The Supreme Court of South Carolina

In the Matter of
Levan Jesse Wingate, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Mr. Wingate passed away on May 29, 2007, and requesting appointment of an attorney to protect Mr. Wingate's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Maria Josefina Mandanas, Esquire, is hereby appointed to assume responsibility for Mr. Wingate's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Wingate maintained. Ms. Mandanas shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Wingate's clients. Ms. Mandanas may make disbursements from Mr. Wingate's trust account(s), escrow account(s), operating account(s), and any other law office account(s)

Mr. Wingate maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Wingate, shall serve as notice to the bank or other financial institution that Maria Josefina Mandanas, Esquire, has been duly appointed by this Court.

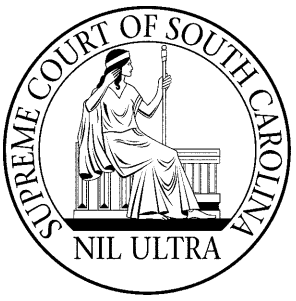
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Maria Josefina Mandanas, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Wingate's mail and the authority to direct that Mr. Wingate's mail be delivered to Ms. Mandanas' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

June 22, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27

July 2, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony M. Enriquez, Respondent,

v.

South Carolina Department of Corrections, Appellant.

Appeal from Marlboro County
Alison Renee Lee, Circuit Court Judge

Opinion No. 26355
Heard May 23, 2007 – Filed July 2, 2007

AFFIRMED

Andrew F. Lindemann, of Davidson, Morrison & Lindemann, P.A., of Columbia; and Andrew McLeod, of Harris, McLeod and Ruffner, of Cheraw, for appellant.

John B. Shupper, of Columbia, for respondent.

JUSTICE MOORE: This appeal is from an order sanctioning appellant South Carolina Department of Corrections (SCDOC) for a discovery violation. We affirm.

FACTS

Respondent Anthony Enriquez commenced this action against SCDOC for allegedly failing to prevent a beating inflicted by other prisoners while he was incarcerated. On the second day of trial, during questioning by Enriquez's counsel, a corrections officer revealed that he had filed an incident report following the altercation. Counsel requested a copy of the report which SCDOC then produced during a break in testimony along with other documents that had not been previously disclosed.[1] After examining the documents, counsel moved for sanctions claiming that the new documents identified other witnesses and would have affected his evaluation of Enriquez's case.

The trial judge found sanctions were appropriate and ordered SCDOC to pay $3,000 in attorney's fees based on counsel's representation of his hourly fee for two days of trial and long distance travel.

ISSUE

Does Rule 37, SCRCP, authorize sanctions in this case?

DISCUSSION

SCDOC contends Rule 37, SCRCP, which allows sanctions for discovery violations, does not authorize sanctions for the failure to supplement discovery responses in this case. We disagree. SCDOC's complaint that it simply failed to "supplement" a previous request has no factual basis. Pursuant to an earlier motion to compel, there was a standing order that SCDOC "promptly comply with discovery or [be] subject to sanctions." Rule 37(b) expressly provides for an award of

[1]Counsel for SCDOC was not aware that the documents had not been produced.

sanctions for a party's failure to obey a discovery order.[2] Because SCDOC failed to fully comply with discovery as ordered, sanctions were authorized under Rule 37.

SCDOC's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR, and the following authorities: Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (procedural due process claim raised for the first time on appeal is not preserved); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000) (appellant has the burden to provide an adequate record for review).

AFFIRMED.

---

[2]This rule provides in pertinent part:

> (b) Failure to Comply With Order.
>
> . . . .
>
> (2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Michael G. Nettles, concur.

The Supreme Court of South Carolina

In the Matter of Deborah A. Koulpasis, Respondent.

ORDER

On June 7, 2007, respondent pled guilty to breach of trust with fraudulent intent, valued at more than $1,000 but less than $5,000, and was sentenced to two (2) years imprisonment, suspended, and payment of court costs. The Office of Disciplinary Counsel (ODC) has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. Respondent has filed a return in which she consents to being placed on interim suspension.

Pursuant to Rule 17(a), RLDE, respondent's license to practice law in this state is hereby suspended until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina
June 26, 2007

The Supreme Court of South Carolina

In the Matter of O. Doyle Martin, Respondent.

ORDER

Respondent was suspended on June 25, 2007, for a period of six months, retroactive to November 8, 2006. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

By s/ Daniel E. Shearouse
Clerk

Pleicones, J., not participating

Columbia, South Carolina

June 27, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Law Firm of Paul L. Erickson, P.A. Appellant,

v.

James R. Boykin and Mona S. Boykin, Respondent.

Appeal From Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4264
Heard November 6, 2006 – Filed June 27, 2007

AFFIRMED

Paul L. Erickson, of Asheville, N.C., for Appellant.

Carolyn R. Hills, of Myrtle Beach, for Respondent.

SHORT, J.: Paul L. Erickson appeals the circuit court's order denying enforcement of a North Carolina default judgment based on the foreign court's lack of personal jurisdiction. We affirm.

FACTS

James and Mona Boykin (the Boykins) are residents of Horry County, South Carolina and the parents of an autistic son. In 1999, they hired Erickson, a North Carolina attorney licensed to practice law in South Carolina, to represent them in an action against the Horry County School District for failure to provide certain services to their son.

Erickson represented the Boykins at a four-day administrative hearing before the School District, at an appeal before the Horry County Circuit Court, and before a federal court in Florence. The action was ultimately unsuccessful; thus, the Boykins were required to pay Erickson a discounted rate of $50 per hour for legal services rendered. Although the Boykins had already paid him over $20,000 in legal fees, Erickson maintained they still owed $21,660.00, plus interest. The Boykins refused to pay Erickson the remaining legal fees he claims they owe.

On August 18, 2003, Erickson obtained a default judgment against the Boykins in Buncombe County, North Carolina. On December 6, 2004, Erickson filed to have the foreign judgment enforced in Horry County. In response, the Boykins moved for relief of enforcement on the basis that North Carolina lacked personal jurisdiction.

At a hearing on June 1, 2005, Erickson's attorney argued North Carolina had personal jurisdiction over the Boykins because they visited his office in North Carolina and because the attorney/client agreement between Erickson and the Boykins provided that any action to collect fees would take place in Buncombe County, North Carolina. The Boykins' attorney denied her clients ever traveled to North Carolina to meet with Erickson and objected to the contract being entered into evidence because it had not been filed with the default judgment and was a hearsay document. The Boykins' attorney also argued that the Boykins had no contact with the State of North

Carolina and that both parties contemplated that any action taken by Erickson on behalf of the Boykins would occur in South Carolina.

By order dated June 1, 2005, the circuit court granted the Boykins' motion for relief, provided the Boykins' attorney with one week to submit a proposed written order, and provided Erickson's attorney with one week to respond to the proposed written order. On June 15, 2005, Erickson submitted to the circuit court an affidavit regarding solicitation and services performed and a request for the court to take judicial notice of the North Carolina complaint and the attorney/client agreement.

The circuit court issued its final order on June 17, 2005. In this order, the circuit court noted the attorney/client agreement had not been admitted into evidence because it was a hearsay document and lacked proper foundation. The circuit court further found no evidence had been offered to show the Boykins had established the requisite minimum contacts to confer personal jurisdiction upon the North Carolina court. Accordingly, the circuit court granted the Boykins relief from the North Carolina judgment.

On June 18, 2005, Erickson filed a motion for reconsideration and again requested the circuit court consider the affidavit and take judicial notice of the documents. On August 26, 2005, the circuit court issued an order denying Erickson's motion for reconsideration, his request for the court to take judicial notice of the documents, and his request for the court to consider the affidavit. In that order, the circuit court found the documents were not admissible because they were submitted after the hearing. This appeal followed.

STANDARD OF REVIEW

"An action to enforce a foreign judgment is an action of law." Sec. Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 539, 529 S.E.2d 283, 286 (Ct. App. 2000). On appeal of an action at law tried without a jury, the circuit court's findings of fact will not be disturbed if there is any evidence which

reasonably supports the findings. Carson v. Vance, 326 S.C. 543, 547, 485 S.E.2d 126, 128 (Ct. App. 1997).

LAW/ANALYSIS

Erickson argues the circuit court erred by failing to give full faith and credit to the North Carolina judgment. He maintains the North Carolina judgment was valid and, as such, bore a presumption that personal jurisdiction was proper. He also contends the Boykins failed to carry the necessary burden of proof to overcome the presumption. Erickson further alleges error in the circuit court's acceptance and entry of an order provided by the Boykins' attorney which contained findings he claims are unsupported in the record. Lastly, Erickson argues the circuit court erred by failing to take judicial notice of numerous documents and facts submitted to the circuit court after the hearing, and he requests that this court take judicial notice of the same. We disagree with each of Erickson's arguments and affirm the circuit court's order.

DEFAULT JUDGMENT

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each state to the . . . judicial proceedings of every other State." U.S. Const. Art. IV. § 1. This clause requires that judgments of the courts of one state are given the same faith and credit in another state. Hamilton v. Patterson, 236 S.C. 487, 492, 115 S.E.2d 68, 70 (1960) (citation omitted). Where a judgment is rendered by a court of competent jurisdiction, the Full Faith and Credit Clause precludes any examination into the merits of the case "or the validity of the legal principles on which the judgment is based." Id. However, the "Full Faith and Credit Clause does not prevent the litigation of personal jurisdiction in an action to enforce a foreign judgment. Colonial Pacific Leasing Corp. v. Taylor, 326 S.C. 529, 532, 484 S.E.2d 595, 596-7 (Ct. App. 1997).

The Supreme Court of South Carolina has recognized that a judgment rendered by a court presumes subject matter and personal jurisdiction, and if the judgment "appears on its face to be a record of a court of general

jurisdiction, such jurisdiction over" the case is presumed "unless disproved by extrinsic evidence, or by the record itself." Taylor v. Taylor, 229 S.C. 92, 97, 91 S.E.2d 876, 879 (1956) (citations omitted). As part of the Uniform Enforcement of Foreign Judgments Act, South Carolina has enacted §15-35-940 which provides:

> (A) The judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment . . . on any . . . ground for which relief from a judgment of this State is allowed.
>
> (B) If the judgment debtor has filed a motion for relief or notice of defenses, then the judgment creditor may move for enforcement or security of the foreign judgment as a judgment of this State, if all appeals of the foreign judgment are finally concluded and the judgment is not further contested. The judgment creditor's motion must be heard before a judge who has jurisdiction of the matter based upon the amount in controversy as the amount remaining unpaid on the foreign judgment. The South Carolina Rules of Civil Procedure apply. The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit.

S.C. Code Ann. § 15-35-940 (2005) (emphasis added).

This statute was enacted by the Legislature to extend greater protection to South Carolina citizens in the enforcement of foreign judgments and impacts the earlier presumption of validity laid out in South Carolina case law.

Under this statutory scheme, the presumption of regularity ends when the judgment debtor files a motion for relief from or notice of defense to the foreign judgment. At that time, the burden of proving the foreign judgment is

entitled to full faith and credit shifts to the judgment creditor.[1] See The Jay Group, Ltd. v. The Bootery of Haywood Mall, Inc., 335 S.C. 114, 116, 515 S.E.2d 542, 543 (Ct. App. 1999). The judgment creditor's burden extends to situations where the judgment debtor challenges the validity of the foreign judgment based on a lack of personal jurisdiction. Id.

In the present case, the Boykins, who did not make a general appearance in North Carolina, moved for relief from enforcement of the foreign judgment. Upon this motion, pursuant to §15-35-940(B) the burden of proving the North Carolina judgment was entitled to full faith and credit shifted to Erickson. The only evidence offered by Erickson at the hearing, the attorney/client agreement, was excluded by the circuit court.[2] A full review of the record shows only that the Boykins are South Carolina residents who hired Erickson to represent them in litigation in South Carolina. The certified copy of the foreign judgment which Erickson filed with the court is devoid of any statement or explanation of personal jurisdiction over the Boykins. Therefore, Erickson has failed to meet his burden of proving that the foreign judgment was entitled to full faith and credit.

The dissent would reverse based on a finding that Erickson, the judgment creditor, had not moved for enforcement of the foreign judgment, and therefore, the burden had not shifted to Erickson to prove the foreign judgment was entitled to full faith and credit. This finding is rooted in the language of §15-35-940(B) which states:

---

[1] To the extent that Sec. Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 529 S.E.2d 283 (Ct. App. 2000) is inconsistent with this opinion, it is overruled.

[2] Erickson argues that the forum selection clause in the attorney/client agreement provides North Carolina with personal jurisdiction. The circuit court found the agreement containing the clause was not admissible because it was a hearsay document and lacked a proper foundation. Erickson does not appeal this ruling. Therefore, we have not considered the forum selection clause in reaching this decision.

> If the judgment debtor has filed a motion for relief or notice of defenses, then the judgment creditor may move for enforcement or security of the foreign judgment as a judgment of this State, if all appeals of the foreign judgment are finally concluded and the judgment is not further contested. The judgment creditor's motion must be heard before a judge who has jurisdiction of the matter based upon the amount in controversy as the amount remaining unpaid on the foreign judgment. The South Carolina Rules of Civil Procedure apply. The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit.

S.C. Code Ann. § 15-35-940 (2005) (emphasis added). The dissent's reasoning is essentially that because the sentence emphasized above is expressly limited to only the judgment creditor's motion the two sentences which follow are likewise limited.

Even though the second sentence of Subsection (B) is expressly limited to only the judgment creditor's motion, it does not follow that the remaining sentences are subject to the same limitation. This is exemplified by the third sentence's mandate that the South Carolina Rules of Civil Procedure apply. Clearly the South Carolina Rules of Civil Procedure would apply to motions made by either party. Under the statute before us, we fail to see why the assignment of the burden of proof would not likewise apply to both motions. Furthermore, the only South Carolina case to ever expressly address the burden of proof in a judgment creditor's motion for relief under § 15-35-940 states the burden is on the judgment creditor to prove the foreign judgment is entitled to full faith and credit. See The Jay Group, Ltd. v. The Bootery of Haywood Mall, Inc., 335 S.C. 114, 116, 515 S.E.2d 542, 543 (Ct. App. 1999).

THE COURT'S ORDER

Erickson argues the seventh finding of fact in the circuit court's order was erroneous. In its order, the circuit court found:

> There was no evidence presented that any services rendered by Plaintiff on behalf of the Defendant[s] took place in North Carolina. To the contrary, it was undisputed that all meetings, hearing, filings, and other contact incident to Plaintiff's services took place in South Carolina.

As laid out in Erickson's brief, his allegation of error appears to focus on whether or not it was disputed that a meeting between the parties took place in North Carolina. At the hearing, Erickson's attorney stated that the Boykins had traveled to North Carolina to meet with his client. As correctly pointed out by Erickson's attorney in his motion for reconsideration and by Erickson himself in his reply brief, an argument by a party's attorney is not evidence. See Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991). The burden of proving the foreign judgment was entitled to full faith and credit fell on Erickson. Since Erickson's attorney's argument was not evidence, the circuit court judge correctly found there was no evidence presented to show Erickson had performed any services on behalf of the Boykins in North Carolina.

JUDICIAL NOTICE

Erickson argues the circuit court erred in failing to take judicial notice of numerous documents and facts, and he requests this court take judicial notice of the same. We find no error and deny his request.

Erickson requested that the circuit court take judicial notice of the complaint he filed in North Carolina, the attorney/client agreement between the parties, and an affidavit stating the Boykins solicited his services and attesting to the number of hours he spent working on the case. By order

dated August 26, 2005, the circuit court denied these requests. In that order, the circuit court found the documents were not admissible because they were submitted after the hearing.

Rule 201, SCRE, governs the taking of judicial notice and provides:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding. . . .

When a court takes judicial notice of a fact it "admit[s] into evidence and consider[s], without proof of the facts, matters of common and general knowledge." Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976) (citation omitted). In order for a fact to be subjected to judicial notice, the fact must be of "such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability." Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (citation omitted).

The facts included in the documents presented by Erickson are not the type accepted without qualification or contention, and, in fact, the Boykins contest the facts contained in these documents. Accepting these facts into evidence without proof would be improper. Moreover, Erickson did not submit these documents or make his request for the circuit court to take judicial notice until after the circuit court had granted the Boykins' motion for relief. By form order dated June 1, 2005 and filed June 6, 2005, the circuit court granted the Boykins' motion for relief. Erickson did not submit the documents or request the court to take judicial notice of the documents

until June 15, 2005. Accordingly, the circuit court denied Erickson's motion because it was filed after the hearing. Given the dispute in this case and the time at which the documents were submitted and the request made, we find the doctrine of judicial notice is not properly applicable to these documents.

Additionally, Erickson requests this court take judicial notice of certain facts showing the majority of the time he spent working on the case was in North Carolina. It is difficult to discern from the record if Erickson requested the circuit court take judicial notice of these particular facts. However, even if these facts were properly presented to the circuit court, we find no error in the circuit court's failure to take judicial notice. Furthermore, we refuse to take judicial notice of these facts as they are irrelevant to the determination of the matter before this court. Erickson's travel time and time spent in North Carolina as opposed to time he spent in South Carolina have no bearing on whether North Carolina has personal jurisdiction over the Boykins. See Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("The unilateral activity [within the forum state] of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State.").

CONCLUSION

The appellant failed to present competent evidence to show that the North Carolina judgment was entitled to full faith and credit; therefore, the judgment of the circuit court is

AFFIRMED.[3]

[3] Erickson requests that if we determine he is not entitled to have his foreign judgment enforced, we enter our order without prejudice so he can bring a "common law action for the enforcement of his judgment." We hold the issues of prejudice and the future application of preclusion are not properly before this court for review.

HUFF, STILWELL, KITTREDGE, BEATTY, and WILLIAMS, JJ., concur.

GOOLSBY, J., dissenting in a separate opinion in which CURETON and LEE, A.JJ., concur.

GOOLSBY, J. (dissenting): I respectfully dissent. I would reverse the judgment below, principally because the trial judge placed the burden of proof upon the wrong party. The judgment debtors bore that burden in this instance, not the judgment creditor, and the judgment debtors failed to carry that burden.

The appellant Law Firm of Paul L. Erickson, P.A., filed with the clerk of court of Horry County pursuant to S.C. Code Ann. § 15-35-920(A) (2005)[4] a properly authenticated copy of a North Carolina judgment it obtained against the respondents James R. Boykin and Mona S. Boykin, two South Carolina residents, on August 19, 2003, in Buncombe County, North Carolina. An affidavit, which the firm's president executed and which indicated, among other things, the judgment was uncontested and wholly unsatisfied, accompanied the copy of the judgment.[5] The Law Firm

[4] The cited code section is included within an article entitled "the Uniform Enforcement of Foreign Judgments Act." S.C. Code Ann. §§ 15-35-900 to -960 (2005).

[5] The filing of a foreign judgment and affidavit allows the foreign judgment to be docketed and indexed. S.C. Code Ann. § 15-35-920(B) (2005). Once a foreign judgment is filed pursuant to S.C. Code Ann. § 15-35-920(A), it "has the same effect and is subject to the same defenses as a judgment of this State and must be enforced or satisfied in like manner." S.C. Code Ann. § 15-35-920(C) (2005); see 50 C.J.S. Judgment § 985, at 593 (1997) ("[A] foreign

thereafter served the notice required by S.C. Code Ann. § 15-35-930(A) (2005) upon the Boykins.

As allowed by S.C. Code Ann. § 15-35-940(A) (2005),[6] the Boykins filed a "Motion for Relief from Enforcement of Foreign Judgment," contesting the North Carolina judgment on the ground "that the North Carolina court lacked personal jurisdiction over the [Boykins]." The Law Firm did not move, as it could have done, "for enforcement or security of the foreign judgment as a judgment of this State."[7]

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judgment rendered by a court of competent jurisdiction may be registered in a court of the forum state for the purposes of enforcement.").

[6] S.C. Code Ann. § 15-35-940(A) (2005) provides in relevant part:

> The judgment debtor may file a motion for relief from . . . the foreign judgment . . . on any ground for which relief from a judgment of this State is allowed.

[7] S.C. Code Ann. § 15-35-940(B). The cited section reads:

> If the judgment debtor has filed a motion for relief or notice of defenses, then the judgment creditor may move for enforcement or security of the foreign judgment as a judgment of this State, if all appeals of the foreign judgment are finally concluded and the judgment is not further contested. The judgment creditor's motion must be heard before a judge who has jurisdiction of the matter based upon the amount in controversy as the amount remaining unpaid on the foreign judgment. The South Carolina Rules of Civil Procedure apply. The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit.

The Uniform Enforcement of Foreign Judgments Act does not affect a "judgment creditor's right to bring a civil action in this State to enforce the

Following a hearing[8] upon the Boykins' motion,[9] the trial court granted the Boykins' "motion for relief" after finding "no evidence offered . . . suggest[ed] that the [Boykins] ever established any contact with North Carolina . . . sufficient to rise to the level of the 'minimum contacts' required." The Boykins, however, offered no evidence at all at the hearing either by testimony or by affidavit regarding the issue of personal jurisdiction, notwithstanding the file containing a copy of the foreign judgment, which appears regular on its face, had been produced to the trial court.[10] Neither did the Boykins point to anything in the record that

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creditor's judgment." S.C. Code Ann. § 15-35-950 (2005). See 50 C.J.S. Judgment §1042, at 650 (1997) ("Courts recognize at least two proceedings for the enforcement of foreign judgments: filing under the Uniform Enforcement of Foreign Judgments Act . . . or filing a common law action.").

[8] The trial judge recognized the Boykins as the moving party at the hearing when he addressed the Boykins' counsel. "Give me," he said, "a little factual history, moving party, what you're seeking, then I'll hear counsel tell me why he thinks you ought not to get that remedy." Whereupon, as the record shows, counsel for the Boykins explained the background of the case. In doing so, counsel for the Boykins admitted her clients "received a default judgment which [the Law Firm] has since registered in Horry County and [the Boykins had] moved for relief from the enforcement of the judgment based on the lack of personal jurisdiction."

[9] The first sentence of the trial court's order recites that "**THIS MATTER COMES BEFORE THE COURT** pursuant to a motion filed by [the Boykins] seeking relief from the enforcement of a final [j]udgment issued in the Buncombe County, North Carolina Superior Court on August 19, 2003. (Bolding in original)"

[10] See infra note 16.

supported their contention. What they did offer was argument of counsel, which, of course, is not "evidence."[11]

The rule that "[a] judgment pronounced by a court of record of general jurisdiction, regular on its face, carries with it a presumption of validity"[12] is so elementary that citation to the rule ought not to be necessary. Consistent with this rule is the one that "[a] party seeking to enforce a judgment usually is aided by certain presumptions as to matters such as jurisdiction, and ordinarily establishes his or her case by producing the judgment."[13] Moreover, "a party who controverts the validity of a judgment generally bears the burden of showing such invalidity by proper evidence."[14] With respect to foreign judgments in particular, such a judgment is presumed to be valid where "rendered by a court of general jurisdiction";[15] and the party attacking the foreign judgment bears the burden of proving "it should not be given full faith and credit."[16]

In South Carolina, "[a] judgment creditor may move for enforcement . . . of the judgment as a judgment of this State"[17] where the judgment debtor, as here, has filed a motion to be relieved from a foreign judgment. If the

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[11] See Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (1986) (holding factual statements of counsel, whether made during oral argument or in written briefs, ordinarily cannot be considered in determining whether a genuine issue of material fact exists).

[12] 47 Am. Jur. 2d Judgments § 800, at 378-79 (2006).

[13] Id. § 799, at 378.

[14] Id.

[15] Id. § 801, at 379.

[16] Id. § 803, at 381.

[17] S.C. Code Ann. § 15-35-940(B) (2005).

judgment creditor—here, the Law Firm—does so move, our statute plainly mandates the motion for enforcement be "heard before a judge who has jurisdiction of the matter," prescribes the South Carolina Rules of Civil Procedure are to apply, and places upon the judgment creditor "the burden of proving that the foreign judgment is entitled to full faith and credit."[18]

Our state's version of the Uniform Enforcement of Foreign Judgments Act does not alter in any way material in this instance the general rule regarding who has the burden of proof. This is because the judgment creditor here has not yet moved to enforce its foreign judgment against the judgment debtors, the Boykins.

As we read the record, all that occurred here was that (a) the Law Firm filed with the appropriate South Carolina clerk of court pursuant to sec. 15-35-920(A) a copy of an authenticated copy of its foreign judgment along with a supporting affidavit; (b) the Law Firm served a notice of the filing pursuant to sec. 15-35-930(A) upon the Boykins; (c) the Boykins filed a motion for relief from the foreign judgment pursuant to sec. 15-35-940(A);[19] and (d) the Boykins at the hearing on their motion failed to rebut the presumption that the Law Firm's North Carolina judgment is entitled to full faith and credit. The presumption arose when the Law Firm filed with the clerk of court and served on the Boykins a "filed, stamped copy"[20] of a foreign judgment that

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[18] Id.

[19] I entertain no doubt that the authenticated copy of the judgment and related documents were of record and before the trial court at the hearing. The trial judge states at one point, "I'm going to read this file for a moment." Counsel for the Boykins apparently knew the contents of the file. The only item counsel claimed that was not part of the file was the contract the Law Firm sought to introduce at the hearing. Counsel states, when voicing her objection to the introduction of the contract, "It's not part of the file. It wasn't filed with the judgment."

[20] S.C. Code Ann. § 15-35-930(A) (2005).

was properly authenticated pursuant to Rule 44(a)(2), SCRCP,[21] a copy of which was included in the file at the hearing and was before the trial court. Under these circumstances, the trial court should not have granted the Boykins the relief that they sought because they, not the Law Firm, had the burden of proof and they offered no evidence and pointed to nothing in the record, as it existed at the time of the hearing, that supported their position that the North Carolina court lacked personal jurisdiction over them. The Law Firm's judgment, which appears regular on its face, was entitled, therefore, to full faith and credit.[22]

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[21] See Coskery v. Wood, 52 S.C. 516, 519, 30 S.E. 475, 476 (1898) ("When . . . an action is brought in this State upon a judgment recovered in another State . . . and the same is properly authenticated in the manner prescribed by the act of Congress for that purpose, it must be regarded, at least, as prima facie evidence that such judgment has been rendered by a court of competent jurisdiction, in conformity to the laws of the state in which it appears to have been rendered."); Sec. Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 540-41, 529 S.E.2d 283, 287 (Ct. App. 2000) ("[The judgment debtor], by challenging the enforcement of the foreign judgment on the ground of lack of personal jurisdiction, assumed the burden of proof."); see also Lust v. Fountain of Life, Inc., 429 S.E.2d 435, 437 (N.C. Ct. App. 1993) ("The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit.").

To the extent that our case Jay Group v. Bootery of Haywood Mall, 335 S.C. 114, 515 S.E.2d 542 (Ct. App. 1999), is in conflict with this opinion, I would overrule it. That case appears to hold that the judgment creditor has the burden of proof in all cases in which the judgment debtor attacks the validity of a foreign judgment. As explained above, this conclusion is erroneous. Only where the judgment debtor moves for relief from a foreign judgment and the judgment creditor "then" moves for enforcement does the judgment creditor have the burden of proving the foreign judgment is entitled to full faith and credit. S.C. Code Ann. § 15-35-940(B) (2005).

[22] Taylor v. Taylor, 229 S.C. 92, 97, 91 S.E.2d 876, 879 (1956).

I would reverse.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shirley Leder Osterneck, as Personal Representative of the Estate of Guy Kenneth Osterneck, Appellant,

v.

Myles N. Osterneck, Gertrude B. Osterneck, and Rhoda Osterneck, Respondents.

Appeal From Horry County
J. Stanton Cross, Jr., Master In Equity

Opinion No. 4265
Heard May 9, 2007 – Filed June 27, 2007

AFFIRMED

John Ravenel Chase, of Florence, and Sarah Patrick Spruill, of Columbia, for Appellant.

David B. Miller and Mary Anna Neill, both of Myrtle Beach, for Respondents.

STILWELL, J.: Shirley Osterneck appeals the master in equity's ruling that Myles Osterneck is the owner of property formerly owned by his parents, David and Gertrude Osterneck (Father and Mother). Shirley disputes the master's reliance on a purported family agreement between Mother and her children, and the allowance of testimony by Rhoda Osterneck, Father and Mother's daughter-in-law. We affirm.

FACTS

Father died testate on November 9, 1986, survived by Mother and their three sons: Robert, Guy Kenneth, and Myles. Father's will named Myles and Robert as co-executors; however, Robert declined to serve. Father's estate consisted of a one-half interest in the marital home, worth approximately $225,000, and approximately $231,000 in other assets. Father and Mother also held a joint certificate of deposit with a right of survivorship. The certificate of deposit was valued at $230,000. Father's will left Mother all personal property and the sons $500,000 to divide equally. There were insufficient non-marital assets in the estate to fund the bequest to the sons. Father's will did not specifically devise his one-half interest in the marital home. On June 11, 1987, Mother disclaimed her interest in the certificate of deposit, allowing the money to pass to the estate.

Father and Mother's eldest son, Robert, died in 1991 and was survived by his widow, Rhoda. Father and Mother's middle son, Guy Kenneth, passed away in 1993 and was survived by his widow, Shirley, the appellant.

In October 1993, Myles filed a petition to reopen Father's estate for the purpose of conveying Father's one-half interest in the marital home to Mother. In a letter dated December 1994, Shirley received notice regarding the deed of distribution.

In October 1998, Myles purchased the marital home from Mother for $635,000, $10,000 more than its appraised value. In March 2001, Shirley instituted litigation claiming an interest in the marital home. She subsequently filed an amended complaint alleging breach of fiduciary duty and fraud by Myles.

The master found that a family agreement existed to exchange Father's half interest in the marital home for Mother's interest in the certificate of deposit, and that title to the marital home belonged to Myles. Further, the master held Myles did not commit fraud or breach his fiduciary duty and that these claims were barred by the statute of limitations.

STANDARD OF REVIEW

The parties disagree on the applicable standard of review. A declaratory judgment action is neither equitable nor legal, but is instead determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

Shirley argues the underlying action is to quiet title, which she requested in her amended complaint. An action to quiet title resides in equity. Van Every v. Chinquapin Hollow, Inc., 265 S.C. 474, 477, 219 S.E.2d 909, 910 (1975). When reviewing an equitable action heard first by a master-in-equity and appealed directly to an appellate court, the court should review the facts in accordance with its own view of the preponderance of evidence in the record. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990). This broad scope of review does not require the appellate court to ignore the fact that the master was in a better position to assess the credibility of witnesses and assign weight to their testimony. Id.

Myles argues the real issue is determining who has title to the marital home. The determination of who has title to real estate is a legal issue. Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (Ct. App. 1989). "In a law case tried by the judge without a jury the standard of appellate review is limited to a correction of errors of law and a determination if there is any evidence to support the factual findings of the trial judge." Id. (citing Wigfall v. Fobbs, 295 S.C. 59, 367 S.E.2d 156 (1988); Patterson v. I.H. Servs. Inc., 295 S.C. 300, 368 S.E.2d 215 (Ct. App. 1988)).

It is unnecessary for us to determine which standard of review is applicable in this particular case, as under either standard the result would be the same.

LAW/ANALYSIS

I. Family Agreement

Shirley argues the master erred in finding the existence of a family agreement to exchange Father's estate's half interest in the marital home for Mother's interest in a certificate of deposit. We disagree.

First, we note the South Carolina Probate Code generally requires family agreements to be in writing. S.C. Code Ann. § 62-3-912 (1987). However, the South Carolina Probate Code does not apply to this case, because the probate code took effect on July 1, 1987, after the agreement resulting in the swap of assets.[1]

The recognition of family agreements is favored by the courts, and the evidence in this case fully supports the making of such an agreement. Smith v. Williams, 141 S.C. 265, 279, 139 S.E. 625, 629 (1927). From a documentary perspective, Father's estate's half interest in the marital home was initially listed in the estate's probate papers. Mother then signed a

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[1] S.C. Code Ann. Code § 62-1-100 (Supp. 2006). Section 62-1-100(4) provides:

> [A]n act done before the effective date in any proceeding and any accrued right is not impaired by this Code. Unless otherwise provided in the Code, a substantive right in the decedent's estate accrues in accordance with the law in effect on the date of the decedent's death. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right . . . .

document disclaiming her interest in a certificate of deposit worth $230,000, allowing this sum to pass through the estate to the sons. Subsequently, an accounting was submitted by Myles, which listed the certificate of deposit but did not list the one-half interest in the marital home. Lastly, the deed of distribution was executed by Myles on behalf of Father's estate, giving Mother the entire interest in the marital home.

Additionally, the testimony of several parties corroborated the evidence regarding the existence of a family agreement. Kenneth Davis, the accountant who prepared the tax return for Father's estate, stated in a deposition:

> So all of us met - - Myles, Guy [Kenneth], Bob, and his mother. All these Osternecks and myself met in Guy's office. And that's when they told me that they had decided that they had made a swap of the CD for the - - for the house in her name. So - - and for me to go ahead and make the tax return based on - - and - - and whatever was best. So that's when I came up with the disclaimer.

At trial Myles testified, "[m]y brothers and myself agreed to exchange the half interest in my father and mother's home so that my mother had full title to the house in exchange for the $230,000." In addition, the testimony of Rhoda, discussed in more detail below, further corroborates the existence of the agreement.

Shirley correctly notes that certain tax returns for Father's estate indicate that Mother and Father jointly held title to the marital home as tenants by the entirety.[2] She contends therefore that the family believed Mother already owned the marital home outright, and she gave her disclaimer for no consideration. If so, there was no true exchange, and Father's half

[2] This is the presumption prevailing under North Carolina law, where the Osternecks had previously resided. See Nesbitt v. Fairview Farms, Inc., 80 S.E.2d 472, 476 (N.C. 1954).

interest in the house should remain in trust for the ultimate benefit of the sons or their heirs. Despite the tax returns, the greater weight of the evidence supports the existence of a family agreement. Consequently, the ruling of the master was appropriate.

II. Testimony Against Interest

Shirley further argues the master erred by admitting hearsay testimony from Rhoda Osterneck regarding statements by Rhoda's deceased husband, Robert. We disagree.

"The admission of evidence is a matter left to the discretion of the trial judge and, absent clear abuse, will not be disturbed on appeal." Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) (citation omitted). "In order for this court to reverse a case based on the erroneous admission or erroneous exclusion of evidence the plaintiff must show error and prejudice." Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970).

Rules 804(a)(4) and 804(b)(3) of the South Carolina Rules of Evidence provide exceptions to the hearsay rule if the declarant, in this case Robert, is unavailable due to death. The exception permits the admission of the statement if it is so far contrary to the declarant's pecuniary interest that a reasonable man in the same position would not have made the statement unless it was true. Rule 804(b)(3), SCRE.

Section 19-11-20 of the South Carolina Code (1976), the "Dead Man's" statute, bars the testimony of a person with an interest from testifying regarding a conversation with a deceased individual. However, the statute has many exceptions, including "witness testimony that is against his or her interest." Brooks v. Kay, 339 S.C. 479, 486, 530 S.E.2d 120, 124 (2000).

At trial, Rhoda agreed she was in the same legal position as Shirley because they are both widows of a son of Father and Mother. Rhoda testified her deceased husband had told her that the sons and Mother met with the accountant and decided Mother would disclaim her interest in the certificate

of deposit in exchange for Father's estate's one-half interest in the marital home.

Rhoda's testimony was against her personal interest, because she could make the same claim Shirley was pursuing for an interest in the marital home. Additionally, Rhoda's husband's statement was against his own interest because, if the family agreement did not exist and Mother disclaimed her interest in the certificate of deposit, the sons would have a windfall. Therefore, the master did not abuse his discretion in admitting Rhoda's testimony. Even if the master erred in admitting Rhoda's testimony, Shirley was not prejudiced due to the overwhelming evidence that the family agreement existed.

III. Deed of Distribution

Shirley argues the deed of distribution does not convey Father's one-half interest in the marital home to Mother. We disagree.

A deed of distribution from a personal representative is evidence that the distributee has succeeded to the interest of the estate. See S.C. Code Ann. § 62-3-908 (Supp. 2006). A personal representative is also authorized to make a distribution in kind pursuant to section 62-3-907 of the South Carolina Code (Supp. 2006).

Father's will vested in Myles, as executor, the following powers:

> (a) To sell, transfer and convey the whole or any part of the property, whether real or personal, constituting this estate or trust, at such times, in such manner, upon such terms and conditions, and for such price, as to the executor or trustee shall seem best, together with power to make, execute and deliver such instruments as shall be necessary to effectuate such sale or sales without an order of court.

Myles acted within his power as executor by releasing the estate's claim on the marital home in accordance with the family agreement through the deed of distribution. Therefore, relying heavily on the master's comprehensive opinion, we hold the equities and legal conclusions reside with Myles.

CONCLUSION

Accordingly, the master did not err in holding Myles the sole owner of title to the marital home because evidence established that a family agreement existed. Further, the master did not err in admitting Rhoda's testimony regarding statements made by her deceased husband, and Myles acted within his powers as executor in releasing Father's estate's claim on the marital home. Therefore, the master's ruling is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Terry Pressley,
Employee/Claimant, Respondent,

v.

REA Construction Company,
Inc., Employer,

and

Zurich-American Insurance
Company, Insurer, Appellants.

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4266
Heard April 5, 2007 – Filed June 27, 2007

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Stephen L. Brown, Matthew K. Mahoney, and Jeffrey J. Wiseman, all of Charleston, for Appellants.

Joe Ann Matthews Calvy, of Kingstree, for Respondent.

CURETON, A.J.: REA Construction Co., Inc. and Zurich-American Insurance Co. (collectively "Insurer") appeal the circuit court's order requiring them to provide Terry Pressley with a wheelchair accessible mobile home and awarding Pressley compensation for ten hours per day of non-professional home healthcare services. We affirm in part, reverse in part and remand.[1]

FACTS

On July 24, 2001, Pressley suffered a compensable injury to his spinal cord while working for REA. The injury rendered Pressley a paraplegic. Insurer admitted Pressley suffered a compensable injury and agreed Pressley was entitled to lifetime benefits. Accordingly, Insurer has continuously provided appropriate medical care and treatment to Pressley.

At the time of the accident, Pressley rented an apartment. After his injury, Pressley temporarily resided in various rehabilitation facilities and hospitals. In September 2002, Pressley moved in with his mother (Mother) where he has lived since. Initially, when Pressley moved in with Mother, professional caregivers attended to his needs about eight hours per day, five days a week. For reasons the record does not reveal, professional care has since diminished to four hours per day. Mother takes care of him at all other times.

At some point, to accommodate Pressley's needs, Insurer made minor modifications to Mother's house. However, the modifications only allowed Pressley to access his bedroom; Pressley could not access any other room, including the kitchen or the bathroom. Mother's house could be modified to become completely handicap accessible for a cost

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

of approximately $68,400,[2] which, according to one estimate, is almost as much as the cost of a new house upfitted for wheelchair accessibility.

In June 2002, Pressley filed a Form 50 with the Workers' Compensation Commission seeking, in relevant part, increased medical care and wheelchair accessible housing. After a hearing, the Single Commissioner held Pressley was entitled to: (1) professional home healthcare for six hours a day, seven days a week; (2) non-professional healthcare (from Mother or other non-professional) for ten hours a day, seven days a week, at $7.00 per hour; and (3) wheelchair accessible housing. To determine the most appropriate method of providing wheelchair accessible housing, the single commissioner instructed Insurer to provide cost estimates for modifying Mother's house, providing a wheelchair accessible apartment, purchasing wheelchair accessible housing with ownership reverting to or retained by Insurer, and other appropriate options.

On appeal, an appellate panel of the Workers' Compensation Commission (hereafter Commission) affirmed the Single Commissioner. However, the Commission's order included two "amendments" to the Commissioner's order: "Housing: Carrier to provide handicap accessible housing-mobile home or residential care facility. If housing is mobile home, the ownership remains with carrier. Finding of Fact #7: [Pressley] entitled to eight hours professional home health care seven days a week; [Pressley] entitled to additional rehabilitation training." The circuit court affirmed the Commission's ruling "in regards to wheelchair accessible housing" and found Pressley was "entitled to eight hours of professional home healthcare as ordered by the [Commission]," and further held Pressley was "entitled to ten hours of non-professional care as ordered by the single commissioner." This appeal followed.

[2] Pressley testified it would cost $70,000 to upfit his mother's home, while a contractor submitted an estimate for $68,400 to make the home wheelchair accessible.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of an administrative agency." Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). Section 1-23-380(A)(5) of the South Carolina Code (Supp. 2006) establishes the substantial evidence rule as the standard of review. Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law, but may only reverse or modify an agency's findings of fact if they are clearly erroneous. See § 1-23-380(A)(5)(d) and (e).

"On appeal, this court must affirm an award of the Workers' Compensation Commission in which the circuit court concurred if substantial evidence supports the findings." Peoples v. Henry Co., 364 S.C. 123, 127, 611 S.E.2d 527, 528-29 (Ct. App. 2005). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted).

The primary rule of statutory construction is that the courts must ascertain the intention of the legislature. Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). The interpretation of a statute involves a question of law for the court. Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). Thus, this court is free to decide matters of law with no particular deference to the trial court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Nevertheless, ordinarily, the construction of a statute by an agency charged with its administration will be accorded the most respectful deference and will not be overruled absent compelling reasons. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410,414 (2002).

LAW/ANALYSIS

I. Purchase of Wheelchair Accessible Mobile Home

Insurer argues the circuit court erred in affirming the Commission's order requiring Insurer to purchase Pressley a wheelchair-accessible mobile home.[3] Specifically, Insurer contends the Commission does not have the statutory authority under § 42-15-60 of the South Carolina Code (1985) to require an Insurer to cover the total purchase price of a wheelchair accessible mobile home. Insurer contends the statute only gives the Commission authority to require the payment of necessary costs to make housing provided by claimant handicap accessible, i.e. the difference between a comparable new mobile home and a new modified mobile home.

Section 42-15-60 governs the Commission's award of reasonably necessary medical costs. Section 42-15-60 provides, in pertinent part: "In cases in which total and permanent disability results, reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital and other treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit." (emphasis added). Thus, this appeal presents the novel issue of whether the Commission has the statutory authority to require an insurer to provide the base cost of furnishing an employee handicap accessible housing. Both parties rely on Strickland v. Bowater, Inc., 322 S.C. 471, 472 S.E.2d 635 (Ct. App. 1996) as furnishing the answer to this question.

In Strickland, this court analyzed whether § 42-15-60, in particular the provision allowing for "other treatment or care," authorizes the Commission to require an Insurer to pay the full cost of a van modified to accommodate the handicapped claimant. In Strickland, the employer agreed to pay the costs associated with modifying the van

[3] We note the Commission's order appears to provide that the purchase of the mobile home is one option Insurer may undertake and does not specifically require Insurer to purchase the mobile home.

and acquiesced to the Commission's order to pay the cost difference between an unmodified van and a mid-range automobile of the same year. On appeal, the employee argued the Insurer should also be required to pay the "base cost" of the modified van. We held: "While the provisions of the workers' compensation law are entitled to a liberal construction in favor of the employee, we do not believe that under our present statute an employer could be required to pay for [the base costs of the unmodified van]." Id. at 474, 472 S.E.2d at 637.

In Thompson v. S.C. Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006) (cert. pending), we examined whether the Commission erred in denying an employee's request for funds to upfit his new home to accommodate his special needs. In Thompson, the Commission ordered employer to advance the employee a lump sum to purchase a new home; however, the Commission did not require the employer to pay the costs for modifying the employee's new home. Id. at 610-11, 632 S.E.2d at 877. Both parties appealed. This court affirmed the partial-lump sum award[4] and held the employer must also pay to upfit the employee's home because "[t]he modifications are necessitated solely by [employee's] admittedly compensable injury." Id. at 619, 632 S.E.2d at 882. Thus, the employer was required to both advance sums to purchase the employee's new home, and pay the cost to modify it.

While Strickland and Thompson offer guidance as to the appropriate interpretation of §42-15-60, neither case controls our analysis in the present appeal. In Strickland, the employer agreed to pay certain costs directly connected to employee's handicapped condition (the costs of modification and increased price of van over average mid-size car). As such, Strickland only stands for the proposition that the Commission has authority to require an employer to pay for that portion of the base cost an employee's unmodified van that exceeds the price of an average mid-sized car. Similarly, in Thompson, the employer only argued the partial-lump sum advance for

[4] This lump-sum was to be deducted from the employee's life time benefits.

the new house, i.e. the "base cost," violated section 42-9-10 of the South Carolina Code (Supp. 2005); the employer did not contend the Commission lacked the authority to make such an award. Id. at 614-15, 632 S.E.2d at 879. Accordingly, Thompson fails to articulate whether § 42-15-60 allows the Commission to require the employer to pay the "base cost" of the employee's new home.

Inasmuch as our Worker's Compensation Act is modeled after the North Carolina Act, we naturally look to North Carolina's decisions in interpreting similar provisions. As stated in Strickland, the North Carolina Supreme Court held in Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986) that "other treatment or care" as contained in its statute required an employer to provide an employee with wheelchair-accessible housing. However, we note that in the subsequent North Carolina Court of Appeals case of Timmons v. N. C. Dep't of Transp., 123 N.C. App. 456, 462-63, 473 S.E. 2d 356, 360 (Ct. App. 1996), that court found that the employer did not have to absorb the entire cost of constructing the claimant's new residence. The court reasoned:

> We do not agree with [claimant], however that Derebery requires [employer] to pay the entire cost of constructing his residence. As pointed out by Justice (later Chief Justice) Billings in her dissent in Derebery, the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Workers' Compensation Act. The costs of modifying such housing, however, to accommodate one with extraordinary needs occasioned by a workplace injury, such as the [claimant] in this case, is not an ordinary expense of life for which the statutory substitute wage is intended as compensation.

Id. at 461-62, 473 S.E.2d at 359 (affirmed by Timmons v. N.C. Dep't of Transp., 346 N.C. 173, 484 S.E.2d 551 (1997)).

We are in agreement with what appears to be the law of North Carolina that the base cost of providing an injured employee housing is an ordinary necessity of life which the statutory substitute for wages should be utilized by the employee to obtain. We, therefore, reverse the circuit court's order to the extent it holds that section 42-15-60 permits the Commission to order an employer to pay the base cost of handicap accessible housing.

At oral argument, it developed that although the employer is willing to provide care for Pressley in a residential care facility, Pressley has refused the same. On the other hand, although Pressley appealed to the circuit court the Commission's failure to "enter specific findings as to its basis/rationale for determining that [employer] is only required to provide [him] handicap accessible housing-mobile home or residential care facility," he has not appealed the failure of the trial court to address that issue. Moreover, the Commission adopted "in toto" the findings of fact of the Single Commissioner which required Insurer to provide a factual basis to enable it to determine what type of handicap accessible housing would be appropriate for Pressley. This has never been done, and the Commission did not have this information before it when it made its decision. The posture of the case is further complicated by the failure of the Commission and trial court to specify whether Insurer or Pressley has the option to choose which of the two types of housing enumerated in the Commission's order the Insurer must provide.

Under the unique facts of this case, it appears that under both Strickland and Thompson, the Commission could have ordered the Insurer to absorb the cost to modify Pressley's mother's house. Moreover, the record indicates that the cost to modify the mother's house totals between $68,400[5] and $70,000.[6] According to the trial court, the apparent reason for the Commission not ordering that option

[5] As stated by a builder.

[6] As testified to by Pressley.

was its economic infeasibility. Under the confused posture of this case, justice demands we remand to the Commission to determine what wheelchair accessible housing is appropriate in light of our decision that the statute does not permit the Commission to require the employer to pay the base cost of a wheelchair accessible mobile home.

II. Non-Professional Care

Insurer argues the circuit court erred in finding Pressley was entitled to receive ten hours per day of non-professional home healthcare. We agree.

Section 42-15-60 also controls our analysis of this issue. Pursuant to section 42-15-60, an injured employee is entitled to receive "reasonable and necessary nursing services."

The Single Commissioner, under findings of fact #7 held:

> [Pressley] is entitled to professional home health care for 6 hours a day, 7 days a week. [Pressley]'s mother or other non-professional should be paid $7.00 an hour for 10 hours a day, 7 days a week. This is a total of 16 hours of health care [sic] and/or assistance per day.

The Commission's order also contained an amendment which read: "Finding of Fact #7: [Pressley] entitled to eight hours professional home health care seven days a week; [Pressley] entitled to additional rehabilitation training." The circuit court held Pressley was entitled to eight hours professional home healthcare as ordered by the Commission and ten hours non-professional care as ordered by the Single Commissioner. The circuit court also remanded the case to the Commission to determine the appropriate compensation rate for non-professional healthcare providers.

Insurer contends the Commission's order implicitly reversed the Single Commissioner's order in regards to non-professional care. We agree. The Commission's order amends finding of fact # 7 to award 8

hours of professional care and eliminates any requirement to pay for non-professional care. Pressley appealed the Commission's failure to provide for non-professional care to the circuit court, which awarded 10 hours of non-professional care daily.

Before the Single Commissioner, Pressley testified he needs assistance throughout most of the day and, at times, when he wakes in the middle of the night. Pressley also testified he believes he needs help twenty-four hours a day. Further, a doctor's evaluation provides that while Pressley is able to perform some self-care functions he "will always need a caregiver to assist him with all the activities of daily living." On the other hand, Dr. Adora Matthews of Palmetto Rehabilitation Medicine stated that "Pressley will benefit from some care in the home, probably up to 8 hours per day."

Although there is evidence that some non-professional care is needed, there is no basis for the finding of the circuit court awarding 10 hours of non-professional care.[7] After a thorough review of the record, we hold substantial evidence supports the finding of the Commission regarding the professional care needed by Pressley, but not a finding that Pressley does not need any non-professional home care. Moreover, while the circuit court could have found the evidence mandated remand to the Commission for a determination of the appropriate hours of non- professional care, the court was not free to establish the hours at ten hours per day. We therefore remand to the Commission the issues of the appropriate number of non-professional hours of care Pressley is entitled to and the establishment of the rate to be paid for that care.

[7] In this regard, the Commission, not the circuit court is the fact finder as to how much non-professional care Pressley is entitled to.

CONCLUSION

We find the circuit court erred in concluding the Insurer was required to provide Pressley with a handicap accessible mobile home. Additionally, the court erred in ordering employer to pay for ten hours per day of non-professional care. We therefore remand this case to the Commission to determine the appropriate handicap accessible housing for Pressley, the appropriate number of hours of non-professional care he may be entitled to receive, and the rate at which the care is to be paid. On both issues, the Commission shall with specificity set forth the basis for its decision in accordance with Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) and Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991). Accordingly, the order of the circuit court is

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

BEATTY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Terry Bernard Davis, Appellant.

Appeal From Florence County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4267
Submitted April 2, 2007 – Filed June 28, 2007

AFFIRMED

Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

GOOLSBY, J.: Terry Bernard Davis ("Davis") appeals his conviction for voluntary manslaughter. Davis argues that the trial judge erred in declining to charge the jury on involuntary manslaughter. We affirm.[1]

FACTS

Davis, along with his cousin Robert Britton, lived in the home of his brother, Christopher Davis ("Christopher"). Davis, a crack cocaine user, allowed Kevin Harrison and Shontae Broaddus to sell crack cocaine out of Christopher's home in exchange for some of their crack cocaine.[2] Davis also acted as a sort of middleman for Harrison and Broaddus, bringing customers to the dealers in exchange for a portion of the crack cocaine being sold. Davis allowed Bridgette Martin, a fellow crack cocaine user, to live in the home.[3]

Before leaving for work on the morning of October 1, 2003, Christopher told Davis that Harrison and Broaddus could no longer stay in the house and that Davis would have to ask them to leave. Broaddus overheard Christopher's request and, realizing he was no longer welcome, decided to leave. Broaddus commented to Harrison that he should leave too; however, Harrison ignored him and returned to a recliner he had been sleeping in earlier.

Davis, in a statement to the police, claimed he asked Harrison to leave the residence. By this time, Christopher, Broaddus, and Britton had already left the house. Harrison supposedly pulled out his handgun, put it to Davis's head, and told Davis to leave him alone. Harrison reportedly said he had given Davis enough crack cocaine to entitle him to remain in the home until

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

[2] Harrison is also referred to by his alias "Little K" throughout the record.

[3] Martin testified she only stayed at the home during the daytime.

10 a.m. Davis returned shortly thereafter with Britton's five-pound sledgehammer, wrapped a towel around the head of it, and hit Harrison twice in the head with it. Harrison was seated in the recliner when Davis struck him with the sledgehammer. The first blow supposedly stunned Harrison, but Davis claimed he needed to hit Harrison again to prevent Harrison from using his gun. Davis then enlisted Martin's help, the only other person in the house at that time, and the two of them dragged Harrison's body outside. Davis repeated this version of events to Christopher and Britton, although in Britton's version Davis claimed he only intended to knock Harrison out and remove him from the home.

Martin testified she did not hear Davis and Harrison argue that day. Before Harrison was killed, Davis told her, "I'm gone [sic] kill that b***h." Martin initially ignored the statement, but Davis returned later and said, while dragging Harrison's body past the bedroom door, that he "kill[ed] that b***h." Davis was holding a sledgehammer with the hammer part wrapped in a towel as he dragged Harrison's body. Martin testified Davis had threatened other dealers in the past, often with a variation of the phrase "[I will] [k]ill you and smoke your s**t like a chimney"; however, the threats were never taken seriously. Martin admitted she smoked crack cocaine and consumed alcohol on the morning that Harrison was killed.

Davis traded Harrison's gun and cell phone for $40 in crack cocaine. Martin also claims that Davis took Harrison's supply of crack cocaine and offered to share with her. A neighbor discovered Harrison's body, wrapped in a carpet, situated between his yard and Christopher Davis's property.

An autopsy of Harrison revealed an injury to his skull, caused by a significant blow to the side of Harrison's head, which produced a fracture at the base of Harrison's skull from ear to ear. The forensic pathologist who conducted the autopsy, Dr. Janice Ross, opined that Harrison's injury was consistent with one or two blows from a sledgehammer that he received

while seated. Her examination of Harrison did not reveal any defensive wounds.[4]

Davis was indicted for murder. Davis's counsel requested jury instructions on involuntary manslaughter and self-defense. The State objected to the involuntary manslaughter charge and the trial court declined to charge the jury on involuntary manslaughter. The jury found Davis guilty of voluntary manslaughter, and the trial court sentenced him to thirty years imprisonment.

STANDARD OF REVIEW

"The law to be charged must be determined from the evidence presented at trial."[5] "To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."[6] "Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense."[7]

LAW/ANALYSIS

Davis argues the trial judge erred by declining to instruct the jury on the lesser included offense of involuntary manslaughter.

Involuntary manslaughter is defined as "the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not

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[4] Dr. Ross testified that defensive wounds are wounds incurred by the victim while trying to defend from an attacker. These injuries are usually in the form of bruises or lacerations on the outside of the arms or hands.

[5] State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006).

[6] Id. at 232, 625 S.E.2d at 245 (Ct. App. 2006).

[7] State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992).

amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others."[8] "To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others."[9]

Davis relies on State v. Chatman for the proposition that an intentional act causing death does not necessarily preclude involuntary manslaughter.[10] We believe Chatman is distinguishable from the case at hand. Chatman was engaged in an assault and battery with the victim, during which Chatman, while facing the victim, pressed his shoulder into the victim's neck.[11] Although Chatman released the victim shortly thereafter, the victim "died as a result of asphyxiation due to manual strangulation."[12] Chatman's actions did not fit the typical strangulation type situation because he did not place his hands around the victim's neck.[13] As a result, the court concluded Chatman was entitled to a charge on involuntary manslaughter because his actions were not the kind that would naturally tend to cause serious bodily injury or death.[14] We think the facts in this case do not fit the first definition of involuntary manslaughter, as the court used in deciding Chatman, because

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[8] State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006).

[9] State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003).

[10] State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999).

[11] Id. at 152-53, 519 S.E.2d at 101-02.

[12] Id. at 152, 519 S.E.2d at 101.

[13] Id. at 153, 519 S.E.2d at 101-02.

[14] Id. at 152-53, 519 S.E.2d at 101-02.

striking someone on the side of the head with a five-pound sledgehammer would naturally tend to cause death or great bodily injury.[15]

Davis also argues the facts of this case fit the second definition of involuntary manslaughter. He contends he acted lawfully by arming himself in self-defense to drive out an armed trespasser. Davis fails to meet the second definition of involuntary manslaughter because there is no evidence he handled the sledgehammer with reckless disregard for the safety of others. The evidence firmly establishes that Davis intentionally struck Harrison on the head with the sledgehammer.[16]

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[15] We note that Davis may have wrapped the head of the sledgehammer in a towel. There is no evidence, however, that this lessened the tendency of a five-pound sledgehammer to cause death or great bodily injury if used to strike someone in the head. See State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 850-51 (1997) ("A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm."); Commonwealth v. Marks, 704 A.2d 1095, 1100 (Pa. Super. Ct. 1997) (categorizing a sledgehammer as a deadly weapon when used upon a vital part of the body such as the head).

[16] See State v. Smith, 315 S.C. 547, 550, 446 S.E.2d 411, 413 (1994) (holding "the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence."); State v. Morris, 307 S.C. 480, 484, 415 S.E.2d 819, 821-22 (Ct. App. 1991) (holding the defendant was not entitled to a charge of involuntary manslaughter where there was no evidence that he involuntarily pulled his gun and shot the victim, noting the act must be unintentional to constitute criminal negligence); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (finding involuntary manslaughter charge not warranted by the evidence where the defendant intentionally fired his shotgun but claimed he meant to shoot over the victim's head); Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (finding no evidence to support an allegation of mere criminal negligence in the use of a dangerous instrumentality because the defendant intentionally fired his weapon); State v. Light, 363 S.C. 325, 331 n.1, 610 S.E.2d 504, 507 n.1 (Ct. App. 2005)

Based on the above, we hold the trial court did not commit error in denying Davis's request for a jury charge on involuntary manslaughter.

AFFIRMED.

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

(noting that evidence tending to show the intentional use of a weapon would not support an involuntary manslaughter charge).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Annabelle Shelton, Appellant,

v.

LS&K, Inc., Respondent.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4268
Submitted April 2, 2007 – Filed June 28, 2007

AFFIRMED

Rodney M. Brown, of Fountain Inn, for Appellant.

Phillip E. Reeves, of Greenville, for Respondent.

HEARN, C.J.: Annabelle Shelton appeals the trial court's granting of summary judgment to LS&K, Inc., and its denial of Shelton's motion to reconsider. We affirm.

FACTS

This case arises out of an accident that occurred on May 7, 2004 in front of a Burger King franchise owned and operated by respondent LS&K. The accident occurred when Jo Ann Suttles was exiting the parking lot to turn onto North Main Street in Fountain Inn, South Carolina. The driveway exit crossed a pedestrian sidewalk to reach the street.

Immediately prior to the accident, Suttles approached the parking lot exit and stopped her vehicle to wait for traffic to pass before making a right turn. Unbeknownst to Suttles, Annabelle Shelton was walking along the sidewalk to the right of Suttles' car. When the traffic cleared, Suttles started her right-turn and struck Shelton as she crossed the driveway on the sidewalk.

Shelton sustained a head injury and has no recollection of how the accident occurred. Officer R. E. Inman saw the accident as Shelton was struck by the car, but did not see any of the preceding events. There were no other witnesses.

The dispute in this case centers on a Bradford Pear tree which was located to Suttles' right as she exited the parking lot onto North Main. Suttles testified that she frequently visited the Burger King and was familiar with the parking lot and the location of the pear tree. Shelton maintains that the tree obscured Suttles' view of Shelton walking on the sidewalk. Shelton alleged that LS&K was negligent in failing to maintain its premises so that drivers exiting the parking lot had a clear view of pedestrians on the sidewalk.

Shelton filed her amended complaint in September of 2004, alleging that LS&K was negligent in the design of its landscaping and parking lot and causing and/or contributing to the accident. After discovery, LS&K moved for summary judgment, arguing no genuine issue of material fact existed as to the elements of negligence. The trial court granted its motion, finding Shelton did not provide evidence that LS&K breached any duty of care owed to her, and that she did not provide evidence of proximate cause. The trial

court concluded Shelton failed to establish a prima facie case of negligence against LS&K, because she offered no expert testimony to establish the appropriate standard of care. This appeal followed.

STANDARD OF REVIEW

Appellate courts review a grant of summary judgment under the same standard applied by the circuit court pursuant to Rule 56, SCRCP. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. When reviewing the record, the evidence and all inferences which can be reasonably drawn therefrom are viewed in the light most favorable to the nonmoving party. Id. 361-62. The existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. Bravis v. Dunbar, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact. McNair v. Rainsford, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct. App. 1998). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing the trial court there is an absence of evidence to support the nonmoving party's case. Id.

LAW/ANALYSIS

I. Breached Duty of Care

Shelton first argues the court misapprehended her negligence claim as an allegation of negligent design, and therefore improperly ruled against her based upon lack of expert testimony. We disagree.

The trial court held there was no evidence to establish that LS&K breached any duty of care owed to the plaintiff because it found that negligence in the design and construction, as a matter of professional negligence, requires qualified expert testimony to establish both the standard

of care for design and construction of the parking lot, and LS&K's deviation therefrom. Notably, Shelton conceded before the circuit court that the design of a parking lot is a matter not within the expertise of a layperson. Thus, because Shelton's only expert had no opinion relating to the design of the parking lot or any other standard of care, the court concluded that Shelton presented no evidence of a breached duty of care.

On appeal, Shelton argues that it was never her position that the parking lot was designed improperly. However, Shelton's complaint and arguments at trial are at odds with this contention. Shelton's amended complaint alleges that LS&K was negligent in "[p]lacing inappropriate trees, shrubbery and landscaping around the driveway," and in "[f]ailing to appropriately delineate where the sidewalk was with any sort of lineage." Also, at the summary judgment hearing, Shelton argued to the trial court: "They designed the lot. They designed where the exit was. They designed where the tree was planted and they planted it." We find that these allegations and arguments did indeed contemplate a claim of negligence in the design. "It is well settled that one cannot present and try [her] case on one theory and then change [her] theory on appeal." Gurganious v. City of Beaufort, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995).

Moreover, even if this was not a design defect case, we would affirm the trial court's grant of summary judgment. In deciding whether a defendant acted negligently, "[t]he court must determine, as a matter of law, whether the defendant owed the plaintiff a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." Underwood v. Coponen, 367 S.C. 214, 217, 625 S.E.2d 236, 238 (Ct. App. 2006). Here, Shelton failed to supply any evidence, expert or otherwise, regarding the proper placement and maintenance of trees in a commercial parking lot. Thus, based on the evidence presented, the visual obstruction caused by the tree was no different than an obstruction caused by a building or anything else encountered in daily life. We find that without any basis on which a jury might differentiate between those visual obstructions which are permissible and those which are not, a jury would have to engage in pure

conjecture and speculation in deciding how LS&K should have designed or maintained its parking lot.[1]

Underwood v. Coponen is factually a very similar case. In Underwood, the trial court granted summary judgment in favor of a defendant landowner whose tree obstructed a stop sign, thereby causing a motorist to be involved in a collision. 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006). The court of appeals affirmed summary judgment because Underwood failed to establish a legal duty on the part of the landowner to prevent his tree from causing such obstruction. Likewise, Shelton does not establish a legal duty on the part of LS&K to prevent the obstruction caused by the Bradford pear tree in this case.

Further, Shelton's own expert testified that Suttles had an unobstructed view twenty-five feet down the sidewalk to her right before she struck Shelton and that Shelton had an unobstructed view of the front of Suttles' vehicle from forty-five feet away. Shelton provided no evidence of how far a pedestrian and a driver should have been afforded unobstructed views at the parking lot exit, and she provided no evidence that these views were insufficient. See Williams v. Lancaster County School Dist., 369 S.C. 293, 307, 631 S.E.2d 286, 294 (Ct. App. 2006) (summary judgment upheld because of claimant's "inability to establish evidence to support the elements required under the claim").

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[1] South Carolina does recognize a duty of reasonable care on the part of urban landowners to inspect trees on their property and make sure they are safe. Underwood v. Coponen, 367 S.C. 214, 217, 625 S.E.2d 236, 238 (Ct. App. 2006). But this duty extends only to ensuring that a tree is not "unsound or defective." Israel v. Carolina Bar-B-Que, 292 S.C. 282, 288-90, 356 S.E.2d 123, 127-28 (Ct. App. 1987) (holding an urban landowner liable for damage caused by a fallen limb because there was evidence that the owner saw or could have seen upon reasonable inspection that the tree was partially decayed). Because the only alleged defect of the tree was that it obscured Suttles' vision at some point before she reached the sidewalk, the Israel rule does not apply to these facts. Underwood v. Coponen, 367 S.C. 214, 218, 625 S.E.2d 236, 238 (Ct. App. 2006).

Finally, landowners generally do not owe a duty to warn others of an open and obvious condition on the property. See Denton v. Winn Dixie Greenville, Inc., 312 S.C. 119, 121, 439 S.E.2d 292, 294 (Ct. App. 1993) (affirming summary judgment in a negligence action where customer tripped over a shopping cart corral in a parking lot, reasoning corrals are common structures that a person taking reasonable care for her own safety would likely expect and see while on the premises). Absent any evidence that LS&K created an unreasonably dangerous condition, there is no genuine issue of material fact and summary judgment is appropriate. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 629, 541 S.E.2d 831, 833 (2001). Because Shelton has failed to provide any evidence to establish how the presence of the tree was unreasonable, she failed to meet her burden of proof. Therefore, we find no error by the trial court in granting summary judgment.

II. Proximate Cause

Second, Shelton argues that the court improperly ruled against her based on lack of evidence of proximate cause. Because we affirm summary judgment based on the duty of care and breach elements, we do not reach Shelton's second argument.

CONCLUSION

Based on the undisputed facts of this case, viewed in the light most favorable to Shelton, we find that Shelton failed to present evidence of a duty on the part of LS&K, or that such a duty was breached. Based on the foregoing, the order of the trial court is

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda McPhail Wilson, Respondent,

v.

State Budget and Control Board
Employee Insurance Program, Appellant.

Appeal From Florence County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4269
Hearn June 5, 2007 – Filed June 29, 2007

REVERSED

Michael T. Brittingham and James T. Hedgepath, of Greenville, for Appellant.

G. Conrad Derrick, of Florence, for Respondent.

HEARN, C.J.: The State Budget and Control Board Employee Insurance Program (the Insurance Program) appeals the circuit court's award of long term disability benefits to Linda McPhail Wilson. The Insurance Program argues the circuit court exceeded its scope of review when it

reversed the Long Term Disability Appeals Committee's denial of Wilson's claim. We agree and reverse.

FACTS

Wilson, a "job developer" for the Darlington County Disabilities and Special Needs Board, applied for long term disability benefits after she was involved in an automobile accident on April 28, 2001. She sought disability benefits due to an alleged injury to her lower back and knee.

Initially, Wilson's claim was reviewed by Standard Insurance Company (Standard), the third-party claims administrator for her long term disability plan. Standard denied the claim, and Wilson requested a review of the denial. For the review, Wilson submitted additional medical records, but again, Standard denied her claim. After receiving this second denial, Wilson sought an independent review from Standard's Quality Assurance Unit, which also denied Wilson's claim. After this denial, Wilson pursued an appeal to the Employee Insurance Program's Long Term Disability Appeals Committee (Appeals Committee). This three-member committee conducted a de novo review of Wilson's Long Term Disability Insurance Plan (the Insurance Plan) and Wilson's medical records.

According to the Insurance Plan, employees are considered disabled if an injury renders them unable to perform "with reasonable continuity the Material Duties of [their] Own Occupation." The Insurance Plan further explains:

> Own Occupation means any employment, business, trade, profession, calling or vocation that involves Material Duties of the same general character as your regular and ordinary employment with the Employer. Your Own Occupation is not limited to your job with your Employer.

According to the generic description of a "Job Developer," the position involves standing, walking, sitting, lifting, carrying, pushing, pulling, climbing, stooping, kneeling, crouching, crawling, and reaching, among other less strenuous activities. However, Wilson's supervisor, Christopher Woods, stated that Wilson's job merely required frequent driving, walking, and standing with no lifting. Furthermore, Karol Paquette, Wilson's vocational case manager, reported that the physical requirements of Wilson's job did not require crawling, kneeling, crouching, or climbing. Paquette opined that Wilson's job might fall in the "sedentary to light range of strength."

In addition to this evidence regarding Wilson's "Own Occupation," the Appeals Committee also reviewed a long transcript of medical records from five different physicians: Dr. Hyler, Wilson's family doctor; Dr. Faulstich, Wilson's radiologist; Dr. Healy, a neurologist; Dr. Beeson, a board-certified internist; and Dr. DeMichele, a neurologist.

Dr. Hyler noted that Wilson experienced "spasms and pain in [her] lower back," and he recommended she stop working after the accident. He referred Wilson to a neurologist. As of July 5, 2001, Dr. Hyler opined she could likely return to work in three months.

On June 6, 2001, Dr. Faulstich performed an MRI of Wilson's spine and found no abnormalities. The record before the Appeals Committee also contained an X-Ray of Wilson's spine taken the day of her accident. This X-Ray did not reveal any abnormalities either.

Dr. Healy, the neurologist to whom Dr. Hyler referred Wilson, also reviewed the June 6, 2001 MRI and found it "unremarkable." He suggested Wilson pursue physical therapy to alleviate her pain.

Dr. Beeson reviewed Wilson's medical records at the behest of Standard, the third-party insurer. In August of 2002, he found that based on the information from Wilson's treating physicians, Wilson could "continue to work in a sedentary or light occupation such as that of a job development specialist."

In October of 2002, Wilson consulted Dr. DeMichele, who ordered a bone scan of Wilson's entire body. The bone scan showed signs of arthritis in Wilson's back. Dr. DeMichele also had Wilson participate in a lower body nerve conduction study. The results showed evidence of nerve damage in Wilson's left leg.

After visiting with Dr. DeMichele, Wilson submitted the results of her bone scan and nerve conduction study to Dr. Beeson. Even in light of this additional information, Dr. Beeson was of the opinion that Wilson could perform a light work occupation.

Before the Appeals Committee made its determination, Wilson submitted a February 18, 2003 note from Dr. DeMichele, which stated Wilson was "totally and permanently disabled." Wilson also submitted notes from her March 19, 2003 visit with Dr. DeMichele, which stated, "If they could read, they would see a nerve conduction study . . . which shows diffuse polyneuropathy in [Wilson's] lower extremity." The notes also opined that Wilson had osteoarthritis and other problems in her lower back.

With these facts before it, the Appeals Committee unanimously denied Wilson's claim, finding "insufficient medical documentation to support limitations or restrictions that continued through the end of the [Plan's 90-day Benefit Waiting Period]." The Appeals Committee also found Wilson's occupation involved "sedentary-light work" and that she was capable of performing the duties required of her.

After receiving this decision from the Appeals Committee, Wilson submitted documentation establishing that she had been approved to receive Social Security Disability. The Appeals Committee reconsidered the case in light of the finding of disability by the Social Security Administration, but reaffirmed its denial of Wilson's claim. The Appeals Committee noted that it was bound by the Long Term Disability Income Benefit Plan, and the information provided regarding Social Security benefits did not alter the Committee's original decision that Wilson did not meet the Plan's definition of disabled.

Wilson appealed this decision to the circuit court. After hearing oral argument from counsel, the circuit court suggested an independent medical examination be conducted by Dr. Donald Johnson, a surgeon at the Southeastern Spine Institute. Both parties consented, and Dr. Johnson examined Wilson and her medical records. Based on his examination, Dr. Johnson opined: "Based on the medical records, particularly the objective information that I have seen, I would expect that this patient should be able to return to sedentary/light work."

Despite Dr. Johnson's independent medical examination, the circuit court found the decision of the Appeals Committee was arbitrary, capricious, and clearly erroneous in light of the substantial evidence in the record. Specifically, the circuit court found the Appeals Committee erred in relying on the opinion of Dr. Beeson, a non-treating internist, rather than on the opinions of her treating physicians, particularly that of Dr. Hyler and Dr. DeMichele. Pursuant to its holding, the circuit court awarded Wilson $36,800 in retroactive benefits and continuing benefits as allowed under the Long Term Disability policy. This appeal followed.

STANDARD OF REVIEW

Pursuant to section 1-23-380(6) of the South Carolina Code (2005), when the circuit court reviews the final decision of an agency, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Rather, the decision of the agency should be affirmed unless it is clearly erroneous in light of the substantial evidence in the record, is arbitrary or capricious, or is affected by other error of law. S.C. Code Ann. § 1-23-380(6) (2005).

LAW/ANALYSIS

The Insurance Program argues the circuit court erred in finding the denial of benefits to Wilson was not supported by substantial evidence. We agree.

Although Wilson presented evidence to the Appeals Committee supporting her disability claim, the Committee also had before it substantial evidence to the contrary. The X-Ray of Wilson's spine taken immediately after the accident showed no abnormalities, and both Dr. Faulstich and Dr. Healy found no abnormalities in the MRI performed on Wilson's lumbar spine in June of 2001. Based on a review of Wilson's medical records, Dr. Beeson unequivocally found Wilson was not disabled. Furthermore, substantial evidence in the record supported the finding that Wilson's job required light to sedentary work. Thus, even though the bone scan showed that Wilson suffered from osteoarthritis, substantial evidence did not demonstrate why such a condition would prevent her from performing light duties. Notably, both parties consented to allowing Dr. Johnson to perform an independent medical examination of Wilson for the circuit court's benefit. Dr. Johnson's opinion reaffirmed the opinion of the Appeals Committee that Wilson was capable of performing light work.

While we recognize that Dr. DeMichele and the Social Security Administration found otherwise, we remain cognizant that as an appellate court, we must affirm an agency's decision when substantial evidence supports the decision. See Converse Power Corp. v. S.C. Dep't of Health and Envtl. Control, 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002) ("Under our standard of review, we may not substitute our judgment for that of an agency unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record."). Accordingly, based on the substantial evidence refuting Wilson's disability claims, the circuit court's award of benefits is

REVERSED.

KITTREDGE, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Henry Ward, Appellant.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 4270
Heard May 7, 2007 – Filed June 29, 2007

AFFIRMED

William J. Watkins, Jr. of Greenville, and Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody Brown, of Columbia, for Respondent.

HEARN, C.J.: John Henry Ward appeals his murder conviction, arguing the trial court erred by (1) refusing to grant a mistrial after the State insinuated the crime revolved around gang activity, (2) permitting autopsy photos to be admitted, (3) charging the jury that "the hand of one is the hand of all," (4) refusing to grant a directed verdict in Ward's favor, and (5) allowing the State to play a recording of a co-defendant's testimony from a prior trial. We affirm.

FACTS

During the early morning hours of May 11, 2003, Jamie Simmons was fatally wounded when a gunfight broke out in the parking lot area of Club Diamante in Charleston County. Simmons, who had the misfortune of stopping outside the club on his way home from work to speak with his cousin, had not been involved in the altercation. Instead, the tragedy resulted from a long-running feud between residents of two communities – the Petersfield community and the Cherry Hill community. This particular fight erupted when John Campbell, a man from Cherry Hill, danced with the girlfriend of Keith Richards, a man from Petersfield. The fight began indoors, but moved outdoors where it continued to escalate.

Once outdoors, Campbell ran to a truck where his cousin, Kevin Dunmeyer, was waiting to give Campbell a ride home. As Campbell tried to flee the scene, a group of Petersfield men, which included Appellant Ward and his co-defendant Tremayne Washington, confronted Dunmeyer and Campbell. Dunmeyer was separated from his vehicle, so he attempted to flee on foot. As he ran, he was chased by a group of Petersfield men. Dunmeyer was rescued by Antonio Washington, a compatriot from the Cherry Hill community, who drove toward Dunmeyer and attempted to run over anyone from Petersfield who was in the way.

Meanwhile, Appellant Ward, co-defendant Washington, and Catrell Douglas, leapt into a truck and chased after Antonio Washington and Dunmeyer. Before the Petersfield contingent got into the truck, a witness

heard co-defendant Washington declare: "We will handle that," and "some bitch is going to die tonight." As the two vehicles left the parking lot, heavy gunfire erupted. Later, investigators found shell casings from three different types of guns: a .40-caliber, a 9-millimeter, and a .25-caliber. Forensic experts determined it was a 9-millimeter bullet that struck and killed Simmons.

The State initially tried Ward for the murder of Simmons in December of 2004; the case ended in a mistrial due to a hung jury. Ward was tried again in June of 2005, this time with Tremayne Washington. The two were tried together as accomplices under the theory that both were guilty because "the hand of one is the hand of all."

At this second trial, numerous witnesses testified regarding the shooting. One witness, James Murphy, remembered that Simmons fell to the ground as soon as the gunfire began but before any shots came from the truck in which Ward rode. Murphy stated that he thought he saw shots fired from the passenger side of the truck. Catrell Douglas, the driver of the truck, testified that Ward fired gunshots out of the window. Although co-defendant Washington did not testify during the second trial, the jury heard testimony from Ward's first trial, wherein Washington indicated Ward had fired shots toward the other vehicle.

When investigators searched the truck, they found an empty holster, a shell casing, an unfired bullet, and magazines, but did not find a gun. At trial, no weapon was introduced into evidence, though records revealing that co-defendant Washington owned a 9-millimeter pistol were entered.

The jury convicted both Ward and Washington, and they were sentenced to thirty years' imprisonment. This appeal followed.

LAW/ANALYSIS

Ward argues the trial court erred by (1) refusing to grant a mistrial after the prosecutor insinuated the crime revolved around gang activity, (2) permitting autopsy photos to be admitted, (3) charging the jury that "the hand

of one is the hand of all," (4) refusing to grant a directed verdict in Ward's favor, and (5) allowing the State to play a recording of a co-defendant's testimony from a prior trial. We address each issue in turn below.

I. Insinuation of Gang Activity

Ward first argues he is entitled to a new trial because the State repeatedly suggested that he was a gangster, and this insinuation infected the trial with prejudice that denied him due process of the law. We disagree.

The comments about which Ward complains first occurred during opening statements when the prosecutor described the victim as someone who "was not a drinker, was not a drug user, [and] was not a gang banger." Unlike the victim, Ward and his co-defendant were described by the prosecutor as drinkers who "were beating their chest[s] and they [had] something to prove that night." According to Ward, this contrasting description of the victim and the defendants implied that the defendants were "drinking and gang banging at the club." Ward also complains that the prosecutor described the fight as being between "a gang of" people from the Cherry Hill community and "a bunch of Petersfield people," and later told the jury that Ward was from Petersfield. However, Ward made no objection to the solicitor's opening argument.

Later in the trial, Kevin Dunmeyer testified that when he attempted to get into his vehicle, there "was a gang of guys at my door." In response to this testimony, the prosecutor asked, "A gang of guys at your door. Where was this gang of guys from?" Dunmeyer answered, "[The] Petersfield area." Again, Ward did not object to this testimony.

Sometime after Dunmeyer testified, a crime scene investigator testified about the discharge of shell casings. The prosecutor asked if the way bullets ejected depended on whether the weapon was held "straight up" or in a "gangster hold." This time, Ward objected. Then, during the cross-examination of a defense expert, the prosecutor again asked about a method of shooting known as "gangster style." Ward's co-defendant objected, and the trial court sustained the objection, advising the jury to disregard the

comment. After the defense expert testified, no other witness was called to the stand. Ward moved for a mistrial based on the State's implication that the defendants were gangsters. The trial court denied the motion, but directed the prosecutor to refrain from mentioning gangs in his closing.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Adams, 354 S.C. 361, 376, 580 S.E.2d 785, 793 (Ct. App. 2003). A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005).

Here, we find no abuse of discretion. Ward failed to object to most of the references about which he now complains. In fact, the only objection preserved for our review came when the prosecutor asked the crime scene investigator if the ejection of bullets depended on whether the shooter held the weapon "straight up" or in a "gangster hold." The other references came in without objection or were objected to by Ward's co-defendant, and therefore are not preserved for review. See Tupper v. Dorchester County, 326 S.C. 318, 324 n.3, 487 S.E.2d 187, 190 n.3 (1997) (explaining that appellant cannot bootstrap an issue for appeal by way of a co-defendant's objection). We do not believe the isolated reference to which Ward objected warranted the grant of his motion for a mistrial, nor do we believe the combination of references which were unobjected to would require the trial court to grant the motion.

Black's Law Dictionary (8th Ed. 2004) defines a gang as "[a] group of persons who go about together or act in concert, esp. for antisocial or criminal purposes." Certainly, the groups of people on both sides of this altercation outside of Club Diamante could be referred to as gangs considering their actions that evening. Furthermore, the term "gangster style" described the way the gun may have been fired – from a horizontal position rather than from the normal, vertical position. See Urban Dictionary, *available at* http://www.urbandictionary.com ("To hold a gun horizontally instead of the way it is normally supposed to be held vertically."). Because the State's references to gangs were not completely

gratuitous and were unobjected to for the most part, we find no error in the trial court's refusal to grant a mistrial.

II. Autopsy Photographs

Ward next argues the trial court erred in permitting the prosecution to enter photographs of the victim's wounds into evidence. We disagree.

The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court, and a ruling regarding photographs' admissibility will not be disturbed absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). "To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). "[P]hotographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a [trial] if they are irrelevant or not substantially necessary to show material facts or conditions." State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

Here, the trial court allowed two photographs which illustrated graze wounds on the victim's back. Ward objected, arguing the probative value of the photographs was outweighed by their prejudicial effect. The trial court overruled the objection, finding the jury's knowledge of the graze wound was necessary to rebut the defense's arguments about the angle of the shot, and therefore the photographs' probative value outweighed their prejudicial effect. This determination is left to the discretion of the trial court, and the record evinces no abuse of that discretion.

III. Jury Charge on "The Hand of One Is the Hand of All"

Ward also argues the trial court erred by charging the jury that "the hand of one is the hand of all." We disagree.

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). If any evidence supports a requested jury charge, the trial court should grant the request. State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

Under "the hand of one is the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Ward argues this theory should not have been charged to the jury because there was no evidence of a common plan or scheme between Ward and his co-defendant. However, evidence revealed that both defendants were with the group of men who confronted Dunmeyer at his truck after the fight spilled outside of the club. As Dunmeyer attempted to run away from the mob, a witness testified that Ward's co-defendant said, "some bitch is going to die tonight," and "we will handle that." The co-defendant and Ward then got into the truck that chased after the car in which Dunmeyer rode. Witnesses also testified that Ward shot his gun toward the other car, and the victim was killed by a stray bullet from this shoot out. After the shooting, the defendants slept at a friend's house, and Ward's co-defendant washed his hands with bleach in the morning.

The evidence at trial supported the theory that Ward and his co-defendant joined together to accomplish an illegal purpose, and therefore it was appropriate for the trial court to instruct the jury that if it found such a joint endeavor existed, each defendant was liable criminally for everything done by his confederate incidental to the execution of that endeavor. See id.

Accordingly, we find no error in the trial court's charge to the jury that "the hand of one is the hand of all."

IV. Directed Verdict

Ward next argues the trial court erred in failing to direct a verdict in his favor. We disagree.

"On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State." State v. Padgett, 354 S.C. 268, 270-271, 580 S.E.2d 159, 161 (Ct. App. 2003). When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." Padgett, 354 S.C. at 271, 580 S.E.2d at 161. "However, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [the appellate court] must find the case was properly submitted to the jury." Id.

The gist of Ward's argument that he is entitled to a directed verdict harkens back to his argument regarding the jury charge: Ward believes there is insufficient evidence to show he and his co-defendant were acting in concert. As explained above, evidence was presented to show that the two were involved in the fight with Dunmeyer; that as Dunmeyer fled, Ward's co-defendant threatened to kill someone that night; and that moments after that threat, Ward and the co-defendant got into a truck from which gunfire erupted towards the vehicle in which Dunmeyer rode. Furthermore, the driver of the truck as well as the co-defendant stated that Ward was shooting out of the passenger side window of the truck. Accordingly, there was some evidence that Ward shot the victim as he fired his weapon toward the other vehicle, and the trial court did not err in sending the case to the jury.

V. Co-Defendant's Testimony

Finally, Ward argues the trial court erred by allowing the State to play a recording of the testimony given by Ward's co-defendant during Ward's first trial. At trial, however, Ward never argued that this former testimony was inadmissible, but instead specifically agreed that the testimony was admissible.[1] Because the issue was never raised or ruled upon by the trial court, it is not preserved for our review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

CONCLUSION

Based on the foregoing, we find the trial court did not err in denying Ward's motions for a mistrial and directed verdict. We also find no error in

[1] On appeal, Ward admits he acquiesced to the playing of the former testimony; however, he points out that he later argued "that the prosecution had tried the case differently than in the first trial." According to Ward, this argument related back to "a lack of the same motive for cross-examination in the first trial as in the second trial," so the issue was raised to and ruled upon by the trial court. We disagree. The record reveals that at the end of the trial, when Ward made his motion for a directed verdict, he argued that the State should be estopped from taking a position in this trial that was different from the position in the first trial. Specifically, he complained that in the first trial, Ward was tried solely as a perpetrator and not as an accomplice, so the defense presented evidence that Tremayne Washington (his co-defendant in the second trial) washed his hands in bleach after the shooting. In the second trial, the State presented the evidence of the hand-washing. However, Ward never argued the trial court erred in allowing his co-defendant's testimony to be played during his current trial, nor did he argue that the change in the State's strategy prevented him from thoroughly cross-examining his co-defendant during that first trial. Thus, his estoppel argument in no way encompassed the argument he makes on appeal.

the admission of the autopsy photographs or with the jury being instructed that the hand of one is the hand of all. Finally, we find Ward failed to preserve any argument with regard to his co-defendant's testimony. Accordingly, Ward's murder conviction is

AFFIRMED.

GOOLSBY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

MID-SOUTH
MANAGEMENT COMPANY
INCORPORATED And
WILLIAM C. BUCHHEIT
TRUST A, as Partners Of
Spartanburg Beach Cove
Associates, a General
Partnership and a Joint
Venturer Of Beach Cove
Associates Joint Venture, And
BEACH COVE ASSOCIATES
JOINT VENTURE, Appellants,

v.

SHERWOOD
DEVELOPMENT
CORPORATION, a Joint
Venturer of Beach Cove
Associates Joint Venture;
COASTAL FINANCIAL
CORPORATION, COASTAL
FEDERAL SAVINGS BANK;
COASTAL MORTGAGE
BANKERS AND REALTY
CO., INC.; JOHN DOE, which
represent unidentified
shareholders of Sherwood
Development Corporation;
MICHAEL C. GERALD and
JAMES T. CLEMMONS, Respondents.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4271
Heard December 7, 2006 – Filed June 29, 2007

AFFIRMED

Michael B.T. Wilkes and D. Alan Lazenby, of Spartanburg, Michael Warner Battle, of Conway,for Appellant.

Robert E. Stepp, and Amy Hill, of Columbia, for Respondents.

PER CURIAM: Mid-South Management Company, Inc., William C. Buchheit Trust A, and Beach Cove Associates Joint Venture (collectively, "Appellants"), appeal from the master-in-equity's order finding the parent companies of Sherwood Development Corporation were not liable to pay Appellants' judgment against Sherwood. We affirm.

FACTS

Spartanburg Beach Cove Associates is a general partnership with Mid-South and the William C. Buchheit Trust A as its majority partners. Spartanburg and Sherwood formed a Joint Venture, Beach Cove Associates Joint Venture. Spartanburg had two-thirds interest in the Joint Venture and

Sherwood had the remaining one-third interest.[1] All income and expenses of the Joint Venture were to be allocated in accordance with the parties' percentage interest. The sole purpose of the Joint Venture was to develop a multi-unit condominium complex in Myrtle Beach.

Sherwood was incorporated by James Clemmons and Mike Gerald, president of Sherwood, as a wholly-owned subsidiary of Coastal Mortgage Bankers and Realty Company, Inc. Coastal Mortgage is the wholly owned subsidiary of Coastal Federal Savings Bank, which is the wholly owned subsidiary of Coastal Financial Corporation.

Sherwood was initially capitalized with $10,000, and had no liabilities at its inception. This was sufficient capital to cover the initial investment into the Joint Venture as required by the Joint Venture agreement. Additionally, Coastal Federal provided the financing for the acquisition of the land and construction by the Joint Venture. Sherwood maintained an active board of directors which held routine meetings in order to conduct the business of the corporation. However, the officers and directors of Sherwood were also in various positions of its parent companies and the company did not maintain separate offices. While Sherwood failed to have its own employees, the Joint Venture contracted with others to provide services. Finally, Sherwood maintained minutes of the board meetings and appropriate financial records, which were independent of its parent companies.

The Joint Venture acquired the property and constructed the condominiums in accordance with the Joint Venture agreement. The parties entered into the project believing it would be profitable and would be able to sustain its own operations. However, the project lost at least $7-8 million, of which Sherwood was responsible for one-third. Sherwood contributed approximately $2.5 million to the Joint Venture as capital calls were made in

[1] When the Joint Venture was originally established, a third entity, Beach Cove Development Corporation, was also involved. The original division of ownership was one-half to Spartanburg, and one-fourth to each Sherwood and Beach Cove Development. However, at all times relevant to this appeal, the only two members of the Joint Venture were Spartanburg and Sherwood.

order to cover the losses generated by the project. The money provided for these capital calls came from Coastal Mortgage. Coastal Mortgage either purchased shares of treasury stock or provided debt funding for Sherwood to continue in operation.

In 1990, S.M. Johnson expressed his interest in purchasing the commercial operations of the Joint Venture as well as undeveloped land owned by the Joint Venture. In a letter to Vickie Myers, a representative of Spartanburg and the accountant for the Joint Venture, Gerald explained that selling may be in the Joint Venture's best interest. Additionally, Gerald explained: "A major area of concern for our Board is the recently enacted banking legislation which necessitates the divestiture of this type of investment by financial institutions. Therefore, Sherwood Development Corporation may, if operating deficits continue, find that it is incapable of supporting the hotel operation further." The deal to sell the commercial operations and property was not approved at that time.

In 1991, Delmar Jones was hired to act as property manager for the condominium project. He had discussions with the homeowners' association board members regarding complaints and problems with water intrusion. However, Jones was unclear about whether he ever reported the problems to the Joint Venture, Sherwood, or any of Sherwood's representatives. Additionally, Jones believed any problems with water intrusion in the common areas was the problem of the homeowners' association and not the Joint Venture.

Gerald was told in late 1992 by Jack Cochrane, president of the homeowners' association, that the association had hired an attorney to look into problems related to the parking garage. In addition, Cochrane stated the attorney "would look around and see if he could make that $200,000 case more like a $2 million case."

In February of 1993, the Joint Venture sold the commercial portion of the venture and some undeveloped property to S.M. Johnson. The proceeds from the sale were approximately $1 million. Sherwood received a distribution from the Joint Venture of approximately $330,000 for its one-third share of the proceeds. Spartanburg received the remainder. Sherwood

did not pay dividends with the money, but it instead utilized that money to repay debt owed to Coastal Mortgage from its previous capital contributions to the Joint Venture. Spartanburg also made a distribution of its portion of the proceeds to its partners. Neither Sherwood, Spartanburg, nor anyone associated with the Joint Venture proposed setting aside any of the money in a reserve for future capital requirements.

In August 1993, the homeowners' association brought suit against, among others, the Joint Venture, seeking damages resulting from the stucco application and water intrusion. As a result, the Joint Venture hired counsel, who began negotiating a possible settlement. Sherwood maintained that it believed the partners of the Joint Venture should not be responsible for payment of any of the settlement. However, Sherwood offered $100,000 towards settlement if the offer was also approved by Coastal Mortgage.

Spartanburg instructed counsel the joint venture would contribute up to $1,000,000 to settle the suit. Counsel was able to settle the suit for a total of $5,450,000. Numerous other defendants and insurance policies contributed to the settlement amount. The Joint Venture was ultimately responsible for $835,000, which was paid by a check drawn on Mid-South Management, one of Spartanburg's partners. Spartanburg declined Sherwood's offer of contributing $100,000 toward the settlement.

After Sherwood refused to pay a capital call for its portion of the settlement amount, Appellants brought suit against Sherwood and its parent companies seeking to recover Sherwood's portion of the settlement. After the trial was bifurcated, Sherwood was found liable for one-third of the settlement amount pursuant to the Joint Venture agreement.[2] The second phase of the trial was to determine whether Sherwood's parent companies or individual officers should be liable for the judgment obtained against Sherwood.

[2] This court upheld the master's order in Mid-South Mgmt. Co. v. Sherwood Dev. Corp., Op. No. 2004-UP-611 (S.C. Ct. App. filed Dec. 7, 2004).

Appellants proffered three main theories seeking to hold Sherwood's parent companies liable: the alter-ego or instrumentality theory, the amalgamation of interest theory, and piercing the corporate veil. At the trial, Appellants offered the testimony of Dr. Oliver Wood, a professor at the University of South Carolina, as an expert to show Sherwood was undercapitalized and operated as an instrument or façade for its parent companies. Additionally, Dr. Wood testified that all reported accounting indicated that Sherwood was consolidated with its parent companies for reporting purposes. Finally, Appellants showed that Sherwood had no employees, and the officers and board members were all involved with Sherwood's parent companies in addition to Sherwood.

Sherwood presented the testimony of Professor John Freeman as its expert. Professor Freeman testified that he believed Sherwood was adequately capitalized and protected by insurance given the nature of its business. In addition, he explained that Sherwood was not established as a sham, but for legitimate business reasons of reducing risk and exposure to liability. He testified there was nothing improper in the way Sherwood was run, the method of reporting and recording Sherwood's activities, or in the manner in which Sherwood operated. With regard to the repayment of the loan to the parent company, Professor Freeman stated, "There's nothing wrong with using some of your cash to pay down your debt. . . . Even if the debt is to your parent corporation."

The master found piercing the corporate veil was the only theory recognized in South Carolina upon which Appellants could receive relief. The court found the alter-ego or instrumentality theory and the amalgamation of interest theory were reserved for specific circumstances, not present in this case. Finally, the master found Appellants failed to demonstrate that Sherwood's corporate veil should equitably be pierced. Accordingly, the master found Sherwood's parent companies were not liable for the judgment against Sherwood.[3] This appeal followed.

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[3] The master also found that individual officers Michael Gerald and James Clemmons were not liable for the judgment against Sherwood. Appellants have not raised any issue on appeal regarding the liability of the individual

STANDARD OF REVIEW

"An action to pierce the corporate veil is one in equity. Thus this court may take its own view of the preponderance of the evidence." Dumas v. Infosafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641, 643 (Ct. App. 1995); see Sturkie v. Sifly, 280 S.C. 453, 456-57, 313 S.E.2d 316, 318 (Ct. App. 1984) (finding that an action to pierce the corporate veil is one in equity and the appellate court takes its own view of the preponderance of the evidence). "The broad scope of review applicable to appeals in equity actions does not, however, require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." Hunting v. Elders, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004), cert. dismissed (Oct. 5, 2005).

LAW/ANALYSIS

Appellants contend the master erred in not finding Sherwood's parent companies liable for the judgment Appellants obtained against Sherwood. Appellants assert Sherwood's parent companies should be liable because: (1) Sherwood's corporate veil should be pierced; (2) Sherwood was the mere instrumentality or alter-ego of the parent companies; or (3) the amalgamation of corporate interests, entities, and activities blurs the legal description between the corporations and their activities. We disagree.

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officers for the judgment. As a result, that portion of the master's order finding the individual officers were not liable is the law of the case. See Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (finding that an unappealed ruling, right or wrong, is the law of the case and requires affirmance).

I. Piercing the Corporate Veil

Appellants maintain the master erred in failing to pierce Sherwood's corporate veil and finding the parent companies liable for Sherwood's obligations. We find Appellants have failed to prove the necessity for piercing the corporate veil of Sherwood.

It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders. Hunting, 359 S.C. at 223, 597 S.E.2d at 806 (citing DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976)). Although the corporate entity may be disregarded in some situations, piercing the corporate veil is not a doctrine to be applied without substantial reflection. Baker v. Equitable Leasing Corp., 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980) ("However, 'piercing the corporate veil' is not a doctrine to be applied without substantial reflection."). Courts are generally reluctant to disregard the corporate entity:

> If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.

Sturkie, 280 S.C. at 457, 313 S.E.2d at 318. Thus, courts generally disregard the corporate entity only where equity requires piercing the corporate veil to assist a third party. Woodside v. Woodside, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct. App. 1986) ("The corporate form may be disregarded only where equity requires the action to assist a third party."). The burden of proof is on the party asserting that the corporate veil should be pierced. Id.

Our courts have outlined a two-prong test to determine whether a corporate veil should be pierced. The first part of the test requires an eight-factor analysis and looks to observance of the corporate formalities by the

dominant shareholders. Sturkie, 280 S.C. at 457-58, 313 S.E.2d at 318. "The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." Id. In determining whether the corporate formalities were observed under the first prong of the Sturkie test, the courts consider eight factors:

> (1) whether the corporation was grossly undercapitalized;
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> (2) failure to observe corporate formalities;
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> (3) non-payment of dividends;
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> (4) insolvency of the debtor corporation at the time;
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> (5) siphoning of funds of the corporation by the dominant stockholder;
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> (6) non-functioning of other officers or directors;
>
> (7) absence of corporate records; and
>
> (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder.

Dumas, 320 S.C. at 192, 463 S.E.2d at 644. "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." Id.[4]

[4] Although Sherwood was not a statutory close corporation, this court has recently noted that the statutory creation of such an entity, designed to lessen the formalities necessary for a corporation, has lessened the importance of some of the Sturkie factors, including: the failure to observe corporate formalities; the nonfunctioning of other officers or other directors; the

Under the second prong of the Sturkie test, the party seeking to pierce the corporate veil must prove injustice or fundamental unfairness if the corporate veil is not pierced. Multimedia Publ'g of S.C., Inc. v. Mullins, 314 S.C. 551, 553, 431 S.E.2d 569, 571 (1993). "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Id. at 556, 431 S.E.2d at 573.

A. Corporate Formalities

Reviewing the eight factors to be considered in the first prong of the Sturkie test, we find Appellants did not meet their burden of proving that Sherwood failed to observe corporate formalities. Sherwood was able to meet all capital calls totaling approximately $2.5 million, it observed corporate formalities by having meetings and keeping records, it had functioning officers and directors, and, although it did not have the money to pay its portion of the settlement at the time of this action, there is no evidence that Sherwood was insolvent because it did not have any outstanding debt nor was it otherwise unable to seek additional funding from its parent companies. The repayment of the loan to the parent corporations out of the sole distribution to Sherwood did not amount to the "siphoning" of funds. There was no evidence that Sherwood was "merely a façade" for the parent companies. The failure of Sherwood to pay dividends to its shareholders did not amount to fraudulent behavior where the Joint Venture never made a profit and the sole distribution was used to repay a debt to the parent companies. Accordingly, Appellants failed to prove Sherwood did not observe corporate formalities.

B. Fundamental Unfairness

Even assuming Sherwood failed to observe corporate formalities, Appellants failed to prove that failure to pierce the corporate veil would result in fundamental unfairness.

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absence of corporate records; and the nonpayment of dividends. Hunting, 359 S.C. at 225, 597 S.E.2d at 807.

The heart of a piercing the corporate veil dispute lies in proving the second prong of the Sturkie test, which requires a showing of fundamental unfairness in recognizing the corporate entity. The main purpose of piercing the corporate veil is to prevent the likelihood of injustice or unfairness if the limited liability enjoyed by the corporate entity is sustained. Sturkie, 280 S.C. at 458-59, 313 S.E.2d at 318. The burden of proving this fundamental unfairness requires the plaintiff to "establish that (1) the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." Dumas, 320 S.C. at 192, 463 S.E.2d at 644. The actual knowledge requirement has been clarified to mean that a person is "'aware' of a claim against the corporation if he has notice of facts which, if pursued with due diligence, would lead to knowledge of the claim." Hunting, 359 S.C. at 229, 597 S.E.2d at 809.

First, we must determine the "plaintiff's claim" that is at issue in this action. Appellants assert the "claim" is the likelihood of damages resulting from the potential suit by the homeowners and Sherwood should have taken steps to insure any judgment received by the homeowners could be covered. Sherwood, on the other hand, contends the "claim" is the request by Spartanburg for contribution of money to satisfy Sherwood's one-third liability for the amount the Joint Venture was required to pay to settle the homeowners' claims. Much of the litigation and the Record on Appeal are devoted to attempting to show what Sherwood knew, should have known, or did not know regarding the homeowners' claims and the potential liability from those claims. However, we find based on the clear language used in numerous cases, the claim to be considered is the claim asserted by Appellants and not the claim asserted by the homeowners against the Joint Venture. See Dumas, 320 S.C. at 192, 463 S.E.2d at 644 (stating that "the defendant was aware of the plaintiff's claim against the corporation") (emphasis added); Sturkie, 280 S.C. at 459, 313 S.E.2d at 319 (reviewing the plaintiff receiver's claim against the corporation).

Based on the record before us, Sherwood would have been aware of Appellants' claims no earlier than when the Joint Venture agreed to pay $835,000 towards settlement of the homeowners' lawsuit. The settlement was reached on February 3, 1997. Prior to this time, Sherwood was under a belief that there would be no requirement of contribution from the Joint Venture and that insurance and other parties would be responsible as had previously taken place when a similar subsidiary of Coastal was involved in a lawsuit and was not responsible for payment of any damages. At the time of the settlement, Sherwood should have known that it would be responsible for one-third of the resulting settlement amount.

The record is devoid of any evidence of self-serving behavior on the part of Sherwood after February 1997. Nothing in the record indicates Sherwood transferred money, property, or other assets out of the corporation after February 1997. Spartanburg knew of Sherwood's resistance to contributing to any proposed settlement based on Sherwood's belief that insurance and other parties should be responsible. In addition, Spartanburg turned down a $100,000 proposed payment by Sherwood, contingent on approval by Coastal Mortgage.

As to any unfairness, we find Appellants knew at all times that Sherwood was a corporation and enjoyed limited liability. Myers testified that she dealt with Sherwood and not any of the parent companies. Sherwood had previously warned Appellants that it may be forced to cease operations if the operating deficits continued to accrue. This is not a case in which the defendant acted in bad faith or with deceit to take advantage of the plaintiff. The Joint Venture was a business deal among sophisticated parties, and Sherwood contributed over $2 million to the venture due to its continuous losses. Accordingly, we find there is no evidence in the record demonstrating any fundamental unfairness resulting from recognizing the limited liability given to Sherwood as a corporation.

However, even assuming Appellants are correct that the "claim" in this case was the likelihood of the Joint Venture being liable to the homeowners, we find Sherwood was not aware of the claim until the suit was filed in August 1993. As discussed in the facts above, Gerald was notified sometime

in the fall of 1992 by the homeowners' association that it hired an attorney due to defects with the parking garage. However, the uncontroverted evidence by Gerald was that he thought the issue with the parking garage was being resolved. In addition, he was told that the attorney for the homeowners' association planned to look around and see "if he could make that $200,000 case more like a $2 million case." However, nothing in this statement would put Gerald or Sherwood on notice of the upcoming lawsuit over stucco and water intrusion damage. Gerald testified that when he received the complaint in August 1993, he was shocked, and it was the first time he had any knowledge of the homeowners' specific allegations.

Appellants attempt to argue Sherwood's self-dealing and unfair behavior was the transfer of the $330,000 from Sherwood to its parent company to repay a debt sometime after March 1993. Appellants maintain Sherwood acted improperly by not setting aside an amount in reserve for the potential homeowners' litigation. However, the testimony by Gerald and Myers reveals that no one from Spartanburg or the other Appellants ever discussed setting up a reserve with the proceeds received from the commercial sale. In addition, Spartanburg distributed its share of the proceeds to its partners and made no attempt to establish a similar reserve that it now demands Sherwood should have done. We find Appellants have presented insufficient evidence that Sherwood acted in a self-serving manner with regard to the property of the corporation and in disregard of Appellants' claim in the property.

Again, Appellants have failed to demonstrate the unfairness resulting from recognizing the corporate entity in order to pierce the corporate veil of Sherwood, even considering the transfer of the $330,000 to its parent company. As discussed above, these are sophisticated parties who entered into a risky development with the expectation of making a profit that ended in the reality of significant losses.

Regardless of the date of the "claim" against Sherwood, we find Sherwood and its parent companies did not act in a self-serving or unfair manner. We agree with the master in this case that no injustice or fundamental unfairness results from allowing Sherwood to maintain its

corporate status and its shareholders to enjoy the limited liability that accompanies being part of a corporation.

II. Other Grounds

Appellants aver that Sherwood's parent companies should also be held liable under either: (1) an alter-ego or instrumentality theory; or (2) an amalgamation of interest or blurred identity theory. We disagree.

a. Alter-Ego or Instrumentality Theory

Appellants maintain the master committed error by failing to recognize that Sherwood was the mere instrumentality of its parent companies and in failing to find the parent companies, therefore, liable for Sherwood's debts. We disagree.

Our supreme court has recently addressed the application of the alter-ego theory in Colleton County Taxpayers v. School District of Colleton County, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). In that case, a non-profit corporation was created by the Colleton County School District to raise funds for renovating existing public school facilities. In determining whether the corporation was the alter-ego of the school district, and thus, subject to the general obligation debt limit imposed on school districts by the South Carolina Constitution, the court stated:

> An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby. Peoples Fed. Sav. & Loan Assoc. v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992). Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. Id. However, this theory does not

> apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice. Id.

Colleton County Taxpayers, 371 S.C. at 237, 638 S.E.2d at 692. The Colleton County court went on to reference Baker v. Equitable Leasing Corporation, 275 S.C. 359, 367-68, 271 S.E.2d 596, 600 (1980), for the theory that control, in and of itself, is not sufficient to find that a subservient corporation is the alter-ego of the dominant one; one must show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy. Id. Noting that there was no evidence of dominance and control, the court found the corporation was not the alter-ego of the school district. Id. at 238, 638 S.E.2d at 692.

In the present case, the master found the alter-ego or instrumentality theory was not appropriate for piercing the corporate veil because, up to that point, our courts had only applied the theory when: (1) recognizing the attorney as the alter-ego of the client; (2) determining whether an employer is liable for the bad acts of its employee; and (3) determining lender liability.[5] The master found that the Sturkie test for piercing the corporate veil was the only way to evaluate corporate structure.

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[5] The master relied upon the following cases in determining what he perceived to be limitations on the application of the alter-ego theory: Williams v. Williams, 335 S.C. 386, 391, 517 S.E.2d 689, 692 (1999) (holding that an attorney is the "alter-ego" of his client); Dickert v. Metro. Life Ins. Co., 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993) (finding that only dominant corporate owners and officers, and not supervisory employees such as an office manager, may be "alter-egos" of employers such that liability falls outside of scope of Workers' Compensation Act and the matter is not one within exclusive province of the Act); and Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992) (holding that when a lender controls the business decisions and actions of its borrower, the borrower becomes the instrument or alter-ego of the lender).

Nothing in the Colleton County Taxpayers case limits application of the alter-ego theory solely to the situations listed by the master. In fact, the case cites Baker, a veil-piercing case, to support its finding that the alter-ego theory does not apply in the absence of fraud or misuse of control resulting in injustice. Colleton County Taxpayers, 371 S.C. at 237, 638 S.E.2d at 692; see Baker, 275 S.C. at 367-68, 271 S.E.2d at 600 (noting that piercing the corporate veil is normally only allowed where retaining separate corporate entities would result in fraud, wrong or injustice or would contravene public policy). Although Colleton County Taxpayers was decided after the master determined the underlying case and the master did not have the benefit of reviewing it, it appears that the alter-ego theory also applies in corporate situations.

Nevertheless, we find the alter-ego theory is inapplicable to the present case. While Sherwood's officers also held positions in the parent companies, Sherwood maintained separate corporate records. As previously discussed, we find nothing inappropriate about Sherwood's transfer of money to its parent companies to repay a debt. Nothing in the record indicates that the "dominant" companies misused their control over Sherwood to promote fraud. The record reflects that Sherwood was incorporated to limit liability, not to promote fraud. As Professor Freeman testified at the trial, "just because a business fails doesn't mean that there's been fraud." Because there is no evidence in the record to support a finding that Sherwood's parent companies abused their control over Sherwood or that a fraud was committed, the alter-ego theory is inapplicable in the present case. Accordingly, the master did not err in finding the parent companies were not liable for the judgment against Sherwood.

b. Amalgamation of Interest or Blurred Identity Theory

Appellants maintain the court erred in failing to find the parent companies liable under an amalgamation of interest theory where the companies' interests, entities, and activities blur the identity of the various companies. We disagree.

In Kincaid v. Landing Development Corporation, this court found a sibling company liable for the obligation of another sibling company due to the evidence revealing an "'amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities.'" Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986) (quoting the trial court's order). In Kincaid, the Landing Development Corporation (LDC), Resort Management Group, Incorporated (RMG), and Resort Construction Corporation (RCC) were all sibling corporations and were sued for negligent construction and breach of warranty. Id. at 91, 344 S.E.2d at 871. On appeal RMG argued the trial court should have directed a verdict in its favor as it was simply the marketing and sales company. Id. at 96, 344 S.E.2d at 874. However, the Kincaid court found the three companies shared officers, shareholders, and location. In addition, the evidence showed RMG was the "project manager" and was the company who the defendant called to attempt to remedy problems. Finally, company letterhead said: "Resort Management Group Inc.," with a notation, "A Development, Construction, Sales, and Property Management Company." Id.

In Kincaid, this court found sibling companies jointly liable for negligent construction. Kincaid was not a situation in which one company owed a judgment and the court imposed liability upon the parent company or a shareholder. Thus, Kincaid is inapplicable to the present action.

In addition, there is no evidence in the record that Spartanburg or the other Appellants could confuse Sherwood with its parent companies. At all times, Appellants dealt only with Sherwood and not Coastal Mortgage. Sherwood had separate letterhead and Myers testified she knew she was dealing only with Sherwood and not Coastal Mortgage. Accordingly, even if the Kincaid amalgamation of interest theory could be used to find a shareholder liable for debts of a corporation, we find Appellants failed to present sufficient evidence to find Sherwood's parent companies liable for its judgment.

CONCLUSION

We hold the master correctly found there was no fundamental unfairness in the way Sherwood conducted business and find Appellants failed to prove a sufficient number of the Sturkie factors to justify piercing the corporate veil. We further find the alter-ego and amalgamation of interest theories are inapplicable to hold Sherwood's parent companies liable for the judgment given the circumstances of this case. Accordingly, the decision of the master is

AFFIRMED.

HEARN, C.J., BEATTY and SHORT, JJ., concur.