THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

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

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

Phillip DeClemente, a/k/a Alec 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); and Jeffrey Reed; Murrell G. Smith, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

Respondents believe the issues can be consolidated and re-stated as follows:

I. Whether the circuit court correctly held Appellant's statute of limitations to sue Respondents for breach of contract began running when Respondents sued Appellant, communicating the unmistakable intent to breach the parties' agreement.

II. Whether the summary judgment in Respondents' favor is supported by independent grounds other than the statute of limitations.

III. Whether the circuit court correctly dismissed Appellant's declaratory judgment as an improper attempt to re-litigate issues from a prior lawsuit where Appellant failed to answer and was held in default.

STATEMENT OF THE CASE

The two cases that were consolidated in this appeal spring from a previous case between the same parties. That case is not part of this appeal.

In October of 2011, Assistive Technology Medical Equipment Services sued Phillip DeClemente and several others. ATMES alleged all those defendants—including DeClemente—fraudulently mis-represented the profitably of a Charleston business named Abacare prior to the purchase of that business by ATMES in 2008.

DeClemente failed to validly answer or defend that suit. The circuit court denied his motion for relief from default and entered a default judgment against him in the amount of $875,144. DeClemente's appeal of that default judgment is pending.

This appeal does not directly involve that case. This appeal involves two cases DeClemente filed while the 2011 case was still being litigated in circuit court. Both cases involve issues DeClemente tried to raise in the 2011 case. He was precluded from raising those issues because he was in default.

A. General Factual Background

All of this litigation is the result of a business venture that went south.

Reliable Medical Equipment of South Carolina is a Sumter business started in 1998 by Murrell Smith and Jeff Reed. In 2008, they acquired an ownership interest in a Charleston business; Abacare Home Medical.

Assistive Technology Medical Equipment Solutions—ATMES—was created to accomplish this acquisition because Reliable and Abacare were already ongoing businesses with existing Medicare provider numbers. Eighty percent (80%) of Abacare's stock was owned by the Estate of Dorothy Connelly. DeClemente owned the other 20%. DeClemente assigned his rights in Abacare to ATMES and ATMES bought the Connelly Estate's shares in Abacare for $809,500. This agreement was executed November 7, 2008.

There was deposition testimony in the 2011 case that problems began immediately afterwards. ATMES originally had four owners: Smith, Reed, DeClemente, and Kim Cuce. DeClemente was to run the Charleston operation and Cuce was to run the business in Sumter. Smith and Reed learned DeClemente and Cuce were having an affair shortly after ATMES bought Abacare. DeClemente also tested positive for marijuana and got into a fistfight with his brother. In June of 2009, less than a year after ATMES bought Abacare, DeClemente sold his 25% interest in ATMES back to the company.

The parties accomplished DeClemente's buyout in June of 2009 via a series of documents. These include a promissory note, a bill of sale, a confidentiality and non-compete agreement, and a release. The note called for DeClemente to receive monthly payments until March of 2013. (R.p.107, ¶3(A)).

The 2011 lawsuit by ATMES came about because more problems followed DeClemente's departure from the company.

Around the same time DeClemente left ATMES the Supreme Court decided a case about whether certain medical equipment was exempt from sales tax. See *Home Med. Sys., Inc. v. S.C. Dep't of Rev.*, 382 S.C. 556, 677 S.E.2d 582 (2009). Shortly thereafter, the Department of Revenue offered taxpayers an amnesty period to pay any back taxes owed as a result of the court decision.

The owners of ATMES claimed they discovered significant accounting irregularities while examining Abacare's books to determine back taxes. There was deposition testimony in the 2011 case that Abacare's past owners had known of these irregularities since 2007 and that this prior knowledge was not disclosed to ATMES until 2010, after DeClemente left.

These background facts come from appellate documents in the 2011 case. C-TRACK Appellate Case No. 2018-000460. *Shores v. Weaver* recognizes this Court may examine the appellate record in other cases. 315 S.C. 347, 355, 433 S.E.2d 913, 917 (Ct. App. 1993).

B. Brief Summary of the Three Lawsuits

2011 case: ATMES sued DeClemente and others in October of 2011, a little over two years after DeClemente left ATMES. (R.p.130).

DeClemente attempted to file a late answer and counterclaims in August of 2012. (R.p.132). His motion for relief from default was denied in an order signed and filed in April of 2014. (R.p.133). Again, the 2011 suit was about misrepresenting Abacare's finances.

2015 case: In June of 2015 DeClemente filed the first case in this consolidated appeal. The complaint in that case had nine (9) causes of action. (R.pp.93-106).

Two claims from the 2015 complaint are relevant to this appeal. The first cause action was for breach of contract. There, DeClemente sought money damages for the alleged breach of his 2009 buyout agreement. (R.pp.94-97). The second cause of action was also for breach of contract. DeClemente alleged ATMES, Smith, and Reed breached the "release" from his 2009 buyout when ATMES sued him in October of 2011. (R.pp.97-98).

DeClemente tried to bring these same exact claims as counterclaims in the 2011 case. (R.p.629, line 11 - p.630, line 10). Again, his answer in that case was barred as late.

The circuit court initially dismissed the entire 2015 case based on the statute of limitations. This was by a Form 4 order filed January 14, 2016. (R.p.23).

Later, however, the circuit court modified that decision and dismissed all of the suit except DeClemente's first cause of action. A Form 4 to this effect was filed March 3, 2016. (R.p.24). A formal order dismissing everything except the first cause of action was filed much later. (R.pp.49-51.).

The circuit court eventually found DeClemente's first cause of action was barred by the statute of limitations as well, but the court made this ruling on summary judgment, not on a motion to dismiss. The court noted DeClemente's multiple admissions that Respondents had not made a full buyout payment to him since September of 2011, which was more than three years before the 2015 case began. (R.pp.9-10). The court also noted DeClemente's admission that the last time DeClemente received *any* payment was when the private investigator served him with the 2011 lawsuit. *Id.* Again, this was more than three years before the 2015 case began. The court found a reasonable person would view these actions—Respondents totally stopping their payments to DeClemente and suing him for

fraud—as a clear signal Respondents did not intend to comply with DeClemente's June of 2009 buyout. *Id.*

2017 case: DeClemente filed the second case in this consolidated appeal in October of 2017. (R.pp.502-504). That complaint sought a declaratory judgment that ATMES, Smith, and Reed violated the "release" from DeClemente's 2009 buyout when ATMES sued him in October of 2011. *Id.*

This was the third time DeClemente tried to plead the same claim. The release was the second counterclaim in the late answer he tried to file in the 2011 case. It was also the second cause of action in the 2015 case. (R.pp.97-98).

The circuit court heard a motion to dismiss on December 11, 2017. This was the same day the court heard Respondents' motion for summary judgment in the 2015 case.

The court granted the motion to dismiss, holding DeClemente could not use a declaratory judgment to resurrect his alleged defense to the 2011 lawsuit. (R.pp.12-14).

The order granting the motion to dismiss was entered July 2, 2018. *Id.* The court granted Respondents summary judgment in the 2015 case the same day. (R.pp.6-10).

STANDARD OF REVIEW

The appeal in the 2015 case involves a summary judgment. An appellate court evaluates summary judgment under the same standard as the trial court. *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. *Id.* at 355, 698 S.E.2d at 789. The evidence and all reasonable inferences are viewed in the non-moving party's favor. *Id.* at 355, 698 S.E.2d at 789.

The 2017 case is a declaratory judgment. Circuit courts have discretion to entertain declaratory judgments. *Med. Univ. of S.C. v. Taylor*, 294 S.C. 99, 102, 362 S.E.2d 881, 883 (Ct. App. 1987). The circuit court's discretionary decision is reviewed under the abuse of discretion standard. *Id.* at 103, 362 S.E.2d at 883.

ARGUMENT

There are three reasons to affirm the judgment in the 2015 case. First, the circuit court properly held the statute of limitations for DeClemente to sue Respondents began running when Respondents sued him for fraud, communicating an unmistakable intent to breach the 2009 buyout. Second, DeClemente's arguments for reversal are either wrong or barred from consideration because he did not make them below. Third and finally, DeClemente's theory of the case requires this claim to have been brought as a counterclaim in 2011. The claim is barred. DeClemente did not timely answer the 2011 lawsuit.

There are two reasons to affirm the judgment in the 2017 case. First, the order dismissing the 2015 case held this same exact claim was barred by the statute of limitations. That ruling has not been appealed. Res judicata bars further litigation. The second reason is related—the 2011 default judgment is res judicata between these parties. DeClemente may not use a declaratory judgment to re-litigate his liability in the 2011 case.

I. The circuit court properly held the statute of limitations for DeClemente to sue Respondents began running when Respondents sued him for fraud, necessarily communicating their intent to breach the 2009 buyout.

The circuit court properly held the statute of limitations for DeClemente to sue Respondents for breaching DeClemente's June of 2009 buyout began running when

Respondents stopped paying DeClemente and sued him. (R.pp.9-10). The circuit court found a reasonable observer would view these actions as a clear signal that Respondents did not intend to further comply with DeClemente's June of 2009 buyout. *Id.* That finding was right. This Court should affirm the circuit court's judgment.

There is a three year statute of limitations on suits for breach of contract. S.C. Code Ann. § 15-3-530(1) (2005). The discovery rule applies to breach of contract actions. *Mitchell v. Holler*, 311 S.C. 406, 409 n.2, 429 S.E.2d 793, 795 n.2 (1993). Under the discovery rule, the statute of limitations begins to run when the right to sue "reasonably ought to have been discovered" and "from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

The circuit court correctly found DeClemente knew or should have known he had a cause of action since the middle or end of 2011. Since this was more than three years before he filed the 2015 lawsuit, the circuit court correctly concluded the suit was barred.

First, there is the fact that Respondents stopped paying. The summary judgment record included all of the checks ATMES sent DeClemente pursuant to the 2009 buyout. From July of 2009 to June of 2011 ATMES sent DeClemente twenty-five (25) checks for the payments under the promissory note. (R.pp.521-545). The records do not reflect any payments on the note after June of 2011.

Second, there is the lawsuit. Respondents sued DeClemente in October of 2011, naming him as a defendant on claims alleging deceit, fraud, negligence, and a civil conspiracy to misrepresent Abacare's financial information. Respondents were claiming

DeClemente participated in a scheme to sell them a company that he and his former partners knew was vastly overvalued. No reasonable person would have believed Respondents would pay DeClemente *more* money at the same time they were alleging he was part of a scheme to sell them a company that did not keep accurate books and that may have engaged in fraud.

The circuit court cited this Court's decision in *Maher v. Titex Corp.* as comparable. (R.pp.9-10). That was a good comparison. *Maher* involved the alleged breach of a contract to pay an annual performance bonus. This Court reversed a jury verdict in the plaintiff's favor, noting the plaintiff's own testimony illustrated that he had approached his boss and received unsatisfactory answers about the bonus more than three years before the plaintiff filed suit. 331 S.C. 371, 379-380, 500 S.E.2d 204, 208 (Ct. App. 1998). This Court explained the statute of limitations requires "very little to start the clock" and that the only reasonable inference was that the plaintiff should have known, at least after his demotion at work, that an alleged right of his had been invaded and that a claim against his employer might exist. 331 S.C. at 380, 500 S.E.2d at 208.

There is no serious dispute that the same rationale applies here. Nobody disputes Respondents ceased paying DeClemente at some point in 2011. There is a small dispute about when the payments stopped. DeClemente says September of 2011. (Supp.R.p.2, ¶8). There are no documented checks past June. (R.p.545). Still, nobody disputes the payments completely stopped. It seems evident there was a distinct breach.

DeClemente says there were some personal checks and partial payments from Respondent Reed, but even DeClemente acknowledged in his deposition these stopped as soon as he was sued. He explained "I was told they were going to catch up and make

payments and to meet this guy to get the payment. And when I did, your clients handed me the lawsuit." (R.p.623, line 21 - p.624, line 5). Again, no reasonable person would have believed Respondents would pay DeClemente more money on his buyout when they had completely stopped paying him and while they were also charging him with a civil conspiracy and fraud.

II. The summary judgment in Respondents' favor is supported by independent grounds other than the statute of limitations.

The summary judgment in Respondents' favor is also supported by two independent grounds other than the statute of limitations. First, DeClemente's arguments are either wrong outright or barred from consideration because he did not make them below. Second, DeClemente's own theory of the case requires this same claim to have been brought as a counterclaim in 2011. Since DeClemente did not file a valid answer to the 2011 lawsuit, his argument compels the conclusion that his breach of contract claim is barred.

a. DeClemente's arguments are either wrong outright or barred from consideration because he did not make them below.

DeClemente's lead argument for reversal is that Judge Nicholson—the circuit judge who granted Respondents' motion for summary judgment—impermissibly reversed the prior decision of Judge Dennis. Judge Dennis denied Respondents' motion to dismiss.

The principle that one circuit court judge cannot overrule another applies to rulings on the merits. A helpful articulation of this rule appears in *Graham v. Town of Loris*, which explains that when a judge of the court of common pleas makes a decision "on the merits of a matter" that decision is not the judge's personal opinion, but a judgment of the circuit

court. 272 S.C. 442, 449, 248 S.E.2d 594, 597 (1978). Graham further explains "[t]here is no appeal from one Circuit Judge to another" and that one circuit judge may not review "the same state of facts" and change, alter, or reverse another circuit judge's decision. 272 S.C. at 449, 248 S.E.2d at 597.

Judge Nicholson and Judge Dennis reviewed different issues and different facts. Judge Dennis was tasked with deciding a motion to dismiss. As the Court is aware, such a motion is confined to the four corners of the complaint. Judge Nicholson decided a motion for summary judgment. As the Court is aware, summary judgment motions generally involve matters outside the complaint; matters like depositions, admissions, affidavits, and the other forms of information listed in Rule 56(c), SCRCP.

Judge Dennis mentioned this difference at the hearing. He explained he was allowing the first cause of action to proceed beyond the motion to dismiss stage because DeClemente's complaint mentioned the promissory note's maturity date of March 2013, which was less than three years before DeClemente brought the 2015 case. (R.p.608, lines 9-23). Judge Dennis said he did not know whether there was information outside the pleadings that would have caused the statute of limitations to start running before the note's maturity date. *Id.* He then explicitly stated he was not ruling on a summary judgment motion and that his ruling would not preclude a summary judgment motion like the one Respondents filed later. (R.p.611, line 17 - p.612, line 21). Judge Nicholson did not overrule Judge Dennis.

DeClemente's other argument is that the statute of limitations on an installment contract does not begin running until the maturity date. This misstates the general rule, but even so, DeClemente cannot make this argument because he did not make it below.

The general rule is that the statute of limitations for an installment contract begins running from the time each individual installment becomes due. *Anton A. Vreede, M.D., P.C. v. Koch*, 380 S.E.2d 615, 616-618 (N.C. Ct. App. 1989) (discussing the Williston treaty on Contracts and other authorities). The general rule also provides, however, that a creditor may wait until the maturity date to sue on the entire contract rather than suing after each individual missed payment. *Id.* The rationale for this rule is that if the creditor is willing to surrender his immediate right to sue and to keep the installment contract in effect the creditor should be allowed to do so without prejudice. *Id.*; see also 54 C.J.S. *Limitations of Actions* § 209 (titled "Provisions for acceleration of maturity").

DeClemente never made this argument below. At the motion to dismiss stage, he argued he did not know Respondents were refusing to pay him until July of 2012. (R.p.133 & p.599, line 12 - p.600, line 5). This was nearly a year before the promissory note matured. July of 2012 was when DeClemente's lawyer received a letter from Respondent Smith explaining ATMES believed DeClemente had caused significantly more damage than whatever balance remained on the note. (R.p.154).

Again, at no point in DeClemente's written or oral argument on the motion to dismiss was there any mention of limitations being tied to the note's maturity date. See (R.pp.129-134) (the written argument); (R.pp.582-606) (the hearing transcript).

At the summary judgment stage, DeClemente argued this issue had already been decided by Judge Dennis and that Judge Dennis' decision was the law of the case. (R.p.637, lines 1-22). The record does not contain any response by DeClemente to Respondents' argument that stopping payment and suing DeClemente counted as an anticipatory breach

and could only be interpreted as repudiating the 2009 buyout. Again, DeClemente's argument was that summary judgment could not be granted because Judge Dennis had previously denied the motion to dismiss.

This matters because error preservation rules strictly limit the appealing party to arguments that the appealing party raised below. A party must try to convince the circuit court it has erred before taking an appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). A corollary of the same principle is that a party may not argue one ground below and a different ground on appeal. *State v. Tucker*, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). The record does not show DeClemente ever arguing that the statute of limitations for an installment contract does not begin running until maturity.

The general rule about installment contracts appears to have been noted by Judge Dennis sua sponte. (R.p.608, lines 10-11). DeClemente's motion to reconsider did not mention the argument. (R.pp.458-462). It also bears mentioning that one of the exhibits to DeClemente's motion to reconsider was an e-mail to DeClemente from Respondent Reed saying "we want our money back that we have paid you[.]" (R.p.467). That e-mail was dated December 9, 2011; roughly three and a half years before DeClemente filed the 2015 suit. Again, any reasonable person would have understood Respondents were not honoring DeClemente's 2009 buyout. They stopped paying them and they sued him.

b. DeClemente's theory of the case requires this claim to have been brought as a counterclaim in 2011.

A final reason to affirm the judgment in Respondents' favor on the 2015 case is that under DeClemente's own theory of the litigation, his claim for breach of his 2009 buyout was

a compulsory counterclaim to the 2011 lawsuit Respondents brought against him for fraud. Since DeClemente did not file a valid answer to the 2011 lawsuit, his own argument compels the conclusion that his breach of contract claim is barred.

Rule 13(a), SCRCP requires a party to state "any claim" as a counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim[.]" In other words, a defendant is generally required to bring against the plaintiff all counterclaims that arise out of the same transaction for which the plaintiff is suing the defendant.

To be clear, DeClemente's 2009 buyout and the 2011 lawsuit against him are not related. The release the parties executed as part of the buyout explains the buyout arose out of "a dispute and disagreement [] between DeClemente and the remaining members of ATMES" and that the parties agreed to release one another from claims growing out of their operation of ATMES. (R.p.122). The 2011 lawsuit, in contrast, relates to conduct prior to the formation of ATMES. As already discussed, the 2011 lawsuit alleged fraud and misrepresentation leading up to the 2008 sale of Abacare.

Even so, DeClemente's theory is that the 2009 release barred the 2011 lawsuit against him. Under that theory, it is hard to see how there can be any other conclusion than the rest of DeClemente's claims for breach of the 2009 buyout would be compulsory counterclaims to the 2011 suit. DeClemente said in his affidavit that the release and promissory note were a part of the same contract. (Supp.R.p.1, ¶5). His second claim in the 2015 case was that the release barred the 2011 lawsuit. (R.pp.97-98). His argument meshes these together. But if they are together, the claims were compulsory and belonged in the 2011 case.

This case is like *Gathings v. Robertson Brokerage Co.*, where a party did not have to bring certain claims as part of the case but was obligated to bring additional claims once the party decided to add certain claims to the suit. 295 S.C. 112, 367 S.E.2d 423 (Ct. App. 1988). There, a defendant chose to implead a third party and bring claims against that party. This obligated the defendant to bring other claims related to the same subject matter.

The same is true here. DeClemente did not have to claim the release from the 2009 buyout as a defense to the 2011 case. But once he did so he was obligated to bring all claims related to the 2009 buyout. The court struck his answer from the 2011 case as untimely. (R.pp.132-133). Respondents are not aware of any authority allowing a litigant to bring a subsequent lawsuit raising issues that would have been compulsory counterclaims in a prior lawsuit where the same litigant was denied relief from default.

III. The circuit court correctly dismissed the 2017 declaratory judgment as an improper attempt to re-litigate issues from a prior lawsuit.

There are two reasons to affirm the judgment in the 2017 case. First, the order of dismissal in the 2015 case held this very same claim was barred by the statute of limitations. That ruling has not been appealed. Res judicata bars further litigation. The second reason is related—the 2011 default judgment is res judicata between these parties. DeClemente may not use a declaratory judgment to re-litigate his liability in the 2011 case.

a. Judge Dennis' decision in the 2015 case is res judicata and bars the 2017 declaratory judgment.

The 2017 declaratory judgment is the same thing that was alleged as the second cause of action in the 2015 case. Compare (R.pp.502-504) with (R.pp.97-98). In the 2015 case

Judge Dennis ruled this cause of action was barred by the statute of limitations. (R.p.49). DeClemente has not appealed that ruling. His appeal in the 2015 case is limited to Judge Nicholson's grant of summary judgment on the first cause of action from his complaint.

Res judicata bars subsequent lawsuits between the same parties when the claims arise out of the same subject as a prior suit between them. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013). Its fundamental purpose is to ensure no one is sued twice for the same cause of action. *Id.* at 386, 737 S.E.2d at 507.

Judge Dennis' unappealed ruling in the 2015 case is that DeClemente's claim for breach of the release is barred by the statute of limitations. That ruling is the law of the case and binds these parties.

b. The default judgment in the 2011 case is res judicata as well.

A default judgment bars additional litigation between the same parties on the same subject matter. There does not appear to be any serious dispute about this. See *Morris v. Jones*, 329 U.S. 545, 550-51 (1947) ("A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default.").

The lawsuit DeClemente filed in 2017 is an attempt to re-litigate his liability on the default judgment entered against him in the 2011 case. It is difficult to understand how this could possibly be permissible. The 2011 default judgment is res juduicata. It conclusively establishes DeClemente's liability on the subject matter of that suit.

This application of res judicata is consistent with interpretations of the declaratory judgment act. Multiple precedents observe that courts will not entertain a declaratory judgment that will interfere with other pending cases and that courts will not allow parties to litigate parts of other pending cases by piecemeal. *Taylor*, 294 S.C. at 103, 362 S.E.2d at 883-884; *Williams Furniture Corp. v. S. Coatings & Chem. Co.*, 216 S.C. 1, 7, 56 S.E.2d 576, 578 (1949). This Court previously explained the reason for this rule was "obvious" because "[a] subsequent case deciding an issue in a prior case would be a classic example of a tail wagging a dog." *Wessinger v. Rauch*, 288 S.C. 157, 160, 341 S.E.2d 643, 644 (Ct. App. 1986).

DeClemente claims his right to pursue the 2017 case is bolstered by *State v. Bacote*, *Kunst v. Loree*, and *Plott v. Justice Enterprises*. None of these cases support the proposition that a party may use a declaratory judgment to attack a default judgment and that the default judgment is not res judicata between the parties to that lawsuit.

Kunst arose out of a dispute between a homebuilder and the people who hired him. After the prospective homeowners sued the builder and procured a default judgment, the builder brought a separate action against the homeowners and a separate person the homeowners hired to help them investigate the builder.

The suit against the homeowners was dismissed and that decision was not appealed. *Kunst v. Loree*, 404 S.C. 649, 652 n.2, 746 S.E.2d 360, 361 n.2 (Ct. App. 2013). This Court reversed the suit's dismissal in favor of the homeowners' employee, and rightly so. A default judgment is not litigation "on the merits" and does establish facts as between the builder and a non-party to that judgment like the homeowners' employee. *Id.* at 658, 746 S.E.2d at 364.

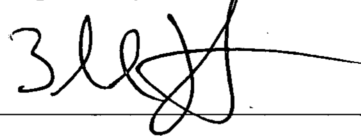
Plott v. Justin Enterprises involved scrutiny of a past lawsuit between the parties to determine whether the prior judgment in that suit barred the current suit's claims. 374 S.C. 504, 512-513, 649 S.E.2d 92, 96 (Ct. App. 2007). In no way does it support the proposition that a party may use a declaratory judgment to litigate an issue the party claims relieves him from liability on a prior default judgment. DeClemente tried to assert the release from his 2009 buyout as a defense to the 2011 case but was precluded from doing so because he was in default. Nothing in *Plott* supports his argument that he may use a declaratory judgment to bring this defense back from the dead.

State v. Bacote was an attempt to apply collateral estoppel to the State in a DUI prosecution based on the Department of Public Safety's failure to appear and oppose the defendant's administrative appeal of his license suspension for refusing to take a breathalyzer test. 331 S.C. 328, 503 S.E.2d 161 (1998). Like *Kunst*, the case involved collateral estoppel. It has no application here. A default judgment binds the parties to that judgment.

CONCLUSION

For the foregoing reasons this Court should affirm.

Respectfully submitted,



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