The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF IVAN N. WALTERS, PETITIONER

On September 28, 2009, Petitioner was definitely suspended from the practice of law for twelve (12) months, retroactive to June 27, 2008. In the Matter of Walters, 385 S.C. 235, 683 S.E.2d 801 (2009). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than August 30, 2010.

Columbia, South Carolina
July 1, 2010

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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N O T I C E

IN THE MATTER OF WILLIAM H. JORDAN, PETITIONER

William H. Jordan, who practices law in Charleston, South Carolina, was definitely suspended from the practice of law for a period of nine (9) months, has petitioned for reinstatement as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, August 13, 2010, beginning at 10:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

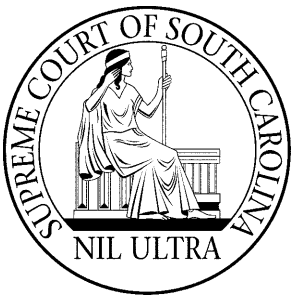
[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 2, 2010



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
July 6, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

James Dean Picklesimer, Respondent.

Appeal From Spartanburg County
Gordon G. Cooper, Circuit Court Judge

Opinion No. 26831
Heard April 20, 2010 – Filed July 6, 2010

REVERSED

John Benjamin Aplin, South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for Appellant.

Appellate Defender Robert M. Pachak, South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE HEARN: The State appeals from the circuit court's discharge of Respondent James Dean Picklesimer's remaining sentence, asserting the court erred in finding Picklesimer had successfully completed his community supervision program (CSP), or alternatively, erred in failing to make a distinction between successful completion of CSP and timing out of CSP supervision due to fulfilling the total available revocation period. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Picklesimer pled guilty to second degree criminal sexual conduct (CSC) with a minor and was sentenced to ten years imprisonment, suspended on the service of five years imprisonment and five years of probation.[1] On September 1, 2004, after serving eighty-five percent of his unsuspended sentence, Picklesimer was released from custody and enrolled in the Department of Probation, Parole, and Pardon Services' (Department) CSP.[2] Thereafter, Picklesimer was charged with violating the terms and conditions of his CSP, his CSP was revoked, and he was remanded to the custody of the Department of Corrections for one year. After serving the additional year's imprisonment, Picklesimer was again released into the Department's CSP on December 1, 2006.

Following Picklesimer's re-enrollment into the CSP, he was charged with violating the program two additional times; however, each time Picklesimer's CSP was continued by order of the circuit court. On June 23, 2008, this Court issued its opinion in *State v. McGrier*, 378 S.C. 320, 663 S.E.2d 15 (2008). Therein, the Court revisited its decision in *State v. Mills*, 360 S.C. 621, 602 S.E.2d 750 (2004), and re-examined a circuit court's ability to revoke a defendant's probation and sentence the defendant to further

[1] Picklesimer was sentenced on September 14, 2001, but was given credit for fifteen and one-half months time served. Thus, his ten year sentence began June 1, 2000, and the five year unsuspended portion of Picklesimer's sentence expired on June 1, 2005.

[2] Service of eighty-five percent of his five year sentence equates to Picklesimer having been released nine months early.

imprisonment over and above the total amount of incarceration time of the original sentence. The Court in *McGrier*, re-interpreting section 24-21-560(D) of the South Carolina Code (2007), found "the total amount of time an inmate [can] be incarcerated after a CSP revocation [is] the length of the remaining balance of the sentence for the 'no parole offense.'" 378 S.C. at 332, 663 S.E.2d at 21. While this clearly established the outside limit of incarceration as the aggregate original sentence, including any suspended portion, subsequent language in the opinion arguably limited the possible incarceration to only the unsuspended portion of the original sentence.

The Department erroneously read *McGrier* to hold that the circuit court could not impose an additional sentence for CSP revocation that would result in the defendant being incarcerated for an aggregate period of time extending beyond the unsuspended portion of the original sentence. Based on this interpretation, the Department re-calculated the possible CSP revocation time for each offender still under its jurisdiction, including Picklesimer. Because his previous CSP revocation imprisonment of one year exceeded the remaining nine months of the unsuspended portion of his sentence, the Department determined Picklesimer could no longer face incarceration for subsequent revocations, and on June 28, 2008, the State closed Picklesimer's CSP, ostensibly in compliance with *McGrier*. On the same day, the State activated the five-year probation term stemming from the suspended portion of Picklesimer's original sentence.

One month later, the Department issued an arrest warrant charging Picklesimer with violating the terms of the five-year probation. In September of 2008, the Department issued a citation against Picklesimer further charging him with violations of the probation. A probation violation hearing was scheduled in October of 2008, and Picklesimer's counsel, relying on *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002), argued that the pending charges against Respondent should be dropped because he should no longer be on probation. The circuit court continued the violation hearing and accepted memoranda from the parties on the subject.

Following a hearing, the circuit court issued an order finding in favor of Picklesimer, and discharged his remaining sentence and probation. The State filed a motion to reconsider, and thereafter the circuit court issued an order denying the motion and supplementing its original order. The State appealed the circuit court's determination to the court of appeals, and this Court, upon request, certified the case from the court of appeals pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the circuit court err in finding Picklesimer must be treated as having successfully completed CSP, due to the fact that his inability to finish the program was solely a result of his own actions in violating the terms and conditions of CSP?

II. Did the circuit court err in failing to distinguish between successful completion of CSP and the inability to continue CSP due to maxing out the defendant's incarceration time attributable to CSP revocations?

LAW/ANALYSIS

I. Section 24-21-560(D) Revisited

In light of the Department's construction of section 24-21-560(D) in this case, we acknowledge some confusion exists as to the aggregate amount of time a defendant can be incarcerated and/or required to participate in CSP under a sentence from the same offense. We take this opportunity to clarify the Court's interpretation of section 24-21-560(D).

Section 24-21-560(D) provides in pertinent part:

> (D) If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, the prisoner also must complete a community supervision program of up to two years as determined by the department pursuant to subsection (B) when he is released from incarceration.
>
> A prisoner who is sentenced for successive revocations of the community supervision program may be required to serve terms of incarceration for successive revocations, as provided in section 24-21-560(C), and may be required to serve additional periods of community supervision for successive revocations, as provided in section 24-21-560(D). The maximum aggregate amount of time the prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original "no parole offense". The original term of incarceration does not include any portion of a suspended sentence.
>
> . . .

We now definitively state that the "original sentence," as referenced in section 24-21-560(D), includes both the suspended and unsuspended portions of a circuit court's sentence; it is, in fact, the total sentence handed down by the court. Therefore, when a circuit court is faced with a defendant's violation of the Department's CSP or normal probationary term, the court may neither revoke and impose a term of further incarceration, nor lengthen the term of the CSP or probation if that will result in the aggregate period of service extending beyond the end of the term of the original sentence.[3] To

[3] We note that under section 24-21-560(C) of the South Carolina Code (2007), a court may revoke a defendant's CSP and impose a sentence of up to one year's incarceration. Our decision today does not impact upon a court's ability and discretion to impose a one-year revocation sentence for CSP

interpret the original sentence, as the Department has done in this case, would be to virtually eliminate the suspended portion of any sentence.

Additionally, both efficiency and fairness dictate that our clarification today be prospective only, applying to Respondent Picklesimer and to any defendant still under the Department's jurisdiction as of the issuance of this opinion.[4]

II. Discharge of the Remaining Sentence, Including CSP and Probation

The State asserts the circuit court erred in discharging Picklesimer from his entire remaining sentence, including CSP and residual probation, pursuant to *State v. Dawkins*. The State first assigns error to the circuit court's finding that Picklesimer must be treated as having successfully completed CSP, because in the Department's good faith attempt to comply with *McGrier* and terminate Picklesimer's CSP due to his apparent fulfillment of the available revocation period, the Department effectively deprived him of the opportunity to successfully complete CSP. We agree.

In *Dawkins*, this Court held that probationary terms, and mandatory CSP terms for sentences deriving from "no parole offenses," run concurrently. 352 S.C. at 166-67, 573 S.E.2d at 785. Moreover, it held that under the strict construction of section 24-21-560(E), once a defendant participant of CSP successfully completes the CSP program, the remainder of the defendant's sentence, including any residual probation, would be discharged. *Id.*; *see also* § 24-21-560(E) ("A prisoner who successfully completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence."). The Court, however, because it was unnecessary to the resolution of the case in

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violations, except for circumstances when less than one year remains of the defendant's original sentence. Instead, our holding sets only an outside time limit on a defendant's aggregate amount of incarceration and/or CSP participation.

[4] The Court recognizes that the term of Picklesimer's original sentence, based on our calculations, expired on June 1, 2010.

Dawkins, did not define what it meant by successful completion of CSP. *Dawkins*, 352 S.C. at 167, 573 S.E.2d at 785 ("Accordingly, Dawkins' sentence, including probation, is discharged upon *successful* completion of the CSP.") (emphasis in original).

We now hold "successful completion" of CSP connotes the completion of a maximum of two continuous years of CSP, as mandated by section 24-21-560(B), without any violations or revocations, or a determination by the Department that a defendant has fulfilled his CSP responsibilities prior to two years' service in the program. If the defendant's CSP is revoked for a period due to violations, the CSP term begins anew upon the defendant's release. *See* § 24-21-560(D). However, we add the following caveat that incorporates our clarification of section 24-21-560(D) above: under no circumstances shall a defendant be incarcerated, or forced to participate in mandatory CSP or residual probation, stemming from the same conviction, outside of the time given by the trial judge in the original sentence, which encompasses both the suspended and unsuspended portions of the sentence.

Under this adjusted interpretation, Picklesimer would not have been treated as having successfully completed his CSP because he had not served two continuous years without any violations or revocations of the CSP. Additionally then, Picklesimer's CSP would have continued to run, and he would have been eligible for incarceration due to revocation until the outside time limit of his original sentence, June 1, 2010, or until he successfully completed his CSP.

Moreover, this definition of successful completion is entirely reconcilable with this Court's holding in *Dawkins*. If a defendant is sentenced to a term including both a suspended and unsuspended portion, once the unsuspended portion has been served, or eighty-five percent of which has been served, the defendant will be released into the Department's CSP or normal probation program. If the defendant is enrolled and thereafter successfully completes a CSP according to the definition expressed above, under *Dawkins*, the defendant's sentence will be discharged, including any residual probation. If the defendant is required to enroll in normal probation

upon initial release, rather than CSP, the probationary term will continue to run until the end of the original sentence.

The State next contends the circuit court erred in finding no distinction between successful completion of a CSP program and the inability to continue CSP due to a defendant reaching the maximum allowable incarceration time attributable to CSP revocations. Based on our clarification and definition of successful completion above, the State's contention is rendered moot, as the scenario that occurred in Picklesimer's case, under the erroneous interpretation of section 24-21-560(D), is no longer a possibility. More specifically, because the Court finds that the original sentence encompasses both the suspended and unsuspended portions of the sentence, coupled with our pronouncement in *Dawkins* that CSP and normal probation run concurrently, then a defendant will either successfully complete his CSP, or continue in CSP due to violation revocations until the end of the original sentence, at which time the sentence will have been fulfilled. As a result, the problem of fulfilling the maximum allowable incarceration time prior to the end of a defendant's original sentence is no longer a temporal possibility. *See Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 195 S.E.2d 713 (1973) (stating when there remains no actual controversy, this Court will not pass on moot and academic questions or render judgment which will have no practical effect).

Based on the foregoing, the judgment of the circuit court is

REVERSED.

TOAL, C.J., PLEICONES and KITTREDGE, JJ., concur.
BEATTY, J., concurring in a separate opinion.

JUSTICE BEATTY: I fully concur in the majority's opinion and write separately to further clarify McGrier.

It is important to recognize that the sentence in McGrier was a no parole straight sentence of three years, not a split sentence. No part of McGrier's sentence was suspended; therefore, the McGrier decision did not involve a CSP incarceration as a result of a probation revocation.

McGrier initially served eighty-five percent of his no parole sentence and was released to CSP. He failed to successfully complete CSP and was re-incarcerated multiple times. The McGrier decision determined that the total period of incarceration for McGrier's CSP violations could not exceed the remaining fifteen percent of his sentence. The McGrier opinion used the phrase "unsuspended portion" because the remaining fifteen percent was in fact unsuspended. Although McGrier was released after having served eighty-five percent of his sentence, good time credits could not be used to eliminate the availability of the unsuspended fifteen percent for CSP purposes. See S.C. Code Ann. § 24-13-210(F) (2007) ("No credits earned pursuant to this section may be applied in a manner which would prevent full participation in the Department of Probation, Parole, and Pardon Services' prerelease or community supervision program as provided in Section 24-21-560.").

Picklesimer received a split sentence of ten years suspended to five years and five years probation. As a result, Picklesimer had five years and nine months left on his sentence which could have been used to successfully complete CSP. The nine months good time credit earned on his initial five years active sentence is effectively nullified pursuant to section 24-13-210(F) of the South Carolina Code.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frank Peterson, Appellant,

v.

Charles Porter and Tiffany Porter, Respondents.

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 4702
Heard March 2, 2010 – Filed June 29, 2010

AFFIRMED

Dwight Christopher Moore, of Sumter, for Appellant.

R. Hawthorne Barrett and Charles F. Moore, both of Columbia, for Respondents.

LOCKEMY, J.: Frank Peterson alleges the circuit court erred in granting Charles and Tiffany Porters' motion for summary judgment. Specifically, Peterson maintains the circuit court erred in: (1) finding he was an invitee on the Porters' property; (2) holding the Porters did not breach any duty owed to him; (3) failing to include in its order those facts that the court found relevant, determinative of the issues, and undisputed, sufficient to provide notice as to the rationale applied in granting summary judgment; and (4) failing to address evidence that he had an employer-employee relationship with the Porters. We affirm.

FACTS

Peterson performed occasional odd jobs for the Porters around their home. While Peterson originally worked for the Porters through a temporary employment agency, the Porters eventually hired him outside of the agency. In most instances, Peterson would contact the Porters whenever he wanted to earn extra money and offer to do any necessary work around their house or yard. The Porters paid Peterson $10 an hour, and he worked between once a month and six to ten times a year.

On September 13, 2003, Peterson contacted the Porters and asked if they needed any work done. Charles Porter offered to pay Peterson to pressure wash his home, and Peterson agreed. The Porters supplied Peterson with a pressure washer, ladder, and wash solution. They did not give Peterson specific instructions on how to perform the task and did not supervise him. Peterson admitted he never felt he needed any assistance or supervision while pressure washing and he felt safe while doing the work. Peterson was injured when he fell 14 feet off of the ladder. He was unable to recall how he fell or even exactly how the accident happened. Peterson could only recall that he was partly on the ladder and partly on the roof when he fell. Peterson suffered a severely broken leg and underwent several surgeries.

Peterson filed suit against the Porters alleging the Porters' negligence, gross negligence, and negligent supervision proximately caused his injuries. In his complaint, Peterson alleged the Porters (1) knew or should have known that he was not trained to safely perform the task assigned, (2) failed to

provide him with the proper training and instruction necessary to safely perform the task assigned, and (3) failed to provide the equipment and support necessary to safely perform the task. Peterson sought damages for his (1) present and physical pain and suffering, (2) present and future mental anguish and shock, (3) present and permanent disability, (4) pre-trial medical expenses, (5) post-trial and future medical expenses, (6) present and future loss of income, and (7) loss of future earning capacity.

The Porters moved for summary judgment. The circuit court held the Porters were entitled to summary judgment because the facts of the case did not give rise to any liability under South Carolina law. The circuit court determined Peterson was an invitee on the Porters' property and the Porters did not breach any duty owed to him. Furthermore, the circuit court determined the Porters did not provide unsafe equipment to Peterson, nor did they fail to warn him of any hidden dangers on their property. The circuit court found the record failed to demonstrate the Porters could have reasonably anticipated the specific harm Peterson suffered. Thereafter, the trial court denied Peterson's motion to reconsider. This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wilson v. Moseley, 327 S.C. 144, 146, 488 S.E.2d 862, 863 (1997). In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the non-moving party. Id.

LAW/ANALYSIS

I. Employer-Employee Relationship

Peterson argues the circuit court erred in finding he was an invitee on the Porters' property. Specifically, Peterson contends he had an employer-employee relationship with the Porters. This issue is not preserved for our review. While Peterson raised the employer-employee argument in his motion to reconsider, he failed to raise it during the summary judgment

proceedings; therefore, it is not preserved. See McClurg v. Deaton, 380 S.C. 563, 579-80, 671 S.E.2d 87, 96 (Ct. App. 2008) (holding a party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment). Accordingly, we affirm the circuit court's determination that Peterson was an invitee on the Porters' property.

II. Breach of Duty

Peterson also argues that assuming he was a business invitee on the Porters' property, the circuit court erred in finding the Porters did not breach any duty owed to him. We disagree.

The circuit court determined Peterson was a "workman on the [Porters'] premises for business purposes," and thus, he was an invitee under South Carolina law. A business visitor "is an invitee whose purpose for being on the property is directly or indirectly connected with business dealings with the owner." Sims v. Giles, 343 S.C. 708, 717, 541 S.E.2d 857, 862 (Ct. App. 2001). "A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004). "The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge." Id. "A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner should have anticipated the resulting harm." Id.

The circuit court determined there was no evidence of any actionable negligence on the part of the Porters. The court found there was no evidence the Porters supplied Peterson with defective equipment or that the equipment caused Peterson to fall. Furthermore, the court determined there was no evidence of any defect or dangerous condition existing on the Porters' property. The court also found the roof's steep slope was an open and obvious condition, and, thus, the Porters did not have a duty to warn Peterson. The court noted there was no evidence anyone had ever fallen from the roof or that the Porters had any reason to believe a fall was likely. The court determined the Porters did not have a duty to instruct or supervise

Porter in his work and there was no evidence Peterson's lack of education prevented him from safely performing his work. Peterson maintains the Porters had a duty to warn him of the inherent danger of pressure washing their home. Peterson also contends the Porters had a duty to provide him instructions for safely using the pressure washing equipment and with on-site supervision and guidance to mitigate any danger.

"To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." Platt v. CSX Transp., Inc., 379 S.C. 249, 258, 665 S.E.2d 631, 635 (Ct. App. 2008). Here, the Porters owed Peterson the duty of reasonable care and to warn him of latent or hidden dangers on their property. The record does not contain any evidence of dangerous or defective conditions on the Porters' property. There is no evidence there were any defects associated with the Porters' ladder, pressure washer, or roof. Furthermore, Peterson failed to establish that the Porters had a duty to give him instructions and supervise his work. Peterson failed to cite any legal authorities supporting his claim that the Porters had a duty to instruct and supervise him. Thus, there is no evidence the Porters breached the duty of reasonable care owed to Peterson as an invitee. Moreover, Peterson's negligence claim also fails because he did not produce any evidence that the Porters' negligence proximately caused his injuries.

Peterson also maintains the Porters had a duty to supervise him and warn him of any dangers on their property due to his mental capacity. Peterson argues his intellectual limitations required the Porters to provide him with detailed instructions and close supervision. Peterson was in special education classes in school and has an eighth grade education. According to a report issued by Vocational Rehabilitation Services, a psychologist assessing Peterson determined he was in the "low educable mentally handicapped range." However, the record does not demonstrate that Peterson's mental capacity required heightened supervision from the Porters or affected his ability to safely perform the pressure washing. Peterson admitted he understood and was comfortable with the task. He testified he never felt he needed any assistance or supervision while pressure washing and he felt safe while doing the work. Peterson had also performed the same

type of pressure washing for the Porters the week before his accident without incident. In addition, Peterson had held full-time jobs and had worked for the Porters previously without any special supervision. Accordingly, we find Peterson's lack of education did not require close supervision or special instructions from the Porters, and we affirm the circuit court's grant of summary judgment.

III. Sufficiency of the Circuit Court's Order

Peterson alleges the circuit court erred in failing to include in its order those facts that the court found relevant, determinative of the issues, and undisputed. He contends the circuit court order was not sufficient to provide him with clear notice as to the court's rationale for granting summary judgment. We disagree.

Peterson relies on Bowen v. Lee Process Systems, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000) to support his argument. In Bowen, this court held:

> [A] trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review. Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed. In doing so, the trial court should provide clear notice to all parties and the reviewing court as to the rationale applied in granting . . . summary judgment.

342 S.C. at 237-38, 536 S.E.2d at 88-89. Peterson argues the circuit court order fails to provide the court's rationale for granting summary judgment and fails to disclose the relevant facts that the court found determinative of the issues. The circuit court listed the following four legal principles in its order: (1) whether a legal duty exists is an issue of law for the trial court to decide, (2) if a legal duty does not exist, there can be no breach of that duty and no liability for negligence, (3) the common law imposes no duty on a person to act, and (4) a duty can arise by statute, contractual relationship, status,

property interest, or some other special circumstance.[1] Peterson argues the cases the circuit court uses to support these legal principles are factually distinguishable from the present case, and thus, not applicable. While the cases cited by the circuit court differ factually from the present case, the legal propositions for which they are cited support the circuit court's analysis. Considering the order in its entirety, we find it clearly indicates the circuit court's rationale for granting summary judgment. The order discusses all the facts the circuit court considered material to its summary judgment decision and contains a thorough analysis of the issues. Accordingly, we affirm the circuit court's grant of summary judgment.

CONCLUSION

We find the circuit court did not err in granting the Porters' motion for summary judgment. Accordingly, the circuit court's order is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

[1] We note the circuit court relied on the following cases in its order: Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001), Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998), Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992), and McCullough v. Goodrich & Pennington Mortgage Fund, Inc., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007), respectively.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William C. Morris, Jr., and
William Robert Morris, Respondents,

v.

Tidewater Land & Timber,
Inc., and Leon E. Fonvielle, II, Appellants.

Appeal from Williamsburg County
Special Referee W. Haigh Porter

Opinion No. 4703
Heard March 3, 2010 – Filed June 30, 2010

AFFIRMED AS MODIFIED

Reynolds Williams and Walker H. Willcox, both of Florence, for Appellants.

William P. Hatfield, of Florence, for Respondents.

GEATHERS, J.: This action for an accounting arises out of the 2003 dissolution of Tidewater Land and Timber, Inc. (Tidewater), a corporation in which Leon E. Fonvielle, II (Chuck), William Robert Morris (Robert), and William C. Morris, Jr. (William) were the equal and sole shareholders. On appeal, Tidewater and Chuck challenge the special referee's judgment awarding Robert and William each $90,897.35 and finding against Tidewater and Chuck on their counterclaim. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

Tidewater was incorporated in 1995 by Chuck, Robert, and William. It engaged in the business of purchasing timber, hiring loggers to cut the timber, and then reselling the timber to mills. Chuck and Robert operated the corporation, while William had minimal involvement.

Tidewater's initial funding originated from a line of credit obtained from the Bank of Greeleyville and secured by William's personal assets. Chuck and Robert did not contribute any capital to the start-up of Tidewater.

For tax purposes, Chuck, Robert, and William also formed a real estate partnership named CRW through which they purchased timberland. CRW would frequently make improvements to the land that it purchased, and Tidewater provided funding for those improvements. When a payment was made on behalf of CRW by Tidewater, it was recorded in Tidewater's books as an account receivable from CRW.

At some point, Chuck, Robert, and William purchased a tract of land in Orangeburg County (Orangeburg tract), which, according to Chuck, was considered an asset of CRW. The funds to purchase the tract were provided through a mortgage loan from Williamsburg First National Bank. The Williamsburg First National Bank loan was recorded on Tidewater's balance sheet as a long-term liability. According to William, the shareholders also invested a substantial amount of money in improvements to the tract from funds obtained from the Bank of Greeleyville. He estimated that, in total, $700,000 was expended on the Orangeburg tract.

In 2001, Tidewater hired Wanda Poindexter, who has a degree in accounting and decades of bookkeeping and accounting experience, to assist with Tidewater's accounting needs. Although Dana Watford, Tidewater's secretary, was performing the day-to-day bookkeeping for Tidewater, Tidewater wanted Poindexter to check Watford's work and to prepare financial statements, something Watford could not do. Once a quarter, Poindexter would send financial statements that she had prepared for Tidewater to the accounting firm of Burch Oxner Seale for its review. The accounting firm never questioned the reliability of any of the financial statements prepared by Poindexter.

Sometime in late 2001 or early 2002, the Orangeburg tract was put up for sale. It languished on the market for a while, but, in October or November of 2002, an Orangeburg man agreed to purchase it for $700,000.

At around that same time, in November 2002, Robert was approached by Poindexter at a horse race in Kingstree. Poindexter expressed concern about Tidewater's finances. She told Robert that the corporation was in financial distress and that if something was not done, the corporation might have to declare bankruptcy. Robert then called Chuck to discuss the conversation that he had with Poindexter. Chuck assured Robert that everything was fine.

However, about a month later, in late December 2002, Chuck called Robert and William and told them that there was a major problem and that an immediate meeting was needed. At the meeting, Chuck warned Robert and William that the corporation could not pay the bills and that it faced bankruptcy. He also informed them that he was willing to take over the corporation if they wanted out.

Either that night or the day after, the shareholders reached an oral agreement that Tidewater would be dissolved and that Chuck would retain the right to use Tidewater's name in a new venture. The three shareholders also agreed *inter alia* that: (i) Chuck would assume all of Tidewater's

liabilities; (ii) Chuck would receive all of Tidewater's assets, with the exception that the accounts receivable from the loggers would be divided equally among the shareholders as collected;[1] and (iii) Chuck would forgive the shareholder debts of Robert and William.

Sometime thereafter, William engaged in a conversation with Scott Williamson, a Senior Vice President at the Bank of Greeleyville, about the dissolution of Tidewater. During this conversation, William discussed what he expected out of the dissolution agreement.

On January 30, 2003, the closing on the Orangeburg tract took place. As a result of the sale, $491,554.45 was disbursed directly from the proceeds to satisfy Williamsburg First National Bank's mortgage on the tract. The remainder was deposited into CRW's checking account. A day after the closing, William wrote a $175,000 check from CRW's checking account to the Bank of Greeleyville to reduce the balance on Tidewater's line of credit. Altogether, Tidewater's liabilities were decreased by $666,554.45 ($491,554.45 plus $175,000) as a direct consequence of the sale of the Orangeburg tract.

Poindexter accounted for the $666,554.45 reduction in Tidewater's liabilities by first extinguishing the account receivable from CRW, which she determined was approximately $383,000. She then treated the remaining amount as a contribution from the shareholders, dividing it equally among Chuck, Robert, and William. As a result, the accounts receivable from Robert and William (i.e., their debts to Tidewater) were converted into accounts payable (i.e., liabilities owed by Tidewater to them). Poindexter testified that she treated things this way because of "accounting practice," not because any of the shareholders told her to do so.

Additionally, on February 15, 2003, Poindexter created a financial statement reflecting the corporation's assets and liabilities as of that day. The

[1] Occasionally, Tidewater would advance funds to the loggers to cover their operating costs. Those funds would then be reimbursed at the time of settlement.

statement showed an account payable to Robert of $61,252.00 and an account payable to William of $36,909.13. At trial, Poindexter testified that she thought that each of the shareholders received the statement. Poindexter's testimony was corroborated by Robert, who indicated that the shareholders did indeed receive the statement.[2]

On February 28, 2003, Tidewater was dissolved. After the dissolution of Tidewater, CRW remained in business for approximately eight months, dissolving in October 2003.

In July 2006, Robert and William filed a complaint in circuit court seeking an accounting of amounts that they claimed were due to them from Tidewater and Chuck. Tidewater and Chuck subsequently counterclaimed for an accounting of amounts allegedly due to Chuck from Robert and William. The matter was then referred to a special referee.

The special referee ultimately awarded Robert and William each $90,897.35 and found against Appellants on their counterclaim. In calculating the $90,897.35 figure, it appears that the special referee subtracted the account receivable from CRW (which he determined was $393,862.39) from the $666,554.45 reduction in Tidewater's liabilities that resulted from the sale of the Orangeburg tract. He then found that the remaining $272,692.06 constituted a contribution by each shareholder of $90,897.35 towards the reduction of Tidewater's debts. Finally, the special referee concluded that Robert and William's contributions to Tidewater resulted in them being substituted for the banks on the debts owed by Tidewater and that, because Chuck assumed the liabilities of Tidewater as of February 28, 2003, Chuck owed Robert and William each $90,897.35.[3]

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[2] Specifically, Robert testified that "once we did the–got the final information there, February 15th of '03, it showed that we had pretty much overpaid some stuff, and–and, you know, that I was due some money from the old company, and my father was also due money from the old company."

[3] Unlike Poindexter, the special referee did not subtract William and Robert's existing debts from their respective contributions.

Tidewater and Chuck subsequently filed a motion to amend the judgment pursuant to Rule 52(b), SCRCP, but it was denied by the special referee after a hearing. This appeal followed.

ISSUES ON APPEAL

1. Did the special referee err by failing to find that Tidewater's assets were distributed in accordance with the shareholder's dissolution agreement?

2. Alternatively, must the distribution of the Orangeburg proceeds be decided in an accounting of CRW rather than of Tidewater?

3. Did the special referee err by excluding the testimony of Scott Williamson regarding a statement made to him by William about Tidewater's dissolution?

4. Did the special referee err by finding against Tidewater and Chuck with respect to their counterclaim?

5. Does equity require the reversal of the special referee's judgment?

STANDARD OF REVIEW

"An action for an accounting sounds in equity." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009). Accordingly, this court may find facts in accordance with its own view of the preponderance of the evidence.[4] Id. However, the court "is not required to

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[4] "A preponderance of the evidence stated simply is that evidence which convinces as to its truth." Semken v. Semken, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008).

disregard the factual findings of the referee, who saw and heard the witnesses and was in a better position to judge their credibility." Godfrey v. Heller, 311 S.C. 516, 518, 429 S.E.2d 859, 860 (Ct. App. 1993).

LAW/ANALYSIS

I. Did Chuck Comply with the Shareholders' Dissolution Agreement?

Appellants contend that Chuck complied with the shareholders' dissolution agreement and that Robert and William were therefore precluded from recovering under an accounting cause of action. As explained below, we conclude that Robert and William were entitled to recover under an accounting cause of action, but that the judgment awarded by the special referee must be modified.

The special referee found, and we agree, that the terms of the dissolution agreement were as follows: (i) Chuck would retain the right to use the Tidewater name; (ii) accounts receivable from the loggers would be divided equally among the shareholders as they were collected; (iii) Chuck would assume all other assets of Tidewater; (iv) Chuck would assume all liabilities of Tidewater; (v) Chuck would forgive all of the debts of Robert and William; and (vi) Chuck would release William from his personal obligation to the Bank of Greeleyville on Tidewater's line of credit.

Our inquiry, however, is not yet complete; we must still decide what Tidewater's liabilities were at the time of its dissolution.[5] More specifically, we must determine what, if anything, Tidewater owed Robert and William when it dissolved.

At trial, the following three accountants testified regarding the amounts owed by Tidewater to Robert and William at the time of its dissolution: (i)

[5] We agree with the special referee's finding that Chuck agreed to assume the liabilities of Tidewater as of February 28, 2003, the date it ceased doing business.

Poindexter;[6] (ii) Janet Hicks; and (iii) James King.[7] After carefully reviewing the record, we conclude that Poindexter's analysis, as evidenced by her February 15, 2003 financial statement, best reflects the shareholders' agreement as to those amounts.[8] Poindexter, who was employed as Tidewater's accountant at the time, created the February 15, 2003 statement specifically for the purposes of Tidewater's dissolution. She testified that "knowing that the company was going to close, you have to have a definition between partners. . . . And at this point with Chuck taking over the company, the assets from the company to a new company, I separated them out per partner where each individual one would know exactly what was being done [to] them or they owed, either way." Considering that the shareholders entered into an agreement in which Chuck agreed to assume all of Tidewater's liabilities, it was certainly important to have a document that stated exactly what those liabilities were. Furthermore, there is simply no evidence that any of the shareholders ever asked Poindexter to modify the statement, even though the record indicates that the shareholders received a copy of it shortly before Tidewater's dissolution.

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[6] According to Appellants' reply brief, Poindexter was presented as a fact witness, not an expert witness. Nonetheless, this court may still consider her testimony on the issue of Tidewater's liabilities to Robert and William. See Bray v. Head, 311 S.C. 490, 497-98, 429 S.E.2d 842, 846 (Ct. App. 1993) (holding, in an action for dissolution of partnership and division of assets, that partner was not required to offer an analysis of partnership accounts by an expert witness, but rather could rely upon the testimony of the partners' office manager).

[7] The trial transcript does not contain the relevant testimony from King. However, as discussed below, the special referee's order indicates that King did provide an opinion as to the amounts owed by Tidewater to Robert and William when it dissolved.

[8] Poindexter's February 15, 2003 financial statement is not in the record. However, Poindexter testified to the pertinent portions of its contents.

With respect to Hicks' analysis of Tidewater's liabilities to Robert and William, we do not find it to be persuasive. At trial, Hicks introduced Defendant's Exhibit 3, which sets forth Hicks' determination as to the assets and liabilities of Tidewater at the time of its dissolution. Defendant's Exhibit 3, which does not list any liabilities owed to Robert, William, or CRW, shows that Tidewater's assets exceeded its liabilities by $57,036.22. Additionally, Hicks testified that Robert and William were collectively able to walk away from liabilities of approximately $120,000 as a result of the dissolution agreement. Hicks therefore concluded that, because Chuck received approximately $60,000 from the dissolution and Robert and William received a benefit worth, on average, $60,000, "no one is due anything and nobody owes anybody anything."

Hicks' approach has two major weaknesses. First, it is premised upon what Hicks believes is a fair outcome rather than on any real evidence as to the shareholders' intent. Significantly, Defendant's Exhibit 3 does not take into account intangible assets like the value of Tidewater's name, even though Chuck testified that he "didn't want to start over as far as the name goes" and that he wanted to keep the Tidewater name because "it was an established, reputable name." Second, Hicks failed to present a clear explanation as to how the payments made to Williamsburg First National Bank and the Bank of Greeleyville should have been treated on Tidewater's books. For instance, while she testified at trial that the payments should have resulted in the account receivable from CRW being converted to an account payable, Defendant's Exhibit 3 does not include an account payable to CRW.

Finally, as to King's analysis, which was relied upon by the special referee, we note that the trial transcript contains only two pages of King's testimony and that those two pages do not address the amount of Tidewater's liabilities to Robert and William. Moreover, while the special referee's order summarizes some of King's testimony, it is unclear why King failed to fully accept the approach taken by Poindexter in accounting for the payments made to Williamsburg First National Bank and the Bank of Greeleyville. Although King appeared to agree with Poindexter that the payments resulted in the shareholders each making a contribution to Tidewater, King apparently

determined that Robert and William's existing debts to Tidewater should not have been subtracted from their respective contributions. However, we are unable to ascertain why King made this latter determination. It is possible that King concluded that Chuck forgave William and Robert's shareholder debts before the proceeds from the Orangeburg tract were disbursed to Williamsburg First National Bank and the Bank of Greeleyville. However, the evidence does not support such a conclusion; in fact, it demonstrates just the opposite. In a deposition, Robert testified that Chuck told him that "when we pay this stuff off, I'll just wash your debt and your daddy's debt clean." By "when we pay this stuff off," Chuck was apparently referring to using the proceeds from the sale of the Orangeburg tract to reduce Tidewater's debt. Thus, it does not appear that Chuck intended to forgive Robert and William's shareholder debts before Tidewater's debts were reduced by means of the Orangeburg tract proceeds. Furthermore, according to the special referee's order, King testified that the Orangeburg tract sale changed the relationship between Tidewater and the Morrises from that of creditor to debtor. Hence, it appears that King believed that Robert and William owed debts to Tidewater at the time of the Orangeburg tract sale and that the Orangeburg tract proceeds erased those debts. Finally, it must be noted that the special referee expressly found that Chuck agreed to assume the liabilities of Tidewater as of February 28, 2003, and there is no evidence in the record that the various portions of the agreement (i.e., the assumption of Tidewater's liabilities and the extinguishment of Robert and William's debts to Tidewater) were intended to become effective at different times. Accordingly, we conclude that Chuck did not forgive Robert and William's shareholder debts prior to the disbursement of the Orangeburg tract proceeds to Williamsburg First National Bank and the Bank of Greeleyville.

For these reasons, we find that Poindexter's February 15, 2003 financial statement best reflects the amounts owed by Tidewater to Robert and William at the time of its dissolution. Cf. Bray, 311 S.C. at 497-98, 429 S.E.2d at 846 (holding, in a partnership accounting action, that the special master properly relied upon the accounting analysis offered by the partners' office manager, rather than the analysis of a certified public accountant, where the office manager's analysis was more consistent with the partners' agreement

regarding the accounting treatment to be afforded to a partner's payments on a partnership loan). As noted above, Poindexter's February 15, 2003 statement shows that Tidewater owed liabilities of $61,252.00 and $36,909.13 to Robert and William, respectively. Accordingly, we hold that the special referee's award of $90,897.35 each to Robert and William must be modified to instead award $61,252.00 to Robert and $36,909.13 to William.

II. Must the Proceeds from the Sale of the Orangeburg Tract be Disbursed in an Accounting of CRW rather than of Tidewater?

Alternatively, Appellants contend that, to the extent that the parties intended for Robert and William to have a claim to the proceeds of the Orangeburg tract, the proper distribution of those proceeds should have been decided in an accounting of CRW, rather than of Tidewater.

We are not persuaded by Appellants' argument. The HUD statement for the sale of the Orangeburg tract shows the sellers as being Chuck, Robert, and William in their individual capacities, not the partnership entity of CRW. In fact, in their brief, Appellants state that the Orangeburg tract was titled in the names of Chuck, Robert, and William.[9] Thus, while the shareholders may have considered the Orangeburg tract to be an asset of CRW, it was not legally a CRW asset.

Furthermore, the asset section of the settlement statement for CRW's dissolution does not list an account receivable from Tidewater, even though the $666,554.45 reduction in Tidewater's debts that resulted from the Orangeburg tract sale exceeded the amount then owed by CRW to Tidewater. This telling fact demonstrates that Chuck, Robert, and William, each of whom signed CRW's settlement statement, did not think CRW was owed

[9] Although Chuck testified in a deposition that CRW purchased the Orangeburg tract, the brief submitted by him and Tidewater states that the tract was titled in the names of Chuck, Robert, and William.

anything as a result of the way in which the Orangeburg tract proceeds were disbursed.

For these reasons, we conclude that an accounting of CRW was not legally required to properly distribute the Orangeburg tract proceeds.

III. Did the Special Referee Err by Excluding Scott Williamson's Testimony Regarding William's Statement to Him About the Dissolution of Tidewater?

Next, Appellants contend that the special referee erred by excluding, on hearsay grounds, testimony by the Bank of Greeleyville's Scott Williamson that William told him that "his main concern [regarding Tidewater's dissolution] was he got his property back off the mortgage, that he was released from any personal liability, [and] that as long as Chuck was going to assume all the liabilities of the company, then he could have the rest of the company as well." Specifically, Appellants argue that this statement was admissible as an admission of a party-opponent under Rule 801(d)(2)(A), SCRE. At trial, the special referee excluded the statement on the ground that it was hearsay as to Robert.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. A statement is not hearsay if the statement is "offered against a party and is (A) the party's own statement in either an individual or a representative capacity." Rule 801(d)(2), SCRE.

In State v. Anders, 331 S.C. 474, 503 S.E.2d 443 (1998), the South Carolina Supreme Court addressed whether a defendant's admission was admissible against another defendant under Rule 801(d)(2)(A) where the two defendants were tried in a joint trial. The court concluded that it was not, explaining:

> Rule 801(d)(2) provides a statement is an admission if it is "offered against a party and is (A) the party's own statement in

> either an individual or a representative capacity . . ." The statement here was not Anders' "own statement," and was clearly therefore not admissible as an admission against Anders.

Id. at 478 n.4, 503 S.E.2d at 445 n.4 (quoting Rule 801(d)(2), SCRE). Thus, in the present case, William's statement was not admissible against Robert under Rule 801(d)(2)(A) because the statement was not Robert's "own statement."

Nevertheless, the statement may have been admissible against William. As the South Carolina Supreme Court has explained, "evidence may be admissible against one defendant and inadmissible against another." Jamison v. Howard, 275 S.C. 344, 349, 271 S.E.2d 116, 119 (1980).[10] In fact, the supreme court has held that "when a statement is admissible against one defendant and not against others, . . . the trial judge must admit the statement against the defendant and instruct the jury to disregard it as to the other defendants." Player v. Thompson, 259 S.C. 600, 608, 193 S.E.2d 531, 535 (1972).[11] Thus, in the present case, because the challenged statement was William's "own statement" as contemplated by Rule 801(d)(2)(A), it arguably should have been admitted against him. Cf. Eberhardt v. Forrester, 241 S.C. 399, 403-04, 128 S.E.2d 687, 689-90 (1962) (holding, in a civil action against the operator and the owners of a vehicle, that the operator's post-collision

[10] The court is cognizant of the fact that Robert and William were plaintiffs here, rather than defendants. However, nothing in Jamison suggests that the quoted language would be inapplicable to a set of plaintiffs.

[11] The court notes that Player was a civil case. In criminal cases, the analysis is generally more complicated because of the Confrontation Clause of the Sixth Amendment. See, e.g., State v. Page, 378 S.C. 476, 481, 663 S.E.2d 357, 359 (Ct. App. 2008) ("The introduction of a nontestifying co-defendant's statement which implicates a defendant violates a defendant's right to confrontation because no opportunity to cross-examine the co-defendant is presented. Because the right to confrontation is so fundamental, limiting instructions are not an adequate substitute.") (citations omitted).

statement regarding the vehicle's brakes was admissible against the operator and that the owners were "entitled only to a ruling or instruction thereabout").

However, even if the special referee erred in excluding the statement, we conclude that any such error was harmless and therefore does not mandate reversal. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) ("[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.").[12] The statement does not touch upon the critical issue in this case, i.e., whether Tidewater's liabilities at the time of its dissolution included amounts owed to Robert and William. Furthermore, the special referee found that the shareholders agreed that Chuck would assume Tidewater's liabilities and, in return, would have the right to all of its assets, other than the accounts receivable from the loggers, which would be divided equally as collected. The only way in which the statement conflicts with that finding is that it does not mention the division of the accounts receivable from the loggers. However, the special referee's finding regarding the accounts receivable from the loggers is not at issue in this case.[13] Accordingly, we conclude that Appellants did not suffer any prejudice as a result of the exclusion of this statement.

IV. Did the Special Referee Err by Finding Against Appellants on their Counterclaim?

Next, Appellants contend that the special referee erred in finding against them with respect to their counterclaim. Specifically, they argue that Robert and William understated the amounts they withdrew from Tidewater. In making this argument, Appellants point to evidence presented by Hicks that purports to show Robert's net withdrawals from the corporation totaled

[12] Interestingly, Appellants state in their reply brief that they "do not request that the Court of Appeals reverse on this error alone."

[13] The special referee found that Chuck had paid all sums of money collected from the accounts receivable of the loggers.

$179,857.83, while William's totaled $175,256.01. Appellants claim that, because Tidewater's December 31, 2002 balance sheet shows a shareholder debt of $22,978.46 for Robert and $47,689.19 for William, Robert understated his debt to Tidewater by $156,879.37 and William understated his debt by $127,566.82. Thus, according to Appellants, Robert and William collectively understated their debts to Tidewater by a total of $284,446.19.

Upon our review of the entire record, we are not persuaded that the special referee erred by finding against Appellants with regard to their counterclaim. At trial, Hicks presented spreadsheets of numerous "questionable checks and deposits" that allegedly demonstrated that Robert and William withdrew net sums of $179,857.83 and $175,256.01, respectively, from Tidewater.[14] However, Hicks did not go through each entry individually and explain why she found it questionable. Moreover, Hicks' testimony at trial was inconsistent with her spreadsheets in that, as noted above, she stated that Robert and William "were allowed to walk away from liabilities that approximate $120,000 in total." According to Hicks' spreadsheets, Robert and William's net withdrawals from Tidewater totaled $355,113.84, which is almost three times the $120,000 figure. Additionally, the evidence presented by Hicks conflicted with testimony provided by Robert and William. For instance, Robert testified that, as far as he knew, Tidewater's records accurately reflected the amounts that he owed. Similarly, William testified that he believed that every personal loan that he received from Tidewater was accounted for. Accordingly, we conclude that Appellants have failed to adequately demonstrate that Robert and William collectively understated their debts to Tidewater by a sum of $284,446.19.

Furthermore, under the terms of the dissolution agreement, Chuck agreed to forgive Robert and William's debts to Tidewater.[15] Moreover,

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[14] Interestingly, Hicks also testified that Chuck withdrew $102,817.03 from Tidewater. Tidewater's December 31, 2002 balance sheet, however, indicates that Chuck did not owe any money to Tidewater.

[15] Indeed, it appears that it was Chuck, rather than Robert or William, who proposed that he forgive the Morrises' shareholder debts.

Chuck, who was Tidewater's president and who kept up with Tidewater's books, testified that he was aware that unrecorded withdrawals were being taken by the Tidewater shareholders, as evidenced by the following exchange between him and his attorney:

> Q: What about loans from the company and that sort of thing?
>
> A: We–they–they were taken.
>
> Q: Explain what you mean when you say they were taken.
> A: Basically, we didn't operate the company the way a company should be operated. It–there were personal loans taken over the whole span that we were [sic] business. . . .
>
> Q: When–when you all would take a loan, would it get booked–would it get written up in the company records?
>
> A: No.
>
> Q: Did it sometimes get written in the . . . ?
>
> A: Sometimes.

Thus, assuming *arguendo* that Robert and William did make some unrecorded withdrawals from Tidewater, it appears that Chuck agreed to forgive those amounts as part of the dissolution agreement.[16]

For these reasons, we conclude that reversal of the special referee's ruling on this issue is not warranted.

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[16] In their reply brief, Appellants contend that Chuck did not know the full extent of Robert and William's unrecorded withdrawals. However, Appellants' argument is not supported by any citation to the record. Under our appellate court rules, we may not consider any fact that does not appear in the record. See Rule 210(h), SCACR.

V. Does Equity Require Reversal of the Special Referee's Judgment?

Finally, Appellants contend that equity requires leaving the parties in the position they were in before the commencement of the accounting action. We disagree.

"Equity will allow a party to recover on an enforceable, legal contract as long as the right to be vindicated arises under that contract and not under an independent illegal agreement." Cherry v. Thomasson, 276 S.C. 524, 527, 280 S.E.2d 541, 542 (1981). In the context of an accounting action, this court has specifically held that "[h]ardship alone provides no basis for relieving one from a contract." Gamble, Givens & Moody v. Moise, 288 S.C. 210, 218, 341 S.E.2d 147, 151 (Ct. App. 1986).

Here, we have concluded that, under the terms of the shareholders' dissolution agreement, Robert was entitled to $61,252.00 and William was entitled to $36,909.13. Appellants have not contended that the dissolution agreement was illegal or otherwise unenforceable.[17] Accordingly, we find that Robert and William must be awarded the amounts they are entitled to under the dissolution agreement.

Conclusion

For the foregoing reasons, we find that the special referee's award of $90,897.35 each to Robert and William must be modified to instead award $61,252.00 to Robert and $36,909.13 to William.

AFFIRMED AS MODIFIED.

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[17] In fact, as noted above, one of Appellants' arguments on appeal is that Respondents cannot recover under an accounting cause of action because Chuck distributed Tidewater's assets in accordance with the dissolution agreement. Thus, Appellants appear to view the dissolution agreement as an enforceable contract.

PIEPER, J., and CURETON, A.J., concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Randolph Boggs, Appellant.

Appeal From Greenwood County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4704
Submitted June 1, 2010 – Filed June 30, 2010

REVERSED

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for Appellant.

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

PER CURIAM: William Randolph Boggs pled guilty to strong arm robbery. Prior to being sentenced, he requested credit for the time he served in pretrial detention. The plea judge indicated his desire that Boggs not receive credit, and on the sentencing sheet, the plea judge did not check the box that would give Boggs credit for time served. Boggs appeals, arguing he is entitled to receive credit for the time he served pursuant to section 24-13-40 of the South Carolina Code (2007). We agree and modify the sentence to include credit for time served.[1]

FACTS

Boggs was charged with armed robbery, and he exercised his right to a jury trial. After the trial was underway, the State agreed to allow Boggs to plead guilty to strong arm robbery. Boggs pled guilty and requested credit for the sixteen-and-a-half months he was detained pretrial.

In response to this request, the plea judge acknowledged being "well aware that section 24-13-40 says you get credit for the time that you were held awaiting sentencing;" however, the judge explained that he was going to request on the sentencing sheet that Boggs not receive credit for time served. Boggs's attorney argued section 24-13-40 was mandatory, to which the judge replied: "I only said request[;] I don't put that in there that he is not to get it[.] He is entitled to it by statute . . . . I am aware of all of that. But when I don't check it off[,] they don't give him credit[.] I am just telling you how it works in the real world."

The plea judge sentenced Boggs to the maximum sentence of fifteen years. On the sentencing sheet, the judge did not check the box notifying the Department of Corrections that Boggs was to be given credit for time served. Instead, the judge hand wrote on the sentencing sheet: "request that Def not be given credit for time served as charge dropped from ar. robbery to st. ar. robbery." This appeal followed.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

LAW/ANALYSIS

Section 23-13-40 of the South Carolina Code (2007) mandates prisoners receive credit for the time they served prior to trial unless one of two exceptions exist, either: (1) the prisoner was an escapee or (2) the prisoner was already serving a sentence on a different offense. Because the language of section 23-13-40 is mandatory, a judge cannot deny a defendant credit for time served prior to trial unless one of the two exceptions applies. See State v. McCord, 349 S.C. 477, 487, 562 S.E.2d 689, 694 (Ct. App. 2002).

Although the State acknowledges Boggs should receive credit for the sixteen months he was detained pretrial, the State argues that the plea judge did not commit an "error of law" because the judge merely made a "precatory request" that Boggs would not get credit. We find the plea judge's own comments undermine the State's assertion that the request had little significance: "But when I don't check [off the box,] they don't give him credit[.] I am just telling you how it works in the real world." Indeed, the online records of the South Carolina Department of Corrections indicate Boggs has not been given credit for time served because his fifteen-year sentence began to run on April 7, 2008, the day of his guilty plea, not the day he was first detained on the charge.

We find the plea judge committed an error of law when he denied Boggs credit for time served based upon the State's decision to drop the charge from armed robbery to strong arm robbery. A judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language in section 23-13-40. Accordingly, the trial judge's decision to deny Boggs credit for time served is reversed.[2] The Department of Corrections shall calculate the credit he is due pursuant to section 23-13-40.

[2] Boggs did not appeal his conviction or fifteen-year sentence.

REVERSED.

FEW, C.J., and THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances S. Hudson, Deceased Employee, by Kenneth L Hudson and Keith B. Hudson, Co-Executors of her Estate, as well as Matthew Deese and/or Andrew Deese, Respondents,

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company, In Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier, Appellants.

Appeal From Lancaster County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 4705
Heard March 3, 2010 – Filed June 30, 2010

AFFIRMED IN PART AND REVERSED IN PART

E. Ros Huff, Jr., of Irmo, for Primary Appellant, and Mark D. Cauthen and Peter P. Leventis, both of Columbia, for Secondary Appellant.

Andrew Nathan Safran and Pope D. Johnson, both of Columbia, and Ann McCrowey Mickle, of Rock Hill, for Respondents.

LOCKEMY, J.: In this workers' compensation action, Lancaster Convalescent Center (Employer) and Legion Insurance Company (Legion), in liquidation through South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty Association), appeal the circuit court's decision affirming the decision of the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) to award Frances S. Hudson certain workers' compensation benefits. We affirm in part and reverse in part.

FACTS

This appeal comes to this court after several workers' compensation hearings. In 1997, Frances S. Hudson sustained an injury to her left leg while in the course and scope of her employment with Employer for which she received workers' compensation benefits. Later, in an order dated October 3, 2001, the single commissioner found Hudson permanently and totally disabled based on a combination of injuries stemming from her original 1997 work-related injury. Due to the combination of her injuries, the single commissioner found Hudson unable to perform any kind of work.

Thereafter, Hudson requested a lump sum payment of her disability award, but Employer and Legion objected. After a hearing on the matter, the single commissioner found it was in Hudson's best interests to receive the lump sum payment of her previous award. The single commissioner noted that the South Carolina Code vests authority in the Workers' Compensation Commission to determine, with discretion, whether a lump sum payment is in an employee's best interest. During the pendency of the lump sum workers' compensation proceedings, Hudson died from cancer on June 30, 2002.

Employer and Legion appealed the single commissioner's ruling to the Appellate Panel and argued it was error to award Hudson the lump sum award. Thereafter, the Appellate Panel affirmed all of the single commissioner's findings of facts and conclusions of law, sustaining his order in its entirety. On July 28, 2003, Legion became insolvent. Accordingly, after the ruling regarding the lump sum payment was rendered, the circuit court stayed the appeal due to Legion's insolvency. During the stay, the Guaranty Association assumed all rights, duties, and obligations of Legion as the insolvent insurance carrier pursuant to section 38-31-60 of the South Carolina Code (Supp. 2009). Thereafter, Employer and the Guaranty Association appealed the Appellate Panel's order to the circuit court and argued it was error to award the lump sum award, and the Appellate Panel's order must be vacated in light of Hudson's untimely death.

The circuit court, under Judge Short, affirmed the Appellate Panel's order in its entirety by written order. The circuit court found substantial evidence supported the Appellate Panel's lump sum award and that the award was not inconsistent with section 42-9-301 of the South Carolina Code (1985). Concerning whether Hudson's death impacted the workers' compensation proceedings, the circuit court found this issue was not preserved for review. Additionally, the circuit court found Employer and Legion's assertion regarding the abatement of Hudson's claim was unpersuasive. Employer and the Guaranty Association appealed the circuit court's decision to this court, but they subsequently withdrew the appeal. Consequently, our clerk of court signed an order of dismissal and remittitur on April 20, 2004.

At some point during the proceedings, Employer and the Guaranty Association learned of Hudson's death and ceased making payments. In response, Kenneth and Keith Hudson, as executors of their mother's estate (the Estate), requested payment of the lump sum award. The Hudson sons raised the claims' issue on behalf of Matthew and Andrew Deese, Hudson's grandchildren. Specifically, the Estate argued the grandchildren were entitled to payment of the lump sum, as Hudson's dependents. Employer and the Guaranty Association argued Hudson's lump sum payment abated upon her death and maintained they were not obliged to pay any sum. The single

commissioner found Judge Short's 2004 order, which addressed Hudson's lump sum award, could not be challenged or relitigated. Specifically, the single commissioner found: (1) Hudson's disability award could reasonably fall within section 42-9-10 of the South Carolina Code (Supp. 2009); (2) all of the current beneficiaries had colorable claims to the lump sum proceeds; and (3) the Guaranty Association failed to establish abatement under section 42-9-280 of the South Carolina Code (1985). Further, the single commissioner ordered the Guaranty Association to pay the lump sum with interest and a ten percent penalty within seven days of the order.

Again, Employer and the Guaranty Association appealed the single commissioner's order. On appeal, the Appellate Panel affirmed all of the single commissioner's factual findings and legal conclusions with the exception of the ten percent penalty imposed. Specifically, the Appellate Panel noted the Guaranty Association did not pursue a frivolous defense. Thereafter, the Estate and the Guaranty Association cross-appealed to the circuit court. Judge Goode issued an order affirming the Appellate Panel with the exception of the ten percent penalty it vacated. In his order, Judge Goode concluded section 42-9-90 of the South Carolina Code (1985) compelled a penalty; accordingly, he reinstated the penalty. This appeal followed.

STANDARD OF REVIEW

"The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission." Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Forrest, 373 S.C. at 306, 644 S.E.2d at 785; see also S.C. Code § 1-23-380(A)(5) (Supp. 2009). The appellate court may reverse or modify the Appellate Panel's decision only if the claimant's substantial rights have been prejudiced because the

decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Forrest, 373 S.C. at 306, 644 S.E.2d at 785-86. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

LAW/ANALYSIS

I. Abatement

Employer and the Guaranty Association argue the circuit court erred in affirming the Appellate Panel's decision finding Hudson's lump sum award survived her death. We find Judge Short's ruling on the abatement issue to be the law of the case; therefore, we decline to address this issue on the merits.

Hudson died during the pendency of the workers' compensation litigation regarding whether to award her lump sum benefits. Specifically, she died between the single commissioner's ruling and the Appellate Panel's ruling. Employer and the Guaranty Association raised the abatement issue at the earliest point possible. See Scott v. Porter, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000) ("[A]n objection usually must be made at the earliest possible opportunity."). Therefore, this issue was properly before the Appellate Panel and the circuit court before Judge Short.

Once the circuit court issued its ruling on abatement, Employer and the Guaranty Association's only means to contest the abatement ruling was to appeal those rulings to our court. Judge Short's order stated the issues were not preserved for review because they had not been raised to the single commissioner. Additionally, Judge Short found the issue of abatement was abandoned. Moreover, he ruled on the merits of the issues and specifically stated that Employer and the Guaranty Association's reliance on Estate of Covington by Montgomery v. AT&T Nassau Metals Corp., 304 S.C. 436, 405 S.E.2d 393 (1991), to the effect Hudson's claim potentially abated upon her death was "misplaced." We found no post-trial motions in the record requesting Judge Short reconsider his ruling. Therefore, right or wrong, his

ruling became the law of the case because Appellants withdrew their appeal to this court. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Appellant may not seek relief from the prior unappealed order of the circuit court because the order has become the law of the case. Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."). Accordingly, we decline to address this issue on the merits and affirm Judge Goode's order on the abatement issue.

II. Beneficiaries/Next of Kin Dependents

Employer argues the circuit court erred in failing to address whether all four beneficiaries have legitimate claims. The Guaranty Association argues the circuit court erred in affirming the Appellate Panel's decision to award Hudson's lump sum to her Estate rather than to her beneficiaries pursuant to section 42-9-280 of the South Carolina Code (1985). In response, the Estate argues Employer and the Guaranty Association acknowledged and accepted the beneficiaries' valid and reasonable settlement of their respective claims to the lump sum proceeds. Thus, based on this stipulation, the Estate argues Employer and the Guaranty Association cannot now contest the manner in which the lump sum award will be distributed. We agree with Employer and the Guaranty Association.

We disagree with the Estate's assertion that Employer and the Guaranty Association acknowledged and accepted the beneficiaries' valid and reasonable settlement of their respective entitlements to the lump sum proceeds. On the contrary, during the hearing before the single commissioner on January 25, 2005, Employer's counsel consistently questioned to whom the lump sum award should go and the manner of the payment. We note there was a discussion among the parties during which they agreed to divide the award evenly between Hudson's sons and minor grandsons. The single commissioner noted Employer's counsel had no objection to the manner in which the funds were split but reserved the right to claim that the funds were payable. However, we do not find such a stipulation by Employer's counsel on the record and note he stated: "our position is the [E]state takes nothing." Thereafter, Employer and Guaranty Association appealed the single

commissioner's decision to award Hudson's lump sum to her Estate, rather than to her beneficiaries, to both the Appellate Panel and the circuit court. Therefore, we find this issue is properly preserved for our review and do not find Employer stipulated to the manner of dividing the lump sum award. Accordingly, we will address this issue on the merits.

Pursuant to section 42-9-280 (emphasis added):

> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

Here, Hudson's cause of death, cancer, was unrelated to her work injury. Pursuant to section 42-9-280, the workers' compensation commission must pay Hudson's dependent grandchildren the unpaid balance of her lump sum compensation award rather than her sons, as beneficiaries of the Estate. Therefore, we find the circuit court erred in affirming the Appellate Panel's decision to award Hudson's lump sum to the Estate rather than to her beneficiaries pursuant to section 42-9-280 of the South Carolina Code (1985). Accordingly, we reverse that portion of the circuit court's order and direct all lump sum payments be paid directly to Hudson's dependent grandsons.

III. Interest Award

Next, Employer and the Guaranty Association argue the circuit court erred in affirming the Appellate Panel's decision to award Hudson's Estate interest on the lump sum award. Specifically, the Guaranty Association maintains section 38-31-20(8)(h) (Supp. 2009) of the South Carolina Property and Casualty Insurance Guaranty Association Act disallows claims for interest. Section 38-31-20(8) provides (emphasis added):

> "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State. 'Covered claim' does not include: . . . (h) any claims for interest.

In response, the Estate points to section 38-31-60 of the South Carolina Code (1985 & Supp. 2009) which reveals broad duties owed by the Guaranty Association. We agree with Employer and the Guaranty Association on this issue.

Section 38-31-60(b) states that the Guaranty Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." As we already indicated, interest is not covered. Accordingly, based on the plain reading of the statute, we reverse the circuit court's order affirming the Appellate Panel's decision to award interest.

IV. Penalty Imposed

Finally, Employer and the Guaranty Association argue the circuit court erred in reversing the Appellate Panel's decision not to award Hudson's Estate a ten percent penalty. Originally, the single commissioner imposed a ten percent penalty under section 42-9-90 of the South Carolina Code (Supp. 2009) based on Employer and the Guaranty Association's frivolous defense. Thereafter, the Appellate Panel reversed the penalty after finding Employer and the Guaranty Association did not pursue a frivolous defense. Finally, the

circuit court reinstated the penalty and relied on Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006). The Estate argues Martin is inapplicable to the facts of their case, and therefore, the circuit court erred by reinstating the ten percent penalty.[1]

In response, the Estate maintains the circuit court properly found that the ten percent penalty pursuant to section 42-9-90 was mandatory. Their reasoning is that Judge Short's order was final and should not have been relitigated. Further, the Estate maintains that under section 42-9-90, an employer or carrier must prove that circumstances beyond their control prevented payment of all compensation owed. Also, the Estate maintains this section does not afford the Commission any discretion when deciding whether to impose a penalty. We agree with the Estate.

Section 42-9-90 provides:

> If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in § 42-9-230, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in § 42-9-240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

[1] We find Martin analogous yet distinguishable from the present situation.

Here, Employer and the Guaranty Association simply stopped paying compensation to the Estate. We agree that they had a non-frivolous defense, as the Appellate Panel found. However, as the single commissioner and Judge Goode found, the imposition of the penalty is mandatory under the statute. Therefore, we affirm the circuit court's reinstatement of the ten percent penalty.

CONCLUSION

Judge Short's order addressing abatement on the merits is the law of the case. Therefore, we decline to address this issue on the merits. Pursuant to section 42-9-280 of the South Carolina Code, we reverse the portion of Judge Goode's order affirming the Appellate Panel's decision to pay Hudson's remaining lump sum balance to her sons as beneficiaries and order the balance be paid to her grandsons as beneficiaries. Finally, based on applicable statutes, we reverse the interest award and affirm the ten percent penalty imposed. Accordingly, the decision of the circuit court is

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Patricia H. Pitts and Robert G. Pitts, Respondents,

v.

Chad Fink, Appellant.

Appeal from Darlington County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4706
Submitted May 3, 2010 - Filed June 30, 2010

AFFIRMED

J. René Josey and Jeffrey L. Payne, of Florence, for Appellant.

Charles J. Hupfer, Jr. and Van Whitehead, of Florence, for Respondents.

PIEPER, J.: In this appeal challenging the enforcement of an Alabama default judgment in South Carolina, Chad Fink (Fink) asserts the circuit court erred in denying his motion for relief from judgment, arguing the judgment was void for lack of personal jurisdiction. We affirm.[1]

FACTS/PROCEDURAL HISTORY

This action to domesticate an Alabama default judgment stems from a dispute over funds loaned by Patricia and Robert Pitts (Mr. and Mrs. Pitts) to Fink, Charles Hobbs, and Barton Pitts pursuant to a loan agreement. The $455,000 loan was in furtherance of the business interests of Roundabout Plantation, LLC, which was operated by Fink, Hobbs, and Pitts for the purpose of developing a golf course and subdivision in Houston County, Alabama. In addition to Fink, Hobbs and Pitts were also named as defendants in the action on the loan.

The loan agreement, which was prepared by the borrowers, bore the caption, "State of Alabama, Houston County," and contained a choice of law provision stating, "[t]he parties hereto agree that this agreement shall be construed and enforced according to the laws of the State of Alabama." The agreement further provided that each of the members of Roundabout Plantation agreed and acknowledged they would be jointly and severally liable for the payment of all sums advanced and all sums which may become due under the terms and conditions of the agreement. A provision for the payment of attorney's fees, in the event the lender would have to employ the services of an attorney to collect any sums due under the agreement, was also included.

When Mr. and Mrs. Pitts were not repaid under the terms of the loan agreement, they initiated the underlying action in Houston County, Alabama. Despite signing the return of service, Fink did not file a response, and a judgment by default was entered against him for the sum of $795,940.78, plus interest and costs.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Thereafter, in an effort to enforce the Alabama default judgment in South Carolina, Mr. and Mrs. Pitts filed the judgment in Darlington County, South Carolina. Fink responded by filing a motion for relief from judgment pursuant to Rule 60(b)(4), SCRCP, and section 15-35-940 of the South Carolina Code (2005), asserting the Alabama judgment was void for lack of personal jurisdiction.

During the discovery that ensued, Mr. and Mrs. Pitts learned that Fink went to Alabama approximately a dozen times to monitor the progress of the golf course. Fink testified in his deposition that the loan proceeds were used for the construction and development of the golf course. Fink further testified that although he did not remember executing the loan agreement, his signature appeared on the document. He also conceded that the signature on the return of service to the summons and complaint appeared to be his own.

Following a hearing on the matter, the circuit court issued an order denying the motion for relief from judgment. The order further directed that the Alabama default judgment be entered in South Carolina in accordance with the notice of filing of foreign judgment by Mr. and Mrs. Pitts. Fink did not file a motion to alter or amend. This appeal followed.

STANDARD OF REVIEW

"An action to enforce a foreign judgment is an action at law." Minorplanet Sys. USA Ltd. v. Am. Aire, Inc., 368 S.C. 146, 149, 628 S.E.2d 43, 44 (2006). In an action at law, tried by a judge without a jury, we accept the findings of the trial court if there is any evidence to support them. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

This case challenges the domestication of an Alabama default judgment due to an alleged lack of personal jurisdiction; thus, we are not called upon to review the merits of the underlying claim. Pursuant to South Carolina's version of the Uniform Enforcement of Foreign Judgments Act (UEFJA), a

judgment debtor is permitted to file a motion for relief from judgment or a notice of defense to a foreign judgment on any ground for which relief from a judgment of this state is allowed. S.C. Code Ann. § 15-35-940(A) (2005); cf. Law Firm of Paul Erickson, P.A., 383 S.C. 497, 505, 681 S.E.2d 575, 579-80 (2009) (striking a portion of section 15-35-940(b) as unconstitutional but severable from the remainder of the statute). Applying the appropriate constitutional and due process considerations, we affirm.

Under article IV, section 1 of the United States Constitution, "Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other State." U.S. Const. art. IV, § 1. In accordance with this provision, every state is required to give to a judgment at least the res judicata effect which the judgment would be accorded in the state where rendered. Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co., 356 S.C. 644, 653, 591 S.E.2d 611, 616 (2004) (quoting Durfee v. Duke, 375 U.S. 106, 109 (1963)) (internal quotations omitted). However, "[a] judgment of a court without jurisdiction of the person or of the subject matter is not entitled to recognition or enforcement in another state, or to the full faith and credit provided for in the federal Constitution." Fin. Fed. Credit Inc. v. Brown, 384 S.C. 555, 562-63, 683 S.E.2d 486, 490 (2009) (quoting 50 C.J.S. Judgments § 986 (1997)). Where the court of the issuing state has fully and fairly litigated and finally decided the question of jurisdiction, further inquiry into the jurisdiction of the issuing court is precluded. Durfee, 375 U.S. at 111. Otherwise, "before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree." Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 705 (1982). Similarly, under the UEFJA, a judgment debtor may seek relief from a judgment due to a lack of personal jurisdiction. PYA/Monarch, Inc. v. Sowell's Meats & Servs., Inc., 327 S.C. 469, 473, 486 S.E.2d 766, 768 (Ct. App. 1997).

Turning to the instant case, since the issue of personal jurisdiction in Alabama was neither fully litigated nor finally decided, we undertake the jurisdictional inquiry suggested in Underwriters Nat'l Assurance Co. See id. When determining the validity and effect of a foreign judgment based on lack of personal jurisdiction, courts look to the law of the state that rendered the

judgment. Fin. Fed. Credit Inc., 384 S.C. at 566-67, 683 S.E.2d at 492. Thus, to ascertain whether the Alabama court properly exercised jurisdiction over Fink, we must consult Alabama law regarding personal jurisdiction.

Alabama's long-arm rule authorizes the assertion of personal jurisdiction to the limits of due process under the federal and state constitutions. Leithead v. Banyan Corp., 926 So.2d 1025, 1030 (Ala. 2005) (noting Alabama's long-arm "statute," which is actually Rule 4.2, Ala. R. Civ. P., extends to the limits of due process). Alabama courts have interpreted the due process rights guaranteed under the Alabama Constitution to be coextensive with the due process rights guaranteed by the United States Constitution. Elliott v. Van Kleef, 830 So.2d 726, 730 (Ala. 2002). Courts employ a two-pronged test for due process. First, the defendant must have certain minimum contacts with the forum state. Id. at 730-31 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Second, the exercise of jurisdiction over the defendant must not offend "traditional notions of fair play and substantial justice." Int'l Shoe Co., 326 U.S. at 316. Under the minimum contacts prong, the defendant's contacts with the forum state must be such that the defendant had "fair warning" that its activities might subject it to personal jurisdiction in the state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). Further, "the minimum contacts test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present." Kulko v. Sup. Ct. of Cal., 436 U.S. 84, 92 (1978) (internal quotation omitted).

In addressing the level and character of a party's minimum contacts, the Supreme Court of Alabama has noted "[t]wo types of contacts can form a basis for personal jurisdiction: general contacts and specific contacts." Ex Parte Phase III Constr., Inc., 723 So.2d 1263, 1266 (Ala. 1998). "General contacts, which give rise to general personal jurisdiction, consist of the defendant's contacts with the forum state that are unrelated to the cause of action and that are both 'continuous and systematic.'" Id. (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984)). "Specific contacts, which give rise to specific jurisdiction, consist of the defendant's contacts with the forum state that are related to the cause of

action." Id. "Although the related contacts [for specific jurisdiction] need not be continuous and systematic, they must rise to such a level as to cause the defendant to anticipate being haled into court in the forum state." Id.

Here, there is insufficient evidence indicating that Fink engaged in such "continuous and systematic" activities in Alabama so as to confer general jurisdiction. See Elliott, 830 So.2d at 730. Therefore, we consider Fink's contacts in the context of specific jurisdiction to determine whether his contacts were of such a nature that Fink could have reasonably anticipated defending an action in Alabama. For specific jurisdiction, there must exist a clear, firm nexus between the acts of the defendant and the allegations forming the basis of the complaint. Duke v. Young, 496 So.2d 37, 39 (Ala. 1986). Furthermore, "[t]he substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." Asahi Metal Indus. Co. v. Sup. Ct. of Cal., 480 U.S. 102, 112 (1987) (internal quotation omitted). "This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." Burger King, 471 U.S. at 475 (internal quotations omitted) (internal citations omitted).

Applying the appropriate considerations under Alabama's long-arm rule and federal due process, we find Fink's connections suffice to meet the requirements of specific personal jurisdiction in Alabama. Initially, we note the loan agreement involved a "subdivision and golf course in Houston County, Alabama," and as evidenced by the agreement, the loan was made "for use in the construction and development of the subdivision and golf course" located in Alabama. The loan agreement provided that Fink was a one-third owner of the Alabama development and also indicated that Fink was jointly and severally liable for the payment of all sums advanced and due under the agreement.

Furthermore, the loan agreement bore the caption "Houston County, Alabama," and contained a choice of law provision indicating the agreement was to be construed and enforced under the laws of the state of Alabama. In

Corporate Waste Alternatives, Inc. v. McLane Cumberland, Inc., 896 So.2d 410 (Ala. 2004), the Supreme Court of Alabama was presented with the issue of personal jurisdiction in a dispute concerning a contract that contained a choice of law provision designating the law of Alabama as the governing law. There, in contemplation of the ramifications of the choice of law provision, the court noted, "the provision in the contract stating that the contract would be governed by Alabama law should have further alerted [the nonresident defendant] that it might reasonably anticipate being haled into court in [Alabama]." Corporate Waste Alternatives, Inc., 896 So.2d at 414 (citing Elliott, 830 So.2d at 730) (internal quotations omitted). While we recognize that a choice of law provision standing alone would be insufficient to confer jurisdiction, it is certainly relevant under the facts of this case. See Burger King, 471 U.S. at 482 (stating that a choice of law provision is relevant but "such a provision standing alone would be insufficient to confer jurisdiction").

With specific regard to minimum contacts, Fink's deposition testimony is also instructive. In particular, Fink's testimony confirmed that the loan proceeds were used for the construction and development of Roundabout Plantation. He further testified that he traveled to Alabama on at least twelve occasions over the course of two years to monitor the progress of the development. He also attended the grand opening of the development. While he stated he did not remember executing the loan agreement, he conceded it was his signature that appeared to be on the document. Fink's actions in traveling to Alabama for the purpose of monitoring the progress of the development demonstrate a nexus between his position as part owner of Roundabout Plantation and his responsibilities under the loan agreement. Moreover, Fink's actions in furtherance of his obligations as a part-owner of Roundabout Plantation were purposely directed toward the forum state so as to establish a substantial connection to Alabama. Most notably, these contacts were not the result of the unilateral activity of another person or a third party. Based on these actions, we conclude Fink's contacts with the state of Alabama reasonably suggest Fink should have anticipated being haled into court in Alabama.

Having determined the requisite minimum contacts have been established, we now turn to whether the assertion of personal jurisdiction comports with "traditional notions of fair play and substantial justice." See Int'l Shoe, 326 U.S. at 316. In addressing this prong, we must consider the contacts in light of other factors, such as the burden on the defendant of litigating in the forum state, as well as the forum state's interest in adjudicating the dispute. Elliott, 830 So.2d at 731. Initially, we note Fink has not argued on appeal that litigation in Alabama would be unfair or burdensome; thus, consideration of this argument is not preserved for review. See Hiller Invs. Inc. v. Insultech Group, Inc., 957 So.2d 1111, 1119 (Ala. 2006) (holding the court need not analyze whether subjecting the nonresident defendant to Alabama's jurisdiction would violate the traditional notions of fair play and substantial justice where the nonresident defendant has not argued those issues on appeal).

Nonetheless, were we to reach this issue, we note that Fink submitted to the jurisdiction of Alabama in two other foreclosure suits pertaining to Roundabout Plantation. Specifically, Fink was involved in litigation against Frizzell Construction Company concerning breach of a promissory note; he also was involved in a similar action by Peoples Community Bank in 2002. Both actions were maintained in Alabama, and Fink did not plead lack of personal jurisdiction in either case. Notwithstanding, Fink's numerous contacts with Alabama relative to Roundabout Plantation in conjunction with his visits to monitor the progress of the development indicate the burden of defending an action in Alabama does not rise to the level of being inconsistent with traditional notions of fair play and substantial justice. See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (noting that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957))).

CONCLUSION

In sum, we find, for purposes of personal jurisdiction, Fink maintained sufficient minimum contacts to satisfy Alabama's long-arm rule and federal

due process. Consequently, the enforcement of the Alabama default judgment against Fink in South Carolina was proper.[2]

Based upon the foregoing, the order of the circuit court is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

[2] Fink also appeals the amount of attorney's fees awarded in the judgment. Although raised at the hearing, we find this issue is not preserved as it was neither ruled upon by the circuit court nor raised by way of a post-trial motion to alter or amend. See Elam v. S.C. Dep't. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party must file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original). Even if we were to find the amount of fees awarded troubling, the matter is not properly before us for review.