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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable Deadra L. Jefferson, Circuit Court Judge  
Case No.: 2018-CP-10-0872

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Appellate Case No. 2019-002002

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Estate of Patricia B. Holliday.....Appellant,

v.

Ross S. Holliday.....Respondent.

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FINAL BRIEF OF APPELLANT

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## **STATEMENT OF ISSUES ON APPEAL**

- I. DID THE CIRCUIT COURT ERR IN HOLDING THAT THE APPELLANT RELEASED HER CLAIMS ON THE NOTE IN THE MARITAL SETTLEMENT AGREEMENT?
- II. DID THE CIRCUIT COURT ERR IN HOLDING THAT S.C. CODE ANN. § 36-3-604 APPLIED TO BAR THE APPELLANT'S CLAIM?
- III. DID THE CIRCUIT COURT ERR IN ITS INTERPRETATION OF S.C. CODE ANN. § 62-2-507(C)(2)?
- IV. DID THE CIRCUIT COURT ERR IN HOLDING THAT PATRICIA HOLLIDAY HAD A BENEFICIAL INTEREST IN THE NOTE AS OPPOSED TO A LEGAL INTEREST AS A JOINT HOLDER WITH RIGHTS OF SURVIVORSHIP?
- V. DID THE CIRCUIT COURT ABUSE ITS DISCRETION BY HOLDING THAT THE ORIGINAL NOTE IS NOT NEWLY DISCOVERED EVIDENCE UNDER RULE 60(B)(2), SCRCP?
- VI. DID THE CIRCUIT COURT ABUSE ITS DISCRETION BY HOLDING THAT THE APPELLANT FAILED TO ESTABLISH THE REQUIRED ELEMENTS FOR RELIEF UNDER RULE 60(B)(2), SCRCP?

## STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment to Respondent Ross S. Holliday ("Respondent") on October 11, 2019 and November 15, 2019 denial of the Appellants' motion for reconsideration (collectively, the "**Summary Judgment Order**"). This is also an appeal of the circuit court's denial of Appellant's Rule 60(b)(2), SCRCP Motion for Relief ("**Rule 60 Order**") from the Summary Judgment Order.

This case involves a claim for payment on a note given by the Respondent to Patricia Holliday and her former husband, Warren Holliday. Patricia and Warren Holliday held that Note as joint holders with rights of survivorship. There is one basis for the order granting summary judgment – that Patricia Holliday transferred her legal interest in the note to Warren Holliday at the time of their 2013 divorce and relinquished all of her rights to Mr. Holliday pursuant to the Marital Settlement Agreement which was incorporated into the divorce decree. This holding was made despite the fact that the Marital Settlement Agreement contains no language which supports a finding that Patricia Holliday relinquished her claim on the note. The holding was also based on the assumption that Warren Holliday retained possession of the original Note prior to his death in 2016. At the time of the summary judgment hearing, the whereabouts of the original Note were undetermined.

During the pendency of the appeal of the Summary Judgment Order, the Appellant discovered the original Note in a box in Patricia Holliday's attic. This Court granted Appellant's Motion for Relief from the Automatic Stay to file a Rule 60(b)(2), SCRCP motion. On June 25, 2021, the circuit court denied the Appellant's motion in the Rule 60 Order. ("**Rule 60 Order**"). The Appellant filed a Notice of Appeal of the Rule 60 Order on July 13, 2021. This Court consolidated the two appeals into the present action by order dated July 23, 2021.

## STATEMENT OF FACTS

### A. Background Facts.

On or about June 18, 2004, Warren Holliday and Patricia Holliday loaned \$2,000,000 to the Respondent. (Note, R. p. 125). Warren and Patricia Holliday, who were married at the time, were joint holders of the Note with rights of survivorship. (Note, R. p. 125).

Patricia Holliday had no knowledge of any repayments on the Note while she was married to Warren Holliday. (Appellant Depo. Tr., R. p. 205, lines 20-25). However, the Respondent claims that Warren Holliday (the joint holder with Patricia Holliday) orally demanded repayment in 2005, and Respondent claims to have made three payments to Warren Holliday totaling roughly \$810,000 between 2005 and 2007. (Respondent Depo. Tr., R. p. 328, lines 1-23). Respondent also claims that he made a \$371,613 payment on December 31, 2010 upon the sale of some real property he alleges he owned. (Respondent Depo. Tr., R. p. 357, line 19 to p. 358, line 16). Respondent has no documentary proof of either payment.

Warren Holliday and Patricia Holliday divorced on December 9, 2013. (Divorce Decree, R. pp. 233, 388). The Divorce Decree incorporated by reference the August 9, 2013 Marital Settlement Agreement. (Marital Settlement Agreement, R. p. 247, 390). The Marital Settlement Agreement set forth the terms of the agreement between Warren and Patricia Holliday concerning division of their marital assets. At the time of the Marital Settlement Agreement, and upon entry of the divorce decree, Warren and Patricia Holliday remained joint holders of the Note with right of survivorship. Warren Holliday died in 2016.

The Marital Settlement provides for division of marital property, but does not specifically address the Note. (Marital Settlement Agreement, R. p. 247, 390). In addition, the Marital Settlement Agreement does not contain a “catch-all” provision dealing with property that is not otherwise addressed. The Marital Settlement Agreement provides for seven categories of

property to be divided in the Equitable Apportionment and Division of Property section. (Marital Settlement Agreement, R. at pp. 251, 394). The categories are generally described as follows:

- A. Marital Abode. – This section addresses the residence of Warren Holliday and Patricia Holliday and provides that this asset shall be owned by a trust benefitting Patricia Holliday.
- B. Vehicles. – This section identifies two specific vehicles and provides that Patricia Holliday will retain ownership and Warren Holliday relinquishes any claim to those vehicles.
- C. Household Goods. – This section provides for division of household goods and precious metals. It provides that Patricia Holliday retains possession of the household goods and precious metals will be divided equally.
- D. Business Assets. – This section provides that “Warren [Holliday] presently owns or holds an interest in several limited liability companies, corporations or other business entities, a schedule of which is attached hereto as Exhibit A. The Parties agree that Warren shall retain and continue full ownership and interest in any and all such companies and other business assets which Warren holds at this time.” The Note was not listed in Exhibit A, and was never held by one of Warren Holliday’s limited liability companies, corporations or other business entities.
- E. Accounts. - This section provides that Warren Holliday and Patricia Holliday retain control of their own individual financial accounts.

- F. Trust Funds and Other Inherited Property. This section provides that Warren Holliday and Patricia Holliday will retain all trust funds and inherited property they individually own.
- G. Other Items of Property. – This section provides for distribution of “all other personal property acquired during the marriage, including, but not limited to, household furnishings, appliances, bank accounts, retirement accounts, money situated in other accounts, jewelry, sporting equipment, and all other personal property of value.” As to these items of property, the Marital Settlement Agreement provides that “Warren [Holliday and Patricia Holliday] have made a physical division of [the property]”, and that “the parties each release the other from all claims of interest to any monies or assets in the possession of the other or titled in the name of the other party unless stated otherwise herein.” There is no evidence in the record concerning whether the Note was otherwise addressed by Warren Holliday and Patricia Holliday.
- H. Debts. This section relates to debts and obligations that Warren and Patricia Holliday incurred, and not money owed to them.

The Respondent claims that, after the divorce, he assisted Warren Holliday in paying off another loan, and that Warren Holliday forgave the debt on the Note. (Respondent Tr., R. p. 338, line 1 to p. 342, line 24; p. 377, line 7 to p. 378, line 24). The payment that allegedly resulted in the forgiveness of the debt occurred on January 22, 2016, when Zeezrom Properties, LLC paid \$1,104,374.46 to Synovus Bank. (Respondent Tr., R. p. 376, lines 5-15). This payment was not made by the Respondent. Rather, it was funded by a capital contribution made by Warren Holliday to Zeezrom Properties, LLC – a business wholly owned by Warren

Holliday. (Respondent Tr., R. p. 377, lines 17-21). The Respondent claims that Warren Holliday then marked the Note “paid in full,” but he does not have a copy of that alleged document. (Respondent Tr., R. p. 378, lines 11-24). Further, Patricia Holliday never forgave the amount owed to her on the Note. (Patricia Holliday Affidavit, R. p. 236).

Patricia Holliday made a demand for payment on the Note on July 12, 2017. (Demand Letter, R. p. 406). The Respondent made no payments in response to that demand, and Patricia Holliday filed this lawsuit on February 20, 2018. (Complaint, R. p. 170).

### **B. Summary Judgment Order.**

In the Summary Judgment Order, the circuit court held that Patricia Holliday relinquished her right to enforce the Note to Warren Holliday by operation of the Marital Settlement Agreement. The assumption that Warren Holliday retained possession of the original Note was central to that conclusion, as set forth in three places in the “Findings of Fact” section of the Order and in the Conclusions of Law:

- “At all times until the NBSC note was repaid in full, Warren had possession of the original Promissory Note.” (Summary Judgment Order, R. at p. 4).
- “The Family Court Order provided that “[t]he personal property acquired by and between the parties during the marriage has been equitably divided to their mutual satisfaction.” (Summary Judgment Order, R. at p. 4).
- “The Marital Settlement Agreement provided that Warren, his successors, heirs and assigns would pay to Patricia \$16,000 per month for her life, that Patricia would own the family home and most of the married couple’s personal effects, and that she would have a life insurance policy on Warren’s life in the amount of \$645,000. In exchange, Patricia gave up all claims to any business property of Warren, *as well as all personal property in Warren’s possession and not specifically mentioned in the Agreement.*” (Summary Judgment Order, R. at p. 4). (emphasis added).
- “When Warren and Patricia obtained a divorce, they entered into a Marital Settlement Agreement that gave Warren all property (whether personal or business) that was not specifically given to Patricia.” (Summary Judgment Order, R. at p. 7).

- “The Court finds that the language of the Marital Settlement Agreement provides that Patricia expressly released any and all claims she had to the marital assets, both business and personal of Patricia and Warren, except as provided in the Agreement. The Court concludes that Patricia has no claim to, or interest in, the Promissory Note at issue in this matter.” (Summary Judgment Order, R. at p. 8).

### **C. Facts Relevant to Newly Discovered Evidence.**

Patricia Holliday, the original Appellant and Plaintiff in the underlying action, died on February 23, 2020. (Affidavit of Mark Holliday, R. p. 459 at ¶ 3). At the time of her death, she resided at 766 Gypsy Lane, Mt. Pleasant, South Carolina. (Affidavit of Mark Holliday, R. p. 459 at ¶ 5). She purchased that home after her divorce – on June 25, 2015 – and moved in shortly thereafter. (Affidavit of Mark Holliday, R. p. 459 at ¶ 5). Warren Holliday never lived with Patricia Holliday in that home. (Affidavit of Mark Holliday, R. p. 459 at ¶ 5).

After Patricia Holliday’s death, her son Mark Holliday began searching for her life insurance documents in the residence. (Affidavit of Mark Holliday, R. p. 459 at ¶ 6). On or about March 7, 2020, Mr. Holliday and his sister Pamela Wallin discovered certain boxes located in the attic of the Residence. (Affidavit of Mark Holliday, R. p. 459 at ¶ 6). This was in an area that was inaccessible to Patricia Holliday due to her age and poor physical health. (Affidavit of Mark Holliday, R. p. 459 at ¶ 7). In one of many heavy banker’s box among Patricia Holliday’s possessions in her attic, Mr. Holliday and Ms. Wallin located what appears to be an original of the June 18, 2004 Promissory Note signed by Ross Holliday in favor of Warren P. Holliday and Patricia S. Holliday. (Affidavit of Mark Holliday, R. p. 459 at ¶ 8).<sup>1</sup> Contrary to the Respondent’s testimony, this original Note has no markings on it and does not have “paid in full” written on it. (Affidavit of Mark Holliday, R. p. 459 at ¶ 9).

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<sup>1</sup> This document is in possession of the Plaintiff’s counsel and will be provided for inspection by the parties and the Court at or before the hearing.

## ARGUMENT

### A. Summary Judgment Standard.

This appeal is to be determined using the summary judgment standard applied by the circuit court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). In evaluating a motion for summary judgment, a court must view “the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party.” *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). This standard requires merely “the slightest amount of relevant evidence” on an issue to warrant denial of summary judgment. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 278, 701 S.E.2d 742, 743 (2010) (dissenting opinion).

### B. Rule 60 Standard.

A trial court may relieve a party from a final judgment, order, or proceeding if "newly discovered evidence which by due diligence could not have been discovered in time to move from a new trial under Rule 59(b)" is presented to the trial court. Rule 60(b)(2), SCRPC. “To receive a new trial based on newly discovered evidence, the moving party must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.” *Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008) (citations omitted). “Evidence is not ‘newly discovered’ if it is known to the party at trial and in the party's possession.”

*Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 637, 670 S.E.2d 680, 688 (Ct. App. 2008) citing *Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005).

The standard of review for denial of a motion under Rule 60(b)(2) is abuse of discretion. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

**I. THE CIRCUIT COURT ERRED IN HOLDING THAT PATRICIA HOLLIDAY RELEASED HER CLAIMS ON THE NOTE IN THE MARITAL SETTLEMENT AGREEMENT.**

At all relevant times, Warren and Patricia Holliday held the Note jointly with a right of survivorship. (Note). Therefore, each of them had an independent ownership interest in the Note at the time of the Marital Settlement Agreement and Divorce Decree in 2013.<sup>2</sup> The circuit court ruled that, as a matter of law, Patricia Holliday released her own independent interest in the Note by entering into the Marital Settlement Agreement. (Oct. 11, 2019 Order, R. at pp. 7-9). However, the Marital Settlement Agreement is not a one-sided document in which Patricia Holliday simply released her claims or transferred her personal interest in the Note. It is a

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<sup>2</sup> South Carolina law provides for disposition of assets held with a right of survivorship among spouses who later divorce. Prior to January 1, 2014, the right of survivorship was not severed. *Duncan v. Investors Diversified Services, Inc.*, 285 S.C. 467, 472, 330 S.E.2d 295, 297-298 (1985) (divorce did not revoke beneficiary designation in a retirement plan as a matter of public policy). Effective January 1, 2014, S.C. Code Ann. § 62-2-507 provides that “[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage: (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship .” Therefore, there is a legal issue regarding whether the right of survivorship between Warren Holliday and Patricia Holliday was severed at the time of the divorce in December of 2013. However, it is clear that, at worst, Patricia Holliday retained a one-half interest in the Note after the divorce under South Carolina law.

mutual document by which Warren and Patricia Holliday released claims against each other. (Marital Settlement Agreement, R. p. 247, 390). It does not address the Note (explicitly or implicitly), does not contain a “catch-all” provision that provides that either Warren Holliday or Patricia Holliday released claims to property not specifically addressed, and certainly cannot be interpreted to read that Patricia Holliday either released her claims or transferred her interest in the Note to Warren Holliday as a matter of law. The circuit court committed plainly reversible error in holding otherwise.

**A. The Marital Settlement Agreement does not address the Note, expressly or implicitly.**

The circuit court held that the “Marital Settlement Agreement, by its terms, resolved all issues of ownership of marital assets [between Warren and Patricia Holliday].” (Oct. 11, 2019 Order, R. at p. 7). The circuit court cited a long quote from the agreement which provides for a mutual release between the parties, and quotes two provisions of the Equitable Apportionment and Division section, but inexplicably never states which of the sections unequivocally provides that Patricia Holliday transferred her rights to the Note. (Oct. 11, 2019 Order, R. at pp. 4-5). That is because there is no such section. The Marital Settlement did not address the Note explicitly or implicitly.

As set forth above, the Marital Settlement Agreement sets forth seven categories of property to be divided in the Equitable Apportionment and Division of Property section of the agreement. It is undisputed that none of these categories expressly addressed the Note. The circuit court appears to cite two of the categories from the Equitable Apportionment and Division of Property section without specifically holding that the Note falls within either one: Business Assets and Other Items of Property. (Oct. 11, 2019 Order, R. at pp. 4-5).

The Business Assets subsection of the Marital Property Agreement provides, in relevant part:

Warren [Holliday] presently owns or holds an interest in *several limited liability companies, corporations or other business entities, a schedule of which is attached hereto as Exhibit A*. The parties agree that Warren shall retain and continue full ownership and interest in any and *all such companies* and other business assets which Warren holds at this time. Patricia Holliday hereby relinquishes and waives any claim she may have in or against these business assets, except as provided in the Patricia Holliday trust.

(Marital Settlement Agreement) (emphasis added). It is undisputed that the Note was held by Warren and Patricia Holliday in their individual names and not in a limited liability company, corporation or other business entity. The Note is not listed in Exhibit A (and Exhibit A was not submitted into the record). Further, Patricia Holliday testified that the Note was a personal loan to the Respondent. (Patricia Holliday Depo. Tr., R. p. 199, lines 11-15). Therefore, the Note is clearly not a “business asset” that was assigned or transferred to Warren Holliday.

The Other Items of Property subsection of the Marital Settlement Agreement provides:

Warren and Patricia have made a physical division of all other personal property acquired during their marriage, including, but not limited to, household furnishings, appliances, bank accounts, retirement accounts, money situated in other accounts, jewelry, sporting equipment, and all other personal property of value . . . [and] . . . the parties each release the other from all claims of interest to any monies or assets in the possession of the other or titled in the name of the other party unless stated otherwise herein.

(Marital Settlement Agreement at R. p. 253, 396).

The circuit court cited no evidence that any physical division of the Note was agreed to by Warren and Patricia Holliday, much less any division that transferred Patricia Holliday’s interest in the Note to Warren Holliday. The only evidence of the parties’ intent is found in documents which clearly demonstrate that the parties did not intend for Patricia Holliday’s interest in the Note to be transferred and released. In Patricia Holliday’s affidavit, she clearly

stated that she did not agree to release claims on the Note by operation of the Marital Settlement Agreement. (Holliday Affidavit, R. p. 236). In addition, Patricia Holliday submitted a financial declaration in the divorce proceeding on December 10, 2013 – several months after the Marital Settlement Agreement – in which she claims ownership of her interest as a holder of the Note. (Financial Declaration, R. at p. 263, 465).

The circuit court based its ruling on the language of the Marital Settlement Agreement, which is anything but unambiguous as it relates to the Note. Indeed, it is only where an agreement is clear on its face and unambiguous that the court may “interpret its lawful meaning and the intent of the parties as found within the agreement.” *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001). However, a contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.* The determination of the parties’ intent is then a question of fact, and the circuit court must be reversed if the Marital Settlement Agreement was ambiguous as to the disposition of the Note. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 300, 391 S.E.2d 577, 579-580 (1990) (reversing summary judgment order where language of subject contract was ambiguous).

The Marital Settlement Agreement provides that Patricia Holliday and Warren Holliday “made a physical division of personal property.” At the time of the summary judgment hearing, there was a complete ambiguity as to whether or how physical division of the Note was made. As set forth above, Patricia Holliday affirms that she did not agree to transfer her interest in the Note to Warren Holliday, and her affirmation is supported by the financial declaration she submitted to Family Court after the Marital Settlement Agreement was signed. (Patricia

Holliday Affidavit, R. p. 236) (Financial Declaration, R. at p. 263, 465). Neither the Respondent nor the circuit court cited any evidence that Warren and Patricia Holliday intended that the Note would become the property of Warren Holliday. The fact is that the Marital Settlement Agreement did not address the Note. The circuit court therefore erred in holding that the Marital Settlement Agreement unambiguously assigned Patricia Holliday's ownership rights in the Note to Warren Holliday.

**B. The Marital Settlement Agreement contains no “catch-all” provision which assigns or transfers any property not otherwise addressed to Warren Holliday.**

The circuit court inexplicably and erroneously agreed with the Respondent that the Marital Settlement Agreement provides that any property not specifically addressed was given to Warren Holliday. (Oct. 11, 2019 Order, R. at p. 7) (“When Warren and Patricia obtained a divorce, they entered into a Marital Settlement Agreement that gave Warren all property (whether personal or business) that was not specifically given to the Patricia.”); (Oct. 11, 2019 Order, R. at 8) (“The Court finds that the language of the Marital Settlement Agreement provides Patricia Holliday expressly released any and all claims she had to the marital assets, both business and personal of Patricia and Warren, except as provided in the Agreement.”). The Marital Settlement Agreement contains no such language, and the circuit court failed to cite the language to which it referred. As set forth above, the Marital Settlement Agreement contains a mutual release and a section on the disposition of marital property, none of which unambiguously address the disposition of the Note or of any property not otherwise addressed. Therefore, the circuit court clearly erred in holding that the Marital Settlement Agreement unambiguously assigns all property not otherwise addressed to Warren Holliday.

## II. THE CIRCUIT COURT ERRED IN HOLDING THAT S.C. CODE ANN. § 36-3-604 APPLIED TO BAR PATRICIA HOLLIDAY'S CLAIM.

The circuit court erred in holding that Patricia Holliday discharged the Respondent's obligation under the Note. The Court held that Patricia Holliday discharged Ross Holliday's obligation on the Note, as a matter of law, pursuant to S.C. Code Ann. § 36-3-604. This holding evidences a complete misreading of the statute.

S.C. Code Ann. § 36-3-604 provides, in relevant part:

- (a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record.

A plain reading of the statute makes it clear that the discharge must be made by some direct act related to the Note itself. The "person entitled to enforce an instrument," *i.e.* Patricia Holliday, must mark the instrument or renounce her rights against the Respondent in a signed record. This is made clear in *In re Washington*, 581 B.R. 150, 158 (Bkrcty. D.S.C. 2017), the only case to interpret the statute. In that case, the court held that the issuance of an IRS Form 1099-C "Cancellation of Debt" was insufficient to evidence a cancellation of amounts owed on a guaranty pursuant to S.C. Code Ann. § 36-3-604, particularly where there was no evidence that that guaranty or related loan documents had been delivered to the debtor as discharge of the debt or intentionally destroyed or marked cancelled. *Id.* Patricia Holliday did not discharge Respondent's liability by signing an ambiguous Marital Settlement Agreement with a third party (Warren Holliday) that contains no reference to the Note, much less an intent to transfer ownership or discharge. As set forth herein, Patricia Holliday had no intent to discharge the Respondent from his obligations on the Note. Therefore, the circuit court committed reversible

error by holding that Patricia Holliday had discharged the Respondent's obligation as a matter of law.

**III. THE CIRCUIT COURT ERRED IN ITS INTERPRETATION OF S.C. CODE ANN. § 62-2-507(C)(2).**

The circuit court held that S.C. Code Ann. § 62-2-507 did not operate to “preserve” Patricia Holliday's interest in the Note. (Oct. 11, 2019 Order, R. at p. 8). This evidences a complete misunderstanding of the applicable law and Patricia Holliday's argument.

The only relevance of Section 62-2-507 and prior common law is that South Carolina law has always provided for disposition of joint property held with right of survivorship among divorced spouses when that property is not otherwise addressed in a divorce settlement. Prior to January 1, 2014, the right of survivorship was not severed. *Duncan v. Investors Diversified Services, Inc.*, 285 S.C. 467, 472, 330 S.E.2d 295, 297-298 (1985) (divorce did not revoke beneficiary designation in a retirement plan as a matter of public policy). Effective January 1, 2014, S.C. Code Ann. § 62-2-507 provides that “[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage: (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship .”

Therefore, since the Marital Settlement does not address the Note, the issue is whether S.C. Code § 62-2-507 retroactively applied to sever Patricia Holliday's interest from Warren Holliday at the time of their divorce (leaving her with one-half of the Note) or whether prior law controlled, making Patricia Holliday the holder of the entire Note by survivorship at the time of Warren Holliday's death in 2016. This issue was not decided by the circuit court and is not on

appeal. However, since the circuit court misconstrued the statute, its order is in error on this point and must be reversed.

**IV. THE CIRCUIT COURT ERRED IN HOLDING THAT PATRICIA HOLLIDAY HAD A BENEFICIAL INTEREST IN THE NOTE RATHER THAN A LEGAL INTEREST AS A JOINT HOLDER WITH RIGHTS OF SURVIVORSHIP.**

Although not clear, it appears that the circuit court found that Patricia Holliday had a beneficial interest, rather than legal interest, in the Note. This is absolutely incorrect. A “beneficial interest” is a “right or expectancy (such as a trust or an estate) as opposed to legal title to that thing.” Black’s Law Dictionary 149 (7th ed. 1999). Patricia Holliday was, and is, a legal holder of the Note with right of survivorship. (Pl. Memo in Opp., filed 9/24/19, R. at p. 111). She had a legal right to enforce it, and was not a beneficiary. See S.C. Code § 36-3-301 (holder is entitled to enforce negotiable instrument). Therefore, Patricia Holliday had her own legal interest in the Note that was not an expectancy dependent on Warren Holliday. The circuit court’s citations to case law concerning release of a beneficial interest in a marital agreement are wholly improper, and the entire ruling was in error.

**V. IN DENYING APPELLANT’S MOTION FOR RELIEF FROM THE SUMMARY JUDGMENT ORDER, THE CIRCUIT COURT ABUSED ITS DISCRETION IN HOLDING THAT THE ORIGINAL NOTE WAS NOT NEWLY DISCOVERED EVIDENCE.**

In denying Appellant’s Rule 60(b)(2) motion, the circuit court improperly relied upon *Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 460 (Ct. App. 2005) and *Lans v. Gateway 2000, Inc.*, 110 F. Supp. 2d 1, 5 (D.D.C. 2000) for the proposition that the original note was not “newly discovered evidence.” Both cases concern circumstances in which the party seeking relief from judgment knew about a document and its contents, but failed to raise the existence of that document to the trial court. In the present case, the discovery of the original Note was consequential because it is evidence that original Note was in the possession of Patricia Holliday,

not because the contents of the original Note differed from what was presented at the summary judgment hearing or that the contents of the original note would have changed the outcome. The circuit court abused its discretion by failing to recognize and apply this distinction. This was an error of law, and warrants reversal.

In *Lanier*, a wife in a divorce proceeding found an antenuptial agreement after the parties had entered into a consent judgment resolving their divorce action. The wife sought to set aside the consent judgment, arguing that the antenuptial agreement should have controlled the terms of the divorce. The Court of Appeals affirmed the family court order holding that the agreement was not “newly discovered evidence” because the wife had not informed the court regarding the document or its potential application prior to the entry of the consent judgment:

We find the instant case analogous to *Lans*. ***Wife was well aware the agreement existed; yet, she did not plead its contents or otherwise inform the court of the document's potential application.*** Instead, she chose to initiate this action and negotiate a property settlement without asserting any potential rights which the agreement might have afforded her. Consequently, the agreement was not newly discovered.

*Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 460 (Ct. App. 2005) (emphasis added). In other words, the antenuptial agreement, and its contents, were being newly presented to the court for the first time, despite the fact that the wife knew of its existence.

The *Lans* case was a patent infringement action brought by a pro se plaintiff that was dismissed by the court because the plaintiff conceded that he was not the owner of the patent. The plaintiff attempted to present an agreement related to the patent for the first time in a Rule 60 motion. As with the *Lanier* holding, the *Lans* decision turned on the fact that the plaintiff had not disclosed the existence of the document, despite knowing of it prior to the dismissal. *Lans v. Gateway 2000, Inc.*, 110 F. Supp. 2d 1, 5 (D.D.C. 2000) (“Assuming Lans's declaration to be

true, the Court cannot conceive of why Lans failed to notify the Court of the potential existence of the Clarification-Contract and request more time to search for it.”).

In fact, the *Lanier* decision specifically distinguished its holding from the facts of the present case:

We recognize that in some out-of-state cases new trials were allowed when lost documents were subsequently found. [citations omitted]. However, most of these cases sounded in equity and were decided before the advent of Rule 60(b). ***Additionally, in all of the cases cited, existence of the lost document was alleged at trial. When the documents were found, the courts held that the original documents themselves were material and not merely cumulative of other evidence as to their contents. Thus, retrials were merited.*** In contrast, Wife did not allege the existence of the agreement at all and made no attempt to recreate any of its contents before settling the case.

*Lanier*, 364 S.C. at 221; 612 S.E.2d at 461 (emphasis added).

In the present case, the existence and contents of the Note were alleged, presented and argued. (Summary Judgment Order, R. p. 3). The circuit court based the Summary Judgment Order on the finding that Warren Holliday retained possession of the original Note and that the Marital Settlement Agreement provided that Patricia Holliday released claims to any personal property in Warren’s possession and not specifically mentioned in the Agreement. (Summary Judgment Order R. at pp. 4, 7). The original Note has now been discovered in the Patricia Holliday’s possession, an event which – although not necessary for reversal – completely undermines the logic of the Summary Judgment Order. (Affidavit of Mark Holliday, R. p. 459 at ¶ 6). This falls squarely within the cases distinguished by the *Lanier* decision, where “existence of the lost document was alleged at trial [and,] [w]hen the documents were found, the courts held that the original documents themselves were material and not merely cumulative of other evidence as to their contents.” *Lanier*, 364 S.C. at 221; 612 S.E.2d at 461.

Therefore, the circuit court abused its discretion by misconstruing the issue and applying cases that support that misconstrued issue – that the “newly discovered evidence” is the content of the document. Clearly, the “newly discovered evidence” in this matter is the possession of the original Note – and that evidence was not known at the time of the summary judgment hearing. As such, the circuit court’s decision is an error of law and must be reversed.

**VI. THE CIRCUIT COURT ABUSED ITS DISCRETION BY FINDING THAT APPELLANT FAILED TO PROVE THE ELEMENTS REQUIRED BY RULE 60(B)(2).**

In holding that Appellant failed to prove the elements required for relief under Rule 60(b)(2), the circuit court misconstrued and misquoted its original Summary Judgment Order and therefore its factual conclusions were without evidentiary support. Indeed, the Appellant did prove that the discovery of the original Note (1) would probably change the result of the Summary Judgment Order; (2) was discovered since the summary judgment hearing; (3) could not have been discovered before the summary judgment hearing; (4) is material to the circuit court’s ruling in the Summary Judgment Order and (5) is not merely cumulative or impeaching. *See Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008) (citations omitted).

**A. The Circuit Court Abused its Discretion in Holding that Discovery of the Original Note Would Not Change the Original Decision.**

The circuit court summarily held that “the location of the original Promissory Note, or which party had possession of the original Promissory Note, was not dispositive to the Court’s ruling on [the] Motion for Summary Judgment.” (Rule 60 Order, R. at p. 21). The circuit court then went to great lengths to attempt explain away the clear holdings in the Summary Judgment Order by stating:

[T]he determinative factor in the [Summary Judgment Order] was that, pursuant to the Marital Settlement Agreement, Warren was to receive all assets and all

liabilities, business, personal and otherwise, and in exchange, Patricia would receive tax-free<sup>3</sup> monthly payments of \$16,000.00 for her life, ownership of the family home, and a life insurance policy on Warren's life in the amount of \$645,000.00."

(Rule 60 Order, R. at p. 23). This holding contradicts both the language of the Marital Settlement Agreement and the Summary Judgment Order.

It is undisputed that the Marital Settlement Agreement does not specifically mention the Note. (Marital Settlement Agreement, R. p. 247, 390). It is also undisputed that there is no catch-all provision in the Marital Settlement Agreement which assigned to Warren Holliday all personal property that was not specifically delineated. (Marital Settlement Agreement, R. p. 247, 390). The Note falls under the "Other Items of Property" subsection in the Equitable Apportionment and Division section of the agreement. That provision reads:

Warren and Patricia have made a physical division of all other personal property acquired during their marriage, including, but not limited to, household furnishings, appliances, bank accounts, retirement accounts, money situated in other accounts, jewelry, sporting equipment, and all other personal property of value . . . [and] . . . the parties each release the other from all claims of interest to any monies or assets in the possession of the other or titled in the name of the other party unless stated otherwise herein.

(Marital Settlement Agreement at R. p. 253, 396). Because the Marital Settlement Agreement contemplates that Warren and Patricia physically divided unspecified personal property, Patricia's possession of the original Note is certainly evidence that it was granted to her by operation of the Marital Settlement Agreement. Therefore, she had the right to enforce the Note.

As set forth more fully in the Factual Background section herein, the Summary Judgment Order absolutely relies heavily on the (incorrect) finding that the Marital Settlement Agreement provides that Patricia Holliday released any claims for assets that were in Warren Holliday's

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<sup>3</sup> There is no evidence in the record to support the statement that payments to Patricia Holliday would receive payments tax-free, and the trial court failed to cite any such support.

possession. (Summary Judgment Order, R. at 4, 7, 8). The circuit court’s attempt to explain away that finding in the Rule 60 Order falls flat, as there is no factual basis for the conclusion that Warren Holliday was to receive *all* assets and liabilities except for the monthly payments, family home and life insurance policy given to Patricia. (Rule 60 Order, R. at p. 23). A simple reading of the “Other Items of Property” language set forth above (among many other provisions) disproves the circuit court’s flawed analysis. Now that the original Note has been discovered in Patricia Holliday’s possessions, the actual basis for the Summary Judgment Order (which is itself an error) is clearly unsupported. As such, the newly discovered evidence – Patricia’s possession of the original Note – would certainly change the result in the Summary Judgment Order.

**B. The Circuit Court Correctly Held that the Original Note Was Discovered Since the Summary Judgment Hearing.**

The circuit court held that the original Note was discovered after the summary judgment hearing, and that Appellant had proven this required element. (Rule 60 Order, R. at p. 21). That conclusion is incontrovertible, and correct.

**C. The Circuit Court Abused its Discretion in Holding That the Original Note Could Have Been Discovered Prior to the Summary Judgment Hearing.**

The circuit court found that Patricia Holliday could have discovered the original Note by exercising due diligence to search for it prior to the summary judgment hearing. (Rule 60 Order, R. at p. 22). This is a harsh definition of due diligence, given that Patricia Holliday was in an advanced age and in poor health and the original Note was discovered in a heavy box in her attic. (Mark Holliday Affidavit, R. p. 459). Nevertheless, the circuit court again misapplies the law.

Under South Carolina law, “[e]vidence is not ‘newly discovered’ if it is *known to the party at trial* and in the party's possession.”). *Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 637, 670 S.E.2d 680, 688 (Ct. App. 2008) (emphasis added). It is uncontested that Patricia

Holliday did not think she had possession of the original Note at the time of her deposition on September 19, 2018. (Patricia Holliday Depo. Tr., R. at p. 203, line 1 – p. 204, line 10). In situations where the evidence – here, the possession of the original Note – is not known to the party, then it is “newly discovered evidence.”

This case is analogous to *Serio v. Badger Mutual Insurance Company*, 266 F.2d 418 (5<sup>th</sup> Cir. 1959). In *Serio*, the defendant insurance company denied plaintiff’s claim under an insurance policy for coverage of inventory destroyed in a fire because the insured violated the “Iron Safe” provision requiring records of the inventory to be kept in a fire-proof safe during times in which the business was closed. In a subsequent declaratory judgment action, the district court ruled that the policy did not afford coverage due to the violation of the Iron Safe provision. The insured subsequently found the records in an old storage room and filed a Rule 60 motion. The district court denied the Rule 60 motion, but the Fifth Circuit Court of Appeals reversed, holding that a reasonable person, believing that the records were destroyed, would not have been expected to conduct a search. *Id.* at 421.

As in the *Serio* case, Patricia Holliday would not have been expected to conduct a search for a record that she did not believe was in her possession. This is particularly true given the fact that it was in a box in an attic that she could not, and did not, access. As such, the original Note could not have been located prior to the summary judgment hearing. The circuit court abused its discretion by failing to acknowledge that the possession of the original Note was not known at the time of the hearing, and that South Carolina law therefore considers such evidence to be “newly discovered.”

**D. The Circuit Court Abused Its Discretion by Finding That the Discovery of the Original Note Was Not Material to the Summary Judgment Determination.**

The circuit court held that the location of the original Note or the party in possession of that Note was not the underlying basis for the Summary Judgment Order and was therefore not material to the circuit court's decision. (Rule 60 Order, R. at p. 22). As set forth herein, the Summary Judgment Order is in fact (erroneously) based on the finding that Warren Holliday retained possession of the Original Note. There is no other reason for the circuit court to find that "Patricia gave up all claims to any business property of Warren, *as well as all personal property in Warren's possession and not specifically mentioned in the Agreement.*" (Summary Judgment Order, R. at p. 4) (emphasis added). There would also be no reason for the circuit court to conclude that the Marital Settlement Agreement "gave Warren all property (whether personal or business) *that was not specifically given to Patricia.*" (Summary Judgment Order, R. at p. 7) (emphasis added). Further, as discussed herein, the Marital Settlement Agreement does not specifically address the Note and provides that Warren and Patricia divided all "Other Items of Property" and released claims to that property against each other. (Marital Settlement Agreement at R. p. 253, 296). Therefore, the discovery of the original Note in Patricia Holliday's possessions is absolutely material to the question of whether Patricia Holliday released claims to enforce the Note in the Marital Settlement Agreement. The circuit court's order was therefore without evidentiary support, and was an abuse of discretion.

**E. The Circuit Court Abused Its Discretion by Holding That the Original Note was Merely Cumulative or Impeaching.**

In holding that the original Note was merely cumulative of other evidence, the circuit court again states the original Note was identical to the copy of the Note presented at the summary judgment hearing and possession of the original Note was not the basis of the Summary Judgment Order. (Rule 60 Order, R. at p. 23). As set forth repeatedly herein, the possession of the original Note was absolutely the basis of the Summary Judgment Order, and

the fact of possession is not cumulative of any evidence presented at the summary judgment hearing. For that reason, the circuit court ignored its own Summary Judgment Order and had no factual basis to support its decision. Therefore, the circuit court abused its discretion.

### **CONCLUSION**

For the reasons set forth above, Appellant Estate of Patricia B. Holliday respectfully requests that this Court reverse the circuit court's grant of summary judgment to Respondent Ross S. Holliday ("Respondent") on October 11, 2019 and November 15, 2019 denial of the motion for reconsideration. Appellant further requests that this Court reverse the circuit court's denial of Appellant's motion for relief from the Summary Judgment Order and remand this case for trial.

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February 22, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable Deadra L. Jefferson, Circuit Court Judge  
Case No.: 2018-CP-10-0872

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Appellate Case No. 2019-002002

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Estate of Patricia B. Holliday.....Appellant,

v.

Ross S. Holliday.....Respondent.

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CERTIFICATE OF COMPLIANCE

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The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b),  
SCACR.

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