

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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S.C. SUPREME COURT

CERTIFIED QUESTION
From the United States Court of Appeals
For the Fourth Circuit

King, Keenan, and Harris, Circuit Judges

Appellate Case No. 2021-000027
Fourth Circuit Appeal No. 19-1957

Poly-Med, Inc.;

Plaintiff,

v.

Novus Scientific Pte. Ltd.;
Novus Scientific, Inc.;
Novus Scientific AB,

Defendants.

BRIEF OF PLAINTIFF

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I. INTRODUCTION

No consideration of this certified question should begin before Plaintiff, Poly-Med, Inc. (“Poly-Med”), makes this perfectly clear:

1. Poly-Med does not seek to sue or recover for any breaches of contract it discovered or should have discovered more than three (3) years before it filed suit; and
2. Poly-Med is in no manner seeking to have this Supreme Court “toll” or apply any principles of tolling to extend the statute of limitations for any breach of contract claim.

This Supreme Court provided the terminology which will generally be used in this brief in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015). In *Wilson*, this Court addressed “discrete, independently actionable wrongs.” In its certification order, the Fourth Circuit Court of Appeals adopted Poly-Med’s terminology (taken from various authorities) to discuss “fresh” and “stale” breaches. Use of these terms is perhaps the clearest way to set forth the claims for breach of contract for which Poly-Med seeks to recover against Novus.¹

¹ “Novus” or the “Novus Defendants” are Defendants, Novus Scientific Pte. Ltd.; Novus Scientific, Inc.; and Novus Scientific AB.

Poly-Med does not seek to recover for each discrete, independently actionable wrong Novus committed under the executory contract between them (the “Agreement”). Poly-Med acknowledges the applicable statute of limitations will not allow recovery of damages flowing from breaches outside the statutory period. Reduced to its simplest form, the chart below establishes the types of claims for which Poly-Med seeks damages and declaratory relief:



Poly-Med argues it is entitled to sue, and not have its action barred by the statute of limitations, for Breach D and Breach E on the chart. Breaches such as Breach D and Breach E are referred to as “fresh” breaches because they fall within the 3-year period prior to the lawsuit being filed. Breaches that occurred and were discovered² more than 3 years before the lawsuit was filed are referred to as “stale” breaches. Poly-Med does not seek to recover for these.

² For the sake of simplicity, the chart omits breaches that, although occurring more than 3 years before the lawsuit was filed, were not, and could not have been, discovered until within the three-year limitations period; however, such breaches are also at issue in this case and, pursuant to the discovery rule, should be treated no differently than the breaches occurring within the limitations period.

No judicially engrafted tolling principles are sought to allow recovery for “stale” breaches, but recovery should be allowed for “fresh” breaches when viewed in light of these facts:

1. The Agreement is an ongoing executory contract;
2. Allowing suits for fresh breaches prevents parties from gaining immunity from suit by engaging (either purposefully or by chance) in a breach of contract at the earliest possible time;
3. Such a ruling is consistent with the purpose of statutes of limitations, as the recency of fresh breaches correlates to witnesses with fresh memories and documentary evidence that is readily available; and
4. Such a ruling is consistent with the view that a contract, especially an executory contract, can be breached on more than one occasion and in more than one way.

II. QUESTION PRESENTED

Under a contract with continuing rights and obligations, does South Carolina law recognize the continuing breach theory in applying the statute of limitations to breach-of-contract claims, such that claims for separate breaches that occurred (or were only first discovered) within the statutory period are not time-barred, notwithstanding the prior occurrence and/or discovery of breaches as to which the

statute of limitations has expired? Does it matter if the breaches are of the same character or type as the previous breaches now barred?

III. PROCEDURAL BACKGROUND

Poly-Med filed suit on May 8, 2015, alleging breach of contract and other claims, seeking both monetary and equitable relief. (*See* J.A. 10.)³ Poly-Med contends the Novus Defendants have violated—and continue to violate—the Agreement by (1) *using and selling* the Mesh (referenced in the Fourth Circuit’s certification order) for applications beyond hernia repair, including, but not limited to, breast reconstruction; (2) *manufacturing* the Mesh *specifically for non-hernia repair applications*; (3) violating Section 8 of the Agreement by filing patent applications in their name(s) and not in Poly-Med’s, maintaining and prosecuting patent applications in their name(s) and not in Poly-Med’s, failing to keep Poly-Med advised of the progress of the applications, and failing to first consult with Poly-Med about the desired course of action;⁴ (4) asserting or assigning ownership rights to certain patents that are the property of Poly-Med; and (5) taking other prohibited actions using Poly-Med Know How. (*See generally* J.A. 1163–1191.)⁵

³ Poly-Med’s operative complaint is its second amended complaint, filed July 10, 2017. (*See generally* J.A. 1163–1191.)

⁴ (*See* J.A. 86–87 § 8.)

⁵ The words “using and selling” and “manufacturing” are emphasized to underscore the difference between *using and selling*, on the one hand, and *manufacturing*, on the other. The right to *use and sell* the Mesh is distinct from the right to actually *manufacture* the Mesh. These rights are set forth in separate

Novus moved the district court for partial summary judgment as to Poly-Med’s “hernia only” and “patent application” breach of contract claims, pointing to evidence that supposedly showed Poly-Med knew of Novus’s improper use of the Mesh for non-hernia applications and improper patent applications no later than 2010 and arguing that as a result, all of Poly-Med’s breach of contract claims were barred by South Carolina’s three-year statute of limitations, S.C. Code Ann. § 15-3-530(1). (*See* J.A. 31.)

Poly-Med argued certain of its breach of contract claims were based on violations of the Agreement by Novus giving rise to independent causes of action *as they accrued less than three years before suit was filed*, i.e., within the statute of limitations. (*See* J.A. 32–33.) Poly-Med identified numerous distinct and separate ways in which Novus had breached the Agreement less than three years before (and even after) suit was filed.⁶ Poly-Med also identified distinct and separate breaches

provisions of the Agreement. (*Compare* J.A. 81–82 § 5 with 83–84 § 6(c).) *See* 1 Eckstrom’s Licensing in For. & Dom. Ops. § 1:9 (West 2019) (“A licensor does not have to grant his or her entire rights to a licensee. Licensors can, and do, choose to limit the extent of the grant conveyed to:[] (1) the duration of the license; (2) the right to manufacture, use, or sell; (3) the field of use; (4) the territory; and the quantity. . . . By entering into a license, the patentee is exchanging rights, not goods, and may relinquish only a portion of its ‘bundle’ of patent protections”) (citing *Impression Prods., Inc. v. Lexmark Intern., Inc.*, 137 S. Ct. 1523, 1534 (2017)); *id.* at § 1:11 (“A patent grant can be divided into three rights—the rights to make, to use, and to sell.[] These rights may be split by a patentee, granting any or all to his or her licensee. Likewise, grants of other intellectual property rights can be restricted to particular types of activities.”) (citing *Adams v. Burke*, 84 U.S. 453 (1873)).

⁶ A contract, and in particular an executory contract, may be subject to

that occurred outside the three-year limitations period that it did not discover, and could not have discovered, until a date within the three-year limitations period. All these violations were distinct under the terms of the executory contract, with each new breach giving rise to a separate cause of action for breach of contract subject to a new statute of limitations period.

Alternatively, Poly-Med was able to show certain breaches had only occurred *for the first time* less than three years before (and some even after) suit was filed. As such, each separate breach would give rise to a new cause of action subject to a new limitations period. Either way, Poly-Med argued, its breach of contract claims were not barred by the statute of limitations.

The district court granted Novus’s motion for summary judgment. (*See generally* J.A. 1660–1676.) In so doing, the court expressly recognized that “the crux of [the motion] require[d] [it] to determine whether South Carolina in the breach of contract context recognizes the theory of ‘continuing breach,’ ‘continuing wrong’ or ‘continuing accrual’ . . . wherein each discrete event of alleged breach individually starts a new limitations period.” (J.A. 1671; *see also* J.A. 1671–1672 (“[I]f the court finds that continuing breach is recognized under South Carolina law, Poly-Med’s claims alleging the breach of the Agreement would not be barred by the statute of

multiple breaches. *Cf. Marshall v. Dodds*, 426 S.C. 453, 827 S.E.2d 570 (2019) (recognizing multiples breaches of the standard of care for medical malpractice claims) (citing *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691, 698 (2007)).

limitations merely because *one or more of the alleged breaches occurred outside of the three year limitations period.*”) (emphasis added).)

The case ultimately made its way to the Fourth Circuit Court of Appeals.⁷ There, the court noted that two relatively recent cases from this Supreme Court raised questions on the issue of whether all of Poly-Med’s claims for breach of contract were barred by prior independent breaches admitted, and in fact bragged about, by Novus. The Fourth Circuit indicated it was particularly inclined to certify this question based upon this Court’s decisions in *Wilson*, 414 S.C. 33, 777 S.E.2d 176, and *Marshall*, 426 S.C. 453, 827 S.E.2d 570. Poly-Med asserts review of the holdings in these cases, consideration of the purpose and utility of the discovery rule, and this Court’s sense of law, justice, and right should result in an affirmative answer to the primary certified question. To hold to the contrary would reward “parties engaged in long-standing malfeasance . . . [to] obtain immunity in perpetuity from suit even for recent and ongoing malfeasance.” *Wilson*, 414 S.C. at 78, 777 S.E.2d 199–200.

IV. STANDARD OF REVIEW

“In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning

⁷ Along the way, there were several procedural issues, as well as an attempt to have this question certified earlier in the appeal process, but none of that is material to this Court’s answer to the certified question now before it.

would best comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.” *Shaw v. Psychemdics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019).

This Court should not be too quick to rely on old answers to different questions; nor should it rely at all on senseless, long-discarded procedural fictions that arose by historical accident. This Court should answer novel questions on a substantive basis and “its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.” *See Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass’n*, 424 S.C. 542, 551–54, 819 S.E.2d 124, 129–130 (2018) (Few, J., concurring).

V. ARGUMENT

A. **This Supreme Court should answer the primary⁸ Certified Question in the affirmative so as to allow Poly-Med to bring suit on fresh or non-stale causes of action.**

This appeal hinges on the resolution of a question of law. Does South Carolina law recognize either the doctrine of continuous breach or continuous accrual in applying the statute of limitations to breach of contract claims, so as to prevent the mere existence of a stale breach(es) from barring a claim(s) based on a separate, fresh breach(es) in the context of a contract, like the Agreement here, that

⁸ The Fourth Circuit raised a secondary question that is dependent on the answer to the primary question raised. It is addressed separately.

establishes continuing rights and obligations governing the parties' relationship over time?⁹ The answer should be YES. A contrary answer should offend this Court's sense of law, justice, and right and would not comport with the law or the public policies of this state.

The Agreement is an "executory" contract, not an "executed" contract. The following quote from the Tenth Circuit is helpful in understanding the difference:

There are contracts, however, that have been said to require continuing (or continuous) performance for some specified period of time, a period that may be definite or indefinite when the contract is made. These contracts too are capable of a series of 'partial' breaches, as well as of a single total breach by repudiation or by such a material failure of performance when due as to go 'to the essence' and to frustrate substantially the purpose for which the contract was agreed to by the injured party. For each 'partial' breach a separate action is maintainable....

Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co., 664 F.2d 252, 255–56 (10th Cir. 1981) (citing 4 A. Corbin, *Corbin on Contracts* § 956, at 841 (1951)). Simply put, "[a]n executory contract is '[a] contract that remains wholly unperformed or for which there remains something still to be done on both sides.' *Executory Contract*,

⁹ With regard to the performance of all obligations, the Agreement specifically provides in relevant part, "Any waiver by either party hereto of any rights arising from any breach of any provision of this Agreement shall not be construed as a continuing waiver of other breaches of the same or other provisions of this Agreement. (J.A. 98–99).

Black's Law Dictionary (9th ed. 2009).” *Olsen v. Fair Co.*, 369 P.2d 473, 478 (Utah App. 2016).

The key issue is whether claims for breaches that happened (or were only first discovered) within the statute of limitations are time barred under an executory contract because of the prior discovery of stale breaches. Based on applicable law, considerations of right and wrong, and the significant impact that barring such claims could have on the many complicated executory contracts currently entered in our state as manufacturing and other businesses locate here, they should not be.

Novus's motion for partial summary judgment as to Poly-Med's "hernia only" and "patent application" breach of contract claims was based on the theory that Poly-Med's actual or constructive knowledge of Novus's violation of the Agreement's "hernia only" and "patent application" provisions rendered time barred *all* claims for breach of contract that Poly-Med could *ever* have—even claims based on breaches that undoubtedly occurred (or were not first discovered by Poly-Med) within three years of the suit. Application of Novus's theory would bar claims based on breaches yet to be committed, as long as at least one prior breach had occurred.

The fallacy of Nova's position is obvious. One cannot discover that which has not yet happened. As such, one should not be barred from bringing suit if such independent wrong was in breach of a contract. Such an unjust result is not mandated by the discovery rule. Rather, this Court should focus on instances such

as this where there is not just a single breach, i.e., “the” breach, but rather there are separate and independent *breaches* (plural) of an executory contract. *Cf. Marshall*, 426 S.C. at 461, 827 S.E.2d at 574 (“[W]e note what this [statutory] provision does not say—the date of the *first* occurrence.”) (emphasis added).

The Agreement prohibits Novus’s *manufacture* of the Mesh for any purpose other than hernia repair. The evidence in the record is that Novus did not begin to *manufacture* the Mesh at all until 2014, well within the three-year statute of limitations. (See J.A. 2723 ¶ 21, 2756 ¶ 64.) Nonetheless, the district court ruled that Poly-Med was powerless to enforce the Agreement’s prohibition on *manufacturing* for non-hernia purposes because Novus had (among other, more recent occasions, which continue presently) previously breached the Agreement’s prohibition on *using and selling* the Mesh (manufactured by Poly-Med) for applications other than hernia repair dating back to 2010.

Under South Carolina law, we use the terminology “the” breach in reference to the discovery rule.¹⁰ It only follows that, like *Marshall*, where there are independent acts of negligence and suit is brought within three (3) years of knowledge of such independent breaches, such fresh claims should not be barred by the statute of limitations.

¹⁰ Merriam-Webster defines “the” as “a function word to indicate the following noun is definitive.” As discussed in *Marshall*, our cases do not say “any” or “first” breach in addressing the discovery rule. Rather, they say “the” breach.

Even though Novus filed some patent applications in breach of the Agreement more than three years before this action was filed, Poly-Med's claims for all breaches of contract resulting from patent applications filed by Novus cannot be time barred. At least four Mesh patent applications were filed within three years of this lawsuit's filing, and Poly-Med could not have known about at least two others until a date less than three years before this action was filed.

It is not possible for all of Poly-Med's breach of contract claims to be time barred by the statute of limitations because many of Novus's violations that form the basis for such claims first occurred less than three years before this action was filed or even after it was filed. Many of the breaches Poly-Med sued on were timely asserted for one or both of the following reasons: (a) certain violations were recurring and had continued throughout the statutory period to the present, with each such violation giving rise to a new cause of action for breach of contract subject to a new limitations period and/or (b) the violation first occurred less than three years before this suit was filed, with each such violation giving rise to a cause of action that could not possibly be barred by the statute of limitations.

In *Santee Portland Cement Co. v. Daniel International Inc.*, 299 S.C. 269, 384 S.E.2d 693 (1989), this Supreme Court held the discovery rule was applicable to contract actions. Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered or should have discovered "*the breach*"

through the exercise of reasonable diligence. *See e.g. RWE Nukem Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) (emphasis added).

On its face, this rule appears rather straightforward. Where it requires further analysis is where the contract in issue is an executory contract with continuous and ongoing obligations and where one party to the contract engages in multiple breaches. In those instances, the non-breaching party (Poly-Med here) must make a determination. Should or must it bring suit over every breach of the contract or may it determine certain breaches, for whatever reason, should not lead to litigation? Poly-Med fully recognizes it has no right of recovery for claims or breaches that are stale, i.e., outside of the three-year statute of limitations. What happens, however, when the breaching party (Novus here) decides to breach the contract again, perhaps even multiple times after the initial breach? In a 10-year contract, if the breaching party commits a breach on day one that is known to the other party to the contract, has it forever inoculated itself from suit for more recent, separate and distinct breaches after 3 years pass from that first breach? The answer should be no.

(1) South Carolina Cases

Recent decisions of this Supreme Court in cases involving related general principles show what appears to be an understanding in favor of allowing the prosecution of claims arising out of recently committed wrongs (and disallowing *de facto* immunity to the perpetrator of those wrongs) even where claims arising out of

earlier (i.e., stale) wrongs of the same character had become time barred. *See, e.g., Wilson*, 414 S.C. at 78, 777 S.E.2d at 199 (holding that continuing UTPA violations constituted a series of “discrete, *independently actionable* wrongs”) (emphasis added); *Marshall*, 426 S.C. at 465–67, 827 S.E.2d at 576–77 (relying on *Wilson* outside the UTPA context and finding that negligence claims based on acts within the statutory period are actionable and not barred by the medical malpractice statute of repose).

South Carolina law supports the legal concept that separate, recurring invasions even of the same right constitute a continuous accrual with each triggering its own limitations period. In *Wilson*, 414 S.C. 33, 777 S.E.2d 176, the South Carolina Attorney General brought an action against a pharmaceutical company alleging violations of the UTPA in connection with its drug labeling. The defendant argued the claims were barred by UTPA’s three-year limitations period because its labeling violations began more than three years before the applicable limitations period.

Though this Supreme Court found that claims for violations occurring prior to the limitations period were time barred (i.e., stale), it rejected the defendant’s position that its successful statute of limitations defense for old violations also “insulated” it from liability for its new ones, endorsing the “concept of continuous accrual” in cases where a claim “presents a series of discrete, independently

actionable wrongs” *Id.* at 77–78, 777 S.E.2d at 199. This Court explained the principles of this type of continuous accrual respond to:

[T]he inequities that would arise if the expiration of the statute of limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where misfeasance is ongoing, a defendant’s claim to repose, the principal justification underlying the limitations defense, is vitiated. . . . [Accordingly,] separate, recurring invasions of the same right can each trigger their own statute of limitations. . . . *Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: [w]hen an obligation or liability arises on a recurring basis, a course of action accrues each time a wrongful act occurs, triggering a new limitations period.*

Id. at 78, 777 S.E.2d 199–200 (emphasis added) (quoting *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871, 880 (2013) (quotations and citations omitted)).

The *Marshall* Court faced a similar issue: “In a medical malpractice case where evidence exists that doctors breached the standard of care on multiple occasions, does the statute of repose begin to run with each breach, resulting in recent breaches being actionable even though older ones are barred?” 426 S.C. at

460–61, 827 S.E.2d at 574.¹¹ Answering the question in the affirmative, this Court reasoned:

We fail to see the logic in preventing an aggrieved party from seeking redress for acts that occurred within the repose period. It can hardly be said that the acts of negligence alleged here that occurred within the repose period constitute “long-forgotten” acts or omissions.

*Our decision also does not implicate any tolling principles, as only claims based on acts within the repose period are actionable. We find it wholly inconsistent to immunize serial malpractice under the guise that the legislature intended an “absolute time limit” when the acts for which the Marshalls seek to recover fall within such time constraints. *See State ex rel. Wilson v. Orth- McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 78, 777 S.E.2d 176, 199-200 (2015) (noting that fixing the deadlines on the date of the first instance of misconduct *when there is repeated wrongdoing would allow “parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance*. In addition, where misfeasance is ongoing, a defendant’s claim to repose, the principal justification underlying the limitations defense, is vitiated”) (quoting *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 151 Cal. Rptr. 3d 827, 292 P.2d 871, 880 (2013)).*

¹¹ Poly-Med realizes the *Marshall* decision was not unanimous. As noted, Poly-Med seeks no tolling, which was the primary area of dispute. While *Marshall* involved a statute of repose, we are dealing with a statute of limitations here. A statute of repose “creates a substantive right in those protected to be free from liability after a legislatively-determined period of time, and it creates a substantive definition of rights rather than a procedural limitation provided by a statute of limitation.” *Rogers v. Lee*, 414 S.C. 225, 230, 777 S.E.2d 402, 405 (Ct. App. 2015). This was a key point of the *Marshall* dissent, but it is immaterial in the instant case.

Id. at 465–66, 827 S.E.2d at 576 (emphasis added); *see also Johnson v. Roberts*, 427 S.C. 258, 259, 830 S.E.2d 910, 911 (2019) (relying on *Marshall* for the proposition that “the statute of repose begins to run after each occurrence [of negligence]”).

Poly-Med maintains that the reasoning and logic of *Marshall* and *Wilson* applies with equal force to the present case. This Supreme Court has plainly recognized the common-sense principle that aggrieved parties should be able to seek timely redress for recent wrongs. There is no logical reason why it would matter whether those wrongs take the form of statutory violations or breaches of contract. Indeed, this conclusion makes all the more sense here, where the contract at issue is said (by the district court and Novus) to still be operative—and thus continues to contain the very terms Novus maintains it has now been freed to violate without consequence in perpetuity.

Wilson provided the basis for the consideration of continuous accrual by a federal district court in this state in denying a motion to dismiss. *Companion Prop. & Cas. Ins. Co. v. Wood*, C.A. No. 3:17-cv-00514-CMC, 2017 WL 4168526 (D.S.C. 2017). The *Companion* Court noted that in light of the fact that the plaintiff argued that the obligations at issue were “*recurring obligations*,” and in light of limitations found in the agreement at issue, the court would not bar, based upon the statute of limitations, the contract based claims, at least not on a motion to dismiss. *Id.* at *8 (emphasis added). *Companion* is well-reasoned support for recognizing a

continuous breach/continuous accrual theory for breach of contract claims under South Carolina law.

Under the district court's reasoning in this case, and if the primary certified question is answered in the negative, a party must sue for any breach of contract—or else it waives its rights to sue for other future distinct breaches under the contract, including those which have not yet occurred. The party must sue for every single claimed breach, no matter how slight, no matter how developed the parties' relationship and, as here, even if the parties contractually agreed that no such instance would be a waiver of rights. (J.A. 94–95 §20, 98–99 § 27.) If the party fails to do so, it completely loses the ability to enforce its contractual rights upon expiration of the three-year period following the first breach—even if similar but distinct or unrelated breaches occur in the future. This was never the purpose of the statute of limitations or the discovery rule. South Carolina's courts have always attempted to balance proper considerations such as the impact of ongoing work when addressing breach of contract claims. *Cf. Republic Contracting Corp. v. S.C. Dep't of Highway & Pub. Transp.*, 332 S.C. 761, 503 S.E.2d 761 (1998).

Counsel cannot attest that he has reviewed every breach of contract case decided in this state after the discovery rule was adopted for breach of contract cases in *Santee Portland Cement*, 299 S.C. 269, 384 S.E.2d 693, but he has tried to do so. In the cases reviewed, he has observed the following:

1. Cases involving executed contracts and a single violation of the contract. *See, e.g., Drews Co., Inc. v. Ledwith-Wolfe Ass'n*, 296 S.C. 207, 371 S.E.2d 532 (1988). In these cases, it is relatively clear how to apply the discovery rule as there is only one breach (“the” breach) as described in the discovery rule.
2. Case(s) involving various obligations but only one term or requirement is breached. *See, e.g., RWE Nukem*, 373 S.C. 190, 644 S.E.2d 730 (only issue with administrative and management services contract at issue related to return of documents). Again, as there is only one breach (“the” breach), one is able to apply the discovery rule as only one date is in issue.
3. Cases where there has been a breach of the contract but a plaintiff did not understand the full extent of his or her damages. *See, e.g., Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 680 S.E.2d 778 (Ct. App. 1999). In those cases again, there was but one breach.

Missing from our state’s jurisprudence are cases addressing the issue(s) presented in this case. In law school, professors caution soon-to-be lawyers not to practice “headnote law.” Headnote law and force of habit could mistakenly lead one to look for the first breach and thus immunize any other breaches that fall more than three years after the non-breaching party knew or should have known of the initial

breach. This is a different issue than has previously been presented to this Supreme Court.

It would be easy for a court to say, “knew or should have known of the breach,” and apply such limitations very broadly in answering the questions posed by the Fourth Circuit. Indeed, Justice Kittredge has raised a similar concern about taking such an approach:

At times, certified questions place this Court in the position of answering questions in the abstract. We do so in furtherance of our prerogative to declare the law of South Carolina, and the federal courts’ respectful deference to our authority to do so. Certified questions are, of course, best suited for questions of law. We are often presented with ostensible questions of law that are predicated on certain factual assumptions. We must answer those questions narrowly and recognize that even a slight tilting of the facts can impact the analysis and alter the conclusion.

Donze v. Gen. Motors, LLC, 420 S.C. 8, 24, 800 S.E.2d 479, 487 (2017) (Kittredge, J. concurring). This case presents one of those opportunities where this Supreme Court should look to that which is just and right.

(2) Other Cases/Authority

In *MedCap Corp. v. Betsy Johnson Health Care Sys., Inc.*, 16 Fed. Appx. 180, 181, 2001 WL 880097 (4th Cir. 2001), the Fourth Circuit Court of Appeals recognized the very issue Poly-Med confronts here:

The Hospital in its five-year contract [for the use of a piece of medical equipment] violates the exclusivity

requirement during the first month, but complies each month thereafter for four years [the agreed applicable statute of limitations for breach of contract actions under North Carolina law]. Four years after this one breach, the Hospital chooses to breach the contract each and every month for the remainder of the contract term. The position of the Hospital would be that the statute of limitations began running at the first month's breach and thereby precluded any action by MedCap for the violations occurring during the last year of the contract. *Such a position is obviously not reasonable*

Id. at 183 (emphasis added). This position is equally unreasonable as applied to the facts of this case.

Other states have addressed similar scenarios and reached similar common sense approaches which protect the rights and expectations of the parties to contracts, support the policy considerations behind statutes of limitations, and do not permit a party to a contract to hide behind a single, alleged prior breach to provide an unfair and unjust defense for later breaches which may or may not have any relevance or similarity to the claimed initial breach. This Supreme Court should follow that logic in this case, particularly in light of Novus's very proud defense that it may have breached the Agreement from the day it was signed—even though Novus had continuing obligations governing its actions throughout the term of the Agreement and never repudiated the Agreement.

Poly-Med hopes this Supreme Court finds interesting the fact that Novus, unlike most parties asserting a statute of limitations defense, does not raise issues

concerning missing evidence or witnesses. It does not claim it was somehow lulled into believing it had the right(s) under the Agreement to take the various actions (i.e., breaches) it is being sued for by Poly-Med. Rather, it proclaims it likely breached the Agreement on the date it was entered. (*See* J.A. 1690–91.) It seeks to turn admitted wrongdoing into a viable defense—to profit and obtain legal rights to which it is not entitled via breaching an executory Agreement (under which it continued to partially perform even after the stale breaches).

Certain states recognize that contracts requiring continuous performance are capable of being partially breached on more than one occasion. *See Hi-Lite Prods. Co. v. Am. Home Prods. Corp.*, 11 F.3d 1402 (7th Cir. 1993); *City of Quincy v. Womack*, 60 So.3d 1076 (Fla. Dist. Ct. App. 2011) (in asserting the limitations period had expired, the City ignores the continuing nature of its obligations under the contract and that its ongoing nonperformance constituted a continuing breach while the contract remained in effect). Each partial breach is actionable and subject to its own accrual date and limitations period. *Corbin on Contracts* § 956, at 841; *see also Luminall Paints, Inc. v. La Salle Nat. Bank*, 163 Ill. App. 3d 243, 243–44, 581 N.E.2d 191, 195 (1991); *Thread & Gage Co., Inc. v. Kucinski*, 116 Ill. App. 3d 178, 182–83, 451 N.E.2d 1292, 1296–97 (1983). Because each breach of a continuous duty has its own accrual date, a plaintiff may sue on any breach that occurred or was discovered within the limitations period, even if earlier breaches

occurred outside the limitations period and damages are not recoverable. That is all Poly-Med asks in this case.

Virginia has a well-developed body of case law on this issue. Whether a claim based on Virginia law accrues at a single time, or accrues at the moment of the initial wrongful act, or a new claim accrues separately with each wrongful act depends on the specific nature of the wrongful act and the harm it causes. *See Jones v. Morris Plan Bank of Portsmouth*, 168 Va. 284, 191 S.E. 608, 609–10 (1937); *see also Hunter v. Custom Bus. Graphics*, 635 F. Supp. 2d 420, 431 (E.D. Va. 2009) (“A survey of Virginia case law indicates that the answer to [the question of whether a claim accrues once or several times] depends entirely upon the nature and type of each individual transaction that supposedly constituted a breach.”).

The specific test applied by Virginia courts to make this determination was articulated in *Hampton Roads Sanitation District v. McDonnell*:

If the wrongful act is of a permanent nature and *one that produces all the damages which can ever result from it, then the entire damages must be recovered in one action, and the statute of limitations begins to run from the date of the wrongful act.* Conversely, when wrongful acts are not continuous but occur only at intervals, each occurrence inflicts a new injury and gives rise to a new and separate cause of action.

234 Va. 235, 239, 360 S.E.2d 841, 843 (1987) (internal quotation marks, citations, and brackets omitted; emphasis added).

In *Hampton Roads*, the court determined that an “original discharge of sewage in 1969 did not produce all the damages to the property. The discharges were not continuous; instead, they occurred only at intervals. Thus, each discharge inflicted a new injury for which [plaintiff] had a separate cause of action.” 234 Va. at 239, 360 S.E.2d at 844.

Similarly, in *American Physical Therapy Association v. Federation of State Boards of Physical Therapy*, the Virginia Supreme Court held that “each time the [defendant] imposed a new fee” in violation of the contract at issue, “a new injury occurred and a separate cause of action accrued.” 271 Va. 481, 484, 628 S.E.2d 928, 930 (2006). In both *Hampton Roads* and *American Physical Therapy*, just as in this case, the alleged wrongful acts occurred at discrete intervals and the injury from each act could be attributed to specific and distinct acts of wrongful conduct or separate breaches of the contract that produced distinct damages.¹²

The facts here are also analogous to those found in *Dave & Buster’s, Inc. v. White Flint Mall, LLP*, 616 F. App’x 552 (4th Cir. 2015). There, Dave & Buster’s entered into a lease with White Flint Mall to open one of its chain of

¹² Novus may attempt to distinguish Virginia’s approach by noting that Virginia has not adopted the discovery rule, but the presence or absence of the discovery rule is immaterial here. While the presence or absence of the discovery rule may impact the date a cause of action accrues, it plays no role in allowing a plaintiff to bring suit for specific or distinct acts of wrongful conduct or separate breaches of contract that produce distinct damages within the applicable limitations period.

restaurant/amusement facilities in the mall. The agreement included a radius restriction clause by which Dave & Buster's agreed not to operate a competing facility within a given radius of the mall. *Id.* at 554. Dave & Buster's began operating a competing facility within the restricted area. In 2006, the mall notified Dave & Buster's that the facility violated the agreement but stated that it was not going to place Dave & Buster's in default. *Id.* at 554–55.

In 2012, the mall gave Dave & Buster's formal notice and demanded that the radius restriction violation be cured. When the default was not cured, the mall terminated the agreement. Dave & Buster's continued to operate and pay rent while the parties attempted to negotiate a resolution. When those efforts failed, Dave & Buster's filed suit seeking a declaratory judgment that the mall's claim for breach of contract was barred by Maryland's three-year statute of limitations. *Id.* at 555.

Ruling in favor of the mall, the court concluded the agreement between the parties imposed a “continuing obligation on [Dave & Buster's] not to operate any competing facilities within the radius restriction area so long as the contract continued to be valid and the parties continued to do business under its terms.” *Id.* at 556. The court found that “an action for breach of contract accrued for so long as Dave & Buster's was in violation of the radius restriction clause through the operation of [the competing facility].” *Id.* “The situation here does not involve the ‘continuing effects of a single earlier act.’” *Id.* (quoting *MacBride v. Pishvaian*, 402

Md. 572, 937 A.2d 233, 240 (2007), *overruled on other grounds by Litz v. Maryland Dep't of Environment*, 76 A.3d 1076, 1090 n.9 (Md. App. 2013)).

The doctrine of continuous accrual of causes of action for breaches of contract finds support in other jurisdictions as well. *See DC Comics v. Pac. Pictures Corp.*, 938 F. Supp. 2d 941, 949 (C.D. Cal. 2013) (“When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.”); *Westchester Cty. Corr. Officers Benev. Ass’n, Inc. v. Cty. of Westchester*, 65 A.D.3d 1226, 1228, 885 N.Y.S.2d 728, 732 (2009) (“[W]here a duty imposed prior to a limitations period is a continuing one, the statute of limitations is not a defense to actions based on breaches of that duty occurring within the limitations period.”); *Jodek Charitable Tr., R.A. v. Vertical Net Inc.*, 412 F. Supp. 2d 469, 475 (E.D. Pa. 2006). South Carolina should do likewise and allow Poly-Med to sue for “fresh” breaches of contract.

(3) Practical Considerations

As a practical matter, this issue appears in our state’s circuit courts on a regular basis, especially in construction cases. A builder enters a contract to build a building in accordance with certain plans and specifications. The plans and specifications are generally incorporated into the contract. The contractor paints the building butter yellow instead of sunshine yellow as called for in the contract. Research shows this difference in color has an impact on the resale value of the

building. There is a breach of contract, but perhaps the owner, for business, personal, or whatever reasons, decides not to sue for the breach. Three years and one day later, the roof starts leaking because the plans were not followed by the contractor. The contractor will argue it breached the contract when it painted the building a color other than the one specified in the contract. As such, under Novus's proposed answer to the certified question, any issues with the roof leak are barred, as the owner knew or should have known about the potential claim against the contractor. The same would hold true for any breaches of contract later discovered with the building.

While this example may seem a bit far-fetched, similar reasoning and motions for summary judgment on this ground are heard regularly by the circuit courts of our state. In that a trial court need not issue any findings on the basis (other than stating there are disputed issues of fact) for denying a motion for summary judgments and denial of summary judgments are not appealable, this issue has only a slight chance to make it to this Court. The trial courts recognize there may be more than one breach of a contract just as in the question before this Court. As such, they are disinclined to allow a party to "inoculate" itself from liability by committing an early breach and using that as a shield or defense to any liability or other breaches of contract more than three years and a day later. This Supreme Court should do likewise.

There are those who argue allowing such lawsuits would deprive the court and the jury of relevant evidence. Poly-Med agrees that statutes of limitation are fundamental to a well-ordered judicial system and serve an important role as to the presentation of evidence and putting some issues to rest. At the same time, application of a statute of limitations should not give a defendant a license to perpetrate misconduct. As Judge Posner aptly noted, if the last act of the unlawful course of conduct occurred within the limitations period, some of the evidence of the alleged misconduct will be “fresh,” and any uncertainty a defendant has about whether they will be sued will evaporate upon the expiration of the statute of limitations period *following the final bad act*. *Taylor v. Meirick*, 712 F.2d 1112, 1119 (7th Cir. 1983) (applying continuous violations doctrine to trademark claims).

If this Court were to answer the primary certified question in the negative, the Court would effectively be telling contracting parties that they must sue for any breach, no matter how slight or inconsequential. If the aggrieved party chooses not to sue on an early, minor breach (perhaps because the resulting harm was negligible or the aggrieved party does not wish to destroy an ongoing business relationship), the aggrieved party would be forever foreclosed from asserting its rights with respect to any later, more consequential, separate and distinct breach. Surely, this Court does not wish to compel parties to long-term, executory contracts to file suit against the other party every time that other party arguably commits a breach of the contract,

no matter how insignificant. The result would be more litigation and needlessly fractured business relationships.

B. This Supreme Court should conclude it does not matter if the breaches are of the same character or type as the previous breaches now barred.

As a secondary question, the Fourth Circuit asked, “Does it matter if the breaches are of the same character or type as the previous breaches now barred?” The answer is NO. The key is they are separate breaches, distinct from the earlier, stale breach. To parse the issue of what is the “character or type” of a breach would turn cases such as this into the legal equivalent of six degrees of separation. Defendant’s would still have an incentive to breach early and then at the end of the statute of limitations, expand boastfully the degree of the prior breach.

More importantly, in answering this question, one should look at the key cases discussed in this brief. In *Wilson*, 414 S.C. 33, 777 S.E.2d 176, the South Carolina Attorney General brought an action against a pharmaceutical company alleging violations of the UTPA in connection with its mislabeling of pharmaceuticals. Although certain claims for mislabeling were time barred, fresher claims for the same continued mislabeling were not barred. The wrongful acts (mislabeling) allowed were of the same character or type as the claims found to be barred by the statute of limitations. Separate, recurring invasions *of the same right* can each trigger their own statute of limitations.

In *Marshall*, this Supreme Court faced a similar issue. While separate acts of malpractice were not necessarily identical, arguably they could be classified as “acts of the same character or type.” Nonetheless, this Court held, in a medical malpractice case, where evidence exists that doctors breached the standard of care on multiple occasions, the statute of repose begins to run with each breach, resulting in recent breaches being actionable even though older ones were barred.

In other cases, we see that the fact that the acts complained of are potentially of the same character and type plays no role in determining if a fresh breach is actionable. In *MedCap*, 16 Fed. Appx. at 181, the Fourth Circuit recognized reoccurring breaches of a contractual provision requiring the exclusive use of a certain type of hospital equipment were not barred by the statute of limitations. In other words, the same contractual provision was being breached over and over, each time giving rise to a new claim. Such would surely be classified as “acts of the same character or type.” See also *Am. Physical Therapy*, 271 Va. 481, 628 S.E.2d 928 (Virginia Supreme Court held that “each time the [defendant] imposed a new fee” in violation of the contract at issue, “a new injury occurred and a separate cause of action accrued”); *Hi-Lite Prods.*, 11 F.3d 1402; *Womack*, 60 So.3d 1076 (in asserting the limitations period had expired, the City ignores the continuing nature of its obligations under the contract and that its ongoing nonperformance constituted a continuing breach while the contract remained in effect).

As these cases demonstrate, whether the acts in issue are “of the same character or type” is not material to determining the certified question asked by the Fourth Circuit. The record here shows some breaches by Novus were more similar and others, such as those for wrongful manufacturing and for not respecting—in effect, stealing—Poly-Med’s intellectual property, were less so. But in any event, the harm for which Poly-Med seeks damages and declaratory relief is unique to each fresh breach, and to deny Poly-Med recourse for the same would be inconsistent with the notions of fair play and justice mandated by this Supreme Court.

VI. CONCLUSION

Novus’s defense to this action is to tout its own violations of the Agreement and use them to render itself untouchable due to the statute of limitations—in other words, to profit from its admitted violations of its continuous obligations. It has thus far successfully contorted the maxim “for every wrong, there is a remedy” into “for every wrong, there is a reward.”

Novus conceded its defense strategy in arguments in support of its motion for summary judgment in the district court when its counsel stated, “To start the clock running, Poly-Med did not need to know every mesh patent application that [Novus] *intended to file and would file in the future* without first notifying Poly-Med in writing.” (J.A. 1690:2–5 (emphasis added); *see generally* J.A. 1690–91.) Novus argues that the fact that it had breached the Agreement in the past was all Poly-Med

needed to know to start the statutory clock ticking not only for the breaches it had already committed but also for those it would commit in the future. Such a rule is patently unreasonable and unjust, and it should not be the law of South Carolina.

Most respectfully, this Supreme Court should answer the Fourth Circuit Court of Appeals so as to allow Poly-Med to prosecute and maintain claims for all fresh causes of action, regardless of whether the fresh breaches are of the same character or type as stale breaches.

Respectfully submitted,
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