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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2021-000037

Unpublished Opinion No. 2020-UP-263 (S.C. Ct. App. filed Sept. 9, 2020)

Phillip DeClemente, a/k/a Alec Rochford, ... Petitioner,

v.

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

and

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was made on October 26, 2020 and finally denied by the Court of Appeals on December 21, 2020.

INTRODUCTION[1]

Appellate Case No. 2018-001413 consolidates two separate appeals from dispositive decisions issued by the circuit court in Case No. 2015-CP-10-3325 ("2015 action/lawsuit" and "breach of contract action/lawsuit") and Case No. 2017-CP-10-5055 ("2017 action/lawsuit" and "declaratory judgment action/lawsuit"). Both the 2015 and 2017 lawsuits pertain to contracts executed between the parties setting the terms and conditions of Respondents' purchase of Mr. DeClemente's ownership interest in the parties' co-founded durable medical equipment supply company, Assistive Technology Medical Equipment Services, LLC ("ATMES"). Each case and its issues will be addressed separately, beginning with the 2015 breach of contract suit.

QUESTIONS PRESENTED: No. 2015-CP-10-3325

1. Did the Court of Appeals err in holding that the discovery rule bars this lawsuit on statute of limitations grounds, while failing to acknowledge and enforce the Promissory Note's unambiguous language and maturity date?

    A. Did the Court of Appeals err in its failure to examine the Promissory Note's language and maturity date when applying the discovery rule to its determination of the statute of limitations' expiration date?

    B. Does the Court of Appeal's decision conflict with this Court's prior decisions governing creditors' rights and contract enforcement?

[1] "In cases seeking review of a decision of the Court of Appeals, Rule 242, SCACR, requires the Petitioner to file two copies of an Appendix. This requirement is suspended. Instead, the necessary documents to comprise the Appendix will be obtained from the electronic records of the case before the Court of Appeals." *See*, Order Re: Operation of Appellate Courts During the Coronavirus Emergency, Section (e) (As Amended May 29, 2020)). All citations herein shall be to the Record on Appeal filed with the South Carolina Court of Appeals in Appellate Case No. 2018-001413.

2. Did the Court of Appeals err in refusing to consider, on issue preservation grounds, emails sent from Respondent Reed to DeClemente, establishing Respondents' expressed intent to satisfy the Promissory Note?

    A. Did the Court of Appeals err in finding Respondent Reed's email unpreserved, where the subject email was also submitted to the circuit court and considered as the court as evidence in DeClemente's opposition to Respondent's summary judgment motion?

    B. Did the Court of Appeals err in finding that DeClemente was required to file a Rule 59(e) motion to preserve the subject email argument for appellate review?

3. Did the Court of Appeals err in ruling, as an additional sustaining ground, that this breach of contract action constitutes a compulsory counterclaim to Respondents' 2011 lawsuit?

    A. Did the Court of Appeals err by exceeding the scope of its discretion under Rule 220(c), SCACR, and *I'On v. Town of Mt. Pleasant*?

    B. Did the Court of Appeals err by incorrectly applying the "logical relationship" test, as stated by this Court in *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*?

STATEMENT OF THE CASE: No. 2015-CP-10-3325

Petitioner DeClemente's 2015 breach of contract lawsuit seeks to recover money Respondents owe Mr. DeClemente. Respondents' debt is secured by the parties' Promissory Note ("Note"). (R. pp. 107-111). With monthly installments which began July 30, 2009, Respondents are required to pay Petitioner a total of $265,000.00, plus interest, in exchange for DeClemente's 25% ownership interest in their durable medical equipment company, Assistive Technology Medical Equipment Services ("ATMES"). (R. p. 107). The monthly payment amount is $7,341.84. (R. p. 107, Section (3)(B)). In the event of missed payments, the Note does not require DeClemente to declare Respondents in default. (R. p. 108, Section (6)(C)). Instead, DeClemente reserves the right to declare contractual breach and enforce the Note at any time until March 2, 2016, three years after Note's maturity date. (R. pp. 107-111).

Petitioner filed this breach of contract lawsuit on June 11, 2015, more than eight months prior to the Promissory Note's maturity date. (R. pp. 92-124). Respondents moved for dismissal

on July 15, 2015, arguing that the three-year statute of limitations period began accrual in September of 2011, and that Petitioner's suit was barred as untimely. (R. pp. 125-126). Respondents' motion to dismiss was heard and granted by Judge Markley Dennis on January 14, 2016. (R. p. 23). DeClemente filed a motion to amend judgment and pleadings on January 25, 2016, making several arguments establishing the lawsuit's timeliness. (R. 458-471). Judge Dennis heard and granted DeClemente's motion on February 19, 2016. Judge Dennis found that since the statute of limitations began to accrue on the Note's maturity date, DeClemente's breach of contract claim on the Note was timely. (R. pp. 608-611).

Mr. DeClemente filed his Amended Complaint on March 22, 2016. (R. 472-476). Respondents then filed another statute of limitations-based motion to dismiss, (R. p. 477-478), which was denied. (R. p. 25). Respondents filed a summary judgment motion on September 20, 2017 arguing, for the third time, that DeClemente's breach of contract suit was filed outside the statute of limitations. (R. p. 495). Judge Nicholson heard Respondents' motion on December 11, 2017. Prior to the hearing, DeClemente submitted documents to the circuit court in support of his argument, including relevant pleadings, emails sent from Respondent Reed to DeClemente, and a letter from Respondent Smith to DeClemente's counsel, in which Reed and Smith re-affirmed Respondents' intent to fully satisfy the Note. *See*, (*Petition for Rehearing*, p. 15)[2] (Listing the twelve items submitted to Judge Nicholson for consideration, with each document's citation to the Record on Appeal). At the hearing, Judge Nicholson informed counsel that he would render a decision on Respondents' motion after reading Judge Dennis' Order denying Respondents' first motion to dismiss on statute of limitations grounds. (R. p. 642:16-19). Judge Dennis' written

[2] Mr. DeClemente's Petition for Rehearing is contained in the record before the appellate court. *See*, n. 1, *supra*. Mr. DeClemente's *Petition for Rehearing and Suggestion for Rehearing En Banc*, hereinafter cited as "*Petition for Rehearing*."

Order, denying Respondents' first motion to dismiss, was not filed until May 16, 2018. (R. pp. 49-51).

On July 2, 2018, Judge Nicholson granted Respondents' summary judgment motion based upon Respondents' identical statute of limitations argument. (R. pp. 5-10). Judge Nicholson's summary judgment Order does not address, nor even acknowledge, the Promissory Note's unambiguous provisions, including its maturity date.

Petitioner filed Notice of Appeal July 27, 2018. (R. p. 576). Oral arguments in the Court of Appeals were scheduled for March 9, 2020, but were canceled. On September 9, 2020, the appellate court issued an unpublished Opinion affirming Judge Nicholson's grant of summary judgment, which is based on the circuit court's application of the discovery rule to its statute of limitations analysis. *DeClemente v. Assistive Tech. Med. Equip. Servs., LLC*, Unpublished Opinion No. 2020-UP-263 (Ct. App. Sept. 9, 2020). The Court of Appeals also found unpreserved DeClemente's alternative, *arguendo* argument (that emails sent from Respondent Reed to DeClemente after Respondents sued DeClemente in 2011 establish unwavering intent to satisfy the Note even after filing suit) unpreserved for review. As an additional sustaining ground, the appellate court held that DeClemente's 2015 breach of contract lawsuit is barred by the doctrine of res judicata, as a compulsory counterclaim to Respondents' 2011 lawsuit against DeClemente and several other defendants.

On October 26, 2020, Petitioner moved for rehearing and filed a Motion For Leave to Supplement the Record on Appeal[3] with proof that Judge Nicholson was in fact provided the subject email, along with other similar emails, prior to the December 11, 2017 summary

[3] Mr. DeClemente's Motion for Leave to Supplement the Record on Appeal is contained in the record before the appellate court. *See*, n. 1, *supra*. Mr. DeClemente's *Motion for Leave to Supplement the Record on Appeal*, hereinafter cited as "*Motion to Supplement*."

judgment hearing, contrary to the Court of Appeals' finding that the email was unpreserved. (*Petition for Rehearing*, pp. 5-24); (*Motion to Supplement*, pp. 1-6, Exhibits A and B). The Court of Appeals denied DeClemente's Motion to Supplement on November 16, 2020, and denied his Petition for Rehearing on December 21, 2020. Petitioner now seeks Writ of Certiorari from this Court to review the Court of Appeals' decision.

ARGUMENT: No. 2015-CP-10-3325

I. THE COURT OF APPEALS ERRED IN FAILING TO ACKNOWLEDGE AND ENFORCE THE PROMISSORY NOTE'S LANGUAGE AND MATURITY DATE, AND ERRONEOUSLY HELD THIS ACTION BARRED BY THE STATUTE OF LIMITATIONS.

At issue in DeClemente's 2015 breach of contract lawsuit is whether the Note's maturity date or the discovery rule properly controls the court's statute of limitations calculation. Specifically, did Respondents' alleged expression of intent to breach the Promissory Note, by suing DeClemente in 2011, invoke the discovery rule and cause statute of limitations accrual to begin? In direct opposition to the Court of Appeals' decision, long-established Supreme Court precedent holds that a contract's maturity date determines the statute of limitations. The circuit and appellate courts erroneously held that the statute of limitations in this breach of contract suit is determined by application of the discovery rule, rather than the Promissory Note's unambiguous language and maturity date. The Court of Appeals' Opinion directly conflicts with binding precedent and requires reversal.

A. The Court Of Appeals Was Required To Examine And Enforce The Note's Unambiguous Language And Maturity Date To Determine Their Effect On Statute of Limitations Calculation.

Inexplicably, both the circuit court and the Court of Appeals relied upon the discovery rule in holding DeClemente's 2015 breach of contract action to be untimely; giving no

recognition or analysis to the Promissory Note's maturity date, or any of its other unambiguous binding provisions.

The discovery rule provides that "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 exercise of reasonable diligence." *CoastalStates Bank v. Hanover Homes*, 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct.App. 2014). But in the case at bar, precedent dictates that the statute of limitations be determined by the Promissory Note's language and maturity date. *See*, *CoastalStates Bank v. Hanover Homes of South Carolina*, 408 S.C. 510, 516-18, 759 S.E.2d 152, 156-57 (Ct. App. 2014) (finding that the statute of limitations begina to accrue on maturity dates provided in promissory notes with guaranties).

"Where a motion for summary judgment presents a question concerning the construction of a written contract, the question is one of law if the language employed by the contract is plain and unambiguous." *Moss v. Porter Bros., Inc.*, 292 S.C. 444, 447, 357 S.E.2d 25, 27 (Ct.App. 1987). "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 document." *Silver v. Aabstract Pools & Spas, Inc.,* 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (quoting *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Courts will not consider evidence arising outside the four corners of a contract if the "contract is clear, unambiguous, and capable of only one reasonable interpretation." *Silver*, 592, 658 S.E.2d at 543. A party to a contract is not free "to

reinterpret written contract terms midstream because he is unhappy with the contract he executed." *Id*.[4]

Mr. DeClemente's evidence and argument in opposition to summary judgment, presented to the circuit court by memoranda and oral argument, is based on the Promissory Note's plain and unambiguous terms, including its maturity date. The Note provides DeClemente the right to file suit for Respondents' breach of contract at a time of his choosing, provided he does so prior to the statute of limitations' March 2, 2016 expiration.[5] The Promissory Note provides as follows:

1. Section 6(B) of the Promissory Note, entitled "*Notice of Default*," states that DeClemente "*may*" give notice demanding payment of an overdue balance if Respondents are in default, and that he "*may*" accelerate the principal balance if Respondents fail to make payment after at least thirty days notice. (R. p. 108);

2. Section 6(C), entitled "*No Waiver by Note Holder*," states that if Respondents are in default and DeClemente does not chose to enforce payment under Section 6(B), he "will still have the right to do so if [Respondents] are in default at a later time." (*Id*.);

3. Section 8, entitled "*WAIVERS*," states that Respondents waive "the right to require [DeClemente] to demand payment of amounts due," as well as "the right to require [DeClemente] to give notice to other persons that amounts due have not been paid." (R. p. 109); and

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[4] *See also*, *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) ("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. It does not depend on the subjective, after the fact meaning one party assigns to it."); *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767, 769 (1976) ("Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed.").

[5] This argument was made in Petitioner's Motion to Amend Judgment and Pleadings, (R. pp. 460-461), after Judge Dennis initially erroneously granted Respondents' Motion to Dismiss based on the statute of limitations. This argument was made part of the record for Judge Nicholson's consideration under Rule 56, SCRCP.

4. Section 3(A), entitled "*Time and Place of Payments*," states that "[i]f on March 1st, 2013, [Respondents] still owe[] amounts under this Promissory Note, [Respondents] will pay those amounts in full on that date, which is called the "Maturity Date." (R. p. 107).

The Note's language is unambiguous throughout, including the issues of breach and maturity date. The Note provides that Respondents' failure to make monthly payments does not constitute a breach unless and until: 1) Petitioner elects to enforce payment; *or* 2) Respondents fail to fully satisfy their debt by the maturity date. The Promissory Note *does not* provide, as Respondents incorrectly argue, that the debtor's alleged expression of intent to breach constitutes a contractual, actual, legal breach. Nor does the Promissory Note provide that Respondents' filing of a lawsuit against Mr. DeClemente constitutes a breach.

Judge Dennis' statute of limitations ruling denying Respondents' motion to dismiss is in accord with established South Carolina precedent.[6] The Court of Appeals erred in failing to properly calculate the statute of limitations by examining the Note's maturity date, and failing to enforce its provisions.

South Carolina law governing enforcement of unambiguous contracts is not complex. "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,

[6] The difference between the scope of consideration allotted to the trial court on motions for summary judgment under Rule 56, SCRCP, and for dismissal under Rule 12, has been highlighted by both Respondents and the lower courts. However, this difference is irrelevant. Although motions for dismissal require the circuit court to make a ruling based on the four corners of the Complaint, Rule 12, SCRCP, DeClemente's 2015 lawsuit was filed with the Promissory Note attached as an exhibit. (R. p. 107). Judge Dennis' ruling was based on the clear language of the Promissory Note as written, and enforced the maturity date as intended by the parties. Thus, Judge Dennis' ruling involved a correct interpretation and enforcement of unambiguous contract terms as provided by law.

372 (4th Cir. 2007) (quoting *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767, 769 (1976)). When the contract is unambiguous concerning a disputed issue, "[t]he court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

As Judge Dennis properly did, Judge Nicholson was also required to enforce the terms of the parties' Promissory Note. The circuit and appellate courts were not at liberty to disregard the parties' contract in determining the time at which Respondents breached and the statute of limitations began to accrue. *See generally*, *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009) (The Court of Appeals stating, "[w]e are without authority to alter an unambiguous contract by construction or to make new contracts for the parties."); *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988) (This Court stating that the judiciary's "duty is limited to the interpretation of the contract made by the parties themselves.").

The Court of Appeals lacks authority to refuse recognition and enforcement of the Promissory Note. The Court of Appeals' refusal to acknowledge and enforce the Note's language and maturity date, and to properly calculate the statute of limitations accordingly, violates precedent and warrants discretionary review by this Court.

B. The Court of Appeals' Erroneous Statute of Limitations Decision Conflicts With This Court's Prior Decisions Involving Creditor's Rights And Enforcement of Maturity Date Contracts.

South Carolina Supreme Court precedent holds that the statute of limitations for breach of maturity contracts commences when: 1) the creditor demands the entire balance owed; *or* 2) the contract's maturity date.

In *Town of Cheraw v. Turnage*, 184 S.C. 76, 191 S.E. 831 (1937), this Court held that a debtor's nonpayment of an early installment does not render the entire balance immediately due, and does not commence accrual of the statute of limitations. The Court held that the limitations period does not begin until the last installment matures, unless the creditor exercises its right to accelerate the balance based on the debtor's default. *Town of Cheraw*, 191 S.E. at 832. *Cheraw* establishes that a debtor does not have the right to accelerate the balance of the principle. *See*, *id*. (Stating that "[e]very reason for entering into [an acceleration] provision bespeaks its optional character with the creditor").

This same fundamental principle of contract law echoes throughout South Carolina creditors' jurisprudence. In *Citizens and Southern Nat. Bank of South Carolina v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994), this Court stated "[a] guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor *at maturity*." *Id*. 313 S.C. at 543, 443 S.E.2d at 550 (emphasis added). The Court further stated that "the creditor *may* maintain an action against the guarantor immediately upon default of the debtor." *Id*. (emphasis added). The decision of when to sue a defaulting debtor is the creditor's, and the creditor maintains the right to file suit at any time within three years of the obligation's maturity date.

More recently, in *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*, 408 S.C. 510, 759 S.E.2d 152 (2014), this Court applied the discovery rule to determine the statute of limitations for promissory notes with guaranties. The Court held that "the statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults." *CoastalStates Bank*, 408 S.C. at 156, 759 S.E.2d at 517 (quoting 38 Am.Jur.2d *Guaranty* § 96, at 1040 (2010)).

The Court of Appeals' erroneous statute of limitations ruling conflicts with this Court's binding precedent, requires reversal, and warrants discretionary review by this Honorable Court.

II. THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER, ON ISSUE PRESERVATION GROUNDS, PETITIONER'S *ARGUENDO*, EMAIL-BASED STATUTE OF LIMITATIONS ARGUMENT.

Arguendo,[7] even when the statute of limitations is calculated with the lower courts' erroneous application of the discovery rule, DeClemente's breach of contract lawsuit was still filed within the statute of limitations. This is because the record also establishes that Respondents' written promises to satisfy their debt in full tolled commencement of the statute of limitations. (R. pp. 466-468, 650). The Court of Appeals expressly declined to address this argument on the ground that it found one particular email, amongst others included in the Record on Appeal, to be unpreserved. The Court of Appeals' failure to consider Respondents' repeated written expressions of intent to pay their debt constitutes error, as it conflicts with the circuit court record and the Record on Appeal.

A. The Court of Appeals Erred in Finding An Email From Respondent Reed Was Unpreserved, Where The Subject Email Was Submitted To The Circuit Court And Considered By The Court In DeClemente's Opposition to Respondents' Summary Judgment Motion.

Under Rule 56, SCRCP, the circuit court "must consider *everything* in the record – pleadings, depositions, interrogatories, admissions on file, affidavits, *etc*." – when "determining whether a genuine issue of material fact exists." *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986) (emphasis in original). In *Gilmore*, the Court of Appeals acknowledged that, "Rule 56 does not, "distinguish between documents merely filed and those singled out by counsel for special attention – the court must consider *both* before granting summary

[7] Petitioner submitted this alternative argument in response to the court's improper statute of limitations analysis of breach of contracts which include clear maturity dates. The proper analysis is discussed in Section I, *Supra*. *See also*, (*Brief of Appellant*, p. 9-10).

judgment.'"" *Id*. 58, 348 S.E.2d at 183-84 (quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980) (emphasis by Court of Appeals)).

As stated in Section III of DeClemente's *Petition for Rehearing and Suggestion for Rehearing en banc*, Respondent Reed's December 14, 2011 email to DeClemente, (R. p. 650) ("subject email"), was submitted to the circuit court for review and consideration in DeClemente's opposition to Respondents' summary judgment motion. *See*, (*Petition for Rehearing*, pp. 13-18); *see also*, (*Motion to Supplement*, pp. 2-5, Exhibits A and B).The subject email is but one of Respondents' several similar written assurances to DeClemente that they would fully satisfy the Note, sent after falling into arrears and after having filed 2011 lawsuit against Mr. DeClemente. *See*, (R. pp. 466-468) and (*Petition for Rehearing*, pp. 18-20).

Judge Nicholson considered the subject email, and the other similar writings DeClemente submitted to the circuit court, before ruling on Respondents' summary judgment motion. *See*, *Gilmore*, *supra*, at 58, 348 S.E.2d at 183-84. DeClemente attempted to supplement the Record on Appeal with dispositive proof that the subject email was submitted to Judge Nicholson prior to the summary judgment hearing, but the Court of Appeals refused to consider his argument on the merits or alter its Opinion to match the circuit court record. *See*, (*Motion to Supplement*, pp. 2-5, Exhibits A and B). This warrants a grant of discretionary review by this Court.

B. Petitioner Was Not Required to File A Rule 59(e) Motion To Preserve His Statute Of Limitations Argument For Appellate Review.

The Court of Appeals' decision implies that DeClemente was required to move for reconsideration under Rule 59(e), SCRCP, prior to appealing judgment. However, the necessity of a Rule 59(e) motion depends on the facts and circumstances of each case.

In *Elam v. South Carolina Dept. of Transp.*, this Court stated that Rule 59(e) motions are "not necessary or desirable in every case." 361 S.C. 9, 25, 602 S.E.2d 772, 781 n. 5 (2004).

Instead of filing a Rule 59(e) motion, "[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 notice of appeal." *Id*.

The principle that Rule 59(e) motions are noncompulsory is demonstrated in *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009), wherein this Court reversed the Court of Appeals' finding that a petitioner's failure to file a Rule 59(e) motion meant that her argument was not preserved for review. In overturning the appellate court, the *Spence* Court held that because the circuit court's order granted respondents summary judgment on the same grounds respondents argued at the summary judgment hearing, the ruling itself preserved petitioner's argument on appeal, even though the order made no mention of petitioner's opposing argument. *Id.* 489, 674 S.E.2d at 170.

In the case at bar, Respondents argue that there is evidence supporting their alleged intention to breach their Promissory Note. Prior to the haring, DeClemente submitted the subject email and other similar writings (also contained in his Motion to Amend Judgment and the Pleadings) as contradictory evidence in opposition to Respondents' summary judgment motion. (R. pp. 648, 650); *see also*, (*Petition for Rehearing*, p. 15) (The subject email is item 12 in the index of exhibits submitted to Judge Nicholson), *and*, (*Motion to Supplement*, Exhibit A). Judge Nicholson's summary judgment ruling is based on the same grounds argued by Respondent, to which DeClemente submitted the contradictory writings in opposition. (R. pp. 8-10). Similar to *Spence*, Judge Nicholson's written Order preserves the subject email even though it makes no mention of Mr. DeClemente's accompanying argument.

Respondents also do not argue that the subject email is unpreserved for appellate review. In *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), the Court of Appeals

found a question concerning punitive damages limitation was preserved. *Garrison*, 358, 838 S.E.2d at 36 n. 20 (citing *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009)). The *Garrison* Court noted that even if there was a doubt as to preservation, Target's brief did not assert that the issue of punitive damages cap was unpreserved. *Id*. The Court of Appeals concluded that it was therefore proper to "resolve any possible doubt as to preservation in favor of the Garrisons on this important question." *Id*.; *see also, Alt. 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) ("[w]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

The record proves that the subject email was presented to the circuit court. The Court of Appeals abused its discretion by denying DeClemente's Motion for Leave to Supplement the Record on Appeal to offer additional evidence of preservation. This is especially true since the Court of Appeals' Opinion oddly suggests that the issue of the subject email's preservation was of importance to the Court, and preservation of the subject email is not contested. The Court of Appeals' erroneous refusal to consider the subject email, which the Court seems to believe important, warrants this Court's discretionary review.

III. THE COURT OF APPEALS' HOLDING THAT DECLEMENTE'S 2015 LAWSUIT IS A COMPULSORY COUNTERCLAIM TO RESPONDENTS' 2011 LAWSUIT CONFLICTS WITH THIS COURT'S PRIOR DECISIONS.

As an additional sustaining ground, the Court of Appeals ruled that DeClemente's 2015 lawsuit is barred as a compulsory counterclaim to the lawsuit Respondents brought against DeClemente and others in 2011. The ruling is unsupported by the Record on Appeal, exceeds the scope of discretion allowed under Rule 220(c), SCACR, and conflicts with this Court's decision in *I'On v. Town of Mt. Pleasant*. The Appellate Court's ruling also conflicts with this Court's

precedent in *N.C. Loan Ass'n v. DAV Corp*. Therefore, this Court's discretionary review is warranted.

A. The Court Of Appeals' Res Judicata Ruling Is Unsupported By The Record, Exceeds The Court's Scope of Discretion Under Rule 220(c), SCACR, And Conflicts With This Court's Precedent.

The Court of Appeals' Opinion purports to rely on *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) and Rule 220(c), SCACR, as authority for its additional sustaining ground: that DeClemente's breach of contract lawsuit is a compulsory counterclaim to Respondents' 2011 lawsuit, and therefore barred by the doctrine of res judicata.

The Court of Appeals maintains discretion to "affirm the lower court's judgment for any reason appearing in the record on appeal." *I'On*, 338 S.C. at 420-21, 526 S.E.2d at 723. But, *I'On* also states that "[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 723.

The Court of Appeals' res judicata ruling is unsupported, if not contradicted, by the evidence. The Record on Appeal establishes that the 2015 breach of contract action is completely unrelated to Respondents' 2011 lawsuit.

After DeClemente was served with Respondents' 2011 lawsuit on December 1, 2011, Respondent Reed sent DeClemente multiple emails reassuring him that Respondents would continue to making payments on their Promissory Note balance. (R. pp. 466-468, 650). In these emails, Reed acknowledges that Respondents' Promissory Note debt is unrelated to their 2011 lawsuit against DeClemente and others. Additional confirmation of Respondents' expressed intent to satisfy their debt *after* filing suit against DeClemente is Respondent Smith's June 12, 2012 letter to Petitioner's counsel. Therein, Smith states that Respondents intended to satisfy

their debt by applying a set-off to any amount which the circuit court might in the future award them in their 2011 lawsuit. (R. p. 154). Smith further states that Respondents will pay any remaining balance if the set-off does not fully satisfy their debt. (*Id*). Smith's letter further confirms Respondents' understanding that their 2011 lawsuit and Respondents' obligations to DeClemente under the Promissory Note are unrelated.

Furthermore, while the circuit court erroneously granted Respondents' summary judgment motion based on Respondents' incorrect statute of limitations argument, the circuit court's order explicitly rejects Respondents' res judicata argument. (R. p. 5). The circuit court's summary judgment Order acknowledges Respondents' res judicata argument, and the court declines to address it. In closing, the Order states: "Any arguments not specifically addressed in this order are denied." (R. p. 5).

Finally, Respondents' admit in their Brief that DeClemente's 2015 breach of contract action and Respondent's 2011 lawsuit are completely unrelated:[8]

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

(*Brief of Respondents*, p. 13) (internal citations and quotations omitted).

The Record on Appeal provides no evidence supporting the Court of Appeals' application of res judicata as an additional sustaining ground under Rule 220(c), SCACR. To the contrary,

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[8] Respondents also argue that DeClemente's 2015 lawsuit was a compulsory counterclaim by making a comparison to *Gathings v. Robertson Brokerage Co., Inc.*, 295 S.C. 112, 367 S.E.2d 423 (Ct. App. 1988). (*Brief of Respondents*, p. 14). However, *Gathings* is distinguishable from the case at bar, and *Gathings* is not cited by the Court of Appeals' Opinion.

the Record on Appeal establishes that there is no relationship between Respondents' 2011 lawsuit and Petitioner's 2015 breach of contract lawsuit.

The *I'On* decision does not provide the Court of Appeals authority to establish the elements of a party's defense by merely citing Rule 220(c), SCACR. The Court of Appeals' reliance on *I'On* as justification for its wholly unsupported application of res judicata warrants this Court's discretionary review.

B. The Court of Appeals' Res Judicata Ruling Conflicts With This Court's Application Of The Logical Relationship Test in *N.C. Federal Sav. & Loan Ass'n v. DAV Corp.*

The Court of Appeals' finding of a logical relationship between DeClemente's 2015 lawsuit and Respondents' 2011 lawsuit conflicts with this Court's application of the logical relationship test in *N.C. Fed. Sav. and Loan Ass'n v. DAV Corp*., and its progeny.

In *N.C. Fed. Sav. and 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. DAV Corp. brought six counterclaims based on the parties' subsequent oral agreements.

Five of DAV Corp.'s counterclaims were based on the allegation that "North Carolina Federal's right to bring suit on the [promissory] note [was] modified by its oral agreement to provide additional financing as provided in the joint venture agreement." *Id*. 518, 381 S.E.2d at 905. This 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 the joint venture. ... We therefore, hold that DAV Corp.'s first five counterclaims are compulsory under the logical relationship test."

Id. 518-19, 381 S.E.2d at 905 (internal citations omitted). Of equal importance, however, is this Court's finding that DAV Corp.'s sixth counterclaim, which alleged breach of the parties' oral agreements "that North Carolina Federal would purchase DAV's interest in the joint venture," was not compulsory. *Id*. This 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 *N.C. Federal* and subsequent cases applying the logical relationship test establish, a counterclaim is compulsory only if it affects the outcome of the underlying action. *Compare*, *First Citizens Bank and Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991) (logical relationship exists between action seeking declaration of rights arising from administration of trust and counterclaim alleging trustee's breach of contractual agreement and breach of fiduciary duty), *with*, *Advance Intern., Inc. v. N. Carolina Nat. Bank of S.C.*, 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994)[9] (logical relationship did not exist between first mortgagee's right to foreclose on loan to business and second mortgagee's claim that its separate loan to the same business was based on misrepresentations given by first mortgagee), *and*, *Mullinax v. Bates*, 317 S.C. 394, 453 S.E.2d 894 (1995) (logical relationship did not exist between claim for accounting in connection with operation of apple orchard and claim made in earlier lawsuit, involving truck farm operations between the parties, where claims involved different businesses, dates of operation and parties, and the evidence as to each claim did not overlap).

At the time Respondents served DeClemente with their frivolous, contractually prohibited 2011 suit, DeClemente had no breach of contract counterclaim against Respondents because Respondents had not yet breached the Promissory Note. The 2015 lawsuit seeks

[9] Affirmed in part, vacated on other grounds by *Advance Intern., Inc. v. N. Carolina Bank of S.C.*, 320 S.C. 532, 466 S.E.2d 580 (1996).

payment of debt secured by Respondents' 2009 Promissory Note, given in exchange for DeClemente's ownership interest in ATMES. (R. pp. 472-476). Respondents' 2011 lawsuit against DeClemente and others alleges the defendants committed fraud and misrepresentation prior to Respondents' 2008 purchase of a different company named Abacare. *See*, (R. pp. 54-57) (outlined in section entitled "GENERAL ALLEGATIONS").

DeClemente's 2015 lawsuit and Respondents' 2011 lawsuit involve different causes of action, different companies, different parties, different transactions, and events separated in time by several years. The evidence to be presented in each trial does not overlap. Petitioner's 2015 lawsuit does not affect the outcome of Respondents' 2011 lawsuit, and *vice versa*. There is no logical relationship connecting the two lawsuits.

The Court of Appeals' res judicata holding conflicts with *N.C. Fed. Sav. and Loan Ass'n v. DAV Corp*., and warrants discretionary review by this Court.

CONCLUSION: No. 2015-CP-10-3325

Based on the evidence, binding precedent and arguments herein, Petitioner respectfully requests that this Court grant Certiorari and review the Court of Appeals' Opinion on the questions presented.

QUESTIONS PRESENTED: No. 2017-CP-10-5055

1. Did the Court of Appeals err in holding that Mr. DeClemente's declaratory judgment lawsuit is a compulsory counterclaim to Respondents' 2011 lawsuit?

    A. Did the Court of Appeals err in holding that a logical relationship exists between Mr. DeClemente's 2017 declaratory judgment lawsuit and Respondents' 2011 lawsuit?

    B. Did the Court of Appeals err in holding that Mr. DeClemente's 2017 declaratory judgment lawsuit is a compulsory counterclaim, even though justiciable controversy did not exist at the time DeClemente was served with Respondents' 2011 lawsuit?

STATEMENT OF THE CASE: No. 2017-CP-10-5055

Mr. DeClemente filed this 2017 declaratory judgment lawsuit on October 3, 2017. (R. 501-508). The Complaint is accompanied by a detailed supporting memorandum. (R. 509-512). The lawsuit seeks declaration of DeClemente's rights and Respondents' duties, as contained in the Full and Final Release agreement executed by the parties in 2009. Specifically, DeClemente seeks declaration of the rights and duties contained in the Release's Damages Satisfaction clause, and seeks enforcement of Respondents' contractual obligation to satisfy the damages judgment pending against him in Respondents' 2011 lawsuit against DeClemente and others. (R. p. 511).

On November 8, 2017, Respondents filed a motion to dismiss DeClemente's declaratory judgment suit. (R. pp. 513-515). Respondents also moved for sanctions against Petitioner's counsel and requested a speedy hearing. (*Id*). The circuit court heard arguments on Respondents' motions on December 11, 2017. On July 2, 2018, the circuit court granted Respondents' motion to dismiss, finding DeClemente's declaratory judgment lawsuit to be a compulsory counterclaim to Respondents' 2011 lawsuit, barred by res judicata. (R. pp. 11-15).

Petitioner filed Notice of Intent to Appeal on July 27, 2018. (R. p. 579). Appellate oral arguments were scheduled for March 9, 2020, but were canceled. On September 9, 2020, the Court of Appeals issued an unpublished Opinion affirming the circuit court's dismissal on the same grounds. *DeClemente v. Assistive Tech. Med. Equip. Servs., LLC*, Unpublished Opinion No. 2020-UP-263 (Ct. App. Sept. 9, 2020). On October 26, 2020, DeClemente filed for rehearing, with suggestion that the case be reheard *en banc*. (*Petition for Rehearing*, pp. 24-28). The Court of Appeals denied the Petition for Rehearing on December 21, 2020. Petitioner now seeks a Writ of Certiorari from this Court to review the Court of Appeals' decision.

ARGUMENT: No. 2017-CP-10-5055

I. THE COURT OF APPEALS ERRED IN HOLDING THAT MR. DECLEMENTE'S 2017 DECLARATORY JUDGMENT LAWSUIT IS A COMPULSORY COUNTERCLAIM TO RESPONDENTS' 2011 LAWSUIT.

A. There Is No Logical Relationship Between Mr. DeClemente's 2017 Declaratory Judgment Lawsuit And Respondents' 2011 Lawsuit.

Pursuant to Rule 13(a), SCRCP, a counterclaim is compulsory only "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." The doctrine of res judicata bars subsequent actions which would have been compulsory in a prior action between the same parties. *See*, *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("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."). This Court has previously held that a claim is compulsory under Rule 13(a) if there is a "logical relationship" between the underlying claim and the counterclaim. *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989).

In the case at bar, the evidence establishes that DeClemente's 2017 declaratory judgment lawsuit and Respondents' 2011 lawsuit arise from separate and unrelated transactions. DeClemente's declaratory judgment action seeks declaration of the parties rights and duties as agreed upon in the parties' Full and Final Release agreement executed as part of Respondents' 2009 purchase of Petitioner's 25% ownership interest in the parties' durable medical equipment company, ATMES. *See*, (R. p. 122-124). Specifically, the 2017 declaratory judgment suit seeks the court's declaration of DeClemente's rights as secured by the damages satisfaction clause of the Release, and seeks declaration of Respondents' contractual obligation to satisfy the damages judgment assessed against DeClemente after he was held in default in Respondents' 2011 lawsuit.

Respondents' 2011 lawsuit relates to the alleged conduct of multiple parties prior to the formation of ATMES and "alleged fraud and misrepresentation leading up to the 2008 sale of Abacare." (*Brief of Respondents*, p. 13). Overlooked by the Court of Appeals, Respondents succinctly admit that "DeClemente's 2009 buyout and the 2011 lawsuit against him are not related." *Id*.

Furthermore, the declaratory judgment action is not a collateral attack on, nor an attempt to re-litigate, the default judgment against DeClemente in Respondents' 2011 lawsuit. By default, Petitioner was held liable for the claims asserted in that lawsuit. (R. pp. 16-20). The circuit court's default judgment is being addressed in a separate appeal. *See*, App. No. 2018-01413; App. No. 2021-000038. Rather than a collateral attack on liability, Petitioner's declaratory judgment action seeks court determination of which party is responsible for satisfying the circuit court's damages judgment against DeClemente, and in no way addresses the court's default judgment. This basis, and the relief sought, is clearly explained in Petitioner's Memorandum in Support of Declaratory Judgment:

> "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. ... The Release requires that in the event damages are awarded against Mr. DeClemente, Defendants must satisfy the judgment. The Full and Final Release the parties executed on July 10, 2009 is Defendants' legally binding promise never to sue Plaintiff ***and*** to satisfy any judgment against him in case 2011-CP-10-8011."

(R. p. 511). Again, Petitioner's declaratory judgment suit does not seek to re-litigate his liability in the 2011 lawsuit. Rather, it seeks declaration of his rights, as afforded and guaranteed by the damages satisfaction provision of the parties' Full and Final Release. (R. p. 506).

A counterclaim is compulsory only if it affects the outcome of the underlying action. *See*, Argument: No. 2015-CP-10-3325, Section III(B), *supra* (compiling cases). In Respondents' 2011 lawsuit, DeClemente was found liable by default, and the circuit court entered damages in

Respondents' favor. The outcome of Respondents' 2011 lawsuit is completely unaffected by DeClemente's declaratory judgment lawsuit, as established by the fact that the case has ended with judgments on both liability and damages. (R. pp. 16-20, 30-44). The question of which party is contractually required to satisfy the damages judgment is an issue entirely separate and unrelated to the issues of liability and damages, which were decided by Respondents' 2011 lawsuit.

The Court of Appeals erred in holding that DeClemente's 2017 declaratory judgment action is barred as a compulsory counterclaim in Respondents' 2011 lawsuit, since there is no logical relationship between the lawsuits. The lower courts erroneously failed to differentiate between the issues of liability and amount of damages, on one hand, and responsibility for satisfaction of damages, on the other.

B. Justiciable Controversy Concerning Damages Satisfaction Did Not Exist At The Time Mr. DeClemente Was Served With Respondents' 2011 Lawsuit, And The Court Of Appeals Erred In Holding That DeClemente Was Required to Counterclaim a Cause Of Action Which Did Not Yet Exist.

In order to state a claim for declaratory judgment, "a party must demonstrate 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).

Thus, if justiciable controversy exists, "[a]ny interested party under a ... written contract ... may have any question concerning the construction or validity arising under the ... contract ... and obtain a declaration of rights, status, or other legal relations thereunder." *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 274, 705 S.E.2d 73, 78 (2010) (alteration in original) (quoting S.C. Code Ann. § 15-53-30 (2005)).

DeClemente's declaratory judgment suit seeks declaration of his rights and Respondents' obligations contained in the Release's damages satisfaction clause. (R. p. 511). Petitioner was able to seek judicial determination of his rights and Respondents' obligations *only after* he was held in default and Respondents showed intent to pursue damages. *See*, *Power v. McNair*, *supra*, 153-54, 177 S.E.2d at 553.

The Court of Appeals' erroneous res judicata holding fails to acknowledge the very language of the Rule upon which it is purportedly based. Rule 13(a), SCRCP, provides in part: "[a] pleading shall state as a counterclaim any claim *which at the time of serving the pleading* the pleader has against the opposing party." *Id*. (emphasis added).

At the time Petitioner was served with Respondents' 2011 lawsuit, the issue of whether Respondents were obligated to satisfy a potential, speculative future damages award, which *might* someday exist, was not ripe and appropriate for judicial determination. The issue of damages satisfaction was entirely "contingent, hypothetical, or abstract" at the time a counterclaim was required as compulsory under Rule 13(a), SCRCP. *Southern Bank & Trust Co.*, *supra*, 285 S.C. at 51, 328 S.E.2d at 67. Even if the 2017 declaratory judgment action had been pled as a counterclaim, it would have been dismissed as premature for lacking justiciable controversy. *See*, Rule 12(b)(6) (dismissal being warranted for "failure to state facts sufficient to constitute a cause of action"); *see also*, (*Petition for Rehearing*, pp. 27-28) (Section VII citing

Orr v. Clyburn, 277 S.C. 536, 290 S.E.2d 804 (1982) as illustrative of why it was not possible for DeClemente to plead declaratory judgment as a counterclaim in Respondents' 2011 lawsuit).

Since justiciable controversy over damages satisfaction did not exist until years after a counterclaim would have been required in Respondents' 2011 lawsuit, DeClemente's declaratory judgment action is not a compulsory counterclaim under the plain language of Rule 13(a), SCRCP. The Court of Appeals' erroneous holding to the contrary warrants discretionary review by this Court.

CONCLUSION: No. 2017-CP-10-5055

Based on the evidence, binding precedent and arguments herein, Petitioner respectfully requests that this Court grant Certiorari and review the Court of Appeals' Opinion on the questions presented.

Respectfully Submitted,

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