THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge
Charleston County

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Case No. 2023-001733

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Jian-Yun (John) Dong, M.D., Ph.D. .....Appellant,

v.

Medical University of South Carolina .....Respondent.

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# BRIEF OF RESPONDENT

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2. Did the Circuit Court error in granting Respondent summary judgment?

3. Did Appellant timely file a motion to alter or amend the Circuit Court's order granting Respondent summary judgment?

4. Did Appellant timely file the Notice of Appeal?

## STATEMENT OF THE CASE

This is an appeal from a grant of summary judgment by the Circuit Court, and the Circuit Court's related orders regarding discovery, scheduling, and summary judgment. Appellant filed his Complaint on September 2, 2014. (R.p. 1002-1018.) Subsequently, on October 22, 2015, Appellant dismissed the Complaint under Rule 40(j), SCRCP. (R.p. 100-101.)

Thereafter, on December 14, 2016, Appellant restored his Complaint to the general docket, under Rule 40(j), SCRCP. (R.p. 96-97.) Although Appellant initially had counsel, Appellant's counsel withdrew in January 2017. (R.p. 981-982.) Respondent and Appellant proceeded with discovery after Appellant restored the case, including the exchange of written discovery requests and associated responses.

In March 2019, Appellant filed his first motion to compel. (R.p. 924-926.) Appellant's first motion to compel was subsequently heard by the Circuit Court. Appellant appeared for the hearing by telephone. As a result of the hearing, the Circuit Court issued an order on June 20, 2019, granting, in part, Appellant's motion to compel. The Circuit Court's order also stayed the case pending Appellant's release from confinement with the Federal Bureau of Prisons. (R.p. 88-90.)

Subsequently, on July 3, 2019, Respondent filed its Motion to Alter or Amend as to the Circuit Court's June 20, 2019, order. (R.p. 916-922.) Thereafter, the Circuit Court held a hearing regarding Respondent's Motion to Alter or Amend. Appellant appeared for the hearing by telephone. As a result of the hearing, the Circuit Court issued an order on October 4, 2019, granting Respondent's Motion to Alter or Amend. The order issued by the Circuit Court on October 4, 2019, became the controlling order in this matter as to Appellant's first motion to compel and further discovery. The Circuit Court's October 4, 2019, order also contained a "scheduling order" establishing various deadlines. (R.p. 83-86.)

On January 29, 2020, Appellant filed his Motion to Expand Discovery. (R.p. 904-908.) On January 11, 2021, Appellant filed Appellant's Motion to Expand Discovery Schedule Due to COVID-19 Pandemics. (R.p. 887-890.) Subsequently, on January 20, 2021, Appellant filed Appellant's Second Motion to Compel Production. (R.p. 881-885.)

Thereafter, on October 29, 2021, Respondent filed a response to Appellant's Second Motion to Compel. (R.p. 819-874.) Appellant then filed a reply related to his Second Motion to Compel on November 24, 2021. (R.p. 811-818.) On December 13, 2021, the Circuit Court heard Appellant's pending motions. Appellant attended the hearing.

After the hearing, on February 3, 2022, Appellant filed his Opposition to Defendant's Proposed Order, or Motion for Reconsideration. (R.p. 805-810.) Subsequently, the Circuit Court issued its Order Denying Plaintiff's Second Motion to Compel and Granting Expanded Time to Complete Discovery. (R.p. 72-79.)

Appellant then filed his Interlocutory Appeal of Magistrate Order to Restrict Discovery or Motion for Reconsideration on March 8, 2022. (R.p. 793-804.) Thereafter on April 7, 2022, the Circuit Court issued an Order for Protection as to Respondent's counsel. (R.p. 70-71.)

On June 17, 2022, Respondent filed a Motion for Protective Order. (R.p. 789-791.) Appellant, on June 30, 2022, filed his Opposition to Defendant's Motion for Protective Order (R.p. 785-788.)

On August 12, 2022, the Circuit Court issued an order denying Appellant's March 8, 2022, Interlocutory Appeal of Magistrate Order to Restrict Discovery or Motion for Reconsideration. (R.p. 67-68.) Thereafter, on August 23, 2022, Appellant filed his Motion for Amendment of Scheduling Order. (R.p. 778-780.) Additionally, on August 23, 2022, Appellant filed another

Motion for Reconsideration. (R.p. 782-784.) Thereafter, on September 8, 2022, the Circuit Court issued an order allowing additional time to conduct discovery. (R.p. 64-66.)

On September 20, 2022, the South Carolina Supreme Court assigned the Honorable Jean Hoefer Toal as the circuit court judge to oversee and complete the case. Additionally, on September 20, 2022, the Circuit Court scheduled a status conference for October 4, 2022. (R.p. 62-63.) On September 28, 2022, the Circuit Court denied Appellant's March 23, 2022, Motion for Reconsideration. (R.p. 59-61.)

The Circuit Court held a status conference on October 4, 2022. Appellant appeared for the hearing. (R.p. 1021-1110.) Subsequently, the Circuit Court issued a Scheduling Order on October 7, 2022. (R.p. 56-58.)

Thereafter, on October 14, 2022, Appellant filed a Notice of Civil Appeal. (R.p. 102-104.) This Court issued an order on November 23, 2022, denying the appeal. (R.p. 54.) Appellant next filed a Motion for Protective Order on December 21, 2022. (R.p. 759-760.) The Circuit Court denied Appellant's Motion for Protective Order on January 4, 2023. (R.p. 51-53.)

Appellant subsequently filed a Motion for Reconsideration or Renewed Request for Protective Order on January 23, 2023. (R.p. 763-773.) The Circuit Court denied the Motion for Reconsideration or Renewed Request for Protective Order on January 31, 2023. (R.p. 49-50.)

On February 22, 2023, Appellant filed a Motion for Extension of Time for Discovery. (R.p. 750-757.) Subsequently, on March 1, 2023, the Circuit Court denied the motion. (R.p. 46-48.) Thereafter, on March 21, 2023, the Circuit Court issued orders of protection as to Respondent's counsel. (R.p. 38-45.)

On March 31, 2023, Respondent filed its Motion for Summary Judgment and related Memorandum in Support of Summary Judgment. (R.p. 606-722.) On April 2, 2023, the Circuit Court issued a Notice of Hearing. (R.p. 36-37.)

Appellant filed a Motion for Extended Time for Response to Motion for Summary Judgment on April 21, 2023. (R.p. 602-605.) Thereafter, on April 24, 2021, Appellant filed his Opposition to Defendant's Motion for Summary Judgment. (R.p. 517-520.)

On May 1, 2023, Appellant filed a Motion for Protective Order. (R.p. 498-515.) Thereafter, on May 8, 2023, the Circuit Court issued a Notice of Hearing scheduling a hearing for May 26, 2023, and Notice of Trial, scheduling trial for July 24, 2023. (R.p. 32-35.)

Appellant filed a Motion for Continuance on May 26, 2023. (R.p. 492-496.) Nonetheless, the Circuit Court heard Respondent's summary judgment motion on May 26, 2023. (R.p. 1111-1209.) Thereafter, on June 20, 2023, the Circuit Court issued an order granting Appellant additional time, until July 3, 2023, to submit objections to Respondent's proposed summary judgment order. (R.p. 29-31.)

Seven days later, on June 27, 2023, Appellant filed a Motion for Rehearing on Plaintiff's Response in Opposition to Defendant's Summary Judgment Motion. (R.p. 486-490.) On the same date, Appellant filed a Memorandum in Support of His Opposition to Summary Judgment. (R.p. 521-600.)

On July 17, 2023, the Circuit Court issued an order containing findings and conclusions regarding Respondent's summary judgment motion. (R.p. 10-25.) In the order, the Circuit Court granted Respondent summary judgment. (R.p. 10-25.) On the same date, the Circuit Court issued an order denying Appellant's Motion for Rehearing of Defendant's Summary Judgment. (R.p. 26-28.)

On July 17, 2023, Appellant received written notice of the Circuit Court's order granting Respondent summary judgment. (R.p. 349-372.) Thereafter, on July 28, 2023, Appellant filed a Motion for Amendment Order Granting Defendant's Summary Judgment. (R.p. 467-484.) Respondent filed a response on August 16, 2023. (R.p. 335-465.)

The Circuit Court issued its Order Denying Plaintiff's Motion for Amendment of Order Granting Defendant's Motion for Summary Judgment on September 22, 2023. (R.p. 4-9.) On the same date, Appellant filed a Reply to Defendant's Response to Plaintiff's Motion for Amendment. (R.p. 322-334.) Moreover, on September 28, 2023, Appellant filed a Motion for Recusal Based on Appearance of Bias. (R.p. 108-321.)

On October 4, 2023, the Circuit Court issued an Order Denying Plaintiff's Motion for Recusal Based on Appearance of Bias. (R.p. 2-3.) On November 3, 2023, Appellant filed his Notice of Appeal in this Court but did not file the Notice of Appeal in the Circuit Court until November 27, 2023. (R.p. 102-104.)

## FACTS

On May 3, 2010, Respondent and Appellant entered into a written agreement (hereinafter, the "Agreement"): "A Final Separation Agreement between The Medical University of South Carolina including its College of Medicine, and Dr. Jian-yun Dong, Professor of Microbiology and Immunology." (R.p. 1006-1014.) Appellant, along with J. G. Reves, M.D. ("Dr. Reves"), Respondent's then Vice President for Medical Affairs and College of Medicine Dean, signed the Agreement on May 3, 2010. (R.p. 632-640; 1006-1014.)

Appellant and Dr. Reves signed the Agreement on May 3, 2010, in Dr. Reves' office. (R.p. 660.) Before signing the Agreement, Appellant did not read the Agreement. (R.p. 666.) Instead,

Appellant "scanned through" the Agreement. (R.p. 660-690.) Dr. Reves did not pressure Appellant to sign the Agreement. (R.p. 661.)

The Agreement imposed obligations and benefits on Appellant and Respondent. (See discussion of Respondent's obligations is in Section C.2 below.) Appellant contends Respondent breached the Agreement no later than June 17, 2010, forty-five days after Respondent and Appellant signed the Agreement on May 3, 2010. (R.p. 670.)

## APPLICABLE STANDARDS OF REVIEW

### A. Discovery.

"A trial court's ruling on a discovery matter will not be disturbed on appeal except where there is an abuse of discretion." Owens v. Stirling, 438 S.C. 352, 358, 882 S.E.2d 858, 861 (2023) (*citing* Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." Dunn at 502, 381 S.E.2d at 735. "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." Id. (*citing* Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974)).

### B. Summary Judgment.

"In reviewing the grant of summary judgment, [an appellate c]ourt applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Ent., Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003).

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. In determining whether summary judgment is appropriate, the evidence must be considered in the light most favorable to the nonmoving party. Id. The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

However, "'[w]ith respect to an issue on which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is absence of evidence to support the non-moving party's case.'" Baughman at 115, 410 S.E.2d at 544 (*quoting* Celotex Corporation v. Catrett, 477 U.S. 317, 325 (1986)). In that instance, the "moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim.'" Id. (*quoting* Celotex, 477 U.S. at 323) (emphasis in original). "Once the moving party has carried its initial burden, the opposing party must . . . 'do more than simply show that there is some metaphysical doubt as to the material facts,' and 'must come forward with 'specific facts showing there is a genuine issue for trial.'" Id. (*quoting* Matsushita Electrical Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87(1986)).

## ARGUMENT

### A. Appellant's Motion to Alter or Amend was Untimely and, Therefore, Appellant's Notice of Appeal was Untimely.

#### 1. Appellant's Motion to Alter or Amend Order Granting Summary Judgment.

##### a. Appellant Submitted Motion Too Late.

The Circuit Court correctly concluded Appellant submitted his Motion for Amendment of Order Granting Defendant Summary Judgment too late. (R.p. 4-9.) South Carolina Rule of Civil Procedure 52(b) allows a party "not later than 10 days after receipt of written notice of entry of

judgment" to request the court "amend its findings or make additional findings and may amend the judgment accordingly . . .." Rule 52(b), SCRCP, further requires "[a] party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after filing the motion."

Appellant and Respondent received the Circuit Court's order on July 17, 2023, by email from the Court. (R.p. 349-372.) Thereafter, Appellant filed the Motion on July 28, 2023. (R.p. 373-392.) According to the certificate of service attached to the Motion, Appellant served the Motion on Respondent's counsel by email and regular mail on July 27, 2023. (R.p. 373-392.)

Respondent's counsel received notice of the filing of the Motion on July 28, 2023. (R.p. 393-394.) However, Respondent's counsel did not receive the Motion by either email or regular mail as shown on the certificate of service attached to the Motion. Consequently, Appellant failed to file or serve the Motion on or before July 27, 2023, resulting in the Motion being untimely because Appellant did not "make" – he neither filed nor served – the Motion within ten days of July 17, 2023. To the contrary, Appellant did not file, and no notification of the Motion was received by counsel for Respondent, until July 28, 2023 - eleven days after July 17, 2023.

Rule 52(b), SCRCP, states "[u]pon motion of a party *made* not later than 10 days after receipt of written notice of entry of judgment the Court may amend its findings or make additional findings and may amend the judgment accordingly . . .." (emphasis added.) It is indisputable Appellant received "written notice of entry of" the Order (i.e., a "judgment") on July 17, 2023. (R.p. 349-372.) Notably, on July 17, 2023, Appellant responded to the email from the Court containing the filed Order, thereby confirming his receipt of the Order on that day. (R.p. 370-372.) Nonetheless, Appellant did not file or serve the Motion within ten days of July 17, 2023.

The Court's July 17, 2023, email to the parties attaching the Order constitutes "receipt of written notice of entry of judgment [the Order] . . .." Rule 52(b), SCRCP. *See* Rule 77(d), SCRCP (requiring service of the notice of the entry of a judgment or order by "first class mail" but stating such "mailing . . . shall not be necessary to parties who have already received notice"); Rule 59(e), SCRCP (stating a motion to alter or amend judgment under Rule 59 must be served not later than ten days after "receipt of written notice of the entry of the order."); Rosen, Rosen & Hagood v. Hiller, 307 S.C. 331, 334, 415 S.E.2d 117, 118 (Ct. App. 1992) (recognizing notice from the clerk under Rule 77, SCRCP, is not required where a party otherwise has notice of the order or judgment). *See also, e.g.,* Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018) (holding an email may constitute "written notice of entry of the order or judgment" under Rule 203(b)(1), SCACR.)

In summary, Appellant neither filed nor served the Motion on or before July 27, 2023. For the reasons discussed, the Circuit Court correctly concluded Appellant's Motion for Amendment Order Granting Defendant Summary Judgment was untimely.

**b. Appellant Failed to Raise or Address in Initial Brief.**

Appellant does not address the Circuit Court's finding that Appellant's Motion for Amendment Order Granting Defendant Summary Judgment was untimely, or otherwise challenge the Circuit Court's finding in Appellant's Initial Brief. Consequently, Appellant abandoned challenging the finding and the Circuit Court's ruling is the law of the case. *See* Fields v. Melrose, Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); Bell v. Bennett, 307 S.C. 286, 294-95, 414 S.E.2d 786, 791 (Ct. App. 1992) (failure to present argument is abandoned and, therefore, becomes an "unappealled ruling" and "the law of the case.")

### 2. Appellant's Notice of Appeal is Untimely.

The Circuit Court correctly found Appellant's Motion for Amendment of Order Granting Defendant Summary Judgment was untimely. Therefore, Appellant's Motion for Amendment of Order Granting Defendant Summary Judgment did not toll Appellant's time for serving and filing the Notice of Appeal. (*See* Rule 203, SCACR, stating a "timely . . . motion to alter or amend the judgment" stays the time for appeal.). Consequently, as discussed above, Appellant's thirty-days to serve and file the Notice of Appeal commenced on July 17, 2023, making August 16, 2023, Appellant's deadline to file a notice of appeal. However, Appellant neither served nor filed the Notice of Appeal until, November 3, 2023 – more than seventy days too late. (R.p. 102-107.) Consequently, Appellant's appeal is barred.

## B. Circuit Court's Discovery Orders Do Not Constitute An Abuse of Discretion.

### 1. Appellant's Requests for Production.

Appellant contends the Circuit Court abused its discretion in limiting the scope of his requests for production. However, a review of the Circuit Court's orders addressing discovery shows a clear absence of any abuse of discretion, including any errors of law. (R.p. 88-90, 83-86, 72-79; 56-58.) For example, a review of the Circuit Court's June 20, 2019, Order shows the Court exercised its discretion in *granting*, in part, Appellant's Motion to Compel, and, in doing so, exercised the its discretion in placing limitations on the scope of discovery.

It is Appellant's burden to show an abuse of discretion, and Appellant has failed to do so.

### 2. Depositions Scheduled and Cancelled by Appellant.

A review of the Scheduling Order (R.p. 56-58.) demonstrates Appellant's general assertions about being denied the opportunity to take depositions is inaccurate. First, other than requiring Appellant to take depositions of Respondent's current employees at Respondent's

counsel's office, no other restrictions were imposed, other than the requirements, restrictions and limitations contained in the South Carolina Rules of Civil Procedure that apply to all civil lawsuits.

Second, Appellant's assertion Respondent's counsel interfered with Appellant taking depositions is inaccurate. To the contrary, the record shows Appellant's failure to take depositions was his failure alone. (R.p. 436-438.) For example, on January 5, 2023, in response to an email from counsel for Respondent regarding rescheduling depositions of Respondent's employees, Appellant stated the following: "Please give me a a [sic] couple of days to look into my schedule in February. Thanks for the follow up." (R.p. 459-465.) However, there is no record of Appellant making subsequent requests to Respondent's counsel to reschedule depositions.

Third, the record is clear that on October 4, 2022, the Circuit Court held a status conference and, thereafter, on October 7, 2022, issued the Scheduling Order. The Scheduling Order required depositions be completed no later than Tuesday, February 28, 2023. (R.p. 56-58; 1021-1110.)

However, Appellant does not dispute that between October 7, 2022, and February 28, 2023, Appellant did not take a deposition. More notable as to Appellant's contention of interference is that during the same time, Respondent's counsel neither requested nor obtained protection from the Court. To the contrary, the record shows that after October 7, 2022, Respondent's counsel requested and received court protection on a single occasion, for the period of March 27, 2023, through April 12, 2023; protection that did not begin until almost 30 days after the time to take depositions expired. (R.p. 42-45.) Consequently, based on the record, it is inaccurate that protection granted to Respondent's counsel interfered with Appellant taking depositions. To the extent Appellant failed to take depositions, the record shows fault lies with Appellant alone and not with the Circuit Court's orders, including the Scheduling Order.

### 3. Circuit Court's Scheduling Order.

Appellant contends the Circuit Court's Scheduling Order hindered and/or interfered with Appellant conducting discovery. However, the Scheduling Order shows this contention is wrong. (R.p. 56-58.) First, Appellant was provided with almost five months to take depositions, the only discovery allowed by the Scheduling Order. However, Appellant did not take a single deposition.

Second, as discussed above, other than requiring Appellant to take depositions of Respondent's current employees at Respondent's counsel's office, no other restrictions were imposed, other than those requirements, restrictions and limitations contained in the South Carolina Rules of Civil Procedure that apply to all civil lawsuits. Contrary to Appellant's contentions, Appellant presents the Court with nothing done by the Circuit Court that constitutes an abuse of discretion.

## C. Circuit Court Properly Granted Summary Judgment.

Appellant asserts a single cause of action for breach of contract. Appellant's Complaint contains no other causes of action, and Appellant's Complaint stands without amendment. Specifically, Appellant alleges Respondent breached the Agreement. (R.p. 1002-1018.)

Appellant, along with Dr. Reves, Respondent's then Vice President for Medical Affairs and College of Medicine Dean, signed the Agreement on May 3, 2010. Appellant filed his Complaint on September 2, 2014.

In this action for breach of contract, the burden is on Appellant to prove the contract [Agreement], its breach, and damages caused to him by such breach. Maro v. Lewis, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010). Additionally, the law imposes an obligation on Appellant to file and serve his Complaint alleging breach of contract within the applicable statutes of limitation.

As the Circuit Court concluded, Appellant does not present sufficient material evidence to show Respondent breached the Agreement, to show damages accrued as to Appellant regarding alleged breaches, or to show Appellant filed and served the Complaint within the applicable three-year statute of limitations. For the reasons expressed by the Circuit Court, the Court should affirm the Circuit Court granting Respondent summary judgment.

**1. Statute of Limitations Bars Appellant's Claim.**

**a. Appellant Failed to Address in Initial Brief.**

Like Appellant's failure, discussed above, to challenge, oppose or address the Circuit Court's finding that his Motion to Alter or Amend was untimely, Appellant fails to address in his Initial Brief the Circuit Court's finding that his breach of contract claim is barred by the statute of limitations. Indeed, in Appellant's Initial Brief, Appellant makes no argument or mentions the Court's conclusion that his breach of contract claim is barred the applicable three-year statute of limitations. Consequently, the Circuit Court's finding regarding the application of the statute of limitations is the law of the case. *See* Fields at 106, 439 S.E.2d at 285; Bell at 294-95, 414 S.E.2d at 791.

**b. Appellant's Claim is Otherwise Barred by the Statute of Limitations.**

Even if Appellant challenged the Circuit Court's Order in respect to the Circuit Court concluding Appellant's breach of contract claim is barred by the statute of limitations, Appellant's claim is barred. The statute of limitations for actions pursuant to contract is three years. Poly-Med, Inc. v. Novus Scientific PTE. LTD, 437 S.C. 343, 347, 878 S.E.2d 896, 898 (2022) (*citing* S.C. Code Ann. § 15-3-530(1) (2005)). Consequently, the statute of limitations applicable to Appellant's allegations regarding the Agreement is three years. The Circuit Court correctly applied

the three-year statute of limitations to Appellant's Complaint, and correctly concluded any breaches of the Agreement Appellant alleges occurred prior to September 2, 2011, are time barred. Appellant presents no material evidence any alleged breach occurred after September 1, 2011.

Second, Appellant presents no material evidence any alleged breach *first* occurred after September 1, 2011, or occurred more than three years after Appellant knew or should have known (i.e., discovered) a cause of action for breach of contract existed. *See* Id. at 350, 878 S.E.2d at 900 ("'The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist.'") (*quoting* Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008)). In Poly-Med, the South Carolina Supreme Court confirmed "South Carolina does not recognize the continuing breach theory in applying the statute of limitations to breach of contract claims." Id. at 355, 878 S.E.2d at 901.

Appellant, at best, could only pursue his breach of contract action for the following alleged breaches by Respondent: 1) breaches *first* occurring after September 1, 2011 – three years prior to filing the Complaint on September 2, 2014; and/or 2) breaches Appellant did not know of and should not have known of through the exercise of due diligence prior to September 2, 2011 – three years prior to Appellant filing the Complaint. However, for the reasons discussed by the Circuit Court, Appellant does not present material evidence to overcome application of the three-year statute of limitations.

**i. Appellant Does Not Present Material Evidence Respondent First Breached the Agreement After September 1, 2011.**

According to Appellant, Respondent breached the Agreement soon after entering into the Agreement. (R.p. 681-682.) For example, Appellant claims Respondent failed to meet the terms of the Agreement addressed in Section C.2.l below. (R.p. 670.) However, the Agreement required

Respondent meet the terms of the Agreement in that respect within forty-five days of entering into the Agreement, being on or before June 17, 2010. (R.p. 1006-1014.)

By way of further example, the Agreement required Respondent meet the terms of the Agreement addressed in Sections C.2.r and C.2.t below. (R.p. 1006-1014.) However, the Agreement required Respondent meet the terms of the Agreement in those respects within thirty days of the effective date of the Agreement – no later than July 17, 2010. (R.p. 1006-1014.) Additionally, Appellant testified "of course" Respondent breached the Agreement prior to March 25, 2011. (R.p. 681-682.)

In summary, taking Appellant's allegations and testimony as true, the Circuit Court correctly concluded Appellant knew or should have known as early as June 17, 2010, that Respondent breached the Agreement. Therefore, the three-year statute of limitations accrued and began to run as to Appellant's breach of contract claim as early as June 17, 2010, but no later than July 17, 2010.

Moreover, Appellant testified he believed Respondent breached the Agreement prior to March 25, 2011. Regardless of what date the statute of limitations accrued as to Appellant's claim Respondent breached the Agreement, the Circuit Court correctly determined that Appellant waiting until September 2, 2014, to file his Complaint results in Appellant's claim falling outside the statute of limitations. Consequently, Appellant's breach of contract claim is time barred.

**ii. Appellant Either Knew of or Should Not Have Known of Alleged Breaches of the Agreement Through the Exercise of Due Diligence Prior to September 2, 2011.**

See Section i above.

### 2. Appellant Does Not Present Sufficient Evidence Respondent Breached the Agreement as to Any Obligation of Respondent.

"'It is fundamental that, in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.'" Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) (*quoting* Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 498-99, 649 S.E.2d 494, 502 (Ct. App. 2007)). "'In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument.'" Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (*quoting* McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). The Agreement is unambiguous and, therefore, the Court, like the Circuit Court, must enforce it "according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

It is a question of law for the Court, as it was for the Circuit Court, whether the language of the Agreement is ambiguous. South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001). Respondent asserts, consistent with the Circuit Court's order granting summary judgment, the Agreement "is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." C.A.N. Enters., Inc. v. South Carolina Health and Human Services Commission, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The Circuit Court correctly agreed with Respondent.

Because the Agreement is "clear and capable of legal construction," the Circuit Court's and now this Court's "only function is to interpret its lawful meaning and the intention of the parties as found within" the Agreement "and give effect to it." Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). This Court, like the Circuit Court, is "without authority to alter" the unambiguous "by construction or to make" a new Agreement for the parties. C.A.N. Enters., Inc., 296 S.C. at 378, 373 S.E.2d at 587.

The Circuit Court recognized the Agreement contains unambiguous obligations as to both Respondent and Appellant. (R.p. 10-25.) However, the Circuit Court correctly concluded Appellant fails to present sufficient evidence Respondent breached its obligations in the Agreement. (R.p. 25.) As addressed by the Circuit Court, Respondent's obligations, as contained in the Agreement, are each addressed sequentially below:

**a. Continue "compensated appointment [of Appellant] as Professor of Microbiology and Immunology will continue through March 31, 2012."**

Appellant, as concluded by the Circuit Court, presented no material evidence Respondent breached this provision in the Agreement. To the contrary, the material evidence shows Respondent did not breach this provision of the Agreement. First, Appellant acknowledges Respondent made the payments to him. (R.p. 662.) Second, the letter from Mark Sothmann, Ph.D. ("Dr. Sothmann"), Respondent's then Vice President for Academic Affairs and Provost, to Appellant on September 29, 2011, placed Appellant on paid administrative leave, and Respondent continued to pay Appellant. Third, Dr. Sothmann did not remove Appellant's faculty appointments. (R.p. 1002-1018.)

**b. "[C]ontinue Dr. Dong's employment, faculty appointment and make scheduled salary payments to him [through March 31, 2012]."**

See Section a above. Appellant presented no evidence to the Circuit Court that Respondent either failed to employee him until March 31, 2012, or make scheduled salary payments to him through March 31, 2012. Additionally, Appellant provided no evidence Respondent did not allow Appellant to continue his faculty appointments, tenure, or title, or that Respondent otherwise removed Appellant's faculty appointments, tenure, or title through March 31, 2012.

**c. Allow Appellant to "retain his faculty appointment, tenure and title until the effective date [March 31, 2012] of his resignation."**

See Sections a and b above.

**d. Allow Appellant "forty-five (45) days after the execution of the agreement to revoke it [the Agreement]."**

The Circuit Court correctly concluded Appellant presented no evidence Respondent breached the Agreement in respect to the revocation provision. Moreover, Appellant acknowledges he did not ask to revoke the Agreement within the forty-five-day period. (R.p. 661.)

**e. "[P]ay Dr. Dong his current level of monthly salary compensation through March 31, 2012. This amount will equal but not exceed his effective annual rate of pay ($105,313.00/year) at November 1, 2009."**

See Sections a and b above.

**f. "Primary [MUSC faculty] appointment will be in the Department of Biochemistry with a secondary appointment in the Department of Microbiology and Immunology [through March 31, 2012]."**

See Sections a and b above.

**g. "Dr. Dong may use the title 'Director of Biotherapeutics and Vaccine Development' [through March 31, 2012]."**

See Section a and b above. Additionally, Appellant acknowledges no recollection of ever using the title. (R.p. 673.) Moreover, Appellant provided no material evidence Respondent told

him to not use the title, or otherwise prohibited Appellant's use of the title, through March 31, 2012.

> **h. "Any and all MUSC academic appointments are understood to be term limited, not to extend beyond March 31, 2012 or the date of his employment at another institution or company, whichever may come first."**

See Sections a, b, and g above.

> **i. "University [MUSC] will waive the direct charging of Dr. Dong's salary to any grants or contracts he receives during the period of this agreement. University [MUSC] will cost-share this expense in compliance with federal rules and regulation."**

Appellant presented no evidence Respondent breached the Agreement in respect to this provision.

> **j. "University [MUSC] will continue to provide customary fiscal support and oversight for research awards received through MUSC and the Division of Basic Science."**

Appellant presented no evidence Respondent breached the Agreement in respect to the provision requiring "customary fiscal support and oversight for research awards received through MUSC and the Division of Basic Science."

> **k. "University [MUSC] will pay Dr. Dong a sum of $30,000 directly from the Chairman's budget in the Department of Microbiology and Immunology, to be paid no later than day 50 following the signing of this agreement."**

According to Appellant, Respondent paid the amount to him. (R.p. 668.)

> **l. "Mr. Scott Reid and Mr. Ronald Bycroft will attempt to locate an vectors or similar materials shared with other investigators for re-propogation by Dr. Dong and will attempt to locate written, enduring, hard-copy records which have been lost. This will occur in the 45 day window above. Any additional items located after that time of search will also be provided Dr. Dong."**

Appellant provided no evidence Respondent, specifically its then employees Scott Reid and Ronald Bycroft, failed to "attempt" to "locate" the "vectors and similar materials." Moreover,

Appellant presented no evidence Respondent failed to provide Appellant with "additional items located after that time of search" by Mr. Reid and Mr. Bycroft or evidence such "additional items" were located at all. (R.p. 670.)

> **m. "University [MUSC] agrees to relinquish any all active, commercially funded research awards received by Dr. Dong to Dr. Dong as permitted by the sponsor upon his resignation."**

Appellant presented no evidence Respondent breached the Agreement in respect to the provision regarding relinquishment of "commercially funded research awards."

> **n. "Active, federally funded research awards received will be relinquished [by MUSC] directly back to the federal agencies as obligated by the award agreements."**

Appellant presented no evidence Respondent breached the Agreement in respect to the relinquishment provision.

> **o. "Enduring grant materials, records, lab books and any other documentation required by law or University policy, will be secured, catalogued and maintained by MUSC, in the office of General Counsel." "Dr. Dong may make copies of his enduring grant materials, records, and lab books."**

Appellant presented no evidence Respondent breached the Agreement in respect to the revocation provision.

> **p. "MUSC will cover Dr. Dong's legal fees and other costs in this matter, through a second one-time payment of $20,000, also to be made to Dr. Dong no later than day 50 following the signing of this agreement."**

Appellant presented no evidence Respondent breached the Agreement in respect to this provision. Appellant acknowledges he does not have knowledge whether Respondent paid the $20,000.00. (R.p. 668.) Additionally, Appellant also acknowledges no recollection of incurring or claiming legal fees, including attorney fees, related to the Agreement because Appellant "didn't

have an attorney involved," and Appellant "did not believe I [he] claimed it [$20,000.00 for legal fees and other costs]." (R.p. 668.)

> **q. "[A]ccess to campus facilities and to their use [by Appellant] shall not be limited during his remaining years of appointment and employment."**

Appellant presented no evidence Respondent breached the Agreement in respect to the access provision. Moreover, although a letter from Dr. Sothmann to Appellant on September 29, 2011, placed Appellant on paid administrative leave, Dr. Sothmann did not prohibit Appellant from accessing "campus facilities" or limit Appellant's use of "campus facilities." (R.p. 747-748.)

> **r. "[A]ny equipment purchased through extramural grants written by Dr. Dong as the sole PI and which was in Dr. Dong's laboratory at the time of relocation to the 700 sf laboratory space (including freezers and refrigerators also located nearby in equipment rooms of CSB) shall be relocated to GenPhar in 30 days of the effective date."**

Respondent acknowledged to the Circuit Court that it never relocated "equipment" subject to this provision of the Agreement. However, as discussed previously, to the extent Appellant could have asserted a claim for breach of the Agreement in regard to this provision, the three-year statute of limitation began to run after thirty days of the effective date of the Agreement – no later than July 17, 2010. (R.p. 22.)

> **s. "Relocate at its [MUSC's] expenses such Exhibit B equipment as it [MUSC] may evaluate from the remaining Vector Core equipment which can be temporarily relocated without jeopardizing other on-going funded faculty researchers," including "equipment which Dr. Dong purchased from UCSF [University of California – San Francisco] and for grants on which Dr. Dong was the named original PI ["Primary Investigatory"] as permitted by law and University [MUSC] policy to the GenPhar location, provided that all certificates of occupancy, governmental permits and insurance coverages are in place for that site." "All equipment shall remain within the MUSC property accounting system."**

Appellant presented no evidence Respondent breached the Agreement in respect to this provision for the following reasons. First, Appellant presented no evidence he ever provided an "Exhibit B" to the Agreement and no "Exhibit B" accompanies the Agreement. The Agreement required Appellant provide Respondent with "Exhibit B" no later than "10 days after the date of entry into" the Agreement – May 13, 2010. (R.p. 634.) Second, Appellant presented no evidence "certificates of occupancy, governmental permits and insurance coverages" were ever issued to or for the "GenPhar location"." (emphasis added.) (R.p. 22-23.)

**t. "University [MUSC] agrees to relocate at its expense the equipment listed in Exhibit A."**

Respondent acknowledged to the Circuit Court that it never relocated the equipment listed in Exhibit A to the Agreement. However, as noted above, Appellant presented no evidence the "GenPhar location" received "certificates of occupancy, governmental permits and insurance coverages." (emphasis added.) In the absence of such certificates, permits and insurance coverages, the Circuit Court correctly conclude the Agreement did not require Respondent relocate the equipment listed in Exhibit A to the Agreement. Additionally, as discussed previously above, to the extent Appellant could have asserted a claim for breach in regard to this provision, the Circuit Court correctly concluded the three-year statute of limitation began to run after thirty days of the effective date of the Agreement – no later than July 17, 2010. (R.p. 23.)

In summary, the Circuit Court correctly concluded Appellant presented no substantive, admissible, material evidence that is sufficient to support Appellant's allegation Respondent breached the Agreement.

**3. Appellant Does Not Present Sufficient Evidence of Damages.**

The Circuit Court correctly concluded Appellant "did not provide any material evidence of damages associated with any alleged breach of the Agreement." (R.p. 24.) "The general rule is that

for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. (*quoting* Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." Id. (*quoting* S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990)). "The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach." S.C. Fin. Corp. of Anderson v. W. Side Fin. Co., 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).

"'Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.'" Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (*quoting* Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). "'While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required.'" Id. (*quoting* Whisenant, 277 S.C. at 13, 281 S.E.2d at 796).

Even if Appellant could show Respondent breached the Agreement, and Appellant did not and has not shown such breach, the Circuit Court correctly concluded Appellant did not and has not presented sufficient, material evidence of damages associated with any alleged breach of the Agreement by Respondent.

## CONCLUSION

For the reasons stated, this Court should affirm the Circuit Court's Order granting summary judgment.

Respectfully submitted,

/s Bob J. Conley

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ATTORNEYS FOR RESPONDENT

Charleston, South Carolina
March 10, 2025

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Honorable Jean H. Toal, Circuit Court Judge

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Appellate Case No. 2023-001733
Case No. 2016-CP-10-06683

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Medical University of South Carolina, .....Respondent,

v.

Jian-Yun (John) Dong, M.D., Ph.D., .....Appellant.

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**CERTIFICATE OF SERVICE**

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Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned counsel for the Respondent Medical University of South Carolina, does hereby certify that service of the **Brief of Respondent** in the above-captioned matter was made upon Appellant by email on this 10th day of March 2025 as follows:

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*s/ Bob J. Conley*

Attorney for Respondent