

**THE STATE OF SOUTH CAROLINA**  
In the Supreme Court

**APPEAL FROM HAMPTON COUNTY**  
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge  
J. Cordell Maddox, Jr., Circuit Judge

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C.A. No. 01-CP-25-127

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Danny Whaley, .....Respondent

v.

CSX Transportation, Inc., .....Appellant

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**BRIEF OF  
THE AMERICAN TORT REFORM ASSOCIATION  
AND  
THE SOUTH CAROLINA CHAMBER OF COMMERCE  
AS AMICI CURIAE IN SUPPORT OF  
APPELLANT CSX TRANSPORTATION, INC.**

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**STATEMENT OF THE ISSUE ON APPEAL**

Amici Curiae address the following issue on appeal, as stated by Appellant CSX

Transportation, Inc. (“CSXT”):

Did the trial court err in denying CSXT’s motion to transfer venue where the undisputed evidence showed that CSXT is not a resident of Hampton County under the only valid test for determining the residency of a foreign corporation, the trial court was not precluded by S.C. Code § 36-2-803(2) from considering CSXT’s motion based upon convenience of witnesses and ends of justice, and the evidence overwhelmingly established that changing venue from Hampton County to Greenwood County would promote the convenience of witnesses and the ends of justice?

**STATEMENT OF THE CASE**

Amici adopt Appellant CSXT's summary of the dispute in question.

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## FACTS

This case focuses on the major reason many employers and other corporations question their ability to receive a fair trial in South Carolina. This case was “forum shopped” to Hampton County, a jurisdiction often viewed as highly favorable for plaintiffs, although Hampton County has no connection to the facts of the case.

Three other counties offered a more convenient and logical location for the trial. The plaintiff, Mr. Whaley, is a resident of Abbeville County, where his family has lived for nearly 250 years. As a CSXT employee, he regularly worked on a sixty-mile, round-trip route between Greenwood and Laurens Counties. It was on this route that Mr. Whaley, a locomotive engineer, was allegedly injured through exposure to excessive heat. Greenwood County is also a county in which his employer maintains an office and an agent, and its courthouse is just thirteen miles away from the plaintiff’s home. Each and every fact witness for both parties lived in Abbeville, Greenwood, or Laurens County.<sup>1</sup> Yet, despite the connection of each of these three counties to the parties, the witnesses, and the alleged injury, Mr. Whaley’s lawyer filed a complaint six counties and 145 miles away in Hampton County, a jurisdiction generally perceived as favorable to plaintiffs and as providing generous awards. The almost predictable result was a verdict for an extraordinary \$1 million in compensatory damages, which the trial court refused to remit.

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<sup>1</sup> The only witness from Hampton County was a physician retained by Mr. Whaley’s counsel to review his condition.

## ARGUMENT

At issue in this case is the definition of where a defendant “resides” for the purpose of venue in South Carolina. See S.C. Code Ann. § 15-7-30. This issue is of great importance because how the Court interprets the residence of a defendant impacts the degree to which a lawyer can “forum shop” for the most friendly jurisdiction in the state. Giving lawyers free rein to file a lawsuit in whatever county is most likely to render the largest verdict for the plaintiff, without regard to the defendant, ignores a defendant’s important and substantial right to trial in the county of its residence. For many years, South Carolina law provided that, for venue purposes, a corporate defendant resided in a county in which it had an office and an agent for the transaction of business. Then, for a relatively brief period, the Court permitted the filing of lawsuits against a domestic corporation in any county in which it “own[ed] property and transact[ed] business” based on language found in a statute pertaining to service of process. See S.C. Code Ann. § 15-9-210 (Supp. 1980). This test was later extended to foreign corporations.

Over twenty years ago, however, the legislature removed this language from the South Carolina Code.<sup>2</sup> Nevertheless, the trial court in this case relied upon a case applying the language of a now-repealed statute to continue to resurrect the broad “owns property and transacts business” test. Experience has shown that this 1980 decision should be formally overruled, not only because the broad transacting business and

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<sup>2</sup> This Court interpreted the service of process statute in pari materia with the general venue statute in In re Asbestosis Cases, 274 S.C. 421, 266 S.E.2d 773 (1980), when it adopted the property/business test, *but* the Legislature subsequently repealed that portion of the service of process statute which this Court had read in concert with the venue statute. To ignore this legislative act and continue an interpretation based on a repealed statute would shake the very foundation of a government based on separation of powers between the three branches. “In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of

ownership of property test it employs has proved unfair to corporate defendants, but, more importantly, because the statutory language upon which the test depends, has long since been repealed.

Some trial courts have exacerbated forum-shopping problems in South Carolina by finding that another South Carolina statute strips them of their discretion to transfer cases for the “convenience of witnesses and the ends of justice.” See S.C. Code § 36-2-803(2). The trial court in this case followed this erroneous interpretation, finding that it lacked discretion to transfer on convenience grounds in this case. But, Section 36-2-803(2), if it is valid at all, applies only to defendants that are *wholly* foreign, *i.e.*, defendants with only the barest level of minimum contacts needed to consent to the jurisdiction of South Carolina courts. Appellant CSXT, of course, is a domesticated foreign corporation that does business, owns property, and maintains an office and agent in South Carolina, and, therefore, is not governed by Section 36-2-803(2).

The overbroad interpretation of the venue statute, coupled with the refusal to exercise discretion to transfer cases in appropriate situations, are largely responsible for the reputation of certain South Carolina counties as “Judicial Hellholes,”<sup>TM</sup> and discourages employers from doing business in the state. Beyond the maintenance of a reputation for fairness, however, the practice of allowing employers and other corporations to be sued in counties with little or no connection to the litigation or the defendant, has endangered the defendant’s right to fundamental fairness.

This case provides the Court with an opportunity to stop blatant forum shopping. Amici urge this Court to restore fairness to South Carolina venue law by finding that a

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one of said departments shall assume or discharge the duties of any other.” Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002) (quoting S.C. Const. Art. I, § 8).

defendant resides where it has an office and agent for the transaction of corporate business. Amici also respectfully request that this Court use this case as an opportunity to affirm that trial courts have discretion to transfer venue when it serves the convenience of witnesses and the interests of justice, particularly where the defendant has an office and agent for the transaction of its business within the State.

**I. THE TRIAL COURT’S INTERPRETATION OF THE VENUE STATUTE IS CONTRARY TO LONGSTANDING SOUTH CAROLINA PRECEDENT AND ALLOWS UNRESTRAINED FORUM SHOPPING.**

“This Court has repeatedly held that the right of a defendant to be tried in the county of his residence is a substantial right.”<sup>3</sup> Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 406 (1991); see also Chestnut v. Reid, 299 S.C. 305, 306, 384 S.E.2d 713, 714 (1989) (citing Lucas v. Atlantic Greyhound Fed. Credit Union, 268 S.C. 30, 231 S.E.2d 302 (1977); Shelton v. Southern Kraft Corp., 195 S.C. 81, 10 S.E.2d 341 (1940)); Graham v. G. F. Beverly, 235 S.C. 222, 110 S.E.2d 923, 926 (1959). This right is substantially eroded if the Court accepts the trial court’s interpretation of where a corporation resides, which potentially can subject a defendant like CSXT to trial in any county in the state. Instead, this Court should return to the practice of defining a corporate defendant’s residence as the location of its office and agent, because the sole basis for this Court’s departure from that definition was a statutory provision that has since been repealed.

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<sup>3</sup> The In re Asbestosis Cases turned the venue statute from defendant protective to defendant destructive. The repeal of the ownership of property and transaction of business benchmarks from the service of process statute should have returned the focus of venue to the status quo ante, but it has not. See 77 Am. Jur. 2d Venue § 32 (1997) (noting that the general spirit of most venue statutes is to give defendants the right to have actions against them tried in the county of their residence).

agent for the transaction of business. See, e.g., Sanders v. Allis Chalmers Mfg. Co., 111 S.E.2d 201 (1959); Shelton, 195 S.C. 81, 10 S.E.2d at 342; Tucker v. Ingram, 187 S.E. 25, 198 S.E. 25, 26 (1938); Campbell v. Mutual Benefit Health Corp. & Accident Ass'n, 161 S.C. 49, 159 S.E. 490, 491 (1931). Moreover, this Court continued to find that a foreign defendant's ownership of property or transaction of business by itself was insufficient to establish residence for venue purposes. See, e.g., Coker v. Sinclair Ref. Co., 203 S.C. 13, 25 S.E.2d 894, 895 (1943) (ruling venue was improper in Darlington County, where the foreign defendant engaged in business, owned real estate, and paid real and personal property taxes, because the "sole issue is whether respondent has an agent or maintains an office" in that county).

In 1964, South Carolina amended Section 15-9-210, which provided, for service of process purposes, that "in the case of domestic or foreign corporations, service as effected under the terms of this section shall be effective and confer jurisdiction over any domestic or foreign corporation in any county where such domestic or foreign corporation shall own property and transact business, regardless of whether or not such domestic or foreign corporation maintains an office or has agents in that county." Reading Section 15-9-210 in tandem with the venue statute, S.C. Code § 15-7-30, this Court then defined the residence of foreign and domestic corporations, for venue purposes, as any county where corporations own property or transact business. See In re Asbestosis Cases, 274 S.C. 421, 425-26, 266 S.E.2d 773, 775 (1980).

Section 15-9-210, however, has been rewritten two times following Asbestosis: in 1981 and 1988. As revised, it no longer includes the language relied upon in Asbestosis to expand venue. Nevertheless, the trial courts have continued to refer to the "own

property and transact business” test that has been stricken from the statute,<sup>4</sup> and it appears they will continue to do so, just as the court below did in this case, until this Court speaks on the subject. (See Order, p. 2; Trans. of venue hearing, p. 13, ll. 20-21). Despite having referred to the “own property and transact business” language of Asbestosis in dicta, this Court has not been called upon or had occasion to squarely address the continuing viability of the test following the statutory revisions.<sup>5</sup>

In a 2004 report to the South Carolina Bar, Professor Patrick Hubbard of the University of South Carolina School of Law found that the “owns property and transacts business” test is defunct. Given the legislative changes discussed above, Professor Hubbard concluded that “there is reason to believe that cases based on [repealed Section 15-9-210] are no longer the law in South Carolina” and that “owning property and transacting business would appear to be legally insufficient to establish residency because the cases using this test of residency rely on a code section that no longer contains this definition.” Patrick Hubbard, Report to the South Carolina Bar on Current Proposals for “Tort Reform” in South Carolina 79, 81 (2004), available at <http://www.sctbar.org/pdf/news/TortReformSCBar04.pdf>. Although that was Professor Hubbard’s legal conclusion, he recognized that, in practice, some courts, like the trial court below, are continuing to apply the old “owning property and transacting business” test. Id. at 81. The report also recognized that this practice may increase the potential for forum shopping. Id. Professor Hubbard’s report highlights the need for this Court to guide lower courts by

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<sup>4</sup> See, e.g., Thomas & Howard Co. v. Wetterau, Inc., 291 S.C. 237, 239, 353 S.E.2d 141, 142 (1987); Dove v. Gold Kist, Inc., 314 S.C. 235, 239, 442 S.E.2d 598, 601 (1994).

<sup>5</sup> In fact, the Court has recognized the need for both an office and an agent for venue purposes. Dove, 314 S.C. at 239, 442 S.E.2d at 601 (remanding the case to the trial court to determine appropriate venue when it found that although the defendant Gold Kist

