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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

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2026-000649
Circuit Court Case No. 2024-CP-10-02016

Calfran Properties,
A South Carolina Limited Partnership,

Respondent,

v.

Thomas D. Calcote,

Appellant.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Where Defendant¹ appealed the master's order filed February 2, 2026, granting summary judgment in favor of Plaintiff², but Defendant did not appeal subsequent orders and judgments in favor of Plaintiff, is Defendant's appeal of the master's February 2, 2026, summary judgment order moot (or otherwise unavailing) because the subsequent unappealed orders and judgments in favor of Plaintiff are the law of the case and appellate jurisdiction no longer exists to upset them?**
- II. Assuming, *arguendo*, Defendant's appeal of the master's February 2, 2026, summary judgment order is not moot (or otherwise unavailing), has Defendant met his burden to show that the master committed reversible error in granting summary judgment in favor of Plaintiff?**

COUNTER-STATEMENT OF THE CASE

On April 17, 2024, Plaintiff filed this non-jury action in the Charleston County Court of Common Pleas claiming that it was entitled to accelerate and collect from Defendant the entirety of his indebtedness to Plaintiff (the principal amount of \$600,000 plus interest) under the terms of a certain promissory note (the "Note"), as well as an award of reasonable attorney fees, costs, and expenses incident to such collection. (Summons & Compl.) In response, Defendant admitted the validity of the Note and even that he had not performed as required by its express terms but asserted affirmative defenses that he contended excused his nonperformance or at least prohibited Plaintiff from complaining about it. (Answer; Am. Answer.)

After a period of discovery, Plaintiff moved for summary judgment on November 14, 2025. (Pl.'s 11/14/25 MSJ with Exs. A–B; *see also* Mem. in Supp. of Pl.'s 11/14/25 MSJ with Exs. A–F; Mem. in Opp'n to Pl.'s 11/14/25 MSJ; 1/9/26 Aff. of T. Calcote; Reply Mem. in Supp. of Pl.'s

¹ "Defendant" refers to Defendant/Appellant, Thomas D. Calcote.

² "Plaintiff" refers to Plaintiff/Respondent, Calfran Properties, a South Carolina Limited Partnership. Its general partner is Defendant's father, Dr. Clarence E. Calcote ("Dr. Calcote").

11/14/25 MSJ with Exs. A–B.)³ Following a hearing on January 14, 2026,⁴ the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County,⁵ granted the motion via form order filed January 15, 2026,⁶ and formal order filed February 2, 2026, finding that there existed no genuine issue of material fact, that Defendant had failed to perform as required by the Note, that there was no evidence to support Defendant’s affirmative defenses, and that Plaintiff was entitled to judgment against Defendant as a matter of law in the amount of \$677,398.94. (Order filed 2/2/26.)⁷ Defendant did not move for alteration, amendment, or reconsideration of the master’s February 2, 2026, summary judgment order under Rule 59(e), SCRPC.

This appeal by Defendant of the master’s February 2, 2026, summary judgment order followed by notice served March 2, 2026. (Def.’s Notice of Appeal.)⁸

³ Plaintiff had previously moved for summary judgment on October 17, 2024. (Pl.’s 10/17/24 MSJ with Ex. A; *see also* Aff. of C. Calcote with Exs. A–D; 10/28/24 Aff. of T. Calcote with Ex. A; Supp’l Aff. of C. Calcote with Exs. A–D; Mem. in Opp’n to Pl.’s 10/17/24 MSJ.) That motion was denied by order filed February 21, 2025. (Order filed 2/21/25.) Plaintiff’s November 14, 2025, motion for summary judgment followed depositions of Defendant and Dr. Calcote in October 2025. (Dep. of T. Calcote; Dep. of C. Calcote.)

⁴ (1/14/26 Hr’g Tr.)

⁵ The case had been referred to the master by order filed September 9, 2025. (Order filed 9/9/25.)

⁶ (Order filed 1/15/26.)

⁷ This amount constitutes “all sums due and owing under the terms of the Note . . . as of January 31, 2026” and comprises “the \$600,000 balance remaining on the principal, \$66,500 in missed and short payments, and interest accruing daily in the amount of \$139.73 from November 15, 2025, to January 31, 2026 (78 days)” (Order filed 2/2/26 p. 13.) The master also found Plaintiff entitled to recover reasonable attorney fees, costs, and expenses. (Order filed 2/2/26 p. 13.)

⁸ By order filed April 13, 2026, the master found Plaintiff entitled to an award of attorney fees in the amount of \$145,085.50 and costs and expenses in the amount of \$16,690.69, and on that date, judgment was entered in favor of Plaintiff against Defendant in the amount of \$839,175.13. (Order filed 4/13/26; Form 4 filed 4/13/26.) In response to a motion by Defendant to deposit funds and stay execution of judgment, by order filed May 29, 2026, the master determined that, with the accrual of statutory post-judgment interest, Plaintiff’s judgment against Defendant had by then grown to \$863,719.58, and on that date, the judgment was amended accordingly. (Order filed 5/29/26; Am. Form 4 filed 5/29/26.) Defendant did not appeal these orders and judgments.

STATEMENT OF FACTS

In March 2014, Plaintiff loaned Defendant \$600,000 and Defendant executed the Note, promising to repay the loan on the following terms:

FOR VALUE RECEIVED, [Defendant⁹] promises to pay to the order of [Plaintiff] . . . the sum of Six Hundred Thousand Dollars (\$600,000.00), together with interest thereon at the rate of Eight and one-half percent (8½%), per annum. The principal and interest shall be paid as follows:

Monthly payments of \$4,250.00 to be auto deposited in [Plaintiff's] bank account on or before the fifth (5th) day of each month, with any outstanding balance due in one lump sum payment due no later than the fifth (5th) day of the one-hundred eightieth month after the date hereof.

Any unpaid installments of principal or interest shall themselves bear interest after maturity at the rate of seven percent (7%), per annum.

With the written consent of [Plaintiff] only, [Defendant] may repay this Promissory Note in part or in full, at any time and from time to time, without premium or penalty.

AND [DEFENDANT] HEREBY AGREES that if at any time any portion of the principal or interest shall be past due and unpaid, the whole amount evidenced by this Promissory Note shall, at the option of [Plaintiff], become immediately due.

AND [DEFENDANT] FURTHER AGREES hereby that if any part of the money due herein shall not be paid when due, or if this Promissory Note be placed in the hands of an attorney for collection, or if this debt or any part thereof, is collected by an attorney or legal proceedings of any kind, a reasonable attorneys' fee, besides all costs and expenses incident to such collection shall be added to the amount due on this Promissory Note, and be collectible as a part thereof.

Demand, presentment, protest, or other requirements of notice or acts of diligence are waived by all parties hereto.

⁹ The Note identifies Defendant as the "Maker (Borrower)" and Plaintiff as the "Holder (Lender)." (Note p. 1.)

(Note p. 1.)

Although the Note does not expressly state that it is an interest-only Note with a balloon payment due at the end of its term, simple math establishes this to be true:

$$\$600,000.00 \times .085 (8 \frac{1}{2}\%) = \$51,000 \text{ interest to be paid per year.}$$

$$\$51,000 \div 12 = \$4,250.00 \text{ interest to be paid per month.}^{10}$$

From April 2014 to January 2021, Defendant made monthly payments of \$4,250 to Plaintiff, as required by the Note. (Aff. of M. Johnson ¶ 10; *see also* 1/9/26 Aff. of T. Calcote ¶ 10; Answer ¶ 8.) From February 2021 to January 2022, however, Defendant made 12 short payments of only \$4,000 (rather than the required \$4,250), and from February 2022 through April 2022, Defendant did not make any payment to Plaintiff at all. (Aff. of M. Johnson ¶¶ 11–12; *see also* 1/9/26 Aff. of T. Calcote ¶¶ 11–12; Answer ¶ 8; Ex. B (Emails) to Reply Mem. in Supp. of Pl.’s 11/14/25 MSJ.) Plaintiff complained about these issues, and in May 2022, Defendant paid Plaintiff \$20,000 to catch-up his repayment obligations as of May 2022. (Aff. of M. Johnson ¶¶ 13–14; 1/9/26 Aff. of T. Calcote ¶¶ 11–12; Dep. of T. Calcote p. 87:3–15.)

In June 2022, however, Defendant resumed making short payments of only \$4,000 a month and continued doing so through April 2024. (Aff. of M. Johnson ¶ 15; *see also* 1/9/26 Aff. of T. Calcote ¶ 12; Answer ¶ 8.) Plaintiff again complained about the short payments, with Dr. Calcote “harassing,” “hassling,” and “badger[ing]” (in Defendant’s words) Defendant and/or his property

¹⁰ Although there was in the past some dispute by Defendant about whether monthly payments called for under the Note constituted interest-only payments, any dispute in this regard is now put to rest because the master found the payments to constitute interest only (2/2/26 Order pp. 3, 5) and Defendant’s principal brief to this Court makes no argument against it. *See Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of the case.”); *see also First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal). Moreover, and in any event, the math is undeniable: $8 \frac{1}{2} \%$ of \$600,000 is \$51,000, and \$51,000 divided by 12 is \$4,250.

manager Drew Burris about rectifying the issue. (Dep. of T. Calcote pp. 77:14–80:3, pp. 89:5–91:21, pp. 99:12–100:8; Ex. C (Emails) to Mem. in Supp. of Pl.’s 11/14/25 MSJ.)

In February 2023 and March 2023, Dr. Calcote and Mr. Burris corresponded regarding Defendant’s failure to make proper payment. (Ex. C (Emails) to Mem. in Supp. of Pl.’s 11/14/25 MSJ.) Seeking to get the account reconciled, on February 16, 2023, Dr. Calcote emailed Mr. Burris his calculations regarding Defendant’s accrued arrearages, beginning this correspondence: “May I request your attention to this matter *again*?” (Ex. C (Emails) to Mem. in Supp. of Pl.’s 11/14/25 MSJ p. 1 (emphasis added).) In reply, Mr. Burris advised that he was “just getting control over this account,” that he would investigate the matter, and that he would “get [Plaintiff] any monies . . . due.” (Ex. C (Emails) to Mem. in Supp. of Pl.’s 11/14/25 MSJ p. 4.) But Defendant continued making short payments of only \$4,000 a month, and on February 7, 2024, Dr. Calcote had an attorney write Defendant requesting that the account be brought current. (Ex. D (Letter) to Mem. in Supp. of Pl.’s 11/14/25 MSJ.)

Defendant did not bring the account current, however. Rather, in April 2024, Dr. Calcote and Defendant met for lunch, and at that meeting, Defendant provided Plaintiff with an *unsigned* check dated May 1, 2024, in the amount of \$4,000 with the words “May payment” written in the memo line and, according to Defendant himself, told Dr. Calcote that it would be the “last” check he would receive from Defendant for a while, i.e., for an undetermined period of time. (Dep. of T. Calcote pp. 101:11–102:25; Ex. B (Check) to Mem. in Supp. of Pl.’s 11/14/25 MSJ.)¹¹ Very soon thereafter, Plaintiff served Defendant with this lawsuit.

¹¹ More specifically, Defendant says that he told Dr. Calcote that it would be the “last” check he would receive from Defendant until such time as Defendant was able to terminate and/or sell his interest in a certain real estate project involving a Walgreens in Cary, North Carolina. (Dep. of T. Calcote pp. 101:11–102:25; *see also* Dep. of T. Calcote p. 9:11–23.) According to Dr. Calcote, Defendant did not merely tell him that the check would be the last

The only “payment” that Defendant has ever made for May 2024 is the unsigned check for \$4,000. (Aff. of M. Johnson dated 11/14/25 ¶ 16.) From June 2024 through October 2024, Defendant made short payments of \$4,000 each. (Aff. of M. Johnson dated 11/14/25 ¶ 17.) Defendant has made no payments since October 2024. (Aff. of M. Johnson dated 11/14/25 ¶ 18; *see also* Dep. of T. Calcote pp. 126:16–127:19.)

STANDARD OF REVIEW

“Appellate courts apply the same standard of review applied by the trial court to review the grant of summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure.” *Williams v. Jeffcoat*, 444 S.C. 224, 234, 906 S.E.2d 588, 593 (2024).

Under Rule 56(c), summary judgment should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. In ruling on a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). “However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Rife v. Hitachi Const. Machinery Co. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. The moving party need not support its motion with affidavits or other similar materials negating the opponent’s claim but must clearly establish by the record the absence of a triable issue of fact. After the moving party has met this initial

check he received from him for a while but rather the last “ever” and that Defendant expressly

burden, the opposing party must, under Rule 56(e), “do more than simply show that there is some metaphysical doubt as to the material facts” and “must come forward with ‘specific facts showing that there is a *genuine issue for trial*.’” *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 461, 892 S.E.2d 297, 300 (2023) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)) (emphasis in original).

With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge this initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party’s case. *Rife*, 363 S.C. at 214, 609 S.E.2d at 568. The non-moving party must show a genuine issue as to any material fact, as set forth in Rule 56(c), requiring the non-moving party show a “reasonable inference” be drawn from the evidence. *Kitchen Planners*, 440 S.C. at 461, 892 S.E.2d at 300. In *Kitchen Planners*, our Supreme Court clarified that the “scintilla” rule which had been applied in a number of cases was an incorrect analysis of Rule 56. *Id.* at 463, 892 S.E.2d at 301. Therefore, if there is no genuine issue as to any material fact, summary judgment must be granted.

ARGUMENT

An appealed order comes to the appellate court with a presumption of correctness, and the burden is on the appellant to demonstrate reversible error. *McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008). And the appellant’s demonstration of reversible error must be based on issues/arguments that are properly preserved and presented to the appellate court for review. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532–33, 564 S.E.2d 322, 323 (2001) (recognizing that preserving issues for appellate review is a fundamental component of appellate practice, as South Carolina appellate courts do not recognize the plain

told him that he was going to “default” on the Note. (Dep. of C. Calcote pp. 53:22–56:25.)

error rule); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (noting that South Carolina's preservation requirements are "mandatory"); *id.* at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e)[, SCRCP,] motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original). Moreover, where a lower court's ruling is not appealed, the ruling is the law of the case, with any challenge thereto abandoned. *Atlantic Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."); *see also McLean*, 314 S.C. 361, 444 S.E.2d 513.

I. Defendant's appeal of the master's February 2, 2026, summary judgment order is moot (or otherwise unavailing) because the master's subsequent orders and judgments in favor of Plaintiff that Defendant did not appeal are the law of the case and appellate jurisdiction no longer exists to upset them.

As explained above, after Defendant took this appeal of the master's February 2, 2026, summary judgment order by notice served March 2, 2026, by order filed April 13, 2026, the master found Plaintiff entitled to an award of attorney fees in the amount of \$145,085.50 and costs and expenses in the amount of \$16,690.69, and on that date, judgment was entered in favor of Plaintiff against Defendant in the amount of \$839,175.13. (Order filed 4/13/26; Form 4 filed 4/13/26.) And in response to a motion by Defendant to deposit funds and stay execution of judgment, by order filed May 29, 2026, the master determined that, with the accrual of statutory post-judgment interest, Plaintiff's judgment against Defendant had by then grown to

\$863,719.58, and on that date, the judgment was amended accordingly. (Order filed 5/29/26; Am. Form 4 filed 5/29/26.) And Defendant did not appeal these orders and judgments. Because Defendant did not appeal these orders and judgments, and the time for appealing them has expired,¹² they are the law of the case¹³ and appellate jurisdiction no longer exists to upset them. *Elam*, 361 S.C. at 14–15, 602 S.E.2d at 775 (“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.”). Consequently, Defendant’s appeal of the master’s February 2, 2026, summary judgment order is moot (or otherwise unavailing) because, even assuming, *arguendo*, the Court were inclined to reverse the master’s February 2, 2026, summary judgment order, the master’s subsequent unappealed orders and judgments in favor of Plaintiff (the most recent of which established Plaintiff’s entitlement to judgment against Defendant in the amount of \$863,719.58 as of May 29, 2026¹⁴) must nonetheless remain intact.

II. Assuming, *arguendo*, Defendant’s appeal of the master’s February 2, 2026, summary judgment order is not moot (or otherwise unavailing), Defendant has not met his burden to show that the master committed reversible error in granting summary judgment in favor of Plaintiff.

To be clear, it is beyond dispute that Defendant failed to perform as required by the terms of the Note. The plain language of the Note clearly and unequivocally obligated Defendant to

¹² Rule 203(b)(1), SCACR, requires a notice of appeal from an order or judgment of the Court of Common Pleas to be served within thirty (30) days after receipt of written notice of entry of the order or judgment. While Rule 203(b)(1) provides for a stay of this time period in the event of a timely motion under Rules 50, 52, or 59, SCRCP, no such motion was made here.

¹³ *Atlantic Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285; *see also McLean*, 314 S.C. 361, 444 S.E.2d 513.

¹⁴ And, of course, statutory post-judgment interest on this judgment continues to accrue.

pay Plaintiff \$4,250 every month from June 2022 through April 2024, and without question, Defendant failed to meet this obligation when he only paid Plaintiff \$4,000 a month during this period. The plain language of the Note clearly and unequivocally obligated Defendant to pay Plaintiff \$4,250 for the month of May 2022, and without question, Defendant failed to meet this obligation when the only “payment” he provided to Plaintiff during this period was an unsigned (and therefore worthless) check for \$4,000. The plain language of the Note clearly and unequivocally obligated Defendant to pay Plaintiff \$4,250 every month from June 2024 through October 2024, and without question, Defendant failed to meet this obligation when he only paid Plaintiff \$4,000 a month during this period. The plain language of the Note clearly and unequivocally obligated (and indeed continues to obligate) Defendant to pay Plaintiff \$4,250 every month from November 2024 to the present, and without question, Defendant failed to meet this obligation when he paid Plaintiff nothing during this period.

Defendant does not deny any of the foregoing but argues a finder of fact might nonetheless reasonably find his nonperformance excusable, or at least find Plaintiff barred from complaining about it, by virtue of waiver and/or estoppel.¹⁵ These affirmative defenses are unavailing, as the master correctly found.

“Waiver is the voluntary and intentional relinquishment of a known right.” *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). Although it

¹⁵ The only affirmative defenses that the master ruled on were waiver, estoppel, and consent. (2/2/26 Order pp. 10–12.) Accordingly, these are the only affirmative defenses that could possibly be preserved for appellate review. *Elam*, 361 S.C. at 23–24, 602 S.E.2d at 779–80. Moreover, because Defendant did not argue consent in his principal brief to this Court, any issue regarding consent is now put to rest. *See Atlantic Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285; *see also McLean*, 314 S.C. 361, 444 S.E.2d 513. Indeed, the master expressly found in this February 2, 2026, summary judgment order that Defendant “appears to have abandoned a number of his affirmative defenses and admitted in his deposition that he has no

may arise by implication, the circumstances must be such as to show that the party against whom waiver is asserted has abandoned or surrendered the right alleged to have been waived. *Id.* at 479, 451 S.E.2d at 929. Again, waiver requires showing that the party against whom waiver is asserted did in fact intend to waive the right alleged to have been waived. *See Id.* at 477, 451 S.E.2d at 928 (contrasting waiver from estoppel, stating, “*Unlike waiver*, the estopped party need not intend to relinquish or change any existing right for estoppel to arise”) (emphasis added)).

As the master correctly found, there is no evidence that could reasonably support a finding that Plaintiff intended to waive the right to full payment. Plaintiff complained about the short (and non-) payments made before June 2022 to the point that Defendant paid Plaintiff \$20,000 in May 2022 to reconcile the account, and as for the short payments that began in June 2022, in Defendant’s own words, Dr. Calcote “harass[ed],” “hassl[ed],” and “badger[ed]” Defendant and/or his property manager Mr. Burris about the issue and would not let it go. (Dep. of T. Calcote pp. 77:14–80:3, pp. 89:5–91:21, pp. 99:12–100:8; Ex. C (Emails) to Mem. in Supp. of Pl.’s 11/14/25 MSJ.)

Defendant’s reliance on *General Motors Acceptance Corporation v. Herlong*, 248 S.C. 55, 149 S.E.2d 51 (1966), is unavailing. Defendant cites this case for the following proposition:

Repeated waivers of default by accepting delayed payments may lull the vendee into making late payments, relying on the expectation that they will be accepted as compliance with his contract. Such a course of conduct will bar the vendor’s right to assert a forfeiture for any payment not made at the time stipulated in the original contract, unless prior thereto he has given notice to the vendee that he will hold him to the original terms and the vendee has had a reasonable opportunity to comply therewith.

evidence to establish the affirmative defense of release, statute of limitations, or laches” (2/2/26 Order p. 10), and Defendant has not argued to this Court against that finding.

(Br. of Appellant p. 9 (citing *Herlong*, 248 S.C. at 60, 149 S.E.2d at 51) (emphasis added by Defendant omitted).) As an initial matter, this proposition applies to “[r]epeated waivers,” and as explained above, there is no evidence here of any waivers. Moreover, even if this proposition applies here, there is no question that Plaintiff gave Defendant ample notice that it would hold him to the terms of the Note and that Defendant had a reasonable opportunity to comply therewith, as, in addition to Dr. Calcote’s aforementioned “harassing,” “hassling,” and “badger[ing]” of Defendant and/or his property manager Mr. Burris about improper short payments,¹⁶ more than two months before bringing this lawsuit, on February 7, 2024, Dr. Calcote had legal counsel write Defendant requesting that the account be brought current. (Ex. D (Letter) to Mem. in Supp. of Pl.’s 11/14/25 MSJ.) Further still, *Herlong* itself recognizes validity of contractual anti-waiver provisions. 248 S.C. at 61, 149 S.E.2d at 53–54 (discussing GMAC’s reliance on the case of *Lundberg v. Switzer*, 146 Wash 416, 263 P. 178 (1928), wherein it was held that a contractual anti-waiver precluded a finding of waiver notwithstanding the past practice of accepting late payments). And here the plain terms of the Note effectively preclude a finding of waiver because they expressly allow Plaintiff the “option” of acceleration “if at any time” “any portion” of Defendant’s indebtedness is unpaid. (Note p. 1) Having the “option” to exercise a right “at any time” necessarily means that that “option” continues over time.

“Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment.” *Gibbs v. Kimbrell*, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993). “Prejudice to the other party is an essential element of equitable estoppel.” *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). With regard to the party estopped, the elements of equitable estoppel are: (1) conduct amounting to

¹⁶ (Dep. of T. Calcote pp. 77:14–80:3, pp. 89:5–91:21, pp. 99:12–100:8; Ex. C

a false representation or concealment of material facts, “or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;” (2) the intention or expectation that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. *Southern Dev. Land & Golf Co., v. South Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). “As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.” *Id.*

As the master correctly found, Defendant himself (a sophisticated businessman) could not point to any evidence in support of his estoppel claim, and in any event, the record simply contains no evidence of any false representation or concealment of material facts by Plaintiff or of any reliance thereon by Defendant or of any resulting prejudice to Defendant.

And although the master’s ruling against Defendant’s estoppel defense is amply supported by the absence of evidence alone, the master’s additional finding that Defendant’s unclean hands barred him from any equitable relief is amply supported, too. The maxim that “[h]e who comes into equity must come with clean hands . . . is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.” *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). Here, as found by the master,¹⁷ the evidence is undeniable that Defendant submitted sworn affidavits making irreconcilable factual assertions about how the short payments were made (the first incorrectly attesting that all of his monthly Note payments were made via

(Emails) to Mem. in Supp. of Pl.’s 11/14/25 MSJ.)

automatic draft and that the short payments were due to a reduction of the auto pay amount the “cause” of which he was “continuing to investigate”¹⁸ and the second correctly attesting that he had in fact signed every one of the short checks himself. (1/9/26 Aff. of T. Calcote ¶¶ 10–11.) Even if the false representations in Defendant’s first affidavit were merely careless, such carelessness as to matters at the heart of this case is nonetheless antithetical to the grant of equitable relief. *See Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (citing “the ancient maxim that ‘equity aids the vigilant and the diligent’”); *see also Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011) (“In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity.”). The same goes for Defendant’s admission that he had “not lifted a finger” to locate discovery documents. (Dep. of T. Calcote pp. 88:8–89:7.)

The master correctly found that the record before him contained no evidence that Plaintiff waived or voluntarily relinquished his right to accelerate the Note and collect the sums Defendant owed under the Note’s terms. No finder of fact could find that the Plaintiff who “harass[ed],” “hassl[ed],” and “badger[ed]” Defendant seeking to bring the Note current had relinquished his right to collect through this litigation. As for the estoppel defense, Defendant has presented no evidence to create a question of fact regarding the essential elements of that affirmative defense. *See Rodarte v. University of S.C.*, 419 S.C. 592, 602–604, 799 S.E.2d 912, 917–918 (2017) (finding that an unambiguous, written contract is inherently incompatible with the doctrine of

¹⁷ (2/2/26 Order p. 6)

¹⁸ (10/28/24 Aff. of T. Calcote ¶¶ 7–8.)

equitable estoppel and that a party cannot use equitable estoppel as an end-run around the parol evidence rule).¹⁹

Lastly, none of Defendant's defenses can possibly get around these unassailable facts: (a) by his own admission, Defendant told Dr. Calcote that the unsigned check dated May 1, 2024, was the last check Plaintiff would received from Defendant until further notice;²⁰ (b) the only "payment" that Defendant made to Plaintiff for May 2024 was the worthless (unsigned) check for \$4,000; (c) the only payments Defendant made to Plaintiff for June 2024 to October 2024 were short (\$4,000) payments; and (d) Defendant has made no payment whatsoever to Plaintiff since October 2024. Without question, Plaintiff had the right to accelerate and collect all amounts due under the Note.

CONCLUSION

For the foregoing reasons, together with, pursuant to Rules 208(b)(2) and 220(c), SCACR, any reason appearing in the record, including in the master's February 2, 2026, summary judgment order itself, the master's summary judgment in favor of Plaintiff against Defendant should be affirmed and, in any event, the May 29, 2026, judgment in favor of Plaintiff against Defendant should remain intact.

<SIGNED ON THE FOLLOWING PAGE>

¹⁹ To be clear, the master found the Note to be an unambiguous contract (2/2/26 Order p. 12), and Defendant has not challenged this finding.

²⁰ While there is some dispute as to exactly what was said by Defendant at the April 2024 lunch meeting with Dr. Calcote, Defendant's own version of the events (that the check he then provided to Dr. Calcote was the "last" he would receive from Defendant until such time as Defendant was able to terminate and/or sell his interest in the Cary, North Carolina, Walgreens venture) is bad enough, as the Note gave Defendant no right to place any such condition on Plaintiff's right to the required monthly payments.

Respectfully submitted,
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