THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-3325, 2017-CP-10-05055
Appellate Case No. 2018-001413

Phillip DeClemente, a/k/a Alex Rochford, ... Appellant,

v.

Assistive Technology Medical Equipment
Services, LLC; Jeffrey Reed; Murrell G. Smith, ...Respondents,

and

Phillip DeClemente, a/k/a Phillip Goodpaster, ... Appellant,

v.

Assistive Technology Medical Equipment
Services, LLC (ATMES); Jeffrey Reed; Murrell G. Smith, ... Respondents.

INITIAL COMBINED BRIEF OF APPELLANT

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COMBINED FACTUAL AND PROCEDURAL BACKGROUND

Mr. DeClemente appeals the circuit court's final orders ending his lawsuits in cases 2015-CP-10-3325 (breach of contract) and 2017-CP-10-5055 (declaratory judgment). These appeals are consolidated[1]. Assistive Technology Medical Equipment Services, LLC (ATMES), Jeffery Reed (Reed), and Murrell G. Smith (Smith) are the Defendants/Respondents in both cases. In case 2015-CP-10-3325, the court granted Respondents' summary judgment motion. (Order, Summary Judgment, Judge Nicholson, filed July 2, 2018). In case 2017-CP-10-5055, Judge Nicholson dismissed Mr. DeClemente's declaratory judgment action. (Order, Dismissal, Judge Nicholson, filed July 2, 2018). Mr. DeClemente was served with both orders on July 5, 2018. On July 27, 2018 Mr. DeClemente filed notice of appeal and proof of service in both cases. (Notice of Appeal and Proof of Service, 2015-CP-10-3325/2017-CP-10-5055).

Litigation between these appellate parties began October 31, 2011 when Respondents filed suit against Mr. DeClemente and other Defendants in case 2011-CP-10-8011. (Complaint 2011-CP-10-8011). In summary, Respondents' suit alleged Defendants fraudulently failed to disclose relevant financial information prior to DeClemente and Respondents merging their two businesses into ATMES, a durable medical equipment supply company. On April 30, 2014 the court entered its default order against Mr. DeClemente despite the fact that Respondents sued Appellant illegally, in violation of the mutually binding Full and Final Release the parties entered five years earlier. (Default Order, Judge Nicholson; ATMES' Full & Final Release of DeClemente,

[1] Appellate Case No. 2018-001413.

dated July 10, 2009). The Release is Respondents' contractual obligation never to sue Mr. DeClemente ***and*** Respondents' contractual obligation to satisfy all potential future judgments against DeClemente which in any way relate to the parties' business relationship. Mr. DeClemente's appeal of Judge Nicholson's erroneous default order and Judge Jefferson's erroneous default judgment against him in case 2011-CP-1-8011 is pending[2] in the Court of Appeals.

On June 30, 2009 Mr. DeClemente sold Respondents his twenty-five percent ownership of their co-founded medical supply company, ATMES. The parties executed several contracts memorializing the terms of Respondents' purchase: (1) Promissory Note and Respondents' Personal Guaranties; (2) Bill of Sale and Transfer; (3) Confidentiality and Non-Competition Agreement; (4) Stock Purchase Agreement; and (5) Full and Final Release. Mr. DeClemente's 2015 breach of contract action seeks collection of the money Respondents owe him pursuant to the Promissory Note and Bill of Sale. The total sum owed on the Promissory Note was $330,382.59. The Bill of Sale requires Respondents pay Mr. DeClemente an additional $30,000.00 for non-compete compliance, $25,000.00 for a land purchase option, and $15,000.00 for a company truck. Mr. DeClemente's 2017 declaratory judgment action seeks to have the court rule upon enforceability of the Full and Final Release's damages satisfaction requirement.

[2] Appellate Case No. 2018-000460.

CASE 2015-CP-10-3325

STATEMENT OF ISSUES ON APPEAL

I. Did the court err in ordering summary judgment against Mr. DeClemente based upon the statute of limitations?

   a. Did Judge Nicholson err in overruling Judge Dennis's prior order which denying Respondents' rule 12(b)(6) motion and correctly holding that the statute of limitations for Mr. DeClemente's breach of contract action began to accrue upon the promissory note's maturity date, thus establishing that the suit was filed prior to the statute of limitations expiration?

   b. Did Mr. DeClemente present a mere scintilla of evidence that Respondents breached their Promissory Note and other contractual obligations owed him?

STATEMENT OF THE CASE

Mr. DeClemente's 2015 breach of contract lawsuit seeks to recover the money Respondents owe him pursuant to the Promissory Note given to DeClemente when Respondents purchased his 25% ownership in their jointly held durable medical equipment company, ATMES. (Promissory Note, June 30, 2009). The suit also seeks enforcement of Respondents' additional contractual obligations to Mr. DeClemente contained in the Bill of Sale and Transfer. These include payment of a non-compete compliance bonus, payment for equity in a truck, and payment for a land purchase option. (Bill of Sale & Transfer, June 30, 2009). Mr. DeClemente filed this breach of contract action against Respondents on June 11, 2015. (Complaint 2015-CP-10-3325).

Respondents moved to dismiss on July 15, 2015, alleging the suit was filed outside the statute of limitations (Motion to Dismiss, filed July 15, 2015). Respondents argued that the statute of limitations began to run in September 2011, when they last gave Mr. DeClemente a full payment toward satisfaction of their indebtedness. On August 24, 2015 Respondents filed a motion for change of venue. (Motion to Change Venue). Both motions were heard by Judge Markley Dennis on January 14, 2016. (Motions Hearing Transcript, Judge Dennis, January 7, 2016). The court denied the motion to change venue[3] and dismissed five causes of action as barred by the statute of limitations. (Form 4 Order denying Venue, January 14, 2016; Form 4 Order on Motion to Dismiss, January 14, 2016).

At a re-hearing on February 19, 2016 Judge Dennis ruled that the breach of contract action was timely filed because the Promissory Note's maturity date, March 1, 2013, was the date upon which the statute of limitations began to accrue. (Maturity Date Hearing Transcript, Judge Dennis, February 19, 2016, Form 4 Order, March 3,2016). Mr. DeClemente's suit was therefore filed two hundred and sixty days prior to the statute of limitations March 1, 2016 expiration date. The court also allowed Mr. DeClemente the opportunity to make a minor clarifying amendment to his complaint. (Form 4 Order, March 3, 2016). The court instructed Respondents' counsel to draft a written order.

Mr. DeClemente's amended complaint was filed March 22, 2016. (Amended Complaint). It clarified that Respondents' had not made a full payment since September of 2011, though they had made partial payments. Respondents filed another identical

[3] Respondents were also unsuccessful on their other motions to change venue.

motion to dismiss and for change of venue on June 6, 2016. (Motion to Transfer Venue and Motion to Dismiss). Judge Cooper denied the motions. (Order, Judge Cooper, October 4, 2016). November 1, 2016 Respondents answered Mr. DeClemente's amended complaint. (Answer to Amended Complaint). September 20, 2017 Respondents filed a summary judgment motion, again arguing for the third time that Mr. DeClemente's lawsuit violated the statute of limitations. (Summary Judgment Motion).

The court heard Respondents' for summary judgment motion on December 11, 2017. (Summary Judgment Hearing Transcript, Judge Nicholson). Judge Nicholson informed the parties that he would rule after reading Judge Dennis's order from the February 19, 2016 hearing, at which Judge Dennis correctly ruled that the breach of contract action does not violate the statute of limitations because of the Promissory Note's maturity date. (Hearing Transcript, Judge Dennis, February 19, 2016). In May 2016, more than two years after Judge Dennis instructed them to do so on February 19, 2016, Respondents submitted the proposed order to Judge Dennis. Judge Dennis filed his order May 16, 2018. (Order Memorialzing Decisions, Judge Dennis). On July 2, 2018, six weeks after Judge Dennis ruled on the statute of limitations, Judge Nicholson overruled Judge Dennis and granted Respondents summary judgment based upon statute of limitations. (Summary Judgment Order, Judge Nicholson; Dismissal Order, Judge Nicholson). This appeal followed.

STATEMENT OF FACTS

When Mr. DeClemente sold his ATMES ownership interest to his co-owners, Reed and Smith, Respondents executed a Promissory Note guaranteeing payment of the

money they owed Mr. DeClemente. (Promissory Note). The Promissory Note's maturity date is March 1, 2013. The note requires Respondents to pay DeClemente $265,000.00, plus annual interest of 12%, in monthly payments of $7,341.84.

Between the date the Promissory Note was executed, June 30, 2009, and its maturity date, March 1, 2013, there was a series of communications between Respondents and DeClemente. In these communications Respondents confirmed both their debt to Mr. DeClemente and their intent to pay all sums owed. (Email Exchange with Respondent Murrell G. Smith, August 10, 2010; (Email from Respondent Jeffery Reed, December 14, 2011). It was not until June 12, 2012 that Respondents informed DeClemente of their intent to breach their contractual obligations and default on their debt. (Letter from Respondent Murrell G. Smith, July 12, 2012). The statute of limitations for filing a breach of contract action is three years. Mr. DeClemente's breach of contract suit was filed on June 11, 2015. (Complaint 2015-CP-10-3325). Case 2015-CP-10-3325 was timely filed under both Judge Dennis' proper maturity date analysis ***and*** under Judge Nicholson's improper discovery rule analysis.

STANDARD OF REVIEW

In reviewing a trial court's grant of summary judgment, the appellate court applies the same standard as the trial court pursuant to Rule 56(c), SCRCP. *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Under Rule 56(c), SCRCP, the moving party is entitled to summary judgment upon showing that "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." *Id.*

Summary judgment is not to be granted "where further inquiry into facts is desirable for clarification of the law" or even when there is "no dispute as to evidentiary facts, but dispute as to the conclusions to be drawn from those facts." *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); *Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp.*, 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982).

ARGUMENT

I. JUDGE NICHOLSON ERRONEOUSLY OVERRULED JUDGE DENNIS BY ORDERING SUMMARY JUDGMENT AGAINST MR. DECLEMENTE BASED UPON THE STATUTE OF LIMITATIONS.

In granting Respondents' summary judgment motion based upon the statute of limitations, Judge Nicholson erroneously overruled Judge Dennis' prior order correctly establishing the promissory note's maturity date as the statute of limitations accrual start date. (Order Memorializing All Prior Decisions, Judge Dennis, filed May 16, 2018; Summary Judgment Order, Judge Nicholson, filed July 2, 2018). There is no grey in this law. It is black and white. Judge Nicholson erred in overruling Judge Dennis. *See*, *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603 S.E.2d 546, 547 (1986) ("One circuit court judge does not have the authority to set aside the order of another.").

A. JUDGE DENNIS CORRECTLY HELD THAT THE 3-YEAR BREACH OF CONTRACT STATUTE OF LIMITATIONS BEGAN TO ACCRUE UPON THE PROMISSORY NOTE'S MATURITY DATE.

Judge Dennis correctly held that analysis of the Promissory Note's March 1, 2013 maturity date is the method for establishing the statute of limitations. (Order, Judge Dennis). The court correctly held that the statute of limitations expired March 1, 2016,

three years after the Promissory Note's maturity date. Mr. DeClemente filed this breach of contract action on June 15, 2015, more than eight months prior to the statute of limitations expiration. (Complaint 2015-CP-10-3325).

Judge Dennis's order honors the entirety of South Carolina jurisprudence, which holds that a contract's maturity date marks the beginning of the statute of limitations accrual period. The South Carolina Supreme Court has repeatedly held that a clearly specified maturity date marks the commencement date for calculating the applicable statute of limitations for filing suit against a defaulting guarantor. *See*, *Citizens and S. Nat. Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). *CoastalStates Bank v. Hanover Homes of S.C., LLC,* held that the applicable 3-year statute of limitations began with the loan's maturity. *Id.* 408 S.C. 510, 759 S.E.2d 152 (Ct. App. 2014). The court wrote, "the statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults." *Id.*, *quoting* 38 Am. Jur. 2d *Guaranty* §96, at 1040 (2010). Adherence to this fundamental law is also seen in *Town of Cheraw v. Turnage*, wherein the South Carolina Supreme Court determined that the statute of limitations on an installment payment debt "did not begin to run until the last installment matures." *Id.* 184 S.C. 76, 191 S.E. 831, 837 (1937).

South Carolina is in accord with other states regarding limitations defenses asserted by guarantors. In *Glass v. Grant*, the Georgia Court held that "in an entire contract for a stated sum, providing for its payment in annual equal installments, the statute of limitations does not begin to run until after the date the last installment

becomes due." *Id.*, 46 Ga. App. 327, 167 S.E. 272 (Ct. App. 1933). The court reasoned, nearly a century ago,

> [a] contrary rule...would necessitate or require a multiplicity of suits, and in many cases a multiplicity of foreclosure of liens,...[and would therefore] be against the general policy to avoid litigation and a multiplicity of actions [and that] the promisee is entitled to wait, if he chooses, until the defendant defaults as to [the] contract in its entirety plus the period of limitations given to him. *Id.*

Colorado, among numerous other states, also holds that where promissory notes provide for a final payment of the unpaid balance to be made upon maturity, the statute of limitations does not begin to run upon a missed payment. *Castle Rock Bank v. Team Transit, LLC*, 292 P.3d 1077, 1089 (Ct. App. 2012) (stating that the Plaintiff can "sue for the final payment of the unpaid principal balance plus accrued interest on each note, in which case the statute of limitations began running from the dates the unpaid principal balance became due, which occurred on the notes' maturity dates").

B. EVEN UNDER JUDGE NICHOLSON'S INCORRECT APPLICATION OF THE DISCOVERY RULE, MR. DECLEMENTE'S BREACH OF CONTRACT ACTION WAS FILED WITHIN THE STATUTE OF LIMITATIONS.

Judge Nicholson's summary judgment order erroneously employs the discovery rule in calculating the statute of limitations. (Summary Judgment Order, Judge Nicholson). The discovery rule is applicable only in cases where parties have failed to include a maturity date as a clear and mutual understanding of when the statute of limitations for legal enforcement commences. *See*, *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 274, 384 S.E.2d 693, 696 (1989) (The discovery rule is only applicable to contracts involving vague language as to maturity). There is no dispute as to

the Promissory Note's maturity date in this case. It is March 1, 2013. (ATMES' Promissory Note).

Respondents' Summary Judgment argument points to two dates on which they claim to have shown their intent to breach their obligation to pay DeClemente the money owed: September of 2011, when Respondents made their last full payment to DeClemente, and December 1, 2011 when DeClemente was served with Respondents' frivolous suit. (Motion for Summary Judgment Hearing Transcript, Judge Nicholson, December 11, 2017). Judge Nicholson erroneously ruled that the statute of limitations began accruing on December 1, 2011. (Summary Judgment Order, Judge Nicholson).

The December 1, 2011 date is irrelevant because of the contract's maturity date. The date is also irrelevant because, Respondents' alleged "clear indication of intention to breach" is contradicted by the evidence including Respondent Reed's December 14, 2011 email to Mr. DeClemente. In the email Reed stated that it was not Respondents' intention to breach, explained why Respondents were in arrears, and assured Mr. DeClemente that Respondents would pay him in full. (Reed Email, December 14, 2011).

Additionally, Mr. DeClemente's pleadings include letters exchanged between DeClemente's counsel and Respondent Smith regarding payment arrearages. On July 8, 2012 DeClemente's counsel sent Respondent Smith a letter giving required written notice of Respondents arrearage and requesting resumption of monthly payments. (Letter from Attorney Marshall, July 8, 2012). On July 15, 2012 DeClemente's counsel received a letter from Respondent Smith in which Respondents informed DeClemente that they would be breaching their contractual obligations. (Letter from Respondent Smith dated

July 12, 2012). This letter from Mr. Smith was the first time Respondents informed DeClemente that they did not intend to honor their contracts.

Even under Judge Nicholson's erroneous application of the discovery rule, since DeClemente filed suit on June 11, 2015, his claim was brought within the 3-year statute of limitations, which under the discovery rule arguably expired July 15, 2015.

C. THE CONTRACT MR. DECLEMENTE ENTERED INTO EVIDENCE CONSTITUTES MORE THAN THE MERE SCINTILLA OF EVIDENCE REQUIRED TO WITHSTAND SUMMARY JUDGMENT.

Having addressed Judge Nicholson's erroneous statute of limitations order, Mr. DeClemente bears the burden of showing the existence of a genuine issue of material fact in order to withstand summary judgment against him. This factual issue is whether Respondents owe DeClemente money.

In order to withstand a summary judgment motion, the non-moving party "must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct.App.2004). The three elements for proving breach of contract include existence of the contract, its breach, and damages caused by the breach. *S. Glass & Plastics, Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct.App. 2012). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." *S. Glass & Plastics Co. v. Kemper,* 399 S.C. 483, 490, 732 S.E.2d 205, 209 (Ct. App. 2012) *quoting, Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct.App. 2009).

The Promissory Note and Non-Compete Agreements are more than a mere scintilla of evidence proving Respondents' debt to DeClemente. The Promissory Note requires Respondents to pay DeClemente a certain amount of money. (ATMES' Promissory Note). Respondents and Judge Nicholson concede that Respondents have failed to do. The Promissory Note is not an allegation of Respondents' liability for payment, it is conclusive proof of Respondents' liability.

The court's summary judgment order concedes that Respondents breached their contractual duties. (Summary Judgment Order, Judge Nicholson). The subject contracts are properly executed and fully enforceable. (DeClemente's Memorandum in Support of Motion for Summary Judgment, filed July 21, 2016). Since there is no dispute as to the contract's enforceability, the court, in order to achieve its desired outcome, erroneously ruled that DeClemente waited too long to sue Respondents.

CASE 2017-CP-10-5055

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err in dismissing Mr. DeClemente's declaratory judgment action?

   a. Does the default order Judge Nicholson entered against Mr. DeClemente in case 2011-CP-10-08011 bar Appellant's right to declaratory judgment on enforceability of the Full and Final Release's damages satisfaction requirement?

b. Does the Full and Final Release require that the erroneous default judgment against Mr. DeClemente be marked "satisfied"?

STATEMENT OF THE CASE

Mr. DeClemente filed declaratory judgment action 2017-CP-10-5055, with detailed supporting memorandum attached, on October 3, 2017. (Complaint 2017-CP-10-5055), (DeClemente's Memorandum in Support of Declaratory Judgment Action, filed October 3, 2017). The lawsuit seeks declaratory judgment on the enforceability of the mutual Full and Final Release's damages provision. The Full and Final Release is the contract in which the parties release one another from any and all damages related to their business relationship. (Full & Final Release, July 8, 2009).

November 8, 2017 Respondents filed a motion to dismiss the declaratory judgment action, for sanctions against DeClemente's counsel and for speedy trial. (Motion to Dismiss, Request for Speedy Hearing, filed November 8, 2017). Judge Nicholson heard Respondents' motions on December 11, 2017. (Hearing Transcript, Judge Nicholson, December 11, 2017). By order filed July 2, 2018 Judge Nicholson erroneously granted Respondents' motion to dismiss DeClemente's declaratory judgment suit. (Dismissal Order, Judge Nicholson). The reasons Judge Nicholson gave for his order were res judicata and DeClemente's default status in case 2011-CP-10-8011. (Default Order, Judge Nicholson, April 30, 2014).

Judge Nicholson's default order in case 2011-CP-10-8011 does not, however, extinguish Mr. DeClemente's right to declaratory judgment on enforceability of the Full and Final Release's damages satisfaction mandate.

STATEMENT OF FACTS

The parties' Full and Final Release *prohibits Respondents from suing Mr. DeClemente* for any reason growing out of his former ownership of, and/or employment with, ATMES and its subsidiaries. (ATMES' Full & Final Release). The Full and Final Release *also requires Respondents to satisfy any damages* DeClemente might suffer as a result his former ownership of, and/or employment with, ATMES and its related companies. (Full & Final Release). The Full & Final Release was executed and signed by both parties on July 10, 2009 as a legally binding promise not to sue Mr. DeClemente. The Release was witnessed by outside parties, contains the words "signed, sealed, and delivered" and the letters "L.S.", and was subsequently notarized. The Release is a fully enforceable sealed instrument in accordance with S.C. Code 15-3-520 and 19-1-160.

Respondents intentionally violated the Full and Final Release by filing suit against Mr. DeClemente on October 31, 2011 in case 2011-CP-10-8011. In that case Judge Nicholson prevented DeClemente from asserting the Full and Final Release as an affirmative, absolute defense to Respondents' illegal lawsuit. The court erroneously held DeClemente in default and struck his answer and counterclaims. (Default Order, Judge Nicholson). Judge Jefferson subsequently entered default judgment against DeClemente in the amount of $875,144.00. (Default Judgment, Judge Jefferson, December 21, 2017). Judge Jefferson then refused to consider Mr. DeClemente's Rule 59 and Rule 60 motions,

which asserted the Release as satisfaction of the erroneous default judgment. (Order Denying Motion to Amend Judgment, Judge Jefferson, January 26, 2018). Mr. DeClemente filed case 2017-CP-10-5055, seeking declaratory judgment on enforceability of the Full and Final Release's damages provision on October 3, 2017. (Complaint 2017-CP-10-5055).

STANDARD OF REVIEW

The decision of whether to grant declaratory judgment rests in the sound discretion of the trial court and will not be overturned absent a clear showing of abuse of discretion. *Garris v. S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820-21 (1995). The trial court retains the discretion to refuse declaratory judgment "where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances." *Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 58–59, 152 S.E.2d 676, 679 (1967).

ARGUMENT

I. THE COURT ERRED IN DISMISSING MR. DECLEMENTE'S DECLARATORY JUDGMENT ACTION, WHICH SEEKS THE COURT'S RULING ON THE ENFORCEABILITY OF THE FULL AND FINAL RELEASE'S DAMAGES SATISFACTION REQUIREMENT.

Mr. DeClemente's right to declaratory judgment is governed by The Declaratory Judgments Act. S.C. Code Ann. §15-53-10 *et. seq*. This declaratory judgment action is not barred by claim preclusion, collateral estoppel, nor the erroneous default judgment issued against DeClemente in case 2011-CP-10-8011, *supra*.

A. The Issue of Whether the Full and Final Release's Damages Satisfaction Requirement is Enforceable Constitutes Justiciable Controversy.

A party demonstrating justiciable controversy is entitled to declaratory judgment on the controversy. *Graham v. State Farm Mut. Auto. Ins. Co.,* 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995); *Brown v. Wingard,* 285 S.C. 478, 330 S.E.2d 301 (1985). South Carolina Code Section 15-53-30 provides:

> Any person interested under a deed, will, **written contract** or other **writings constituting a contract** or **whose rights, status or other legal relations are affected by a** statute, municipal ordinance, **contract** or franchise **may have determined any question of construction or validity arising under the instrument**, statute, ordinance, **contract** or franchise **and obtain a declaration of rights, status or other legal relations thereunder.** *Id.* (emphasis added).

All individuals affected by a contract have the right to court determination of the contract's enforceability. Declaratory judgment statutes are liberally construed so they may embody the intended purposes of the Declaratory Judgment Act. See, *Williams Furniture Corp. v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 56 S.E.2d 576 (1949). Those purposes of the Declaratory Judgment Act are to afford a speedy and inexpensive method of deciding legal disputes and to settle legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995).

Mr. DeClemente's answer to Respondents' improper 2011 lawsuit pled the Full and Final Release as an absolute defense, requiring the suit's dismissal. (ATMES' Full & Final Release; Answer, Counterclaim, and Cross-claim of Philip DeClemente, August 10, 2012). DeClemente simultaneously filed counterclaims alleging breach of contract,

among other causes of action. (*Id.*). Judge Nicholson struck both the answer and counterclaims without prejudice. (Default Order, Judge Nicholson, dated April 30, 2014). But even if DeClemente had not filed an answer and counterclaims, a party's failure to assert an action establishing liability in pleadings does not bar a subsequent declaratory judgment action where defendant's denial of liability constitutes justiciable controversy. *Graham v. State Farm Mut. Auto Ins. Co.*, 319 S.C. 69, 72, 459 S.E.2d 844, 846 (1995).

The Full and Final Release requires that Respondents satisfy the erroneous default judgment against DeClemente in case 2011-CP-10-8011. Both Judge Nicholson and Judge Jefferson repeatedly refused to acknowledge the Full and Final Release and rule on its enforceability. (Order Denying Motion to Reconsider, Judge Nicholson, filed May 7, 2014; Order Denying Motion to Reconsider, Judge Jefferson, filed November 18, 2016; Order Denying Motion to Amend Judgment, Judge Jefferson, filed January 26, 2018). A party bringing a declaratory judgment action is required to show justiciable controversy. See, *Brown v. Wingard*, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985). In *Power v. McNair,* the Court wrote, "justiciable controversy calling for the invocation of declaratory judgment action [exists] where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party." *Id.*, 255 S.C. 150, 153–54, 177 S.E.2d 551, 553 (1970)[4].

The mutual Release the parties executed is Respondents' legally binding, fully executed, contractual obligation to never sue Mr. DeClemente **and** Respondents' contractual obligation to satisfy the default judgment they have illegally obtained against

[4] The court referencing their decision in *Dantzler v. Callison,* 227 S.C. 317, 88 S.E.2d 64 (1955).

him. These are two separate contractual duties. The fact that the court improperly prevented DeClemente from asserting the Release as one of his defenses to Respondents' 2011 illegal *lawsuit* is irrelevant to this declaratory judgment action.

This declaratory judgment action seeks the court's ruling on enforceability of the Full and Final Release's *damages satisfaction requirement.* If the Full and Final Release is properly executed, binding, and enforceable, then the court's erroneous default judgment against Mr. DeClemente in 2011-CP-10-8011 must be marked "satisfied." The Full and Final Release's damages satisfaction requirement reads as follows:

> [t]he undersigned [Respondents] do intend to and do hereby individually and for their heirs, executors, administrators, successors and assigns, **release, acquit and forever discharge Phillip L. DeClemente** as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and **from any and all claims, actions, causes of action, demands, rights, *damages, cost, loss of services, expenses and compensation*** whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of **any and all ownership interest or employment** in any of the entities set forth above whether known or unknown, foreseen or unforeseen and ***any consequences thereof***, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein. (Emphasis added, Full and Final Release).

This Full and Final Release requires that Respondents satisfy the improper and abusive default judgment they obtained against Mr. DeClemente by illegally filing case 2011-CP-10-8011. Enforceability of the Release's damages satisfaction requirement presents a justiciable controversy over whether Mr. DeClemente or Respondents must satisfy Judge Jefferson's improper default judgment.

The claim for declarative relief asserted in case 2017-CP-10-05055 embodies South Carolina's justiciable controversy definition. *See, Power v, McNair*, *supra*, (DeClemente's Complaint, memo attached, October 3, 2017).

The Full and Final Release's enforceability has never been ruled upon because Mr. DeClemente's answer, asserting the Release as a complete defense to Respondents' illegal lawsuit, was struck by Judge Nicholson and never considered by the court. (Default Order, Judge Nicholson). When the Release was raised in DeClemente's Rule 59 and 60 motions, Judge Jefferson refused to consider the document. (Order Denying Motion to Reconsider, Judge Jefferson). Both orders are currently on appeal in case 2018-000460. Since Mr. DeClemente's action for declaratory judgment is based in justiciable controversy, and dispositive relief is readily available upon judgment in his favor, Mr. DeClemente is entitled to a ruling on enforceability of the Release's damages satisfaction requirement. *See,* S.C. Code Ann. §15-53-30.

This declaratory judgment action is independent from Respondents' frivolous 2011 lawsuit against DeClemente. SCRCP Rule 60 addresses relief from judgment or order and provides: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." *Id.* The court's ruling, that DeClemente is without procedural authority to bring this declaratory judgment action is erroneous and disingenuous.

B. MR. DECLEMENTE'S DECLARATORY JUDGMENT ACTION IS NOT BARRED BY COLLATERAL ESTOPPEL.

Issues not "actually litigated and determined by a valid and final judgment" are not barred from being brought in a subsequent legal action. Restatement (Second) of *Judgments* § 27. In case 2011-CP-10-8011 Judge Nicholson held Mr. DeClemente in default and struck his answer and counterclaims without prejudice, preventing litigation of the Full and Final Release's enforceability. (Default Order, Judge Nicholson, April 30, 2014). Because DeClemente was prevented from litigating this issue, collateral estoppel does not bar this declaratory judgment suit.

When collateral estoppel is asserted as an affirmative defense, the moving party [Respondents here] must show "that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.,* 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct.App. 2009).

The publishing of the Restatement (Second) of *Judgments* (Am. Law Inst. 1982) marked the beginning of South Carolina's current, unambiguous approach to issue preclusion. See, *Beall v. Doe,* 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct.App.1984) ("[A] fair rule regarding the application of issue preclusion in subsequent litigation ... is the rule recently formulated by the American Law Institute [in the Restatement (Second) of Judgments]."). Section 27 of the Restatement reads:

> When an issue of fact or law is **actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment**, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

Restatement (Second) of *Judgments* § 27 (Am. Law Inst. 1982). (emphasis added). In *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.* the South Carolina Supreme Court officially adopted the Restatement (Second) of *Judgments* § 27 as the general rule for collateral estoppel. *Id.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991).

Comment e. of *Judgments* § 27 addresses the application of collateral estoppel against a party who has been held in default in a prior suit. The relevant portion of comment e. states:

> In the case of a judgment entered by confession, consent, or **default**, none of the issues is actually litigated. Therefore, the rule of this Section[5] does not apply with respect to any issue in a subsequent action.

Restatement (Second) of *Judgments* § 27 cmt e. (1982) (emphasis added).

In *State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161, 162–63 (1998), the Supreme Court held that previous default status does not have the preclusive effect of collateral estoppel. In *Bacote*, the Court held: "In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation." *Id.*, 331 S.C. 328, 330–31, 503 S.E.2d 161, 162–63 (1998); 50 C.J.S. *Judgments* § 797 (1997).

Default does not have the preclusive effect of collateral estoppel. *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013). Suit was brought against Kunst alleging breach of contract and fraud[6]. *Id.* Kunst was held in default by the circuit court and his

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[5] Referring to collateral estoppel.

[6] These claims were amongst several others of the same nature and in relation to breach of contract.

motion for default relief was denied. *Id.* Kunst then sued the original plaintiffs, alleging defamation and other related claims. *Id.* The circuit court found Kunst's claims to be compulsory counterclaims in the original action and held that the claims were barred by collateral estoppel. *Id.* The Court of Appeals reversed, holding that "the doctrine of collateral estoppel cannot be applied to default judgments because the essential element requiring the claim sought to be precluded actually have been litigated in the earlier action is not met. Therefore, we find the circuit court erred in ruling Kunst's [present] claim was precluded under the doctrine of collateral estoppel based upon the default judgment rendered in the [previous action]." *Kunst v. Loree*, 404 S.C. 649, 658, 746 S.E.2d 360, 364 (Ct. App. 2013).

The facts of *Kunst v. Loree* closely resemble those presented in this declaratory judgment action. Like *Kunst*, DeClemente was held in default and denied relief. Judge Nicholson and Judge Jefferson both refused to rule upon the Full and Final Release's enforceability. (Order Denying Motion to Reconsider, Judge Nicholson; Order Denying Motion to Reconsider, Judge Jefferson). Further, the court in case 2011-CP-10-8011 denied DeClemente's motion for relief from default judgment, cementing his inability to litigate the defense or to bring the issue before the court for determination by valid and final judgment. Like *Kunst*, DeClemente's subsequent separate action against the Defendants for declaratory judgment was dismissed as a compulsory counterclaim which should have been asserted[7] but was not. The circuit court erroneously dismissed

[7] Both DeClemente and Kunst were prevented from pursuing their counterclaims in the original actions brought against them. The judges in both cases failed to distinguish "should have asserted" from "inability to assert."

DeClemente's declaratory judgment action in part, because it erroneously believed it to be a compulsory counterclaim which DeClemente failed to bring in his 2011 answer and counter claims. Judge Nicholson employed this faulty reasoning despite the fact that DeClemente did plead the Release in his answer and counterclaims, only to have Judge Nicholson strike all of DeClemente's pleadings. (Default Order, Judge Nicholson, April 30, 2014).

The *Kunst* court, faced with facts similar to this declaratory judgment case held, "the doctrine of collateral estoppel cannot be applied to default judgments because the essential element requiring the claim sought to be precluded actually have been litigated in the earlier action is not met." *Kunst v. Loree*, 404 S.C. 649, 658, 746 S.E.2d 360, 364 (Ct. App. 2013). In contrast, an effort to justify its dismissal of Mr. DeClemente's declaratory judgment action, the circuit court cites, *Stark Truss Co. v. Superior Construction Corp.*, 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004). *Stark Truss Co.* in no way supports the court's erroneous dismissal of DeClemente's declaratory judgment action. *Stark Truss* addresses relief from default, an issue irrelevant to Mr. DeClemente's present declaratory judgment action. The issue in *Stark Truss Co.* was whether the trial court erred in declining to set aside default under SCRCP 55, and whether failure to give the defaulting party notice of the default judgment hearing is reversable error. *Stark Truss Co.* is inapplicable to DeClemente's declaratory judgment action under any interpretation of the facts or law. In contrast, *Kunst v. Loree* is binding precedent for the case at bar. *Id.*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013).

C. MR. DECLEMENTE'S DECLARATORY JUDGMENT ACTION IS NOT A COMPUSORY COUNTERCLAIM, NOR IS IT BARRED BY THE DOCTRINE OF CLAIM PRECLUSION.

Judge Nicholson's finding that Mr. DeClemente's declaratory judgment action constitutes a "collateral attack on his liability in the 2011 case," is erroneous without evidentiary or legal support and in violation of long-standing South Carolina precedent. (Order Granting Motion to Dismiss, Judge Nicholson, filed July 2, 2018). The issue of the Release's enforceability has never been litigated because Judge Nicholson and Jefferson failed to follow normal judicial procedures. The circuit court ruled that Mr. DeClemente's declaratory judgment action is barred by the doctrine of claim preclusion. The erroneous finding seems to be based in the court's mistaken belief that DeClemente's reference to the Release as an affirmative defense in his 2011 answer and counterclaims, which the court struck and never considered, prohibits this declaratory judgment action.

The only similarity between by Mr. DeClemente's affirmative defense and counterclaim in the 2011 case and his 2017 declaratory judgment action is that each pleading references the Full and Final Release. The reference to the Release in DeClemente's pleadings does not constitute res judicata. Mr. DeClemente's counterclaim to Respondent's 2011 case was for breach of contract, and his answer sought dismissal of the illegal claims brought against him. DeClemente's pleadings referenced the Release's provision barring Respondents from suing him. This is seen in the language of DeClemente's pleadings:

> "In the Full and Final Release, ATMES agreed to permanently release Mr. DeClemente from any and all causes of action, both past and future." (Answer, Cross-claims and Counterclaims, filed 8/10/12).

DeClemente's answer and counterclaim do not address the Release's damages satisfaction provision, which is the sole basis for this 2017 declaratory judgment action. Compare the claim Mr. DeClemente makes in his 2011 case answer and counterclaim with that made in this declaratory judgment action:

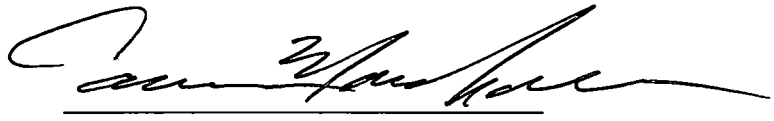
> Case 2011-CP-10-8011 still exists because the court has not yet ruled upon Mr. DeClemente's assertion that the Full and Final Release is a complete bar to [Respondents] collecting any damages from him. The release requires that in the event damages are awarded against Mr. DeClemente, the judgment must be satisfied by [Respondents]. (Declaratory Judgment Action & Memorandum in Support, filed October 3, 2017).

The circuit court additionally erred in incorrectly identifying Mr. DeClemente's 2017 declaratory judgment action as a compulsory counterclaim to Respondent's illegal 2011 lawsuit. The order dismissing DeClemente's declaratory judgment action points to *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.* as supporting the court's assertion that DeClemente's declaratory judgment action is a compulsory counterclaim. *Id.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). But *N.C. Fed. Sav. & Loan* does not support the court's order because it is not relevant to circumstances involving an order of default. *Id.* But, the South Carolina Court of Appeals has ruled on circumstances similar to those presented by Mr. DeClemente's declaratory judgment action.

In *Plott v. Justice Enterprises*, the court found that a prior trespass action between landowners and their neighbors did not bar, under res judicata, the landowners' subsequent action for declaratory judgment as to rights of parties to the easement, although they had attempted to assert an action for interference with the use of the easement, which was barred as untimely. *Id.* In reversing the trial court's dismissal of the

The law in these appeals is not complex. The relevant legal principles presented by these two cases are among the most fundamental: contracts mean what they say and are enforceable; circuit court judges do not have authority to overrule one another; courts are required to enforce the unambiguous language of statutes; all citizens are entitled to equal access to legal process and justice.

The circuit court's contorted mangling of elemental legal principles in order to assist one party in achieving improper financial gain over another is grossly abusive. The court's orders are disturbingly anathematic to the rule of law and to maintenance of a just and orderly society. But Lady Justice remains blind to the litigants' identity and remains steadfast in her determination that these appellate proceedings will produce justice.



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CERTIFCATE OF COMPLIANCE

I, Cameron Marshall, counsel for the Appellant, hereby certify the Appellant's Initial Combined Brief complies with the provisions of Rule 208 and Rule 267 of the South Carolina Appellate Court Rules.

November 6, 2018
Charleston, SC

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-3325, 2017-CP-10-5055
Appellate Case No. 2018-001413

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the Court of Appeals and opposing counsel with:

1. Original Initial Combined Brief of Appellant;
2. Designation of Matter; and
3. Original Proof of Service;

by depositing a copy of the same in the U.S. Mail, first class postage pre-paid and addressed to James E. Smith, Jr., P.A., james@jamessmithpa.com, 1422 Laurel Street, Columbia, SC 29201, Blake Hewitt, P.O. Box 7965, Columbia, SC 29202 and Hon. Jenny A. Kitchings, P.O. Box 11629, Columbia, SC 29211, on this, the 6th day of November 2018, in Charleston, South Carolina.

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November 6, 2018

Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

IN RE: Phillip DeClemente v. Assistive Technology Medical Equipment Services, LLC (ATMES); Jeffery Reed and Murrell G. Smith
2018-001413

Dear Ms. Kitchings,

Please find enclosed the following documents:

1. Original Initial Combined Brief of Appellant;
2. Designation of Matter; and
3. Original Proof of Service on opposing counsel.

Please file the enclosed documents and return copies to me in the enclosed self-addressed envelope.

Thank you for your assistance in this matter.

Respectfully,

Cameron L. Marshall

Enclosures as stated
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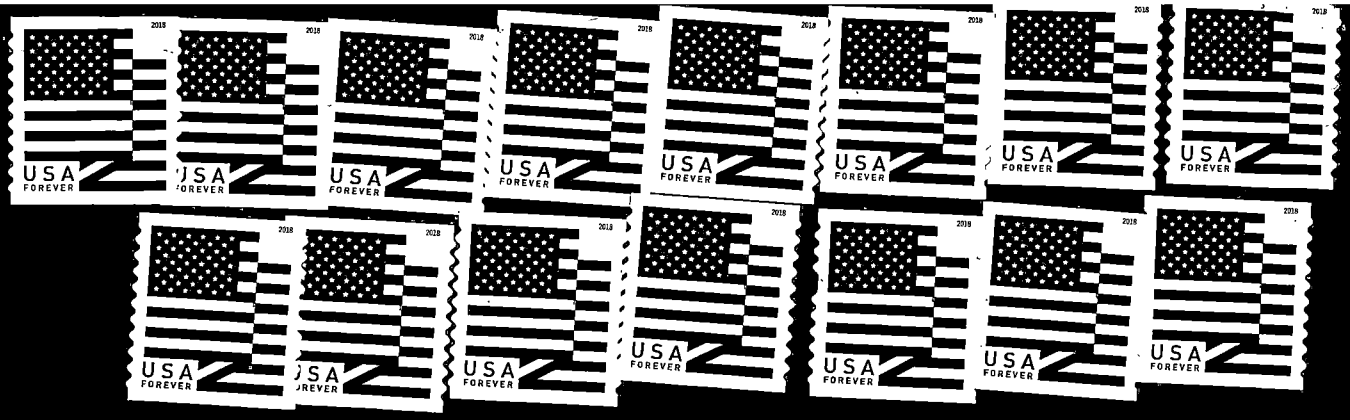

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declaratory judgment suit, the Court wrote, "We have found nothing in the arguments [the neighbors] presented either in their briefs or during oral argument that would explain how resolution of any of the claims or counterclaims would necessarily involve a determination of where [the land owners] could access their property from the right-of-way" and the "trial court's refusal to allow Respondents to proceed on their claim for interference with their use of the right-of-way was not a ruling on the merits of that cause of action." *Id.* 374 S.C. 504, 512, 649 S.E.2d 92, 96 (Ct. App. 2007). Thus, the court found that the subsequent action for declaratory judgment was not a compulsory claim.

The circumstances in the case at bar are similar to those seen in *Plott v. Justice Enterprises*. Respondents' illegal 2011 lawsuit did not involve determination of the enforceability of the Full and Final Release's damages satisfaction provision, or any of its other provisions. Additionally, the court's refusal to allow DeClemente to assert the Full and Final Release as an affirmative defense in case 2011-CP-10-8011 was not a ruling on the merits of the dispositive defense or counterclaim, but rather a result of the default order against him. Pursuant to *Plott v. Justice*, DeClemente's claim in case 2017-CP-10-5055 is not a compulsory counterclaim and is not barred by the doctrine of claim preclusion.

CONCLUSION

This court should reverse the circuit court's summary judgment order ending Mr. DeClemente's 2015 breach of contract action. This court should also reverse the circuit court's dismissal of DeClemente's 2017 declaratory judgment action.