THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master in Equity

The Honorable Charles B. Simmons, Master in Equity

Appellate Case No. 2019-002047

Independence National Bank.....Respondent,

v.

Buncombe Professional Park, LLC and David Decarlis s/a David D. Decarlis,

Of Whom David Decarlis is the.....Appellant.

MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR EXPETIDITED TREATMENT

Respondent, Independence National Bank, by and through their undersigned counsel, respectfully move this Court pursuant to Rules 240 and 260 of the South Carolina Appellate Court Rules, for an Order dismissing this consolidated appeal filed by the Appellant, David Decarlis ("Decarlis" or "Defendant") due to his arguments on appeal being moot, or in the alternative, affording this appeal expedited treatment for the reasons set forth below.

SUMMARY OF MOTION AND SUPPORTING GROUNDS

This consolidated appeal should be dismissed because Defendant's arguments on appeal are all rendered moot by the binding holdings of multiple orders he failed to appeal. The Master entered a Repatriation Order on October 8, 2019 that Defendant did not appeal:

- finding that the Defendant had the power to instruct an offshore Trust holding over $1M of his assets to repatriate $902,886.00 to South Carolina in order to satisfy the judgment held by the Plaintiff;
- finding that Defendant fraudulently transferred the initial funds to the Trust in violation of the Statute of Elizabeth making that transaction void *ab initio*; and
- ordering Defendant to repatriate $ 902,866.00 from the Trust to satisfy the judgment held by the Plaintiff.

The Master later the December Contempt Order on December 5, 2019 that Defendant did not appeal:

- finding again that Defendant has control over the funds he was ordered to repatriate from the Trust;
- finding that Defendant willfully failed to abide by the order to repatriate those funds; and
- holding Defendant in contempt for that failure.

Defendant did not appeal either order, making their findings and holdings binding upon him as the law of the case.

On appeal, Defendant challenges (1) the Master's denial of his Moton to Reconsider the previous ruling ordering repatriation of the offshore funds; (2) holding Defendant in contempt through a February Contempt Order because he still had not repatriated the funds; and (3) in appointing a Receiver to aid in collection of assets. All of those challenges and claims of err the Defendant asks this Court to review and reverse on appeal are predicated upon the argument that the Master erred in finding that the Defendant has the power to repatriate the offshore funds. Without that finding he would not have been ordered to repatriate the assets, held in contempt for

failing to do so, nor have a Receiver appointed to aid in collection of the still outstanding judgment. That foundational finding, however, was made in two orders Defendant failed to appeal. Therefore, this Court cannot reverse or modify the rulings challenged on appeal because doing so would require it first find the Master erred in determining that the Defendant has the power to instruct the Trust to repatriate his funds. That unappealed finding is binding upon the Defendant, the law of the case, and unsusceptible to modification or reversal on appeal.

Furthermore, the Master's unchallenged finding in the Repatriation Order that the Defendant's initial transfer of funds to the Trust was a fraudulent conveyance in violation of the Statute of Elizbeth (thus void *ab initio*) makes reversal or modification of the appealed orders impossible. That ruling being the law of the case renders the consideration of whether Defendant has the power to repatriate the offshore funds moot because it invalidates the Trust from its inception, making it such that the Trust never obtained legal possession or control over the funds in the first place, and thereby, rendering moot the issue of whether Defendant has control to repatriate funds from the Trust.

Thus, those unappealed orders, and the findings within them, are the law of the case making it impossible for this Court to grant effectual relief because any judgment it may render would have no practical legal effect upon an existing controversy. Therefore, dismissal of this consolidated appeal is warranted and necessary.

Alternatively, should the Court not dismiss this matter in whole or in part, the Plaintiff respectfully requests it be given expedited treatment in order to avoid the Defendant claiming the judgment at issue is stale on or after August 2, 2021 due to it being entered ten years prior to that date. As demonstrated below, this appeal is nothing more than a delay tactic pursued by the Defendant as part and parcel of his ongoing efforts to avoid paying his debt to the Plaintiff by

attempting to run out the clock on the underlying judgment. Defendant's actions reflect the true purpose of these consolidated appeals and the lack of substance within them.

I. PROCEDURAL HISTORY

Independence National Bank, (*hereinafter* "Plaintiff" or "Independence") obtained a deficiency judgment against David D. Decarlis (*hereinafter* "Defendant" or "Decarlis") and Buncombe Professional Park, LLC on August 2, 2011 in the amount of $491,978.13. Subsequent litigation over several issues ensued throughout the following years. Ultimately, Plaintiff was able to proceed with collecting on the judgment. Plaintiff attempted to locate and personally serve the Defendant with supplemental proceeding filings on twenty-seven occasions over the course of eight months, from October 5, 2018 through May 9, 2019. On May 29, 2019, the lower court issued an Order for Publication, allowing Plaintiff to serve the Defendant through publishing notice of a Rule to Show Cause hearing in the local newspaper.

A Rule to Show Cause hearing was held before the Master in Equity for Greenville County on July 24, 2019. All parties appeared with counsel. The Rule to Show Cause hearing was continued and the court ordered Decarlis be deposed within twenty-one days. On August 10, 2019, Defendant filed a notice of appeal attempting to appeal the Rule to Show Cause Order entered on July 25, 2019. Despite Defendant's attempt to stay the proceedings with the appeal of that interlocutory order, the Master ordered that the Defendant to be deposed on August 12, 2019. That deposition took place on the specified date, after which, a Rule to Show Cause Order was issued on August 27, 2019.

The continued Rule to Show Cause hearing was held on September 20, 2019. During that hearing evidence and live testimony (as detailed more thoroughly below) was presented to the

Master primarily focused on the substantial assets Defendant had attempted to place in an offshore Trust to avoid repaying his creditors, including Independence.

On October 2, 2019, the Plaintiff filed a Motion to Appoint a Receiver looking to have a Receiver put in place to set aside another fraudulent conveyance which is not subject of this appeal and to aid in the satisfaction of Plaintiff's judgment against the Defendant.

The Master issued an October 8, 2019 Order for Repatriation of Assets (the "Repatriation Order") ordering the Defendant to repatriate $902,886.00 in funds (the "Funds" or "Trust Funds") claimed to be held in the name of the Bayview Trust with Capital Security Bank in the Cook Islands back to the United States within fifteen days. (R. pp. 3-11 - Rep. Order). The Repatriation Order found that Defendant's attempted transfer of over $1 million dollars to the Bayview Trust was a fraudulent conveyance under the Statute of Elizabeth and therefore constituted non-exempt assets over which he had possession and the attendant power and control to repatriate. *Id.*

On October 18, 2019, Defendant filed a Motion to Reconsider the Repatriation Order. (R. pp. 343-347 - 10.18.19 Mot. Recon.). Plaintiff filed a Motion for Contempt on October 29, 2019 after the Defendant failed to abide by the Repatriation Order's directive that he repatriate the Funds within fifteen days. (R. pp. 333-342 - 10.29.19 Mot. Contempt).

On November 6, 2019, the lower court heard both the Motion to Reconsider and the Motion for Contempt. Counsel for each party argued their respective motions during that hearing. Also present at the hearing was Rory Whelehan, Esq., who was duly sworn and presented testimony as to his qualifications to serve as a Receiver.

The Master entered the Order Appointing the Receiver on November 12, 2019 appointing Mr. Whelehan to act as the Receiver and empowering him to conduct independent discovery to

investigate the assets of the Defendant and directing he provide written reports to the court every fourteen days. (R. pp. 23-27 - Rec. Order).

On December 5, 2019, the lower court entered a Form 4 Order Denying Defendant's Motion to Reconsider the Repatriation Order. (R. pp. 12-14 - 12.05.19 Order Den. Recon.).

Thereafter, on December 10, 2019, Decarlis filed his first notice of appeal seeking review of the Order Denying Defendant's Motion to Reconsider entered December 5, 2019 and the Order for Appointment of Receiver entered November 12, 2019. (12.12.19 NOA).

A week later, on December 17, 2019, the Master entered the Order Holding Defendant Decarlis in Contempt of Court (the "December Contempt Order") for failing to abide by the Repatriation Order (R. pp. 15-19).

The deadline for appealing both the Repatriation Order and the December Contempt Order passed. Following passage of those appeal deadlines, Plaintiff filed a Motion to Enforce the Contempt Order on February 6, 2020. Defendant filed a Motion Seeking Relief from that Order. (R. pp. 348-349 - Def. Mot. Relief). The Master considered those filings and issued a February 13, 2020 Order (the "February Contempt Order") reaffirming the contempt findings in the December Contempt Order and imposing the sanctions in that earlier order (R. pp. 20-22).

Defendant then filed a second notice of appeal on March 16, 2020, seeking review of the February Contempt Order entered February 13, 2020. (3.16.20 NOA).

A Motion to Consolidate the appeals was filed on April 6, 2020. This Court granted that motion and consolidated the two appeals through an Order dated April 14, 2020.

Defendant filed his Initial Brief on March 12, 2020. The entirety of Defendant's challenges to the lower court's rulings relied upon the claim that he had no control over the trust funds he was ordered to repatriate. Plaintiff filed its Initial Response Brief on July 6, 2020 with the headline

argument that Defendant's appeal is rendered moot due to his failure to appeal the Repatriation Order and the December Contempt Order. Plaintiff pointed out that the lower court in those unappealed orders found that Defendant had the power to repatriate the trust assets, directed him to do so, and punished him for failing to abide by its order. Defendant left that dispositive argument unaddressed by choosing to not file any Reply Brief. Defendant then served the Record on Appeal over ten days late after Plaintiff counsel twice inquired as to when it would be served. Plaintiff filed its Final Brief on September 4, 2020. The deadline for filing final briefs fell on September 8, 2020. Defendant failed to file his Final Brief, and it is currently some twenty days past due.

Defendant's failure to appeal the Repatriation Order or the December Contempt Order render his appeal moot and subject to dismissal. Furthermore, his failure to file a Final Brief as required under the Rules also subjects this consolidated appeal to dismissal.

II. RELEVANT FACTUAL BACKGROUND

A. The Original Debt – Independence Bank Note for $1.65 Million Dollars

On April 28, 2006, Defendant Decarlis purchased a home at 216 Cleveland St. in Greenville, South Carolina for $610,000. Defendant Buncombe Professional Park, LLC, through its member Defendant Decarlis, applied for a commercial mortgage loan from Independence in the original principal sum of One Million Six Hundred Fifty Thousand 00/100 Dollars ($1,650,000.00) which was to be used for the refinancing of an existing first mortgage loan with First National Bank of Spartanburg and the establishment of an interest reserve fund to initially service the loan to the Plaintiff. (R. pp. 65-66; R.. pp. 73-90 - Amend. Compl. pp. 1-2 & Exhs. A- C). That loan had an eighteen (18) month term making the maturity date March 25, 2009. (R. pp. 73-82 - Amend. Compl. Exh. A&B). Defendant signed a personal Guaranty on the debt as well as signing one on behalf of Buncombe Professional Park, LLC. (R. pp. 91-92 - Amend. Compl. Exh. D). On October

21, 2008, Defendant took out a $250,000 HELOC mortgage with Regions Bank with 216 Cleveland Street as the encumbered/secured property.

Defendant wished to have Independence agree to a change in the terms of the loan; specifically, an extension of the maturity date. As part of that process, he submitted a Personal Financial Statement dated March 8, 2009 listing:

i. A total annual income of $456,000;

ii. 216 Cleveland Street property as unencumbered;

iii. 3009 Palm Blvd. property as being encumbered by a mortgage with SunTrust with a balance of approximately $993,000;

iv. $200,000 in deposits at other banking institutions; and

v. A Net Worth of $3,647,000.

(R. pp. 239-243 - Personal Fin. Statement). The total Net Worth on that Financial Statement included the value of the same real property Defendant associated with the mortgage and note he entered with Royal Blue on the heels of obtaining the loan modification as detailed below. Based on the Personal Financial Statement, Plaintiff agreed to extend the maturity date on the mortgage and guaranty by one year to March 25, 2010. (R. pp. 83-90 - Amend. Compl. Exh C - 04.01.09 Change in Terms).

B. Defendant Attempts to Establish Elaborate Obstacles to Collecting the Debt

Sometime in 2009, as the loan was originally becoming due and Decarlis sought and obtained a modification of the maturity date, he retained the Presser Goldstein law firm in Florida to setup an offshore trust in an attempt to place a substantial amount of assets out of reach of his creditors, including Independence. That same year, Attorney Goldstein co-authored and published Asset Protection-A Guide for Professionals and Their Clients, a nearly 300 page guide to asset

protection that includes a chapter entitled "Asset Protection a Judge Will Respect" which contains the following passage:

> To summarize, ***instead of being obvious about what we're doing, we are subtle. We use camouflage.*** We have a bona fide reason for doing what we're doing besides asset protection. ***We do things so as to be able to prove our inability to repatriate assets if needed.*** We have liability insurance that will pay a reasonable amount of the claim, thus ensuring that the plaintiff's attorney get an easy payout, which serves to divert him from the tough and uncertain uphill battle he'll have to wage it he wants any significant portion of the debtor's wealth.

(R. p. 338 - 10.29.19 Memo Supp. Plf. Mot. Contempt p. 6 *quoting* ARNOLD S. GOLDSTEIN & W. RYAN FOWLER, ASSET PROTECTION, p. 255 (Garrett Press 2009))(***emphasis added***).

On April 21, 2009, a Deed of Trust was executed claiming to establish The Bayview Trust (the "Trust"). (R. pp. 267-312 - P-5 Southpac Trust Info.). Decarlis was designated the Settlor and sole beneficiary of the Trust. *Id.* Southpac Trust International Inc., an entity based in the Isle of Nevis, was named the Trustee. On May 27, 2009, the Bayview Trust was registered in the Cook Islands. The Summary of Assets in the Trust documents reflected an entity value of $10.00 which was the initial settlement of cash placed into a Capital Security Bank ("CSB") account (#**0236) for Bayview. (R. pp. 269 - P-5 Southpac Trust Info. p. 3). The other two designated assets, 98% of Ellis & Co, LP and a second CSB account (#**0243) were placed into the Trust on June 10 and 11, 2009 respectively. At that time both assets were listed as having zero value. (*See* R. pp. 269 - P-5 Southpac Trust Info. p. 3).

Royal Blue Lending House, LLC was incorporated on or about July 1, 2009 in the Isle of Nevis. Then, on January 1, 2010, Defendant along with two of his single-member LLCs, 3009 Palm Blvd. LLC (a beach house on the Isle of Palms) and TJ Ventures of South Carolina, LLC (an LLC with no assets at the time) entered into a Loan Facility with Royal Blue Lending House, LLC for a sum of One Million and Three Thousand Three Hundred and Thirty-Nine Dollars 12/100

($1,003,339.12). (R. pp. 244-263 - P-2 Royal Blue Loan Facility). Shortly thereafter, on February 4, 2010 a Deed of Charge was executed between CSB and Southpac Trust International, Inc. and a Brokerage Agreement entered into by and between CSB, Royal Blue Lending House, LLC, and Southpac Trust International, Inc. Defendant then signed a Promissory Note on February 25, 2010 wherein he promised to pay Royal Blue Lending House, LLC the principal amount of $1,003,339.12 and secured the Note by five real properties that he owned either individually or through an entity in which he was the sole member. (R. pp. 266 - P-4 Promissory Note).

On March 11, 2010, a mortgage was recorded in Greenville County on the Royal Blue loan with 216 Cleveland Street and four other properties listed as being encumbered. The mortgage was also filed in other counties to cover the other properties. On March 12, 2010, Defendant signed an Agreement to Deposit between CSB and Southpac Trust International to fund the CSB accounts listed as Trust assets using the Royal Blue loan funds. The entities signed the Agreement on March 23, 2010. The Royal Blue loan proceeds were then transferred to the CSB account(s) listed as assets of the Trust. Defendant testified that the Royal Blue loan funds were invested in a long-term interest-bearing CD, the interest from which would go to repay the mortgage payments to Royal Blue and the remainder into the Trust. (R. pp. 180 - 09.20.19 Trans. p. 18, lns. 3-13).

Three days after Defendant signed the Agreement to Deposit precipitating the transfer of the Royal Blue loan funds into the Trust, on March 15, 2010, Plaintiff filed a *Lis Pendens* on Decarlis and Buncombe Professional Park, LLC related to its mortgage arising from the 2007 loan. (R. pp. 264-265 - P-3 Lis Pendens). On March 25, 2010, two days after CSB and Southpac signed the Agreement to Deposit, the Independence loan matured, and Defendants were in default. Plaintiff filed a Complaint on May 14, 2010 against the Defendants, seeking to foreclose on its

mortgage and obtain a deficiency judgment. (R. pp. 38-64 - Compl). An Amended Complaint was filed on April 7, 2011. (R. pp. 65-92 - Amend. Compl.).

On April 27, 2011, Defendant deeded the 216 Cleveland Street property to his wife and himself as joint tenants in exchange for "$5.00 dollars love and affection." Subsequently, on August 2, 2011, a deficiency judgment was entered against Decarlis and Buncombe Professional Park, LLC for $491,978.13.

In 2016 the Trust made a distribution of $100,000 at Defendant's request to a Spartanburg entity which Defendant said was an investment opportunity for a friend. (R. pp. 183-184 - 09.20.19 Trans. p. 21, ln. 4 - p. 22, ln. 13). The CSB Statement Plaintiff obtained from Defendant's accountant noted that the $100,000 wire transfer was a "transfer out to David" [Decarlis]. (R. pp. 314 - P-6 CSB Statement p. 2).

In 2017 the Trust made a constructive distribution of $631,750 to the Settlor (Defendant Decarlis) to pay off the Royal Blue mortgage. (R. pp. 315-316 - P-7 3520-A Form).

The $250,000 HELOC mortgage with Regions Bank was marked "Satisfied" on July 29, 2019.

C. Rule to Show Cause Hearing - September 20, 2019

Following entry of the deficiency judgment, issues concerning mortgage priority and the like were litigated. The Defendant continued to refuse to repay his debt to the Plaintiff. Finally, in August of 2018, Independence was able to initiate supplemental proceedings. That proved and has continued to prove a Herculean effort due to the sham roadblocks Defendant attempted to erect through his offshore trust scheme. Ultimately, Plaintiff was able to obtain sufficient evidence to seek to have Defendant repatriate the assets he claimed were held by the Trust but restricted from being distributed to him for repaying his debt to Independence. On September 20, 2019, the Master

took up the Rule to Show Cause to determine if Plaintiff was entitled to that relief. The primary issue before the Master was whether Defendant had control over the Funds he claims were held by the Trust and the ability to have them repatriated in order to repay his debt to the Plaintiff.

Defendant claimed that he was unable to have the Trust distribute any of the Funds to him due to the Trust's prohibition on making distributions to the creditors of any settlor or beneficiary. He argued that the Trust and Trustee exclusively possess and control the Funds and their distribution. In an attempt to make his point, soon before the hearing, Defendant made a feigned attempt to request the Trust distribute $350,000 to him for payment of the judgment debt. That request, he knew by design would be rejected due to the language of the Trust governance documents established by his Florida counsel which claimed to prohibit distributions to any creditor of the settlor or beneficiary. He wished the court to believe that he had put over $1M of his money in the hands of an overseas third party over which he had no control.

At the hearing, Plaintiff presented evidence and testimony that the Master found demonstrated that Defendant in fact had the control over the Funds he claimed to lack. Specifically, Plaintiff was able to show that Defendant used the Trust Funds to pay personal taxes, directed payment of $100,000 in 2016 to fund a local investment opportunity in Spartanburg, South Carolina, and used his personal funds to pay the Trustee. (R. pp. 171–189 - 09.20.19 Trans. pp. 9-27; R. pp. 239-320 - Plf. Hearing Exhs. 1-8). It was further established that Trust Funds were used to pay off the Royal Blue loan to the Defendant as reflected in a Form 3520-A provided by his accountant which clearly stated that the "Bayview Trust made a constructive distribution in the amount of $631,750 to the settlor [Decarlis] through paying the loan on his behalf." (R. pp. 315-316 - P-7 Southpac Info.). The two CBS accounts had a value of over $1,400,000 at the time the Repatriation Order was entered. (R. pp. 4 - Rep. Or. p. 2). Thus, the objective evidence presented

to the Master demonstrated that the Funds were under Defendant's control. In light of that evidence and common sense, the Master refused to accept Defendant's argument that he was hamstrung from paying his debt to the Plaintiff with Trust Funds because he did not control those assets. The Master ordered Defendant to repatriate $902,876.44 from the Trust to pay his debt to the Plaintiff finding that evidence demonstrated that he has the power to do so and holding that the initial transfer of the Funds to the Trust was a fraudulent conveyance under the Statute of Elizabeth. (R. pp. 3-11 - Rep. Order).

D. Defendant Held in Contempt by December Order

Defendant failed to abide by the Repatriation Order and was accordingly held in contempt through an Order entered on December 17, 2019 (the "December Contempt Order"). (R. pp. 15-19). The Master found that the evidence established Defendant had sufficient access to and control over the Funds he was ordered to repatriate, but willfully refused to abide by attempting to hide behind what the Master deemed a "calculated, elaborate and carefully planned effort started by Defendant many years ago in an attempt to shield and hide assets from a judgment creditor." (R. pp. 16 - Dec. Contempt Order p. 2).

E. No Appeal of the Repatriation Order or the December Contempt Order

Defendant did not appeal either the Repatriation Order or the December Contempt Order. Those failures nullify and render moot his arguments on appeal wherein he is attempting to challenge the Order Denying Defendant's Motion to Reconsider the Repatriation Order and the February Contempt Order.

III. LEGAL ARGUMENTS AND AUTHORITIES

A. Defendant's Failure to Appeal the Repatriation Order and December Contempt Order Render His Appeal Moot and Require Dismissal

As explained in detail below, the issues raised in this consolidated appeal have been rendered moot by Defendant's failure to appeal the Repatriation Order and December Contempt Order. As a result, there is nothing for the Court to decide on appeal and it cannot enter a ruling with any legal effect because the Defendant is bound by the findings and holdings within those unappealed orders. Therefore, dismissing this appeal is appropriate and necessary.

The appellate Courts "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Mathis v. South Carolina State Highway Dept.*, 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.* When the issues on appeal are moot, they should be dismissed. *See Gainey v. Gainey*, 279 S.C. 68, 301 S.E.2d 763 (1983)(Dismissing issue on appeal for mootness because "This Court will not issue advisory opinions on questions for which no meaningful relief can be granted."). Defendant's failure to appeal the Repatriation Order and December Contempt Order are events that make it impossible for this Court, as the reviewing tribunal, to grant effectual relief.

A party seeking to appeal an order of a lower court is required to file a notice of appeal within thirty days after they receive written notice of the entry of the order or judgment. SCACR 203(b)(1). "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." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). Thus, to challenge a lower court's rulings one must file a timely notice of appeal of the order or orders

containing the findings and holdings they wish to have the appellate court reverse or modify. Defendant failed to do so in this case.

The Master entered the Repatriation Order on October 8, 2019. Defendant filed a Motion to Reconsider that Order ten days later, thus tolling his deadline for filing an appeal until an order on that motion was entered. The Motion to Reconsider was denied by Order dated December 5, 2019, giving Defendant until January 6, 2020 to file a notice of appeal of the Repatriation Order. The Master entered the December Contempt Order on December 17, 2019. No Rule 59 Motion was filed regarding it, making Defendant's deadline for filing a notice of appeal of that Order January 17, 2020. He did not file any, much less a timely notice of appeal seeking review of either the Repatriation Order or the December Contempt Order.[1]

Defendant filed his first notice of appeal on December 10, 2019 stating that he was appealing the Master's Order Denying Defendant's Motion to Reconsider (the "Reconsideration Order") and the Order for Appointment of Receiver (the "Receiver Order"). (12.12.19 NOA). He filed the second notice of appeal on March 16, 2020, which sought review of the Master's February 13, 2020 Order for Contempt (the "February Contempt Order"). (3.16.20 NOA). Per the Rules, Defendant submitted the Orders referenced with the respective notice of appeal. On brief, Defendant states that "[t]his is an appeal from the Master in Equity's Order Denying the Appellant's Motion for Reconsideration of its order dated October 8th [*sic*], 2020 Order [*sic*] David Decarlis to 'Repatriate' assets held in Bayview Trust and the subsequent Order holding Mr. Decarlis in contempt of that order dated February 13, 2020." (Ap. Br. p. 2).[2] Defendant did not

[1] Defendant filed a Motion for Relief from the December Contempt Order with the lower court on February 6, 2020 in which he recognized that he had not appealed that order within the prescribed 30-day window. (R. pp. 348-349 - 02.06.20 Def. Mot. Relief).

[2] All citations to Appellant's Brief are to his Initial Brief because he filed no Final Brief though the deadline for doing so passed over twenty days ago.

lodge any, much less timely, appeal of either the Repatriation Order or the December Contempt Order. That failure does not only prevent him from seeking appellate review of those orders; it binds him to the findings and holdings within them.

A party that does not appeal from an adverse decision is bound by that decision. *King v. Island Club Apartments*, 2005 WL 7083456, (Ct. App. 2005)(Held that because the Island Club did not appeal the lower court's finding that there was no evidence of a civil conspiracy between King and others, it was bound by that unappealed ruling.); *Charleston Cnty. Sch. Dist. v. South Carolina State Diary Comm'n*, 274 S.C. 250, 252, 262 S.E.2d 901, 902 (1980)(Held the Commission's failure to appeal an order of the lower court finding the contract at issue was valid was bound by that order and its directive.). "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997). "An unappealed order, right or wrong, is considered the law of the case." TOAL, WALKER, & BAKER, Appellate Practice in South Carolina, p. 214 (3rd Ed. 2016); *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 171-72, 714 S.E.2d 869, 878 (2001)(finding the trial judge's unappealed procedural ruling was the law of the case); *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009)(finding circuit court's unchallenged ruling on magistrate court's subject matter jurisdiction was the law of the case). The appellate court is required to affirm an unappealed ruling, right or wrong, because it becomes the law of the case.

By not appealing the Repatriation Order or the December Contempt Order, the findings and holdings within them are the law of the case, making them binding upon the Defendant and rendering his arguments on appeal moot.

Specifically, Defendant's entire position on appeal is predicated upon his claim that he has no control over the Funds the court ordered him to repatriate, and therefore the Master erred in denying his Motion for Reconsideration of its previous ruling ordering him to repatriate those assets and in punishing him for failing to do so through the February Contempt Order. (Ap. Br. pp. 5-19). That same premise underlies his challenge to the Receiver Order, with Defendant arguing the Master erred in appointing the Receiver because he has no control over any collectable assets which could be used to satisfy the judgment debt owed to the Plaintiff. (Ap. Br. pp. 19-20). The orders Defendant failed to appeal, however, both found that he has control over the Funds and the attendant ability to repatriate them. The December Contempt Order found that he willingly failed to abide by the Repatriation Order's directive in contempt of court. Those findings are the law of the case.

1. Order for Repatriation of Assets Entered October 8, 2019

In the Repatriation Order the court concluded that (1) the Defendant has control over the Funds he claims are held in the Trust and the ability to repatriate them; and (2) the transfer of the $1,003,339.12 by the Defendant to the Trust was a fraudulent conveyance under the Statute of Elizabeth. (R. pp. 6 - Rep. Or. p. 4). The Master's specified basis for those conclusions and the holdings themselves in the Repatriation Order eviscerate Defendant's positions on appeal.

a. Defendant is bound by the Master's conclusion that Defendant has control over and can repatriate the Funds claimed to be held in Trust

First, the Master determined that the evidence and testimony presented below established that Defendant has control of the Funds held in the Bayview Trust and the ability to repatriate them. (R. pp. 6-7 - Rep. Or. pp. 4-5). The Master found that the fact that Defendant managed and controlled the Funds located in the two Cook Island accounts at least until the time he made the beneficiary change less than two years ago, he had been both the Settlor and beneficiary of the

Trust, directed the payment of $100,000 in 2016 from the accounts in the Cook Islands to fund a local investment opportunity of a friend in Spartanburg, South Carolina, used the Trust Funds to pay his personal taxes, and used his own personal funds to pay the Trustee all made it "clear that the Defendant has the means and authority to repatriate the funds to the United States." (R. pp. 6 - Rep. Or. p. 4). That conclusion of law and the evidentiary basis for it as laid out in the Repatriation Order are the very things Defendant seeks to argue was determined in err in the Order Denying Defendant's Motion to Reconsider. (Ap. Br. p. 5-17). That becomes a fool's errand, however, given the fact that he is bound by the finding in the Repatriation Order that he has control over the Funds held in the Trust which he was ordered to repatriate.

On brief, Defendant's headline argument is that the "Master in Equity's conclusion that [he] has control over the Trust is not supported by facts or the law." (Ap. Br. p. 5). Defendant's entire position relies upon this premise. Without control over the Funds, Defendant is beholden to the Trust and its restrictions on distributions which make him unable to comply with the Repatriation Order and, therefore, undeserving of the punishment placed upon him in the February Contempt Order for not doing something he lacks the power to do. (Ap. Br. pp. 5-19). The foundational premise of Defendant's position is impossible for him to establish because the law of the case – that he has control over the Funds – was decided in the Repatriation Order he has failed to appeal. The Master's finding that Defendant has control over the Trust and the legal and evidentiary basis for it in the Repatriation Order are the law of the case and binding upon him. He cannot challenge them by appealing the Order Denying Defendant's Motion to Reconsider that merely affirmed that holding. Furthermore, even if this Court considered his arguments on appeal and reversed the Order Denying Defendant's Motion to Reconsider, the Repatriation Order would remain intact, unappealable, and binding upon the Defendant. Therefore, this Court's consideration

of Defendant's challenges to the finding that he has control of and can repatriate the Funds would serve no purpose because he is bound by the unappealed finding on this issue within the Repatriation Order.

b. Defendant is bound by the Master's conclusion in the Repatriation Order that the transfer of $1,003,339.12 Royal Blue loan funds to the Trust was a fraudulent conveyance under the Statute of Elizabeth

Second, the Repatriation Order concluded that the "admitted gift of $1,003,339.12 by the Defendant to 'The Bayview Trust' was clearly a fraudulent conveyance under the Statute of Elizabeth analysis." (R. pp. 4, 7-9 - Rep. Or. pp. 2, 5-7). Defendant's failure to appeal that Order makes this conclusion binding upon him. Unlike the issue of whether he has control over the Trust and the Funds discussed above, the record is devoid of any attempt to challenge the fraudulent conveyance finding. Defendant's Motion to Reconsider the Repatriation Order did not address it at all. (*See* R. pp. 343-347 - 10.18.19 Def. Mot. Recon.). In fact, during the hearing on that motion, Defendant's counsel made a single mention of the fraudulent conveyance finding prompting the Master to ask "Where in the motion is that raised?" which forced the admission that "It wasn't raised in the motion, Your Honor." (R. p. 209 - 11.6.19 Trans. p. 3, lns. 6-18). The Master's subsequent Order Denying Defendant's Motion to Reconsider which Defendant has appealed contains no mention of the fraudulent conveyance finding and nothing in Appellant's Initial Brief addresses or argues for reversal of it.[3] (*See* R. pp. 12-14 - Recon. Order; Ap. Br. pp. 5-15). Thus, the Master's finding that Defendant's transfer of the over $1M loan funds from Royal Blue to the Trust was a fraudulent conveyance is the law of the case and binding upon him.

[3] Appellant's Initial Brief contains only a general passing reference to this finding stating that "[a]ssuming for the sake of argument that the transfer may be a fraudulent transfer to the trust, that is a separate issue from the current location of the assets and Mr. Decarlis' control over them." (Ap. Br. p. 16). He never argues that the Master erred in deeming the transfer of the $1,003,339.12 to the Trust fraudulent under the Statute of Elizabeth analysis.

Fraudulent transfers made in violation of the Statute of Elizabeth are completely and utterly void under the law. The Statute of Elizabeth provides that:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken . . . to be clearly and utterly void . . . .

S.C. Code Ann. § 27-23-10(A). The unchallenged and binding conclusion within the Repatriation Order that Decarlis' transfer of the initial Royal Blue Funds to the Trust was a fraudulent conveyance renders that transaction "utterly void." That attempted transfer was void *ab initio* under the law. Consequently, the Trust never obtained legal possession and control of those Funds. The fact that the Trust lacked and continues to lack legal possession of the Funds necessarily means their disbursement or transfer to the Defendant or another party at his direction is not prohibited by the Trust instruments as he claims. Those Funds are under his control, and the Trust's rules and prohibitions on distributions Defendant maintains prevented his efforts to comply with the Repatriation Order are inapplicable and irrelevant.

The Repatriation Order directed the Defendant to repatriate $902,876.44 of the Funds within fifteen days of entry. Due to his failure to appeal that Order the Defendant is bound to abide by the Master's mandate and his arguments imputing err to the Order Denying the Motion to Reconsider rendered moot.

2. Order Holding Defendant in Contempt entered December 17, 2019

Decarlis also did not appeal the December Contempt Order which contains numerous conclusions of law and findings that are binding upon him and render his arguments on appeal moot. Those include the Master (1) finding the evidence established Defendant has control over

the Funds he was ordered to repatriate;[4] (2) concluding the facts established a calculated, elaborate, and carefully planned effort started by the Defendant years prior in an attempt to shield and hide assets from a judgment creditor; (3) holding that the Defendant willfully disobeyed the Repatriation Order by refusing to repatriate the Funds; and (4) determining that Defendant's willful noncompliance warranted holding him in contempt and the imposition of severe punitive sanctions should he continue to be noncompliant. (R. pp. 17-18 - Dec. Cont. Order pp. 3-4). All those findings are now the law of the case, making them binding on the Defendant, and rendering his arguments the Master erred by holding him in contempt and sanctioning him for it moot.

a. Defendant is bound by the Master's conclusion that he can repatriate the Funds and is in contempt of the Repatriation Order for willfully failing to do so

As noted above, Decarlis appealed the February Contempt Order. That Order merely affirmed that he remained and continued to be in contempt of the Repatriation Order and ordered that the sanctions in the December Contempt Order be imposed upon him. (R. pp. 21 - Feb. Cont. Order p. 2). Defendant argues on appeal that the Master erred in that February Contempt Order by holding him in contempt "for failing to perform an action he could not perform" – repatriating the Funds he claims are held and controlled by the Trust. (Ap. Br. pp. 17-19). That argument can only fail.

First, the February Contempt Order did not hold him in contempt but merely affirmed he remained in contempt and directed the previously specified sanctions within the December Contempt Order be imposed. Second, his position is reliant upon successfully establishing he does not have the power or ability to repatriate the Funds the Master ordered he repatriate. The

[4] That holding was premised upon the Master again finding that the evidence, including what was previously cited in the Repatriation Order, along with two Independent Investigatory Reports by the Receiver and an affidavit of Jay Adkisson, an attorney and expert in offshore trusts both submitted after entry of that earlier order. (R. pp. 16-17 - Dec. Cont. Or. pp. 2-3).

unappealed December Contempt Order, however, contains clear findings that the Defendant could repatriate the Funds as ordered, had willfully refused to do so in contempt of the court's Repatriation Order and should be punished for his noncompliance. (R. pp. 15-19 - Dec. Cont. Order). The Defendant is bound by those unappealed rulings, thus rendering moot his argument that the Master erred in the February Contempt Order by holding him in contempt for failing to perform an act he lacked the power to perform.

3. Unappealed Holdings Render Defendant's Challenge to the Receiver Order Moot

Defendant's argument that the Master erred in appointing a Receiver likewise cannot succeed considering the binding rulings which he failed to appeal; namely that he has the power and ability to repatriate the Funds at issue. He argues the Plaintiff did not meet the statutory requirement of showing that the debtor is withholding assets that can be used to satisfy the judgment necessary for the appointment of a Receiver. (Ap. Br. pp. 19-20). That determination, however, was made in the December Contempt Order with the court finding that "the evidence presented establishes Defendant has sufficient access and control to the funds ordered to be repatriated, but has willfully and in clear violation and disregard refused to comply with" the Repatriation Order. (R. pp. 16-17 - Dec. Contempt Order pp. 2-3). That being the law of the case makes Defendant's arguments for reversal of the Receiver Order moot and requires dismissal of his appeal.

In sum, Defendant's arguments on appeal that the lower court erred in denying his Motion for Reconsideration, holding him in contempt in the February Contempt Order, and appointing a Receiver are rendered moot because they are predicated upon a position that is contradicted by the findings within multiple orders he failed to appeal. Given the circumstances it is impossible for this Court to grant effectual relief because any judgment it may render would have no practical

legal effect upon an existing controversy. Therefore, dismissal of this consolidated appeal is warranted and necessary.

B. Failure to Comply with Mandated Deadlines Under SCACR Warrants Dismissal

The Defendant has failed to comply with a multitude of requirements imposed upon him as the Appellant under the applicable Rules, thus requiring and justifying dismissal of this consolidated appeal.

Rule 260 reads in pertinent part that "[w]henever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk *shall* issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." SCACR 260(a) (*emphasis added*). This Court has recognized that a party losses their right to appeal through a variety of actions, including "failure to serve and file a record on appeal and final brief under Rules 210 and 211, SCACR. *State v. Serrette*, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007). Here, the Defendant failed to comply with multiple deadlines, including filing his final brief.

Plaintiff, as the Respondent, filed its initial brief on July 6, 2020. Defendant was therefore required to serve and file the record on appeal on or before August 7, 2020. *See* SCACR 210. After that deadline passed, the Plaintiff twice inquired as to when the record would be served. On August 18, 2020, after the second inquiry and more than ten days following passage of the deadline, Defendant served the record on appeal. That made the deadline for filing file briefs September 8, 2020. *See* SCACR 211. Plaintiff filed its final brief on September 4, 2020. The Defendant did not file a final brief, which as of the date of this filing is over three weeks past due. *Id.*

Defendant's dereliction of his duties as the Appellant under the Rules is not a harmless error or result of simple oversight. It is part and parcel of his deliberate efforts to avoid paying his

debt to the Plaintiff by attempting to run out the clock on the underlying judgment. Defendant's failure to adhere to the filing deadlines mandating what an Appellant is required to do and when in order to pursue his appeal should and must result in dismissal. To rule otherwise would reward Defendant's intentional non-compliance and aid his global strategy of levering the court system to run out the clock.

C. Alternative Relief Sought: Expedited Treatment of this Appeal

Should the Court not dismiss the consolidated appeal, the Plaintiff respectfully asks that it be given expedited treatment given the circumstances to avoid Defendant attempting to evade payment of his debt by claiming the judgment is stale.

The underlying judgment which Plaintiff has sought to collect through supplemental proceedings was entered on August 2, 2011. Section 15-39-30 provides:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this is whether any return may or may not have been made during such period on such executions.

S.C. Code Ann. § 15-39-30. Recently the South Carolina Supreme Court reestablished the historical bright line rule that a judgment becomes stale and a judgment lien is extinguished after ten years. *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E.2d 173 (2018).[5] The ten-year deadline is less than a year away. If this appeal continues in the normal course without being afforded expedited treatment it is certain that any decision will be entered well beyond August 2, 2021. Thus, absent dismissal, the only way to ensure that the Defendant does not potentially succeed in utilizing the judicial system as a stall tactic to evade paying on the large judgment against him is for this appeal to be considered and decided in an expedited manner. Doing otherwise not only

[5] Plaintiff is not conceding that the judgment will be stale on or after August 2, 2021 and expressly reserves its rights and abilities to argue otherwise should it become necessary.

rewards the Defendant's efforts to avoid responsibility for his debt but would also create a perverse incentive for judgment debtors with the means to exploit the judicial process in order to run out the clock on collection. It would send a clear message to wealthy judgment debtors that they can avoid paying their debts by utilizing the courts to stymy the judicial process it is meant to accomplish—which in this context is collection of a large debt. That would be particularly true when the judgment debt is as large as the one in this case. It makes economical sense for the Defendant to invest in litigation to impede the collection process to the extent it may render it legally impossible. Such a ruling would upend credit markets by gravely impairing lender's ability to hold debtors responsible for repaying their debts.

Therefore, should the Court not dismiss this consolidated appeal at all or in its entirety, the Plaintiff respectfully requests it be afforded expedited treatment to ensure that a decision is rendered well before August 2, 2021.[6]

IV. Conclusion

The Master considered the objective evidence and circumstances surrounding the establishment of the Bayview Trust and correctly determined that the Defendant has the power and authority to repatriate the Trust Funds in order to pay his debt to the Plaintiff. The Master ordered Plaintiff to repatriate those funds in the Repatriation Order and held him in contempt for not doing so by entry of the December Contempt Order. Both of those Orders found that Defendant had the power to repatriate the Funds he claimed to lack and the December Contempt Order determined his failure to do so was a willful violation of the Master's directive. Defendant's failure to appeal either of those orders makes the findings and conclusions within them the law of the case

[6] To be clear, the Plaintiff remains concerned that even if the Court of Appeals enters an order before August 2, 2021, the Defendant will almost certainly applied for a writ of certiorari with the Supreme Court.

and binding upon the Defendant. As a consequence, his arguments on appeal are rendered moot and requires his appeal be dismissed.

Alternatively, should the Court not dismiss this consolidated appeal at all or in its entirety, it should be afforded expedited treatment in order to avoid rewarding Defendant's dilatory tactics and exploitation of the judicial process for avoidance of paying his large judgment debt rather than for its intended purpose of resolving legal controversies.

(signature page to follow)

Respectfully Submitted,

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October 9, 2020
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-In-Equity

The Honorable Charles B. Simmons, Jr., Master in Equity

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SC Court of Appeals

Appellate Case No. 2020-000490

Independence National Bank.....Respondent,

v.

Buncombe Professional Park, LLC and
David Decarlis s/a David D. Decarlis,
Defendants,

Of whom, David Decarlis is the .....Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent's Motion to Dismiss or in the Alternative for Expedited Treatment on the above-named Appellant via electronic means per the Court's March 20, 2020 Order, on October 9, 2020, to counsel of record as follows.

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October 9, 2020
Greenville, South Carolina

98412

SMITH HUDSON
LAW

October 12, 2020

VIA USPS
Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Independence National Bank v. Buncombe Professional Park, LLC and David Decarlis s/a David D. Decarlis, Defendants
Appellate Case No. 2019-002047
SHL No. 2707.0002

Dear Madam Clerk:

Enclosed please find Smith Hudson Law Check No. 2217 made payable to SC Court of Appeals in the amount of $50.00 to satisfy the motion filing fee. A copy of the Motion to Dismiss or for Expedited Treatment, which was submitted on Friday, October 9, 2020, is enclosed for your ease of reference.

If you have any question or issues, please let me know.

With highest regards, I am

Sincerely,

SMITH HUDSON LAW, LLC

Joseph O. Smith

JOS/ads

Enclosures (*as stated*)

CC: Shawn M. French, Esq.
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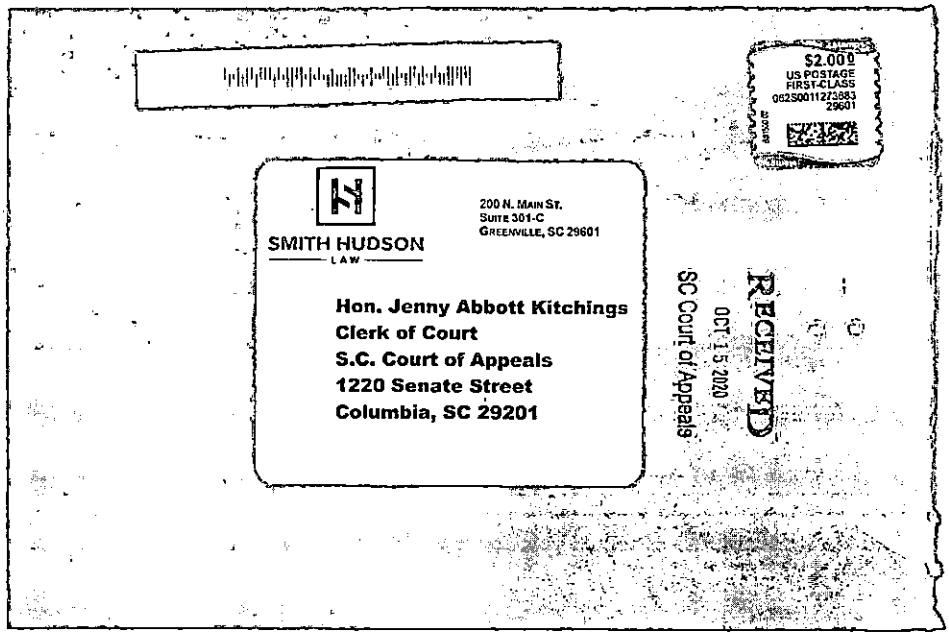

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