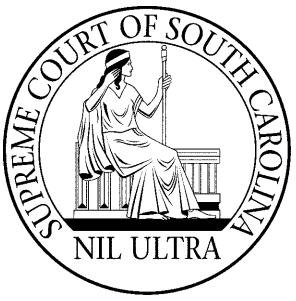


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 38**
**October 24, 2012**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Justin O'Toole Lucey and
Justin O'Toole Lucey, P.A., Appellants,

v.

Amy Meyer, Respondent.

And Lorcan Lucey, GMAC
Mortgage Corporation,
Citimortgage, Inc., and
John Doe Finance, Third Party Defendants.

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Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

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Opinion No. 4960
Heard January 26, 2012 - Filed March 28, 2012
Withdrawn, Substituted and Refiled October 24, 2012

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**REVERSED**

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Cherie Blackburn, of Charleston, for Appellants.

Nancy Bloodgood and Lucy C. Sanders, both of North Charleston, for Respondent.

**LOCKEMY, J.:** In this civil action involving an employment contract, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A. (Firm) (collectively Appellants) appeal the trial court's denial of their motion to compel arbitration. Appellants contend the trial court erred in: (1) finding the Federal Arbitration Act (FAA) did not apply because the relationship between Firm and Amy Meyer did not involve interstate commerce; (2) finding the arbitration clause was unconscionable; (3) striking the entire arbitration clause when it was more appropriate to sever the alleged unconscionable portion and compel arbitration; and (4) finding the South Carolina Arbitration Act (SCAA) applicable to the contract. We reverse.

## FACTS

Meyer began practicing law in 2002 and is licensed to practice law only in South Carolina. Prior to joining Firm, Meyer was employed as an Assistant Solicitor for the Ninth Circuit, specializing in white collar crime, but had no civil trial experience. She also practiced public accounting for 6 years as a certified public accountant before going to work with the Solicitor's Office. In January 2006, Firm hired Meyer as an associate attorney.

In June of 2006, Meyer and Firm executed an employment agreement (2006 agreement). Explaining the purpose of the 2006 agreement, the beginning paragraph stated:

> As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalese, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

The 2006 agreement contained an arbitration clause in the middle of the second page in regular type which stated:

> Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

A base salary and bonus structure for contingency cases along with other benefits were also included in the 2006 agreement. The paragraph preceding the signature line stated:

> Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

Under "Subsequent Modifications," the 2006 agreement listed additional benefits to Meyer, including an increased bonus of fifteen percent on a case referred to as the Harper case and a graduated trial bonus on cases which Meyer shared the work with Lucey in getting ready for trial.

The 2006 agreement specifically referenced certain cases that Meyer would be working on, including the Cusack, Harper, Shoshan, Hanson, and Turner cases. Appellants allege each of these cases involved interstate commerce. They state Shoshan was an employment lawsuit against a non-South Carolina resident car parts manufacturing subsidiary of a German company which had a North Charleston factory. Turner was a partnership/employment lawsuit involving a dental student who had been marketed a dental practice by a Georgia professional practice referral service and who obtained a loan from a Georgia bank. Harper involved a treating doctor who resided in and was deposed in Florida. Firm's primary liability expert for the Harper case resided in and was deposed in Georgia, while another of Firm's experts for the case resided in and was deposed in

California. Appellants also allege that most of this out-of-state work was handled by Meyer.

In May of 2007, Firm and Meyer amended the 2006 agreement (2007 amendment) to address Meyer's salary bonus for work on a complex construction defect case (the Ocean Club case) involving a construction project on the Isle of Palms near Charleston, SC. After being provided a draft of the 2007 amendment for review, Meyer crossed out and initialed certain language to which she objected and then signed the document. Appellants stated Meyer was not spearheading the Ocean Club case.

Firm's primary client in the Ocean Club case was the Ocean Club Horizontal Property Regime, which was composed of homeowners located in various states. On February 2, 2009, Meyer prepared a summary of the travel expenses incurred in connection with the case, showing repeated travel outside of South Carolina. Further, documentation was presented showing many out-of-state depositions in which Meyer participated. During Meyer's work for this case, Firm made intermittent payments toward her salary bonuses. On July 20, 2009, the Ocean Club case was settled, and on July 22, 2009, Meyer's employment was terminated.

In July of 2009, Meyer began making demands for vacation, 401K money, and bonus money allegedly due under the Ocean Club case. In response, Firm filed an arbitration proceeding on October 22 with National Arbitration and Mediation, Inc. (NAM). Meyer did not respond to the NAM arbitration filing and sent a draft complaint to Appellants on October 30, 2009. On November 2, 2009, Appellants filed a complaint, a motion for a temporary restraining order and preliminary injunction, and a motion to compel arbitration. Appellants state they filed the complaint in an effort to prevent the filing of the draft complaint from Meyer, because the draft complaint contained confidential information about Firm's clients and disregarded the binding arbitration clause contained in the 2006 agreement. On November 30, 2009, Meyer filed an answer, counterclaims, and third party complaint. Meyer asked for an award of $1.7 million for the value of her time on the Ocean Club case.

After a hearing on December 9, 2009, the trial court denied the motion to compel arbitration. The trial court made the following conclusions: (1) the arbitration clause did not meet the requirements of SCUAA; (2) the employment contract did not involve commerce within the meaning of the FAA; (3) the arbitration clause at issue was further void on equitable grounds; and (4) there were differences in compelling arbitration in real estate development and construction cases under the FAA and compelling arbitration for personal service contracts.

Appellants filed a Rule 59(a) motion asking the trial court to reconsider the following: (1) the determination that the FAA did not apply, because the trial court improperly focused on Meyer's activities, rather than the activities of the Firm; (2) the delegation to Meyer's counsel of the ruling on the issue of whether the arbitration clause was unconscionable; and (3) the failure to recognize or evaluate the factors which render arbitration clauses reasonable and conscionable, especially as between sophisticated parties. However, during the hearing on the motion for reconsideration, Appellants failed to pursue their second argument regarding improper delegation. The trial court issued a Form 4 denial of the Appellants' 59(a) motion for reconsideration, and this appeal followed.

## ISSUES ON APPEAL

1. Did the trial court err in its determination the employment contract between the parties did not involve interstate commerce within the meaning of the FAA such that the FAA does not apply?

2. Did the trial court err in its determination that the arbitration clause at issue is unconscionable, thus it is invalid and not enforceable?

3. Did the trial court err in failing to sever the "limitation of live witnesses" portion of the arbitration clause and then enforce the remainder?

4. Did the trial court err in its determination that the SCUAA applies to the agreement between the parties and that the employment agreement is not in compliance with such act?

## STANDARD OF REVIEW

"'Arbitrability determinations are subject to de novo review.'" Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "'Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.'" Id. (quoting Simpson, 373 S.C. at 22, 644 S.E.2d at 667).

## LAW/ANALYSIS

### I. Timeliness of Appellants' Notice of Appeal

As a threshold procedural matter, we will address Meyer's argument that Appellants' Rule 59(a) motion for reconsideration was an insufficient and improper way to request review of a trial court's denial of a motion to compel arbitration. Thus, Meyer contends this is an untimely appeal because the improper motion did not toll the time for appeal from the arbitration order. We disagree.

Appellants' motion stated they are requesting reconsideration pursuant to Rule 59(a), SCRCP. Rule 59(a) states:

> Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been

> entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

The grounds for Appellants' motion are stated as follows: (1) the trial court incorrectly focused on Meyer's activities, rather than the activities of the Firm when determining whether the FAA applied; (2) the trial court delegated the ruling on the issue of whether the arbitration clause was unconscionable to Meyer's counsel; and (3) the trial court failed to recognize or evaluate the factors which render arbitration clauses reasonable and unconscionable, especially as between sophisticated parties. The Appellants then filed a memorandum in support of their motion for reconsideration which expands upon their three grounds.

"'A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.'" Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. "Rule 7(b)(1), SCRCP requires that motions 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" Camp, 386 S.C. at 575, 689 S.E.2d at 636. "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.'" Id. (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir. 1996)). "'By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.'" Id. (quoting Calderon v. Kansas Dep't of Soc. & Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir. 1999)). However, when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical application does not serve the purpose of Rule 7(b)(1), SCRCP. Id. at 575-76, 689 S.E.2d at 636-37.

When the trial court is able to discern the relief requested, "[i]t is the substance of the requested relief that matters 'regardless of the form in which

the request for relief was framed.'" Richland Cnty. v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) (holding it was proper to treat plaintiff's written motion as a Rule 59(e) motion to the extent the motion addressed the trial court's evidentiary rulings, which the plaintiff challenged in her briefly stated oral motion at the end of the trial, even though it was erroneously captioned as a motion for new trial).

At the hearing for reconsideration, Meyer raised her contention that the Appellants filed their motion improperly pursuant to Rule 59(a), instead of Rule 59(e). The court responded:

> I'm not trying to be smart with you, but if I made a mistake I'll correct it irrespective of whether it's 59(a) or 59(e). Okay? So base your argument on that, okay. That's my concern if whether I made a mistake and that's what the motion for reconsideration -- generally, it's for the Courts to correct themselves. And I have done that on, I won't say several occasions, but I have corrected myself on some motions. . . . So don't give up any of your arguments for appellate, okay?

Addressing Meyer again at the end of the hearing, the trial court stated:

> All right. I'm giving you an opportunity to give me any facts you want to give me that you didn't give me last time. That's what I'm giving you ten days for. Okay? . . . I'm not going to consider any new issues. I'll be happy to receive any facts that you want to present to me on those issues.

The trial court explained that despite the rule cited in the motion, it understood the motion to be one for reconsideration of the issues, and it would address the motion as such. The grounds, with the exception of the

second ground that Appellants dropped, were issues brought up in the initial hearing.

Acknowledging the flexibility of the particularity requirement, we find the court fairly addressed the motion as a Rule 59(e) motion for reconsideration. Any potential prejudice to Meyer was relieved by permitting ten days after the hearing to file any other arguments she felt applicable. For the foregoing reasons, we hold the filing of the captioned Rule 59(a) motion for reconsideration tolled the time period to file a notice of appeal, and therefore, Appellants' notice of appeal was timely.

## II. Interstate Commerce within the definition of the FAA

Appellants argue the trial court erred in finding the employment contract with Meyer did not involve interstate commerce. Specifically, they contend interstate commerce is broadly construed for purposes of the FAA; thus, because the employment contract's named cases required out-of-state travel and work from Meyer, the contract involved interstate commerce. We agree.

"Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008) (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). The FAA provides: "A written provision in any [] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2009). "The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.'" Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995)); see also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional

equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."). "'Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce.'" Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (quoting Citizens Bank, 539 U.S. at 56).

"In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." Id. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.")). "Our courts consistently look to the essential character of the contract when applying the FAA." Id. at 96, 592 S.E.2d at 52 (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved").

Our supreme court and this court have ruled on several cases which are applicable to our determination of whether the contract at bar involves interstate commerce. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce involved in a construction contract where a builder was domiciled in South Carolina, but under the contract, was assigned rights to a Delaware creditor); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding interstate commerce was involved in a contract requiring removal of water and sludge from property in South Carolina to a facility in North Carolina); Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993) (stating that a contract between a nursing home and patient did not involve interstate commerce, despite the fact that the nursing home was a division of a Delaware partnership, marketed its services to persons residing outside of the state, and purchased the majority of its supplies and equipment from out-of-state; the Court reasoned that the performance of the contract, the provision of patient-resident services in South Carolina, did not require any activities in interstate commerce); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a

contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); Blanton v. Stathos, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because "the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce").

In Thornton v. Trident Med. Ctr., L.L.C., James Thornton entered into a recruiting agreement with Trident Medical Center. 357 S.C. 91, 93, 592 S.E.2d 50, 51 (Ct. App. 2003). The agreement required Thornton to relocate his medical practice from Michigan to Charleston, SC, for a total of at least four years and included the additional terms: (1) a net collectable revenue guarantee which provided Thornton with a guaranteed income for twenty-four months; (2) a signing bonus; (3) a relocation agreement for payment of moving expenses; and (4) an agreement providing that Thornton was being recruited into the existing practice of SCCA. Id. An arbitration clause was included in the contract. Id. Thornton left Charleston before the contracted four years and filed a declaratory judgment seeking a determination that the arbitration clause was unenforceable. Id. at 94, 592 S.E.2d at 51. In finding the contract involved interstate commerce such that the FAA applied, this court decided the "subject matter of the contract clearly [extended] beyond Thornton's obligation to provide medical services in South Carolina." Id. at 97, 592 S.E.2d at 53. This court found the recruiting agreement was primarily to induce Thornton to move from Michigan to South Carolina. Id. at 97-98, 592 S.E.2d at 53. Additionally, the agreement included reimbursement for Thornton's relocation expenses and prevented Thornton from practicing in any other state other than South Carolina for four years. Id. Thus, "the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines," and "[t]he express purpose [] was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." Id. at 98, 592 S.E.2d at 53.

In contrast, our supreme court found the agreement in Timms v. Greene did not involve interstate commerce. 310 S.C. 469, 473, 427 S.E.2d 642, 644 (1993). The Timms contract was between a nursing home and one of the nursing home's residents and included an arbitration clause. Id. at 470-71, 427 S.E.2d at 643. In support of its decision, the supreme court found the only evidence raised to show interstate commerce was that the nursing home: (1) was a division of National HealthCorp, L.P., a Delaware Limited Partnership; (2) marketed its services to persons residing outside this State; (3) hired employees from outside the State; (4) purchased a majority of its goods, equipment and supplies outside the state for use at the home; and (5) contemplated payment in part by Medicare or Medicaid. Id. at 473, 427 S.E.2d at 644. The court stated although the listed factors could show the nursing home's involvement in interstate commerce, their relationship to the agreement between the nursing home and the resident was "insufficient to form the basis of the contract between the parties." Id.

Towles v. United Healthcare Corp. is also relevant to our analysis here. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). United Healthcare Corporation (United) was a national company headquartered in Minnesota. Id. at 33, 524 S.E.2d at 841. United hired Winfield Towles as a medical director in South Carolina and required him to sign a Code of Conduct and Employment Handbook, which included an arbitration clause. Id. at 33-34, 524 S.E.2d at 841-42. This court noted Towles' responsibilities included helping to establish medical policy, overseeing utilization review and quality management for plan participants, attending out-of-state conferences, participating in telephone conferences with United's corporate medical affairs staff in Minnesota, and reviewing claims from out-of-state providers and specialty providers located in North Carolina and Georgia. Id. at 36, 524 S.E.2d at 843. Furthermore, Towles participated in sales presentations in South Carolina and Georgia and worked with officials from national companies in resolving questions of utilization review and medical necessity for PHP participants. Id. Towles also reviewed proposals for services from out-of-state medical and ancillary service providers. Id. This court found those activities provided "sufficient evidence of interstate commerce to invoke the FAA." Id.

In this case, the trial court found the facts to be most similar to Timms because "an attorney is providing legal services for a South Carolina law firm doing business in South Carolina." The trial court then stated even if the facts are as the Appellants state them to be, they fail to rise to the level of involving or affecting interstate commerce because domicile of the parties to the litigation, activities outside the state of South Carolina incident to the completion of a transaction, and receipt of insurance proceeds do not render a transaction as "involving" or "affecting" interstate commerce within the purview of the FAA. In the hearing for the motion to reconsider, the trial court stated:

> My concern was that we were simply looking at an employment contract between two attorneys here in Charleston, South Carolina, and I did not feel like you could expand it by saying that she's working on cases that were involving [out-of-state] information or interstate commerce. That's the reason basically I ruled the way I ruled.

Despite the trial court's reasoning, this court finds Towles most applicable to these facts.[1] Using the Towles court's analysis, this court holds

[1] Equal Emp't Opportunity Comm. v. Rinella & Rinella is also persuasive in our analysis, although not controlling. 401 F. Supp. 175 (N.D. Ill. 1975). Rinella was a Title VII action; however, its discussion regarding how a local law firm dealing primarily in divorces affects interstate commerce is instructive. Id. at 181-82 ("Notwithstanding the defendants' divorce orientation, they admit that their practice encompasses other types of business, i.e., corporate, probate and real estate. They further admit that various attorneys travel out of state on firm business. Samuel Rinella, for instance, travelled to London, England and to Arizona, and Richard Rinella travelled to Washington, D.C. The firm's long distance phone bill in calendar year 1974 was $1,277.01; its out-of-state travel expenses amounted to approximately $2,000 for the same year. The firm also purchased both office intercommunication equipment from an out-of-state company for $8,400, and law and reference books from out-of-state publishers billed at approximately $2,500. These various factors establish that Rinella & Rinella indeed affects

the employment contract involves interstate commerce. Even though Firm is not a national employer as United was, Firm handles business with many out-of-state clients, similar to United. However, our holding does not deem all employment contracts involving attorneys' services subject to the FAA. It is critical that this is not a situation where Meyer simply worked in South Carolina on cases that involved out-of-state clients and businesses. Here, Meyer was employed to work on specific cases, which were identified in the contract, that Appellants allege involved interstate commerce. Despite the fact there is not substantial documentation regarding out-of-state traveling or work Meyer may have done in the cases in the initial contract, the subsequent amendment to the contract was designed with the express purpose of allowing additional compensation and provisions for the Ocean Club case, a case which involved significant out-of-state work. The 2007 Amendment references a $10,000 advance on her Ocean Club work, with the expectation of further compensation to come in the near future as partial settlements occurred. Meyer travelled extensively to conduct her legal work and billed hours for her out-of-state work and travel. Pre-bill worksheets for the Ocean Club case reflect travels to Atlanta, Georgia; Sarasota Beach, Florida; Charlotte, North Carolina; Minneapolis, Minnesota; and Knoxville and Kingsport, Tennessee. Moreover, Meyer brought this claim to recover $1.7 million for the value of her labor on the Ocean Club case, implicating the substantial amount of work and time she spent on this particular case. Considering the liberal application of the Commerce Clause, and recognizing the FAA is to be construed to full extent of the Commerce Clause, we find Meyer's out-of-state activities rose to the level of "involving interstate commerce," and thus, triggered the enforcement of the FAA. *Compare Flexon v. PHC-Jasper, Inc.*, __ S.C. __, 731 S.E.2d 1, 4 (Ct. App. 2012) (affirming the trial court's finding that the agreement did not involve interstate commerce because it was a contract calling for "local services to be performed by a Hardeeville resident at a medical facility located in Hardeeville," and thus, did not implicate the FAA). For the foregoing reasons, we reverse the trial court and find the FAA does apply to the parties' employment contract.

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interstate commerce and, accordingly, is subject to the proscriptions of Title VII.").

## III. Unconscionability

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. Towles, 338 S.C. at 37, 524 S.E.2d at 843-44. "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (quoting S.C. Code Ann. § 15-48-10(a) (2005)). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005).

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." Simpson, 373 S.C. at 24, 644 S.E.2d at 668 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001)). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 24-25, 644 S.E.2d at 668 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

"In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Simpson, 373 S.C. at 25, 644 S.E.2d at 668; see Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999). Our supreme court has adopted the Fourth Circuit's view, and "[i]t is under this general rubric that [this court determines] whether a contract provision is unconscionable due to both an absence of meaningful choice **and** oppressive, one-sided terms." Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (emphasis added).

### 1. Absence of meaningful choice

Appellants argue the trial court erred in finding there was an absence of meaningful choice because Meyer had been working for Firm for six months before receiving the 2006 employment agreement and she essentially had to agree to it or else "jeopardize her existing job." We agree.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669; see Carlson v. General Motors Corp., 883 F.2d 287, 295-96 (4th Cir. 1989). "In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (quoting Carlson, 883 F.2d at 293, 295); see also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.").

"[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Simpson, 373 S.C. at 26-27, 644 S.E.2d at 669 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The finding of an adhesion contract is not per se unconscionable, however it is the beginning point to the analysis. Id. at 27, 644 S.E.2d at 669.

We hold Meyer had a meaningful choice involving the 2006 agreement. Meyer argues her lack of civil experience put her at a disadvantage as it relates to the relative sophistication of the parties. However, we find her substantial work as an assistant solicitor in addition to her time at law school permitted Meyer to have enough sophistication that any disadvantage would be minimal in this situation. In concluding the 2006 agreement, Firm stated:

> Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

The 2006 agreement, as shown above, allowed Meyer as much time as she needed to understand and accept the conditions. In addition, the 2006 agreement stated a meeting could be set up if there was a need to discuss the terms, allowing for negotiation of the terms. Because of this apparent opportunity for negotiation, this was not an adhesion contract. It did not force Meyer to "take-it-or-leave-it." Rather, it indicated Meyer had some bargaining power, while perhaps not as much as the Firm. We also note Meyer felt comfortable striking out language to which she objected in the 2007 amendment; again, supporting her ability to negotiate these contracts. Further, this was not a lengthy contract at three pages. The arbitration clause is on the second page, and it is not "buried" within the short contract; thus, there does not appear to be any element of surprise.

While Meyer argues that because the employment climate for law firms was difficult, she felt she was forced to agree to the contract, we do not find that is a valid reason for holding there was an absence of meaningful choice. It is unfortunate the employment or economic climate may have been difficult at that particular time, but the external environment did not extinguish Meyer's meaningful choice of whether to sign the contract or not. Further, we recognize Lucey and the Firm did not contribute to the negative economic climate; therefore, we cannot use that as a factor against them in this case. For the foregoing reasons, we hold the trial court erred in finding there was an absence of meaningful choice.

**2. Oppressive and one-sided terms**

Appellants argue the terms of the arbitration clause are not unduly harsh because its sole limitation is the presentment of live witnesses and there is no other limitation of evidence or testimony. We agree.

As stated previously, this prong of the test sets forth that we are to review the terms to see if no reasonable person would make them and no fair and honest person would accept them. Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668.

"Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays." Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003). The benefits received by arbitrating come with certain limitations on discovery. See Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007) (stating that if parties conducted little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," thus, prejudice will likely not exist, and the law would favor arbitration; however, if the parties conducted significant discovery, then the party seeking arbitration took "advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration); In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 286 (4th Cir. 2007) (stating "while discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the 'procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration' that is inherent in every agreement to arbitrate and "[b]ecause limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement").

The arbitration clause in the 2006 agreement provides:

> Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

While the arbitration clause here does limit discovery by allowing the parties to be the only witnesses called in person, this cannot, standing alone, be a

reason to invalidate an arbitration agreement. Appellants are correct in stating that the arbitration restriction applies equally to both parties, and the clause places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings. We find the arbitration clause is not one-sided, nor is it oppressive to Meyer. Because a finding of unconscionability requires an absence of meaningful choice as well as oppressive, one-sided terms, we reverse the trial court.

## IV. Severability

Appellants contend that even if the provision limiting live witnesses is substantively unconscionable, the trial court should have severed that portion of the arbitration clause and compelled arbitration. Because we find the arbitration clause is not unconscionable, we need not review this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

## V. Applicability of the SCUAA

Appellants contend that because the FAA applies to the employment contract at issue, it preempts the SCUAA and there is no need to meet the requirements of the state statutes. In addition to the FAA's preemption of the SCUAA, the SCUAA itself provides that it does not apply to arbitration agreements between employers and employees unless the agreement states that the SCUAA shall apply.

Because all parties agree the arbitration clause did not meet the SCUAA notice requirements,[2] and the trial court ruled it did not meet SCUAA requirements, there is no controversy for this court to rule upon. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (stating "[a]n appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy").

[2] Appellants acknowledge the arbitration clause did not meet SCUAA's notice requirements, but argued that was irrelevant because SCUAA was inapplicable altogether.

## CONCLUSION

Based on the foregoing reasons, the trial court's denial of Appellants' motion to compel is

**REVERSED.**

**HUFF and PIEPER, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Wendell Williams, Appellant.

Appellate Case No. 2009-147808

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Appeal From Spartanburg County
E. C. Burnett, III, Special Circuit Court Judge

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Opinion No. 5039
Heard March 13, 2012 – Filed October 24, 2012

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**REVERSED**

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Appellate Defender Kathrine Hudgins, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William Blitch, Jr., all of Columbia; and Solicitor Barry J. Barnette, of Spartanburg, for Respondent.

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**WILLIAMS, J.:** In this criminal appeal, Wendell Williams (Williams) argues the circuit court erred in three respects when it: (1) refused to instruct the jury on the law of self-defense; (2) refused to instruct the jury on the law of accident; and (3)

refused to admit toxicology evidence regarding the intoxication of the victim. We reverse.

**FACTS**

The following evidence was adduced during Williams' trial for killing his brother, Joe Williams (victim).

Around midnight on September 26, 2008, Williams went to the victim's house. The victim's girlfriend, Victoria Holbert (Holbert), testified that she and the victim saw car lights pulling into the driveway. Holbert said that while she did not go onto the porch, she overhead Williams telling the victim that he owed Williams money for a car. When Holbert peered out the window, she noticed what appeared to be a shotgun in Williams' hand. She immediately called 911. Shortly thereafter, Holbert heard a single gunshot and called 911 again. She testified she saw the victim lying on the porch with a gunshot wound to his right leg. Holbert stated the victim was unarmed during the entire altercation.

Kevin Kelly (Kelly) also testified at trial. According to Kelly, Williams called him the night of the shooting and asked Kelly to pick Williams up and drive him to the victim's house. At trial, Kelly stated when they pulled into the victim's driveway, Williams approached the victim's porch armed with a shotgun. Kelly testified he overheard Williams tell the victim that the victim owed Williams money for his car that had disappeared while Williams was in prison. As the argument escalated, Kelly testified the victim began retreating towards the front door. According to Kelly, Williams then stated, "I'm going to ask you one more time, where's my money?" Kelly claimed the victim replied that he was not giving Williams anything, and the victim then tried to turn around and walk into his house. Kelly testified that as the victim walked away, Williams shot the victim in the back of his right leg. Kelly said he never saw the victim with a gun. Once Kelly heard gunfire, he testified he began backing out of the victim's driveway, at which time Williams jumped into the passenger's side of the car. Kelly testified he never observed Williams call 911 nor did Williams ask Kelly to call 911.

Williams testified in his own defense at trial. Williams stated he drove to the victim's house at approximately 1:00 a.m. because his niece had been on the phone all night and he needed to talk to the victim about money the victim owed to him. Williams, however, also testified that he came to the victim's house because someone had seen Williams' car parked on a nearby highway. When Williams

called the police about recovering it, Williams claimed the police told him the victim would have to file a report because the victim last possessed the keys to the vehicle. Williams claimed the victim was sitting on the victim's front porch when he and Kelly pulled into the driveway. When Williams approached the porch, he testified he could see a small revolver tucked into the waistband of the victim's boxer shorts. Williams stated he tried to tell the victim the information about his missing vehicle as he approached the porch, but the victim started cussing at Williams. Because the victim had a "demented" look on his face, Williams stated he became scared.

According to Williams, the victim then reached towards a mailbox on the wall with his left hand and towards the revolver in his boxer shorts with his right hand. At this point, Williams jumped over the banister of the porch and ran back towards the car. Williams testified that as he was retreating, he was "expecting to get shot in the back" and "was in fear for [his] life." Williams stated that Kelly, who was standing behind the passenger's side door, then threw Williams a loaded shotgun.[1] Williams claimed the victim pointed his revolver at Williams, and Williams pulled the trigger on his shotgun. Williams stated he did not remember pulling the trigger and claimed he did not intentionally shoot the victim. Williams said he heard the victim say, "Oh," but Williams thought the bullets bounced off the ground since he was pointing the shotgun towards the ground when he shot it. However, during cross-examination, Williams stated he knew the victim had shot a couple of people, and if he had not defended himself, he knew the victim would have shot him. Williams and Kelly immediately fled the scene, but Williams later turned himself into police.

After Williams' testimony, he attempted to introduce toxicology evidence about which substances were in the victim's bloodstream at the time of his death. Williams claimed this testimony was relevant because the presence of intoxicating substances could affect the victim's demeanor and would be evidence which the jury could consider in determining whether Williams felt threatened at the time of the altercation. The circuit court excluded the testimony but allowed Williams to

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[1] Williams admitted on cross-examination he initially told the police he found a loaded shotgun lying on the sidewalk, but Williams later explained he was trying to protect Kelly who was on probation. Williams also admitted on cross-examination to lying to the police about leaving the gun at the scene and telling the police another person, not Kelly, drove the getaway vehicle.

proffer the toxicologist's testimony, which would have revealed that the victim's blood tested positive for alcohol, cocaine, hydrocodone, THC, and diazepam.

Williams then requested the circuit court charge the jury on voluntary manslaughter, self-defense, and accident. The circuit court granted Williams' motion on voluntary manslaughter but denied his requests for self-defense and accident. The circuit court then charged the jury on murder and voluntary manslaughter. The jury found Williams guilty of the lesser-included charge of voluntary manslaughter, and the circuit court sentenced Williams to twenty-one years imprisonment. This appeal followed.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." *Id.* "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the [circuit court]'s ruling is supported by any evidence." *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

## LAW/ANALYSIS

### I. Self-Defense

Williams claims the circuit court erred when it refused to instruct the jury on self-defense. We agree.

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (internal citations omitted). "The law to be charged must be determined from the evidence presented at trial." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (internal citations omitted); *see also Mattison*, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial"). When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. *Cole*, 338 S.C. at 101, 525 S.E.2d at 512-13.

"If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." *State v. Day*, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000). A person is justified in using deadly force in self-defense when:

> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

*State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). When a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt. *State v.Wiggins*, 330 S.C. 538, 544-45, 500 S.E.2d 489, 492-93 (1998). "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." *State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

We reverse the circuit court's decision not to instruct the jury on self-defense because some evidence exists to support a self-defense charge. *See State v. Jackson*, 384 S.C. 29, 35, 681 S.E.2d 17, 21 (Ct. App. 2009) ("When any evidence in the record entitles the accused to a jury charge on self-defense, a [circuit court's] refusal to give the charge is reversible error."). At trial, Williams testified the victim had a "demented" look on his face when Williams approached the front porch. Williams claimed the victim began to curse at him when Williams asked

the victim about Williams' missing car. Williams stated he became scared because the victim started to reach for a revolver that was tucked into the victim's boxer shorts. Once the victim began to reach for his gun, Williams jumped over the banister of the porch. Williams claimed he "was in fear for his life" and thought he was about to "get shot in the back." As Williams was running from the house, he stated Kelly threw a loaded shotgun to him, and when he turned back towards "[his] brother, he was turning around on [Williams] . . . [with] the pistol in his hand at that time." Because Williams knew his brother had shot people before, he claimed if he had not shot his brother, he "[knew] he would have shot me."

Viewing the evidence in the light most favorable to Williams, we find a jury could have found Williams was not at fault in bringing about the difficulty based on Williams' testimony that the victim began cursing at him, had a "demented" look on his face, and pulled a pistol on Williams after Williams confronted him unarmed. *See Dickey*, 394 S.C. at 500, 716 S.E.2d at 101 (finding defendant was not at fault in bringing about difficulty despite pulling loaded weapon on victim when victim began advancing towards defendant in an aggressive manner). Williams stated the victim had shot other people before, and he knew his brother would have shot him if he did not shoot first. Williams' testimony that he thought his brother was going to shoot him in his back as he ran from the front porch indicates Williams believed he was in imminent danger, and if true, we find this belief to be reasonable. *See Day*, 341 S.C. at 417, 535 S.E.2d at 435 (finding defendant was entitled to self-defense charge when he shot and killed victim because defendant believed he was in imminent danger when he thought the victim was going to pull a gun on him). Last, there is evidence, although conflicting, that Williams had no other probable means of avoiding the danger. Specifically, when Williams turned back towards the victim, Williams stated the victim was already pointing a gun at him. Although both eyewitnesses' testimonies support a very different theory of fault, we cannot ignore the fact that at least some evidence was presented to make self-defense a jury question. Accordingly, we find the circuit court erred in refusing to charge self-defense to the jury.

## II. Accident

Next, Williams claims the circuit court erred in failing to charge the jury on accident. We agree.

A homicide will be excusable on the ground of accident when (1) the killing was unintentional; (2) the defendant was acting lawfully; and (3) due care was

exercised in the handling of the weapon. *State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999). If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

Williams' testimony at trial vacillated as to whether he acted intentionally or unintentionally when he shot the victim. As discussed above, Williams testified he shot the victim because he feared the victim was going to shoot him first. As such, Williams had the right to act in self-defense. However, Williams also stated he shot the weapon but did not remember doing it and did not intentionally shoot it. He further testified that the gun was pointing down and he did not intend to shoot the victim. Because the State failed to disprove that Williams was using due care when he handled the gun, we believe this testimony is sufficient to at least present a question for the jury as to whether Williams shot the victim accidentally. *See State v. Harris*, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009) (holding the burden rests on the State to prove beyond a reasonable doubt the act was not an accident).

We note that even though self-defense and accident charges are often mutually exclusive, there is evidence in the record to support both charges in this case. *See Burriss*, 334 S.C. at 262, 513 S.E.2d at 108 (stating that if the circumstances prove a defendant was entitled to arm himself in self-defense when the shooting occurred, the defendant would be entitled to a charge of accident so long as evidence satisfies the other elements of the doctrine); *cf. State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469-70 (2008) ("A past holding of this Court seems to indicate that, where a defendant is claiming self-defense . . . involuntary manslaughter may not be charged. . . . However, a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, *as long as there is any evidence to support both charges*. . . . When there is a factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally, then the defendant is entitled to both charges as there is 'any evidence' to support each charge." (emphasis added)); *see also* 15 A.L.R. 4th 983 ("Underlying the court's decision in many, if not most, cases involving the defendant's right, in a prosecution for homicide or attempted homicide by shooting to an instruction on both self-defense and accident is its view as to whether, in a particular evidentiary context, the defenses are inconsistent and may not be asserted simultaneously, even in the alternative; and this, in turn, appears to depend

largely on the nature of the defendant's testimony, and that of other witnesses, relating to the defenses.").

Accordingly, we find the circuit court erred in refusing Williams' request to charge the jury on the law of accident.

## CONCLUSION

Based on the foregoing, we **REVERSE** Williams' conviction and **REMAND** for a new trial.[2]

**THOMAS, J., concurs.**

**LOCKEMY, J., concurs in part and dissents in part.**

I respectfully concur in part and dissent in part. I concur with the majority's holding that the circuit court erred in failing to charge self-defense to the jury. However, I dissent in the majority's decision to reverse the circuit court as to Williams' request to charge the jury on the law of accident.

Williams' testimony is the only evidence in the record supporting a charge that could excuse him of killing the victim. Williams testified he noticed the victim had a gun in his boxer shorts as he approached the porch. When Williams saw the victim reach for the gun, he jumped over the porch bannister and ran back towards the car where, according to one version of Williams' testimony, Kelly threw him a loaded shotgun. Williams, who feared he would be shot in the back, turned around and faced the victim. Williams testified he did not remember pulling the trigger, but admitted firing the shotgun as the victim pointed the revolver at him. Williams claimed he was pointing the shotgun toward the ground when he fired and did not intentionally shoot the victim. If the jury believes Williams' testimony that he was defending himself by arming himself with the shotgun, then, after a proper charge of self-defense, the jury can acquit Williams. The jury can choose whether or not to believe Williams intended to shoot the victim. Either way, self-defense should

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[2] Our decision to reverse on the foregoing issues disposes of Williams' remaining argument on appeal. Therefore, we decline to address Williams' remaining argument. *See Futch v. McAllister Towing, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

have been charged because Williams presented the shotgun in response to the aggression of the victim.

Although I agree with my colleagues that self-defense and accident charges are not *per se* mutually exclusive, I believe they exclude each other in this case. I state this with the knowledge that the jury can accept the testimony of a witness as a whole or in part, and may believe the testimony of one witness and not another. As the majority states, homicide will be excusable on the ground of accident when (1) the killing was unintentional; (2) the defendant was acting lawfully; and (3) due care was exercised in the handling of a weapon. *See Chatman*, 336 S.C at 153, 519 S.E.2d at 102. Here, none of the evidence presented supports a finding that Williams acted lawfully. Element one is satisfied by Williams' testimony that he did not intentionally shoot the victim. Additionally, although a stretch, catching a loaded shotgun in mid-air and reeling around like John Wayne in *Rio Bravo*[3] to face a charging "demented" person could be considered handling a weapon with due care. However, even though the first and third elements may be satisfied, no evidence was presented to satisfy the second element. If Williams shot the victim because he reasonably believed the victim was about to kill him, then he was acting in self-defense. If that was not the case, as other witnesses stated, or the belief was not reasonable, then Williams' presentation of the shotgun was not lawful. Whether Williams shot at the ground, into the air, or not at all, he committed a crime by presenting a firearm. Williams' presentation of the shotgun was only lawful if it was presented in self-defense.

Accordingly, I concur with the majority's holding that the circuit court erred in failing to charge the jury on self-defense and that this case should be remanded for a new trial. However, I do not believe the circuit court erred in not charging the law of accident.

[3] *Rio Bravo* (Warner Bros. Pictures 1959).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Williams Carpet Contractors, Inc., Appellant,

v.

Mark Skelly, Respondent.

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Appeal From Horry County
Steven H. John, Circuit Court Judge

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Opinion No. 5040
Heard June 7, 2012 - Filed October 24, 2012

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**REVERSED**

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Henrietta U. Golding and James K. Gilliam, of Myrtle Beach, for Appellant.

G. Michael Smith, of Conway, for Respondent.

**KONDUROS, J.:** Williams Carpet Contractors, Inc. appeals the circuit court's granting of Mark Skelly's motion for judgment notwithstanding the

verdict (JNOV). Williams Carpet argues the court improperly weighed the evidence in making its determination. We reverse.

## FACTS/PROCEDURAL HISTORY

Williams Carpet provides and installs floor coverings, including carpet, tile, and hardwood floors, in the Myrtle Beach area. Skelly is a builder and developer in Horry County. Around 1982, Williams Carpet and Skelly began doing business together. Over the years, Williams Carpet provided materials to projects Skelly developed and built through various corporations. Williams Carpet dealt directly with Skelly for those projects, and Skelly paid each time. The parties never entered into a written contract but had oral agreements sealed with a handshake.

In 2003, M.S. Industries acquired a parcel of property known as Green Haven on which to develop and build condominiums. Skelly was the president of M.S. Industries, and he and John L. Martini, Jr. were shareholders. Skelly selected carpet and tile from Williams Carpet by himself on his initial visit, and he and his wife made the final selections. Skelly negotiated the price and verbally agreed to pay with a handshake for the items. Skelly did not inform Williams Carpet that anyone was involved in building or developing the project other than himself.

Before construction of Green Haven began in 2005, M.S. Industries hired Baldwin Construction Company as the general contractor for the project; it built the first three buildings. M.S. Industries then replaced Baldwin with Rick Ruonola, a former employee of Baldwin, and his new LLC, Ruonala and Company, for the remaining six buildings, all without Williams Carpet's knowledge. On April 18, 2005, Skelly, through M.S. Industries, and Ruonala and Company entered into a contract to construct six buildings at Green Haven for $650,000 per building. Williams Carpet began installing carpet and tile at Green Haven in 2005, and Skelly requested it send all invoices to Ruonala and Company, which alarmed Williams Carpet. Skelly told Williams Carpet "don't worry about it, you bill it and I will pay

for it" and "I'll make sure you get paid for it," and Williams Carpet agreed to send all invoices to Ruonala and Company.

Because Williams Carpet had not been paid after it installed carpet and tile in five of the six buildings, it informed Skelly it would not do any of the remaining work until it was paid and threatened to file a mechanic's lien if it did not receive payment. Skelly asked it to refrain from filing a mechanic's lien and promised it would receive full payment once it completed the job. Skelly requested Williams Carpet send all invoices directly to him, and it completed the final building. Skelly, through M.S. Industries, paid Williams Carpet $45,272.33 and Williams Carpet received a total of $78,781.52 with a balance of $188,851.40 remaining. Skelly and Martini each received one million three thousand dollars for the project.

Williams Carpet brought suit against Ruonala and Company, Skelly, and M.S. Industries for breach of contract, quantum meruit, negligent misrepresentation, and violations of the Unfair Trade Practices Act. At trial, just after the selection of the jury, Williams Carpet dismissed its breach of contract claim, without objection. The owners of Williams Carpet testified that it would have never agreed to do business with Ruonala and Company because the owner had no money and had previously worked at Baldwin Construction, which failed to pay Williams Carpet for prior jobs. Beverly Causey, one of the owners of Williams Carpet, testified Skelly asked it not to file a mechanic's lien, requesting "please get this last building done and I will pay you all your money."

Prior to the case being submitted to the jury, Williams Carpet dismissed M.S. Industries and Ruonala and Company from the suit. At the conclusion of Williams Carpet's case, Skelly moved for a directed verdict on all of the causes of action. The trial court denied the motion as to the quantum meruit and negligent misrepresentation actions and granted the motion as to the Unfair Trade Practices action. The jury found in favor of Skelly on the negligent misrepresentation action and Williams Carpet for the quantum meruit cause of action and awarded it $168,000 in damages. Skelly moved for a JNOV, arguing awarding quantum meruit to Williams Carpet would

result in Skelly paying for its products and services twice because M.S. Industries had paid Ruonala and Company the full contract price of $650,000 per building. Williams Carpet argued it had presented evidence M.S. Industries did not pay Ruonala and Company in full.

The trial court gave the parties seven days to submit further research on the matter. The trial court ultimately granted Skelly's JNOV motion, finding, "the evidence proved that [Skelly's] corporation, M.S. Industries, Inc., paid for the value of the materials provided by [Williams Carpet] for the project when it paid in excess of the full construction contract price to Ruonala and Company, LLC." Williams Carpet filed a motion for reconsideration pursuant to Rules 59 and 60, SCRCP, which the trial court denied. This appeal followed.

## STANDARD OF REVIEW

A motion for JNOV, under Rule 50(b), SCRCP, is a renewal of the directed verdict motion. Glover v. N.C. Mut. Life Ins. Co., 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988). When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). This court must follow the same standard. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965).

## LAW/ANALYSIS

### I. Quantum Meruit

Williams Carpet argues the trial court erred in granting Skelly's JNOV motion because it presented evidence demonstrating M.S. Industries paid less than the full contract price to Ruonala and Company. We agree.

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (citations and internal quotation marks omitted) (alteration by court). "The terms 'restitution' and 'unjust enrichment' are modern designations for the older doctrine of quasi-contracts." Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988). To prevail on a quantum meruit claim, a plaintiff must establish (1) he conferred a benefit upon the defendant; (2) the defendant realized that benefit; and (3) retention of the benefit by the defendant under the circumstances make it inequitable for the defendant to retain it without paying its value. Swanson v. Stratos, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct. App. 2002); see also Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010) (providing the same requirements).

"Courts addressing a claim of unjust enrichment by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor." Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 262-63, 440 S.E.2d 129, 131 (1994) (citing Cohen v. Delmar Drive-in Theatre, Inc., 84 A.2d 597 (Del. Super. Ct. 1951); Guldberg v. Greenfield, 146 N.W.2d 298 (Iowa 1966); Crockett v. Brady, 455 S.W.2d 807 (Tex. Civ. App. 1970)) (comparing Costanzo v. Stewart, 453 P.2d 526 (Ariz. Ct. App. 1969) (allowing recovery for unjust enrichment when owner assured subcontractor money was escrowed to pay for job and owner did not pay general contractor)).

The trial court erred in granting Skelly's JNOV motion because Williams Carpet presented evidence Ruonala and Company was not paid in full for the project. That evidence included a spreadsheet showing M.S. Industries paid less than full contract price for four of the buildings constructed and the exact contract price for the other two buildings. Additionally, Skelly testified M.S. Industries paid less than the full contract price per building. Williams Carpet also submitted evidence that M.S. Industries included money paid for services like landscaping as part of the

contract price even though those services were not part of the agreement. The trial court stated that Ruonala and Company came in under contract for two buildings.

Skelly testified that he believed Ruonala and Company was paid less than the contract price because he "imagine[d] that went to subcontractors directly, or jointly." Skelly argues that M.S. Industries paid over the contract price to Ruonala and Company and the subcontractors. The evidence conflicts as to whether Ruonala and Company was fully paid under the contract. Therefore, because some evidence supports that Ruonala and Company was not fully paid, the trial court erred in granting Skelly's motion for JNOV.

## II. Additional Sustaining Grounds

Skelly argues as additional sustaining grounds that Williams Carpet should be barred from recovering under the theory of quantum meruit because it did not pursue a mechanic's lien and because it had a contract with Skelly. We disagree.

> [A] respondent . . . may raise . . . any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). However, "an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." Id. at 421, 526 S.E.2d at 724.

**A. Mechanic's Lien**

"Some courts addressing quasi-contractual claims have held a subcontractor's failure to pursue the statutory remedy of a mechanic's lien precludes a finding the enrichment is unjust." Columbia Wholesale Co., 312 S.C. at 263, 440 S.E.2d at 131 (citing Lynn v. Miller Lumber Co., 246 S.E.2d 137 (Ga. Ct. App. 1978); Pay-N-Taket, Inc. v. Crooks, 145 N.W.2d 621 (Iowa 1966); Crockett, 455 S.W.2d at 810). "Other courts have allowed recovery in quantum meruit even where a mechanic's lien was not pursued." Id. (citing United States v. Ins. Co. of N. Am., 695 F.2d 455 (10th Cir. 1982) (applying New Mexico law); G & G Langenbrunner, Inc. v. Davis Constr. Co., 488 N.E.2d 506 (Ohio Munic. Ct. 1984)). The South Carolina Supreme Court has determined, "Failure to pursue a mechanic's lien, however, will not bar an action for quantum meruit recovery as a matter of law if a plaintiff can otherwise prove circumstances establishing unjust enrichment." Id. at 263, 440 S.E.2d at 131-32 (citing Gee v. Eberle, 420 A.2d 1050 (Pa. Super. Ct. 1980); Costanzo, 453 P.2d at 529 (finding the failure to file mechanic's lien did not bar recovery for unjust enrichment when owner paid no one)).

The South Carolina Supreme Court has found failure to pursue a mechanic's lien will not bar an action for quantum meruit recovery as a matter of law if a plaintiff can otherwise prove circumstances establishing unjust enrichment. Here, when Williams Carpet was threatening to obtain a mechanic's lien, Skelly convinced it not to do so. Accordingly, its failure to obtain a mechanic's lien in this situation does not bar it from recovering under the quantum meruit action.

**B. Express Contract v. Quantum Meruit**

"A breach of contract claim and quantum meruit claim can be alternative rather than inconsistent remedies." JASDIP Props. SC, LLC v. Estate of Richardson, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011) (citing Franke Assocs. by Simmons v. Russell, 295 S.C. 327, 332, 368 S.E.2d 462, 465 (1988)). In Earthscapes Unlimited, Inc., 390 S.C. at 617,

703 S.E.2d at 225, the supreme court affirmed the circuit court's decision to award damages under the theory of quantum meruit even though the circuit court had found a contract between the parties. The supreme court found, "While the circuit court did find there was a contract between the two parties in this action, it never awarded damages because of a breach of that contract. Rather, the circuit court chose the theory of quantum meruit as an alternate remedy." Id. at 617 n.4, 703 S.E.2d at 225 n.4.

However, "[i]f the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit." Swanson, 350 S.C. at 122, 564 S.E.2d at 120 (citing 66 Am. Jur. 2d Restitution and Implied Contracts § 81 (2001) ("[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished.")) (comparing Strickland v. Coastal Design Assocs., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct. App. 1987) ("The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit unless the original contract remains in force."); Johnston v. Brown, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct. App. 1986), rev'd on other grounds, 292 S.C. 478, 357 S.E.2d 450 (1987) ("While a recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff's recovery is limited to the amount the parties agreed should be paid for the services." (footnote omitted))).

Case law bars recovering under both theories. Here, Williams Carpet abandoned its breach of contract claim without any objection from Skelly and instead proceeded only under the quantum meruit theory. The jury never considered whether Skelly and Williams Carpet formed a contract. Because a finding was never made on whether there was an express contract, Williams Carpet could pursue recovery under quantum meruit. Further, Skelly never raised this issue at trial. Although an additional sustaining ground does not have to be raised at trial, it does make it less likely that this court would rely

on it. Accordingly, the alleged contract does not bar Williams Carpet's recovery under the theory of quantum meruit.

## CONCLUSION

As some evidence supports that Ruonala and Company was not fully paid, the trial court erred in granting Skelly's motion for JNOV. Further, we do not find Skelly's arguments as to his additional sustaining grounds merit affirming. Therefore, the trial court's order granting Skelly's JNOV motion is

**REVERSED.**

**WILLIAMS and PIEPER, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Carolina First Bank, n/k/a TD Bank, NA, Respondent,

v.

BADD, LLC, William McKown, and Charles A. Christenson, Defendants,

Of whom BADD, LLC and William McKown are Appellants.

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BADD, LLC and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2011-187747

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Appeal From Horry County
Steven H. John, Circuit Court Judge

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Published Opinion No. 5041
Heard September 13, 2012 – Filed October 24, 2012

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**REVERSED AND REMANDED**

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Richard R. Gleissner, of Gleissner Law Firm, LLC, of Columbia, for Appellants.

William Wayne DesChamps, III, of DesChamps Law Firm, of Myrtle Beach, for Respondent.

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**WILLIAMS, J.:** BADD, LLC (BADD) and William McKown appeal the circuit court's order referring the instant case to the master-in-equity (master), arguing the circuit court erred in (1) referring Carolina First Bank's (Carolina First) claim against McKown as guarantor to the master based on its finding that the main purpose of the action was equitable in nature; and (2) referring BADD and McKown's counterclaims to the master based on its finding that those claims were permissive counterclaims asserted in an equitable action and, thus, that BADD and McKown waived their right to a jury trial on those claims. We reverse.

## I. FACTS

On March 14, 2008, Charles Christenson and McKown, as members of and on behalf of BADD, executed a promissory note and mortgage to obtain financing for the acquisition of income-producing real estate. McKown also executed a guaranty at the same time, personally guaranteeing performance and payment of the promissory note. On April 1, 2008, Christenson and McKown, again on behalf of BADD, executed another promissory note and mortgage to obtain additional financing for income-producing real estate (collectively Notes and Mortgages). McKown executed a second guaranty on the same day (collectively Guaranties). In 2009, Christenson began experiencing financial problems and sought McKown's consent to allow William Rempher to buy his interest in BADD and assume responsibility for the operations of BADD. McKown agreed to the arrangement, and Rempher became a member of BADD.

On September 9, 2010, Carolina First filed an action against BADD seeking judgment for the full amount owed on the Notes and Mortgages and foreclosure and sale of the properties secured by the Mortgages. In addition, Carolina First sought a judgment against McKown, as guarantor of the Notes and Mortgages, for payment of the residue of the mortgage indebtedness, if any, remaining unsatisfied after the judicial sale of the properties. In response, McKown demanded a jury trial on Carolina First's claim against him based on the Guaranties and, along with BADD, filed several counterclaims against Carolina First, including civil conspiracy, breach of contract, and a claim seeking a determination that the

Guarantees were unconscionable and, thus, unenforceable. In addition, McKown impleaded Rempher as a third-party defendant by alleging causes of action against him for civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty. Carolina First filed a motion to refer the entire case to a master-in-equity, and the circuit court granted the motion, finding that the action brought by Carolina First was an equitable action to foreclose two mortgages and that BADD and McKown waived their right to a jury trial on their counterclaims because the claims were permissive. This appeal followed.

## II. STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." *Id.* at 15, 690 S.E.2d at 772-73.

## III. LAW/ANALYSIS

McKown argues that Carolina First's claim against him for any indebtedness resulting after the sale of the subject properties is a breach of contract claim arising from the Guaranties and is legal in nature. Accordingly, McKown asserts the circuit court erred in referring this claim to the master. In addition, McKown and BADD argue the circuit court erred in referring their legal counterclaims for civil conspiracy and breach of contract to the master. We agree.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (internal quotation marks omitted). However, "[i]t is well settled that a guarantor's liability is an independent contractual obligation." *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 295, 478 S.E.2d 63, 65 (Ct. App. 1996). Accordingly, a claim to recover on a guaranty agreement is one at law, even if the plaintiff seeks a deficiency judgment resulting from the foreclosure of real property. *See S. Bank & Trust Co. v. Harley*, 295 S.C. 423, 424, 368 S.E.2d 908, 909 (1988) (noting that a plaintiff's case seeking a deficiency judgment on a guaranty agreement after the foreclosure of real

properties "was a law case"); *see also Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 53, 354 S.E.2d 895, 896 (1987) (classifying a party's counterclaim for damages under a guaranty agreement as a "legal counterclaim"). "When a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury while equitable issues are for the judge." *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011).

In its order referring this case to the master, the circuit court found that the main purpose of the instant action was to foreclose on the properties securing the Notes and that it was therefore appropriate to refer the claims on the Guaranties to the master as well as the foreclosure claim. This reasoning traces its roots to the case of *Alford v. Martin*, in which our supreme court explained that "[t]he character of an action is determined by the complaint in its main purpose and broad outlines and not merely by allegations that are merely incidental." 176 S.C. 207, 212, 180 S.E.13, 15 (1935). However, our supreme court more recently expressed its concern in *Floyd v. Floyd* "that, as courts have sought to ascertain the 'main purpose' of lawsuits, the pendulum appears to have swung with steadied progress toward decisions tending to place within the sole purview of the equity judge issues properly triable only by jury." 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991). Consequently, "[w]ith a view toward harmonizing the case law on this issue," the supreme court clarified "that in instances where legal and equitable issues or rights are asserted in the same complaint, the legal issues are for determination by a jury and the equitable issues are to be decided by the court." *Id.*

Based on the supreme court's holding in *Floyd*, we hold the circuit court erred in referring Carolina First's claim against McKown arising from the Guaranties to the master. This claim was separate and distinct from the foreclosure action and was legal in nature. Accordingly, McKown was entitled to a jury trial on this claim, and we reverse the circuit court's order referring this claim to the master. Further, the filing of a legal counterclaim in response to an equitable complaint amounts to a waiver of the right to a trial by jury only when the counterclaim is permissive. *See Johnson*, 292 S.C. at 55-56, 354 S.E.2d at 897. Because we find Carolina First's complaint against BADD and McKown contained both a legal and an equitable claim, we find BADD and McKown did not waive their right to a jury trial by filing legal counterclaims against Carolina First. Accordingly, we also reverse the circuit court's order to the extent it referred BADD and McKown's counterclaims for breach of contract and civil conspiracy to the master and remand for proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

**FEW, C.J., and PIEPER, J., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Ricky Cheeks, Appellant.

Appellate Case No. 2010-174907

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

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Opinion No. 5042
Heard September 11, 2012 – Filed October 24, 2012

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**AFFIRMED**

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Wanda H. Carter, Deputy Chief Appellate Defender, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, all of Columbia, and Solicitor Barry Barnette, of Spartanburg, for Respondent.

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**HUFF, J.:** Appellant, Ricky Cheeks, was tried for and convicted of possession with intent to distribute crack cocaine within one-half mile of a school, trafficking in crack cocaine of more than 400 grams, and trafficking in crack cocaine of more than 100 grams. The trial court sentenced Cheeks to concurrent terms of twenty-

five years each on the two trafficking charges and ten years on the possession with intent to distribute charge. Cheeks appeals, asserting the trial court erred in (1) failing to suppress the drugs seized in a residence because the search warrant was facially invalid inasmuch as it did not include a description of the place to be searched and (2) instructing the jury that "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use." We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

On June 4, 2009, SLED agent Hanning was conducting surveillance on individuals Ricky Cheeks (Ricky), Eric Elder (Elder), and Derrick Cheeks (Derrick) at a Super 8 Motel. He observed a black, Ford Crown Victoria automobile with Elder and Ricky at the vehicle. Derrick came from the hotel to meet Ricky and Elder, at which time all three of the men left in the vehicle and drove to the home of Tracy Markley (Markley). Elder had gone to the motel in Derrick's automobile to pick up Derrick, because Derrick did not have a driver's license. Once the men arrived at Markley's, Derrick began cooking cocaine that he had brought with him to the home. Derrick instructed Ricky to go purchase a box of baking soda from Wal-Mart, and Elder drove Ricky because Ricky was unable to drive. Officers conducting surveillance on the vehicle observed Elder drive to Wal-Mart, with Ricky riding as a passenger. At Wal-Mart, Elder went inside to purchase the baking soda. The two men then returned to Markley's house, which had been kept under surveillance. When Elder and Ricky arrived back at the house, Derrick was in the process of cooking crack.

Elder and Ricky subsequently left Markley's residence again, after Derrick told Ricky that somebody was calling and "he needed to get rid of something." Officers observed Ricky and Elder get back in the Crown Victoria and leave the residence again, and the officers then followed the vehicle, driven by Elder with Ricky riding in the front passenger seat. When the vehicle failed to come to a complete stop at a stop sign, the officers initiated a traffic stop. According to Elder, Ricky had crack cocaine in his possession when they left Markley's residence. After Elder stepped away from the driver's side of the car, and Ricky stepped away from the passenger side, a drug detection K-9 conducted a free air sniff of the vehicle and alerted at the passenger side. As Ricky was escorted to the rear of the car, in between the passenger door and the trunk area, he kept reaching for the right side of his cargo-pocket shorts. After the K-9 alerted and a search of the vehicle began, one of the officers located a bag of off-white, rock-like substance on the ground in the "exact area" between the trunk and passenger door

of the car where Ricky had been previously escorted. At no point was Elder on the passenger side of the car, and other than the officers, no one besides Ricky was in the area where the substance was found on the ground. Subsequent analysis of the substance revealed it to be 111.31 grams of crack cocaine.

Officers then executed a search of Markley's residence after obtaining a search warrant. Upon entering Markley's home they encountered Derrick, who ran from the kitchen area into a bedroom, and Markley, who was sitting in a chair in the family room. They found a large amount of what appeared to be crack cocaine on the counter in the kitchen. They also found boiling water on the stove, indicating crack was possibly being cooked at that time, as well as scales, razor blades and plates used in the process of cooking crack cocaine. Officers additionally discovered in the kitchen a bottle of Inositol, commonly used as a cutting agent in powder cocaine. Analysis of the substances recovered from Markley's home revealed crack cocaine with a total weight of 662.42 grams.

Ricky, who was tried along with Derrick, was convicted of trafficking in crack cocaine of more than 100 grams based on the crack found during the traffic stop, and trafficking in crack cocaine of more than 400 grams for the crack cocaine found in Markley's home. He was also convicted of possession with intent to distribute crack cocaine within one-half mile of a school, based on the location of an elementary school less than one-half mile from Markley's residence.

**ISSUES**

1. Whether the drugs seized in the home should be suppressed because the search warrant, which did not give any description of the place to be searched, was facially invalid.

2. Whether it was error for the trial court to instruct the jury that actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use.

**STANDARD OF REVIEW**

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When reviewing the circuit court's ruling on a motion to suppress based on the Fourth Amendment, "an appellate court must affirm if there is any evidence to support the ruling," and will reverse only when there is clear error. *State v. Wright*, 391 S.C. 436, 442, 706

S.E.2d 324, 326 (2011). The appellate court is not barred, however, from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. *Narciso v. State*, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012).

## LAW/ANALYSIS

### I. Search Warrant[1]

The record shows trial counsel[2] made a pretrial motion to suppress, attacking the sufficiency of the search warrant on the basis that it was deficient under state and federal law because it completely omitted a description of the place to be searched. The solicitor countered that the affidavit included a description of the premises, and the warrant and affidavit should be read together.[3] Trial counsel argued the warrant in this case was deficient pursuant to *Groh v. Ramirez*, 540 U.S. 551 (2004), and the affidavit could not be used to replace the complete omission because in order to do so, the affidavit would have to be clearly referenced and incorporated into the search warrant with words of incorporation. The trial court noted, while the warrant itself did not include a description of the place or property to be searched in the blank that was provided for that purpose, the warrant did, in the first paragraph, "refer[] back to the attached affidavit and state[d] that there's reasonable grounds to believe that certain property, subject to seizure [was] located

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[1] We recognize the possibility that Ricky may not have standing to challenge the search warrant in this case. However, inasmuch as the record before us and the briefs show no indication the parties or the trial court ever addressed this issue as to Ricky, because we find the trial court's ruling on the sufficiency of the search warrant is correct, we decline to address Ricky's standing to challenge the warrant.

[2] The argument made for suppression was presented by counsel for Derrick, but was joined in by counsel for Ricky.

[3] The warrant states, "It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13 140, [sic] 1976 Code of Laws of South Carolina, as amended, is located on the following premises," but fails to include any description below the notation for " DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED." However, the affidavit provides details of the residence to be searched, including the street number and name, directions to the residence, and a description of the residence.

on the following premises." The trial court noted the South Carolina Supreme Court case of *State v. Williams*, 297 S.C. 404, 377 S.E.2d 308 (1989) allows the warrant and affidavit to be read together to supply information upon which to base the warrant. The court further reviewed *Groh* and concluded there was no indication in the *Groh* case that the warrant referred back to the affidavit, while the warrant did refer back to the affidavit in this case. The court additionally observed, "it goes on to say now, therefore, you are hereby authorized to search the premises for the property described below and to seize the property if found," such that it again, "referr[ed] to the entire document." Finally, the court stated, "according to this, the affidavit was attached to the search warrant when it was served." The solicitor then confirmed it was, in fact, attached. The court therefore denied the motion to suppress.

On appeal, Ricky cites *Groh* for the proposition that the Fourth Amendment requires particularity in a warrant, not a supporting document to the warrant, such that an adequate description in the supporting document will not save a warrant that is facially invalid. He also cites *United States v. Hurwitz*, 459 F.3d 463, 470-71 (4th Cir. 2006) for the proposition that, even though a supporting affidavit or document may be read with the document, the warrant itself must use "appropriate words of incorporation." He contends the search warrant here is devoid of any specific description of the place to be searched, and though the trial court noted the warrant referred back to the affidavit, the description of the property on the warrant did not "specifically refer back to the description on the affidavit." He therefore contends, pursuant to *Groh*, the search warrant in this matter is facially invalid, and he should be granted a new trial for the trafficking in excess of 400 grams of crack cocaine charge and the possession with intent to distribute crack cocaine within one-half mile of a school charge, related to the search of Markley's home.

Both the United States Constitution and the South Carolina Constitution provide a safeguard against unlawful searches and seizures, guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and avowing no warrants shall issue except upon probable cause, supported by oath or affirmation, "and particularly describing the place to be searched," as well as the persons or things to be seized. U.S. Const. amend. IV; S.C. Const. art. I, § 10.[4] Evidence that is obtained in violation of the

[4] Our warrant statute also requires "a warrant identifying the property and naming or describing the person or place to be searched." S.C. Code Ann. § 17-13-140 (2003).

Fourth Amendment is inadmissible in both state and federal court. *State v. Gentile*, 373 S.C. 506, 512, 646 S.E.2d 171, 174 (Ct. App. 2007).

> The specific requirement that a search warrant particularly describe the person, place, or thing to be searched is aimed at preventing general warrants—those authorizing a general, exploratory rummaging in a person's belongings. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

*State v. Thompson*, 363 S.C. 192, 200, 609 S.E.2d 556, 560-61 (Ct. App. 2005) (citations and quotations omitted).

In *Williams*, our supreme court specifically noted it has "held that a warrant may be read in connection with the supporting affidavit to satisfy constitutional and statutory requirements of particularity in the description of the place to be searched." *Id.* at 406, 377 S.E.2d at 309.

Ricky relies on *Groh* for the proposition that the facially invalid warrant cannot be saved by the description in the affidavit. The *Groh* case involved a search warrant which failed to identify any of the items intended to be seized pursuant to the warrant. Though the application for the warrant, which was supported by a detailed affidavit, described the contraband expected to be found, the warrant itself was less specific, it failed to identify any of the items intended to be seized, and it did not incorporate by reference the itemized list contained in the application. *Id.* at 554-55. The United States Supreme Court found the warrant, which provided no description of the type of evidence sought, was "plainly invalid" under the Fourth Amendment. *Id.* at 557. The court further found the fact that an application for the warrant "adequately described the 'things to be seized' [did] not save the *warrant* from its facial invalidity," as "[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Id.* (emphasis in original). However, the court refused to hold "that the Fourth Amendment prohibits a warrant from cross-referencing other documents," noting "most Courts of Appeals have held that a court 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 557-58.[5]

In *Hurwitz*, also relied upon by Ricky, the Fourth Circuit Court of Appeals determined, pursuant to Groh, "[t]he particularity requirement of the Fourth Amendment may be satisfied by cross-reference in the warrant to separate documents that identify the property in sufficient detail." *Id.* at 470. Although the court in *Hurwitz* also acknowledged *Groh* provided that "a supporting affidavit or document may be read together with (and considered part of) a warrant that otherwise lacks sufficient particularity 'if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant,'" the court concluded *Groh* did not establish a two-part rule — that both words of incorporation be used AND that the incorporated document accompany the warrant. *Id.* 470-71. Rather, while recognizing a majority of sister Circuit Courts of Appeals appear to require both conditions before allowing a separate document to be read as part of the search warrant, the court nonetheless held it was sufficient in that circuit "either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself." *Id.* at 471. Thus, the search warrant was sufficient in that case, regardless of whether the attachment accompanied or was appended to the search warrant, because the warrant cross-referenced the attachment to a supporting affidavit. *Id.* at 471-72.

Here, Ricky has not challenged, either at the trial level or on appeal, the trial court's determination and the solicitor's confirmation that the affidavit, which described in particularity the place to be searched, was attached to the search warrant when it was served. Thus, it is the law of the case. *See State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (noting appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case). As noted, *Hurwitz* provided that a search warrant will be considered sufficient if it either incorporates a supporting document by reference which provides the requisite particularity, or if such supporting document is attached to the warrant itself. Here, the affidavit showing the requisite

[5] It should be noted that *Groh* did not involve the suppression of evidence obtained pursuant to an invalid search warrant in a criminal matter, but was a civil action raising a claim of violation of Ramirez's Fourth Amendment rights by Agent Groh. *Id.* at 555. The court ultimately held, because Agent Groh did not have in his possession a warrant that particularly described the things he intended to seize, his action in proceeding with the search was clearly unreasonable under the Fourth Amendment. *Id.* at 563.

particularity was attached to the warrant. Accordingly, the supporting affidavit supplied the description of the property to be searched with sufficient particularity, the affidavit was attached to the warrant, and under *Hurwitz* and *Williams*, this was sufficient to comply with both federal and state constitutional mandates. At any rate, Ricky has failed to show the warrant was deficient in providing the appropriate words of incorporation, citing no authority for his position that the description of the property on the warrant must "specifically refer back to the description on the affidavit." Here, the warrant states as follows: "*It appearing from the attached affidavit* that there are reasonable grounds to believe that certain property subject to seizure . . . is located on the following premises." (emphasis added). Thus, the warrant clearly included words of incorporation, cross-referencing the attached affidavit which described with particularity the place to be searched.

## II. Jury Charge[6]

In its instruction to the jury concerning the law regarding possession, the trial court charged the jury as follows:

> Now, possession, to prove possession the State must prove, beyond a reasonable doubt, that the defendant . . . 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

[6] The State appears to contend that Ricky's statement of issue on appeal in this regard is insufficient under Rule 208(b)(1)(B), SCACR. We do not find it to run afoul of this rule.

> 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 should have. Two or more persons may have joint possession of a drug.

Trial counsel thereafter objected to the court's language in the charge that a defendant's knowledge of the presence of crack cocaine is strong evidence of the defendant's intent to control its disposition or use. Counsel argued such a charge "takes away and nullifies the mere presence" portion of the charge, and "seems to comment on the facts and the weight." Relying on *State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987) and *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994), the trial court found the charge was proper.

On appeal, Ricky argues *Kimbrell* and *Solomon* are distinguishable from the case at hand. He contends *Kimbrell* dealt with a directed verdict motion wherein our supreme court commented that actual knowledge was strong evidence of intent to control. He further maintains *Solomon* was a post-conviction relief (PCR) action where the issue was whether trial counsel's failure to object to a "strong evidence" charge was reasonable under prevailing professional norms. He argues, given that the supreme court in *Solomon* noted the instruction was based on *Kimbrell*, the court simply found trial counsel acted reasonably in not objecting to the charge. Under these circumstances Ricky argues, while it may have been reasonable for trial counsel not to object to the strong evidence charge, such did not "validate the underlying precedent."

Ricky contends the "strong evidence" charge here was an impermissible charge on the facts and comment on the weight of the evidence, as the trial court not only instructed the jury to consider actual knowledge in determining if he was merely present, but also demanded the jury consider actual knowledge as strong evidence of constructive possession. Ricky further argues the "strong evidence" charge negated the mere presence charge to which he was entitled. He cites *Goldsmith v. Witkowski*, 981 F.2d 697, 701 (4th Cir. 1992) for the proposition that "[t]he mere presence of a defendant in an area containing drugs, even 'coupled with knowledge of the drugs,' is insufficient to prove possession."

In *Kimbrell*, our supreme court, in finding Kimbrell was not entitled to a directed verdict on her drug trafficking charge, noted that one has possession of contraband when he has both the power and intent to control its disposition or use. *Id.* at 54, 362 S.E.2d at 631. The court then stated as follows:

> Here, the State produced evidence that Kimbrell 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. Possession may be inferred from circumstances.

*Id.* (citation omitted). Thereafter, in *Solomon*, our supreme court addressed Solomon's assertion that the PCR judge erred in its determination that trial counsel was not ineffective in failing to object to the court's charge that actual knowledge of the presence of a controlled substance is strong evidence of intent to control disposition, arguing the trial judge's use of the word "strong" amounted to a comment on the facts or an opinion on the weight of the evidence. *Id.* at 529, 443 S.E.2d at 542. Finding the trial judge's instruction was in accord with the court's previous holding in *Kimbrell*, that actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use and that knowledge may be equated with or substituted for the intent element, our supreme court concluded the PCR judge properly held that trial counsel acted reasonably in not objecting to this charge. *Id.* Accordingly, our supreme court has specifically approved this "strong evidence" jury charge in the face of an argument that such a charge is a comment on the facts and weight of the evidence. Additionally, Ricky acknowledges in his argument on appeal that such a charge is "precedent," even though he contends a PCR determination that the charge was not unreasonable given the precedent "does not validate the underlying precedent." Yet, Ricky has not made a motion to argue against this precedent and, in any case, this court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

We would further find the instruction, read as a whole, did not negate the mere presence charge to which he was entitled. Importantly, in making this argument and citing to *Goldsmith*, Ricky omitted a portion of the court's statement on the matter. There, the Fourth Circuit Court of Appeals noted South Carolina law provides that a conviction for the crime of possession with the intent to distribute

requires proof of possession of drugs, either actual or constructive, and the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. *Id.* at 701. The court went on to state, "Again, even presence coupled with knowledge of the drugs is insufficient to sustain a possession conviction; *the State must also prove dominion and control*." *Id.* (emphasis added). Ricky failed to include this emphasized portion of the court's statement in his argument. Thus, it is clear the *Goldsmith* court simply determined that presence, coupled only with knowledge of the drugs, is insufficient to prove possession, because the State must also prove dominion and control over the drugs.

As noted above, while charging the law in regard to possession in conjunction with its charge that actual knowledge of the presence of the drug is strong evidence of a defendant's intent to control the drug's disposition, the trial court specifically charged the jury that mere presence at a scene where drugs are found is not enough to prove possession. Further, the trial court charged the jury here that in order to prove possession, the State was required to prove the defendant had the power and the intent to control the disposition or use of the drug. Accordingly, the trial court instructed the jury that more was needed to prove possession than simply presence and knowledge, but that the State was also required to prove power and intent to control disposition of the drug. Thus, the trial court properly charged the jury on mere presence as Ricky contends he was entitled pursuant to *Goldsmith.*

Thus, considering the charge as a whole, we hold the trial court properly charged the jury on mere presence, and its charge that actual knowledge was strong evidence of a defendant's intent to control its disposition or use did not negate the mere presence charge. *See State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

For the foregoing reasons, Ricky's convictions are

**AFFIRMED.**

**THOMAS and GEATHERS, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Benedict College, Respondent,

v.

National Credit Systems, Inc., Christopher Rehkow, and Eric Dean Snyder, Appellants,

v.

Darren L. Ford, individually, and Leonard Williams, individually and in his representative capacity on behalf of Benedict College, Third Party Defendants,

Of whom Leonard Williams is also a Respondent.

Appellate Case No. 2010-174166

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Appeal From Richland County
Clifton Newman, Circuit Court Judge

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Opinion No. 5043
Heard April 4, 2012 – Filed October 24, 2012

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**REVERSED**

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J. Charles Ormond Jr., of Holler Dennis Corbett Ormond Plante & Garner, of Columbia, for Appellants.

Charles T. Speth II and Douglas J. Rosinski, of Ogletree Deakins Nash Smoak & Stewart PC, of Columbia, for Respondents.

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**THOMAS, J.:** National Credit Systems, Inc. (NCS) appeals the dismissal of its counterclaim for civil conspiracy. NCS argues the circuit court erred in (1) finding it failed to state a claim upon which relief could be granted and (2) failing to provide an opportunity to amend its pleading. We reverse.

**FACTS**

On May 8, 2007, Benedict College entered into an Amended and Restated Mortgage and Security Agreement (the Security Agreement) with its lenders in exchange for a loan of $8.4 million. Among other restrictions, the Security Agreement required the College to obtain the written approval of its bond insurer, Radian Asset Assurance, before selling its portfolio of certain student loans.

On May 18, 2007, the College and NCS entered into an agreement under which NCS would attempt to collect those student loans on behalf of the College (the Collection Agreement). Leonard N. Williams, the College's Interim Chief Financial Officer, signed on behalf of the College, and sales representatives Darren L. Ford and Eric Dean Snyder signed on behalf of NCS. The College did not secure Radian's approval before executing the Collection Agreement.

In 2008, the College filed an action against NCS for breach of contract, fraud, fraud in the inducement, and unjust enrichment. Following procedural matters and the addition of other parties, NCS counterclaimed against the College for breach of contract and civil conspiracy.

NCS's breach of contract claim asserted the College breached the Collection Agreement by failing to provide the number of accounts agreed to under its provisions, settling or deferring certain accounts directly with debtors, and failing to remit money due to NCS as a result of its collection efforts. The contract claim further alleged NCS had suffered actual and consequential damages "[a]s a direct and proximate result of these breaches of the Collection Agreement."

NCS also counter- and cross-claimed for civil conspiracy against Williams, Ford and the College. The civil conspiracy claim alleged the following[1]:

> Williams was an agent of the College and at all times had the authority to act on its behalf. Ford worked as an independent contractor sales trainee for NCS, and he arranged the potential deal between the College and NCS through prior relationships he maintained with people at the College. In May 2007, the College and NCS executed the Collection Agreement. However, the College did so without obtaining the prior approval of its bond insurer, Radian, which was required by the Security Agreement. NCS did not know the College had failed to obtain the required pre-approval of the Collection Agreement before executing it.
>
> Williams subsequently sought Radian's approval of the Collection Agreement. However, he provided Radian with an unsigned copy of the Collection Agreement without mentioning it had already been entered. Radian rejected the Collection Agreement, and Williams contacted NCS's principals for "clarification" of the Collection Agreement's terms. NCS's principals did not "agree to modify or alter the terms of the Collection Agreement."
>
> "[B]ecause NCS management . . . would not agree [to] modifications of the terms of the Collection Agreement, which . . . Radian was requiring of [the College] in order for Radian to provide its written consent . . . , Williams pursued other means." Williams obtained a document from Radian's and the College's counsels with terms acceptable to Radian—the Addendum. He then

[1] These block paragraphs do not quote the pleading unless indicated by quotation marks.

presented the Addendum to Ford. Ford lacked express, implied or apparent authority to sign the Addendum for NCS, and Williams knew Ford's limitations. Nevertheless, Williams and Ford signed the Addendum without providing a copy to NCS. The Addendum removed or altered many provisions in the Collection Agreement designed to protect NCS, including a guaranteed refund provision that would effectively limit NCS's contractual liability to $255,000. Under the Addendum, NCS's liability could reach $1,020,000.

After the Addendum was executed, the College paid NCS, and NCS provided services to the College, in accordance with the Collection Agreement. NCS continued to lack knowledge of the Addendum while providing those services, and the allegations do not indicate when NCS first learned of the Addendum. However, the College eventually initiated the current lawsuit seeking payment pursuant to the Addendum's guaranteed refund provision.

Williams and Ford executed the Addendum "conspiring and intending to unilaterally alter the terms of the guarantee provisions in the Collection Agreement with the specific intent of harming NCS by way of purportedly binding it to contractual terms and guarantee provisions, to which NCS had not agreed." Moreover, "the joint discussions between Williams and Ford were made with the intent to maliciously injure and harm NCS and to further their own motives and objectives." Lastly, "[t]he acts of Williams, Ford, and [the College] . . . directly and proximately resulted in special and additional damages to NCS, which include, but are not limited to, the costs and

> attorney's fees associated with the defense of [the College]'s allegations."[2]

Williams and the College filed a motion to dismiss NCS's civil conspiracy cause of action under Rule 12(b)(6), SCRCP, arguing NCS failed to adequately plead two of the three elements of civil conspiracy: intent to harm and special damages. After arguments, the circuit court granted the motion. The court found NCS failed to allege Williams and Ford intended to harm NCS. It also found NCS failed to assert any special damages, specifically reasoning "costs and attorney's fees are not special damages" and the damages NCS sought to recover for civil conspiracy were the same damages it claimed for breach of contract. This appeal followed.

## ISSUES

1. Did the circuit court err in finding NCS failed to state a claim for civil conspiracy?

2. Did the circuit court err in failing to provide NCS an opportunity to amend its pleadings?

## STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move for the dismissal of a complaint on the basis that the plaintiff "fail[ed] to state facts sufficient to constitute a cause of action." In evaluating a motion to dismiss pursuant to this rule, the circuit court must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). If those facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to state a claim is improper. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). On appeal, the appellate court applies the same standard of review as the circuit court.

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[2] NCS also raised a third-party claim solely against Ford, but neither party has discussed that claim as it relates to the issues on appeal. We accordingly do not consider it.

*Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). A complaint should not be dismissed merely because doubt exists that the plaintiff will ultimately prevail. *Id.* at 395, 645 S.E.2d at 248.

## ANALYSIS

### I. Dismissal of the Civil Conspiracy Claim

NCS argues the circuit court erred in dismissing its civil conspiracy claim. Specifically, NCS asserts the circuit court erred in finding NCS failed to (1) allege Williams and Ford intended to harm NCS and (2) raise sufficient claims for special damages. We agree.[3]

"The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage." *Hackworth*, 385 S.C. at 115, 682 S.E.2d at 874 (citing *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989)).

#### A. Intent to Harm

On appeal, NCS contends the circuit court erred in finding no allegation of intent to harm NCS because the complaint asserts Williams and Ford conspired to alter the terms of the Agreement and purport to bind NCS to those terms. We agree.

In a civil conspiracy claim, injury to the plaintiff need not be the only purpose behind the tortfeasor's conduct; many conspiracies will be at least partly motivated by the tortfeasor's desire to protect or benefit the tortfeasor's own lot. To be actionable, therefore, a conspiracy's "primary purpose or object" must be "to injure the plaintiff." *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986); *see also Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006).

[3] In holding the circuit court erred in dismissing the civil conspiracy claim, we again consider only those arguments raised to us.

Viewed in the light most favorable to NCS, the allegations can reasonably be interpreted to mean Williams and Ford signed the Addendum with the primary purpose to eventually induce NCS to follow the Addendum's guaranteed refund provision without realizing the Addendum was unenforceable. Although it is clear that Williams and Ford may have signed the Addendum at least partly to protect the College from a claim by Radian, the specific intent alleged by NCS's pleading explicitly states they acted to "harm[] NCS by way of purportedly binding" NCS to terms the company had not agreed to. As interpreted, therefore, NCS's allegations satisfy the requirement that the conspiracy's "primary purpose" was "to injure the plaintiff." Thus, the circuit court erred in dismissing the claim on this basis.

B. Special Damages

NCS contends the circuit court also erred in dismissing its claim for failure to allege special damages. We agree.

1. *Allegations of Special Damages*

NCS argues the circuit court erred in finding the costs and attorney's fees sought under the civil conspiracy claim were not special damages. NCS contends these items did not overlap with the damages sought under its breach of contract claim against the College and are otherwise special damages. We agree.

Unlike other torts, an action for civil conspiracy requires the tortious conduct in question to cause the plaintiff special damage. *Hackworth*, 385 S.C. at 115, 682 S.E.2d at 874. While general damages "are the immediate, direct, and proximate result of the" tortfeasor's conduct, special damages "are the natural, but not the necessary or usual, consequence of the" tortfeasor's conduct. *Id.* at 116-17, 682 S.E.2d at 875. Moreover, dismissal of a claim for civil conspiracy is appropriate when "a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim." *Id.* at 117, 682 S.E.2d at 875.

Here, the damages NCS sought under the civil conspiracy claim did not overlap with the damages sought under its breach of contract claim against the College. Under its civil conspiracy claim, NCS sought to recover "the costs and attorney's fees associated with the defense of [the College]'s allegations." In its breach of contract claim, NCS sought consequential damages that were "a direct and

proximate result of th[e College's] breaches of the Collection Agreement." The contract claim further enumerated the College's breaches of the Collection Agreement, and the breaches did not relate to Williams and Ford's conspiracy. Thus, while the contract claim could be construed to seek the costs and attorney's fees NCS incurred to prosecute the College's alleged breaches of the Collection Agreement, it could not be construed to seek the costs and fees NCS incurred in defending against the College's claims. Accordingly, the circuit court erred in finding NCS's civil conspiracy claim sought the same damages as its breach of contract claim.

Moreover, the costs and attorney's fees incurred by NCS in defending the College's claims for payment pursuant to the Addendum's guaranteed refund provision were not the immediate, direct result of Williams and Ford's alleged intent that NCS abide by the Addendum without realizing it was unenforceable. A lawsuit brought by the College against NCS to obtain payment of the Addendum's guaranteed refund would have been foreseeable if NCS determined it was not bound by the Addendum. Yet under the pleadings, the College would know through Williams that the Addendum was unenforceable because Williams knew Ford lacked authority to sign it. *See Sheek v. Lee*, 289 S.C. 327, 328, 345 S.E.2d 496, 497 (1986) ("General damages are those which must necessarily result from the wrongful act upon which liability is based. . . . 'Damages for losses that are the natural and proximate, but not the necessary, result of the'" tort are special damages (quoting *Hobbs v. Carolina Coca-Cola Bottling Co.*, 194 S.C. 543, 549, 10 S.E.2d 25, 28 (1940)); *Hackworth*, 385 S.C. at 115-17, 682 S.E.2d at 874-75 (providing that special damages "are the natural, but not the necessary or usual, consequence of the defendant's conduct" (citing *Loeb v. Mann*, 39 S.C. 465, 469, 18 S.E. 1, 2 (1893)). Thus, the conspiracy would not have necessarily or usually resulted in the College's lawsuit, and the costs and fees sought by NCS would be special damages caused by Williams and Ford's combination.

2. *Specificity of Special Damages Allegation*

As an additional sustaining ground, the College contends the circuit court's dismissal of NCS's civil conspiracy claim should be affirmed because the claim failed to allege special damages in accordance with Rule 9(g), SCRCP. We disagree.

Rule 9(g) provides, "When items of special damage are claimed, they shall be specifically stated." This rule is based upon the distinction between general and special damages. "General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of." *Hackworth*, 385 S.C. at 116-17, 682 S.E.2d at 875. In contrast, special damages are not implied by law because they "are the natural, but not the necessary or usual, consequence of the defendant's conduct." *Id.* Thus, special damages must "be specifically stated" to avoid surprise to the other party. *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 99, 399 S.E.2d 19, 21 (Ct. App. 1990) (discussing Rule 9(g)); *see also* Rule 9 notes (providing that Rule 9(g) mirrors the substance of South Carolina practice prior to the adoption of our rules); *Sheek*, 289 S.C. at 328-29, 345 S.E.2d at 497 (discussing case law prior to our current rules of procedure and stating that "[s]pecial damages . . . are not implied by law because they do not necessarily result from the wrong. Special damages must be alleged in the complaint to avoid surprise to the other party" (citation omitted)).

NCS has alleged special damages with sufficient specificity to satisfy our rules of civil procedure. NCS's pleading asserts the College "initiated this lawsuit seeking payment of a guaranteed amount pursuant to the terms of the purported Addendum to the Collection Agreement." The civil conspiracy claim then explicitly incorporates that assertion[4] and limits the special damages it seeks to "the costs and attorney's fees associated with the defense of [the College]'s allegations." Taking this language together, NCS does not assert amorphous or unlimited grounds for special damages.[5] The language provides sufficient specificity to inform the College, Williams, and Ford of a limited number and type of sources from which the alleged special damages are being sought. In light of the pleading, therefore, Rule 9(g) does not require that NCS separately identify which exact causes of action its pleading is referring to so long as it seeks only those costs and fees

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[4] NCS lists the alleged facts underlying its claims in a separate section of its pleading, and NCS's civil conspiracy claim explicitly incorporates these allegations. Therefore, any discussion of NCS's claim should consider those allegations as well. *See* Rule 10(c), SCRCP ("Statements in a pleading may be adopted by reference in a different part of the same pleading . . . .").

[5] In fact, the language thus excludes any costs or attorney's fees incurred in the prosecution of its own claims for breach of contract against the College under the Collection Agreement.

incurred in defending the College's claims seeking payment under the Addendum's guaranteed refund provision. The pleading protects the College from the surprise contemplated by Rule 9(g), and the circuit court erred in dismissing NCS's claim pursuant to that rule's requirements. Rule 9 notes, SCRCP (providing that Rule 9(g) mirrors the substance of the Federal Rules of Civil Procedure); 22 Am. Jur. *Damages* § 631 (2011) ("[T]he allegation of special damages [under Federal Rule 9(g)] is sufficient when it notifies the defendant of the nature of the claimed damages even though it does not delineate them with as great precision as might be possible or desirable."). Whether the items sought are in-fact special damages is a separate question.

3. AJG Holdings LLC v. Dunn[6]

The College argues our decision in *AJG Holdings LLC v. Dunn* is controlling. We disagree.

In *AJG Holdings*, the circuit court granted summary judgment against the appellants' civil conspiracy claim. 392 S.C. at 168, 708 S.E.2d at 223. In the opinion, we explained the appeal's procedural posture in the following manner:

> In their pleadings, the Dunns allege that Respondents conspired "for the purpose of injuring [the Dunns] and such conspiracy has resulted in special damages, insofar as [the Dunns] have lost the quiet use and enjoyment of their property, have suffered damage to their reputations in the community, as well as other injury in an amount to be proven at trial." At the summary judgment hearing, the circuit court pointed out that these damages were no different from the damages alleged in the Dunns' other causes of action. At that point, the Dunns argued that their payment of attorney's fees and costs constituted special damages. Every litigant represented by a lawyer incurs attorney's fees and costs. However, the Dunns never pointed out to the

[6] 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011).

> circuit court specific attorney's fees or costs they contended qualified as special damages, nor did they seek permission to amend their counterclaim to include the specificity required by Rule 9(g). In granting summary judgment, the circuit court noted the damages the Dunns alleged did not "go beyond the damages alleged in other causes of action."

*Id.* We subsequently affirmed the circuit court "[b]ecause the Dunns failed to plead a sufficient claim for special damages unique to the civil conspiracy claim." *Id.* We explained that the damages actually pled in the Dunns' civil conspiracy claim could not constitute special damages because appellants conceded they were no different than the damages sought in another of their claims. *Id.* We declined to address the Dunns' argument that the circuit court erred in finding their allegations of costs and attorney's fees were insufficiently specific under Rule 9(g) because the Dunns raised an argument on appeal that was different from the argument presented below. *Id.*

*AJG* does not control this case. Unlike in *AJG*, NCS actually alleged costs and attorney's fees as special damages, and those damages did not overlap with NCS's breach of contract damages. Moreover, while this court in *AJG* refused to address whether the costs and fees alleged as special damages in that case were sufficiently specific to satisfy Rule 9(g), we hold the allegations of special damages in this case do satisfy the rule.

## II. Amendment of the Complaint

Because we find the circuit court erred in dismissing NCS's civil conspiracy claim, we need not reach this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

## CONCLUSION

We find the circuit court erred in dismissing NCS's civil conspiracy claim, and as a result, we reverse the dismissal.

**REVERSED.**

**WILLIAMS, J., and CURETON, A.J., concur.**