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 & 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); Jeffrey Reed; Murrell G. Smith, ... Respondents.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Appellant, Phillip DeClemente, respectfully petitions this Court for rehearing pursuant to Rule 221, SCACR. In light of the important issues in this case and in order to maintain uniformity of its decisions, Appellant suggests that the Court rehear this matter *en banc* pursuant to Rule 219, SCACR.

Background and Summary of Grounds for Rehearing

Appellate Case No. 2018-001413 consolidates two separate appeals from dispositive decisions issued by Judge Nicholson in Case No. 2015-CP-10-3325 and Case No. 2017-CP-10-5055. This Court's September 9, 2020 Opinion (No. 2020-UP-263) overlooks material facts and binding precedent. This combined appeal has *nothing* to do with Respondents' 2011 lawsuit against Declemente and other Defendants. To the contrary, this appeal pertains to Respondents' obligations under two contracts executed by Declemente and Respondents in a 2009 transaction wholly unrelated to the 2008 transaction which is the subject of Respondents' 2011 lawsuit. Unless corrected, this Court's ruling will allow Respondents to use their 2011 lawsuit to extinguish *all* their contractual obligations to Appellant by erroneously voiding the parties 2009 contracts.

Case No. 2015-CP-10-3325 (Breach of Contract)

In Case No. 2015-CP-10-3325 ("2015 action"), Appellant brought suit against Respondents' for breach of contract based on their failure to make monthly installment payments in the amount of $7,341.84, as agreed in the parties' promissory note. (R. p. 107). The 2015 action was ended by Judge Nicholson's summary judgment order, wherein the circuit court erroneously applied the discovery rule in holding that the statute of limitations began to accrue when Respondents allegedly showed *intention* to breach the promissory note by serving

Declemente with their unrelated 2011 lawsuit. This Court's decision affirming the summary judgment order overlooks foundational contract law.

This Court's Opinion overlooks Appellant's argument that the promissory note's mutually agreed upon terms dictate when the statute of limitations began to run against Declemente's 2015 breach of contract lawsuit. The promissory note's maturity date is the date Respondents' full performance was due. Thus, the discovery rule could only become relevant after the maturity date passed and Respondents had failed to fully comply with their financial obligation. Judge Dennis agreed, and held that the statute of limitations commenced at the promissory note's maturity date. His holding is in accord with longstanding fundamental principles of contract law. On summary judgment, Judge Nicholson was required to apply precedent and interpret the same promissory note Judge Dennis interpreted. There was no additional evidence presented to Judge Nicholson which was not presented to Judge Dennis. This Court's Opinion overlooks Judge Nicholson's failure to apply binding maturity date contract law to determination of the statute of limitations.

This Court's erroneous Opinion also overlooks the fact that even under Judge Nicholson's incorrect application of the discovery rule, Declemente's 2015 breach of contract action is timely. Although Appellant has always addressed Judge Nicholson's fatally flawed statute of limitations analysis *arguendo,* this Court's Opinion dismisses the evidence requiring reversal of summary judgement as unpreserved for appellate review. For the reasons discussed *infra*, and in Appellant's Motion to Supplement the Record on Appeal, this Court's Opinion is also rooted in its misapprehension of the circuit court record.

Additionally, this Court's Opinion concludes, as an additional sustaining ground, that res judicata bars Declemente's 2015 action as a compulsory counterclaim. This mistaken conclusion

was reached only because this Court overlooked material facts and governing precedent. There is *no* logical relationship between Respondents' 2011 lawsuit and Appellant's 2015 breach of contract action.

Case No. 2017-CP-10-5055 (Declaratory Judgment Action)

In Case No. 2017-CP-10-5055 ("2017 action"), Appellant Declemente seeks declaratory judgment to determine his legal rights under the damages satisfaction provision of the parties' 2009 Full and Final Release. The 2017 action seeks to settle the dispute between the parties as to which is required to satisfy the damages judgment against Declemente which is the result of the default judgment Judge Nicholson entered against him when Declemente failed to timely answer Respondents' unrelated 2011 lawsuit and his Answer and Counterclaims were struck. Judge Nicholson dismissed the declaratory judgment action. The dismissal order holds that the 2017 declaratory judgment action is barred by res judicata as an un-asserted compulsory counterclaim to Respondents' 2011 lawsuit. This Court erroneously affirmed, finding that a "logical relationship" exists between Declemente's 2017 declaratory judgment action and Respondents' unrelated 2011 lawsuit.

Aside from Respondents' admission that the subject of the declaratory judgment action (the parties' 2009 Full and Final Release) has nothing to do with Respondents' 2011 lawsuit, the evidence proves that the two actions arise from completely different transactions. Furthermore, the 2017 declaratory judgment action was not procedurally available to Declemente when he answered and counterclaimed in Respondents' 2011 lawsuit. The declaratory judgment action's justiciable controversy - whether Respondents are required to satisfy the default damages judgment against Appellant – did not exist at the time Declemente was required to file his counterclaims in Respondents' 2011 lawsuit, and therefore could not have been pled as a

counterclaim against Respondents. Even if Declemente's counterclaims in Respondents' 2011 lawsuit had not eventually been struck when he was later held in default, he could not, procedurally, have counterclaimed with a declaratory judgement action seeking determination of the Full and Final Release's impact upon a speculative, hypothetical future damages award against him. A justiciable controversy concerning the Release's damages satisfaction provision did not arise until Judge Nicholson's default judgment was entered, years after Declemente's counterclaims in Respondents' 2011 case were due. Though not relevant to this appeal, the erroneous default judgment is currently on appeal.

For these reasons, rehearing is warranted and necessary.[1] As detailed, *infra*, this Court's Opinion both overlooks and misapprehends material facts, governing law, and Appellant's arguments, consideration of which are necessary for this Court to reach a decision which does not violate longstanding fundamental contract law and procedural law precedent. Therefore, Appellant respectfully requests rehearing.

ARGUMENT: CASE No. 2015-CP-10-3325

I. This Court Misapprehended Appellant's Argument That Judge Nicholson "Overruled" Judge Dennis's Order Holding DeClemente's 2015 Breach Of Contract Action Complies With The Statute of Limitations.

This Court's Opinion states, "We find no merit to Appellant's argument that Judge Nicholson erred in overruling Judge Dennis's ruling on the statute of limitations. Judge Dennis's

[1] The purpose of a petition for rehearing "is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 238 (1933). Here, the existing record and governing law do not support this Court's decision, and petition for rehearing is appropriate. *See, e.g., Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492, 763 S.E.2d 19, 21 n.4 (2014) ("If, based on the current record, we have misapprehended the scope of PCS's indemnification claim against Ross, we invite a rehearing petition ..."); *See, Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument."); Rule 221(a), SCACR (petition shall state the points "supposed to have been overlooked or misapprehended"). Appellant's petition meets these standards.

order denying Respondents' motion to dismiss did not establish the law of the case." This Court misapprehended DeClemente's "overrule" argument.

Respondents' failed motion to dismiss DeClemente's 2015 breach of contract action and subsequent successful summary judgment motion were both based upon their statute of limitations argument. In opposition to Respondents' summary judgment motion, Appellant argues that Judge Dennis correctly ruled, as a matter of law, that the promissory note's maturity date commenced the three-year limitations period; not the date Respondents missed a payment, nor the date they served Declemente with their unrelated 2011 lawsuit. At the summary judgment hearing, Judge Nicholson considered this argument, and clarified it for opposing counsel as follows:

> Mr. Smith, what the argument I believe he is making, irrespective of what Judge Dennis did, is that the maturity date is the date when the statute should have started running, not the missed payment.

(R. p. 641, Lines 2-5).

Yet in his order granting Respondents' summary judgment motion, Judge Nicholson inexplicably and erroneously applied the discovery rule to the time period prior to the promissory note's maturity date. Pursuant to the discovery rule, a breach of contract action accrues "not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). Judge Nicholson ruled that service upon DeClemente of Respondents' 2011 lawsuit concerning a separate, prior transaction between the parties, unrelated to the promissory note, should have alerted DeClemente that Respondents intended to breach their promissory note and therefore triggered the statute of limitations pursuant to the discovery rule. (R. pp. 9-10).

The discovery rule favors the aggrieved party, not the at fault party. *See*, *Gabelli v. S.E.C.*, 568 U.S. 442, 449 (2013) ("Under [the discovery] rule, accrual is delayed until the plaintiff discovered his cause of action.") (quoting *Merck & Co. v. Reynolds*, 130 S.Ct. 1784, 1793 (2010)). Precedent holds that in order for the discovery rule to apply, there must be an actual breach of contract. *E.g.*, *CostalStates Bank v. Hanover Homes of South Carolina, LLC*, 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct. App. 2014). In the case at bar, the promissory note provides that there is no breach until either: 1) ATMES misses one or more payments and Declemente chooses to treat the missed payment(s) as a breach; or 2) ATMES fails to fully satisfy the note by March 1, 2013. Judge Nicholson's order is not based upon either of these occurrences, but rather is based upon Respondents' alleged intent to breach, allegedly expressed by service upon Declemente of Respondents' unrelated lawsuit on December 1, 2011. Aside from the instant case, Appellant is unaware of any court ever having held that a party's intent to breach a maturity date contract invokes the discovery rule and begins statute of limitations accrual. Such erroneous interpretation of black letter contract law would alter the terms of all maturity date contracts, to the detriment of aggrieved parties, and in violation of citizens' rights to freely construct and enforce contractual obligations.

Appellant's statement that "Judge Nicholson overruled Judge Dennis's ruling on the statute of limitations," though perhaps poorly worded, is based upon Judge Dennis's correct application of maturity date contract law and Judge Nicholson's subsequent incorrect application of the discovery rule. The parties' maturity date promissory note which Judge Dennis analyzed and ruled upon is the exact same note Judge Nicholson analyzed and ruled upon. Judge Nicholson considered no additional evidence, because none existed, before implicitly and erroneously ruling that the contract's maturity date is irrelevant to the statute of limitations for

Declemente's breach of contract lawsuit. One of the most basic principles of contract law is that "[n]on-performance is not a breach unless performance is due." Restatement (Second) of Contracts § 235(b) (1981) (further stating, "[w]hen performance is due, anything short of full performance is a breach."). Judge Dennis correctly held that the promissory note's March 1, 2013 maturity date is the date upon which Respondents' full performance was due, and is the date upon which the statute of limitations began to accrue. The statute of limitations for Declemente's lawsuit therefore expired March 2, 2016.

Precedent requires Judge Nicholson's statute of limitations ruling to have been controlled by fundamental, binding contract law precedent and by the unambiguous mutually agreed upon provisions of the parties' promissory note. *See*, *First Citizens Bank & Trust Co. v. Conway Nat. Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984) ("Where a motion for summary judgment presents a question as to the construction of a written contract, the question is one of law if the language employed by the agreement is plain and unambiguous."); and *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539, 542 (Ct. App. 2008) ("In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument." quoting *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 33 S.E.2d 501, 509 (1945)).

Section 3(A) of the parties' promissory note states:

> *If on March 1st, 2013, ATMES LLC still owes amounts under this Promissory Note, ATMES, LLC will pay those amounts in full on that date, which is called the "Maturity Date."*

(R. p. 107) The maturity date is the date upon which Respondents' full performance became due, and the date upon which the three year limitations period for enforcement of Declemente's

contractual rights began. The fact that the limitations period began accruing on March 1, 2013 – and not on December 1, 2011 when Respondents' allegedly expressed intent to breach the promissory note by serving an unrelated lawsuit – is further proven by Section 6(C) of the promissory note, entitled "No Waiver by Note Holder," which states:

> *Even if, at a time when ATMES, LLC is in default, Note Holder does not require ATMES, LLC to pay immediately in full as described above, Note Holder will still have the right to do so if ATMES, LLC is in default at a later time.*

(R. p. 108) This language further ensures DeClemente's right, prior to the note's maturity date, to sue ATMES for missed payments and the note's full balance; it does not require him to file suit upon missed payment. The promissory note permits Declemente to sue ATMES for breach of the promissory note at any time prior to March 2, 2016, the date the statute of limitations expired. Declemente filed suit for ATMES' breach of the promissory note on June 11, 2015, more than 8 ½ months prior to the time the statute of limitations expired and he was legally required to do so.

This Court misapprehended Appellant's argument, apparently believing that Appellant argued that one circuit court judge hearing a summary judgment motion does not have authority to grant the motion after a different judge denied a motion to dismiss based upon the same grounds. That is not the law and that is not what Appellant has argued. Appellant's argument is that Judge Dennis's ruling properly applies maturity date contract law to the terms of the parties' promissory note. The maturity date commences the statute of limitations for DeClemente's 2015 action because it is the date when Respondents' full performance was due. Though summary judgment procedural law allowed Judge Nicholson to consider evidence outside the pleadings, Rule 56(c) SCRCP, there is *no* evidence altering the promissory note's maturity date nor any of its other provisions. Judge Nicholson erroneously granted summary judgment based upon his

mistaken belief that the statute of limitations was controlled by the date Declemente was served with a lawsuit completely unrelated to the promissory note, because the court found that service of that lawsuit was Respondents' expression of intent to breach their promissory note.

Absent additional evidence, Judge Nicholson was bound by Judge Dennis's ruling and the language of the promissory note when ruling upon Respondents' summary judgment motion. Judge Nicholson failed, without any additional evidence, to apply controlling contract law to the parties' promissory note, and in this sense, he "overruled" Judge Dennis. Rehearing is necessary so that this Court may consider and rule upon Appellant's argument, which was initially misapprehended.

II. This Court's Opinion Overlooks Appellant's Argument That The Limitations Period For Declemente's 2015 Breach of Contract Lawsuit Began To Accrue Upon The Promissory Note's Maturity Date.

This Court's Opinion overlooks DeClemente's argument that "the 3-year breach of contract statute of limitations began to accrue upon the promissory note's maturity date." (Appellant's Brief, pp. 7 – 9). This Court overlooked the terms of the parties' promissory note and overlooked its duty to apply controlling law to an analysis of the promissory note.

In denying Respondents' motion for dismissal based upon the statute of limitations, Judge Dennis held that the statute of limitations began to run at the promissory note's maturity date. (R. p. 637). In contrast, Judge Nicholson's order granting summary judgment violates the most basic principles of contract law and ignores the terms of the parties' promissory note. The statute of limitations period for an installment contract begins to accrue on the date upon which full payment becomes due. *See*, 54 C.J.S. Limitations § 204 (September 2020 Update) ("The statute of limitations begins to run on a promise to pay money on a certain date, from the date it becomes due, and where a promissory note is payable at a definite time in the future the statute

begins to run at the maturity of the instrument."); *Town of Cheraw v. Turnage*, 184 S.C. 76, 191 S.E.2d 831, 837 (1937) (ruling that if the creditor does not exercise his right to accelerate the whole debt owed on an installment contract, the limitations period "does not then begin to run until the last installment matures."). Because the discovery rule can only be triggered by a breach of contract, the discovery rule is *irrelevant* until the maturity date passes and Respondents have actually breached.

The United States Supreme Court has long held that "repudiation ripens into a breach prior to the time for performance only if the promisee elects to treat it as such." *Franconia Associates v. United States*, 536 U.S. 129, 143 (2002) (citing *Roehm v. Horst*, 178 U.S. 1 (1900)). Over a century ago, in *Roehm v. Horst*, the United States Supreme Court held that repudiation "give[s] the promisee the right of electing to ... wait till the time for [the promisor's] performance has arrived, or act upon [the renunciation] and treat it as a final assertion by the promisor that he is no longer bound by the contract." 178 U.S. 1, 13 (1900). The Supreme Court wrote, "it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, ... which may be advantageous to the innocent party." *Roehm*, 178 U.S. at 10.

The *Roehm* holding is echoed in *Franconia Associates v. United States*, 536 U.S. 129 (2002). In *Franconia*, the government attempted to defeat public breach of contract claims as untimely under the applicable limitations statute by arguing that the government's repudiations of contracts were actually breaches. The Supreme Court rejected this argument, stating, "[t]he Government's construction of the [limitations statute] would thus convert the repudiation doctrine from a shield for the promisee into a sword by which the Government could invoke its

own wrongdoing to defeat otherwise timely suits." *Franconia Associates*, 536 U.S. at 146. The Court held:

> [T]he time for accrual depends on whether the injured party chooses to treat the repudiation as a present breach. If that party elects to place the repudiator in breach before the performance date, the accrual date of the cause of action is accelerated from the time of performance to the time of such election. But if the injured party instead opts to await performance, the cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation.

Id., at 144 (internal citations omitted) (emphasis added).

On this issue, South Carolina is, and always has been, in accord with the United States Supreme Court and the appellate courts of other states. This is fundamental, universal black letter contract law. The circuit court and this Court have offered no explanation for their decisions not to apply controlling authority.

In the case at bar, the promissory note states that Declemente preserves the right to bring suit for non-payment at any time in which Respondents are in default, and that he never waives this right by failing to immediately do so. *See*, (R. p. 108) (Section 6(C), entitled "No Waiver by Noteholder").[2] Section 3(A) of the promissory note provides that full performance becomes due on March 1, 2013 – the maturity date. (R. p. 107). To quote fabled Professor Arthur Corbin, "[t]he plaintiff should not be penalized for leaving to the defendant an opportunity to retract its wrongful repudiation; and he would be so penalized if the statutory period of limitations is held to run against him immediately." Corbin, Contracts § 989, at p. 967. In this case, DeClemente

[2] The promissory note contains a discretionary acceleration clause. *See*, (R. p. 108) (Section 6(B) stating, " Note Holder may require ATMES, LLC to pay immediately the full amount of Principal which has not been paid and all the interest that ATMES, LLC owes on that amount" if Respondents are in default). However, the mere existence of an acceleration clause in a contract does not convert a repudiation into a breach in favor of the at-fault party, especially when the creditor party elects not to treat it as so. *See*, *Town of Cheraw*, 184 S.C. 76, 191 S.E. at 837-38 (Stating, "it would be grossly oppressive and out of key with current judicial and economic thought to make the acceleration provision mandatory and self-executing.").

has been wrongly penalized for his adherence to the plain terms of the parties' binding promissory note.

III. Respondent Reed's December 14, 2011 Email, Expressing Respondents' Intent to Satisfy Their Promissory Note, Is Preserved For Appellate Review.

This Court's Opinion states, "[w]e find unpreserved Appellant's argument that an email from Jeff Reed demonstrated Respondents did not have a clear intention to breach the promissory note on December 1, 2011 . . . This argument was not raised to Judge Nicholson, and, thus, he did not rule on it." This conclusion is incorrect and disproven by the circuit court record. Rehearing is necessary to allow consideration of Appellant's overlooked argument.

While the Record on Appeal contains several other emails from Respondent Reed to Declemente which establish that Respondents' have never intended to breach the promissory note, (R. pp. 467-68), Appellant's brief also cites an email sent from Reed to DeClemente on December 14, 2011. (R. p. 650; Appellant's Brief, pp. 9-10). This email was filed and presented to Judge Nicholson prior to the December 11, 2017 summary judgment hearing addressing Respondents' argument that Declemente's 2015 breach of contract lawsuit violates the statute of limitations. Following Judge Dennis's dismissal of causes of action one through five of Declemente's 2015 lawsuit, Appellant filed a SCRCP 59 Motion to Amend Judgment and Pleadings, with attached exhibits. (R. pp. 458-70). Appellant's second argument in the Motion to Amend states, in part:

> The statute of limitations did not begin to run against Plaintiff in September of 2011, as the Court incorrectly ruled, because subsequent to that time Defendants made partial payment to Plaintiff *and acknowledged their debt in writing.*

(R. p. 460) (emphasis added). In proving this argument, Declemente cites the December 14, 2011 email he received from Respondent Reed, subsequent to the December 1, 2011 service upon Declemente of Respondents' unrelated 2011 lawsuit. (R. pp. 466-68). The emails in the Record

confirm Respondents' intent to satisfy the promissory note. The December 14 email was not submitted as an exhibit to Declemente's motion to Amend Judgment. Judge Dennis granted Appellant's Motion to Amend Judgment and restored the first cause of action (Respondents' breach of the promissory note) because the court correctly held that the promissory note's maturity date marked the beginning of the limitations period. (R. pp. 49-51). Appellant filed an Amended Complaint on March 22, 2016, restating his argument in Paragraph 20. (R. p. 474) (Stating, Respondents "have, on multiple occasions, acknowledged their debt in writing.").

This argument was consistently made throughout all stages of litigation in the circuit court and preserved on the record for Judge Nicholson's consideration.

On September 20, 2017, Respondents filed a motion for summary judgment arguing, for the third time, that Declemente's breach of contract lawsuit was filed outside the statute of limitations. (R. pp. 495-96). A hearing on Respondents' motion was scheduled for December 11, 2017. On December 8, 2017, Declemente submitted twelve documents to the court supporting his argument that Respondents, on multiple occasions, in writing, acknowledged and pledged their intent to satisfy the promissory note. (Exhibit A).[3] These documents were filed with the circuit court on December 11, 2017. *Id.* Appellant also emailed these documents to both Judge Nicholson and Respondents' counsel on December 8, 2017. (Exhibit B); *id.* Prior to the December 11, 2017 summary judgment hearing, Judge Nicholson's law clerk sent counsel email confirmation that the court did receive the filed exhibits. *Id.* At the beginning of the summary judgment hearing, Appellant's counsel again brought these documents to Judge Nicholson's

[3] Exhibit A contains the filing's time-stamped cover page and index of the filed documents. Exhibit B contains the email correspondence in which Appellant's counsel provided Judge Nicholson and Respondents' counsel with the documents prior to the December 11, 2017 hearing. Accompanying this Petition is Appellant's Motion to Supplement the Record on Appeal with these filed exhibits.

attention, confirming that the court received the exhibits for review in consideration of Respondents' summary judgment motion. (R. p. 636, Lines 19-25).[4]

The December 14, 2011 email is one of the twelve documents filed prior to the summary judgment hearing and submitted to the court for Judge Nicholson's consideration. Because the cover page and index of Appellant's filing were inadvertently not included in the Record on Appeal, (Exhibit A), it is understandable that this Court mistakenly concluded that the subject email is not in the circuit court record. Aside from a now irrelevant email sent from Declemente to Respondent Reed on August 18, 2011, all of the documents contained in Appellant's December 11, 2017 filing have been provided to this Court in the Record on Appeal. The following illustrates the documents as they are organized in the index filed with the circuit court December 11, 2017, (Exhibit A), including the location of each in the Record on Appeal:

1. Amended Complaint (R. pp. 472-76);
2. Answer to Amended Complaint (R. pp. 491-94);
3. June 8, 2012 Correspondence with Proof of Delivery (R. pp. 152-53);
4. June 12, 2012 Correspondence (R. pp. 154-55);
5. Plaintiff's Affidavit (Supplemental Record on Appeal pp. 1-5);
6. June 30, 2009 Promissory Note (R. pp. 107-9);
7. Personal Guarantees (R. pp. 110-11);
8. Bill of Sale (R. pp. 112-16);
9. Confidentially and Non-Compete Agreement (R. pp. 117-21);
10. Stock Purchase and Assignment Agreement (R. pp. 379-84);
11. Full and Final Release (R. pp. 122-23); and,
12. Emails (R. pp. 648, 650).[5]

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[4] After confirming that Judge Nicholson had received the emails and that they were on the record, Appellant's counsel proceeded to discuss Judge Dennis's Order denying Respondents' motion to dismiss Declemente's breach of contract action, which is based upon Respondents' breach of the promissory note. Judge Dennis correctly held that, as a matter of law, the statute of limitations applicable to the cause of action is controlled by the note's maturity date. Judge Nicholson initially appeared unaware of this issue, as Respondents' counsel had not yet drafted a formal Order memorializing Judge Dennis's decision. (R. p. 640, Lines 9-21).

[5] The only email contained in item 12 that is not included the Record on Appeal is an email sent from Declemente to Respondent Reed on August 18, 2011 wherein Declemente asks Reed about a truck which was the subject of a cause of action which Judge Dennis dismissed. As this email is irrelevant to the instant matter, it was not included in the Record on Appeal.

See, (Exhibit B). [6] Because most of these documents were raised at different times throughout litigation, and to avoid duplicity, the summary judgment hearing documents were not presented in the Record on Appeal in the same order in which they were organized in Declemente's December 11, 2017 circuit court filing. The filing's time-stamped cover page and index page prove that these documents, including the December 14, 2011 email which this Court mistakenly believed was not preserved for review, were in fact submitted to Judge Nicholson as evidence in opposition to Respondents' summary judgment motion. (Exhibit A).

This Court's Opinion cites *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) as supporting its conclusion that Appellant's argument and the subject email was not preserved. In that case, the Supreme Court stated that Rule 59(e) motions are "not necessary or desirable in every case." *Elam*, 361 S.C. at 25, 602 S.E.2d at 781 n. 5. The Elam Court states, "[a]n aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal." *Id.*

Appellant's December 11, 2017 filing consists of documentary evidence supporting his arguments in opposition to Respondents' statute of limitations-based summary judgment motion. One of these arguments is that the statute of limitations did not begin to accrue when DeClemente was served with Respondents unrelated 2011 lawsuit because, subsequent to service on December 1, 2011, Respondents acknowledged their debt in writing and confirmed their intent to satisfy the promissory note. Reed's December 14, 2011 email to Declemente is one of

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[6] To avoid duplicity in the Record on Appeal, Appellant has moved for supplementation of just the filing's time-stamped cover page and the filing's index page. Although all but a single irrelevant email is included in the Record on Appeal, the full filing is available on the public index for this Court's review, if needed. *See*, Letter From Attorney Marshall, in Re: Documents for Hearing, *Phillip DeClemente v. Assistive Technology Medical Equipment Services, LLC*, No.2015CP1003325 (S.C.Com.Pl. Dec. 11, 2017), https://imgweb.charlestoncounty.org/CMSOBView/Service1.asmx/StreamDocAsPDF?viewertype=cms&ctagency=10002&casenumber=2015CP1003325&docseq=P0A25.

Respondents' multiple written confirmations of intent too satisfy the promissory note. This argument is on the circuit court record and contained in Appellant's pleadings. (R. pp. 460, 474). In support of this argument, Declemente submitted, *inter alia*, Reed's December 14, 2011 email (R. p. 650) and a June 12, 2012 letter from Respondent Murrell Smith, (R. p. 154), both confirming Respondents' intent to satisfy the promissory note. Respondents countered this evidence by arguing that they showed intent to breach the promissory note by missing monthly payments and serving DeClemente with their 2011 lawsuit concerning an unrelated transaction the parties conducted in a prior year.

Although Judge Nicholson's order granting summary judgment does not recite all of the evidence and every argument presented by the parties, this is not required to preserve these issues for appellate review. As required, Judge Nicholson considered both Appellant's and Respondents' evidence before making his ruling on Respondents' summary judgment motion and ruled on the full record before him. *See*, Rule 56(c), SCRCP; *see also*, *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 527, 735 S.E.2d 428, 433 (2014) (Stating, "a decision on a motion for summary judgment is based on depositions, interrogatories, and other evidentiary materials provided by the parties."). Judge Nicholson considered both parties' arguments and submissions and his order expressly adopts Respondents' statute of limitations argument. Judge Nicholson's consideration of Appellant's statute of limitations argument, which was made on the record, makes a Rule 59(e) motion unnecessary and undesirable in this case. *See generally*, *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009). Any doubts as to preservation should be resolved in favor of Appellant. *See*, *Garrison v. Target Corporation*, 429 S.C. 324, 358, 838 S.E.2d 18, 36 n. 20 (Ct. App. 2020) (citing *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398

S.C. 323, 333, 730 S.E.2d 282, 287 (2012), Toal, C.J. (concurring in result in part and dissenting in part)).

IV. Even Under Judge Nicholson's Incorrect Application Of The Discovery Rule, To The Statute Of Limitations Issue, This Court Overlooked Material Facts Proving That Respondents Have Never Intended To Breach Their Promissory Note And That The 2015 Action Was Filed Within The Limitations Period.

This Court overlooked material facts contained in the Record on Appeal proving that Declemente's 2015 lawsuit for Respondents' breach of the promissory note was filed timely, even when subjected to Judge Nicholson's improper application of the discovery.

South Carolina's objective contract interpretation rule provides that if the language of a contract "is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767, 769 (1976). The court's legally irrelevant discovery rule analysis, discussed *infra*, is offered only to establish that DeClemente's 2015 breach of contract action is not barred by the statute of limitations, even when the lawsuit is subjected to Judge Nicholson's incorrect application of the discovery rule rather than application of the maturity date rule, as precedent mandates. The statute of limitations in this case is controlled by the promissory note's maturity date. The correct analysis of statute of limitations law under the facts of this case is discussed in Sections I and II of this Petition, and establishes the limitations expiration date as March 2, 2016 – three years after promissory note's maturity date.

Judge Nicholson's summary judgment order states that the discovery rule was triggered on December 1, 2011 "when he received the last payment on [Respondents'] behalf from a private investigator who served him with the 2011 lawsuit." (R. p. 9). Respondents' process server served DeClemente with the lawsuit *and* simultaneously delivered Respondents' partial payment on the promissory note. (R. p. 623, Lines 12-20). There is no evidence that the process

server told DeClemente that the payment was the last he would receive, nor is there any evidence that the process server had authority to do so. To the contrary, Respondents' act of paying DeClemente money toward the promissory note's balance was Respondents' acknowledgement of their debt, and further evidence of their ongoing efforts to satisfy the debt. If Respondents intended the check given Declemente by the process server to be their final payment on the promissory note, they could have written "final payment" on the check's memo line. The fact that the so called "final payment" check is not included in the Record on Appeal is evidence that the final check contains no such notation.

Respondents' emails following December 1, 2011 further disprove the Court's finding that Respondents' service upon Declemente of their unrelated 2011 lawsuit, which has no facts in common with Declemente's 2015 breach of contract suit, [7] gave Declemente notice that Respondents intended to breach their obligations under the promissory note and commenced the three year statute of limitations. *See*, (R. pp. 466-68). Specifically, Respondent Reed's December 14, 2011 email to Declemente states, "[i]t is not that we are not paying you on purpose" and "[w]e are working to borrow and get you on your way." (R. p. 650). The email proves that after Respondents' December 1, 2011 service upon Declemente, Respondents continued to assure Declemente that they intended to follow through with their monthly payments and full debt satisfaction as required by the promissory note.

Respondent Murrell Smith's July 15, 2012 letter to Declemente's counsel also disproves the Court's erroneous finding that on December 1, 2011 Respondents expressed "clear intention"

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[7] Respondents' 2009 execution of the promissory note for Respondents' purchase of DeClemente's ownership interest in ATMES is an entirely separate transaction from Respondents' 2008 purchase of Abacare, which gave rise to Respondents' 2011 lawsuit. The parties' written correspondence concerning the 2011 lawsuit and Respondents' late payments owed to Appellant establish the parties' agreement that these are two entirely separate transactions. This is discussed at further length, *infra*, in Section V.

to breach the promissory note. On July 8, 2012, DeClemente's counsel sent Respondent Smith a letter, as required by the promissory note, giving notice of Respondents' monthly payment arrearage and requesting payment. (R. pp. 152-53). On July 15, 2012, Smith responded to Declemente's letter stating, in relevant part:

> Once we have our damages set [in the 2011 lawsuit], *then we can determine the amount that is owed pursuant to the Promissory Note. We intend to apply a set-off to any amounts awarded by the Court. At that point, we will pay the remaining balance, if any*.

(R. p. 154) (emphasis added). This letter again reaffirms Respondents' acknowledgement of their debt and their intent to pay the debt in full. Even if this Court were to erroneously find that this letter from Respondent Smith constitutes intent to breach and thereby commences the statute of limitations under the discovery rule, the statute of limitations on DeClemente's breach of contract action did not expire until July 15, 2015 – three years after counsel's receipt of Respondent Smith's letter. DeClemente filed suit on June 11, 2015, well within the limitations period even when Declemente's lawsuit is subjected to the circuit court's erroneous application of the discovery rule.

The circuit court's calculation of the statute of limitations period violates binding precedent controlling maturity date contracts and bears no relation to the evidence in this case. This Court overlooked the evidence in the Record, including the promissory note, and overlooked controlling authority. Therefore, rehearing is necessary.

V. This Court's Opinion Overlooks Material Facts And Governing Precedent Establishing That Declemente's 2015 Action Is *Not* A Compulsory Counterclaim.

This Court's Opinion states, "we find a logical relationship exists between Appellant's claim for breach of contract and Respondents' claims in the 2011 action, and thus, the breach of contract claim was a compulsory counterclaim to the 2011 action." In a footnote, the Opinion

cites *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000), as authority for this conclusion. Precedent, however, compels the conclusion that Appellant's breach of contract counterclaim was permissive to the 2011 lawsuit.

This Court's Opinion misapprehends the holding in *Ion. I'On* focuses on Rule 220(c), SCACR, which "provides that the appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal." *Id.*, 380 S.C. at 418, 526 S.E.2d at 722 (quoting Rule 220(c), SCACR). But this Court's Opinion overlooks the duty to identify some evidence in the Record which could possibly support the Court's unspecified grounds for its Opinion. Under *I'On*, "[a]n appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case." *Id.*, 420, 526 S.E.2d at 725.

Contrary to this Court's conclusion, the Record on Appeal establishes that Declemente's 2015 suit for breach of the promissory note and Respondents' 2011 lawsuit do not arise from the same transaction or occurrence. *See*, *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991) ("By definition, a counterclaim is only compulsory if it arises out of the same transaction or occurrence as the opposing party's claim.").

Emails sent to Declemente by Respondent Reed in December, 2011 discuss Respondents' 2011 lawsuit and reassure DeClemente that Respondents will continue to make payments on their promissory note. (R. pp. 466-68, 650).

Additionally, in the June 12, 2012 letter to Appellant's counsel regarding Respondents' promissory note payment arrearage, Respondent Smith states, "[w]e intend to apply a set-off [for amount owed under the promissory note] to any amounts awarded by the Court [in the 2011 lawsuit]. At that point, we will pay the remaining balance [of the promissory note], if any." (R. p.

154). Mr. Smith's letter is an additional admission by Respondents that there is no logical relationship between Respondents' 2011 lawsuit and Declemente's 2015 lawsuit. *See*, (Respondents' Brief, p. 13) ("[t]o be clear, DeClemente's 2009 buyout and the 2011 lawsuit against him are not related."). "Declemente's 2009 buyout" refers to ATMES' purchase of Declemente's ownership in ATMES, secured by the promissory note which is the subject of Declemente's 2015 breach of contract cause of action.

Appellant submits that the reason this Court fails to identify any ground in the Record supporting its erroneous finding of a logical relationship between the two lawsuits is that the Record contains no evidence that Respondents' breach of the promissory note and Respondents' 2011 lawsuit are in any way related.

Precedent establishes that Declemente's 2015 breach of contract lawsuit is not barred by res judicata. In 1989, the South Carolina Supreme Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory of permissive. In *N.C. Federal Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989), North Carolina Federal sued to foreclose on a promissory note and mortgage given to it by DAV Corp. to finance a hotel condominium project as part of a joint venture agreement. *Id.*, 298 S.C. at 516, 381 S.E.2d at 905. Five of DAV Corp.'s counterclaims alleged that "North Carolina Federal's right to bring suit on the [promissory] note were modified by its oral agreement to provide additional financing as provided in the joint venture agreement." *Id.*, at 518, 381 S.E.2d at 905. The Supreme Court held that these counterclaims were compulsory, stating:

> Clearly, there is a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by joint venture. ... We therefore hold that DAV's first five counterclaims are compulsory under the logical relationship test.

Id., at 518-19, 381 S.E.2d at 905 (internal citations omitted). The Supreme Court went on to address DAV Corp.'s sixth counterclaim, which alleged breach of two oral agreements "that North Carolina Federal would purchase DAV's interest in the joint venture." *Id.* The Court held that since those oral agreements "[did] not affect the enforceability of the [promissory] note" upon which North Carolina Federal commenced action, DAV Corp.'s sixth counterclaim was permissive under the logical relationship test. *Id.*

As in *N.C. Federal*, there is no logical relationship between the enforceability of ATMES' 2009 Promissory Note, which was executed to guarantee ATMES' debt to DeClemente for its buyout of his ownership in ATMES, and ATMES' 2011 lawsuit against Declemente and other defendants alleging fraud and misrepresentation, *inter alia*, which allegedly occurred prior to Respondents' 2008 purchase of Abacare. Declemente was a partial owner of Abacare when it merged with Respondents' company, Reliable Medical Equip Services, to form ATMES. Unlike DAV Corp.'s five counterclaims in *N.C. Federal*, Declemente's suit for Respondents' breach of the 2009 promissory note securing their purchase of Declemente's ownership in ATMES has no logical relationship to Respondents' 2011 lawsuit against Declemente and other individuals involved in the 2008 sale of Abacare to ATMES.

Respondents' 2008 purchase of Abacare and Respondents' 2009 purchase of DeClemente's ownership in a different company, ATMES, are not related transactions. Logically, they are unrelated, separate transactions occurring in different years and separated by nine months. The parties to the transactions are not identical, and the evidence which would be presented at the trials of the unrelated lawsuits does not overlap. *N.C. Federal*'s "logical relationship" test establishes DeClemente's 2015 breach of contract claim as permissive to Respondents' 2011 lawsuit. *Id.*

Because DeClemente's breach of contract cause of action is permissive to ATMES's 2011 lawsuit, his 2015 breach of contract action is not barred by the doctrine of claim preclusion. *See*, *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) ("If a counterclaim is permissive, but not raised in the first case, a defendant is not precluded from asserting the claim in a later action.").

Rehearing is necessary so that this Court may consider overlooked facts and correct its misapprehension of res judicata.

ARGUMENT: CASE No. 2017-CP-10-5055

VI. This Court's Opinion Overlooks Material Facts And Governing Law Establishing That Declemente's 2017 Declaratory Judgment Action Did *Not* Arise From The Same Transaction Or Occurrence As Respondents' 2011 Lawsuit.

This Court's Opinion affirming the circuit court's dismissal of Appellant's 2017 declaratory judgment action states, "the claims Appellant asserted in his 2017 Action complaint [*sic*] were compulsory counterclaims to the 2011 Action; thus, he was barred by res judicata from re-litigating them." In reaching this erroneous conclusion, this Court overlooked material facts in the Record, and overlooked controlling precedent.

The circuit court's order dismissing Declemente's declaratory judgment action completely misstates the basis for Appellant's lawsuit. The circuit court's written order states, "DeClemente's complaint is based on his contention that the written agreement between the parties executed in 2009 precluded the Defendants from suing him in 2011." (R. p. 13) (emphasis added). The circuit court ignored the declaratory judgment action's allegations and prayer for relief and substituted its own. Appellant's Memorandum in Support of Declaratory Judgment explains the basis for the lawsuit as follows:

> In this case, Mr. DeClemente seeks to have his legal rights declared pursuant to the Full and Final Release signed by both Petitioner and Respondents.

> [Respondents' 2011 lawsuit] still exists only because the Court has not yet ruled upon Mr. DeClemente's assertion that the Full and Final Release is a complete bar to Defendants collecting any damages from him. The Release requires that in the event damages are awarded against Mr. DeClemente, the judgment must be satisfied by Defendants.

(R. p. 511) (emphasis added). The circuit court, however, disregarded the damages relief sought in the declaratory judgment action. The court, *sua sponte*, substituted relief from liability in an attempt to justify dismissal of the declaratory judgment action as "a collateral attack on his *liability* in the 2011 case." (R. p. 14) (emphasis added). This is a blatant misstatement of Declemente's declaratory judgment action, and the court was not at liberty to change the pleadings' factual allegations and relief sought.

It is apparent that this Court has over looked the facts and misapprehended the law in adopting the circuit court's misstatement of Declemente's declaratory judgment action. This Court's Opinion erroneously affirms the circuit court's dismissal, mistakenly holding that the declaratory judgment action seeks relief from the default judgment's liability finding and is a compulsory counterclaim to Respondents' 2011 lawsuit.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999); Rule 13(a), SCRCP. Under this definition alone, Declemente's declaratory judgment action does not arise from the same transaction or occurrence which gave rise to Respondents' lawsuit. Declemente's declaratory judgment suit seeks the court's ruling on enforceability of the Full and Final Release's *damages satisfaction mandate*; it has nothing to do with shielding Declemente from liability, a claim invented by the circuit court. Though the Release's language does also insulate Declemente from liability in Respondents' frivolous 2011 suit, the court held

Declemente in default and struck his answer and counterclaims, leading to the court's judgment by default on the issue of liability. The Release's requirement that Respondents satisfy damages awarded against DeClemente is an issue separate and distinct from the Release's prohibition of Respondents' 2011 lawsuit and the resulting liability by default.

Declemente's declaratory judgment suit arises from ATMES 2009 buyout of his 25% ownership interest in ATMES. (R. p. 122). The declaratory judgment action seeks the court's ruling on enforceability of Respondents' contractual obligation to satisfy "any and all damages and costs in any way related to his [Declemente's] ownership interests in ATMES." *Id.* By Respondents' own admission, its "2011 lawsuit, in contrast, relates to conduct prior to the formation of ATMES" and "alleged fraud and misrepresentation leading up to the 2008 sale of Abacare." (Respondents' Brief, p. 13). DeClemente's 2017 declaratory judgment action and Respondents' 2011 lawsuit are based upon two completely separate transactions and are unrelated. Res judicata does not bar an action merely because the same parties are involved in a prior unrelated lawsuit, nor does it bar Declemente's declaratory judgment action merely because Declemente pled the release as a defense to liability (in a counterclaim struck by Judge Nicholson) and later pled the Release as a defense to damages once a justiciable controversy over damages arose.

DeClemente's reliance upon Respondents' violation of their promise to never sue him was struck when the circuit court entered default judgment against him on the issue of liability. However, DeClemente's default at the liability stage of Respondents' lawsuit does not prevent him from asserting the Release's damages satisfaction provision during the damages phase of the lawsuit. Once liability was established by default judgment, the Release became relevant to the issue of damages satisfaction.

VII. This Court's Opinion Overlooks The Fact That The 2017 Declaratory Judgment Action Was *Not* An Available Counterclaim When Declemente Answered And Counterclaimed In Respondents' 2011 Lawsuit.

Rule 13(a), SCRCP, provides, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against the opposing party. Declemente's 2017 declaratory judgment action could not be pled against Respondents at the time he was served with the 2011 lawsuit because justiciable controversy concerning enforcement of the Release's damages satisfaction provision did not exist.

In order to state a claim for declaratory judgment, "a party must demonstrate a justiciable controversy." *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985). A justiciable controversy 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." *Power v. McNair*, 255 S.C. 150, 153-54, 177 S.E.2d 551, 553 (1970) (quoting *Dantzler v. Callison*, 227 S.C. 317, 88 S.E.2d 64, 65 (1955)). A justiciable controversy must be "a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Southern Bank & Trust Co. v. Harrison Sales Co.*, 285 S.C. 50, 51, 328 S.E.2d 66, 67 (1985).

In *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1982), the Sheriff of Chester County instituted an action for declaratory judgment against the South Carolina Commission on Human Affairs after he had been alerted that the Commissioner had instituted an investigation against him involving discrimination. He sought declaration from the court that "sheriffs are not subject to the provisions of the South Carolina Human Affairs Law." *Id.*, 539, 290 S.E.2d at 806. The Supreme Court held that the Sheriff's action was premature because justiciable controversy did not exist, distinguishing the dispute as being "contingent, hypothetical or abstract [in] character."

542, 290 S.E.2d at 807. The Court found that the action could only be maintained after a lawsuit was filed in the court of common pleas, "and then only after a full trial on the merits." 541, 290 S.E.2d at 806-7.

Even if the circuit court had not entered default judgment against DeClemente, and DeClemente had brought a declaratory judgment action on the Release's damages satisfaction provision as a counterclaim in Respondents' 2011 lawsuit, the counterclaim would have been dismissed as premature. *See*, Rule 12(b)(6), SCRCP (dismissal being warranted for "failure to state facts sufficient to constitute a cause of action"). When Declemente answered and asserted counterclaims to Respondents' 2011 lawsuit, damages were not yet at issue. Damages did not become an issue until the court found DeClemente liable by default. When Declemente's counterclaims in Respondents' lawsuit were due, he had not yet been held in default, so there was not yet even a determination of liability, much less damages. Any dispute concerning damages at that time would have been merely contingent and hypothetical. Declemente was at that time not legally permitted to plead his declaratory judgment action on damages as a counterclaim to the 2011 action because justiciable controversy over damages did not exist. Justiciable controversy on damages did not arise until DeClemente was found liable by default judgment. To paraphrase the Supreme Court in *Orr*: "The Declaratory Judgment Act is not properly invoked for an advisory opinion to be put on ice by [Appellant] for use if [Respondents] reach the occasion which might demand it." *Id.* (citing *Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957)).

Grounds For Rehearing *En Banc*

Rule 219(a), SCACR, provides that rehearing of a matter *en banc* "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Appellant respectfully submits that these two factors exist in this appeal.

The cases consolidated in this appeal involve two separate contracts between the parties, and both cases hinge on contract interpretation and enforcement. "South Carolina follows an objective contract interpretation rule, meaning that if the language of a contract is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." *Catawba Indian Tribe of S.C. v. City of Rock Hill*, 501 F.3d 368, 372 (4th Cir. 2007) (quoting *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767, 769 (1976)). In South Carolina, "[i]f a contract is unambiguous, a court must enforce it according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Mears Group, Inc. v. Kiawah Island Utility, Inc.*, 372 F.3d 363, 373 (D.S.C. 2019) (quoting *S.C. Dep't of Transp. v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008)).

This appeal is not complex. It requires a straight-forward application of South Carolina's objective contract interpretation rule to determine the effect of each unambiguous contract. Rehearing of this case *en banc* is necessary to maintain uniformity of the Court's decisions involving application of contract law.

If the Court declines, as it has so far, to maintain uniformity in contract interpretation and enforcement, then this case seemingly involves questions of exceptional importance: whether this Court has authority to alter, or refuse enforcement of, unambiguous contracts. Answering this question in the affirmative would contradict precedent and end the uniformity of prior decisions. *See*, *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct.

App. 2009) ("[The Appellate Court is] without any authority to alter an unambiguous contract by construction or make a new contract for the parties.").

Additionally, this Court's application of res judicata is unprecedented and broadens the "logical relationship" test beyond its comprehensible scope. Rehearing *en banc* is necessary to apply the "logical relationship" test to the facts of this case in accord with prior decisions, and secure uniformity so that it may be applied as intended in future cases.

It is within the Court's discretion to take these questions and issues into consideration in making its determination. *See*, *Williamson v. Middleton*, 383 S.C. 490, 494, 681 S.E.2d 867, 879 (2009). For these reasons, and those discussed in further detail in this Petition, Appellant suggests that this case should be reheard *en banc*.

Appellant's Consent To Adjudication By Appointed Panel

This Court's overlooking and misapprehension of facts, arguments and binding precedent necessitate consideration of the Court's possible conflicts of interest in this case and the companion case, 2018-000460. Respondent Murrell Smith's role in state government leadership has for years included contact with members of the Court of Appeals and oversite of the Appellate Courts. Additionally, before sitting on this Court of Appeals Judge Blake Hewitt served as Respondents' counsel in this case and the companion case and filed Respondents' appellate brief in both cases. It is therefore understandable and likely that this Court's members may be conflicted. If the Court chooses to recuse, Appellant consents to having this appeal and the companion appeal decided by an appointed panel of retired judges.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court grant rehearing in this matter and suggests that rehearing *en banc* is appropriate and warranted. For the

reasons set out in Appellant's briefs and herein, he asks that this Court reverse the appealed orders and remand this case for further proceedings.

Respectfully submitted,

Cameron L. Marshall
SC Bar #64192
7 Gamecock Ave., Suite 707
Charleston, SC 29407
(843) 795-2298
Cameorn@attorneymarshall.com
Attorney for Appellant

Exhibit A

CAMERON MARSHALL

ATTORNEY AT LAW

December 8, 2017

The Honorable Julie Armstong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: *Phillip Declemente a/k/a Alec Rochford v. Assisted Technology Medical Equipment Services, LLC; Jeffrey Reed and Murrell Smith*
2015-CP-10-3325

Dear Ms. Armstrong:

Enclosed for filing, please find an original and four copies of documents to be considered at Defendants' Motion for Summary Judgment which is being heard Monday morning. Please see that a copy is forwarded to Judge Nicholson as soon as possible.

Thank you.

With kindest regards,

Cameron L. Marshall

Cameron Marshall, LLC 7 Gamecock Ave., Ste. 707, Charleston, 29407 Phone: 843-795-2298 Fax: 843-795-5081

INDEX FOR PLAINTIFF'S SUBMISSIONS

DECEMBER 11, 2017 SUMMARY JUDGMENT HEARING

1. Amended Complaint – 5 pages
2. Answer to Amended Complaint – 5 pages
3. June 8, 2012 Correspondence with Proof of Delivery – 2 pages
4. June 12, 2012 Correspondence – 2 Pages
5. Plaintiff's Affidavit – 4 pages
6. June 30, 2009 Promissory Note – 3 pages
7. Personal Guarantees - 2 Pages
8. Bill of Sale - 5 Pages
9. Confidentiality and Non-Compete Agreement – 5 Pages
10. Stock Purchase and Assignment Agreement – 6 Pages
11. Full and Final Release – 3 Pages
12. Emails – 3 Pages

Exhibit B

From: attorneymarshall@gmail.com [mailto:attorneymarshall@gmail.com] **On Behalf Of** Cameron Marshall
Sent: Friday, December 8, 2017 3:45 PM
To: Nicholson, J. C. Law Clerk (Jonathan Arndt) <JNicholsonLC@sccourts.org>
Cc: Nicholson, J. C. <JNicholsonJ@sccourts.org>; james@jamessmithpa.com
Subject: DeClemente v. Assistive Technology , et al 15CP103325

Good afternoon Judge Nicholson:

Please find attached Plaintiff's Submissions for the Summary Judgment hearing scheduled in your courtroom Monday morning, December 11, 2017, as well as an Index. By copy of this email I am simultaneously serving Defense Counsel James Smith with a copy of these submissions.

Thank you for your consideration.

Respectfully yours,

Cameron Marshall

Nicholson, J. C. Law Clerk (Jonathan Arndt) <JNicholsonLC@sccourts.org> Fri, Dec 8, 2017 at 4:08 PM
To: Cameron Marshall <cameron@attorneymarshall.com>
Cc: "Nicholson, J. C." <JNicholsonJ@sccourts.org>, "james@jamessmithpa.com" <james@jamessmithpa.com>

There are no attachments to the email. Maybe try resending.

Jonathan S. Arndt

Law Clerk to The Honorable J.C. Nicholson, Jr.

Circuit Court Judge

100 Broad Street

Charleston, South Carolina 29401

Tel.: (843) 958-5047

JNicholsonlc@sccourts.org

Cameron Marshall <attorneymarshall@gmail.com> Fri, Dec 8, 2017 at 4:56 PM
To: "Nicholson, J. C. Law Clerk (Jonathan Arndt)" <JNicholsonLC@sccourts.org>
Cc: Cameron Marshall <cameron@attorneymarshall.com>, "Nicholson, J. C." <JNicholsonJ@sccourts.org>, "james@jamessmithpa.com" <james@jamessmithpa.com>

Hello Jonathan,

Thanks for letting us know. My assistant, Kim, has already left the office for the day, but I've spoken with her and she will resend the email, with attachments, to everyone in the morning at about 10 AM.

Kind regards, Cameron

Sent from my iPhone
[Quoted text hidden]

Cameron Marshall <cameron@attorneymarshall.com> Fri, Dec 8, 2017 at 8:39 PM
To: "Nicholson, J. C. Law Clerk (Jonathan Arndt)" <JNicholsonLC@sccourts.org>
Cc: Cameron Marshall <cameron@attorneymarshall.com>, "Nicholson, J. C." <JNicholsonJ@sccourts.org>, "james@jamessmithpa.com" <james@jamessmithpa.com>

Good Evening to all.

I was in the area and decided to resend tonight. So sorry for leaving off the attachments.

Thank you.

7 Gamecock Ave., Suite 707
Charleston, SC 29407
P (843) 795-2298
F (843) 795-5081
www.attorneymarshall.com

[Quoted text hidden]

2 attachments

Submissions for 12.11 SUmm Judg Hearing.pdf
6448K

INDEX FOR PLAINTIFF.docx
35K

Nicholson, J. C. Law Clerk (Jonathan Arndt) <JNicholsonLC@sccourts.org> Mon, Dec 11, 2017 at 9:00 AM
To: Cameron Marshall <cameron@attorneymarshall.com>
Cc: "Nicholson, J. C." <JNicholsonJ@sccourts.org>, "james@jamessmithpa.com" <james@jamessmithpa.com>

Received. Thank you.

[Quoted text hidden]

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Oct 26 2020
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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); Jeffrey Reed; Murrell G. Smith, ... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondents, Assistive Technology Medical Equipment Services, LLC, Jeffrey Reed and Murrell G. Smith, James E. Smith, Jr. with a copy of Appellant's *Petition for Rehearing and Suggestion for Rehearing En Banc* by emailing the same to the following address:

James E. Smith, Jr.
1422 Laurel Street
Columbia, SC 29201
james@jamessmithpa.com

Cameron L. Marshall
Attorney for Appellant

October 26, 2020