The Supreme Court of South Carolina

In the Matter of Heather Hunt Watroba, Petitioner

Appellate Case No. 2012-213638

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 2007, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 19, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Heather Hunt Watroba shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 11, 2013

The Supreme Court of South Carolina

In the Matter of Lillie Currington Hart. Petitioner

Appellate Case No. 2012-213630

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court, dated December 20, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Lillie Currington Hart shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

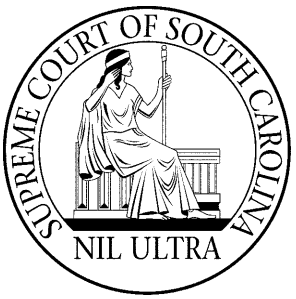
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 11, 2013



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 16, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles V.B. Cushman, Respondent.

Appellate Case No. 2012-213490

Opinion No. 27209
Submitted December 10, 2012 – Filed January 16, 2013

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel

J. Steedley Bogan of Bogan Law Firm, of Columbia, for respondent

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PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent and have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension from the practice of law for up to six (6) months. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

From 1987 until 2012, respondent was employed as a city prosecutor. During that time, respondent continued the practice of previous city prosecutors which involved dismissing criminal charges in certain types of cases in exchange for

payments from the defendant to a city "drug fund." In 2003, the Chief Justice of the Supreme Court of South Carolina issued an order stating that the use of pretrial diversion programs without the authority or consent of a solicitor was prohibited. Respondent reviewed the order at the time and concluded it did not apply to his drug fund "donation" practice. He did not seek advice from others and did not seek clarification from the Chief Justice.

In 2011, the solicitor contacted respondent and expressed his concern that respondent's practice of dismissing cases in exchange for "donations" was illegal and should be stopped. Respondent conducted some research, but concluded the practice was appropriate. He did not seek the advice of others, seek clarification from the Chief Justice, and he did not consult further with the solicitor.

On September 9, 2012, a warrant was issued for respondent's arrest on a charge of Misconduct in Office, stating that "he did breach [his official] duties by intentionally dismissing and/or Nolle Prossing [sic] criminal charges under the condition that a 'donation' be made by the defense to the City of Camden Drug Fund." On September 27, 2012, the Court placed respondent on interim suspension.[1] On November 8, 2012, respondent pled guilty to violating South Carolina Code Ann. § 40-5-510 (2011).

Respondent admits he sought "donations" to the city drug fund in cases he believed he could not successfully prosecute. Ordinarily, the amount of the "donation" collected was approximately the equivalent of the fine the defendant would have paid if the defendant was found guilty. Respondent used this method of resolution to punish defendants in cases that, in all likelihood, would have resulted in acquittal.

Respondent further admits that his practice of dismissing criminal charges in exchange for "donations" to the city drug fund was an unauthorized diversion program, although he believed the practice to be appropriate based on the conduct of his predecessors. He further admits that he failed to comply with the Chief Justice's 2003 order, that he should have ceased the practice immediately after issuance of the 2003 order, and sought advice and/or clarification at the time. In addition, respondent admits he improperly ignored the solicitor's concerns in 2011,

[1] *In the Matter of Cushman*, Order filed September 27, 2012 (Shearouse Adv. Sh. No. 35 at p.43).

that he should have ceased the practice then, and sought appropriate advice and or clarification after contact from the solicitor.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.1 (lawyer shall not assert frivolous claim unless there is basis in law for doing so); Rule 3.8(a) (prosecutor in criminal case shall refrain from prosecuting charge that prosecutor knows is not supported by probable cause); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime); and Rule 7(a)(7) (it shall be ground for discipline for lawyer to willfully violate valid court order issued by a court of this state).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent's interim suspension is hereby lifted.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jarmel L. Rice, Appellant.

Appellate Case No. 2009-141166

Appeal from Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 27210
Submitted October 1, 2012 – Filed January 16, 2013

AFFIRMED

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

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all of Columbia, and Solicitor Christina T. Adams, of Anderson, for the State.

JUSTICE KITTREDGE: This is a direct appeal from a guilty plea. We affirm.

I.

Appellant Jarmel Rice was charged as a juvenile when he was fifteen years old for a series of violent crimes. Following a contested waiver from family court to general sessions court, Appellant pled guilty to three counts of armed robbery and one count of assault with intent to kill and received a sentence of eleven years in prison, with many other charges dismissed. In pleading guilty, Appellant raised no objection to the family court waiver. On appeal, Appellant seeks to resurrect his family court constitutional challenge to the waiver as violative of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

A.

South Carolina does not recognize conditional guilty pleas. *State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982); *see also In re Johnny Lee W.*, 371 S.C. 217, 220, 638 S.E.2d 682, 684 (2006) ("A trial court may not accept a conditional plea."). Rather, in South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights. *See Hyman v. State*, 397 S.C. 35, 723 S.E.2d 375 (2012) (citing *Rivers v. Strickland*, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975)) (noting that a valid guilty plea constitutes a waiver of nonjurisdictional defects and defenses). The rationale for this rule has been long understood, as the United States Supreme Court (USSC) stated:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the plea . . . .

Tollett v. Henderson, 411 U.S. 258, 267 (1973); *see also State v. Passaro*, 350 S.C. 499, 506, 567 S.E.2d 862, 866 (2002) (stating a "a guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights"); *Vogel v. City of Myrtle Beach*, 291 S.C. 229, 231, 353 S.E.2d 137, 138 (1987) ("A plea of guilty constitutes a waiver of nonjurisdictional defects and

defenses . . . . It conclusively disposes of all prior issues including independent claims of deprivations of constitutional rights."); *State v. Tucker*, 376 S.C. 412, 418, 656 S.E.2d 403, 406-07 (Ct. App. 2008) (finding a defendant's plea of guilty waived any challenge to his conviction based on an alleged pre-trial violation of statutorily prescribed procedure).

While South Carolina has remained steadfast in its opposition to conditional guilty pleas, many states allow conditional guilty pleas, primarily through statutes and court rules. In fact today, most states, all federal courts, military courts, and the District of Columbia permit conditional guilty pleas in some manner. *See People v. Neuhaus*, 240 P.3d 391, 394-96 (Colo. Ct. App. 2009) (providing a general review of the varying approaches as to conditional guilty pleas). Because South Carolina permits only unconditional guilty pleas and no jurisdictional claim is presented, Appellant waived his right to assert a claim based on *Apprendi*. Nevertheless, we proceed further in light of the dissent.

B.

The dissent laments how unfair it would be to require this juvenile to proceed to trial and forgo the favorable plea offer to preserve his right to challenge the transfer from family court to the court of general sessions. Yet, that is the essence of our law disallowing conditional pleas, and it applies equally to juveniles and adults. The dissent further characterizes Appellant's challenge as jurisdictional. Respectfully, we do not view Appellant's argument as jurisdictional in nature. Appellant casts his issue on appeal as a constitutional claim, not a jurisdictional one. Specifically, Appellant posits that South Carolina's juvenile transfer law violates his "Sixth Amendment right to a jury trial and due process of law under *Apprendi* . . . ."

Beyond Appellant's failure to assert a jurisdictional argument on appeal, were we to read his brief as broadly as does the dissent, we would nevertheless reject the assertion of a jurisdictional error. We find instructive the case of *State v. Yodprasit*, which considered this very issue. 564 N.W.2d 383 (Iowa 1997). Yodprasit, a juvenile offender, pled guilty in adult court following the waiver of jurisdiction by the juvenile court. On appeal, Yodprasit challenged the juvenile court's waiver of jurisdiction, specifically asserting a jurisdictional error. The Iowa Supreme Court disagreed, holding that any such error is "judicial, not jurisdictional." *Id*. at 386 ("A juvenile court might enter an erroneous order waiving jurisdiction. . . . Such an order, however, does not undermine the district

court's subject matter jurisdiction to conduct the criminal proceedings, accept a plea of guilty, and sentence the defendant-juvenile. In short, the error is judicial, not jurisdictional."). The *Yodprasit* court held that an error in a waiver proceeding which does not deprive the adult court of jurisdiction over criminal proceedings involving a juvenile can be waived if the juvenile pleads guilty. *Id.* at 387. We agree with *Yodprasit*'s reasoning that an erroneous order transferring a juvenile to general sessions court would be a judicial error—not a jurisdictional error.

II.

In any event, Appellant's *Apprendi* challenge fails on the merits. In *Apprendi*, the USSC held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. This applies to any fact that will "expose the defendant to a greater punishment than that authorized by the jury's verdict." *Id.* at 494; *see also Blakely v. Washington*, 542 U.S. 296, 303 (2004) (clarifying that for purposes of *Apprendi*, the "statutory maximum" is the maximum term of imprisonment a court may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"). In *Oregon v. Ice*, in which the USSC held *Apprendi* did not apply to findings of fact required as a predicate to imposing consecutive, rather than concurrent, sentences on a defendant, the USSC stated "[t]here is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark *at trial* between the State and the accused." 555 U.S. 160, 169 (2009) (emphasis added).

Indeed, many challenges similar to Appellant's have been rejected on the basis that *Apprendi* is not applicable. *See e.g.*, *United States v. Juvenile*, 228 F.3d 987 (9th Cir. 2000) (holding that juvenile transfer does not increase punishment but merely establishes a basis for district court jurisdiction); *State v. Kalmakoff*, 122 P.3d 224 (Alaska App. 2005) (finding juvenile waiver hearings are not sentencing proceedings and therefore not governed by *Apprendi*); *State v. Rodriguez*, 71 P.3d 919 (Ariz. Ct. App. 2003) (finding transfer statute does not implicate *Apprendi* because it does not subject a juvenile to enhanced punishment but only to the adult criminal justice system); *People v. Beltran*, 765 N.E.2d 1071 (Ill. 2002) (concluding *Apprendi* does not apply to a decision to prosecute defendant as adult because transfer hearing is not adjudicatory); *Villalon v. State*, 956 N.E.2d 697 (Ind. Ct. App. 2011) (concluding that the juvenile waiver statute does not provide

sentencing enhancement correlated with proof of a particular fact and, therefore, does not implicate the core concerns of *Apprendi*); *State v. Jones*, 47 P.3d 783 (Kan. 2002) (holding *Apprendi* does not apply to juvenile waiver hearings because they determine only which judicial system is appropriate for juvenile offender); *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004) (holding that a juvenile transfer proceeding does not implicate *Apprendi* because it does not involve sentencing or a determination of guilt or innocence); *State v. Andrews*, 329 S.W.3d 369 (Mo. 2010) (finding *Apprendi* does not apply to juvenile transfer proceedings because transfer does not enhance the potential maximum sentence but merely determines proper forum); *State v. Rudy B.*, 243 P.3d 726 (N.M. 2010) (finding *Apprendi* not applicable to an evidentiary hearing to determine whether a juvenile adjudicated as a youthful offender should be sentenced as a juvenile or as an adult); *State v. Childress*, 280 P.3d 1144 (Wash. Ct. App. 2012) (finding statutory procedure for declination of jurisdiction by juvenile court does not violate a defendant's right to a jury trial). We adopt this approach and hold that *Apprendi* is not applicable to a family court juvenile waiver hearing, for the decision whether to waive a juvenile to general sessions court in no manner determines the juvenile's guilt, innocence, or punishment—it merely determines the forum in which the case is to be tried.

AFFIRMED.

TOAL, C.J., BEATTY and HEARN, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that our state's juvenile waiver procedure does not implicate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). I write separately, however, because I do not agree that appellant's decision to plead guilty in general sessions court waived his right to appeal the family court's waiver decision.

The circuit court has jurisdiction over an appeal from a family court order in only one circumstance: when the family court judge has denied the State's request to transfer a matter that charges a juvenile with murder or with criminal sexual conduct. S.C. Code Ann. § 63-19-1210(6) (2010). Other than in this one circumstance, appeals from a family court order are cognizable only in either the Court of Appeals or the Supreme Court. In my opinion, since the court of general sessions has no jurisdiction over the family court order that transferred appellant, he cannot be said to have waived his right to appeal by pleading guilty in that forum. A party need not raise an issue before a tribunal that lacks jurisdiction to adjudicate the claim in order to preserve the issue for appeal. *E.g., Travelscape, LLC v. South Carolina Dept. of Rev.*, 391 S.C. 89, 705 S.E.2d 28 (2011); *Video Gaming Consultants, Inc. v. South Carolina Dep't of Rev.*, 342 S.C. 34, 535 S.E.2d 642 (2000). I would not hold that a guilty plea in general sessions acts as a waiver of a juvenile's right to appeal the family court's transfer order.

It is well-settled that a juvenile who has been waived to general sessions may not immediately appeal that order but must wait, like other criminal defendants, until he has been sentenced. *E.g., State v. Lockhart*, 275 S.C. 160, 267 S.E.2d 720 (1980). In my opinion, it would violate our *parens patriae* duty[1] as well as public policy to require a juvenile to forego a plea opportunity in order to preserve his right to appeal. Here, appellant received a sentence of eleven years in exchange for a guilty plea to four charges and the dropping of others. Had he not accepted the State's plea offer, appellant faced five counts of armed robbery, four counts of kidnapping, three counts of possession a weapon during the commission of a crime, and one count each of criminal conspiracy, unlawfully carrying a pistol, assault with intent

[1] *See State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (recognizing *parens patriae* in juvenile proceeding).

to kill, safecracking, and petit larceny. Each armed robbery count and each kidnapping count carried the possibility of a thirty-year sentence. I would not require a juvenile to forego a negotiated plea and face a trial in order to preserve his right to appeal the transfer order.[2]

Finally, the majority cites *Vogel v. City of Myrtle Beach*, 291 S.C. 229, 353 S.E.2d 137 (1987), for the proposition that a guilty plea waives "nonjurisdictional defects and defenses, including claim of violation of constitutional rights prior to the plea. . . . It conclusively disposes of all prior issues including independent claims of deprivation of constitutional rights." Appellant is raising a jurisdictional challenge, alleging the transfer from family court to general sessions was accomplished under an unconstitutional statute. The unlawful waiver of jurisdiction over a juvenile does not confer subject matter jurisdiction on the court of general sessions. *E.g.*, *Austin v. State*, 352 S.C. 473, 575 SE.2d 547 (2003).[3] There is no plea waiver here. Moreover, I would not apply the waiver rule where the appellant is not challenging anything related to the criminal proceedings against him or his plea, but rather the constitutionality of a procedural statute. *Cf. State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011) (capital defendant did not render plea conditional by appealing constitutionality of procedural sentencing statute since his claim did not affect validity of plea itself).

I concur in the holding that *Apprendi* does not apply, but dissent from that part of the majority opinion finding appellant waived his right to appeal the family court's transfer order.

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[2] As the Supreme Court has recognized, plea bargaining is the norm in our criminal justice system. *See Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (since 97% of federal convictions and 94% of state convictions result from pleas, plea negotiations are "almost always the critical point for a defendant").

[3] The fundamental question of subject matter jurisdiction is determined by South Carolina law, and an appellate court should take notice of a defect *ex mero motu*. *E.g.*, *State v. Gorie*, 256 S.C. 539, 183 S.E.2d 334 (1971).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Derrick Lamar Cheeks, Appellant.

Appellate Case No. 2011-183009

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27211
Heard November 15, 2012 – Filed January 16, 2013

AFFIRMED

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie Kate Keeney, all of Columbia, and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

JUSTICE PLEICONES: Appellant was convicted of trafficking in crack cocaine in excess of 400 grams and possession of crack with intent to distribute within proximity to a school and received concurrent sentences of twenty-five years (trafficking) and ten years (proximity). On appeal, he contends the trial court erred

in failing to find a search warrant fatally defective, and in giving an improper jury instruction. [1] We find no merit in the warrant issue, but agree the instruction was improper. Because we find appellant was not prejudiced by the erroneous charge, however, we affirm his convictions and sentences.

ISSUES

1) Was the search warrant fatally defective because it did not contain a description of the place to be searched?

2) Did the trial judge err in charging the jury that "[a]ctual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use?"

DISCUSSION

1. Search warrant.

Appellant contends the search warrant which led to his arrest was invalid because it did not describe the place to be searched. We disagree.

The search warrant is blank following the section titled "**Description of Premises (Person, Place, or Thing) to be Searched**." The warrant refers to the attached affidavit, however, which contains both a description of the dwelling to be searched, including its address, and detailed directions to it. Moreover, the solicitor represented that the warrant and affidavit were served together. The trial judge held the warrant and affidavit could be read together to establish the premises description and found the description of the place to be searched met all constitutional and statutory requirements. *State v. Ellis*, 263 S.C. 12, 207 S.E.2d 408 (1974) (warrant and affidavit read together withstand constitutional and statutory attacks on particularity of premises) *disapproved on other grounds by*

[1] Appellant's codefendant (and uncle) raised virtually the same arguments in an appeal decided by the Court of Appeals. *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012).

State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987); *State v. Williams*, 297 S.C. 404, 377 S.E.2d 308 (1989).[2]

Appellant contends the warrant is "plainly invalid" because it did not comply with the Fourth Amendment's requirement that the warrant "particularly describ[e] the place to be searched . . . ." citing *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). *Groh* was a *Bivens*[3] suit where the warrant application that contained the particularized information was not incorporated into the warrant itself. The *Groh* Court therefore did not reach the issue whether a facially defective warrant can be salvaged by considering other related documents. The Court did acknowledge that most appellate courts have held that they "may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id*. at 557-558; *see also U.S. v. Hurwitz*, 459 F.3d 463, 470-471 (4th Cir. 2006) (in Fourth Circuit, warrant construed with supporting documents if incorporated by warrant language or if those documents accompany warrant).

Here, the warrant refers to the attached affidavit, and the solicitor represented without contradiction that the affidavit accompanied the warrant. As we read the opinion, nothing in *Groh* prohibits a court from considering an accompanying or "incorporated" affidavit along with the search warrant for purposes of satisfying the Fourth Amendment's particularity requirements.

We affirm the trial judge's ruling upholding the validity of the search warrant.

2. Jury instruction.

When the police executed the warrant at witness Markley's house, they interrupted appellant in the process of 'cooking' crack cocaine. He was observed fleeing from the kitchen, where water was boiling, materials[4] used in the manufacture of crack were on the kitchen counters, and a digital scale was found. In addition, 650 grams

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[2] Appellant's argument rests largely on U.S. Const. amend. IV, but he also invokes S.C. Const. art. I, § 10 and S.C. Code Ann. §§ 17-13-140 and -160 (2003). Our decision disposes of all grounds.

[3] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[4] Inositol and baking powder.

of crack,[5] most of which was broken up into baggies, was seized from the kitchen where appellant had been found cooking. Moreover, on the day of his arrest, appellant sent his uncle on "an errand" from the house where appellant was found cooking, after having sent the uncle to a store to buy baking soda. When the car in which the uncle was travelling was stopped and searched, two ounces of crack were found, the inference being that the uncle was delivering the crack for appellant. In short, there was overwhelming evidence that appellant both trafficked in more than 400 grams of crack and possessed it with intent to distribute.

During the jury charge, the jury was repeatedly instructed that mere presence at the scene of a crime is insufficient evidence, in and of itself, to support a guilty verdict. When charging the jury on trafficking by possession, the trial judge stated:

> Now, possession, to prove possession the State must prove, beyond a reasonable doubt, that the defendant in the, in the case both had the power and the intent to control the disposition or use of the crack cocaine. Therefore, possession, under the law, can either be actual or constructive.
>
> Now, actual possession means that the crack cocaine was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion or control or the right to exercise dominion or control over either the crack cocaine or the property on which the crack cocaine was found.
>
> Now, mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it

[5] The crack was valued at between $23,000 (wholesale) and $65,000 (retail).

> should have. Two or more persons may have joint possession of a drug.
>
> (emphasis supplied).

Appellant objected to this "actual knowledge/strong evidence" charge, arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge. He followed up by noting that *State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987), upon which the judge and solicitor relied, did not involve a jury charge. The judge clarified he was also relying on *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994). We now clarify *Kimbrell* and overrule *Solomon* to the extent it approves of the "actual knowledge/strong evidence" charge.

In *Kimbrell*, appellant contended she was entitled to a directed verdict because the State failed to present evidence that she knowingly possessed the cocaine. The evidence at trial showed that appellant's ex-husband dealt drugs from his trailer. Appellant was present at the trailer when a confidential informant (CI) arrived for an arranged buy. As the ex-husband and CI left the trailer to look at the marijuana stored outside, the ex-husband had appellant leave a bedroom and go to the kitchen where cocaine was on the counter, telling her "the toot [cocaine] is laying on the table, we're going outside, watch it." In deciding the directed verdict issue on appeal, the Court noted that a "person has possession of contraband when he has the power and intent to control its disposition or use" and then held

> [t]he State produced evidence that [appellant] had actual knowledge of the presence of the cocaine. Because actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element.

Kimbrell, 294 S.C. at 54, 362 S.E.2d at 631.

From this language has evolved a jury charge to the effect that "actual knowledge [of the possession of drugs] is strong evidence of intent to control its disposition or use." We agree with appellant that this charge both improperly weighs the evidence, and that it largely negates the mere presence charge.

Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts. For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places "undue emphasis" on that piece of circumstantial evidence. *E.g.*, *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980). Similarly, charging a jury that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence. This charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug. We agree with appellant that this charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law.

Even if we did not agree with appellant that the "strong evidence" charge undermines the mere presence charge, we hold that the "strong evidence" charge is improper as an expression of the judge's view of the weight of certain evidence, and overrule *Solomon* on this point.

In his post-conviction relief (PCR) action, Solomon contended the use of the adjective "strong" was either a comment on the facts or an improper expression of the trial judge's view of the weight of the evidence and alleged his trial counsel was ineffective for failing to object to it. On certiorari to review the denial of Solomon's PCR, the Court summarily dealt with this issue, stating only that the "instruction was in accord with *Kimbrell*." *Solomon*, 313 S.C. at 529, 443 S.E.2d at 542. *Solomon* is wrongly decided because, as appellant argues, "strong" is necessarily a comment on the weight of the evidence, and *Kimbrell* does not approve any such charge.

We now overrule *Solomon* and instruct the bench to no longer use the "strong evidence" charge, which is derived from a statement on the sufficiency of the evidence in *Kimbrell*. Appellant cannot show prejudice from the charge in this case, however, as there was no evidence that he was "merely present" at Markley's house when the search warrant was executed. Rather the evidence was that he was

actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant's guilt, he cannot demonstrate prejudice warranting reversal from the adjective "strong" used in the charge.

CONCLUSION

Appellant's convictions and sentences are

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Kenneth L. Edwards, Petitioner.

Appellate Case No. 2012-212024

ORDER

On December 11, 2006, the Court suspended petitioner from the practice of law for eighteen (18) months. *See In the Matter of Edwards*, 371 S.C. 266, 639 S.E.2d 47 (2006). Petitioner has filed a Petition for Reinstatement.[1] The petition is granted.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 10, 2013

[1] This is petitioner's second Petition for Reinstatement. Petitioner withdrew his first Petition for Reinstatement in April 2010. *See* Rule 33(g), RLDE, Rule 413, SCACR ("[i]f the petition for reinstatement is withdrawn after the start of the hearing [before the Committee], the lawyer must wait two years from the date the petition is withdrawn to reapply for reinstatement.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael Cunningham, Appellant,

v.

Anderson County, Respondent.

Appellate Case No. 2011-194209

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

Opinion No. 5072
Heard November 14, 2012 – Filed January 16, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, and Brian P. Murphy, of Brian Murphy Law Firm, PC, of Greenville, for Appellant.

William W. Wilkins, E. Grantland Burns, and Kirsten E. Small, of Nexsen Pruet, LLC, of Greenville, for Respondent.

Michael E. Kozlarek and Ray E. Jones, of Parker Poe Adams & Bernstein, LLP, of Columbia, for Amicus Curiae South Carolina City and County Management Association.

GEATHERS, J.: In this breach of contract case, Appellant Michael Cunningham seeks review of the circuit court's order granting summary judgment to Respondent Anderson County (the County) on all of Cunningham's causes of action. Cunningham challenges the circuit court's conclusion that his employment contract with the County was void. Cunningham also challenges the circuit court's conclusions that (1) he could not avail himself of the public policy exception to the at-will employment doctrine, and (2) his accrued sick leave did not constitute "wages" under the South Carolina Payment of Wages Act.[1] We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

The County operates under a Council-Administrator form of government, in which the Council employs an administrator to serve as the administrative head of the County's government. The administrator is responsible for the administration of all departments over which the Council has control.[2] The Council's members are elected for two-year, non-staggered terms.[3] According to the County, three of the Council's seven members were defeated in the November 4, 2008 general election.[4]

During its November 18, 2008 meeting, the lame-duck Council (the 2008 Council) amended the previously-noticed agenda to vote on a severance contract with the then-current administrator, Joey Preston. This contract was drafted in anticipation of the termination of his employment. The 2008 Council voted 5-2 in favor of the contract.[5] During the same meeting, the 2008 Council voted 5-2 in favor of a "Master Employment Agreement" appointing Cunningham, then the assistant

[1] S.C. Code Ann. § 41-10-10 to -110 (Supp. 2011).
[2] *See* S.C. Code Ann. § 4-9-620 (1986) (describing office of the administrator).
[3] *See* S.C. Code Ann. § 4-9-610 (1986) (requiring council members to be elected in the general election for terms of two or four years "commencing on the first of January next following their election").
[4] The seven members were Michael Thompson, Bob Waldrep, Cindy Wilson, Larry Greer, Gracie Floyd, Bill McAbee, and Ron Wilson. Thompson, Greer, and McAbee were defeated in the November 2008 election.
[5] The five members voting in favor of the contract, which provided for a $1 million dollar payment to Preston, included the three "lame-duck" members.

administrator, as the new administrator for a three-year term.[6] On November 19, 2008, Cunningham signed the contract, which provided for a severance package in the event he was later terminated "without cause."

On January 6, 2009, the new Council (2009 Council) met and passed a resolution condemning the 2008 Council's actions in entering into the severance contract with Joey Preston and the employment contract with Cunningham.[7] Subsequently, the 2009 Council's ad hoc personnel committee presented Cunningham with a written at-will employment contract based on the position of the 2009 Council that Cunningham's November 19, 2008 employment contract was no longer valid.[8] After reviewing the new contract, Cunningham wrote a letter to the members of the 2009 Council, dated January 27, 2009, stating that he saw no need to sign a contract for at-will employment as the 2009 Council already viewed his employment as at-will.

At its February 3, 2009 meeting, the 2009 Council voted to terminate Cunningham's employment, stating that he had rejected the 2009 Council's two separate proposals for an at-will employment contract.[9] Before the vote was taken, Cunningham reminded the 2009 Council that he had offered in his January 27, 2009 letter to continue to work under his "current conditions," referencing the 2009 Council's position that he was an at-will employee. Cunningham also indicated that he intended to request a public hearing on his termination.

On February 9, the ad hoc personnel committee met with Cunningham in executive session to discuss his employment. Cunningham offered to "enter into an agreement through the end of the term of the [2009] [C]ouncil." At Cunningham's request, the 2009 Council conducted a public hearing on March 2, 2009 concerning

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[6] Likewise, the five members voting in favor of this contract included the three lame-duck members.

[7] The members of the 2009 Council were Eddie Moore, Bob Waldrep, Cindy Wilson, Gracie Floyd, Tommy Dunn, Ron Wilson, and Tom Allen.

[8] This committee consisted of Bob Waldrep, Tommy Dunn, and Eddie Moore.

[9] The record does not indicate when the ad hoc personnel committee made the second proposal, which was for a demotion to the Assistant Administrator position, but with a higher salary than what Cunningham previously received in that position.

his termination. At the conclusion of the hearing, the 2009 Council once again voted to remove Cunningham from his position as Administrator.

Cunningham filed this action on April 22, 2009, asserting causes of action for Breach of Contract, Wrongful Discharge, and violation of the Payment of Wages Act. The parties engaged in discovery on the breach of contract claim but agreed to postpone discovery on the wrongful discharge claim until after the contract claim had been resolved. Subsequently, Cunningham filed a motion for summary judgment as to the breach of contract claim. The County filed a cross-motion for summary judgment as to all three causes of action in Cunningham's complaint. Cunningham then filed a second motion for summary judgment as to his claim under the Payment of Wages Act. The circuit court denied Cunningham's summary judgment motions and granted the County's summary judgment motion.

In granting the County's summary judgment motion, the circuit court concluded that Cunningham's 2008 contract was void and could not bind the 2009 Council. The circuit court also concluded that Cunningham's claim for accrued sick leave was not compensable under the Payment of Wages Act because (1) the County did not have a policy of compensating its at-will employees for accrued sick leave upon their termination; (2) the provision for sick leave in Cunningham's contract was part of a void contract; and (3) the sick leave provision was part of the severance package set forth in the contract, and the Payment of Wages Act excludes severance from the definition of "wages." Finally, the circuit court concluded Cunningham could not avail himself of the public policy exception to the at-will employment doctrine in support of his wrongful discharge claim because he did not claim that he was an at-will employee. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment to the County as to the breach of contract cause of action on the ground that Cunningham's employment contract was void?

2. Did the circuit court err in granting summary judgment to the County as to Cunningham's cause of action for violation of the South Carolina Payment of Wages Act on the ground that Cunningham's accrued sick leave did not constitute "wages" under the Act?

3. Did the circuit court err in granting summary judgment to the County as to Cunningham's wrongful discharge cause of action on the ground that Cunningham did not claim he was an at-will employee?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Rather, "[t]he purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Comm. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 329-30, 673 S.E.2d at 802.

LAW/ANALYSIS

I. Breach of Contract

Cunningham asserts the circuit court erred in concluding that his employment contract was void. We disagree.

In *Piedmont Public Service District v. Cowart*, this court considered a twenty-year employment contract between a special purpose district and its administrator that required five years' severance pay. 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) (*Cowart I*), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996) (*Cowart II*). The court held that the contract involved the "governmental or legislative powers" of the District, and, therefore, could not be binding on successor boards. *Id.* at 133, 459 S.E.2d at 881. In applying the law of municipalities to the District, the court acknowledged that public service or special purpose districts are "not necessarily equivalent to municipalities or municipal corporations for all purposes." *Id.* at 131 n.2, 459 S.E.2d at 880 n.2 (citation omitted). However, the court noted "for the purpose of determining the scope of the District's power to enter into contracts, the law governing municipal corporations is applicable." *Id.* (citations omitted); *see also City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 178-79, 480 S.E.2d 728, 731 (1997) (applying *Cowart I* to Beaufort–Jasper County Water and Sewer Authority, a special purpose district).

By logical extension, the law of municipalities would apply to Anderson County's actions in the present case. Notably, other jurisdictions have applied the prohibition against binding successor governing bodies to counties. *See Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978) (recognizing that, but for a provision in a county's charter allowing for appointment of the county manager for a four-year term, the county's legislators would be unable to appoint the county manager for a term extending into the term of the legislators' successors); *accord Valvano v. Bd. of Chosen Freeholders of Union Cnty.*, 183 A.2d 450, 453 (N.J. Super. Ct. App. Div. 1962).

In addressing municipal contracts extending past the term of a governing body, the court in *Cowart I* set forth the following primer:

> If the term of the contract in question extends beyond the term of the governing members of the municipality entering into the contract, the validity of the contract is dependent on the subject matter of the contract. The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at

> the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, *if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils*.

Id. at 132, 459 S.E.2d at 880 (emphasis added). Quoting from *Newman v. McCullough*, 212 S.C. 17, 25-26, 46 S.E.2d 252, 256 (1948), which involved an employment contract with the City of Greenville, the court set forth the following rationale:

> [W]here the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council[,] *unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term*, no power of the council to do so exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.

Id. at 132, 459 S.E.2d at 880-81 (emphasis added). The court distinguished between proprietary and governmental functions as follows:

> [T]he difference between proprietary and governmental functions is often difficult to determine, because, as the scope of "governmentality" expands, the intertwining and overlapping of such functions make it increasingly more difficult to draw any definitive line of separation. However, it is clear the rule is intended to protect the public by insuring that each governing body has available to it the powers necessary to effectively carry out its duties. Thus, when determining whether a contract is

> binding on successor boards, it appears that *the true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired*.

Id. at 132-33, 459 S.E.2d at 881 (emphasis added) (citations omitted).

In *Cowart II*, our supreme court emphasized that the appointment or removal of a public officer "is a *governmental* function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837 (emphasis added) (citation omitted). "Such a contract is not binding on the successors to the local governing body." *Id.*[10] "[T]he rule is intended to ensure that governing bodies are

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[10] Other jurisdictions also recognize this fundamental principle. *See Grassini v. DuPage Twp.*, 665 N.E.2d 860, 864 (Ill. App. 1996) ("[I]t is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision."); *id.* ("This principle has not been confined in application to county governments . . . . Indeed, it has found expression with respect to employment decisions in . . . the Municipal Code . . . ." (citation omitted)); *City of Hazel Park v. Potter*, 426 N.W.2d 789, 793 (Mich. App. 1988) (holding that an employment contract between an outgoing city council and the city manager was void on public policy grounds because it attempted to take away "the governmental or legislative power of the incoming council to appoint and remove public officers"); *Morin v. Foster*, 380 N.E.2d 217, 220 (N.Y. 1978) ("[I]t is obvious that the appointment of a county manager is precisely and unmistakably a governmental matter within the rule's purview and the Monroe County legislators would be limited by it but for the fact that the county charter specifically provides for appointment of the manager to a four-year term."); *Lobolito, Inc. v. N. Pocono Sch. Dist.*, 755 A.2d 1287, 1289 (Pa. 2000) ("With respect to those agreements involving municipal or legislative bodies that encompass governmental functions, we have repeatedly held that governing bodies cannot bind their successors."); *id.* at 1289-90 ("The obvious purpose of the rule is *to permit a newly appointed governmental body to function freely on behalf of the public and in response to the governmental power or body politic by which it was appointed or elected . . . .*" (emphasis added)); *id.* at 1290 n.5 ("The rule against binding governmental successors is recognized in most other jurisdictions as well."); *Falls Twp. v. McManamon*, 537 A.2d 946, 948 (Pa.

free to discharge their governmental duties in the manner they deem appropriate and beneficial to the public they serve." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882. An exception to this rule exists when "enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms." *Cowart II*, 324 S.C. at 241, 478 S.E.2d at 838 (emphasis added).

Cunningham argues that *Cowart I* and *Cowart II* do not apply to this case because *Cowart I* applied the common-law principle known as Dillon's Rule, which our supreme court declared abolished by the Home Rule Act.[11] *See Williams v. Town of Hilton Head Island, S.C.*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) ("This Court concludes that by enacting the Home Rule Act, . . . the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government."). Dillon's Rule states

> A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

The court in *Cowart I*, which post-dated the Home Rule Act, admittedly recited Dillon's rule at the beginning of its discussion of the contract's validity. 319 S.C. at 131, 459 S.E.2d at 880. However, the court did not ultimately rely on Dillon's rule in determining that Cowart's employment contract was void; in addition to relying on the contract's unreasonable duration, the court relied on the independent principle that governmental bodies have no authority to impair the power and discretion delegated to their successors by the public,[12] as aptly expressed in *Newman v. McCullough*:

Cmmw. Ct. 1988) (holding that a three-year employment contract between the lame-duck supervisors of a township and the individual appointed by them to serve as police chief was invalid as against public policy because it was an attempt by the lame-duck supervisors to influence the governmental functions of their successors).

[11] Codified at S.C. Code Ann. § 4-9-10 to -1230 (1986 & Supp. 2011).

[12] 319 S.C. at 132-36, 459 S.E.2d at 880-83.

> The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors. *That acting as a governmental agency, it is bound always to act as trustee of the power delegated to it and may not surrender or restrict any portion of such power conferred upon it*.

212 S.C. at 25-26, 46 S.E.2d at 256 (emphasis added).

As stated above, when determining whether a contract is binding on successor governing bodies, "the true test is whether the contract itself *deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired*." *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (emphasis added). This prohibition against limiting the powers of a successor council is consistent with the requirement of the Home Rule Act to construe the powers of a county in a liberal manner. Therefore, Cunningham's argument regarding the abolition of Dillon's Rule is irrelevant to our analysis.

Cunningham also argues that the County's enabling legislation, the Home Rule Act, clearly authorized the lame-duck council to enter into an employment contract extending beyond the outgoing members' terms of office. We disagree. Section 4-9-620 of the South Carolina Code (1986) states, in pertinent part, "The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. The council may, in its discretion, employ the administrator for a definite term." We do not view this language as clearly authorizing the "definite term" to extend beyond the terms of the outgoing council members.

Cunningham also maintains that the Act's requirement that the powers of a county be liberally construed authorized the 2008 Council to bind the 2009 Council. In support of this proposition, Cunningham cites S.C. Code Ann. § 4-9-25 (Supp. 2011), which states:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, *not inconsistent with the Constitution and general law of this State*, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. *The powers of a county must be liberally construed in favor of the county* and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25 (Supp. 2011) (emphasis added).

We do not view this provision as authorizing a county's lame-duck council to bind the successor council as to governmental functions. Cunningham's argument that the County's 2008 Council could bind the 2009 Council requires the court to take a narrow view of the 2009 Council's powers, which is contrary to the requirement that a county's powers must be given a liberal construction.

Cunningham argues in the alternative that the payment of severance under his employment contract would be a proprietary function rather than a governmental function, and, hence, the 2008 Council was permitted to bind the 2009 Council as to payment of his severance. *See Cowart I*, 319 S.C. at 132, 459 S.E.2d at 880 (holding that if the contract involves the exercise of the municipal corporation's business or proprietary powers, it is binding on successor bodies "if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality"). Cunningham is making a distinction without a difference, and "'[w]hatever doesn't make a difference doesn't matter' in the law." *See McClurg v. Deaton*, 395 S.C. 85, 92, 716 S.E.2d 887, 890 (2011) (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)). The payment of severance would be based on an employment contract that purports to bind the 2009 Council and is therefore void. *See Cowart II*, 324 S.C. at 241, 478 S.E.2d at 837 (holding that the appointment of a public officer is a governmental function

that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body).

Based on the foregoing, the circuit court properly concluded that Cunningham's 2008 contract was void and could not bind the 2009 Council. Therefore, we affirm summary judgment for the County on this cause of action.

II. Payment of Wages Act

Cunningham asserts the circuit court erred in concluding that his accrued sick leave did not constitute "wages" under the Payment of Wages Act. Contrary to the circuit court's ruling, Cunningham argues that the Act's exclusion of "severance" from the definition of "wages" does not bar his claim for sick leave because his contract's provision for payment of accrued sick leave was not part of the severance package required by the contract.[13] *See* S.C. Code Ann. § 41-10-10(2) (Supp. 2011) ("'Wages' means all amounts at which labor rendered is recompensed . . . and includes vacation, holiday, and sick leave payments *which are due to an employee under any employer policy or employment contract*.") (emphasis added).

This court may affirm for any ground appearing in the record on appeal. Rule 220(c), SCACR. Here, we need not determine whether sick leave was part of the contract's severance package because the sick leave claim is based solely on the proposition that the contract was valid and binding on the 2009 Council.[14]

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[13] The circuit court's ruling as to the exclusion of severance from the Act's definition of wages was an alternative ruling; the circuit court's primary ruling as to the Payment of Wages claim was that Cunningham was not entitled to accrued sick leave "resulting from the termination of a void contract."

[14] Cunningham submits the alternative argument that the contract's provision for payment of accrued sick leave is severable from the remainder of the contract pursuant to the severability clause in section 17(D) of the contract, which states, in pertinent part:

> If any *provision*, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, in whole or in part, by any court of competent jurisdiction, the remainder of this Agreement or the portion thereof in question shall be deemed

However, the contract was void. Further, Cunningham has admitted that he would not be entitled to sick leave from the County if his contract is determined to be void as the County did not have a policy of compensating its at-will employees for accrued sick leave upon their termination. Therefore, we affirm summary judgment for the County on this cause of action.

III. Wrongful Discharge

Cunningham maintains the circuit court erred in concluding he could not avail himself of the public policy exception to the at-will employment doctrine on the ground that he did not claim he was an at-will employee. We agree.

> In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment. An at-will employee may be terminated at any time for any reason or for no reason, with or without cause. Under the "public policy exception" to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy. The public policy exception clearly applies in cases where either: (1) the employer requires the employee to violate

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> severable, shall not be affected thereby, and shall remain in full force and effect.

(emphasis added). The County maintains that this argument is not preserved because the circuit court did not rule on it and Cunningham did not file a Rule 59(e) motion seeking a ruling. Cunningham responds that because the trial court viewed the contract in its entirety as void, it would have been futile for him to seek a ruling on the severability argument. Assuming, without deciding, this precise issue is preserved for review, we reject Cunningham's argument. Because the circuit court correctly ruled that the contract was void in its entirety, no part of the contract is valid or enforceable against the 2009 Council.

> the law, or (2) the reason for the employee's termination itself is a violation of criminal law.

Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011) (citations and quotation marks omitted). However, "the public policy exception is not limited to these situations." *Id.* at 614, 713 S.E.2d at 637.[15] Further, the existence of an employment contract does not preclude a determination that the employment is terminable at will. *See Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) ("An employment contract for an indefinite term is presumptively terminable at will . . . .").

Here, within the wrongful discharge cause of action in the complaint, Cunningham alleged that the County conditioned his continued employment on his agreement to (1) "implement directives of individual council members, including those that violate actions directed by the body itself[;]" (2) commit acts violating "the public policy regarding the respective powers of Administrator and Council[;]" and (3) "commit acts that, upon information and belief, would violate the policy set forth in S.C. Code Ann. § 16-17-560[.]" Section 16-17-560 prohibits discharging a citizen from employment because of political opinions or the exercise of political rights and privileges.

The County argues that Cunningham has never claimed to be an at-will employee, and, therefore, he may not obtain relief based on the law governing at-will

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[15] "The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination." *Id.* at 615, 713 S.E.2d at 637; *see Epps v. Clarendon Cnty.*, 304 S.C. 424, 426, 405 S.E.2d 386, 387 (1991) (declining to extend the public policy exception when the employee has an existing remedy for a discharge that allegedly violates rights other than the right to the employment itself and stating that the appellant claimed an infringement of his constitutional rights to free speech and association, for which he could seek redress in a § 1983 action). Additionally, "[t]he determination of what constitutes public policy is a question of law for the courts to decide." *Barron*, 393 S.C. at 617, 713 S.E.2d at 638 (citation omitted). "It is not a function of the jury to determine questions of law such as what constitutes public policy. Rather, once a public policy is established, the jury would determine the factual question [of] whether the employee's termination was in violation of that public policy." *Id.*

employment. We agree with Cunningham that the County should not be permitted to argue that the Master Employment Agreement was unenforceable and then rely on the contract's existence to deflect liability on the wrongful discharge claim. By pleading both a breach of contract cause of action and a wrongful discharge cause of action, Cunningham simply set forth alternative theories of relief due to the parties' dispute over the legality of the contract. Rule 8, SCRCP, allows for such pleading in the alternative: "Relief in the alternative or of several different types may be demanded."[16]

In its brief, the County implies that Cunningham did not properly plead a cause of action for wrongful discharge because he did not allege that he was an at-will employee: "[H]e could have alleged that if the Contract was void, then he was an at-will employee entitled to bring a wrongful discharge claim. Cunningham elected not to do so." The County further states: "Instead he has always maintained that *the terms of the Contract* allow him to maintain both a breach of contract claim and a wrongful discharge claim." (emphasis in Brief of Respondent). The County then quotes a statement made by Cunningham's counsel during the motions hearing: "'[J]ust because you have a contract doesn't mean you give up the right to sue in court. . . . *It's not alternative causes of action*.'" (emphasis in Brief of Respondent).

We view this statement of Cunningham's counsel as merely a reference to our supreme court's precedent indicating that the existence of an employment contract does not preclude a determination that the employment is terminable at will. *See Cape*, 365 S.C. at 319, 618 S.E.2d at 883 ("An employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause. These are mere presumptions, however, which the parties can alter by express contract provisions."); *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 226, 516 S.E.2d 449, 451 (1999) ("[A]n employee under an at-will contract with a 30 day notice

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[16] *See also Harper v. Ethridge*, 290 S.C. 112, 118, 348 S.E.2d 374, 377 (Ct. App. 1986), *declined to extend on other grounds by Mendelsohn v. Whitfield*, 312 S.C. 17, 19, 430 S.E.2d 524, 526 (Ct. App. 1993) ("[A] plaintiff may join as alternate claims as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent." (citations omitted)).

provision may maintain an action for wrongful discharge in violation of public policy . . . .").

Therefore, counsel's statement during the motions hearing did not waive the complaint's assertion of a cause of action for wrongful discharge. Further, Cunningham's complaint adequately expresses a cause of action for wrongful discharge despite the omission of the words "at will." *See* Rule 8, SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties."); *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("[P]leadings in a case should be construed liberally so that substantial justice is done between the parties.").

Based on the foregoing, the circuit court erred in concluding that Cunningham was precluded from asserting a wrongful discharge claim based on the public policy exception to the at-will employment doctrine.

The County also argues that even if Cunningham could invoke the public policy exception to at-will employment, the facts alleged in the complaint would not entitle him to relief. Cunningham responds that the County's sole basis for its summary judgment motion as to the wrongful discharge cause of action was that the public policy exception was unavailable to Cunningham as a matter of law. Cunningham asserts that this ground for summary judgment on the wrongful discharge claim was the only ground litigated and ruled on by the circuit court. Cunningham's assertion is correct.

During the motions hearing, counsel for the County admitted that if the circuit court denied the County's summary judgment motion as to Cunningham's legal ability to assert the wrongful discharge cause of action, then the parties would have to engage in further discovery. Counsel for both parties represented to the circuit court that they had an agreement to allow discovery on this cause of action if the circuit court denied summary judgment on it.[17] Both counsel further agreed to

[17] Two months prior to the hearing, on March 8, 2011, Cunningham's attorney filed a "Rule 56(f) Affidavit of Counsel" stating that further discovery was necessary "regarding the issue of whether Plaintiff was terminated for, among other reasons, refusing to carry out a directive to terminate employees." The affidavit sets forth the agreement of counsel for both parties to delay discovery on the wrongful discharge claim until the contract claim was resolved.

allow the County the option of submitting another summary judgment motion on the wrongful discharge claim after the completion of discovery.

"Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citation omitted). Therefore, we reverse the grant of summary judgment on this claim and remand the claim to the circuit court so that the parties may engage in further discovery.

CONCLUSION

Accordingly, we affirm the circuit court's grant of summary judgment to the County as to Cunningham's causes of action for breach of contract and violation of the Payment of Wages Act. We reverse the circuit court's grant of summary judgment to the County as to Cunningham's wrongful discharge cause of action and remand to the circuit court to allow the parties to engage in further discovery.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Benjamin Fortner, Claimant,

v.

Thomas M. Evans Construction and Development, LLC, Employer, and Thomas Evans Custom Building and Renovations, Inc., Employer, and South Carolina Workers' Compensation Uninsured Employers' Fund, and SUA Insurance Company, Inc., Carrier, Defendants,

Of Whom Benjamin Fortner and Thomas M. Evans Construction and Development, LLC, and Thomas Evans Custom Building and Renovations, Inc., Employers, and South Carolina Workers' Compensation Uninsured Employers' Fund are the Respondents,

and SUA Insurance Company is the Appellant.

Appellate Case No. 2011-197246

Appeal From The Workers' Compensation Commission

Opinion No. 5073
Heard October 29, 2012 – Filed January 16, 2013

AFFIRMED

Edwin P. Martin, Jr., of Hedrick Gardner Kencheloe & Garofalo LLP, of Columbia, for Appellant SUA Insurance Company.

John S. Rodenberg, of Rodenberg Callihan Davis Lohr & Syracuse, LLC, of North Charleston, for Respondent Benjamin Fortner, III; R. Mark Davis and Andrew Luadzers, both of McAngus Goudelock & Courie, LLC, of Mount Pleasant, for Respondent Thomas M. Evans Construction & Development LLC; F. Reid Warder, Jr. and Kathryn R. Fiehrer, both of Wood & Warder, LLC, of Charleston, for Respondent Thomas Evans Custom Building & Renovations; and Timothy Blair Killen, of the South Carolina Second Injury Fund, of Columbia, for Respondent South Carolina Workers' Compensation Uninsured Employers' Fund.

LOCKEMY, J.: This action arose from injuries Benjamin Fortner, III, sustained while pressure washing a residential home on the Isle of Palms, South Carolina (Serenbetz property) on April 19, 2010. In this appeal from the Appellate Panel of the Workers' Compensation Commission (Appellate Panel), SUA Insurance Company (SUA) contends the Appellate Panel erred in finding Fortner was a statutory employee of Thomas M. Evans Construction & Development, LLC (Evans Construction) at the time of his injuries. We affirm.

FACTS

From 2004 to 2006, Fortner worked for Evans Construction, owned by Thomas Evans, Jr. (Evans, Jr.). While Fortner was employed with Evans Construction, Thomas Evans, III (Evans, III), son of Evans, Jr., worked as an onsite supervisor for the company. Fortner left Evans Construction in 2006. In 2009, due to a downturn in the economy, Evans, III also left Evans Construction and began his own company, Thomas Evans Custom Building and Renovations, Inc. (Custom Building). Evans, Jr. owns approximately one percent in Custom Building, while Evans, III has an undetermined ownership interest in Evans Construction from which he would benefit financially.

Custom Building performs a large number of kitchen and bathroom renovations, whereas Evans Construction performs more homebuilding "from the ground up." Initially, Evans Construction allowed Custom Building to use its credit with

different accounts, i.e., building materials, because Custom Building had not yet established credit. Evans Construction's accounting department kept a running tab of those expenses, and Custom Building paid down its tab after a job completion. Further, Evans Construction occasionally used Custom Building's employees for a specific job, but not as permanent employees. When that occurred, the employee would continue on Custom Building's payroll, and Evans Construction credited Custom Building's tab.

While Evans, III was employed with Evans Construction, he secured a job on the Serenbetz property for the company, which consisted of a $600,000 makeover of the home. Evans Construction was paid upon job completion in July of 2009. Subsequently, in 2010, the Serenbetz property suffered a suspected power surge that caused the heating and air conditioner to malfunction and damaged the floors, walls, and cabinets. Evans, III's company, Custom Building, was then hired to repair the damage.

In March of 2010, Fortner took a position with Custom Building as a painting supervisor on the Serenbetz property. Two weeks into Fortner's employment with Custom Building and the Friday before the accident, Evans, III asked Fortner to pressure wash the Serenbetz property because the owners were returning to town, and the home "needed . . . to look immaculate for when the owners got back." Evans, III further requested that Fortner locate a pressure washer for the task. On Sunday, Fortner called and told Evans, III he could not find a pressure washer, and Evans, III asked Fortner to call him on Monday morning to remedy the situation. On Monday morning, Evans, III told Fortner to meet him at a pressure washer rental store. While at the store, Evans, III rented the pressure washer with Custom Building's credit card, and then helped Fortner load it onto a truck to carry back to the Serenbetz property. Fortner testified they unloaded the pressure washer once they reached the Serenbetz property, and then Evans, III walked him through the home to explain everything that needed to be fixed once he finished pressure washing. Evans, III disputed this fact and stated he never took Fortner inside to show him what needed to be fixed. However, they both agree Evans, III showed Fortner that the air conditioner cover needed a coat of paint and impressed upon Fortner the importance of "making sure that the house was clean the best that [he] could get it clean." After the walk-through, Evans, III left the Serenbetz property, and Fortner began pressure washing on the roof. While pressure washing, Fortner lost his balance and fell, sustaining injuries. A fellow worker called Evans, III to inform him of the accident and then called 911.

Evans, Jr. testified he spoke with Evans, III on either a Saturday or Sunday about hiring Fortner as a replacement supervisor because Evans Construction's supervisor had suffered a heart attack. Evans, Jr. claimed a change in employment occurred the morning of April 19, 2010. Evans, Jr. admitted the decision had not been discussed with Fortner before his accident occurred. Evans, Jr. further asserted that it was he, on behalf of Evans Construction, who asked Evans, III to power wash the Serenbetz property as a gesture of goodwill because Mr. Serenbetz was coming to town, and Evans, Jr. wanted to "look good." Evans Jr. explained it was more convenient for Evans, III to take care of the task because Evans, III was working at the Serenbetz property. Kelly Gabel, Evans Construction's office manager, confirmed that Evans Construction's employees maintained properties through pressure washing them and performing lawn care services.

On the morning of the accident, Evans, Jr. spoke with Evans, III several times, and he alleged that at least one call was to confirm the pressure washing. Telephone records established that Evans, Jr. received calls from his son at 8:36 a.m. lasting about ten minutes, at 9 a.m. lasting about seven minutes, at 9:30 a.m. lasting about two minutes, at 9:32 a.m. lasting about one minute, and 9:48 lasting about five minutes. Evans, Jr. asserted he was not aware of Fortner's accident until around 10 a.m., when Evans, III called to inform him of what had occurred. Additionally, Evans, Jr. claimed he did not know Evans, III was not carrying workers' compensation insurance until a few days after Fortner's accident. Evans, III was unclear as to which phone call might have been the one informing Evans, Jr. of Fortner's accident. However, Evans, III testified Fortner normally started work around 8 a.m., and his fall probably occurred around 8:10 a.m.

Fortner believed he was working for Evans, III until two days after his accident when his wife informed him that Evans, III told her at the hospital Fortner had been switched to Evans Construction's payroll on the morning of his accident. Neither Evans, Jr. nor Evans, III personally spoke with Fortner to tell him about the change in employment. Fortner admitted Evans, III had spoken with him once before the accident regarding the possibility of working for both Custom Building and Evans Construction because the painting supervisor for Evans Construction had suffered a heart attack. Fortner was told his services might be necessary to "keep things going for both companies until they get someone to fill in for [the other supervisor]." However, Fortner claimed that was the only notification he received regarding a potential change in his employment status. Fortner also stated

he would not have had any objections to working between the companies if that had been necessary. He testified it was common for workers in the construction industry to "bounce back and forth between companies" because they go where the work is located.

After Fortner's injuries, Evans, III, on behalf of Custom Building, issued two checks to assist Fortner during his unemployment. Evans, Jr. and Gabel claimed Evans Construction credited Custom Building's tab for the checks, explaining that because Evans, III knew how to contact Fortner, it was more convenient for Evans, III to give him the check.

At the hearing, the parties stipulated Fortner was entitled to workers' compensation benefits as a result of his injury. Fortner and SUA contended Fortner was employed by Custom Building at the time of his injury. Evans Construction, Workers' Compensation Uninsured Employers' Fund (UEF), and Custom Building all maintained Fortner was either employed directly by Evans Construction, or alternatively, Evans Construction was the statutory employer of Fortner at the time of his injury. The single commissioner found Fortner to be the most credible of the witnesses that testified, while Evans, Jr. and Benjamin Fortner, Jr., Fortner's father, were marginally credible. The commissioner found Evans, III was not credible at all. The commissioner concluded that unless Fortner "knew of and agreed to a new employer-employee relationship with [Evans Construction], replacing the one theretofore existing with [Custom Building], his rights under the Workers' Compensation Act [WCA] against his regular employer were unabridged." Thus, he ruled that Custom Building, or UEF if Custom Building was unable or unwilling to pay, was liable. While the commissioner denied the argument that Fortner was a direct employee of Evans Construction, he did not address the statutory employer argument in his final order.

Evans Construction, Custom Building, and UEF (collectively referred to as Respondents) filed applications for review with the Appellate Panel following the single commissioner's decision. The single issue before the Appellate Panel was whether Thomas Evans Custom Building and Renovation (Custom Building) or Evans Construction would be held liable for Fortner's injuries. The Appellate Panel determined the commissioner erred in failing to find that Fortner was a statutory employee of Evans Construction at the time of his accident, citing *Ost v. Integrated Prods.*, 296 S.C. 241, 371 S.E.2d 796 (1988). The Appellate Panel found Fortner was under the direction and control of Evans Construction at the

time he was injured because it was Evans, Jr.'s decision to have the home pressure washed. Further, because Evans, Jr. and Gabel testified that Evans Construction regularly performed pressure washing activities or contracted with others to perform the pressure washing, and Evans Construction owned its own pressure washing equipment, the Appellate Panel concluded Fortner was performing an activity within the general trade, business, or occupation of Evans Construction, the principal employer. It further found Fortner was performing an activity that was an integral part of the business because of the close business connection between the two companies, basing that finding largely on testimony from Evans, Jr. and Evans, III. The Appellate Panel explicitly adopted the single commissioner's findings of fact regarding the witnesses' credibility and amended the commissioner's order to find that Fortner was a statutory employee of Evans Construction pursuant to section 42-1-400 of the South Carolina Code (1985). SUA subsequently filed this appeal.

STANDARD OF REVIEW

"The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 398 (Ct. App. 2008) (citing *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999); *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997)). "As a result, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." *Id.* at 216, 661 S.E.2d at 399 (citing *Harrell*, 337 S.C. at 320, 523 S.E.2d at 769; *Glass*, 325 S.C. at 202, 482 S.E.2d at 51); *see also Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 7-10, 132 S.E.2d 18, 20-22 (1963), *overruled in part on other grounds, Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002) (holding the existence or absence of an employment relationship is a jurisdictional fact that the court must determine based on its review of all the evidence in the record). "Where the issue involves jurisdiction, the appellate court can take its own view of the preponderance of the evidence." *Posey*, 378 S.C. at 216-17, 661 S.E.2d at 399 (citing *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002)). "It is South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the [WCA]." *Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004).

LAW/ANALYSIS

Section 42-1-400: "Owner" and "Subcontract"

SUA first argues the Appellate Panel erred in applying the three-part test set forth in *Voss* without initially determining whether Evans Construction was an "owner" for purposes of the statute and whether there was a "subcontract" in place. We disagree. *See Voss v. Ramco, Inc.*, 325 S.C. 560, 568, 482 S.E.2d 582, 586 (Ct. App. 1997).

The statutory employment section of the WCA provides:

> When any person, in this section . . . referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section . . . referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (1985).

"Whatever the parties contract to call their relationship is not controlling in a statutory employment analysis." *Pineland*, 337 S.C. at 322, 523 S.E.2d at 770; *see* S.C. Code Ann. § 42-1-610 (1985) ("No contract or agreement, written or implied, and no rule, regulation or other device shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this Title except as otherwise expressly provided in this Title."); *see also Wilson v. Daniel Int'l Corp.*, 260 S.C. 548, 553, 197 S.E.2d 686, 688 (1973) (stating that the terminology used by the parties is not controlling of their relationship). "The term 'owner' as used in Section 42-1-400 is synonymous with 'principal contractor'." *Murray v. Aaron Mizell Trucking Co.*, 286 S.C. 351, 354, 334 S.E.2d 128, 130 (Ct. App. 1985)

(citing *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 362-63, 2 S.E.2d 825 (1939)).

Despite concern over the Appellate Panel's credibility findings, the record contains indisputable evidence that Evans, Jr., on behalf of Evans Construction, requested Custom Building to pressure wash the Serenbetz property for the purpose of engendering goodwill with the Serenbetzes. Custom Building accepted the request and had Fortner complete the task. Essentially, although Fortner was not aware of it, he was pressure washing the Serenbetz property at the direction of Evans Construction. Custom Building paid Fortner for his hours spent pressure washing, and Evans Construction paid Custom Building by crediting its tab.

Evans, Jr. and Evans, III created a contractor-subcontractor relationship between Evans Construction and Evans Custom Building with the agreement to pressure wash the Serenbetz property. The preponderance of the evidence supports the Appellate Panel's finding that section 42-1-400 applied to these facts.

Section 41-1-410

SUA maintains that because the Appellate Panel used the term "contractor" and "owner" interchangeably, it implicated section 42-1-410 of the South Carolina Code (1985). We disagree.

As previously stated, the terms owner and contractor can be used interchangeably. *Mizell Trucking Co.*, 286 S.C. at 354, 334 S.E.2d at 130 (citing *Marchbanks*, 190 S.C. at 362-63, 2 S.E.2d at 836). Accordingly, the Appellate Panel's word usage does not necessarily implicate a particular statute, and it specifically based its decision on section 41-1-400.

***Voss* Three-Part Analysis**

SUA contends even if section 42-1-400 applied to these facts, the Appellate Panel erred in determining that Evans Construction was Fortner's statutory employer. We disagree.

> To determine whether the work performed by a subcontractor is a part of the owner's business, this [c]ourt must consider whether (1) the activity of the

> subcontractor is an important part of the owner's trade or business; (2) the activity performed by the subcontractor is a necessary, essential, and integral part of the owner's business; or (3) the identical activity performed by the subcontractor has been performed by employees of the owner.

Voss, 325 S.C. at 568, 482 S.E.2d at 586 (citing *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 292, 411 S.E.2d 439, 440 (1991)). "If any one of these tests is satisfied, the injured worker is considered the statutory employee of the owner." *Id.* (citing *Riden v. Kemet Elecs. Corp.*, 313 S.C. 261, 263, 437 S.E.2d 156, 158 (Ct. App. 1993)). "Any doubts as to a worker's status are to be resolved in favor of coverage under the [WCA]." *Id.* (citing *Riden*, 313 S.C. at 263-64, 437 S.E.2d at 158).

Evans, Jr. stated Evans Construction owned pressure washers, but it was more logical to rent one near the job site rather than to move one of the company's pressure washers forty miles for just one job. He and Gabel testified that Evans Construction's employees pressure wash properties on a consistent basis, the identical activity performed by Fortner. Evidence in the record established that the third prong of the *Voss* analysis was satisfied. Moreover, the purpose of having the Serenbetz property pressure washed was to engender goodwill. Evans, Jr. claimed maintaining goodwill was crucial to Evans Construction's business, satisfying the first prong of the *Voss* analysis.

The preponderance of the evidence supports a finding that at least the first and third prongs of the *Voss* test are fulfilled, and thus, Evans Construction was Fortner's statutory employer. Accordingly, we affirm the Appellate Panel.

Public Policy

SUA maintains by upholding the Appellate Panel's decision that Evans Construction was Fortner's statutory employer, we would detrimentally expand the scope of the statutory employer doctrine. We disagree.

The concept of statutory employment provides an exception to the general rule that coverage under the WCA requires the existence of an employer-employee relationship. *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 217, 661 S.E.2d

395, 399 (Ct. App. 2008); *see* § 42-1-410. "The statutory employee doctrine converts conceded non-employees into employees for purposes of the [WCA]. The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997). "The effect of . . . [statutory employment] provisions when brought into operation is to impose the absolute liability of an immediate employer upon the owner and/or general contractor although it was not in law the immediate employer of the injured workman." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 72, 267 S.E.2d 524, 527-28 (1980).

"Due to the many different factual situations which arise, this [c]ourt recognizes that no easily applied formula can be laid down for the determination of whether or not work in a given case is a part of the general trade, business or occupation of the principal employer. Each case must be determined on its own facts." *Ost v. Integrated Prods., Inc.*, 296 S.C. 241, 244, 371 S.E.2d 796, 798 (1988). Our decision in this case will not detrimentally expand the scope of the statutory employment doctrine because we are simply judging this case on its own merits. Accordingly, we reject this argument and affirm the Appellate Panel.

Remaining Arguments

Evans Construction argues that even if it was not the statutory employer of Fortner on the date of the accident, Fortner was either a direct or lent employee of Evans Construction. Because we affirm the Appellate Panel's finding that Evans Construction is Fortner's statutory employer, it is not necessary to reach these issues. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find the preponderance of the evidence supports a finding that Evans Construction was Fortner's statutory employer at the time of his injuries. For the foregoing reasons, the Appellate Panel's decision is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Kevin Baugh, M.D. and Barry J. Feldman, M.D.,
Respondents,

v.

Columbia Heart Clinic, P.A., Appellant.

Appellate Case No. 2010-176767

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

Opinion No. 5074
Heard September 12, 2012 – Filed January 16, 2013

REVERSED

A. Camden Lewis, Keith M. Babcock, and Ariail King, of Lewis Babcock & Griffin LLP, of Columbia, for Appellant.

Charles F. Thompson Jr., of Malone Thompson Summers & Ott LLC, of Columbia, for Respondents.

THOMAS, J: Columbia Heart Clinic, P.A., appeals the trial court's final order from a non-jury trial. The trial court held (1) the restrictions on competition in agreements between Columbia Heart and the respondents are unenforceable and (2) the South Carolina Wage Payment Act entitled the respondents to unpaid compensation. We reverse.

FACTS & PROCEDURAL HISTORY

I. The Practice

Columbia Heart is a corporate medical practice that provides comprehensive cardiology services. Its physicians are all cardiologists, although each performs different subspecialties within that field.

J. Kevin Baugh, M.D., and Barry J. Feldman, M.D. (collectively, Respondents) are cardiologists who had been shareholders and employees of Columbia Heart since before 2000. They specialize in interventional cardiology. Interventional cardiology is a subspecialty of general cardiology focusing on certain invasive procedures such as the implantation of medical balloons and stents to unblock arteries. Usually interventional cardiology must be performed in a hospital with capability to perform open-heart surgery in case complications arise from interventional procedures.

II. The Agreements

When Respondents became shareholders, they each entered employment agreements that forfeited money payable to them upon termination if they competed with Columbia Heart in Lexington and Richland Counties within a year. These agreements contained no other provisions that discouraged competition, and their consideration was a compensation system attached as an exhibit.

In 2004, Columbia Heart's shareholders embarked on the construction of a new medical office building in Lexington County through a limited liability company (the LLC). The LLC was almost entirely owned by the shareholder-physicians of Columbia Heart. Columbia Heart was to be the anchor tenant, but it did not own any interest in the LLC. Each member of the LLC signed personal obligations on the project debt in proportion to their equity in the LLC. Because of (1) the investment and liabilities undertaken by Columbia Heart's shareholders as members of the LLC and (2) a recent departure of a large number of Columbia Heart physicians, Columbia Heart sought to bind its shareholder-physicians more

tightly to the medical practice. Thus, in July 2004 Columbia Heart's shareholder-physicians entered into the agreements at issue (the Agreements).[1]

The Agreements contain two separate non-competition provisions, one in Article 4 and one in Article 5. Section 4.5(i) of Article 4 provides the following:

> Notwithstanding any other provision in this Agreement in the event at any time during the twelve (12) month period immediately following the expiration or termination (for any reason, whether with or without Cause) of this Agreement Physician continues or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5 following Physician's continuation or commencement of the practice of medicine in violation of this Section 4.5(i).

Section 5.1 of Article 5 says the following:

> Physician, in the event of termination or expiration of this agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete . . . with Columbia Heart.

Section 5.2 defines specific terms "[f]or purposes of Article 5":

> "Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia

[1] Columbia Heart's non-shareholder physicians had different employment agreements than its shareholders.

> Heart: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) assisting any Person (as director, officer, employee, agent, consultant, lendor, lessor or otherwise) to engage in the Business in the Territory.

"Business" is defined as "the practice of medicine in the field of cardiology." "Territory" is defined as "the area within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement."

No separate monetary consideration was paid to any shareholder-physician to sign the Agreements, nor did the Agreements change the compensation system established by Respondents' prior agreements.

III. Respondents' Departure and Ensuing Litigation

Columbia Heart opened a new office in the LLC's building in December 2005. In April 2006, Respondents left Columbia Heart in accordance with the Agreements. Ten shareholders remained.

Within a month after departing, Respondents opened a new practice, Lexington Heart Clinic, where they treated patients in cardiology and hired a number of Columbia Heart's administrative and medical support staff. Lexington Heart was on the same campus as Columbia Heart's Lexington office, separated by an approximate distance of 300 yards. Columbia Heart's physicians were rotated in pairs to work in its new Lexington office until the office closed in September 2006 because of fiscal unsustainability.

Respondents filed suit against Columbia Heart, raising a number of claims. They raised a declaratory judgment action against Columbia Heart, seeking two things: (1) a ruling that the Agreements contain unenforceable non-competition provisions and (2) injunctions to prohibit Columbia Heart from enforcing those provisions. Respondents also claimed violation of the Wage Payment Act, seeking treble damages for unpaid compensation, plus costs and attorney's fees. Columbia Heart answered and sought damages for contract and fiduciary duty counterclaims but did not seek injunctive relief.

The trial court conducted a bench trial addressing Respondents' declaratory judgment and wage payment claims.[2] It held the Agreements' non-competition provisions unenforceable and awarded Respondents unpaid compensation under the Wage Payment Act. This appeal followed.

ISSUES

1. Did the trial court err in holding the Agreements contain unenforceable non-competition provisions?

2. Did the trial court err in holding Respondents are entitled to unpaid compensation under the Wage Payment Act?

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006). "The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review." *Id.* at 17-18, 640 S.E.2d at 495.

ANALYSIS

I. Declaratory Judgment Action

On appeal, Columbia Heart contends the Agreements' non-competition provisions are enforceable for a number of reasons. Respondents raise alternative sustaining grounds. We address these arguments in turn.

The trial court found the Agreements were supported by consideration and subject to review for whether their non-competition provisions were reasonable. The court addressed the provisions in Article 5 and Article 4 separately. It found Article 5's territory restriction was reasonable because the twenty-mile radius was necessary

[2] Trial will proceed on the remaining actions after these claims are resolved.

to protect Columbia Heart's legitimate business interests and was not unduly burdensome on Respondents' ability to earn a living. The court also found Article 5's restriction against "the practice of medicine in the field of cardiology" was not overbroad. However, the court held Article 5's prohibition of "assisting any Person . . . to engage in the [practice of medicine in the field of cardiology]" was unreasonable under *Preferred Research, Inc. v. Reeve*[3] and *Faces Boutique, Ltd. v. Gibbs*.[4] The court reasoned this restriction "goes beyond restricting [Respondents] from doing what they did for" Columbia Heart and would bar them from assisting any cardiology practice "in any capacity." The court thus held the restriction was not necessary to protect a legitimate interest of Columbia Heart, and it found the restriction could not be blue-penciled from the rest of Article 5. And as a result, the court struck the entire covenant as unenforceable. In tandem, the court struck the non-competition provision in Article 4 because the court found the provision was a "part of, intended to be part of, and cannot be logically separated from the consequences of violating the non-compete provisions of Article 5."

To determine the standard of review for a claim brought under the Declaratory Judgment Act, we look to the main purpose of the complaint, as reflected by the character of the claims, evidence, and relief sought. *Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010). Respondents' declaratory judgment claim seeks a determination that the Agreements' non-competition provisions are unreasonable and an injunction. An injunction is an equitable remedy, and the interpretation of an unambiguous contract is a question of law, as is the question of whether a non-competition clause is reasonable. *Madden v. Bent Palm Invs., LLC*, 386 S.C. 459, 467, 688 S.E.2d 597, 601 (Ct. App. 2010); *Preferred Research*, 292 S.C. at 547-48, 357 S.E.2d at 490. Thus, we interpret the Agreements and address necessary factual questions involving the declaratory judgment action de novo. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

"While recognizing the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living." *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509,

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[3] 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987).

[4] 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995).

273 S.E.2d 338, 338 (1980). Therefore, restrictions on competition "are generally disfavored and will be strictly construed against the employer." *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). Hence, they "must be narrowly drawn to protect the legitimate interests of the employer." *Faces Boutique*, 318 S.C. at 42, 455 S.E.2d at 708. Such an arrangement is enforceable only if it is (1) supported by valuable consideration; (2) necessary to protect the employer in some legitimate interest; (3) not unduly harsh and oppressive in curtailing the employee's legitimate efforts to earn a livelihood; and (4) otherwise reasonable from the standpoint of sound public policy. *Rental Uniform Serv.*, 278 S.C. at 675-76, 301 S.E.2d at 143. The arrangement must be reasonably limited "with respect to time and place," but an otherwise reasonable limitation on the solicitation of former clients can substitute for a territory restriction. *Rental Uniform Serv.*, 278 S.C. at 675-76, 301 S.E.2d at 143; *Wolf v. Colonial Life & Acc. Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992).

A. The Agreements Are Subject to Reasonableness Review

Columbia Heart argues the trial court erred in finding the Agreements' non-competition provisions are unenforceable. Columbia Heart contends that under *J.W. Hunt & Co. v. Davis*,[5] the non-competition provisions are not subject to reasonableness review because Respondents were two of twelve shareholders in a professional association that operates "in practice" as a partnership.[6] The trial court rejected this argument, and so do we.

In *J.W. Hunt & Co. v. Davis*, an accounting partnership sued a former partner for providing services to the partnership's clients after resigning from the partnership. 313 S.C. at 353, 437 S.E.2d at 558. The firm sought to enforce a provision in the partnership agreement. *Id.* While an earlier partnership agreement "prohibited a withdrawing partner from rendering any accounting services to the partnership's clients for a five year period," the provision in issue stated the following:

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[5] 313 S.C. 352, 437 S.E.2d 557 (Ct. App. 1993) (cert. denied).

[6] As an alternative sustaining ground, Respondents argue Columbia Heart conceded the Agreements were subject to reasonableness review. We disagree. The issue was never conceded and is otherwise preserved.

> In the event a partner . . . leaves the employ of the Firm and such Partner either "directly or indirectly" within a period of three (years) of such departure from the Firm does work for former or existing clients of the Firm, such [P]artner shall pay the following as liquidated damages . . . . The meaning of "directly or indirectly" is that such Partner will not render public accounting services in any of its phases . . . .

Id. at 353 n.1, 437 S.E.2d at 558 n.1. The trial court held the provision was not subject to review for whether it was a reasonable restraint on trade. *Id.* This court agreed. *Id.* It reasoned the provision was not a "covenant not to compete" because it "neither prohibit[ed] [the withdrawing partner] from practicing public accounting for any specific period of time nor from servicing any client in any specific geographic region." *Id.* at 355, 437 S.E.2d at 559. The provision instead "allow[ed] a withdrawing partner to service former clients provided the partner pays the partnership liquidated damages calculated by using a formula prescribed by [the provision]." *Id.* at 353, 437 S.E.2d at 558. The court also distinguished its circumstances from the facts of a case where our supreme court held a provision was subject to reasonableness review, *Almers v. South Carolina National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975).

In *Almers*, a vice president was covered under a profit sharing program with his employer bank. *Id.* at 50, 217 S.E.2d at 135. He had acquired an 85% vested interest in the program as he departed to work for another bank in substantially the same duties. *Id.* After he left, his former bank terminated his benefits under the program pursuant to the following provision in the plan:

> Notwithstanding anything in this Plan to the contrary, no benefit shall be paid hereunder subsequent to the date any Participant, former Participant or Retired Employee enters any employment in the State of South Carolina, if in the opinion of the Board such employment is in competition with or to the detriment of The South Carolina National Bank of Charleston.

Id. at 50-51, 217 S.E.2d at 136. On appeal, our supreme court acknowledged this provision was not "the classic example of a direct restraint" on competition, the "covenant not to compete." *Id.* at 51, 217 S.E.2d at 136. The court instead characterized the provision as a "forfeiture clause" and noted that "the consequence [of the clause] is not the inability to engage in competitive employment, but the forfeiture of pecuniary benefits should [the bank] . . . determine that an employee with accrued benefits had" competed against the bank. *Id.* at 52, 217 S.E.2d at 136. Despite the distinction, the court held that "a forfeiture clause in a profit or pension plan which provides that upon employment with a competitor a participant is divested of rights under the plan is invalid unless" it satisfies the same reasonableness review applied to covenants not to compete. *Id.* at 56, 217 S.E.2d at 138-39.

In rejecting the *Almers* analogy, the *J.W. Hunt* court explained the following:

> Unlike *Almers,* there is no employment relationship involved in this case. Instead, the relationship here is a partnership agreement between partners with equal bargaining power. When Article VII was adopted in 1986, Davis formally assented to Article VII by signing the agreement. Although the partnership agreement was subsequently amended five times, Article VII remained intact. As opposed to the sole protection of an employer's interest accomplished through the forfeiture of accrued benefits in *Almers,* Article VII, a provision for which Davis bargained, afforded Davis protection against withdrawing partners from the time of the Article's adoption until Davis' withdrawal in 1990.

Id. at 355-56, 437 S.E.2d at 559-60 (citations omitted) (alterations in original).

J.W. Hunt does not apply to the provisions of this case. First, the Agreements are contracts of employment.

Further, the non-competition provisions in the Agreements are substantively different than the provision in *J.W. Hunt.* Unlike the provision in *J.W. Hunt*, Article 5's non-competition provision is a covenant not to compete. Section 5.1 directly prohibits certain types of competitive conduct within a certain territory for

a certain period of time. None of our courts have declined to apply a reasonableness analysis to covenants not to compete, and thus, Section 5.1 is subject to reasonableness review. Like the provision in *J.W. Hunt*, Article 4's non-competition provision is not a covenant not to compete. Unlike in *J.W. Hunt*, however, Article 4's provision is a forfeiture clause. While the clause in *J.W. Hunt* required the partner to pay a certain amount upon competition, Article 4 upon competition divests Respondents' rights to "any monies payable to Physician pursuant to this Section 4.5" under the Agreements. Forfeiture clauses are generally subject to reasonableness review, and none of our courts have declined to apply a reasonableness analysis to forfeitures. *See also Wolf*, 309 S.C. at 106, 420 S.E.2d at 220 (providing forfeiture clauses "are subject to the same requirements and strict analysis as covenants not to compete") (per curiam).

B. Article 5's Activity Restriction Is Reasonable

Columbia Heart also argues the trial court erred in finding Article 5's restriction against assisting a person to engage in the practice of medicine in the field of cardiology is not necessary to protect a legitimate interest of Columbia Heart.[7] Columbia Heart specifically contends the covenant's prohibition against assisting the practice of medicine in the field of cardiology is necessary to prevent Respondents from indirectly engaging in activities they clearly could not participate in directly. We agree.

Here, the record evidences that Columbia Heart's patients, referral sources, and other goodwill would be at risk if Respondents were able to assist others to engage in the practice of cardiology. Patients stay with and follow their doctors, and general practitioners refer patients to cardiologists based upon both the reputation of the doctor and the doctor's practice, current and past. If the Agreements did not prohibit Respondents from assisting another person to engage in the practice of medicine in the field of cardiology, Respondents could treat Columbia Heart's patients and use Columbia Heart's referral sources and goodwill simply by staying one step from the medical services provided. Therefore, the restriction is necessary to protect a legitimate interest of Columbia Heart.

Respondents maintain this case is controlled by *Preferred Research, Inc. v. Reeve* and *Faces Boutique, Ltd. v. Gibbs*. However, those cases are inapposite.

[7] No party contends Article 4's activity restriction is unreasonable.

In *Preferred Research*, an attorney executed a licensing agreement to perform real estate title work and related services for a company. 292 S.C. at 546, 357 S.E.2d at 489. The agreement described the company's business as "a national service in the fields of courthouse records research and verification, title searches, title insurance commitments and policies, loan closings, real estate appraising, credit investigations, examination of records affecting title to real estate and personal property and related services." *Id.* at 548, 357 S.E.2d at 490. The agreement further provided the following:

> In the event of termination of this Agreement for any reason whatsoever, Licensee shall not thereafter engage either directly or indirectly as principal or employee, alone or in association with others, in a similar business, *in any capacity*, to that licensed and established hereunder within an airline radius of twenty-five (25) miles of any of Licensee's places of business established under this Agreement and within the Territory described in Exhibit "B" attached hereto and by reference incorporated herein, for a period of twelve (12) months.

Id. at 547, 357 S.E.2d at 490. Applying Georgia law, this court held the activity restriction was broader than necessary to protect the company because it would prevent the attorney from working in any capacity for any employer who engaged in any of the activities encompassed by the company's business. *Id.* at 548, 357 S.E.2d at 490.

In *Faces Boutique*, a facial spa that provided skin care and face lifts employed the defendant, an esthetician who performed facials. 318 S.C. at 41, 455 S.E.2d at 708. The defendant's employment contract contained the following covenant:

> For a period of three (3) years after the termination of this agreement, the Employee will not, WITHIN THE TOWN OF HILTON HEAD ISLAND, SC, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner with the ownership, management, operation, advertisement or

> control of any business in direct competition with the type of business conducted by [Employer].

Id. The court held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of the spa's legitimate business interests. *Id.* a 43, 455 S.E.2d at 708. It reasoned the owner of the spa admitted the covenant prohibited the defendant from being employed "at any place of business engaged in the selling of cosmetics or giving facials, even if [the defendant] herself did not participate in these activities" and "even though, in such a situation, [the] business would not be threatened." *Id.*

The "any capacity" restrictions employed in *Preferred Research* and *Faces Boutique* are broader than the restriction here. Article 5 only prohibits "assisting any Person . . . *to engage in* [the practice of medicine in the field of cardiology]." Assuming Respondents do not violate the other restrictions, they could work for a business that practices medicine in the field of cardiology so long as they do not assist a person to engage in the practice of cardiology. Although Respondents do not contest that they breached the restrictions here, whether a shareholder-physician has actually assisted someone to engage in the practice of medicine in the field of cardiology could be a question of fact in other cases.
We accordingly find the trial court erred in determining the scope of activity restricted by Article 5's covenant not to compete was unreasonable. We thus must consider Respondents' additional grounds for sustaining the trial court's finding that the Agreements' non-competition provisions are unenforceable.

C. The Agreements Are Supported by New Consideration

Respondents contend as an additional sustaining ground that the Agreements are unenforceable because they are not supported by new consideration. We disagree.

"[W]hen a covenant [not to compete] is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable." *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001). "[T]here is no consideration when the contract containing the covenant is exacted after several years' employment and the employee's duties and position are left unchanged." *Id.*

Respondents executed the Agreements after they became employed by Columbia Heart, and the Agreements did not change the general compensation system agreed to by the parties under their prior employment contracts. However, Section 4.5(l) of Article 4 of the Agreements provides the following:

> Physician shall be paid Five Thousand and No/100 Dollars ($5,000.00) per month for each of the twelve (12) months following termination, so long as the Physician is not in violation of Article 5 of this Agreement.

This language established that Columbia Heart promised to pay each Respondent a total of $60,000 over twelve months after termination so long as they did not violate the non-competition provision in Article 5. In Article 5, Respondents promise not to compete with Columbia Heart, and the parameters of that promise are more restrictive than the covenants in the prior agreements. Consequently, the Agreements are supported by new consideration. *See Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises . . . constitute a good consideration.").

Respondents maintain Columbia Heart's promise to pay $60,000 in severance after termination was illusory because they will not receive the money if they compete in violation of Article 5. However, a promise is not illusory merely because its enforceability depends upon the performance of a reciprocal promise. Consequently, the Agreements are supported by new consideration.

D. Article 5's Territory Restriction Is Reasonable

As a further additional sustaining ground, Respondents argue the Agreements' non-competition provisions are unenforceable because Article 5's territory restriction is unreasonable.[8] Respondents maintain the nearest medical facilities outside the territory restriction that are authorized to perform elective invasive procedures critical to their subspecialty, interventional cardiology, are 55 miles away. In other words, they argue the territory restriction would in practical effect force them to make a significant relocation in order to perform their practice. They contend the territory restriction is therefore not tied to a legitimate interest of Columbia Heart

[8] No party contends Article 4's territory restriction is unreasonable.

and constitutes an unduly oppressive restraint on their ability to earn a living. We disagree.

Here, the territory restriction is necessary to protect a legitimate interest of Columbia Heart. The plain terms of the restriction prohibit Respondents from competing within a 20-mile radius of Columbia Heart offices at which Respondents "routinely provided services" during the last year of their employment. At the height of its size, Columbia Heart had permanent offices in Providence Hospital, Palmetto Richland Memorial Hospital, and Lexington Medical Center, as well as clinics throughout the state. Respondents worked primarily at Columbia Heart's Lexington and Richland County offices. Although Columbia Heart receives referrals from all over South Carolina, most of its physicians' patients come from the county where the physicians' main office is located. The restriction is limited to areas where Respondents primarily dealt with Columbia Heart patients, and no evidence in the record shows a large number of these patients were located within a distance significantly smaller than the 20-mile radius. *See Stringer v. Herron*, 309 S.C. 529, 532, 424 S.E.2d 547, 548 (Ct. App. 1992) (holding a covenant in an employment contract unreasonable where it prohibited a veterinarian from competing against his prior veterinary medicine practice "within fifteen miles of any veterinary practice operated by the employer . . . at the time of termination of employment" because the 15 mile radius around each location overlapped with the others and reached into adjoining counties and another state despite the fact that the "overwhelming majority" of the practice's clients "lived much closer than 15 miles from at least one of the practice locations").

Further, the fact that the practical effect of the territory restriction will make it difficult for Respondents to practice their subspecialty in interventional cardiology does not indicate under our facts that the restriction is unnecessary to protect Columbia Heart's legitimate interests. *See Rental Uniform Serv.*, 278 S.C. at 676, 301 S.E.2d at 143 ("A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers."). Such an argument more appropriately addresses whether the covenant is unduly oppressive.

In this case, the territory restriction's practical effect on Respondents' practice is not unduly harsh or oppressive in curtailing their legitimate efforts to earn a

livelihood. Respondents highlight *Cardiovascular Surgical Specialists, Corp. v. Mammana*[9] for their argument that the territory restriction is unreasonable because of the practical effect on Respondents' practices. There, a medical practice specializing in cardiovascular and thoracic surgery imposed a covenant not to compete that prohibited one of its surgeons from, among other things, owning, operating, or participating in cardiovascular or thoracic surgery for two years after termination. 61 P.3d at 213-14. Testimony indicated the prohibition would effectively bar the physician from practicing in cardiovascular and thoracic surgery within 100 miles of his former practice's location due to the remoteness of other hospitals. *Id.* at 214. The court struck the restriction because the employer testified, "It would be unlikely that if the non-compete was abided by, that someone would stay in the community for two years, not practice, and then have a viable practice at the end of two years." *Id.* The court further rejected the argument that the physician could switch to another medical specialty. *Id.*

Unlike in *Mammana*, Columbia Heart is a full-service cardiology practice, and Respondents specialized in general cardiology, with a subspecialty in interventional cardiology. While the restriction in *Mammana* prevented the physician from practicing in his field far beyond the technical terms of the provision, here Respondents can continue to practice in their field—offering cardiology services not involving interventional cardiology—outside the 20-mile radius.[10] Moreover, Respondents have not established their inability to perform interventional procedures would prevent them from having a viable practice after the one-year period**.** The evidence indicates board certification in interventional cardiology lasts for ten years, and Respondents' ability to obtain credentialing in that field after the one-year period would depend upon subsequent negotiations between Respondents and the hospitals at which they attempt to obtain credentialing. Consequently, Respondents have not shown the restriction would be

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[9] 61 P.3d 210 (Okla. 2002).

[10] Both sides' testimony indicates that interventional procedures constitute only 5 to 10% of Respondents' time. Further, one witness testified interventional cardiology constitutes "probably three or four percent" of Respondents' income "at most." Another witness testified 90% of cardiology patients are managed medically, and less than 10% require interventional procedures each year.

unduly burdensome on their ability to earn a living, and the trial court did not err in finding the territory restriction in Article 5's covenant was reasonable.[11]

E. Article 5 and Article 4 Are Subject to Review for Whether They Contain Penalties

As another sustaining ground, Respondents assert the Agreements' non-competition provisions are not enforceable because they contain penalties for violation of their restrictions. We disagree.

"Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of" breach. *Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011). They likewise may stipulate that a breaching party will lose a right to which the party is entitled under the agreement. *Tate v. Le Master*, 231 S.C. 429, 441-42, 99 S.E.2d 39, 45-46 (1957) (providing that parties may stipulate to the "forfeiture" of rights under a contract). However, if the stipulation is a penalty, it will not be enforced. *Foreign Academic*, 394 S.C. at 204, 715 S.E.2d at 334; *Tate*, 231 S.C. at 442, 99 S.E.2d at 46.

Whether a provision is a penalty is a question of construction and is generally determined by the intention of the parties. *Tate*, 231 S.C. at 429, 99 S.E.2d at 39. "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning." *ERIE Ins. Co. v. Winter Consrt. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). We must "look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach." *Id.* at 460, 713 S.E.2d at 322 (quoting *Foster v. Roach*, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922)). Where the stipulation "is reasonably intended by the parties as the predetermined measure of

[11] We do not address the trial court's findings that Article 4 and Article 5's non-competition provisions were intended to operate together in all cases and were thus unenforceable because Article 5 contained an unreasonable activity restriction. We find Article 5 enforceable. Therefore, the argument that Article 4 must fail because Article 5 fails does not apply to this case.

compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages." *Tate*, 231 S.C. at 440, 99 S.E.2d at 45-46. "However, where the stipulation is not based upon contemplated actual damages but is intended to provide punishment for breach of the contract, it is a penalty." *Moser v. Gosnell*, 334 S.C. 425, 432, 513 S.E.2d 123, 126 (Ct. App. 1999). The stipulation will be deemed a penalty if it "is so large that it is plainly disproportionate to any probable damage resulting from breach of contract." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002).

It is clear the Agreements' remedies were created in part to deter departures from the practice. However, that fact does not by itself indicate the remedies are penalties. A stipulation for breach will often serve as a disincentive to breach. Here, the probable damages caused by a shareholder-physician's competition would have been difficult to estimate at the time the Agreements were created. Although patients follow their doctors, the continuance of that relationship relies upon the uncertain actions and feelings of the patients. Further, Columbia Heart generates income through the delivery of services, and the practice's accounts receivable does not reflect what the company actually collects through those services. In this particular practice, the accounts receivable actually collected ranged between 37% and 48%. Lastly, the parties entered the Agreements knowing Columbia Heart itself planned to—and did—incur $5 million in debt to furnish its space in the LCC's Lexington building with equipment and furniture. The practice's ability to utilize these assets thus would depend upon the physicians' abilities to continue or increase services provided. As a result, the effect of a doctor's departure on a practice's business, while expected to be negative, would have been highly uncertain.

1. *Article 5's Stipulated Damages Provision Is Not a Penalty*

Article 5 provides remedies "available to Columbia Heart in the event of a breach of" the covenant. Those remedies included Section 5.4(a), a stipulated damages provision:

> In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Columbia Heart liquidated damages in advance of practicing in violation

> of that Section in an amount equal to One Hundred Percent (100%) of Physician's Income . . . . For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of physician-shareholders of Columbia Heart in the calendar year prior to the date of termination or expiration of this Agreement.
>
> These damages are in partial restitution for the loss or damage which Columbia Heart will suffer as a result of such breach and in partial recovery of its investment in the practice of Physician, which together constitute full payment of such losses or damages. Notwithstanding anything to the contrary stated herein, payment of such liquidated damages (together with the forfeiture described in Article 4 above) will entitle Physician to practice in breach of the provisions contained in Section 5.1 without further liability to Columbia Heart for such breach.

Article 5 subsequently states:

> Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, . . . , and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the protection of Columbia Heart.

Article 5's stipulated damages provision is not a penalty. It reasonably attempted to provide a conservative estimate of damages sustained by Columbia Heart when a shareholder-physician departed and competed. The parties agreed at trial that the amount established by the average shareholder-physician's taxable income from the year before equaled roughly $591,710 and that Respondents are financially able to pay that amount. Further, Respondents' taxable income for each year was generally "six figures" less than the net revenue earned by each shareholder-physician for the practice. Because patients tend to follow their doctors, the use of a physician's W-2 income for the prior year is a logical estimate of the income to be lost by the practice when the physician leaves. The provision further contains

an acknowledgment the stipulated amount reflects a portion of the damages Columbia Heart would suffer from breach. Consequently, the stipulated damages provision is enforceable. *Cf. ERIE Ins. Co.*, 393 S.C. at 461, 464, 713 S.E.2d at 321, 322 (holding the language of a contract that imposed a 15% fee to cover the burden of overseeing completion of a project after the project's breach was reasonably intended as a predetermined measure of loss from breach because it varied the recoverable damages based upon the outstanding work).

2. *Article 4's Forfeiture Is Not a Penalty*

Article 4's forfeiture provides that if Respondents competed with Columbia Heart in violation of Article 4, they "shall forfeit any monies payable to [them] pursuant to this Section 4.5." Section 4.5(l) provides that upon termination, Respondents were entitled to $60,000. Section 4.5(f) provides that upon termination without cause, Respondents were entitled to:

> (i) All salary earned or accrued but unpaid as of the date of [termination][12]; and
>
> (ii) Physician's Prorata Share of the Current Year's Actual Collection Percentage of the accounts receivable of Columbia Heart, computed on the date of termination of this Agreement.

Article 4 defined "Physician's Prorata Share" and "Current Year's Actual Collection Percentage." Those definitions indicate the shareholder-physician is entitled to a percentage of the accounts receivable earned by Columbia Heart between the beginning of the fiscal year and time of termination (the defined share of accounts receivable). The percentage of earned accounts receivable is based upon the shareholder-physician's ownership in Columbia Heart at termination and the percentage of accounts receivable actually collected by Columbia Heart in the last fiscal year.

Section 4.6 of Article 4 provides:

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[12] This section states "Physician's death," but every party agrees the language is a typo.

> Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which Columbia Heart will suffer as a result of competition by Physician with Columbia Heart. Physician further acknowledges that such forfeiture . . . , is fair and reasonably required for the protection of Columbia Heart.

Like Article 5's stipulated damages provision, Article 4's forfeiture is not a penalty. Here, the Agreements indicate that if a shareholder-physician was to compete in violation of Article 4, Article 4 would simultaneously divest the shareholder-physician's rights to earned but unpaid salary, the defined share of accounts receivable, and the $60,000 severance pay. The defined share of accounts receivable is a formula that estimates the accounts receivable attributable to the physician until the physician left during the current year. Reviewed in that light, its forfeiture may conservatively estimate probable damage caused by a departed shareholder-physician's competition with Columbia Heart for a period equal to the amount of time the physician worked for the practice in the year he left. *See ERIE Ins. Co.*, 393 S.C. at 461, 464, 713 S.E.2d at 321, 322 (holding the language of a contract that imposed a 15% fee to cover the burden of overseeing completion of a project after the project's breach was reasonably intended as a predetermined measure of loss from breach because it varied the recoverable damages based upon the outstanding work). In contrast, the amounts reflecting earned but unpaid salary and $60,000 severance pay are not on their face related to Columbia Heart's probable loss suffered by a shareholder-physician's departure and competition. But the damages to be expected by competition are highly difficult to predict, and the Agreements involved large sums of money, sophisticated shareholder-physicians, and arm's length negotiation. Article 4 itself says the forfeiture was "reasonable" and "intended as <u>partial</u> restitution" for Columbia Heart's damages caused by competition. The money actually forfeited by each Respondent pursuant to Article 4 totaled near $240,000,[13] and the difference between the stipulated damages in Article 5 and the revenue loss Columbia Heart could expect in one year if a

[13] Each Respondent's defined share of accounts receivable equaled around $172,000, and each Respondent sought the $60,000 severance pay and about $8,000 in earned but unpaid salary.

shareholder-physician took patients away from the practice equaled about "six figures," or $100,000.[14] Although Article 4's forfeiture would as a result divest each Respondent of items worth $140,000 more than the estimate of the net revenue each shareholder-physician might earn for the practice in serving its patients, Columbia Heart's loss of patients was not the only foreseeable loss resulting from departure and competition by shareholder-physicians. Probable damages to Columbia Heart could include other losses resulting from the closing of an office, and no evidence allows us to conclude the $140,000 difference is an unreasonable estimate of those uncertain losses. *See* Restatement (Second) of Contracts § 356 cmt. b ("To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of the parties."), *cited by ERIE Ins. Co.*, 393 S.C. at 462, 713 S.E.2d at 322. Considering the Agreements as a whole and the circumstances surrounding their entry—especially the millions of dollars Columbia Heart incurred in opening the new practice—the forfeiture in Article 4 could reasonably be intended to compensate Columbia Heart for part of the probable damages resulting from the shareholder-physician's departure and competition in contravention of Article 4. *See id.* § 356 cmt. b ("The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss. The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable." (citations omitted)). Consequently, the forfeiture in Article 4 is enforceable.

II. Wage Payment Action

Columbia Heart contends the trial court erred in awarding Respondents the unpaid compensation they sought under the Wage Payment Act. We agree.

At trial, Respondents sought payment from Columbia Heart under the Wage Payment Act for compensation left unpaid after they departed from the practice.

[14] We consider Article 5's stipulated damages provision along with Article 4's forfeiture because Respondents breached the non-competition provisions of both.

Both doctors sought amounts owed for their defined share of accounts receivable and earned but unpaid salary. Dr. Feldman sought payment for unpaid director's fees, but Dr. Baugh did not. Respondents did not seek payment for the $60,000 severance pay.

The parties agreed that Respondents had competed in contravention of the Agreements, but the trial court held the non-competition provisions were unenforceable. Thus, the court found Respondents had not lost their rights to the above compensation by competing with Columbia Heart, and it awarded Respondents compensation for their wage payment claims. The court declined to grant treble damages or attorney's fees.

Actions seeking damages for a violation of the Wage Payment Act are actions at law. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010). In an action at law tried without a jury, the trial court's findings are conclusive on appeal when supported by competent evidence. *Id.* Accordingly, our standard of review is limited to correcting errors of law and determining whether the trial court's findings are supported by competent evidence. *Id.*

Under the Wage Payment Act, Respondents are entitled to recover in a civil action "all wages due" but unpaid by Columbia Heart when Respondents left the practice. S.C. Code Ann. § 41-10-50 (Supp. 2012); S.C. Code Ann. § 41-10-80(C) (Supp. 2012). The Act provides the trial court the discretion to award treble damages, attorney's fees, and costs as well. *Mathis*, 389 S.C. at 315, 698 S.E.2d at 781.

Under the Act, "wages" are defined as the following:

> [A]ll amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

S.C. Code Ann. § 41-10-10(2) (Supp. 2012). In other words, the Act "defines 'wages' as 'all amounts . . . which are due to an employee under any . . .

employment contract.'" *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 195 n.4, 463 S.E.2d 641, 645 n.4 (Ct. App. 1995) (quoting § 41-10-10(2)).

Here, because the forfeiture in Article 4 is enforceable and Respondents have forfeited their rights to compensation under that article, no evidence indicates the defined shares of accounts receivable, unpaid draws, and director's fees are "due" to them under the Agreements. Accordingly, the items are not "wages" and the trial court erred in holding Respondents were entitled to them pursuant to their wage payment claims.

CONCLUSION

We reverse the trial court's finding that the non-competition provisions in Article 5 and Article 4 are unenforceable. We also reverse the trial court's finding that Respondents were entitled to damages for unpaid director's fees, draws, and the defined share of accounts receivable under the Wage Payment Act.

REVERSED.

HUFF and LOCKEMY, JJ., concur.