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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No.: 2023-001739
Civil Action No.: 2022-CP-10-03510

Richard Young and Jason Greene……...Respondents,

v.

John W. Beasley a/k/a John W. Beasley, Sr.
and Lillian Beasley in their individual capacities
and as Trustees or as Successors in trust under
the Beasley Living Trust dated August 14, 2018,
and any amendments thereto……..Appellants.

INITIAL BRIEF OF RESPONDENTS

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III. Whether the Lower Court erred in determining that Respondents are entitled to foreclose on the Mortgage executed by Appellants when Appellants have failed to pay the amount owed to Respondents.

STATEMENT OF THE CASE

This matter is before this Court pursuant to a Notice of Appeal filed by Appellants ("Appellants" or "the Beasleys") on November 6, 2023. Appellants are appealing five separate Orders from the Master-In-Equity. Notwithstanding Appellants' appeal of five separate Orders, Appellants' primary focus of their appeal is the Order of Summary Judgment issued by the Master-in-Equity, Mikell Scarborough, pursuant to Rule 56, SCRCP.

This action began on August 14, 2022, when Respondents filed a Lis Pendens, Summons and Verified Complaint, including as Exhibits the Promissory Note ("the Note") and Mortgage ("Mortgage") executed by Respondents. See R _____. On August 22, 2023, Respondents filed an Amended Lis Pendens, Amended Summons and Amended Verified Complaint,[1] including a copy of a plat, the Note and Mortgage executed by Respondents. See R. _____. The matter was referred to the Charleston County Master-In-Equity in accordance with Rule 53(b), SCRCP, on January 25, 2023, by way of an Order (Mandatory Order of Reference) entered by the Charleston County Clerk of Court. See R. _____. Following written discovery, Respondents moved for Summary Judgment on May 17, 2023. See R. _____.

[1] Respondents filed the Amended Pleadings to correct a potential title issue relating to access to the property at issue in this civil action. The title issue was corrected by way of an Order of the Master In Equity and is no longer an issue in this matter.

Arguments were held by the Master-In-Equity on August 8, 2023.[2] Thereafter, the Master-In-Equity entered an Order Granting Respondents' Summary Judgment on August 23, 2023. See R. _____.

Appellants filed a Motion for Reconsideration on September 1, 2023. See R. _____. On September 7, 2023, Respondents filed their Motion for Foreclosure Hearing and Award of Attorneys Fees and Costs. See R. _____. Said Motion was accompanied by Affidavits of Respondents' Counsel to seek Respondents' attorneys' fees and actual costs incurred, as well as an updated Affidavit of Respondents in Support of the debt amount. See R. _____; R. _____. On September 27, 2023, the Master-In-Equity held a hearing on all outstanding motions,[3] including Appellants' Motion for Reconsideration. See R. _____. On October 6, 2023, the Master In Equity denied Appellants Motion for Reconsideration. See R. _____. Thereafter, an Order of Judgment and Foreclosure was entered on October 6, 2023. See R. _____. The Order of Judgment and Foreclosure was simply a matter of mathematical calculations because the parties agreed on the amount that had been paid to Respondents (including the dates), based on written discovery. The Note provided the interest rate and amount of attorneys' fees due to Respondents. The Order of Judgment and Foreclosure was amended to

[2] Prior to hearing the Motion for Summary Judgment, the Court also heard and denied Appellant's Motion to Recuse. Appellants have not appealed the order denying same, and, therefore, that ruling is the law of the case. See *Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("[A]n unappealed ruling is the law of the case and requires affirmance.")

[3] In addition to Appellants' Motion for Reconsideration and Respondents' Motion for Foreclosure Hearing and Attorneys Fees, there were other Motions heard on September 27, 2023; only one of the Orders from the September 27, 2023 hearing is being appealed. The other motions heard on September 27, 2023 included (1) Respondents' Motion for a Protective Order regarding Requests to Admit transmitted to Respondents' Counsel after the hearing on Respondents' Motion for Summary Judgment, (2) Appellants' Motion for Summary Judgment, filed after the hearing on Respondents' Motion for Summary Judgment and (3) Respondents' Motion to Strike and/or Summary Judgment on Appellants' Counterclaims. Appellants are appealing the Order of Summary Judgment in favor of Respondents, the denial of Appellants' Motion for Summary Judgment, the denial of Appellants' Motion for Reconsideration, the Order of Judgment and Foreclosure and the Amended Order of Judgment and Foreclosure.

correct a few clerical errors, after Respondents filed a Rule 60(a) Motion, on November 2, 2023. See R. _____. This appeal followed.

STANDARD OF REVIEW

This is an appeal stemming from the entry of Summary Judgment in favor of Respondents. The standard of review relating to a review of an Order granting summary judgment has recently changed. In August of 2023, the South Carolina Supreme Court modified the ruling in *Hancock* as follows:

> We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166. To the extent what we said in *Hancock* is inconsistent with our decision today, *Hancock* is overruled.

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463-64, 892 S.E.2d 297, 301 (2023). The South Carolina Supreme Court has noted the following regarding the scope of review from a final judgment by a Master-In-Equity: "Our scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." *Tiger*, *Inc. v. Fisher Agro*, *Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). *Miller v. Dillon*, 432 S.C. 197, 205, 851 S.E.2d 462, 467 (Ct. App. 2020).

However, "[a]n action to construe a contract is an action at law." *Pruitt v. S.C. Med. Malpractice Liability Joint Underwriting Ass'n,* 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "A reviewing court is free to decide questions of law with no particular deference to the trial court." *Hunt v. S.C. Forestry Comm'n,* 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct.App.2004). *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541–42 (Ct. App. 2008). However, "[w]hen reviewing a judgment made in a law case tried by a master without a jury, the

appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them." *See Silver* at 590 citing *Karl Sitte Plumbing Co., Inc. v. Darby Dev. Co. of Columbia, Inc.,* 295 S.C. 70, 77, 367 S.E.2d 162, 166 (Ct.App.1988).

STATEMENT OF THE FACTS

The events that give rise to the disputes in this matter began in the fall of 2017, when Respondents made a series of loans to John W. Beasley Jr. ("Beasley Jr.") totaling Six Hundred Forty Thousand dollars and 00/100s ($640,000.00).[4] Beasley Jr. and Ricky Young had known each other since college and Beasley Jr. parlayed that friendship into loans from Respondents. The loans to Beasley Jr. were intended to be short term loans and/or investment loans to help fund Beasley Jr.'s construction business.[5]

Beasley Jr. did not honor his repayment obligations to Respondents and in November of 2017, Appellants, Beasley Jr.'s parents, stepped in and obligated themselves to repay their son's debts to Respondents. In November of 2017, Appellants, Beasley Jr. and Beasley Construction Company, LLC ("Beasley Construction") entered into a Settlement Agreement with Respondents (hereinafter "the First Settlement Agreement"), which provided for the repayment of the loans to Respondents and provided Respondents with security for the promise of payment. See R. _____. [First Settlement Agreement].

Under the terms of the First Settlement Agreement, Appellants, Beasley Jr. and Beasley Construction promised to repay the debt owed to Respondents. Contemporaneously with the execution of the First Settlement Agreement and pursuant to the terms thereof, Appellants, Beasley

[4] These series of loans are referenced herein as "the loans" or "Loan."

[5] Beasley Jr. was charged with wire fraud and ultimately pled guilty to one count of wire fraud in May of 2022. Beasley Jr. was sentenced on April 25, 2023 to five years' probation, with the first year under home detention. https://www.postandcourier.com/news/ex-charleston-construction-company-owner-guilty-of-fraud-sentenced-to-home-detention/article_067efa94-e3a0-11ed-94c7-4355e94d8127.html#:~:text=John%20Woodrow%20Beasley%20Jr.,to%20the%20U.S.%20Attorney's%20office.

Jr. and Beasley Construction made, executed and delivered three (3) separate instruments: (1) the Note in the amount of Six Hundred Forty-Seven Thousand Five Hundred and 00/100s ($647,500.00) dollars which provided for a one-year maturity date of November 18, 2018; (2) Mortgages on three (3) different properties, one of which is the property at issue in this matter ("Subject Property") and (3) a Confession of Judgment to be held unfiled by Counsel for Respondents, unless and until, Appellants, Beasley, Jr. and Beasley Construction failed to pay Respondents in accordance with the terms of the First Settlement Agreement.[6] See R. _____. [First Settlement Agreement, Promissory Note, Mortgage and Confession of Judgment.] Appellants, Beasley Jr. and Beasley Construction failed to honor the terms of payment set forth in the First Settlement Agreement and Promissory Note resulting in the Confession of Judgment being filed on May 30, 2019. See R. _____. [Filed Confession of Judgment.]

Appellants, Beasley Jr. and Beasley Construction were simultaneously experiencing financial distress with First-Citizens Bank & Trust Company ("First Citizens") in 2019, which resulted in a foreclosure action being filed on September 30, 2019, captioned as *First Citizens Bank & Trust Company v. John W. Beasley, et al.,* C/A No.: 2019-CP-10-4676 (the "First Citizens Foreclosure"). First Citizens sought to foreclose on several properties owned by Appellants, including the Subject Property. The pleadings in the First Citizens Foreclosure notate the various judgments, notes and mortgages that were unpaid, including the filed Confession of Judgment in favor of Respondents and the Mortgage in favor of Respondents. See R._____. [Order of Foreclosure from the First Citizens Foreclosure.] Eventually, First Citizens was made whole through the foreclosure sale of a different property(ies) and a Satisfaction of First Citizens Order and Judgment of Foreclosure was filed on April 20, 2022, ending the First Citizens Foreclosure.

[6] Appellants have admitted that these documents were indeed signed by Appellants. R. _____. [Appellants Responses to Requests to Admit.]

See R. _____. [Satisfaction of First Citizens Judgment.] As result of the First Citizens Satisfaction filing, the Subject Property was no longer encumbered by the First Citizens Mortgage.

In late November or early December of 2020, Appellants and Respondents entered into another Settlement Agreement and Conditional Release of Claims ("the Second Settlement Agreement"). The Second Settlement Agreement provided that Appellants would pay Respondents the sum of Twenty-Five Thousand and 00/100s ($25,000.00) dollars each (a total of Fifty Thousand and 00/100s ($50,000.00) dollars) in exchange for Respondents filing a *Release of Judgment Lien as to Specific Property, Release of Judgment Lien as to Certain Defendants, and Partial Satisfaction of Judgment* ("Release of Judgment"), which would release the Subject Property and Appellants from the filed Confession of Judgment. See R. _____. Appellants paid the money to Respondents and Respondents honored their obligation by filing the Release of Judgment. See R._____. As set forth more fully hereinbelow, the Second Settlement Agreement did not obligate Respondents to satisfy the mortgage nor did it serve to satisfy the Debt evidenced by the Note. In fact, quite to the contrary, there is no reference to the Note or the Mortgage contained in the Second Settlement Agreement. R. ____. [Second Settlement Agreement]. Despite Appellants' assertions to the contrary, the Second Settlement Agreement merely obligated Respondents to execute and record the Release of Judgment, the terms of which are very clear, which Respondents did on March 27, 2021.

The following facts are taken from Appellants' responses to Respondents' Discovery Requests, specifically Requests to Admit:

> 1. Admit that the Promissory Note ("Note") dated November 20, 2017, a copy of which is attached hereto as Exhibit A, bears the signatures of Defendants John W. Beasley a/k/a John W. Beasley, Sr. and Lillian Beasley.
> **RESPONSE: Admit.**
> 2. Admit the Mortgage, Security Agreement and Financing Statement ("Mortgage") dated November 20, 2017, a copy of which

is attached hereto as Exhibit B, bears the signature of Defendants John W. Beasley a/k/a John W. Beasley, Sr. and Lillian Beasley.

RESPONSE: Admit.

3. Admit that the Mortgage was validly recorded in the office of the Register of Mesne Conveyances for Charleston County on December 8, 2017 in Mortgage Book 0864 at page 902.

RESPONSE: The Beasleys are informed and believe the Mortgage was validly recorded, and craves reference to the recorded Mortgage for the recording information.

4. Admit that the Mortgage has not been satisfied.

RESPONSE: The Beasleys admit that, despite full payment of all amounts due from them to Plaintiffs, pursuant to the Settlement Agreement and Conditional Release of Claims, dated on or about November 30, 2020, entered between the parties ("Second Settlement Agreement"), Plaintiffs have failed to satisfy the Mortgage.

5. Admit that the only payments made by, or on behalf of, Defendants John W. Beasley a/k/a John W. Beasley, Sr. and Lillian Beasley total Seventy-Five Thousand dollars and No/100 ($75,000.00) towards the debt referenced in Exhibit A & B attached hereto.

RESPONSE: The Beasleys admit a total of $75,000 was paid by or on behalf of The Beasleys to Plaintiffs, said amount being the full amount due from The Beasleys to Plaintiffs, pursuant to the Second Settlement Agreement.

6. Admit that the Defendants paid, or caused to be paid on their behalf, Twenty-Five Thousand Dollars and No/100 ($25,000.00) on, or about, November 26, 2018.

RESPONSE: Admit, incorporating response to Request No. 5 above.

7. Admit that the Defendants, paid, or caused to be paid on their behalf, Fifty Thousand Dollars and No/1000 ($50,000.00) on, or about, December 10, 2020.

RESPONSE: Admit, incorporating response to Request No. 5 above.

8. Admit that the Confession of Judgment executed by Defendants John W. Beasley a/k/a John W. Beasley, Sr. and Lillian Beasley, among others, and filed on May 30, 2019, a copy of which is attached hereto as Exhibit C, was released only as to Defendants John W. Beasley a/k/a John W. Beasley, Sr. and Lillian Beasley on March 17, 2021.

RESPONSE: The Beasleys admit, upon information and belief, that the Release of Judgment Lien as to a Specific Property, Release of Judgment Lien as to Certain Defendants, and Partial Satisfaction of Judgment filed with the Clerk of Court for Charleston County on or about March 17, 2021, released The Beasleys and their property, commonly referred to as 1050 Sea

> **Eagle Watch, Charleston, South Carolina from the Confession of Judgment filed on or about May 30, 2019.**
> 9. Admit that the sums due and owing under the Note have not been paid in full.
> **RESPONSE: The Beasleys admit that all sums due and owing from them, pursuant to the Note, and as set forth in the Second Settlement Agreement, have been paid in full. As to other amounts that may remain due and owing pursuant to the Note, The Beasleys are without information known or readily obtainable by them to admit or deny.**
>
> See R. _____. [Responses to Plaintiffs' Requests for Admission, Exhibit 2 to Plaintiffs' Motion for Summary Judgment.]

Appellants have asserted and continue to assert in their Initial Brief, that the Second Settlement Agreement "releases" Appellants from their obligations under the Note and the Mortgage. Stated another way, Appellants argue that the Second Settlement Agreement required Respondents to file a Satisfaction of the Mortgage and to either mark the Note as satisfied or release Appellants from their obligations of repayment thereunder. However, as set forth herein, there are no terms in the Second Settlement Agreement requiring any such action. There is no reference to the Note or the Mortgage contained in the Second Settlement Agreement. In reality, Appellants are asking the Court to insert or "blue-pencil" additional terms into the Second Settlement Agreement, which would drastically alter its meaning and effect by undoing two separate security instruments without cause.

ARGUMENT

In their brief and throughout this litigation, Appellants are seeking (and/or demanding) that the Court interject additional terms into the Second Settlement Agreement. They do so despite the express acknowledgement in their lower court filings, their arguments in the lower court and in their brief that the words "Note" and "Mortgage" do not appear in the Second Settlement Agreement. In fact, during the hearing on Appellants' Motion for Reconsideration on September 27, 2023, when directly asked by the Master In Equity about a reference to the Note and Mortgage

in the Second Settlement Agreement, Counsel for Appellants acknowledged that the words "Note" and "Mortgage" do not appear in the Second Settlement Agreement:

> **THE COURT:** Dancing around on the head of a pin, and I can't find it. And I read your memoranda more than once, and it says it was clearly referenced in there. I looked for it a second time, and I didn't find it. And then I read the response to your memo in reconsideration and I couldn't find it. And then I found -- actually, I found it the first time I read it. But I did agree with y'all to some degree, and that would be in the language found on page 8. I think this is Ms. Shoun's memoranda. Reference to Exhibit G, pages 1 through 4. We're talking about the settlement agreement. **To be sure, if you search for the word "note" in the second settlement agreement, that word is not found.**
> **MR. RICARD:** Yes, Your Honor.
> **THE COURT:** I am in total agreement with that.
> **MR. RICARD:** Yes, Your Honor.
> **THE COURT:** And that is your statement of fact?
> **MR. RICARD:** Absolutely.
> **THE COURT:** Flip over to page 9. Again, **a perfunctory search for the word "mortgage" in the second settlement agreement will be unavailing in determining whether the second settlement agreement actually references the mortgage**, and I agree with that statement of fact. I can't find it in there anywhere. You find it for me, I might change my mind. But unless you can do that, I'm not going to change my mind.
>
> See R. _____, September 27, 2023 Transcript, P. 18-20, emphasis Respondents.

A simple reading of the Second Settlement Agreement makes it clear that the Second Settlement Agreement dealt specifically with the Release of the Confession of Judgment and was not a satisfaction of the debt evidenced by the Note or the Mortgage. The Second Settlement Agreement was simply an agreement to release the judgment pursuant to the express terms of the Second Settlement Agreement and Release of Judgment.

Had Appellants and/or Respondents intended that the Note and Mortgage be satisfied, an express term would have been included in the Second Settlement Agreement to that effect. It would have taken a single sentence to spell out any such obligation of Respondents. But, alas, no

such obligation exists, and it is clear that Respondents did not agree to satisfy the Note or Mortgage.

I. Appellants did not submit an Affidavit in Opposition to Respondents' Motion for Summary Judgment.

As a threshold matter, it is important to note that Appellants do not dispute the authenticity of their signatures on the Note or the Mortgage. See R. _____. [Appellants' Responses to Respondents' First Set of Requests for Admission, Exhibit 2 to Respondents' Motion for Summary Judgment, filed May 17, 2023.] There is no dispute regarding the authenticity of the Note and Mortgage and Appellants have admitted that they signed the Note and Mortgage.

Interestingly, Appellants did not offer a single affidavit in opposition to Respondents Motion for Summary Judgment. "When a motion for summary judgment is made ... an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *Rule 56(e), SCRCP. See also, Doe ex rel. Doe v. Batson*, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001). ("Rule 56(e), SCRCP, relied upon by the trial court, requires a party opposing summary judgment to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial.") (Emphasis by Respondents.)

Respondents' Motion for Summary Judgment was supported by an Affidavit in Support dated May 17, 2023. See R. _____. [Exhibit 5 to Respondents' Motion for Summary Judgment, filed May 17, 2023.] Respondents' Affidavit noted, among other things, as follows:

> 2. We are the owners and holders of the Promissory Note and Mortgage which are the subject of this action.
>
> 3. As described in detail in the Complaint, Defendant John W. Beasley a/k/a John W. Beasley, Sr. and Lillian Beasley, in their individual capacities and as Trustees or as successors in trust under the Beasley Living Trust dated August 14, 2018 and any amendments thereto are in default under the terms of the Note and Mortgage.

These basic facts are undisputed since Appellants did not file an Affidavit, or offer any testimony, to contradict Respondents' Affidavit declaring that Appellants were in default under the terms of the Note and Mortgage. As a result of Appellants' failure to submit/file an Affidavit in opposition, there is no evidence to support any of Appellants' contentions nor is there evidence to create a genuine issue of material fact.

Notably, Appellants did not seek refuge in Rule 56(f), which would have provided Appellants with another opportunity to simply tell the Court that they, for whatever reason, could not supply the Court with Affidavits. *See* Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions taken or discovery to be had or may make such order as is just."). The dearth of evidence presented by Appellants leads to one logical conclusion – **Appellants could not offer any sworn testimony to refute the Affidavits/sworn testimony of Respondents**. Regardless of the reason why Appellants did not submit an Affidavit in Opposition to Respondents' Affidavit, the fact is that Respondents' affidavit was completely unopposed. [7]

II. Appellants are Judicially Estopped from taking a different position in this Litigation after the Entry of Summary Judgment against Appellants.

Despite their contention that there are genuine issues of material fact set forth in their Brief, Appellants noted in their Memorandum in Opposition to Respondents' Motion for Summary Judgment that there were no genuine issues of material fact: "The [Appellants] agree there are no issues of material fact that exist in this case…" See R. _____. [Page 7, Memorandum in

[7] It is also of note that Appellants own Motion for Summary Judgment filed on August 23, 2023 was likewise unsupported by an affidavit of Appellants or anyone else. See R. _____.

Opposition to Plaintiffs' Motion for Summary Judgment, filed August 8, 2023, emphasis supplied by Respondents.]

However, after the entry of Summary Judgment against Appellants, Appellants changed their position and began asserting that there were genuine issues of material fact. See R. _____. [Appellants' Motion for Reconsideration, Brief pgs. 8 and 9.] In fact, during the hearing on September 27, 2023, Appellants represented to the Master in Equity that there were eight (8) genuine issues of material fact. See R. _____ (Hearing Transcript, September 27, 2023, P. 41-42). It seems readily apparent that this sudden change of position was caused by the entry of Summary Judgment against Appellants. Unsurprisingly, Appellants' Initial Brief asserts that there are "Genuine Issues of Material Fact." See Initial Brief of Appellants, p. 16.

However, Respondents would submit that Appellants are barred from taking two (2) contrary positions in the same litigation under the doctrine of Judicial Estoppel, as outlined in the case of *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004):

> Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. *See Colleton Reg. Hosp. v. MRS Med. Rev. Systs.,* 866 F.Supp. 896, 900 (D.S.C.1994). The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary. *See Hawkins v. Bruno Yacht Sales,* 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003).
> …
>
> This Court has not previously explicitly delineated the requirements for the application of judicial estoppel. We now adopt the following elements necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *See*

> *Carrigg v. Cannon,* 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct.App.2001).

357 S.C. at 215-16, 592 S.E.2d at 632.

As noted above, the purpose of Judicial Estoppel is to protect the integrity of the judicial process. A careful read of Appellants' filings, arguments before the Master In Equity and now before this Court clearly articulate and delineate how Appellants have taken opposite positions regarding the existence of genuine issues of material fact. In this matter, Appellants meet every element:

(1) Appellants, in their response to Respondent's Motion for Summary Judgment, affirmatively asserted that there were no issues of material fact. After Summary Judgment was granted, Appellants changed their position and began arguing that there were issues of material fact (eight, to be exact).
(2) These polar-opposite positions were taken in the same civil action / same proceedings.
(3) Appellants were successful and received a benefit as they were able to argue and maintain a position in opposition to Plaintiffs' Motion for Summary Judgment (prior to the entry of Summary Judgment), that there were no issues of material fact.
(4) The inconsistency is indeed part of an intentional effort to mislead the Court by initially representing to the Court that there were no issues of material fact and then completely changing their position to assert that there are issues of material fact.
(5) These two positions are completely inconsistent with one another.

Based on the forgoing, Respondents would submit that Appellants are Judicially Estopped from taking these inconsistent positions and any reference(s) to the existence of genuine issues of material facts should be disregarded by this Court based on the doctrine of Judicial Estoppel.

III. The Case Law Supports Respondents.

A. The Contract and its interpretation.

The Second Settlement Agreement is, first and foremost, a contract. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 381, 588 S.E.2d

643, 645 (Ct. App. 2003) (quoting *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992)). "Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Koontz v. Thomas*, 333 S.C. 702, 708, 511 S.E.2d 407, 410 (Ct. App. 1999) (quoting *Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995)). "It has long been held that to ascertain the intention of an instrument, the court must first look to its language, and if it is perfectly plain and capable of legal construction, then that language alone determines the instrument's force and effect." *Id.* at 708-709, 511 S.E.2d at 410 (internal citations omitted).

Further, where a contract contains a merger clause, that merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement." *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (internal citations omitted). "The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence or contemporaneous agreements not included in the writing." *Id.* (internal citations omitted). "'The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument.'" *Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999) (quoting *Gilliland v. Elmwood Properties*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990)).

The Second Settlement Agreement is perfectly clear and capable of legal construction. *See Koontz v. Thomas*, 333 S.C. at 708, 511 S.E.2d at 410. The Recitals in the Second Settlement Agreement expressly define its scope:

> WHEREAS, the terms of the Prior Settlement and Release Agreement provided for the recording of certain confessions of judgment with the Clerk of Court for Charleston County, South

> Carolina, and thereafter such other jurisdictions as deemed appropriate by Creditors, should certain sums due thereunder not be timely paid. . . See R. _____. [Second Settlement Agreement, page 2].

As noted above, there is absolutely no mention, or use, of the words "Promissory Note" or "Mortgage," in the Second Settlement Agreement and despite Appellants' assertions to the contrary, the word "Loan" does not have the same meaning as "Note" and "Mortgage." Any assertion to the contrary is simply misdirection.

The Second Settlement Agreement exclusively addresses the Confession of Judgment and a release therefrom. A small sum of money[8] was paid to Respondents, and, in exchange, Respondents filed the Release of Judgment. The "Release" is simply a release of Appellants from the Judgment Lien and not a Satisfaction of Judgment. If the parties intended to satisfy the Judgment or to release Appellants from their obligations under the Second Settlement Agreement, Note and Mortgage, as advocated by Appellants, then the parties would have included a simple provision requiring satisfaction of Mortgage. However, there is no such requirement contained in the Second Settlement Agreement. This fact was clearly understood by the Trial Court in the following exchange with Appellants' Counsel on September 27, 2023:

> **MR. RICARD:** So plaintiffs accept $50,000 from Senior and Lillian in exchange for a release, and that's when the fifth document is created, a release form is created. And it releases two of the four parties that were to the original first settlement agreement. There's four there.
> **THE COURT:** Where in that document does it say that they're getting a release? Where is the release?
> **MR. RICARD:** Yes, Your Honor. And I will get to that.
> **THE COURT:** Release of what --
> **MR. RICARD:** Right.
> **THE COURT:** -- is my question. That would be significant.

[8] As a practical matter, a Confession of Judgment would preclude a borrower from seeking financing because it is a "Judgment." It is unlikely that any bank or financier would loan money when a Judgment was filed against a potential borrower(s).

MR. RICARD: It would be from everything, Your Honor. It's $50,000 in exchange for the release of note, mortgage, confession of judgement, everything.
THE COURT: And where in the document does it release that note and the mortgage and satisfy the note and mortgage?
MR. RICARD: Yes, Your Honor. So I'm going to ask you to -- we're going to go through that --
THE COURT: No, you need to answer that question. Let's just go right there. Okay?
MR. RICARD: Sure, Your Honor.
THE COURT: Dancing around on the head of a pin, and I can't find it. And I read your memoranda more than once, and it says it was clearly referenced in there. I looked for it a second time, and I didn't find it. And then I read the response to your memo in reconsideration and I couldn't find it. And then I found -- actually, I found it the first time I read it. But I did agree with y'all to some degree, and that would be in the language found on page 8. I think this is Ms. Shoun's memoranda. Reference to Exhibit G, pages 1 through 4. We're talking about the settlement agreement. **To be sure, if you search for the word "note" in the second settlement agreement, that word is not found.**
MR. RICARD: Yes, Your Honor.
THE COURT: I am in total agreement with that.
MR. RICARD: Yes, Your Honor.
THE COURT: And that is your statement of fact?
MR. RICARD: Absolutely.
THE COURT: Flip over to page 9. Again, **a perfunctory search for the word "mortgage" in the second settlement agreement will be unavailing in determining whether the second settlement agreement actually references the mortgage**, and I agree with that statement of fact. I can't find it in there anywhere. You find it for me, I might change my mind. But unless you can do that, I'm not going to change my mind.
MR. RICARD: Understood. So if you look at Tab D, that's Exhibit D, delta, to our motion, this is the second settlement agreement. Page 1, very bottom of the page, that provision, that last whereas clause on the first page.
THE COURT: All right. Well, what document are we in again?
MR. RICARD: Second settlement agreement, Tab D in the binder.
THE COURT: All right. You highlighted it, right?
MR. RICARD: Yes, Your Honor. So that highlighted provision, it says: In summation, John Beasley Jr. borrowed the principal sum of 640,000 from the creditors, which that sum was to be solely used for the improvement of certain real estate and to be repaid in full with, which interest, totaled $765,000 on or before October 19, 2017. And then in parentheses, the, quote, "loan." That, Your Honor, is a reference to the note.

> **THE COURT:** No, it's not.
> **MR. RICARD:** Respectively, Your Honor, we disagree.
> **THE COURT:** All right.
> **MR. RICARD:** That debt, that debt right there, is synonymous.
> **THE COURT:** It's the loan. It's the money, right? What they borrowed is the money.
> **MR. RICARD:** And the note is simply acknowledgment of the loan.
> **THE COURT:** Well, it is that. I agree. I agree it's acknowledgment of that. But it's separate and distinct from the note. The loan and the note are not the same thing. The note is a representation of the loan.
> **MR. RICARD:** Respectfully, Your Honor, we disagree. The note is simply an acknowledgment of the loan that is in existence. It's an acknowledgment of the debt.
> **THE COURT:** It's a representation of the loan, yes, and it sets forth the terms of whatever the terms of the note are. I agree with that.
> **MR. RICARD:** Yes, Your Honor. And so this whereas clause -- the note and the loan are synonymous. And if you look at plaintiffs' memoranda in opposition, they actually agree with that. The promissory note is the loan in question. And so by referencing the loan here, by referencing the debt, by referencing this in the last whereas clause, that's a reference to the note and it implicates what is being released in the second settlement agreement.
> **THE COURT:** Okay. Go ahead.
>
> See R. _____, September 27, 2023 Transcript, P. 18-22, emphasis Respondents.

In response to the direct questions from the Court during the September 27, 2023 hearing, Counsel for Appellants engaged in a series of mental gymnastics, contortions and misdirection. Appellants, through counsel, attempt to point out clauses and phrases in the Second Settlement Agreement, in isolation, to suggest to the Court that the Note and Mortgage are part of the Second Settlement Agreement by way of "inference" or "reference." In short, they seek to conflate the term Loan with Note and Mortgage.

Despite Appellants' assertions to the contrary, the Second Settlement Agreement **does not** operate to release Appellants from the debt itself. The Fifty Thousand and 00/100s ($50,000.00) dollars payment to release the Confession of Judgment pales in comparison to the amounts that Appellants agreed to pay Respondents. The Second Settlement Agreement is clear and

unambiguous – Appellants paid Fifty Thousand and 00/100s ($50,000.00) dollars and Respondents filed the Release of Judgment. The Second Settlement Agreement contains a merger clause which reads as follows:

> This Settlement and Release constitutes the entire agreement and understanding between Creditors and Debtors, and it supersedes all prior understanding or agreement, written or oral, **on the subjects contained herein**, and the terms of this Settlement and Release are contractual and not mere recitals. (Emphasis Respondents.) See R. _____, Second Settlement Agreement, ¶ 5.

The only subjects addressed in the Second Settlement Agreement relate to the filing of the Release of Judgment as to Specific Property. Therefore, extrinsic evidence should not be used to twist and contort the Agreement's unambiguous terms nor should the court be required to deploy mental gymnastics to understand the Second Settlement Agreement. Any introduction of additional terms is barred.

Further, Paragraph 16 of Agreement provides as follows:

> Except for the release of the Debtors herein, this Settlement and Release **shall not alter or amend the [First Settlement Agreement]** nor the [Confession] Judgment, which shall remain in full force and effect and of record. See R. ___, Second Settlement Agreement, ¶ 16. (Emphasis Respondents.)

Based on the plain language of Paragraph 16, the Note and Mortgage, both of which are the subject of the First Settlement Agreement, "shall remain in full force and effect and of record." Therefore, the plain and unambiguous language of the Second Settlement Agreement preserves Respondents' rights under the Note and Mortgage.

Appellants argue that the Confession of Judgment, the Mortgage, and the Note should be considered one remedy, or the "same remedy," such that the execution of an agreement regarding the Confession of Judgment subsumes the Mortgage and the Note. Appellants further argue that the execution of the Second Settlement Agreement and the filing of the Release of Judgment bars

any further recovery against Appellants. This contention is patently false based upon the clear language of the Second Settlement Agreement and is also incorrect under existing South Carolina law, as will be discussed hereinbelow. The Second Settlement Agreement does not automatically satisfy the Mortgage or the Note, simply because the same underlying debt is involved, nor does the Second Settlement Agreement require Respondents to satisfy the Note or Mortgage.

Appellants also suggest that the release language contained in the Second Settlement Agreement, which is clearly directed to the rights of Respondents to pursue Appellants under the Confession of Judgment, bars further recovery. To reach this conclusion, Appellants read the Second Settlement Agreement in an "a la carte" fashion, ignoring all other words, sentences, paragraphs and obligations contained therein.

However, the law regarding contracts requires a reading of a contract in its entirety. "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Appellants refuse to acknowledge that the Second Settlement Agreement obligated Appellants to pay a sum certain, Fifty Thousand and 00/100s ($50,000.00) dollars and, in return, Respondents were required to take specific action, i.e. file the Release of Judgment and nothing more.

B. The Confession of Judgement and Mortgage are Separate Security for the Debt.

Appellants contend that once the Release of Judgment was filed, Respondents were barred from further recovery from Appellants because the Note, Mortgage and Confession are all one debt and Respondents are not entitled to pursue multiple paths to recovery. This position stands in complete opposition to long standing South Carolina caselaw and, for that matter, numerous other jurisdictions.

In *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 647 S.E.2d 214 (2007), the South Carolina Supreme Court made it clear that a mortgage is a separate security that may be pursued instead of

or in addition to other remedies. *See Lever* at 33 (citing *Satterwhite v. Kennedy*, 3 Strob. 457 (1849)) ("A creditor shall not have two satisfactions for the same debt, but there is no inconsistency in his pursuing two remedies. If one produces satisfaction, that is a bar to the other. A mortgage is a specific lien, and a judgment is a general lien. Both may be consistently pursued, until the debt is satisfied.") *Lever* is almost, from a factual standpoint, directly on point and provides us clear guidance.

In *Lever*, a debtor and creditor signed an agreement, a note, and a mortgage by which the debtor agreed to pay the creditor according to the terms of the agreement. *See Id. at* 31, 647 S.E.2d at 216. When the debtor did not pay in accordance with the agreement, the creditor chose to bring a lawsuit on the note and obtained a judgment. *See Id.* Subsequently, the judgment expired and the creditor initiated a foreclosure action against the debtor after the prior mortgages (other creditors) had been satisfied. In response, the debtor maintained that, because the lien of the judgment had elapsed (ten years) the creditor could not pursue a foreclosure action under the mortgage. *See Id.* at 32, 647 S.E.2d at 216. The South Carolina Supreme Court disagreed and ruled in favor of the creditor, making it absolutely clear that the fate of a mortgage <u>is not</u> tied to a judgment, even if both instruments apply to the same debt. *See Lever*, 374 S.C. at 35, 647 S.E.2d at 217 (quoting *Nichols v. Briggs,* 18 S.C. 473 (1883)) ("Though the debt be barred, the lien may be enforced. The fact that a debt secured by a mortgage is barred by a statute of limitations, does not necessarily, or as a general rule, extinguish the mortgage security or prevent the maintaining an action to enforce it.")

The only factual difference between *Lever* and the case at hand is that instead of the Judgment expiring, Respondents filed a Release of the Judgment Lien. Again, Respondents <u>did not file a Satisfaction of the Judgment Lien</u>, which provides further evidence that Respondents DID NOT agree to relieve Appellants of their obligations under the Note and Mortgage.

The following language in the *Lever* case is probably the most instructive:

> The cases are uniform in holding that **until the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it, and does not preclude its foreclosure in a subsequent suit** instituted for that purpose, or the exercise of the power of sale contained in the mortgage or deed of trust.

374 S.C. at 33–34, 647 S.E.2d at 216 (quoting 55 Am.Jur.2d *Mortgages* § 524) (emphasis by SC Supreme Court).

In summary, the Judgment and Mortgage are two separate and distinct remedies. A creditor can pick and choose, and/or pursue both remedies, to collect on a debt. A Judgment and a Mortgage are simply different forms of security to ensure that a creditor gets paid if/when a debtor fails to pay in accordance with the debtor's promise/obligation to pay.

B. The Second Settlement Agreement does not Reference and Does not Encompass the Note and Mortgage.

In spite of Appellants' twists and contortions, along with their attempts to blur the meanings of certain words (debt, loan, note, mortgage), Appellants cannot change the plain and unambiguous language of the Second Settlement Agreement, nor can they change the existing case law of this State. The Second Settlement Agreement's plain language clearly explains and provides that its sole purpose was to address the previously filed Confession of Judgment. The Second Settlement Agreement <u>does not</u> address or mention the Mortgage or the Note.

As a threshold matter, Appellants' filings throughout this case demonstrate a fundamental misunderstanding of the function of a promissory note and mortgage. Appellants have asserted that a "loan" has the same meaning as "note" and the same meaning as "mortgage." This is simply incorrect and demonstrates Appellants' misunderstanding of the basic legal principles involving loans, notes and mortgages.

A loan is defined as "delivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it, with or without interest." *Loan,* Black's Law Dictionary (6th ed. 1990). A promissory note, is "an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds." SC § Code 36-9-102(a)(65). In short, the promissory note is the written evidence of the Loan. A mortgage, on the other hand, is "a consensual interest in real property, including fixtures, which secures payment or performance of an obligation." SC Code § 36-9-102(a)(55). In other words, a mortgage is the security for the loan as evidenced by the promissory note. Generally speaking, the process is as follows: money is loaned, a promissory note evidencing that loan is executed and a mortgage is executed to secure the promise to pay.

In this case, Respondents provided the loans and Appellants executed the Note to evidence their unconditional promise to repay the loans. As security for their promise to pay the loans, Appellants executed the Mortgage to "secure payment or performance of an obligation," i.e. the repayment of the loans. Appellants provided collateral to Respondents in the form of a Mortgage on the Subject Property to secure Appellants' promise of repayment to Respondents. Appellants, and others, also executed a Confession of Judgment to provide Respondents with further assurances that they would be repaid the money that they had extended as loans. The Mortgage and Confession of Judgment are separate instruments of security for the Loan as evidenced by the Note.

> A creditor shall not have two satisfactions for the same debt, but there is **no inconsistency** in his pursuing two remedies. If one produces satisfaction, that is a bar to the other. A mortgage is a specific lien and a judgment is a general lien. Both may be consistently pursued, until the debt is satisfied.

Lever at 35-36 (emphasis by Respondents) (Citations omitted).

As noted by the court in its Order, *Lever* is squarely on point. Just like the creditor in *Lever* could no longer enforce its judgment, Appellants can no longer pursue Appellants on the Confession of Judgment that was released by way of the Second Settlement Agreement (i.e. execution, Supplemental Proceedings and the like). However, as in *Lever*, Respondents can pursue their other remedy through a foreclosure of the Mortgage to seek repayment of the of the debt owed to Respondents. *See Lever supra*. As clearly set forth in Respondents' Affidavit and uncontested by way of counter affidavit, the debt evidenced by the Note has not been paid and; therefore, the Mortgage is a valid lien on the Property. As such, Respondents are free to pursue their remedies available through a Mortgage foreclosure.

IV. The *Judgment in a Criminal Case* against John W. Beasley Jr. (from the United Stated District Court), coined by Appellants as "Order of Restitution" Cannot be Considered in the Context of this Foreclosure Action.

A. The *Judgment in a Criminal Case* was not properly before the Trial Court since it was first raised on Appellants' Rule 59 Motion.

In their Motion to Reconsider filed on September 1, 2023 and summarily denied by the Master by Order filed on October 6, 2023, as well as in their brief, Appellants assert that Respondents should be required to look only to a Restitution Order entered in Beasley, Jr.'s criminal case. First, such an assertion, as well as the Restitution Order itself, are not timely. It is well-settled that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 30, 686 S.E.2d 689, 694 (Ct. App. 2009). *See also Repko v. County of Georgetown*, 424 S.C. 464, 502, 818 S.E.2d 743, 748 (S.C. 2018) ("an issue may not be raised for the first time in a motion to reconsider"). A motion to reconsider serves to address the narrow scenario when a party believes the court misunderstood, failed to fully consider,

or failed to rule on an argument or issue that was presented to it. *See Elam v. South Carolina Dept. of Transp.*, 602 S.E.2d 772 (S.C. 2004).

The purported issue relating to the "Order of Restitution" against Beasley Jr. was not raised until after the Master In Equity granted Respondents' Order of Summary Judgment. See R. _____, Appellants' Motion for Reconsideration. As such, as a preliminary matter, neither the Master In Equity nor this Appellate Court should consider this purported issue relating to the "Order of Restitution."

B. Even if the *Judgment in a Criminal Case* against John W. Beasley Jr. (from the United Stated District Court) was properly before the Trial Court, it is a "red herring" intended to be a distraction from the real issues in this matter.

Even if the *Judgment in Criminal Case* (as Appellants call it, "the Restitution Order") should be considered, we must actually read the terms of the Restitution Order. See R. _____. The Restitution Order required John W. Beasley Jr. to pay One Million Three Hundred Thirty-Four Thousand Four Hundred and 00/100s ($1,334,400.00) dollars, immediately, to be allocated among ten different victims of John W. Beasley Jr.'s financial crimes. A Judgment is not a guarantee of payment. In fact, the Federal Court noted in the *Judgment* that John W. Beasley Jr. could not pay the lump sum payment of One Million Three Hundred Thirty-Four Thousand Four Hundred and 00/100s ($1,334,400.00) dollars because the Court specifically authorized payments of One Hundred and 00/100s ($100.00) dollars per month. Based on the total amount of restitution, the ten different victims of Beasley Jr.'s financial crimes and the amounts identified as being owed to Respondents (Respondents' debt equates to roughly 44% of the total amount of Restitution), that would amount to approximately Forty-Four and 00/100s ($44.00) dollars per month being paid to Respondents, if Beasley Jr. actually makes any restitution payments. The payment of Forty-Four and 00/100s ($44.00) dollars per month would mean that it would take Beasley Jr. a little over Two Thousand (2000) years to repay the debt owed to Respondents. It is absurd for

Appellants to suggest that Respondents will be paid through what they have coined the "Order of Restitution" … which is actually a *Judgment in Criminal Case*.

As for the interplay between restitution orders and civil judgments, the South Carolina Court of Appeals has made it clear that the existence of a restitution order "do[es] not limit any civil claims a crime victim may file." *State v. Morgan*, 417 S.C. 338, 342, 790 S.E.2d 27, 29 (Ct. App. 2016). The court in *State v. Morgan* held that "the constructs of restitution and civil damages are separate and distinct." *Id.* at 344, 790 S.E.2d at 30. The existence of a restitution order does not prevent any subsequent civil remedy or recovery; rather, the amount of restitution shall be set off by the amount of civil recovery. *Id.* at 343, 790 S.E. 2d at 30, n. 1.

As a practical matter, IF ANY AMOUNT is ever paid to Respondents, any amounts received would be accounted for by way of a reduction in the amount owed under the Foreclosure Order; however, that does not bar Respondents' right to foreclose the Mortgage and the Court Ordered public sale of the Subject Property.

CONCLUSION

Wherefore, based upon the foregoing and the record in this matter, Respondents would respectfully pray that this Court affirm the Lower Court's Orders.

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