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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the
South Carolina Supreme Court (Retired),
Acting as Circuit Court Judge

Case No.: 2021-000341

William F. Tomz and Frances W. Tomz,
Individually and as Class Representatives, ... Respondents

v.

Capital Investment Funding, LLC
by and through its Receiver, Jerry T. Saad, and Arthur M. Field, ……Defendants

Of Which Capital Investment Funding, LLC, by and through its Receiver,
Jerry T. Saad is a Respondent and Arthur M. Field is the Appellant.

In Re: Kathryn Taillon, Appellant.

FINAL BRIEF OF APPELLANT ARTHUR M. FIELD

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STATEMENT OF ISSUES ON APPEAL[1]

1. Did the Circuit Court err in not applying the S.C. Uniform Declaratory Judgment Act; or if the Act did not apply, did the Circuit Court lack subject matter jurisdiction?

2. Did the Circuit Court err in holding it had personal or subject matter jurisdiction over Field, a Florida citizen, and this case?

3. Did the Circuit Court err in awarding CIF liquidated damages?

[1] Appellant Field adopts all issues and arguments raised by, or to be raised by, Appellant Taillon in proceedings below or on appeal.

INTRODUCTION

This is a complicated civil case that spans thirteen years of litigation in multiple forums,[2] and involves a related criminal case.[3] At issue in this appeal are rulings in an Amended Order entered March 2, 2021, by retired Chief Justice Jean H. Toal, sitting on the Circuit Court. The Order is the latest step in this extended procedural history, briefly recapped below.

Appellant Arthur Field is a citizen and resident of Florida, who was the Defendant in the civil and criminal matters underlying the issues presented in this Appeal. Respondents William and Frances Tomz were the Class Representatives of most of the noteholders of Capital Investment Funding, LLC ("CIF"). CIF is an entity citizen of the State of South Carolina in winding up since January 2008. Jerry Saad was appointed CIF Receiver and its manager on August 24, 2009, in a judgment entered against CIF in *Tomz v. Capital Investment Funding, LLC and Arthur Field* (2008-CP-23-3665). Field was dismissed therefrom without prejudice by the Class, and implicitly dismissed with prejudice by CIF. ("Mediated Global Settlement Agreement 8/24/09", ¶ 9)(Reserving the right to reinstitute only "any claim or action dismissed without prejudice" against Field solely to Class Counsel "within the time limit imposed by law or court rule.") (R. pp.58—76, ¶9, R. pp.65-66)

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[2] The actions include those listed below. Pursuant to R. 201(d), SCRE, Appellant Field requests this Court take judicial notice of the existence of these cases, including filing and closing dates, pleadings, and Orders. See, *Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014).

a) *Tomz v. Capital Investment Funding, LLC, and Arthur Field,* 2008-CP-23-03665
b) *Roberts, et al. v. Field, Capital Investment Funding, LLC, Taillon, et al.*, 2008-CP-23-05514
c) *Robert E. Lee, et al. v. Bradford Financial Group, Arthur Field, et al.,* 2008-CP-39-1184
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e) *Capital Investment Funding, LLC v. Field, Taillon, et al.*, 6:13-cv-02326-BHH-JDA (D.S.C.)
f) *Harold Brooks, et al. v. Arthur Field, et al.*, 6:14-CV-02267-BHH-JDA (D.S.C.)
g) *Capital Investment Funding, LLC v. Arthur Field, Taillon, et al.*, 2015-CP-23-01263
h) *Capital Investment Funding v. Calvary Asset Mgt., LLC, Robert Sypher, Elliot Salzman and Arthur Field,* BER-L-3790-12 (NJ 2012)
i) *Capital Investment Funding, LLC v. Arthur Field*, CA18-1513 (Fla. 7th Jud.Dist.)(originally, *Saad v. Arthur Field)*
j) *Capital Investment Funding, LLC v. Arthur Field and Kathryn Taillon*, 3:19-cv-0606-J-32JRK (M.D. Fla. 5/24/19)

[3] *State of South Carolina v. Arthur Field*, 2012-GS-47-08.

The many civil cases in this matter were ended with a Global Mediated Settlement Agreement (hereafter, "GSA"). (3/10/2017) (R. pp.154-169) The GSA was negotiated in the mediation ordered by U.S. District Judge Bruce Hendricks during the litigation of *Brooks v. Field, et al.* (6:14-cv-02267-BHH-JDA). ("Order EDF#317" 8/18/2016) (R. pp.137-138) The parties' negotiation lasted seven (7) months, was executed by twenty-four (24) persons or entities, and was entered into the record of the South Carolina District Court on March 20, 2017 ("Order EDF# 440") (R. p.145) Judge Hendricks entered a *Rubin* Order dismissal on May 16, 2017 ("Order EDF#446") (R. p.146)

On March 10, 2017, Receiver presented a "Motion to Approve Class Settlement and Ratify the Global Settlement Agreement dated 3/8/2017" as to the Class at a fairness hearing before the Honorable Edward W. Miller in 2008-CP-23-3665. (R. pp.297-299) Judge Miller reserved decision on that motion, pending a Motion to Modify Restitution that was to be filed in General Sessions in Anderson County as negotiated in GSA Paragraph 8. On November 1, 2017, the Honorable J. Cordell Maddox, Jr. heard Field's Motion, supported by the Receiver, and entered an Order modifying Field's restitution in 2012-GS-47-08. (R. pp.80-89) The GSA was ratified as to the Class in Greenville County by Judge Miller's Order dated December 1, 2017, Rule 23, SCRCP. (R.pp.30-33)

Receiver subsequently initiated *Jerry Saad v. Arthur M. Field* (CA18-1513), an action in a Florida state court against Field's homestead property. (7th Jud.Dist.Fl., 12/7/2018) (R. pp.690-693) Receiver sought to collect judgment based on the Order announced in South Carolina General Sessions by Judge Maddox on November 1, 2017.[4] (R. p.693, EDF#4) On March 18, 2019, Field filed a statutory Notice of Homestead Exemption in St. Johns County, Florida. (O.R. Book 4695, p.793) (R. pp.204-205; R. p.693, EDF#39) The sale of Field's property was canceled. (R. p.692, EDF#52) In response,

[4] Appellant Field reserves all objections to such judgment and amounts therein.

CIF filed a 'Petition Seeking Declaratory Judgment to Determine Homestead Exemption' against Field, and newly-named defendant Taillon. (5/2/2019) (R. p.691, EDF#57; R. pp.487-495)

Taillon removed CIF's action to federal court on May 22, 2019, which was then designated as *Capital Investment Funding, LLC v. Arthur Field and Kathryn Taillon.* (R. p.691, EDF#60; R. p.212, EDF #1, 3:19-cv-0606-J-32JRK) CIF's Petition was entered therein. (R. p.212, EDF#3, 3:19-cv-0606) Counsel for each Taillon and Field moved to dismiss the Florida federal action (11/1/2019) (R. pp.496-514); and (11/15/2019) (R. pp.515-530) CIF did not respond to either dismissal motion.

At a December 3, 2019, status conference before U.S. District Court Judge Thomas J. Corrigan in the Middle District of Florida, disagreement arose over interpretation of the language of the GSA. CIF argued to Judge Corrigan the issues should be referred solely to South Carolina Circuit Court Judge Edward W. Miller because Judge Miller had special knowledge and expertise in this matter. (R. p.533, line 17—p.534, line 2) Counsel for Field and Taillon opposed CIF's request for the stay. (12/24/2019) (R. pp.538-543)

On December 31, 2019, Receiver filed a "Motion for Declaratory Relief Related to CIF's Judgment Collection Action in Florida" in Greenville County seeking to have Judge Miller answer the federal district court's pending questions about the interpretation of the GSA. (R. pp.147-153)

Judge Corrigan issued a stay in the Florida federal case on February 19, 2020. (R. p.214, EDF#24)

In November, 2020, Judge Miller recused himself before ruling on any matter. The Honorable Jean H. Toal, retired from the South Carolina Supreme Court and sitting as a Circuit Court judge, was appointed to the case. (11/12/2020) (R. p.20)

Judge Corrigan continued the stay in the Florida federal case, at CIF's requests (R. pp.553-558; pp.559-565), on February 26, 2021, (R. pp.100-101) over Field's and Taillon's objections. (R. p.215, EDF##37, 39, 48)

Chief Justice Toal entered an Amended Order as to CIF's Motion for Declaratory Relief on March 2, 2021. (R. pp.1-12) The Amended Order is presented here on appeal.

STATEMENT OF THE CASE

On October 8, 2013, in the criminal case against Appellant Arthur Field, the Honorable J. Cordell Maddox, Jr., ordered, *inter alia*, Field to pay all the noteholder/victims $2,877,711.73.

The many civil cases in this matter were ended with a Global Mediated Settlement Agreement ("GSA") (R. pp.154-169) negotiated as a result of the mediation ordered by U.S. District Judge Bruce Hendricks in the context of *Brooks v. Field, et al.,* 6:14-cv-02267-BHH-JDA. (R. pp.137-138, EDF #317.) Negotiation involving numerous parties lasted over seven (7) months and the resulting GSA was executed by twenty-four (24) persons or entities, and entered into the record of the South Carolina District Court March, 20 2017, when Judge Hendricks entered the initial *Rubin* Order, conditioned upon no change to the GSA. (R. p.145, EDF#440)

On March 10, 2017, Receiver presented a Motion to Ratify the GSA as to the Class at a fairness hearing before the Honorable Edward W. Miller in 2008-CP-23-3665. (R. pp.297-299) Judge Miller withheld decision on that motion, pending a Motion to Modify Restitution that was to be filed in General Sessions in Anderson County as negotiated in GSA Paragraph 8. (R. p.156, ¶8)

On November 1, 2017, Judge Maddox, having presided over the criminal matter, heard Field's Motion to Reconsider and Terminate Restitution. Field's motion was strongly supported by Receiver and the Class Counsel, but was opposed by the S.C. Attorney General's Office. Judge Maddox asked all parties to engage in negotiations related to restitution. (R. pp.81-82)

After the parties agreed any remaining unpaid restitution would be entered as a civil judgment at the conclusion of Field's probationary term to satisfy the Attorney General's concerns, Judge Maddox pronounced an Order on November 1, 2017, terminating all monthly restitution payments and modifying Field's 2013 Restitution Order. (R. pp.80-89) The Order, entered November 27, 2017,

referred to the victims as 'all the noteholders of CIF' and provided for a 'civil judgment' in accord with law, with only the amount of such judgment to be liquidated after the sale of Allyson Field's residence, as set forth in GSA Paragraph 14(A). (R. pp.158-159) The GSA specified certain monies and property values, approximately $1.6 Million, paid and transferred to CIF by Field, Taillon, and Allyson Field under GSA Paragraphs 14(A), 14(B), 14(C), 14(E) and 14(F) were to be credited towards Field "for purposes of rescinding [the 2013] restitution", GSA ¶ 14(I)(v). (R. pp.158-166)

The GSA, including an Addendum drafted by CIF on November 27, 2017, (R. pp.180-184) was ratified as to the Class in Greenville County by Judge Miller's Order dated December 1, 2017. (R. pp.30-33) The Addendum directly references the civil judgment pursuant to the applicable South Carolina law. (R. p.181, ¶1(iv))

GSA Paragraph 14(I)(ii) specifically provided that "Judge Edward W. Miller, the presiding judge in the *Tomz* Case, shall have the sole and exclusive jurisdiction regarding any dispute…." (R. pp.165-166, ¶14(I)(ii))

The GSA ended the 2008-CP-23-3665 case. CIF and Field were again dismissed with prejudice from it and all other cases, including 2015-CP-23-01263 (R. p.155, ¶¶ 3,5), and were released from any and all claims known or unknown. (R. p.155, ¶4; p.165, ¶14(I)(ii))

Receiver subsequently filed *Saad v. Arthur M. Field* (CA18-1513) in a Florida circuit court against Field's Florida homestead property purporting to collect judgment based on the Order announced in South Carolina General Sessions on November 1, 2017—prior to the ratification of the GSA—converting unpaid restitution to a civil judgment. (R. pp.690-693) Pursuant to Florida law, Field filed a Notice of Homestead Exemption in the St. Johns County Official Records, O.R. 4695, p.973. (R. p.204.) Receiver then changed the named plaintiff to 'Capital Investment Funding, LLC' and filed a 'Petition for Declaratory Judgment to Determine Homestead' in CA18-1513 against Field and newly-named defendant Taillon. (R. pp.487-495)

Taillon removed CIF's action to federal court on May 22, 2019, which was re-designated as *Capital Investment Funding, LLC v. Arthur Field and Kathryn Taillon.* (R. p.212, EDF#1 3:19-cv-0606-J-32JRK) Counsel for each Field and Taillon moved to dismiss the Florida federal action based on preclusion and contractual release grounds. (R. pp.496-514, 11/1/2019); (R. pp.515-530, 11/15/2019) CIF did not respond to either dismissal motion.

At a December 3 2019, status conference before U.S. District Court Judge Thomas J. Corrigan in the Middle District of Florida, disagreement arose whether the plain language of the GSA barred Receiver's collection action. At issue was Field's Florida homestead property, and whether preclusion principles applied to those issues resolved in South Carolina by the GSA and the several dismissals with prejudice; and/or whether the plain language of the releases in the GSA barred the Florida action. CIF argued to Judge Corrigan the issues should be referred solely to South Carolina Circuit Court Judge Edward W. Miller because, "Judge Miller is familiar with the parties involved and extensively familiar with the facts of these claims and the procedural history of the GSA." (R. p.534, lines 1-2) Field and Taillon objected to CIF's request for a stay. (R. pp.538-543 12/24/2019) In February, 2020, the District Court granted CIF's request and indicated it would await Judge Miller's decision. (R. p.214, EDF#24)

Prior to Judge Corrigan's February 19, 2020, Order, on December 31, 2019, CIF returned to South Carolina state court to file a "Motion for Declaratory Relief Related to CIF's Judgment Collection Action in Florida" in the already-dismissed case, 2008-CP-23-3665. (R. pp.147-153) In its motion, CIF asked Judge Miller to declare CIF's judgment collection action in the United States District Court in the Middle District of Florida (3:19-cv-0606-J-32JRK) 'proper' under the terms of the GSA. (R. p.147, lines 1-6) CIF's motion also demanded monetary damages for breach of contract, and requested such be enforced through the Court's contempt powers. (R. p.147, lines 10-12; pp.152-153)

In response, Field attempted removal of the 2008-CP-23-3665 action to the South Carolina District Court on January 28, 2020. United States Magistrate Judge Jacquelyn Austin remanded the matter on February 6, 2020, finding that the Court lacked subject matter jurisdiction because the matter was closed. (6:20-cv-0312-BHH-JDA) (R. pp.94-99, i.e. R. p.98, lines 3-5)

On September 27, 2020, Field moved to recuse Judge Miller, and to dismiss Receiver's Motion for Declaratory Relief. (R. pp.351-454); (R. pp.192-206) CIF did not respond to the Motion to Dismiss.

The case was reassigned to retired Chief Justice Toal on November 12, 2020. (R. p.20)

On December 15, 2020, Chief Justice Toal denied Field's motion to recuse Judge Miller as moot. (R. pp.18-19)

On December 17, 2020, without a hearing and without reviewing Field's Motion to Dismiss, Chief Justice Toal granted CIF declaratory relief, awarded damages of $250,000, and further provided such amount be added to Field's restitution order and collectable in Florida as part of the 2017 civil judgment. (R. pp.13-17)

On December 18, 2020, Field filed a Motion to Reconsider, Alter or Amend the December 17th Order. (R. pp.207-216) CIF again did not respond until ordered to do so by the Court. (R. pp.257-267) On January 25, 2021, Field filed a Response in Opposition. (R. pp.268-275)

On March 2, 2021, the Court entered an Amended Order modifying its December 17, 2020, Order. (R. pp.1-12) The Court re-styled CIF's motion as a 'Motion to Enforce Settlement Agreement'. (R. p.5, sec. #3.) This appeal arises therefrom.

Because no hearings were held for the Amended Order being appealed here, there are no new transcripts and the record includes only the filings and orders entered in the several cases, all of which this Court may and is requested to take judicial notice pursuant to Rule 201(d), SCRE.

STANDARDS OF REVIEW

Declaratory Judgment. In order to determine the appropriate standard of review to apply in an appeal from a declaratory judgment action, which is neither 'legal' nor 'equitable', the Court of Appeals must look to the nature of the underlying action. *Consignment Sales LLC v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (Ct.App. 2011); *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009); *Nationwide Mut.Ins.Co. v. Rhoden,* 398 S.C. 393, 728 S.E.2d 477 (2012).

CIF requested declaratory relief interpreting the Global Settlement Agreement, a contract. *Pee Dee Stores, Inc. v. Doyle,* 381 S.C. 234,241, 672 S.E.2d 799,802 (Ct.App. 2009). Because an action to construe or interpret a contract is an action of law, this Court reviews the matter *de novo. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011); *Fesmire v. Digh,* 385 S.C.296, 683 S.E.2d 803 (Ct.App. 2009). "Whether the language of a contract is ambiguous is a question of law for the court." *Pee Dee Stores, supra,* citing *Auten v. Snipes,* 370 S.C. 664,669, 636 S.E.2d 644,646(Ct.App. 2006) .

Jury Trial. Whether a party is entitled to a jury trial is a question of law, which an appellate court reviews *de novo*, owing no deference to the [circuit court's] decision. *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 778 S.E.2d 106 (2015); *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg Co.*, 249 S.C. 561, 155 S.E.2d 618 (1967).

Summary Judgment. When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court under Rule 56, SCRCP. *Helms Realty, Inc. v. Gibson-Wall Co.,* 363 S.C. 334,340, 611 S.E.2d 485,488(2005); *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 563 S.E.2d 331 (2002).

Subject Matter Jurisdiction. Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court. *Ex Parte Cannon*, 685 S.E.2d 814 (S.C.

App. 2009) *citing Lake v. Reeder Constr. Co.*, 330 S.C. 242, 498 S.E.2d 650 (Ct.App.1998). This is an appeal from the grant of a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP. "The question of subject matter jurisdiction is a question of law for the court…We are free to decide questions of law with no deference to the [circuit] court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct.App.2009).

Personal Jurisdiction. The Court may consider extrinsic evidence to determine issues of personal jurisdiction. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (Ct.App. 2012) (dismissal affirmed) (plaintiff bears burden of proving personal jurisdiction pre-trial over a non-resident). Deference is given to the Circuit Court for findings of fact, unless no evidence exists to support such findings.

Res Judicata: Issues of preclusion and the *res judicata* effect of Settlement Agreements are questions of law and are reviewed *de novo. Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (2014) (Rehearing den.).

ARGUMENT

1. THE CIRCUIT COURT ERRED IN NOT APPLYING THE S.C. UNIFORM DECLARATORY JUDGMENT ACT; AND IF THE ACT DID NOT APPLY, THE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

a. Receiver's Motion is a Declaratory Judgment Action.

Receiver CIF's instant state court filing by its caption, its contents, and its request, is brought under the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. §15-53-10, *et seq.*, ("SCUDJA"). (R. pp.147-153) The Circuit Court's Amended Order of March 2, 2021, *sua sponte*, effectively rewrote CIF's Declaratory Judgment motion, re-styling it as a "Motion to Enforce Settlement Agreement," but the principal purpose of the filing remained an attempt by Receiver to employ the SCUDJA. (R. p.5, sec.#3) The Circuit Court committed harmful error and its Order should be overturned.

CIF's motion is captioned "Receiver's Motion for Declaratory Relief Related to CIF's Judgment Collection Action in Florida." Its opening sentence begins, "[p]ursuant to South Carolina Code of Laws §15-53-20 . . . ." Receiver requests relief that relies on the SCUDJA: "[Receiver] moves for this Court to declare that its judgment collection action . . . is just and proper under the terms of the Global Settlement Agreement ("GSA")." (R. p.147, lines 1-6) The balance of Receiver's seven (7) page motion is (a) recitation of litigation history, (b) argument on the character of outstanding restitution, and (c) request for liquidated damages to be enforced by contempt. (R. pp.147-153)

CIF's SCUDJA action arises out of a collection attempt it filed in Florida state court against Appellant's homestead. (R. pp.690-693) Seven months after the matter was removed from Florida state court to the federal District Court for the Middle District of Florida, CIF came back to South Carolina and filed its action seeking to settle the legal rights of the parties as to the Motions to Dismiss pending in the Florida federal court. (R. pp.496-514; pp.515-530)

The SCUDJA provides:

> Any person interested under a . . . written contract . . . whose rights, status or other legal relations are affected . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30. "The purpose of the Declaratory Judgments Act 'is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.'" *S.C. Lottery Comm'n v. Glassmeyer*, 428 S.C. 423, 835 S.E.2d 524 (Ct.App. 2019) *citing* S.C. Code Ann. § 15-53-130 (2005). "The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004).

The SCUDJA does not authorize relief by motion. The SCUDJA requires a new action, including service of a Summons and Complaint pursuant to Rule 4, SCRCP—none of which was done by Receiver. See, e.g., *Stecker v. TALX Corp.*, 384 S.C. 224, 661 S.E.2d 890 (Ct.App. 2009). (R. p.198)

Because the SCUDJA was the proper vehicle for addressing its claim, the Circuit Court effectively denied Appellant his due process rights and those rights established under state statute and in the S.C. Rules of Civil Procedure, including the right to responsive pleading, discovery, and jury trial. S.C. Code Ann. §15-53-90; Rule 57, SCRCP. (R. pp.209-210; p.218) In particular, the right to jury trial to determine any issues of fact in a Declaratory Judgment action or breach of contract action is inviolate. See, *Legette v. Smith*, 226 S.C. 403, 85 S.E. 2d 576 (1955). (R. p.198)

Field's Motion to Dismiss (R. pp.192-206), and Motion to Reconsider (R. pp.207-216), raised the issue of ambiguity between the mediated, fully-negotiated GSA and the hastily-crafted, last-minute

Addendum.[5] (e.g., R. pp.200-201) Taillon's pleadings raised similar issues of ambiguity and questions about the formation, validity, and/or enforceability of the Addendum. (R. pp.185-191; pp.217-228)

"When a written contract is ambiguous, parol and extrinsic evidence may be admitted regarding the parties' intent." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). The Circuit Court erred by not permitting the parties to file responsive pleadings and perform discovery when the Motion to Dismiss was denied, or by not affording Field a meaningful opportunity to be heard—the touchstone of due process. See, *Baughman v. AT&T,* 306 S.C. 101, 410 S.E.2d 537(1991); *S.C.D.S.S. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703 (1997). (R. p.187; p.198)

While the case law cited by the Circuit Court in its Amended Order of March 2, 2021, does contemplate inherent jurisdiction in an enforcement action of a settlement agreement, the Receiver's filings in this matter make clear that its goal is success in its Florida collection action, where it seeks to defeat the homestead rights of Field guaranteed under Florida *Constitution*, Article X, section 4.

If this were a Motion to Enforce Settlement, then CIF should have been held to the standard applicable to summary judgments. See, *Pee Dee Stores, Inc. v. Doyle, supra*, 381 S.C. at 241, 672 S.E.2d at 799; *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); similarly *Lavigne v. Green,* 106 Wash.App. 12, 23 P.3d 515 (Wash. App. 2001)("The standard of review is *de novo* because the motion to enforce a settlement agreement is like a summary judgment motion."). Summary judgment is not

[5] Examination of the Addendum (R.pp.180-181) shows it only modified GSA Paragraph 8 and removed "return of earned salary" from GSA Paragraph 14.(I)(v). (R. p.166) Appellant Field maintains the Addendum does not accurately reflect Judge Maddox's Order of 11/1/2017, which Order granted the relief set forth in GSA Paragraph 8(c). The Addendum (R. pp.180-184) did not contain any language modifying the very broad release language of GSA Paragraph 4, or the dismissals with prejudice of all actions, in GSA Paragraphs 3 and 5. (R. p.155) Nor does the Addendum void the protection of Florida's homestead laws Any ambiguity should have been resolved against CIF, which drafted the last-minute Addendum. (R.180-184.) *Mathis v. Brown & Brown of S.C., Inc.,* 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC,* 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct.App. 2007). The Order dated October 30, 2018 does not appear to have been served upon Field in 2012-GS-47-08. (R. pp.77-79) Inexplicably, it was docketed only in Spartanburg County, 2018-cp-42-04037, and there is no record of service of any filing upon Field or any party to 2008-CP-23-3665. (R.693, EDF #3). See, *Initial Brief* of Appellant Taillon in this appeal.

appropriate if a contract is ambiguous, or when further inquiry into the facts of the case is desirable to clarify the application of the law. *Tupper v. Dorchester County*, 326 S.C. 318,325, 487 S.E.2d 187,191(1997). (R. pp.269-270, as to summary judgment standard and 'First Breach Doctrine')

Field maintains that the facts and the arguments advanced by both Appellants were sufficient to defeat summary judgment. *Froneberger v. Smith,* 406 S.C. 37, 748 S.E.2d 625 (Ct.App. 2013) (summary judgment reversed when defendant presented an issue of fact in its pleadings). CIF disputes Field's and Taillon's factual assertions concerning the GSA and Addendum, and their arguments on the issues, including preclusion. (R. pp.229-236); and (R. pp.257-267) Due process requires the courts to provide the parties "full and fair opportunity to complete discovery". *Baughman, supra,* 306 S.C. at 111. Failing to provide for due process is error by the Circuit Court. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008). Where genuine issues of material fact exist, the Circuit Court should conduct an evidentiary hearing prior to issuing a summary judgment. *Hawkins v. Greenwood Dev. Corp*., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.,* 301 S.C. 418, 392 S.E.2d 460 (1990). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Wade v. Berkeley County,* 339 S.C. 513, 529 S.E.2d 743 (Ct.App. 2000) rehear.den.; *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 534 S.E.2d 672(2000).

The procedural due process requirements notwithstanding, particularly where no hearing was held, Field was entitled to all reasonable inferences in the light most favorable to him as the non-moving party. *Strother v. Lexington Cnty. Rec. Comm'n,* 332 S.C. 54, 504 S.E.2d 117(1998); *McLaughlin v. Williams*, 379 S.C. 451,455-56, 665 S.E.2d 667,670 (Ct.App.2008). (R. p.270) The Circuit Court did not articulate the standard it employed for reaching its conclusions, nor did it provide any analysis of the

facts and law in arriving at its decision, or its determination whether the GSA and Addendum was ambiguous. Nor did it set forth its analysis of the pleadings in the various cases to determine the issue of preclusion. *Pee Dee, supra,* at 242, 672 S.E.2d at 803; *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct.App. 2000) (summary judgment reversed).

Beyond its language and arguments in its South Carolina filings, in its April 29, 2021, Status Report Update in Florida federal court, CIF reiterated its South Carolina pleading was a "Motion for Declaratory Relief", not a 'Motion to Enforce a Settlement' (R. p.560, lines1-2, and lines14-16; p.561, lines 4-8), and requested the District Court disregard the South Carolina appeals and not await the final decision in South Carolina, despite Rule 241, SCACR. (R. p.570, lines 11—17)

The parties are back in South Carolina's courts because the Receiver wants a favorable advisory opinion it can take back to the U.S. District Court in Florida. There is no reason not to accept CIF's Motion on its face as being one brought pursuant to the SCUDJA.

b. <u>If SCUDJA Does Not Apply, the Circuit Court Lacks Jurisdiction.</u>

A judgment is void and without legal effect if a court does not have jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 457 S.E.2d 340 (1995). Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. *Ex Parte Cannon*, 685 S.E.2d 814 (S.C. App. 2009). The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. *Peterson v. Peterson*, 333 S.C. 538, 510 S.E.2d 426, (Ct.App. 1998).

i. <u>Ratification of the Global Settlement Agreement Closed the Case.</u>

Pursuant to the GSA, this <u>2008-CP-23-3665</u> action was dismissed when that Agreement was ratified in December 2017. The case under which Receiver filed this motion, *Tomz v. Capital Investment Funding, LLC and Arthur Field*, <u>2008-CP-23-03665</u>, was among the cases that were conclusively ended by the execution of the GSA, and which were unquestionably dismissed with prejudice as to all parties,

GSA Paragraphs 3(d) and 5. (R. p.155, ¶¶ 3,5) GSA Paragraph 10 provided an automatic rescission remedy if the motion to terminate restitution was not approved, including return of all monies and property to Field and Taillon and Allyson Field. (R. p.157, ¶10); (R. p.270)

The 'Addendum' does not revise or modify Paragraphs 3, 5 or 10 in any respect.[6] GSA Paragraph 14 states the Settlement is full and final as to all parties.(R. p.165, ¶14(I)(ii)) Nothing in the Addendum (R. pp.180-184) changed that or otherwise invoked the GSA Paragraph 10 remedies. (R. p.200) Neither the Receiver nor any other party may continue filing motions in this case as an alternative to bringing a new action by Summons and Complaint. The justiciable controversy at the heart of 2008-CP-23-3665, and all related cases, ended with the approval of the GSA by the South Carolina federal and state courts. (R. pp.197-198)

That the 2008-CP-23-3665 case was closed was sufficiently obvious to U.S. Magistrate Judge Jacquelyn Austin that she raised the issue *sua sponte* and remanded this case on that basis without any party mentioning the issue, following Field's timely attempt to remove it to federal court. (R. pp.94-99) On February 6, 2020, finding the Court lacked subject matter jurisdiction, Judge Austin ruled "[u]pon an examination of the Notice of Removal, along with the entire record before the Court, it is apparent that removal of the matter was improper because the State Court Action is closed." (R.98, lines 3-5)

CIF did not contest that ruling. U.S. Magistrate Austin's ruling is law of the case. *Watkins v. Hodge*, 232 S.C. 245, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged by an appeal); *Judy v. Martin,* 381 S.C.455, 674 S.E.2d 151 (2009).

[6] CIF has not yet returned funds to Appellant Field, Appellant Taillon, or Allyson Field.

If 2008-CP-23-3665 case were not over, Field would have removed the matter to the federal district court. If the Circuit Court determined that Judge Austin was wrong and that the case was not closed, Field should have been given the opportunity to remove to the District Court. (R. p.209, lines16-18)

Receiver's position that it has some sort of perpetual right to use this 2008-CP-23-3665 case as a vehicle to harass and threaten Appellant Field and others is contrary to the plain language of the GSA and the intent of the parties. (R. pp.186-187)

U.S. Magistrate Austin was correct: this case is over. Where a case is closed, subject matter jurisdiction cannot exist and the parties cannot confer subject matter jurisdiction upon a court by agreement. It is CIF's burden to demonstrate jurisdiction did exist, which it cannot do. *Badeaux v. Davis,* 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct.App. 1999); *S.C.D.S.S. v. Tran,* 418 S.C.308, 792 S.E.2d 254 (Ct.App. 2016) (parties cannot confer jurisdiction by agreement and plaintiff bears burden of proving jurisdiction).

The Circuit Court erred in granting subject matter jurisdiction unto itself in a closed case.

ii. Questions of Law Should Have Been Certified to the South Carolina Supreme Court.

On February 19, 2020, United States District Judge Corrigan of the Middle District of Florida stayed the litigation initiated in Florida by Receiver while Receiver turned to a South Carolina court for its views on the GSA. CIF admitted it was "unaware of any procedural mechanism which would permit this Court to transfer the issue to South Carolina." (3:19-cv-0606) (R. p.534 lines 9-11)

To the extent a federal district court in Florida sought a South Carolina court to answer a question of law, the only appropriate procedure is to certify the question to the South Carolina Supreme Court, not the Circuit Court. See, Rule 244, SCACR. It is the sole province of our Supreme Court whether and how to answer such questions. Rule 244(a), SCACR; *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531, 532 (2010). (R. p.196, lines 9-11; p.549)

If Receiver's purpose was not an action under the SCUDJA, as it now insists, its many attorneys were nonetheless, presumably, aware of Rule 244, SCACR. In filing its motion prior to Judge Corrigan's full consideration of the matter, the Receiver's litigation strategy amounts to forum shopping that deliberately subverts the South Carolina Rules of Appellate Procedure. (R. pp.548-549) The Circuit Court erred when it permitted Receiver to do so.

iii. The Circuit Court Lacked Jurisdiction to Enforce the GSA as to Florida Real Property.

The Circuit Court rewrote Receiver's Motion as one to enforce the GSA in its Amended Order of March 2, 2021. However, the Circuit Court had no authority to grant such relief. It is axiomatic to say that the South Carolina Circuit Court cannot grant CIF relief as to Florida real property owned by a Florida citizen, or make any determination concerning the application of Florida constitutional law, in a Florida dispute; only a Florida court could do that. (R. p.195, lines 19-20; pp.545-546) CIF conceded the South Carolina court lacked jurisdiction to do so. (R. p.534, lines 3-8.; p.548) Without the ability to grant relief, the South Carolina Circuit Court lacks subject matter jurisdiction and Receiver's action is subject to dismissal under Rule 12(b)(6), SCRCP. CIF's Motion was insufficient on its face to grant the court jurisdiction.

The issue in Florida is *not* "does a civil judgment in South Carolina exist?" Neither Field's nor Taillon's filings in Florida contest the *existence* of the civil judgment or the validity of the GSA. The issue in Florida is the application of the GSA under Florida law. The Circuit Court here erred by purporting to enforce the GSA under Florida law in its March 2, 2021, Order.

Field's Florida counsel argued CIF's Florida collection action is barred by GSA Paragraph 4's sweeping releases (R. pp.516-519) Field's counsel further argued that CIF's allegations involving fraud and fraudulent transfer of the Florida property are subject to claim and/or issue preclusion. (R. pp.519-527) Field's Florida counsel based the preclusion arguments on the allegations and relief

sought in the Florida CA18-1513 Petition (R. pp.487-495), and the South Carolina case, 2015-CP-23-01263 (R. pp.573-689), where that matter was resolved by dismissal with prejudice. (6/12/2018) (R. pp.90-92)

Field's counsel extensively quoted the 2015-CP-23-01263 CIF Amended Complaint (R. pp.521-523) and argued that CIF's "Petition does not allege any new material facts not derived from the same underlying nucleus as the 2015 Amended Complaint of which were known to Petitioner by 2015…existence of [the civil judgment] was a certainty and known by November 27, 2017, prior to the GSA effective date." (R. p.524, lines 2-7) [7] Appellants maintain these issues are solely for the Court in the Middle District of Florida to decide and that abstention was inappropriate under the *Colorado River* doctrine. (R. pp.538-542); and (R. pp.544-550)

Under South Carolina law, when causes of action are virtually indistinguishable, and relief sought is fundamentally the same, *res judicata* bars the second action, even if claims were not litigated in the first action. *Zinn v. CFI Sales & Mktg, Ltd.*, 415 S.C. 93, 780 S.E.2d 611, 619 (Ct.App. 2015) (holding claims barred after settlement); *Doe v. Bishop of Charleston,* 407 S.C. 128*,* 754 S.E.2d 494 (2014) (*res judicata* barred subsequent claims which were substantially the same as those addressed in the prior class action settlement); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct.App. 1994) (barring action under collateral estoppel); *Plum Creek Dev. Co. v. City of Conway,* 334 S.C. 30,34, 512 S.E.2d 106(1999)(different remedy based on essentially similar facts barred by *res judicata*). (R. p.199) The Eleventh Circuit agrees that preclusion applies to "all legal theories and claims arising out of the same nucleus of operative facts." *Wesch v. Folsom,* 6 F.3d 1464,1471(11th Cir. 1993). (see, R. p.549)

[7] Compare, e.g., "Amended Complaint of CIF" 2015-CP-23-01263, Paragraphs 157 and 158 (R. p.628), and Claims for Relief Paragraphs 293 (R. p.658) and 298 (R. pp.659-660), with "CIF's Petition for Declaratory Judgment (R. p.488, lines 1-2)("the Property was obtained with fraudulently-obtained funds") and Paragraph 7(e) (R. p.490)("The Property was acquired with funds generated by fraudulent activity."). The allegations in 2015-CP-23-01263 contain allegations in the State Grand Jury indictment in 2012-GS-47-08 repeated verbatim.

Further, if it was going to apply Florida homestead law, the Circuit Court erred by not doing so correctly. Field's Notice of Homestead Exemption (R. p.204), automatically invoked the Florida homestead protections from judgment creditors established in Florida *Constitution*, Article X, Section 4, and Florida Statutes found at Sections 222.01 through 222.10.[8] Nothing in the GSA or the Addendum speaks to the method of collection of civil judgments, nor grants the Receiver the right to collect such civil judgments against Field's Florida homestead. Field did not waive the protection of Florida's Constitution or statutes.

If the Circuit Court determined it had authority to apply Florida law, it erred in doing so.

2. THE CIRCUIT COURT DID NOT HAVE PERSONAL JURISDICTION OVER APPELLANT ARTHUR M. FIELD

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 594 S.E.2d 878 (Ct.App. 2004). In *Southern Plastics Co. v. Southern Commerce Bank*, our Supreme Court adopted the due process analysis articulated by the U.S. Supreme Court in regard to exercise of personal jurisdiction. *Southern Plastics Co.,* 310 S.C. 256, 423 S.E.2d 128 (1992) *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, n.15 (1985).

First, in order for the courts to have statutory authority to exercise jurisdiction, the nonresident defendant's conduct must meet the requirements of South Carolina's long-arm statute. *White v. Stephens*, 300 S.C. 241, 387 S.E.2d 260 (1990); S.C. Code Ann. §36-2-803 (2003). Second, the exercise

[8] Fla. Stat. § 222.01(1): "Whenever any natural person residing in this state desires to avail himself or herself of the benefit of the provisions of the constitution and laws exempting property as a homestead from forced sale under any process of law, he or she may make a statement, in writing, containing a description of the real property…claimed to be exempt and declaring that the real property…is the homestead of the party in whose behalf such claim is being made." Fla. Stat. § 222.09, "The circuit courts have equity jurisdiction to enjoin the sale of all property, real or personal, that is exempt from forced sale."

of jurisdiction must comport with the requirements of the due process clause. *Southern Plastics, supra.* The defendant must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated. *White*, 300 S.C. at 245, 387 S.E.2d at 262; *International Mariculture Res. v. Grant*, 336 S.C. 434, 520 S.E.2d 160 (Ct.App. 1999).

Traditionally, our courts have conducted the two-step analysis to determine whether specific jurisdiction is proper by (1) determining if the long arm statute applies and (2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 665 S.E.2d 660 (Ct.App. 2008). However, a more recent trend compresses the analysis into a due process assessment only. *Id.* at 431, 665 S.E.2d at 664-65 (Ct.App. 2008); Also*, Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485,491, 611 S.E.2d 505,508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.").

Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice, *Coggeshall v. Reproductive Endocrine Assocs of Charlotte,* 376 S.C. 12, 655 S.E.2d 476 (2007).

Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Power Prods.*, 379 S.C. at 431-32, 665 S.E.2d at 665 (Ct.App. 2008). "The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the 'power' to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." *Id.* To support a finding of due process, both prongs must be satisfied. *Id.* (R. p.197)

To satisfy the power prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. *Moosally, supra*. The *Moosally* court stated:

> It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case.

358 S.C. at 332, 594 S.E.2d 878 (Ct.App. 2004) (internal citations omitted).

"An individual's contract with an out-of-state party cannot alone establish sufficient minimum contact's in the other party's home forum." *Burger King, supra*, 471 U.S. at 485-86, 105 S.Ct. at 2189-90 (1985). Formation or execution of a contract in South Carolina is insufficient to obtain personal jurisdiction. *Delta Apparel, Inc. v. Farina,* 406 S.C. 257, 750 S.E.2d 615 (Ct.App. 2013); *Cribb v. Spatholt*, 382 S.C. 490,501, 676 S.E.2d 714,720 (Ct.App.2009). A judgment is void if a court acts without personal jurisdiction, as it did here.

a. <u>Receiver Did Not Meet Its Burden of Satisfying the *Southern Plastics Co.* Tests for Establishing Personal Jurisdiction.</u>

The record in this case is that Appellant Arthur M. Field is a citizen and a resident of the State of Florida; that he has a homestead residence at 5489 Atlantic Vw, St. Augustine, Florida, 32080; that he obtained the homestead residence since September 3, 2011 by deed recorded St. Johns County O.R.3472, p.400; that he filed a Declaration of Domicile in St. Johns County, Florida, on December 3, 2013, O.R.3820, p.382 per Fla. Stat. Section 222.17; that the St. Johns County Tax Assessor granted him a Homestead Exemption as to the property's ad valorem taxes in 2017; that he obtained a driver's license in Florida April 23, 2012 (#F430-53-53-144-0); that he has paid vehicle taxes in Florida since at least 2014 (license plate FL HIX H37); and that he registered to vote in Florida on April 23 2012,

(ID#119657811)—all of which are official records this Court may take judicial notice. Rule 201(b)(2), SCRE. These are included in the Record of this case and/or are available in official public records. (R. p.193, pp.196-197, p.206) None of this was challenged by Receiver.[9]

Judge Miller's Order of December 1, 2017, ratifying the GSA dismissed Appellants from the case with prejudice. (R. pp.29-37) No showing of minimum contacts after December, 2017, was made by Receiver. Field affirmatively objected to the Court's personal jurisdiction over him in each filing in 2008-CP-23-3665 since the case was dismissed. (R. p.192, pp.196-197, p.207, p.268 and p.351)

CIF seeks to collect money in Florida from a Florida citizen by executing on his Florida homestead. Even if the money were construed to be 'due' in South Carolina, that is insufficient to subject a non-resident defendant to jurisdiction in South Carolina when an action already exists in Florida and the Florida court has jurisdiction over the matter. See, *Builder Mart v. First Union*, 394 S.C. 500, 563 S.E.2d 352(Ct.App. 2000)(no personal jurisdiction when collateral in North Carolina). A defendant does not waive jurisdiction merely by signing a forum selection clause. *Cf.*, *Security Credit Leasing, Inc. v. Armaly,* 339 S.C. 533, 529 S.E.2d 283 (Ct.App. 2000)(jurisdiction existed in Florida when funds were to be paid in Florida). Any contact Field had with South Carolina ended years ago, which is why CIF sued Field in Florida.

Receiver, and the Circuit Court, rely exclusively on Field's participation in the GSA to establish personal jurisdiction in this declaratory judgment action. This reliance is in error. The complaining party bears the burden of satisfying the prongs of the *Southern Plastics Co.* test. "It is well-settled that the party seeking to invoke personal jurisdiction over a non-resident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." *Moosally, supra,* 358 S.C. at 327, 594 S.E.2d 878 (Ct.App. 2004).

[9] CIF admitted Field is a Florida citizen and the Florida District Court confirmed diversity jurisdiction. (R. p.213, "Text Order" EDF#12, 3:19-cv-0606, 10/15/2019)

The Receiver, as the complaining party, has not met its burden to establish personal jurisdiction. The Circuit Court's Amended Order of March 2, 2021, did not include the findings required under *Power Prods.* Nor did it articulate a standard for any of its conclusions.

b. <u>Receiver Did Not Serve Appellants with a Summons and Complaint to Establish Personal Jurisdiction.</u>

"'Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995).

Appellant Field was dismissed with prejudice from this case in Judge Miller's December 1, 2017, Order. Nothing in the GSA waived any future service of process. No Summons or Complaint in this latest filing exists in the Record. Receiver's Motion does not have Proof of Service on Field in Florida. Receiver's failure to comply with Rule 4, SCRCP, violated Appellant Field's right to due process. (R. p.269) And, at the time the matter was filed in South Carolina, the action was still pending in Florida. (R. p.214, EDF#24) The case should have been dismissed under Rule 12(b)(4), (5) or (8), SCRCP. The Circuit Court's failure to dismiss was error.

c. <u>The GSA Granted Only Judge Edward W. Miller with Personal Jurisdiction of Appellant Field in South Carolina.</u>

Alternatively, assuming *arguendo* that the case was still open, only Judge Edward W. Miller, had jurisdiction to hear disputes arising out of the GSA. The GSA provided at Paragraph 14(I)(ii):

> The parties agree that the [sic] Judge Edward W. Miller, the presiding judge in the Tomz [c]ase, shall have sole and exclusive jurisdiction regarding any dispute related to the enforcement, performance or non-performance of any future obligation contained herein (including any integral components hereof). (R. pp.165-166)

In *Pee Dee Stores*, this Court held that general contract principles are applied in the construction of a settlement agreement, *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009). It is axiomatic in law to say that words in a contract should be given their plain, ordinary meaning.

On September 27, 2020, Appellant Field filed a motion to recuse Judge Miller from this matter. (R. pp.351-358) Without a ruling on that motion, Chief Justice Beatty issued an order on November 12, 2020, appointing the Honorable Jean H. Toal, retired Chief Justice, to hear the pending motions in this case. (R. p.20) In his order, Chief Justice Beatty wrote, "The Honorable Edward W. Miller has recused himself from hearing any further matters regarding this case." *Ibid.* Chief Justice Beatty's order came without Judge Miller entering an order on Appellant Field's motion for recusal or otherwise indicating why he had recused himself. Chief Justice Toal dismissed Appellant Field's recusal motion as moot. (R. pp.18-19)

The contract here specifies it is "Judge Edward W. Miller" retaining exclusive jurisdiction, using the appositive modifier, "the presiding judge in the Tomz [c]ase", to more specifically identify him and his unique connection to the matter. It strains credulity to suggest that the parties agreed anything other than that Judge Edward W. Miller would hear any future disputes.

The contractual provision provides that only one individual, Judge Edward W. Miller, was designated by the parties to have jurisdiction to hear future controversies arising from this agreement. The parties did <u>not</u> bargain and agree that *any* judge sitting in South Carolina's 13th Judicial Circuit would retain jurisdiction. The parties memorialized their agreement that if a future dispute were to arise only Judge Miller, given his experience with this complex case and his unique involvement therein over 11 years, could exclusively retain jurisdiction.

CIF's entire rationale for referring the matter to South Carolina was Judge Miller's unique relationship with the parties, the facts, the claims, and the extended procedural history. (R. p.533, line 17-p.534, line 2) CIF repeated this argument in its opposition to Field's and Taillon's Motions to

Vacate the Stay, claiming "sole jurisdiction" to interpret and enforce the GSA lay "more particularly [with] Judge Edward Miller, who presided over the Tomz Case and approved the GSA and Addendum to the GSA on November 27, 2017." (R. p.556, lines 3-5; lines 11-18) The same rationale cannot be applied to any other South Carolina Circuit Court judge.

To the extent Appellant Field waived personal jurisdiction, it was solely and exclusively for disputes heard by Judge Miller. Receiver cannot now unilaterally rewrite the express terms of the agreement from "Judge Edward W. Miller" to "any South Carolina state court judge" and then bootstrap the court into jurisdiction. (R. pp.226-227)

The Circuit Court erred in vesting itself with jurisdiction after Judge Miller's recusal. The Circuit Court should have exercised its authority under its appointment to the case to dismiss the matter for lack of jurisdiction, pursuant to the terms of Paragraph 14(I) (ii), (v) of the GSA. (R. pp.165-166)

3. THE CIRCUIT COURT ERRED IN AWARDING LIQUIDATED DAMAGES

The GSA provides in pertinent part on Page 13:

> Subsequent to the execution of this Agreement (and its approval by the Court), should any party **file any suit or claim** wherein he/she/they/it **attempt(s) to revoke or disqualify any term of this Agreement** for any reason, the parties agree that the that the [sic] **prevailing party** shall be entitled a minimum of $250,000.00 as liquidated damages for defending, responding or enforcing the terms of this Agreement. (emphasis added).[10]

(R. p.166)

[10] GSA P. 13 of 16 in 2-24-2017 version, (R. p.166)

a. **The plain language of the GSA anticipates imposing liquidated damages only against a party that may "*file* any suit or claim," not for a defense or responses to another party's litigiousness, and prevails.**

When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning, *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct.App. 2004).

Here, the contractual language contemplates a party filing a suit or claim. A straightforward reading of "filing" implicates that the filer is initiating the suit or claim. The language does not preclude any party from responding to a lawsuit initiated by another party. Damages are strictly for the party 'defending' the law suit. (R. p.190; p.273)

It is the Receiver, not Field, who has filed the lawsuit in Florida, and is also filing this latest matter in South Carolina. The record in this case is bereft of any instance where Field filed any suit or claim after the approval of the GSA gave that agreement effect, much less the filing of a suit or claim that seeks to 'revoke or disqualify' a term of the GSA. If Receiver wanted a liquidated damages provision that would be triggered by the filing of a responsive pleading, it could have negotiated for the inclusion of such a term in the GSA. It did not.

CIF did not produce any evidence before the Circuit Court demonstrating Field attempted to set aside any portion of the GSA, or that he ever objected to the jurisdiction of the U.S. District Court in the Middle District of Florida. To the contrary, Field's Motion to Dismiss in *Capital Investment Funding, LLC v. Arthur Field & Kathryn Taillon*, 3:19-cv-0606, asked for specific enforcement of the GSA—including its releases and dismissals with prejudice. (R. pp.516-519) CIF admits Field and Taillon were asking the Florida District Court to "enforce the GSA." (R. p.533, lines 15-17, and p.554)

Field's objections to jurisdiction were raised in South Carolina, and as argued above, were only in response to this latest litigation filed by CIF.

Moreover, a party seeking the benefit of the GSA's liquidated damages provision must show that it is the "prevailing" party. (R. p.166) CIF admits it has not "prevailed" in Florida. (R. pp.566-572) If CIF had prevailed in the litigation it initiated in Florida, there would have been no predicate for the Motion for Declaratory Relief that has beget this appeal.

Receiver cannot file yet another suit or claim in another jurisdiction and then complain it is entitled to liquidated damages because another party responded to its filing. Such a holding would incentivize unabated offensive litigation by CIF and chill any person sued by CIF from exercising constitutional due process right to defend against the action.

b. <u>The liquidated damages provision is an unenforceable penalty.</u>

"Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance." *Lewis v. Premium Inv. Corp*., 351 S.C. 167,172, 568 S.E.2d 361,363 (2002). "Where, however, the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty." *Id.* (R. p.190; pp. 201-203; p.210) The dispositive test whether a provision in a contract is for liquidated damages or is an unenforceable penalty was set forth by our Supreme Court in *Tate v. LeMaster,* 231 S.C. 429, 99 S.E.2d 39(1957):

> Implicit in the meaning of 'liquidated damages' is the idea of compensation; in that of 'penalty,' the idea of punishment. Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

Tate, 231 S.C. at 441, 99 S.E.2d at 45–46. See*,* also*, Foreign Academic & Cultural Exchange Services, Inc. v. Tripon,* 394 S.C. 197, 715 S.E.2d 331 (2011) (rehearing denied)(affirming liquidated damages as an unenforceable penalty; holding court should have conducted hearing to determine actual damages); *Lefemine v. Baron,* 573 So.2d 326, 328 (Fla. 1991) (holding under Florida law if it is unclear whether a provision for payment of an arbitrary sum is a penalty or genuine liquidated damages, then . . . courts

tend to construe the provision as an unenforceable penalty); *Goldblatt v. C.P.Motion, Inc.,* 77 So.3d 798(Fl. 3DCA 2011) ("…[t]he mere fact that [the defendant] stipulated to an otherwise unenforceable liquidated damages clause does not automatically render the clause enforceable…the court can still invalidate the clause [if] the stipulated sum is disproportionate to [the actual damages]. **The prime factor in determining whether such sum is a penalty or a forfeiture is whether the sum named is just compensation for damages resulting from the breach.**")(emphasis in original).

Proof of actual attorneys' fees, or other professional services, can be ascertained with an affidavit. CIF's Receiver submitted no evidence tending to prove it incurred more than nominal legal fees in Florida or South Carolina. The record reflects that CIF's Receiver did not respond to motions or other pleadings in Florida, and that it opposed every attempt by Field and Taillon to expedite the Florida federal case, including opposing Field's and Taillon's April, 2020, Motions to Vacate Stay. (R. pp.544-552, pp.538-543); (CIF opposition: R. pp.553-558) Nine months later, CIF Moved to Continue the Stay (1/21/2021) (R. pp.559-565; p.210)

Receiver's pleadings below in South Carolina consist of: (a) its initial Motion for Declaratory Relief 12/31/2019 (R. pp.147-154); (b) its reply to Field's Motion to Recuse; and (c) its Responses to Field's and Taillon's Motions to Reconsider. (R. pp.229-236; pp.257-267)

The relative paucity of work without any Affidavit of Fees does not justify an award of $250,000. The Circuit Court erred by awarding $250,000 to CIF without any evidence in the record of legal fees approaching that amount. Absent clear and convincing evidence the amount awarded is justified, the amount is a penalty. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

The Circuit Court further erred by adding the penalty it awarded to a pre-existing civil judgment. The Circuit Court did not cite any precedent or other authority for doing so because no such authority exists.

Were CIF to prevail in Florida, it is free to attempt to obtain an award of actual legal fees from the Court there, if permitted and justified. It is error for the South Carolina Circuit Court to reward CIF with the proceeds of a penalty assessed against Appellant Arthur Field.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse or vacate the Amended Order entered by the Circuit Court on March 2, 2021, and dismiss "Receiver's Motion for Declaratory Relief." The South Carolina Uniform Declaratory Judgment Act applied, and if it did not apply, the Court did not have jurisdiction; the Circuit Court did not have personal jurisdiction of Appellant Field; Appellant Field was denied his due process rights; and, liquidated damages were improperly awarded.

Respectfully Submitted,

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