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SC Court of Appeals

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Unpublished Opinion No. 2020-UP-263 (S.C. Ct.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.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S ARGUMENT IN REPLY

Respondents' Return raises several "counter-questions" in an attempt to distract from the errors of fact and law which underlie the lower courts' decisions in this matter. Without abandoning the questions, issues, and arguments presented in the Petition for Writ of Certiorari, Petitioner addresses each of Respondents' "counter-questions" in turn, pursuant to SCACR 242(g).

Case No. 2015-CP-10-3325

I. ***Whether the Court of Appeals erred in deciding the circuit court properly held the statute of limitations for DeClemente to sue Respondents began running when Respondents sued him for fraud, necessarily communicating their intent to breach the 2009 buyout.***

The Court of Appeals erred in affirming the circuit court's grant of summary judgment on statute of limitations grounds in Petitioner's 2015 breach of contract lawsuit. Respondents' argument fails to acknowledge the trial court's primary function when met with a question of contract interpretation at summary judgment- from the four corners of the written instrument, determine the parties' intention and the contract's effect.

The trial court's function is to ensure that parties are governed by their objective expressions made at the time the contract was executed. Courts will not consider a party's after-the-fact, subjective interpretation of a contract's terms in alternative to the instrument's unambiguous language. *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984). Parties are prohibited from altering the terms of a binding contract to escape their obligations. *See, Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 593, 658 S.E.2d 539, 543 (Ct. App. 2008) (Stating that a party "is not permitted to reinterpret written contract terms midstream because he is unhappy with the contract he executed."). Therefore, "if the language of a contract is perfectly plain and capable of legal construction, such language determines the force

and effect of the instrument." *Catawba Indian Tribe of S.C. v. City of Rock Hill*, 501 F.3d 368, 372 (4th Cir. 2007) (quoting *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767 (1976)).

The terms of the Promissory Note are unambiguous, and reflect a clear manifestation of the parties' intentions. (*See*, *Petition for Writ of Certiorari*, pp. 7-8 (discussing applicable sections of the Promissory Note)). The circuit court was not at liberty to consider Respondents' extrinsic evidence in determining the statute of limitations date.[1] If the appellate court had read the Promissory Note and applied South Carolina's law of objective contract interpretation, it would have found that the discovery rule could apply in only two scenarios: (1) Petitioner's election to enforce payment after default; *or* (2) Respondents' failure to satisfy their debt on the promissory note's maturity date. Respondents' argument ignores the Promissory Note's maturity date and this State's body of contract law.

Respondents' reliance on the appellate court's decision in *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) is also misplaced and unpersuasive. The bonus plan at issue in *Maher* did not provide a sum certain to be paid in monthly installments by a date-certain. In fact, the bonus plan in *Maher* contained no provision enumerating the employees' rights and no provision governing Tietex's non-performance. The Promissory Note includes language defining contractual breach and language establishing statute of limitations expiration. Contrary to Respondents' argument, *Maher v. Tietex Corp.* is inapplicable.

Under the circuit court's application of *Maher* to Petitioner's 2015 breach of contract lawsuit, debtors would have the right to determine statute of limitations dates, in violation of express maturity dates contained in the parties' contract. The lower courts' holding violates the

[1] Respondents' argument that Judge Dennis and Judge Nicholson's statute of limitations rulings were based on different evidence is without merit, since Judge Nicholson's consideration of extrinsic evidence on an issue of contract interpretation constituted legal error.

most fundamental principles of contract law. The lower courts' novel departure from established contract law presents special and important reasons for discretionary review and directly conflicts with this Court's precedent, (*See*, *Petition for Writ of Certiorari*, Section I(B), pp. 9-11)), which is a stated ground for Certiorari under SCACR 242(b)(3).

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

In the circuit court Petitioner presented two alternative arguments establishing that his 2015 breach of contract case was filed within the limitations period. (1) the statute of limitations under the express terms of the promissory note's maturity date; and (2) notwithstanding the promissory note's maturity date, Respondents did not indicate clear intent to breach their promissory note by suing DeClemente in 2011.

The determination of whether a genuine issue of material fact exists entails the court's consideration of *everything* on the record, including pleadings, and "Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention." (*Petition for Writ of Certiorari*, Section I(A) pp. 11-12 (quoting *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183-84 (Ct.App. 1986)).

Both arguments that his 2015 lawsuit was timely filed were made in Petitioner's Memorandum In Opposition to Respondents' Motion to Dismiss, (R. pp. 129-134), and in his Motion to Amend Judgment and Pleadings, (R. pp. 458-462). Additional exhibits supporting Petitioner's second alternative argument (based on Respondent Reed's emails sent after initiation of the 2011 lawsuit) were submitted to the circuit court prior to its hearing of Respondents' motion for summary judgment. (*See*, *Petition for Writ of Certiorari*, Section I(A) pp. 11-12). Both of Petitioner's arguments were presented to the circuit court in opposition to Respondents' motion for summary judgment.

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). Rule 59(e) motions are compulsory *only* in instances where issues have been raised, but not ruled on by the court. *Id.* 24, 602 S.E.2d at 780. In this case, a Rule 59(e) motion was unnecessary, undesirable, and noncompulsory. Judge Nicholson's Order, made after considering Judge Dennis' Order, preserves Petitioner's arguments for appeal. *See*, *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009).

Respondents' argument that Petitioner has not preserved his arguments, or that he is raising new arguments on appeal, ignores the Record.

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

Respondents' argument that Petitioner's 2015 breach of contract case is barred by the doctrine of res judicata is also without merit. Although not cited for support in the Court of Appeals' res judicata ruling, Respondents claim their argument is bolstered by *Gathings v. Robertson Brokerage Co., Inc.*, 295 S.C. 112, 367 S.E.2d 423 (Ct.App. 1988).

Respondents' application of *Gathings* is contingent upon Petitioner's claims related to the parties Full and Final Release having been actually asserted as a defense to Respondent's 2011 lawsuit. Unlike *Gathings*, the circuit court entered default judgment against Petitioner in the 2011 lawsuit, and his defenses and counterclaims were struck without prejudice. Since the court prohibited all of Petitioner's counter claims from being, asserted in the 2011 action, Petitioner's 2015 breach of contract suit, by definition, cannot qualify as a compulsory counterclaim. *Gathings* is distinguishable and not inapplicable.

N.C. Fed. Sav. and Loan Ass'n v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903 (1989), wherein this Court formally adopted the logical relationship test for compulsory counterclaims,

is instructive and applicable. (*See*, *Petition for Writ of Certiorari*, Section III(B), pp. 17-19 (discussing application of the logical relationship test under *N.C. Federal* and its progeny)).

The appellate court's abuse of SCACR 220(c) conflicts with its scope of authority as stated by this Court in *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), and the appellate court's additional sustaining ground conflicts with this Court's application of the logical relationship test in *N.C. Federal*. (*Petition for Writ of Certiorari*, Sections III(A) and (B), pp. 15-19). Conflict with this Court's precedent is a stated ground for Certiorari under SCACR 242(b)(3).

Case No. 2017-CP-10-5055

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

Judge Dennis' decision in Respondent's 2015 case *does not* bar his 2017 declaratory judgment action under the doctrine of res judicata.

One of Petitioner's 2015 causes of action sought damages for Respondents' breach of their promise not to sue Petitioner, contained in the parties' Full and Final Release agreement. (R. p. 98, ¶ 45 and ¶ 47). Petitioner's 2015 cause of action for Respondent's breach of their Release agreement was ultimately dismissed as untimely.

In contrast, Petitioner's 2017 declaratory judgment action seeks the Court's declaration of Petitioner's rights as secured by the damages satisfaction clause of the parties' Full and Final Release, and seeks declaration of Respondents' obligation to satisfy the damages judgment assessed against him in Respondents' 2011 lawsuit, which Respondents' admit they filed in violation of the Release. Petitioner's 2017 declaratory judgment lawsuit was filed contemporaneously with a supporting memorandum, which clearly states the rights Petitioner seeks to have declared:

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

(R. p. 511 (emphasis added)).

The circuit court and the appellate court declined to find Petitioner's 2015 breach of contract claim as barring Petitioner's 2017 declaratory judgment action under the doctrine of res judicata, and rightfully so. These actions are completely different and the doctrine of res judicata is inapplicable.

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

The default judgment in Respondents' 2011 lawsuit *does not* bar Petitioner's 2017 declaratory judgment action under the doctrine of res judicata. The 2017 action is a proper exercise of Petitioner's rights under South Carolina's Declaratory Judgment Act. In pertinent part, the Act provides that "any person interested under a ... written contract ... may have determined any question of 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 (Ct. App. 2010) ((alteration by Court of Appeals) quoting S.C. Code Ann. § 15-53-30).

Respondents do correctly argue that the default judgment in their frivolous 2011 lawsuit precludes any re-litigation of *liability* in that case. No one disputes this. The trial court's erroneous default judgment caused Petitioner to lose his ability to enforce Respondents' promise never to sue him. But the default judgment did not terminate enforceability of the Release's other provisions. Specifically, Respondents' obligations and Petitioner's rights under the damages satisfaction clause of the parties' Full and Final Release Agreement remained unaffected.

Petitioner's 2017 action seeks declaration of Respondents' obligation to satisfy the *damages judgment* against Petitioner. The lawsuit has nothing to do with *liability*. Respondents' obligation to satisfy the default judgment arose post-judgment, and Petitioner's suit does not involve issues of liability. Respondents' argument does not address the issue of damages, nor does it address the *damages satisfaction clause* of the parties' Release Agreement.

There are two reasons the Court of Appeals' decision was erroneous: (1) there is no logical relationship between Petitioner's Declaratory Judgment action and Respondents' 2011 lawsuit; and (2) the Declaratory Judgment action could not have been brought as a counterclaim to Respondents' 2011 lawsuit because justiciable controversy concerning damages satisfaction did not exist at that time. (*See*, *Petition for Writ of Certiorari*, Argument: No. 2017-CP-10-5055, Section I pp. 21-25); (*see also*, *Petition for Rehearing and Suggestion for Rehearing En Banc*, Argument: Case No. 2017-CP-10-5055, Sections VI and VII, pp. 24-28).

Respondents may not escape their contractual obligations by merely claiming that the 2017 declaratory judgment action pertains to the issue of liability, when it clearly does not. Words have meaning and litigants are not free to ignore contractual obligations. The lower courts' failure to recognize and enforce Petitioner's rights as guaranteed by the Full and Final Release and Petitioner's exercise of his rights under South Carolina's Declaratory Judgment Act, present special and important reasons which warrant this Court's discretionary review.

CONCLUSION

This Petition consolidates two deeply problematic cases that are fraught with both factual and legal error. Respondents' Return is unpersuasive, and it is clear that the Petition presents special and important reasons which warrant discretionary review. Based on the foregoing

reasons, and those stated in the Petition, this Court should grant the Petition for Certiorari and permit further briefing of the issues presented.

Respectfully Submitted,

s/ Cameron L. Marshall
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Attorney for Petitioner

May 6, 2021
Charleston, South Carolina

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondents, James E. Smith, Jr. with a copy of Petitioner's *REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI* by emailing the same to the following AIS email address:

James E. Smith, Jr.
james@jamessmithpa.com
Counsel for Respondents

The undersigned also certifies that, on the date indicated below, a copy of Petitioner's *REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI* has been sent to the South Carolina Court of Appeals via email using that court's email address, ctappfilings@sccourts.org.

May 6, 2021
Charleston, South Carolina

S/ Cameron L. Marshall
Cameron L. Marshall

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May 06 2021
SC Court of Appeals

CAMERON MARSHALL
ATTORNEY AT LAW

May 6, 2021

VIA EMAIL ONLY
Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
By Email to: supctfilings@sccourts.org

RE: Appellate Case No. 2021-000037
Phillip DeClemente, a/k/a Alec Rochford,
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And
Phillip DeClemente, a/k/a Phillip Goodpaster,
v.
Assistive Technology Medical Equipment Services, LLC (ATMES); Jeffrey Reed; and Murrell G. Smith.

Dear Mr. Shearouse:

Please find attached Mr. DeClemente's *Reply to Return to Petition for Writ of Certiorari* in reference to the matter above, along with proof of email service of this document on opposing counsel.

A copy of this letter, Mr. DeClemente's Reply, and proof of service has also been emailed to the Court of Appeals.

Respectfully,

/s/Cameron L. Marshall
Cameron L. Marshall

Enclosures as stated
cc via email: Hon. Jenny Abbott Kitchings, Clerk of Court, S.C. Court of Appeals
cc via email: James E. Smith, Jr., Esquire

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