg-Calhoun Regional Law Enforcement Commission to provide facilities for incarceration of prisoners. A detention center was established and operated by this joint commission, composed of representatives appointed by the governing bodies of all three entities. The detention center included a canteen from which inmates and staff could purchase drinks, snacks, cigarettes, and sundries. The money generated from the canteen and the pay telephones was known as the "canteen fund."

During the relevant times, James Gordon was the Director of the Detention Center. In 1990, Joshua Davis applied for the position of Deputy Director. Davis told Gordon that he had a bachelor's degree in marketing and accounting and at least thirty hours of college credit in accounting.[1] Gordon hired Davis, and assigned him the task of establishing an accounting system for the canteen fund so that it could be properly audited. At that time there were no policies or procedures governing the handling of the canteen fund.

Davis drafted policies and procedures which the commission revised and adopted in 1991. Under these procedures, Davis had primary responsibility for counting, verifying, and maintaining the cash receipts, as well as verifying the deposit of funds by an administrative assistant. Davis reconciled the fund records and reported monthly in writing to the commission.

In 1993, the City of Orangeburg withdrew from the commission. Orangeburg and Calhoun Counties repealed their enabling ordinances and

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[1] Davis did have a degree in marketing, but his college transcript reveals he accumulated only nine credit hours in accounting courses, with one course repeated due to a below-average grade.

created a new commission. Although Davis argues in his brief that Calhoun County did not follow Orangeburg County's lead in abolishing the "old" OCLEC by amending the Calhoun ordinance, it is clear that Calhoun County also abolished the old OCLEC. Calhoun County ordinance 92-5 "abolish[es] the existing commission and establish[es] a new commission." Seven members were appointed to the new OCLEC, including some who had served on the previous commission.

In June 1993, the OCLEC approved a canteen fund policy largely promulgated by Davis, which required an annual audit. A certified public accountant audited the fund for the fiscal year ending June 30, 1993, reporting no problems. In November 1994, Davis reported a $1,250 expense for the 1994 audit of the canteen fund, leading the OCLEC to believe an audit had been performed for that year.[2] In 1995 the canteen fund audit was added to the bid package with other Orangeburg County audits, and the county selected a different accounting firm to conduct the audit.

In November 1995, the new auditor reported to the OCLEC that the Detention Center did not have sufficient records to audit the canteen fund. A committee was formed to investigate, and a bookkeeper was hired to put the records into ledger form. Later that month, an OCLEC commissioner reviewed the records and concluded that they did not agree with the monthly reports Davis had presented to the OCLEC.

In early January 1996, the bookkeeper and several OCLEC commissioners met with Davis and Gordon at the Detention Center to inventory the canteen. Davis allegedly told them he did not consider it necessary to set up the account on a ledger system and insisted the fund could be audited as it was. Contrary to Davis's position, OCLEC commissioners testified that they spent in excess of 100 hours trying to reconcile the records, and eventually concluded more than $30,000 was missing.

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[2] The OCLEC later discovered the $1,250 expenditure was for inmate uniforms for the kitchen and no audit had been performed that year.

At the OCLEC's meeting in January 1996, the OCLEC unanimously adopted the investigating committee report recommending that Davis be discharged for cause, that Gordon be reprimanded, that the matter be referred to the Solicitor's office, and that a State Law Enforcement Division (SLED) investigation be requested. The OCLEC Chairman then instructed Gordon to immediately terminate Davis's employment, which Gordon did. Subsequently, Gordon sent Davis an official termination letter which stated the reason for Davis's termination as "incompetence and violation of policy in handling the Canteen Fund." It further stated, "This decision is based on an investigation of the Canteen Fund precipitated by the 1995 Auditor's Report."

Davis grieved his termination to the OCLEC's grievance committee, which denied his grievance. Davis then filed this action for breach of employment contract and related claims against Gordon and two OCLEC commissioners. The trial court granted summary judgment on the related claims.

Davis's breach of contract claim was tried before a jury. The jury returned a verdict for Davis in the amount of $305,000. The OCLEC moved to alter or amend the judgment under Rule 59(e), SCRCP, which the trial court denied. This appeal follows.

LAW / ANALYSIS

The OCLEC argues the trial court erred in failing to grant a directed verdict, or a judgment notwithstanding the verdict because Davis failed to present evidence sufficient to raise a factual issue as to alteration of his at-will employment status. We agree.

When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, we must consider the evidence in the light most favorable to the non-moving party. Brady Dev. Co. v. Town of Hilton Head Island, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993); McGill v. Univ. of South Carolina, 310 S.C. 224, 226, 423 S.E.2d 109, 111 (1992). A directed verdict or judgment notwithstanding the verdict should not be granted unless only one reasonable inference can be drawn from the evidence. Brady Dev. Co., 312 S.C.

at 78, 439 S.E.2d at 269. "Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997).

Davis asserts two bases for arguing that his original at-will status was altered by the OCLEC. These are: 1) the adoption of an OCLEC policy manual; and 2) a statement he maintains Director Gordon made to him when he was hired. In response, the OCLEC argues that the policy manual relied upon by Davis was never adopted by the OCLEC, is inapplicable under the circumstances, and is too vague to have altered Davis' at-will status. The OCLEC also maintains that Gordon's alleged statement was insufficient to establish a contract altering the at-will relationship.

The doctrine of employment at-will has long been recognized in the State of South Carolina. See Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936). The doctrine dictates that employment for an indefinite term is terminable by either the employee or the employer for any reason or for no reason without incurring liability for wrongful discharge. Culler v. Blue Ridge Elec. Coop., 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992); Hudson v. Zenith Engraving Co., 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979).

South Carolina has carved out two explicit exceptions to this general rule. First, an employee has recourse against an employer for termination in violation of public policy. Small v. Springs Indus., Inc., 300 S.C. 481, 484, 388 S.E.2d 808, 810 (1990). Second, an employee has a cause of action against an employer who contractually alters the at-will relationship and terminates the employee in violation of the contract. Id. In certain situations, termination of an at-will employee may give rise to a cause of action for wrongful termination where the at-will status of the employee is altered by the terms of an employee handbook. Id. Thus, while the doctrine of employment at-will is the law in this state, our supreme court has held that a jury can consider an employee handbook in deciding whether the employer and the employee had a limiting agreement on the employee's at-will employment status. Kumpf v. United Tel. Co., 311 S.C. 533, 536, 429 S.E.2d 869, 871 (Ct. App. 1993).

In order to prove the existence of a contract, the employee must show "the following three elements: 1) a specific offer, 2) communication of the offer to the employee, and 3) performance of job duties in reliance on the offer." Prescott v. Farmers Tel. Coop., 335 S.C. 330, 336, 516 S.E.2d 923, 926 (1999).

I. Policy Manual

With regard to the policy manual, Davis argues the OCLEC contractually altered his at-will status through promises contained in the Detention Center's policy and procedure manual.[3] He maintains the OCLEC breached the terms of his employment contract in at least two ways.

First, Policy A-260 of the manual states the "initiation of discipline is the responsibility of the Director." Davis asserts that his discipline could, therefore, only be instigated by Director Gordon with the OCLEC serving as the final approving authority. Accordingly, the OCLEC improperly terminated him by not following this procedure.

Second, he contends the OCLEC violated Policy A-235 when it discharged him without justification. Davis maintains that Policy A-235 alters his at-will employment to a contract for employment with termination only for cause.

The OCLEC minutes do not reflect that the policies Davis relies upon were ever adopted by the OCLEC. The minutes are silent on the issue. At trial, the OCLEC objected to the introduction of the manual into evidence, which was overruled. On appeal, the OCLEC argues this was error. We agree.

Parol evidence may not be admitted to explain, enlarge or contradict minutes which are complete and unambiguous on their face. Berkeley Elec. Coop. v. Town of Mt. Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992). "Otherwise, parol evidence could render official minutes uncertain or unreliable

[3] This manual purports to be in the nature of an employee handbook.

so that the minutes would fail to afford dependable evidence of the proceedings . . . ." Id.; see also Moore v. Postal Telegraph-Cable Co., 202 S.C. 225, 236, 24 S.E.2d 361, 365 (1943) (stating that where company's Pension and Benefit Committee was required to keep minutes of meetings, the original minutes of the meetings were the best evidence of changes in the pension plan and parol testimony was properly excluded). A court must initially review the minutes to determine whether the minutes are incomplete or ambiguous and whether parol evidence is admissible to then clarify them. Berkeley Elec. Coop., 308 S.C. at 209, 417 S.E.2d at 582 (holding that, after review, the minutes were unambiguous and the trial judge erred in admitting parol evidence).

The OCLEC enabling ordinances require a full and accurate account of the OCLEC's actions and doings at all times. Additionally, all public bodies are required to keep written minutes of their public meetings recording "the substance of all matters proposed, discussed or decided." S.C. Code Ann. § 30-4-90(a)(3) (1991).

Davis testified that he was responsible for preparing and presenting the minutes of OCLEC meetings. He offered into evidence OCLEC minutes recording the adoption of other policies, including the canteen fund policy. However, these minutes do not show that the OCLEC adopted the policies upon which Davis relies. Davis's parol testimony that the policies were adopted and in force was not admissible on this point. Berkeley Elec. Coop., 308 S.C. at 208, 417 S.E.2d at 581.

Davis argues that parol evidence was admissible because the minutes are ambiguous and the policies do not contradict the minutes. We disagree. The minutes in the record are not ambiguous on their face. There is nothing to suggest that the OCLEC discussed and adopted policies not mentioned in the minutes. Silence on the issue does not create ambiguity. It merely reflects that no official action was discussed or taken. To allow parol evidence to contradict this conclusion would undermine the integrity of the official record, in contravention of our supreme court's clear mandate in Berkeley Electric Cooperative.

Davis further argues that OCLEC Commissioner Andrea Bowers testified the policies of the commission had to be "redone" when the new OCLEC was created, supporting his contention that the OCLEC reenacted all of its old policies. However, even if this parol evidence were admissible, Bowers also testified that not all of the policies were "redone."

Finally, Davis argues that the presence of a date stamp on the pertinent policies supports his contention that the policies were adopted by the OCLEC and that the minutes are, therefore, ambiguous. Again, this is inadmissible parol evidence.[4]

Because Davis' testimony regarding the adoption of the policies was inadmissible parol evidence, he has failed to establish a question for the jury as to whether the OCLEC made him a specific offer altering his at-will status through those policies.

II. Oral Assurance

Davis maintained at trial and on appeal that Gordon made a statement altering his at-will status to an employment contract allowing for termination only for cause. Davis testified that Gordon told him he could "only be terminated for cause." Davis argues this evidence is sufficient to create a factual issue as to alteration of his at-will status. We disagree. Assuming Gordon did make the statement, we find it insufficient by itself to provide a factual issue as to alteration of Davis's at-will employment status.

"[T]he at-will status of an employee may be altered by an oral contract of definite employment." Prescott, 335 S.C. at 335, 516 S.E.2d at 926. "To be

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[4] Even if admissible, Davis himself testified that the date stamped on the policies was an arbitrary date, having nothing to do with the effective date of the policy. Furthermore, the Canteen Fund Policy, which was adopted according to the minutes of the June 1993 meeting, does not have a date stamp on it. Consequently, we fail to see how this stamped date infers adoption by the OCLEC.

binding, an offer must be definite." Id. at 336-37, 516 S.E.2d at 926. One must show a specific offer, a communication of the offer to him, and performance of job duties in reliance on the offer. Id. at 336, 516 S.E2d at 926.

The statement Davis attributed to Gordon is not definite enough to alter his at-will status. See id.; see also Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998) (statements that an employee will be discharged only for "good reason" or "good cause" do not form a binding contract "when there is no agreement on what those terms encompass. Without such agreement the employee cannot reasonably expect to limit the employer's right to terminate him.").

CONCLUSION

Davis failed to present sufficient evidence of an alteration of his at-will employment status to establish a question for the jury. Therefore, the trial court erred in failing to grant the OCLEC's motion for directed verdict. For the foregoing reasons the final judgment is

REVERSED.[5]

STILWELL and SHULER, JJ., concur.

[5] Because of our disposition of this question, it is unnecessary to address the OCLEC's remaining issues on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Herbert P. Wiedemann,

Appellant,

v.

Town of Hilton Head Island, South Carolina,

Respondent.

Appeal From Beaufort County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 3293
Heard January 8, 2001 - Filed January 29, 2001

AFFIRMED

Herbert P.Wiedemann, of Hilton Head Island, pro se.

Curtis L. Coltrane, of Hilton Head Island, for respondent.

HEARN, C.J.: Herbert Wiedemann appeals a declaratory judgment in favor of the Town of Hilton Head. The circuit court held the Town

demonstrated the necessity of holding Town Council meetings outside the municipal limits. We affirm.

FACTS AND PROCEDURAL BACKGROUND

This is the third time this case has been before an appellate court. See Wiedemann v. Town of Hilton Head Island, 326 S.C. 573, 486 S.E.2d 263 (Ct. App. 1997) (Wiedemann I); Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E.2d 783 (1998) (Wiedemann II).

Herbert Wiedemann, a Hilton Head resident, filed an action alleging Hilton Head violated the South Carolina Freedom of Information Act (FOIA) by holding a three-day workshop on Dataw Island, approximately 45 miles from Hilton Head's town limits. S.C. Code Ann. §§ 30-4-10 to -110 (1991 & Supp. 1999). Wiedemann claims the Town meetings violated the open meeting provision of the FOIA by imposing a heightened cost and delay on the public.

Hilton Head, on behalf of the Town Council, moved to dismiss Wiedemann's complaint under Rule 12(b)(6), SCRCP. The circuit court converted the Town's motion to one for summary judgment, and Wiedemann also moved for summary judgment. The court granted summary judgment to the Town. Wiedemann appealed.

On appeal, this court adopted a balancing test to determine whether the interests of the Town Council in holding an out-of-town meeting outweighed the increased cost or delay to the public in attending the meeting. Wiedemann I, 326 S.C. at 582, 486 S.E.2d at 268. Applying a balancing test, this court affirmed the grant of summary judgment to the Town. Id.

The supreme court affirmed the use of a balancing test but reversed the grant of summary judgment. Wiedemann II, 330 S.C. at 537, 500 S.E.2d at 785. The supreme court held the grant of summary judgment was improper because there was insufficient evidence in the record as to why it was necessary for the Town to conduct the meeting at Dataw Island. Id. at 537, 500 S.E.2d at 786. Accordingly, the court remanded the case to the circuit court for further

evidence of the Town's reasons for holding the meetings at the remote site. Id. at 537-38, 500 S.E.2d at 786.

After reviewing additional evidence, the circuit court issued a declaratory judgment in favor of the Town, holding that the Town's interests outweighed the small cost the public incurred in attending the remote meetings. No appeal was taken from the circuit court's finding that the cost to the public was small. Wiedemann appeals.

STANDARD OF REVIEW

Wiedemann sought injunctive relief and a declaratory judgment pursuant to the FOIA. § 30-4-15. Declaratory judgments in and of themselves are neither legal nor equitable. See Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. Id.

Actions for injunctive relief are equitable in nature. See Miller v. Borg-Warner Acceptance Corp., 279 S.C. 90, 92, 302 S.E.2d 340, 341 (1983); Godfrey v. Heller, 311 S.C. 516, 517, 429 S.E.2d 859, 860 (Ct. App. 1993). See also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 193 (1999). In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence. See Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000); Townes Assocs. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 776 (1976).

DISCUSSION

Wiedemann contends the circuit court erred in its application of the balancing test and in finding the Town presented sufficient evidence that its interest in holding the meeting at the remote site did not violate the provisions of the FOIA. We disagree.

The FOIA provides:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

§ 30-4-15. Section 30-4-60 states "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter."[1]

The FOIA provisions must be construed to make it possible for the public to learn of and report on the activities of public officials. See § 30-4-15. See also Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) ("South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government."); Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) ("[T]he essential purpose of the FOIA is to protect the public from secret government activity.") However, nowhere in the FOIA are public bodies required to conduct public meetings within municipal limits. Wiedemann II, 330 S.C. at 536, 500 S.E.2d at 785. On the contrary, the only restriction is that meetings be conducted with "minimum cost or delay" to the public. Id. (quoting § 30-4-15).

The Town presented considerable evidence to support holding the workshop at Dataw Island. It presented testimony that council members are

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[1] None of section 30-4-70's exemptions are applicable to the present case.

distracted, take personal calls, and attend to personal business when meetings are held within town boundaries. The workshop conductor testified that remote meetings were more effective because council members were better focused, more productive, and implemented goals faster after attending workshops at remote locations. The retreat facilitator testified that meetings at remote locations result in better communications and interpersonal relations within the council, ultimately resulting in greater efficiency. The mayor of Hilton Head stated that at a previous retreat held within the town limits he and two other council members did not focus well because they were distracted. He said he thought the council benefitted from the Dataw Island meetings.

After hearing the evidence, the circuit court concluded remote meetings, such as the Dataw Island workshops, are necessary for the efficient functioning of the Town Council. The circuit court further held that a minimum distance necessary to achieve undistracted, uninterrupted participation by council members is 35 to 40 miles. The circuit court found the Town presented undisputed evidence that the Dataw Island meeting was necessary for the effective functioning of a municipal council, and although the public incurred some small cost or delay, "the necessity of the Town and benefits enjoyed by the Town in being able to hold the workshops outside of the municipal limits ... outweigh the 'cost or delay' occasioned by the public in attending the meeting."

Wiedemann urged both the circuit court and this court to rule in his favor based on the supreme court's use of the words "necessary" and "necessity." Wiedemann II, 330 S.C. at 537, 500 S.E.2d at 786. In its opinion the supreme court stated: "[T]here are genuine issues of material fact concerning the **necessity** of Town conducting the meeting outside the municipal limits. There is simply **no** evidence in the record as to why it was necessary for town to conduct the meeting at Dataw Island." Id. Weidemann argues necessary and necessity mean "indispensible, unavoidable, and essential". The circuit court refused to adopt Wiedemann's argument, stating:

> The Town need not provide evidence that it was "indispensable," "unavoidable" and "essential" for the Town to conduct the workshop outside of its municipal

> limits, as is urged by the Plaintiff. Such a literal interpretation of the words "necessity" and "necessary" as used by the Supreme Court contradicts the rationale of the balancing of interests test adopted by the Supreme Court. If it were "indispensable" and "unavoidable" for the Town to conduct the workshop outside of the Town's limits, then that would in and of itself justify conducting the workshop at Dataw Island Club, and there would be no reason to balance the interest of the public in attending the workshop.

We agree. Although the supreme court's opinion uses the words "necessary" and "necessity," the opinion clearly embraced the application of a balancing test. Wiedemann II, 330 S.C. at 537, 500 S.E.2d at 786. If "necessary" as used in the supreme court's opinion meant indispensable and essential, as asserted by Wiedemann, there would be no need for any balancing of interests to occur. A requirement of absolute necessity is inconsistent with the supreme court's requirement that the trial judge balance a variety of factors in reaching its decision.

In adopting the balancing test in Weidemann I, this court relied heavily on Rhea v. School Bd., 636 So. 2d 1383 (Fla. Dist. Ct. App. 1994). In Rhea, the school board conducted a meeting more than 100 miles from its regular meeting place. The board advertised the meeting in the local newspaper. Rhea filed a complaint for injunctive and declaratory relief alleging the board violated the state law requiring board meetings be open to the public at all times. The board countered that the meeting was held in a public meeting room in a hotel and that the hotel staff was advised to direct any members of the public to the appropriate location.

The Rhea court found that the distance to the meeting site and any action by the board to minimize the expense and inconvenience to the public were factors to be considered under the balancing test. Under that test, "[t]he interests of the public in having a reasonable opportunity to attend a Board workshop must be balanced against the Board's need to conduct a workshop at

a site beyond the county boundaries." Id. at 1385. This balancing must occur whenever the board had a perceived need to meet outside the municipal limits. Id. at 1386.

Taking our own view of a preponderance of the evidence, we find the Town did not violate the FOIA by holding its workshop at Dataw Island. Applying our original balancing test, we find the Town has presented sufficient evidence that its interest in increased attention and focus outweighed the small cost and delay to the public in attending the workshop at Dataw Island. We agree with the circuit court that the Town need not prove it was indispensable, unavoidable, or essential to conduct its workshop outside of the municipal limits.

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

AFFIRMED.

ANDERSON and STILWELL, JJ., concur.