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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Hon. J. Derham Cole, Circuit Court Judge

Appellate Case No. 2023-000155
Civil Action No. 2019-CP-23-06915

Richard D. White,.....Appellant,

v.

FT Acquisitions, LLC,
Commercial Foodservice Repair,
Inc., and Kurt Herwald,.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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INTRODUCTION

Respondent, Commercial Foodservice Repair, Inc. ("CFR"), founded in South Carolina in 1982, provides fast, skilled, on-site foodservice equipment repair and maintenance for convenience stores, restaurants, coffee shops, and concessions operations, as well as other related services and parts. During the times relevant to this action, CFR has operated twenty-four (24) facilities in twenty-two (22) states, in which it has provided essential repair services and parts to many of the most recognized companies in the foodservice industry.

Appellant, Richard White ("White"), is a businessman from Virginia who, prior to 2014, was president and the majority shareholder of Foodservices Technologies, Inc. ("FT"). In 2014, White and J.C. Viteri, the other shareholder of FT, sold their interests to CFR (through its wholly-owned subsidiary, Respondent FT Acquisitions, LLC ("FTA") for $14,000,000, and White became employed by CFR as its Vice President of Operations, the senior operations position in the company. In November of 2017, White resigned his employment with CFR and executed a general release of all claims in return for severance payments of $300,000.

In late 2019, having received the vast majority of those severance payments, White elected to disregard his contractual obligations under the general release and to sue CFR, FTA, and CFR's former president, Kurt Herwald (collectively, "Respondents") based on claims that he released in November of 2017. Accordingly, Respondents asserted counterclaims against White primarily based on his filing of this action in breach of his various contractual obligations to Respondents. The provisions of the general release are clear and unambiguous. The trial court determined the same and granted Respondents' April 6, 2022 Motion for Summary Judgment.

In this appeal, White has raised irrelevant and legally incorrect arguments in an attempt to avoid the effects of a clear and unambiguous general release. As fully set forth below, the trial

court's September 14, 2022 Order granting Respondents' April 6, 2022 Motion for Summary Judgment is correct in all respects and should be affirmed.

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion in considering Respondents' April 6, 2022 Motion for Summary Judgment?
2. Did the trial court correctly grant Respondents' April 6, 2022 Motion for Summary Judgment on White's claims and Respondents' counterclaims?

COUNTER-STATEMENT OF THE CASE

I. Initial Transaction and White's Employment with CFR

In July 2014, White and J.C. Viteri, the other shareholder of FT, sold FT to CFR (through its wholly-owned subsidiary, FTA) for $14,000,000. (R. __ (Ex. B to Mem. Supp. Apr. 6, 2022 MSJ ("White Dep.") at 37:2-8).) White and Mr. Viteri were paid $13,000,000 upon the closing of the purchase. (*Id.*) The remaining $1,000,000 was to be paid pursuant to the terms of a Junior Subordinated Promissory Note (the "Note"), with White receiving fifty-five percent (55%) of the total payments and Mr. Viteri receiving forty-five percent (45%) of the total payments, commensurate with their ownership interests in the company. (*See* R. __ (Ex. A to Mem. Supp. Apr. 6, 2022 MSJ ("Note")); *see also* R. __ (White Dep. 58:6-59:18).) Respondents made thirty-four (34) of the fifty-nine (59) monthly payments originally due under the Note to White, amounting to $641,622.16. (R. __ (White Dep. at 63:17-64:9).) The last payment made under the Note to White was on July 5, 2017. (R. __ (*Id.* at 64:13-15).) CFR paid the remaining amount owed to Mr. Viteri on October 27, 2020. (*See* R. __ (Ex. C to Mem. Supp. Apr. 6, 2022 MSJ).)

The Note has at all times been subject to a Subordination Agreement. (*See* R. __ (Ex. D to Mem. Supp. Apr. 6, 2022 MSJ ("Subordination Agreement")); R. __ (White Dep. 45:17-46:7).) Under the terms of the Subordination Agreement, the Note was subordinate to CFR's senior

lienholders, who initially were PNC Bank and Leeds Novamark Capital I, L.P. ("Leeds"). (R. __ (*Id.* at 45:4-16).) The Subordination Agreement provided that White, as a junior lienholder, was not permitted to assert any claim against CFR on the Note unless and until CFR had satisfied its debts to the senior lienholders. (R. __ (*Id.* at 47:5-10).)

Prior to selling FT to CFR in 2014, White served as FT's Chief Executive Officer. Thus, he was intimately familiar with the foodservice repair industry and with FT's business operations and finances. (R. __ (Second Am. Compl. at ¶¶ 9-11).) In particular, he had relationships with FT's many vendors and suppliers. (R. __ (White Dep. at 103:19-104:1).) At the time he sold FT, White also became employed by CFR as its Vice President of Operations. (R. __ (Ex. I to Mem. Supp. Apr. 6, 2022 MSJ ("Employment Agreement")); R. __ (White Dep. 109:16-18).)

II. Default and White's Investment

In 2017, CFR was experiencing liquidity issues and financial challenges. In connection with those financial challenges, CFR defaulted on its obligations to its senior lender, Fifth Third Bank, which along with its mezzanine lender, McLarty Capital Partners ("McLarty"), had assumed the position of senior lienholders under the Subordination Agreement executed by White. (R. __ (Ex. E to Mem. Supp. Apr. 6, 2022 MSJ ("Herwald Dep.") at 63:21-64:22).) As a result, on June 29, 2017, Fifth Third Bank issued a payment blockage which prevented CFR from making any further Note payments to White. (*Id.*) Due to this payment blockage, CFR was not permitted to make scheduled payments to White under the Note on August 1, September 1, October 1, or November 1 of 2017 (or at any time thereafter until the default was cured). (*Id.*) White admitted he was informed of the payment blockage by CFR's president, Mr. Herwald, on or about July 5, 2017. (R. __ (Ex. F to Mem. Supp. Apr. 6, 2022 MSJ ("White's Resp. to Respondents' Interrog.") at No. 28).) Specifically, White acknowledged the following in his written responses to Respondents' Interrogatories:

> Plaintiff had numerous conversations with Kurt Herwald regarding nonpayment on the Junior Subordinated Promissory Note. Plaintiff learned of the blocked payment on or about July 5, 2017. During the conversation between Plaintiff and Herwald, Herwald stated that the senior lender was preventing CFR from making any further payments to Plaintiff due to CFR's insolvency and inability to pay under the terms of the senior note.

(*Id.*; *see also* R. __ (White's Resp. to Respondents' Interrog. at No. 14).)

On September 11, 2017, over two (2) months after White was informed of the payment blockage and of CFR's insolvency, White invested $550,000 in CFR in exchange for common stock. (R. __ (White Dep. at 109:6-11).) At the same time White invested in CFR, Herwald also invested $150,000 in CFR's common stock at the same price and under all of the same terms as White. (R. __ (*Id.* at 128:5-15).)

On November 2, 2017, Clark Mizell, CFR's Chief Financial Officer, emailed White comprehensive financial reports for CFR that included detailed income statements, profit and loss sheets, and balance sheets for CFR and its various divisions. (R. __ (White Dep. at 145:18-146:1.) The report contained extensive financial information about CFR's operations, including among other things, CFR's outstanding debts and negative shareholder equity. (*Id.*) Although White claims that he did not receive complete financial information regarding CFR throughout his tenure with the company, it is undisputed that he received these comprehensive financial reports on November 2, 2017, and that he understood the contents of the reports. (*See* R. __ (*Id.* at 145:18-156:12).) Importantly, White admitted that, after he received these financial reports on November 2, 2017, he was fully aware of CFR's financial condition. (R. __ (*Id.* at 156:2-12).) White also acknowledged that after receiving these financial reports, he "discussed this issue with Kurt Herwald and ultimately elected to resign his position." (R. __ (White's Resp. to Respondents' Interrog. at No. 9).)

III. White's Resignation and Execution of General Waiver and Release Agreement

On November 29, 2017, after providing an ultimatum to Herwald regarding the direction of CFR and approximately 2.5 months after making his investment in CFR, White resigned his employment with CFR. In connection with his resignation, White was presented with a "General Waiver and Release Agreement," (the "General Release"), dated November 29, 2017. (R. __ (Ex. G to Mem. Supp. Apr. 6, 2022 MSJ ("General Release")).) Gordon Miller, CFR's Director of Human Resources, emailed the General Release to White for review and execution. (*See* R. __ (Ex. H to Mem. Supp. Apr. 6, 2022 MSJ).) The General Release contained provisions that advised White to consult with an attorney prior to executing the agreement, provided him twenty-one days to consider signing the agreement, and provided another seven days to revoke the agreement if he changed his mind after execution. (R. __ (General Release at 6 & ¶ 19).) White executed the General Release twice – once electronically on November 30, 2017, and once with a wet signature before a notary on December 5, 2017. (R. __ (White Dep. at 169:13-171:9).) During White's deposition, he testified that Mr. Miller's email providing a copy of the General Release was the only statement made by anyone at CFR to White about the General Release, and that Herwald never spoke to him about the General Release. (R. __ (*Id.* at 168:21-169:12, 178:2-9).)

Pursuant to the General Release, White agreed to receive the gross amount of $300,000 in severance payments over the course of three (3) years, to be paid in equal installments through CFR's payroll procedures. (R. __ (General Release at ¶ 1).) In exchange for the severance payments, White agreed to release all claims, causes of action, and demands against CFR and its affiliates, subsidiaries, and officers based on events occurring on or before November 30, 2017. (*Id.* ¶ 3.)[1] At the time he executed the General Release, White knew that he had not received a

[1] Notably, White's 2014 Employment Agreement with CFR expressly provided that, as a condition of receiving severance if White was terminated by CFR, White would be required to execute a

payment under the Note for four (4) months due to a payment blockage, and was fully aware of CFR's financial challenges that existed prior to and at the time of his investment in CFR. (R. __ (White Dep. at 181:17-23).) It is undisputed that CFR made severance payments to White in the amount of $300,000, and that White would not have received these severance payments had he not signed the General Release. (R. __ (*Id.* at 205:3-17).) White did not return or offer to return these severance payments prior to filing this action. (R. __ (Ex. A to Apr. 6. 2022 MSJ).)

IV. Procedural History

On November 11, 2019, White commenced this civil action against Respondents by filing the Summons and Complaint. (R. __ (Compl.).) Respondents timely answered the Complaint and asserted counterclaims. (R. __ (Answer & Countercl.).) On March 10, 2020, White filed an Amended Summons and Complaint. (R. __ (Am. Compl.).) In the Amended Complaint, White raised the following claims: (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) fraud in the inducement in connection with the Note; (4) fraud; (5) intentional misrepresentation; and (6) violation of the South Carolina Uniform Securities Act of 2005. (*Id.*) White filed a motion for summary judgment on March 1, 2021 seeking summary judgment only on Respondents' counterclaims. (R. __ (White's March 1, 2021 MSJ).) Respondents filed a competing motion for summary judgment on March 10, 2021, and sought summary judgment on all claims raised in White's Amended Complaint and all counterclaims raised by Respondents. (R.

"**general release** acceptable to the Company." (R. __ (Employment Agreement at ¶ 6(d)) (emphasis added).) This provision of the Employment Agreement was never triggered, because it only applied if White was terminated by CFR without cause, and it is undisputed that White was not terminated, but instead voluntarily resigned. (R. __ (Second Am. Compl. ¶¶ 60, 62).) The $300,000 severance payment White received was not owed under the Employment Agreement, but was provided voluntarily by CFR in return for execution of the General Release. However, this provision shows that, from the outset of the employment relationship, it was expressly contemplated that, in order to receive $300,000 in severance payments if White was terminated by CFR, White would be required to release all claims against CFR, and not just those arising out of his employment relationship with the company.

__ (Respondents' March 10, 2021 MSJ).) The trial court held a hearing before the Honorable R. Scott Sprouse on both motions for summary judgment on May 17, 2021. (R. __ (May 17, 2021 Hr'g Tr.).) Following the hearing, the parties engaged in email correspondence with the trial court. (R. __ (May 17-18, 2021 Email Correspondence).) The trial court denied both parties' motions for summary judgment on May 28, 2021 (electronically filed on June 1, 2021) via Form 4 Order that stated there was "a genuine issue of material fact" that precluded summary judgment. (R. __ (May 28, 2021 Form 4 Order).) The Form 4 Order did not identify the specific genuine issue of material fact that existed. (*Id.*)

On July 19, 2021, White filed a Second Amended Summons and Complaint in which he raised claims against Respondents for (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, (3) fraud in the inducement in connection with the General Release, and (4) violation of the South Carolina Uniform Securities Act of 2005. (R. __ (Second Am. Compl._.) The third cause of action (fraud in the inducement in connection with the General Release) was not previously raised in White's original Complaint or Amended Complaint. All of White's claims relate either to allegations that Respondents failed to make payments to White under the Note or that Respondents provided false or incomplete information to White in connection with the General Release or with White's September 11, 2017 acquisition of stock in Respondent CFR. (*See* R. __ (Second Am. Compl. ¶¶ 46-82).)

Specifically, White's first and second causes of action concern an alleged breach of the Note based on CFR's failure to make payments under the Note beginning in August 2017. (R. __ (*Id.* ¶¶ 46-57).) White's third cause of action concerns alleged misrepresentations made by Herwald on behalf of Respondents in connection with White's execution of the General Release on November 30, 2017. (R. __ (*Id.* ¶¶ 58-70).) Finally, White's fourth cause of action concerns

allegations that Respondents made misrepresentations in connection with White's investment in CFR on September 11, 2017. (R. __ (*Id.* ¶¶ 71-82).) The first, second, and fourth causes of action indisputably are based on events which occurred prior to White's initial execution of the General Release on November 30, 2017, and thus were released in full when White did not revoke the General Release within seven (7) days after he executed the General Release. (*See* R. __ (Ex. J to Mem. Supp. Apr. 6, 2022 MSJ ("Demonstrative Timeline")).)

On August 31, 2021, Respondents filed their Answer to the Second Amended Complaint and Counterclaims, raising counterclaims against White for (1) breach of contract – General Waiver and Release Agreement, and (2) breach of contract – Subordination Agreement. (R. __ (Answer to Second Am. Compl. & Countercl.).) The parties then continued conducting discovery for seven (7) months. Respondents filed a Motion for Summary Judgment on White's Second Amended Complaint on April 6, 2022. (R. __ (Apr. 6, 2022 MSJ).) In their April 6, 2022 Motion for Summary Judgment, Respondents requested that the trial court enter summary judgment in favor of Respondents on all of White's claims and on all of Respondents' counterclaims. (*Id.*) Respondents submitted a Memorandum in Support of their Motion for Summary Judgment on April 29, 2022. (R. __ (Apr. 29, 2022 Mem. Supp. MSJ).) White did not submit a memorandum in opposition to Respondents' April 6, 2022 Motion for Summary Judgment, and relied on previous briefing submitted to the trial court. A hearing was held before the Honorable J. Derham Cole on May 9, 2022. (R. __ (May 9, 2022 Hr'g Tr.).) Following the hearing, Respondents submitted additional information via email. (R. __ (May 9, 2022 Email).) On August 22, 2022, the trial court issued a Form 4 Order granting Respondents' April 6, 2022 Motion for Summary Judgment and instructing Respondents to submit a proposed order. (R. __ (Aug. 22, 2022 Form 4

Order).) A formal written order was entered by the trial court on September 14, 2022. (R. __ (Sept. 14, 2022 Order).)

White filed a Motion to Alter and Amend and Memorandum in Support of his Motion to Alter and Amend on September 24, 2022. (R. __ (White's Mot. Alter & Am.).) Respondents filed a Memorandum in Opposition to Plaintiff's Motion to Alter and Amend on November 11, 2022. (R. __ (Nov. 11, 2022 Mem. Opp'n Pls. Mot. Alter & Am.).) A hearing was held before Judge Cole on December 1, 2022. (R. __ (Dec. 1, 2022 Hr'g Tr.).) Due to certain arguments presented by White during the hearing, the trial court allowed the parties to submit additional analysis to the trial court via email following the hearing. (R. __ (Dec. 1, 2022 Hr'g Tr.); R. __ (Dec. 1, 2022 Email Correspondence.) The trial court denied White's Motion to Alter and Amend on January 13, 2023 via Form 4 Order. (R. __ (Jan. 13, 2023 Form 4 Order).) White then filed his Notice of Appeal on January 30, 2023 appealing the September 14, 2022 Order and filed his Initial Brief on April 10, 2023.

STANDARD OF REVIEW

The first issue on appeal is reviewed under the abuse of discretion standard. *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) (applying abuse of discretion standard when reviewing trial court's consideration of renewed motion for summary judgment). An abuse of discretion occurs when a trial court commits an error of law, makes a factual finding that lacks evidentiary support, or fails to exercise any of its vested discretion. *Flowers v. Giep*, 436 S.C. 281, 286, 871 S.E.2d 604, 607 (Ct. App. 2021). An abuse of discretion may be found when the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to appellant, thereby amounting to an error of law. *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 456-57, 814 S.E.2d 643, 656 (Ct. App. 2018).

The burden is on the party appealing to demonstrate the trial court abused its discretion. *Halverson v. Yawn*, 328 S.C. 618, 621, 493 S.E.2d 883, 884 (Ct. App. 1997).

The second issue on appeal is reviewed using the same standard applied by the trial court. "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 281 (Ct. App. 2010). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP," and summary judgment "is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citing Rule 56(c), SCRCP). "'The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.'" *Thalia S. v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (quoting *Hansen v. United Servs. Auto. Ass'n*, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002)).

ARGUMENT

I. The Trial Court Properly Considered Respondents' April 6, 2022 Motion for Summary Judgment.

White contends that the trial court abused its discretion in considering Respondents' April 6, 2022 Motion for Summary Judgment. "An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." *Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004). White's argument fails because (1) his argument is not preserved for appeal, (2) even if preserved, White has not carried his burden to demonstrate an abuse of discretion.

A. White's Argument is Not Preserved For Appeal.

White argues that there is "no right of appeal from one [circuit] judge to another," pursuant to Rule 43(l), SCRCP, and that this rule should have prevented the trial court from hearing Respondents' April 6, 2022 Motion for Summary Judgment. (White's Initial Br. at 7.) This argument is not preserved for appeal.

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (quoting Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* 57 (2d ed. 2002)). "A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Poch v. Bayshore Concrete Prods./South Carolina, Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009); *see also Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (affirming circuit court's decision refusing to rule on certain arguments raised for the first time in a Rule 59(e) motion); *Kiawah Prop. Owners Grp. v. Public Serv. Com'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (noting that an issue raised for the first time in a petition for rehearing is not preserved); *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (refusing to consider a document that was included for the first time as an attachment to Rule 59(e) motion because such document was not before the lower court prior to judgment).

Here, White did not raise his argument concerning Rule 43(l), SCRCP, in a timely manner and with sufficient specificity prior to the trial court's entry of its September 14, 2022 Order. In response to Respondents' April 6, 2022 Motion for Summary Judgment on White's Second Amended Complaint, White did not submit any new briefing, but instead, relied on his May 16,

2021 Memorandum in Opposition to Respondents' March 10, 2021 Motion for Summary Judgment on White's Amended Complaint. (R. __ (May 9, 2022 Hr'g Tr. at 46:12-22).) Therefore, he did not submit any arguments in briefing regarding Respondents' ability to file a subsequent motion for summary judgment prior to the trial court's entry of its September 14, 2022 Order. At the hearing on Respondents' April 6, 2022 Motion for Summary Judgment, White briefly argued that certain issues presented by Respondents were previously raised and ruled on by Judge Sprouse, but he never asserted that Respondents were not permitted to file the April 6, 2022 Motion for Summary Judgment; he never argued that it would be an abuse of discretion for Judge Cole to hear and consider the April 6, 2022 Motion for Summary Judgment; and he made no argument related to Rule 43(l), SCRCP, which now forms the basis for his appeal on this issue. (R. __ (May 9, 2022 Hr'g Tr. at 26:12-27:4).) White's Initial Brief is the first time he has ever mentioned Rule 43(l), SCRCP. If White wanted to object to Judge Cole hearing and considering Respondent's April 6, 2022 Motion for Summary Judgment on the basis of Rule 43(l), he had every opportunity to make such an objection, whether by filing briefing with the trial court or by raising the objection during oral argument. White failed to do so, and therefore, he did not preserve the issue for appeal.[2]

B. The Trial Court Did Not Abuse its Discretion by Considering Respondents' April 6, 2022 Motion for Summary Judgment.

White contends "it was an abuse of discretion to have granted the renewed motion for summary judgment based on the facts and evidence previously submitted to Judge Sprouse." (White's Initial Br. at 10.) White's argument is based on his contention that Respondents were not

[2] Although White made arguments concerning Respondents' ability to bring a renewed motion for summary judgment in his Motion to Alter and Amend, that argument was not timely and did not preserve the issue for appeal. *Kiawah Prop. Owners Grp.*, 359 S.C. at 113 (noting that an issue raised for the first time in a petition for rehearing is not preserved); *Stevens*, 409 S.C. at 567 ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not.").

permitted to file their April 6, 2022 Motion for Summary Judgment on White's Second Amended Complaint because Respondents had previously filed the March 10, 2021 Motion for Summary Judgment on White's Amended Complaint. Even if this argument is preserved for appeal, White is incorrect, and he has failed to carry his burden to demonstrate the trial court abused its discretion.

Under South Carolina law, it is well settled that a trial judge has the discretionary authority to hear a renewed motion for summary judgment. *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004). The fact that a different trial judge previously denied the motion does not preclude a party from renewing a motion for summary judgment. *Id.* "[I]f the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial." *Crosswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992). "A defendant can bring a subsequent summary judgment motion after his first motion had been denied. . . . The rationale behind these cases is that the denial of a motion for summary judgment is an interlocutory decision which the trial judge can reconsider until the end of the trial." *Blyth v. Marcus*, 335 S.C. 363, 366-67, 517 S.E.2d 433, 434 (1999).

In this case, Respondents filed an earlier motion for summary judgment at a much different stage in the litigation. As explained above, South Carolina law plainly permitted the trial court to consider Respondents' April 6, 2022 Motion for Summary Judgment, which was raised prior to trial. Therefore, the substance of Respondents' earlier motion is immaterial. However, for purposes of clarity, and to correct White's misrepresentations regarding the earlier motion, Respondents explain below the circumstances surrounding their prior motion.

i. Respondents' March 10, 2021 Motion for Summary Judgment

White filed the original Summons and Complaint on November 26, 2019, and filed an Amended Complaint on March 9, 2020. (R. __ (Compl.); R. __ (Am. Compl.).) In the Amended Complaint, White raised the following claims: (1) breach of contract; (2) breach of contract

accompanied by a fraudulent act; (3) fraud in the inducement in connection with the Note; (4) fraud; (5) intentional misrepresentation; and (6) violation of the South Carolina Uniform Securities Act of 2005. (R. __ (Am. Compl.).) Respondents subsequently filed their Answer to White's Amended Complaint and Counterclaims. (R. __ (Answer to Am. Compl. & Countercl.).)

White filed a motion for summary judgment on March 1, 2021 seeking summary judgment only on Respondents' counterclaims. (R. __ (White's March 1, 2021 MSJ).) Respondents filed a competing motion for summary judgment on March 10, 2021, and sought summary judgment on all claims raised in White's Amended Complaint and on all of Respondents' counterclaims. (R. __ (Respondents' March 10, 2021 MSJ).) Both motions for summary judgment were heard on May 17, 2021. (R. __ (May 17, 2021 Hr'g Tr.).) Judge Sprouse denied both parties' motions for summary judgment on May 28, 2021 (electronically filed on June 1, 2021) via Form 4 Order that stated there was "a genuine issue of material fact" precluding summary judgment. (R. __ (May 28, 2021 Form 4 Order).) The Form 4 Order did not identify the specific genuine issue of material fact that existed. (*Id.*)

ii. Subsequent Discovery

On May 14, 2021, White moved for leave to file a Second Amended Complaint. (R. __ (May 14, 2021 Mot. to Am.).) White's Second Amended Complaint was filed on July 19, 2021, and Respondents subsequently filed their Answer to the Second Amended Complaint and Counterclaims. (R. __ (Second Am. Compl.); R. __ (Answer to Second Am. Compl. & Countercl.).) White's Second Amended Complaint raised the following claims: (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) fraud in the inducement in connection with the General Waiver and Release Agreement; and (4) violation of the South Carolina Uniform Securities Act of 2005. (R. __ (Second Am. Compl.).) Notably, White's Second

Amended Complaint raised a new claim for fraud in the inducement in connection with the General Release, which was not raised either in his original Complaint or Amended Complaint. (*Id.*)

After the trial court denied the parties' motions for summary judgment on May 28, 2021, the parties engaged in extensive additional discovery, including the following:

a. June 6, 2021: White produced expert report of R. Wayne Klein, a purported securities law expert.

b. June 24, 2021: White produced his Second Supplemental Responses to Respondents' First Interrogatories.

c. July 12, 2021: Respondents served Second Set of Interrogatories and Requests for Production to White.

d. July 12, 2021: Respondents sent subpoena *duces tecum* to White's expert, R. Wayne Klein.

e. July 26, 2021: Response to Respondents' subpoena *duces tecum* provided by White's expert, R. Wayne Klein.

f. September 21, 2021: Deposition of CFR's former Chief Financial Officer, Jean Hodges held.

g. September 29, 2021: White provided responses to Respondents' Second Set of Interrogatories and Requests for Production.

h. October 4, 2021: White served his Third Set of Discovery Requests to Respondents.

i. January 28, 2022: Respondents provided their Second Supplemental Responses to White's First Requests for Production.

j. February 4, 2022: Respondents provided their Second Supplemental Responses to White's First Interrogatories; Respondents' First Supplemental Responses to White's Third Interrogatories; and Respondents' Third Supplemental Responses to White's First Requests for Production.

k. February 10, 2022: White served subpoena *duces tecum* to Respondents' securities law expert, Professor Martin McWilliams.

l. March 30, 2022: Deposition of White's expert, R. Wayne Klein, held.

m. April 14, 2022: Respondents provided their Third Supplemental and Amended Responses to White's First Interrogatories.

n. April 26, 2022: Deposition of Respondents' expert, Professor Martin McWilliams, held.

Thus, the record shows that the parties engaged in extensive additional fact and expert discovery after the entry of the May 28, 2021 Form 4 Order.

iii. Respondents' April 6, 2022 Motion for Summary Judgment

Between the trial court's May 28, 2021 Order denying the parties' motions for summary judgment and the filing of Respondents' April 6, 2022 Motion for Summary Judgment, White filed his Second Amended Complaint which raised a new claim for fraud in the inducement of the General Release. (R. __ (Second Am. Compl.).) The parties conducted extensive additional discovery which cemented that there was no genuine issue of material fact in this case. Furthermore, by April 6, 2022, the scheduled trial date of May 31, 2022 was approaching and White still had not sought to return the consideration that he received for signing the General Release, which confirmed that the tender back rule, discussed *infra*, conclusively barred his attacks on the enforceability of the General Release.

Therefore, based on White's failure to produce information creating a genuine issue of material fact, his addition of a new cause of action for fraud in the inducement of the General Release in the Second Amended Complaint, and White's failure to tender back the consideration he received for signing the General Release, Respondents filed their April 6, 2022 Motion for Summary Judgment. The trial court conducted a lengthy hearing on Respondents' Motion for Summary Judgment on May 9, 2022. EMAIL On August 22, 2022, the trial court issued a Form 4 Order granting Respondents' Motion for Summary Judgment and instructing Respondents to submit a proposed order. (R. __ (Aug. 22, 2022 Form 4 Order).) A formal written order was entered by the Court on September 14, 2022. (R. __ (Sept. 14, 2022 Order).)

iv. Analysis

White argues, pursuant to Rule 43(l), SCRCP, there were insufficient new grounds for Respondents' April 6, 2022 Motion for Summary Judgment, and therefore, the trial court abused

its discretion in hearing Respondents' April 6, 2022 Motion for Summary Judgment. (White's Initial Br. at 7-10.) White is incorrect because (1) Respondents were permitted to file a subsequent motion for summary judgment on White's Second Amended Complaint, (2) the May 28, 2021 Form 4 Order did not establish the law of the case, (3) South Carolina case law permits a party to file a subsequent motion for summary judgment, and (4) White's claim for fraud in the inducement of the General Release was not before the trial court when Respondents' March 10, 2021 Motion for Summary Judgment was considered.

First, White repeatedly characterizes Respondents' April 6, 2022 Motion for Summary Judgment as an "appeal" of Judge Sprouse's May 28, 2021 Form 4 Order. (White's Initial Br. at 7.) This is not an accurate description of Respondents' April 6, 2022 Motion for Summary Judgment, which was a new motion filed on a new operative complaint after months of additional discovery.

Respondents were permitted under South Carolina law to file a new motion for summary judgment on the new version of the complaint that White filed on July 19, 2021. In *Pruitt v. Bowers*, the South Carolina Court of Appeals recognized that, after a defendant filed a motion for summary judgment on one version of a complaint, the defendant could file a subsequent motion for summary judgment after a plaintiff filed an amended complaint. *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998). Specifically, the Court of Appeals considered a situation in which (a) the plaintiff appealed the trial court's grant of the defendant's motion for summary judgment, and (b) the defendant appealed the trial court's grant of the plaintiff's motion to amend the complaint. *Id.* Importantly, the Court of Appeals noted that "the trial court has not had an opportunity to rule on the sufficiency of the allegations [of the amended complaint]. Arguments going to the legal merits of the proposed pleadings are better taken up in the context

of a Rule 12(b) motion to dismiss or a Rule 56, SCRCP, motion for summary judgment." *Id.* at 488. In other words, even though the defendant had previously filed a motion for summary judgment in connection with the original complaint, the Court of Appeals specifically noted that the defendant had the future opportunity to file another motion for summary judgment in connection with the amended complaint. *Id.*

Likewise, here, Respondents were permitted to file a motion for summary judgment in connection with White's Second Amended Complaint. Respondents' March 10, 2021 Motion for Summary Judgment addressed the claims raised in White's Amended Complaint. Respondents' April 6, 2022 Motion for Summary Judgment addressed the claims raised in White's Second Amended Complaint. Therefore, the trial court was not required to exercise discretion to hear a renewed motion for summary judgment because Respondents' April 6, 2022 Motion for Summary Judgment (a) concerned a new amended complaint that White chose to file, and (b) was filed after an additional ten (10) months of discovery was conducted which cemented the lack of a genuine issue of material fact. *See also Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC,* 394 S.C. 97, 102-103, 713 S.E.2d 650, 652-53 (Ct. App. 2011) (noting that defendant filed a summary judgment motion in connection with the original complaint and was permitted to file another motion for summary judgment later in the case after an amended complaint was filed).

Second, although White does not expressly invoke the "law of the case" doctrine, White essentially argues that Judge Cole, in his consideration of Respondents' April 6, 2022 Motion for Summary Judgment, should have treated the May 28, 2021 denial of Respondents' March 10, 2021 Motion for Summary Judgment as the law of the case. (White's Initial Br. at 10.) However, the May 28, 2021 Form 4 Order did not establish the law of the case. *In re Rabens*, 386 S.C. 469, 473, 688 S.E.2d 602, 604 (Ct. App. 2010) ("A denial of summary judgment does not establish the law

of the case[.]"); *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct. App. 2014) (noting that "[l]ike the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings.") (quoting *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994)); *Brown v. Pearson*, 326 S.C. 409, 416, 483 S.E.2d 477, 481 (Ct. App. 1997) ("A denial of a motion for summary judgment does not establish the law of the case[.]"). Therefore, the trial court's May 28, 2021 Form 4 Order did not establish the law of the case and did not preclude Respondents from filing their April 6, 2022 Motion for Summary Judgment.

Third, White relies on inapplicable case law to argue that the trial court abused its discretion. White cites *Steele v. Charlotte, C. & A. R. Co.*, 14 S.C. 324 (1880), for the proposition that a party cannot appeal the decision of a circuit court judge to another circuit court judge. (White's Initial Br. at 8.) In *Steele*, the case was tried before one judge, and after a verdict was reached, that judge denied a post-trial motion for a new trial. *Id.* at 325. While the case was on appeal, the appellant made a motion for a new trial to another trial judge—a judge who did not try the case—and the second judge determined that he did not have authority to hear the second motion for a new trial. *Id.* The South Carolina Supreme Court determined that the second motion was "really an appeal from the judgment of one judge to that of another," which was not permitted. *Id.* at 331. The facts in *Steele* are not analogous to the facts in the instant case, and the ruling in *Steele* is not relevant to this Court's consideration of White's appeal. Here, by filing their April 6, 2022 Motion for Summary Judgment, Respondents were not asking the trial court to reconsider Judge Sprouse's ruling or to reconsider their March 10, 2021 Motion for Summary Judgment. Instead, Respondents were asking the trial court to consider a new motion concerning a new version of

White's complaint that raised a new claim. Therefore, *Steele* should have no bearing on the Court's analysis of this case.

Instead, the Court should consider applicable case law. In *Brown v. Pearson*, the South Carolina Court of Appeals considered whether the trial court abused its discretion in considering a party's second motion for summary judgment. *Brown v. Pearson*, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997). There, the defendant filed a motion for summary judgment that was denied by one judge. *Id.* After additional discovery took place, the defendant filed another motion for summary judgment. *Id.* The second motion for summary judgment was considered and granted by a different judge than the judge who heard the first motion for summary judgment. *Id.* The Court of Appeals found that the trial court did not abuse its discretion in considering the renewed motion for summary judgment, stating: "A denial of a motion for summary judgment does not establish the law of the case, and the issues raised in the motion may be raised later in the proceedings[.]" *Id.* The Court of Appeals favorably cited *Lindsey v. Dayton–Hudson Corp*., 592 F.2d 1118 (10th Cir.), cert. denied, 444 U.S. 856 (1979), which noted, "[w]e see no merit in the contentions that summary judgment was improper because . . . an earlier motion for summary judgment, which raised the same issues, had been denied." *Id.* at 1121. The Court of Appeals also favorably cited Corpus Juris Secundum for the proposition that "a grant of summary judgment is not precluded by a prior denial of a motion for summary judgment." 21 C.J.S. Courts § 149 at 183 (1990). Likewise, in *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008), the South Carolina Supreme Court found Rule 43(l), SCRCP, did not preclude a moving party from renewing a motion for summary judgment once new evidence was gathered. *Id.* at 421.

Here, to the extent the trial court was required to exercise its discretion, it did not abuse that discretion. Not only was an additional ten (10) months of discovery conducted between

Respondents' March 5, 2021 and April 6, 2022 Motions for Summary Judgment, but each motion also addressed different versions of White's Complaint and the different claims raised therein. The April 6, 2022 Motion for Summary Judgment also introduced the Affidavit of Kurt Herwald, which was not previously before the trial court. (R. __.) Moreover, White's addition of the claim for fraud in the inducement of the General Release triggered Respondents' ability to raise the issue of the application of the tender back rule to defeat that claim, as discussed *infra*. Therefore, the trial court properly exercised its discretion to hear Respondents' April 6, 2022 Motion for Summary Judgment.

Fourth, White claims that his cause of action for fraud in the inducement of the General Release was before the trial court and addressed by the parties at the May 17, 2021 hearing before Judge Sprouse. (White's Initial Br. at 10.) That is incorrect. White's claim for fraud in the inducement of the General Release was first made in his Second Amended Complaint, which was filed July 19, 2021. (R. __ (Second Am. Compl.).) White filed his motion for leave to amend on Friday, May 14, 2021 at 3:45 p.m., one business day before the hearing on the parties' motions for summary judgment was held by Judge Sprouse on Monday, May 17, 2021 at 9:30 a.m. In White's Memorandum in Opposition to Respondents' March 10, 2021 Motion for Summary Judgment, filed on Sunday, May 16, 2021 at 5:16 p.m., White analyzed his fraud claim using the terms "fraud in the inducement." (R. __ (May, 16, 2021 Mem. Opp'n MSJ at 11).) Further, White's Amended Complaint contained a claim for fraud in the inducement in connection with the Note. (R. __ (Am. Compl.).) However, while fraud in the inducement was discussed in those contexts at the hearing, White's claim for fraud in the inducement of the General Release was not before the trial court in that hearing.

Accordingly, the additional issues raised in Respondents' April 6, 2022 Motion for Summary Judgment, and in White's July 19, 2021 Second Amended Complaint, were not ripe for review during the May 17, 2021 hearing, and were not properly before the trial court at that time. More importantly, under the well-established South Carolina case law cited above, even if White's fraud in the inducement claim had been argued at the earlier hearing and ruled upon by the trial court—which it was not—that would not have prevented Respondents from filing a subsequent motion for summary judgment prior to trial. *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. at 325, 605 S.E.2d at 18 (2004) (finding trial judge had discretionary authority to hear subsequent motion for summary judgment); *Crosswell Enter., Inc. v. Arnold*, 309 S.C. at 279, 422 S.E.2d at 159 (Ct. App. 1992) ("If the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial."); *Blyth v. Marcus*, 335 S.C. 363, 366, 517 S.E.2d 433, 434 (1999) ("A defendant can bring a subsequent summary judgment motion after his first motion had been denied.").

For all these reasons, the trial court properly considered Respondents' April 6, 2022 Motion for Summary Judgment. White has failed to identify an abuse of discretion and, therefore, has not carried his burden. As a result, this Court should find the trial court did not abuse its discretion by considering Respondents' April 6, 2022 Motion for Summary Judgment as to White's Second Amended Complaint and affirm the trial court's September 14, 2022 Order.

II. The Trial Court Correctly Granted Respondents' Motion for Summary Judgment as to White's Claims.

In the September 14, 2022 Order, the trial court entered summary judgment against White on all of White's claims on the grounds that:

> (1) White's first, second, and fourth claims were released through White's execution of the General Release, and (2) White's third claim (for fraudulent inducement of the General Release) is barred by South Carolina's "tender back"

> rule, and separately fails because White has failed to create a genuine issue of material fact that he was fraudulently induced into entering the General Release.

(R. __ (Sept. 14, 2022 Order at 6).) For the reasons set forth below, the trial court's September 14, 2022 Order should be affirmed.[3]

A. The Trial Court Correctly Interpreted and Applied the General Release.[4]

White argues that in granting Respondents' April 6, 2022 Motion for Summary Judgment, the trial court improperly determined that the unambiguous language of the General Release released the claims raised by White in his Second Amended Complaint. (White's Initial Br. at 17-20.) White argues that the scope of the General Release should have been decided by a jury. (*Id.*) White's argument fails because (1) the language of the General Release is clear and unambiguous, (2) White did not preserve for appeal his argument regarding latent ambiguity, and (3) even if preserved, White's arguments concerning alleged ambiguity in the General Release are legally incorrect.

[3] Throughout White's Initial Brief, he contends that Judge Sprouse, in his May 28, 2021 Form 4 Order denying the parties' March 2021 cross motions for summary judgment, ruled that there were genuine issues of material fact as to various aspects of this case. (*See, e.g.*, White's Initial Br. at 20, 22, and 28.) However, Judge Sprouse's May 28, 2021 Form 4 Order stated, in its entirety: "After review of the pleadings, the parties' memoranda, exhibits, arguments of counsel, and the applicable law, the Court finds that there exists a genuine issue of material fact in this case and that both the Plaintiff's and the Defendant's motion are DENIED." (R. __ (May 28, 2021 Form 4 Order).) Therefore, Judge Sprouse did not identify what specific genuine issue of material fact existed at that time in connection with White's claims under the Amended Complaint. White's repeated contentions that Judge Sprouse identified specific genuine issues of material fact in his May 28, 2021 Form 4 Order are simply speculative, inappropriate, and misleading.

[4] White has not appealed the trial court's determinations that (a) White's first, second, and fourth claims accrued prior to his execution of the General Release, and (b) the Release Provision in the General Release applies to claims against all Respondents. (*See* R. __ (Sept. 14, 2022 Order at 7, 13-14).) Therefore, those issues are not before this Court, and White has not preserved his ability to contest those conclusions on appeal.

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 525, 709 S.E.2d 85, 95 (Ct. App. 2011). Here, the language in the Release Provision in the General Release is clear, unambiguous, and plainly applies to all claims, as it states:

> **3. Release.** Executive hereby releases, acquits, and forever discharges the Company, its parent companies, subsidiaries, divisions, affiliates and controlling persons (if any), their officers, directors, board members, shareholders, members employees, representatives, attorneys, personal representatives, affiliated or unaffiliated benefit plans, third-party administrators, any and all of their successors and assigns, and all persons acting by, through, under, or in concert with any of them (collectively, the "Company") ***from any and all actions, causes of action, claims, demands, losses, claims for attorneys' fees, and all other forms of civil damages, occurrences, and liabilities of any kind whatsoever, both known or unknown, arising out of any matter, happening, or things, from the beginning of time to the date of this Agreement is signed by Executive***, specifically including, but not limited to, any and all liability arising from, including amendments to and anti-retaliation provisions deriving from the following:
>
> - **Local, state, or federal common law, statute, regulation, or ordinance;**
> - Title VII of the Civil Rights Act of 1964;
> - Section 1981 of the Civil Rights Act of 1866;
> - the Age Discrimination in Employment Act of 1967;
> - the Americans with Disabilities Act of 1990;
> - the Family and Medical Leave Act;
> - the Employee Retirement Income Security Act of 1974;
> - the Health Insurance Portability and Accountability Act;
> - the Occupational Safety and Health Act;
> - the Equal Pay Act;
> - the Uniformed Services Employment and Re-employment Act of 1994;
> - Executive Orders 11246 and 11141;
> - the Worker Adjustment and Retraining Notification Act;
> - the Rehabilitation Act of 1973;
> - the Medicare, Medicaid and SCHIP Extension Act of 2007;
> - state workers' compensation laws;
> - state non-discrimination and/or human affairs laws;
> - state payment of wages laws, acts or regulations;
> - Executive's employment relationship and/or affiliation with Company

> **This release also includes a release of any claims for wrongful termination, breach of express or implied contract, intentional or negligent infliction of emotional distress, libel slander, as well as <u>any other claims</u>, whether in tort, contract or equity, under federal or state statutory or common law.**
>
> Without waiving any prospective or retrospective rights under the Fair Labor Standards Act ("FLSA"), Executive admits that he has received from Company all rights and benefits, if any, potentially due to him pursuant to the FLSA. Executive states that he is aware of no facts (including any injuries or illnesses) which might lead to his filing a workers' compensation claim against the Company. **It is the parties' intent to release <u>all claims which can legally be released</u> but no more than that.**
>
> Executive further stipulates, such stipulation being expressly understood by Executive as material to this Agreement, that he has not engaged in, nor is he aware of, any misconduct or wrongdoing on the part of the Company of any kind or any regard. Executive's stipulation in this regard is material to the Company's willingness to enter into this Agreement and provide Executive the benefits provided hereunder.

(R. __ (General Release at 1-2) (emphasis added).)

The plain language of the Release Provision indicates that White released all actions and causes of action against Respondents existing at the time of White's execution of the General Release, specifically including:

> (a) "liability arising from . . . (l)ocal, state, or federal common law, statute, regulation, or ordinance;"
>
> (b) "liability arising from . . . Executive's employment relationship and/or affiliation with Company;"
>
> (c) "breach of express or implied contract;" and
>
> (d) "as well as any other claims, whether in tort, contract or equity, under federal or state statutory or common law."

(*Id.*) White's first cause of action for breach of contract, second cause of action for breach of contract accompanied by fraudulent act, and fourth cause of action for violation of the South Carolina Uniform Securities Act, S.C. Code Ann. § 35-1-101, *et seq.*, all qualify as claims falling

into these categories, and there is no other plausible way to read the Release Provision. Moreover, in addition to being titled "General Waiver and Release Agreement," the General Release also includes the following notices:

> PLEASE READ THIS AGREEMENT CAREFULLY. IT CONTAINS A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS. YOU AGREE THAT YOU RECEIVED VALUABLE CONSIDERATION IN EXCHANGE FOR ENTERING INTO THIS AGREEMENT AND THAT THE COMPANY ADVISED YOU IN WRITING TO CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT. YOU PROMISE THAT NO REPRESENTATIONS OR INDUCEMENTS HAVE BEEN MADE TO YOU EXCEPT AS SET FORTH HEREIN, AND THAT YOU HAVE SIGNED THE SAME KNOWINGLY AND VOLUNTARILY.

> YOU HAVE BEEN PROVIDED AT LEAST TWENTY-ONE (21) DAYS WITHIN WHICH TO CONSIDER THIS AGREEMENT AND WAIVE AND RELEASE ALL CLAIMS AND RIGHTS INCLUDING BUT NOT LIMITED TO THOSE ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT. YOU SHALL HAVE SEVEN (7) DAYS WITHIN WHICH TO REVOKE THIS AGREEMENT AND THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THAT REVOCATION PERIOD HAS EXPIRED. ANY SUCH REVOCATION MUST BE IN WRITING AND RECEIVED BY THE COMPANY, IN ACCORDANCE WITH THE NOTICE PROVISIONS SET FORTH ABOVE, PRIOR TO THE END OF THE REVOCATION PERIOD.

(R. __ (General Release at 6).) In Paragraph 19 of the General Release, White also expressly acknowledged that he was advised to consult with counsel prior to executing the General Release, that he had twenty-one (21) days to consider the General Release, and that, if he executed it, he had another seven (7) days to revoke his agreement. (R. __ (*Id.* at ¶ 19).) Based on the foregoing, the Release Provision in the General Release clearly and unambiguously applied to all claims White may have possessed against Respondents at the time of White's execution of the General Release.

However, White urges this Court to discern an ambiguity of his own creation using extrinsic evidence which has nothing to do with the General Release. (White's Initial Br. at 18.) "Extrinsic evidence may not be used to *create* an ambiguity in an otherwise unambiguous policy." *Beaufort Cty. Sch. Dist.*, 392 S.C. at 525 (emphasis added). A court may only consider extrinsic evidence to aid in contract interpretation if the ambiguity is latent, as opposed to patent. *Id.* "A

patent ambiguity is one that arises upon the words of a will, deed, or contract." *Id.* "A latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described," such as when a will (which is unambiguous on its face) names a beneficiary but there are two individuals with that name. *Id.* "Interpretation of an unambiguous [contract], or a [contract] with a patent ambiguity, is for the court." *Id.* "Interpretation of a [contract] with a latent ambiguity is for the jury." *Id.*[5]

In his arguments, White does not use the terms "latent ambiguity" or "patent ambiguity," and does not identify the distinction between the two, but nevertheless appears to argue that the General Release contains a latent ambiguity that should have been interpreted by a jury rather than the trial court. (White's Initial Br. at 17-18.) However, White never argued to the trial court that the General Release contained a latent ambiguity, and, therefore, he failed to preserve that argument for appeal. In White's Memorandum in Opposition to Respondents' March 10, 2021 Motion for Summary Judgment, White generally argued that "an ambiguity exist [sic] regarding the scope of the release." (R. __ (Mem. Opp'n March 10, 2021 MSJ).) However, White only argued that the scope of the Release Provision was limited to "employment related claims." (*Id.*) He did not argue that a latent ambiguity existed in the General Release. Accordingly, that issue was not preserved for appeal. *See State v. Rivers*, 411 S.C. 551, 553, 769 S.E.2d 263, 265 (Ct. App. 2015) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

[5] White incorrectly states that the jury must construe the language of a contract if the language is ambiguous in any way, and fails to draw the proper distinction between a patent and latent ambiguity. (White's Initial Br. at 17.)

However, even if preserved, White's argument fails. White attempts to use extrinsic evidence related to his execution of the General Release to create an alleged ambiguity as to the scope of the Release Provision in the General Release. (White's Initial Br. 17-20.) White's argument is plainly prohibited by the parol evidence rule. *See, e.g.*, *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument. . . . Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties."); *Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument." (quoting *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990)); *Beaufort Cty. Sch. Dist.*, 392 S.C. at 525 ("Extrinsic evidence may not be used to create an ambiguity in an otherwise unambiguous policy."); *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (noting that a party "cannot create ambiguity when it does not exist within the four corners" of a contract).

Nevertheless, White has argued throughout this case that the language of the Release Provision only applies to "employment claims," and attempts to use alleged statements unrelated to the General Release to explain his alleged understanding of the Release Provision. (White's Initial Br. at 18.) However, White's argument is not supported by the record before the trial court because White has not identified what language in the General Release limits the Release Provision to "employment claims," and has never explained what he means by "employment claims." In fact,

in his deposition, White admitted that the General Release contains no language which limits its scope to employment claims, but instead expressly states that it applies to all claims, known or unknown, against Respondents:

> Q. . . . My question is: Where in the language that I just read does it say that it's limited to claims arising out of or related to your employment?
> A. We will just have to disagree, man. I don't agree with you.
> Q. I'm asking - - no, you don't get to do that. I'm asking you to point to the language that says that or tell me that there isn't any.
> A. I can't point to one.
> Q. Okay. It actually says that you're releasing all claims against the company, doesn't it?
> A. That's what it says.
> . . . .
> Q. If this agreement had been intended to only release claims relating to employment, could words to that effect have been added that specified that?
> A. I'm sure they could be.
> Q. If you go down to the bottom of this agreement, there's a box that says, "Please read this agreement carefully." Do you see that?
> A. Yes.
> Q. Okay. And it says it contains the release of all known and unknown claims. Do you see that?
> A. Yes.
> Q. Does that say that the claims that are being released are limited to claims related to your employment?
> A. It doesn't say that.
> Q. Okay. It also says that the company advised you in writing to consult an attorney prior to signing this agreement. You didn't consult an attorney?
> A. No.
> Q. Okay. If you would have wanted to, could you have?
> A. Yes.

(R. __ (White Dep. at 175:12-177:10).) White further acknowledged that the language of the Release Provision applied to claims against all Respondents, CFR, FTA, and Herwald. (R. __ (*Id.* at 178:10-25).)

White has not identified any language in the Release Provision, or any other portion of the General Release, that he contends is a patent or latent ambiguity. Instead, he contends that "the underlying context of the execution of the November 2017 Agreement" is what creates an unspecified ambiguity. (White's Initial Br. at 18.) As discussed above, that argument is expressly

prohibited by South Carolina law. *See McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument. . . . Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties.").

White cites *Maryland Casualty Company v. Gaffney Manufacturing Company*, 93 S.C. 406 (1913), in support of his argument. (White's Initial Br. at 17.) However, in *Maryland Casualty Company*, the South Carolina Supreme Court expressly examined a latent ambiguity and did not create a standard that allows a party to always introduce extrinsic evidence to explain his or her intent, as White argues. *Maryland Casualty Company*, 93 S.C. at 408-409. "An example of a latent ambiguity is where there is a named beneficiary in a will and two individuals share that same name; the language seems clear, but in applying the terms, an ambiguity arises." *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 527 (D.S.C. 2020) (interpreting and applying South Carolina law). White has not identified a latent ambiguity in the General Release that would allow this Court to consider any extrinsic evidence offered by White as he has not identified any portion of the Release Provision that "seems clear, but in applying the terms, an ambiguity arises." *See id.* Therefore, even if preserved, White's argument concerning ambiguity fails.

In sum, the Release Provision in the General Release is clear, unambiguous, and applies to all claims – not just "employment claims" as argued by White. White cannot unilaterally alter the plain language of the General Release, and he cannot, for the first time on appeal, claim that extrinsic evidence can be used to create a latent ambiguity that is not present in the four corners of

the General Release. *See, e.g.*, *Gray v. Riso Kagaku Corp.*, 82 F.3d 410 (Table) (4th Cir. 1996) (unpublished) (affirming trial court's grant of summary judgment on basis that plaintiff's claims were covered in scope of general release and noting "[a]lthough [appellant] contends that the General Release was only intended to release certain specific claims, the language of the General Release does not admit of such limitation."); *Wilson Grp., Inc. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 426 n.9 (D.S.C. 1995) (noting that a plaintiff's argument that its representatives did not intend to provide a general release failed because "the subjective intention of parties to a clear and unambiguous contract do not control its meaning. Any other principle would allow a party to avoid the legal effect of a release by claiming it did not believe it was releasing its rights.").

Further, "[t]o determine the intention of the parties, the court must first look at the language of the contract. . . . Whether the language of a contract is ambiguous is a question of law for the court." *Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 273, 777 S.E.2d 425, 428 (Ct. App. 2015). "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. S.C. Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997); *see also Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984) ("Courts are without authority to alter a contract by construction or to make new contracts for the parties. Their duty is limited to the interpretation of the contract made by the parties themselves '..... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" (quoting *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767 (1976)). White's contention that this Court should look to extrinsic evidence to determine his intent is plainly incorrect. This Court should

affirm the trial court's interpretation of the unambiguous language of the General Release and affirm the September 14, 2022 Order.

Finally, White attempts to argue that Respondents have somehow conceded a limitation in the General Release based on their previous statement that White's execution of the General Release did not dispossess him of his shares in CFR. (White's Initial Br. at 19.) White, again, confuses ownership of shares with the ability to bring a claim related to those shares. By executing the General Release, White released his ability to bring any legal or equitable claims that had accrued as of the date he signed the General Release, including claims related to his acquisition of shares in CFR. There has never been any dispute that White retained possession of his shares in CFR, as explained by Defendants' counsel in the May 17, 2021 hearing before Judge Sprouse, and as previously cited by White. (*See* R. __ (White's Mem. Supp. White's Mot. Alter & Am. at 13-14).) Respondents have never argued that White's execution of the General Release dispossessed him of his shares in CFR, and this argument is inapposite.

For all these reasons, the trial court correctly concluded that the General Release was unambiguous, that White's first, second, and fourth causes of action fell within the scope of the Release Provision, and therefore, that the General Release serves as a complete bar to White's first, second, and fourth causes of action in this case. This Court should affirm the trial court's September 14, 2022 Order.

B. The Trial Court Correctly Applied the Tender Back Rule.

White contends that it was error for the trial court to find that, pursuant to South Carolina's "tender back" rule, by failing to return the consideration received in exchange for his execution of the General Release, White is bound to its terms. (White's Initial Br. at 20.) White alleges two errors in the trial court's ruling: (1) the trial court should not have applied the tender back rule because it is only applicable "to unwind the 'compromise' of liability that the parties had reached,"

(White's Initial Br. at 20), and (2) the trial court incorrectly determined that the General Release was supported by consideration. (White's Initial Br. at 21.) White is incorrect on both points.

Under South Carolina's well-established "tender back" rule, if a party to a release does not return or offer to return the consideration received in exchange for execution of a release, that party is deemed to have affirmed the contract and is bound to its terms. More specifically,

> [i]n South Carolina, "it is well settled that one who seeks to avoid the effects of a release must first return or tender consideration paid therefor." *State Farm Mut. Ins. Co. v. Turner*, 399 S.E.2d 22, 23 (S.C. Ct. App. 1990). A release induced by fraud is not void, but voidable. *Levister v. Southern Railway Co.*, 35 S.E. 207, 209 (S.C. 1900). Thus, where a releasor, after discovering the fraud, does not repay or offer to repay the consideration received from the releasee, "he will thereby be held to have waived the tort and affirmed the contract." *Id.*

Brewer v. EnerSys, Inc., C.A. No. 3:04-1335-MJP, 2006 WL 8446422, at *7 (D.S.C. June 29, 2006) ("[R]eleasors seeking to avoid the bar of a release must first tender back the consideration they received for signing the release.").

First, White contends that the tender back rule "is only designed to unwind the 'compromise' of liability that the parties had reached." (White's Initial Br. at 20.) White cites *Taylor v. Palmetto State Life Insurance Company*, 196 S.C. 195, 12 S.E.2d 708 (1940), for this proposition. However, in *Taylor*, the South Carolina Supreme Court stated:

> We presume that no doubt exists as to the soundness of the general proposition that where a party to a compromise desires to set aside or avoid a release duly entered into and be remitted to his original rights, he must place the other party in statu quo by returning or tendering the return of whatever has been received by him under such compromise, if of any value, and so far as possible, any right lost by the other party in consequence thereof. This rule obtains even though the contract of settlement was induced by the fraud or false representations of the other party. The rationale of the doctrine is that by electing to retain the property the party must be conclusively held to be bound by the settlement. The rule applies to actions ex contractu as well as to actions ex delicto. . . . Ordinarily, the consideration received for a release should be returned or tendered before an action is instituted, or contemporaneously with the institution thereof.

Id. at 710.

Additionally, in *Brewer*, employees attempted to raise claims against their former employer after executing severance agreements that contained releases. *Brewer*, 2006 WL 8446422, at *1-2. The United States District Court for the District of South Carolina applied South Carolina law and held that because the employees failed to return, or offer to return, the severance benefits prior to filing the lawsuit, the employees waived the ability to pursue any claims covered by the scope of the release provisions in the severance agreements. *Id.* at *7. The district court further held that the plaintiff employee's fraud and negligent misrepresentation claims associated with their execution of the severance agreements were barred by their failure, prior to filing suit, to repay or offer to repay the consideration received exchange for the releases in the severance agreements. *Id.* at *8.[6] Therefore, courts have not limited the tender back rule to only apply to settlement agreements in the context of litigation or potential litigation and have applied the rule to all release agreements, including those in severance agreements. No South Carolina court has made the distinction that White asks this Court to make.

Second, White contends that the General Release lacked consideration. White appears to raise a number of arguments about the sufficiency of the consideration supporting the General Release, including (a) that the entire General Release was not supported by consideration because he was already entitled to receipt of $300,000 under the terms of an Employment Agreement, (b) that there was nothing for him to tender back to Respondents because the $300,000 he received under the General Release was only in consideration for his non-competition obligations, and (c) that there was no consideration specifically supporting the Release Provision in the General

[6] The trial court found the same here in connection with White's fraud in the inducement claim, and White has not appealed that determination. White has also not disputed that he did not return or offer to return the severance payment received under the General Release.

Release. (White's Initial Br. at 21.) However, the language of the Employment Agreement and the General Release, as well as White's own testimony, contradict these assertions.

On July 28, 2014, White executed an Employment Agreement with FT, a wholly owned subsidiary of CFR. (R. __ (Employment Agreement).) Paragraph 6 of the Employment Agreement governed the termination of White's employment with FT. Paragraph 6(c) stated:

> (c) *Termination Other than for Death or Disability.* Company may terminate Employee's employment during the Employment Period for any reason or no reason upon thirty (30) days notice.

(R. ___ (*Id.*).) Paragraph 6(d) stated that if White was terminated

> pursuant to Section 6(c) for any reason other than Death or Disability, and prior to Employee's sixtieth birthday, upon execution of a general release acceptable to the Company, Employee shall be paid $100,000 per year for three years as severance and as compensation for his continued compliance with the terms of this Agreement and the NON-COMPETITION AGREEMENT of even date.

(R. __ (*Id.*).) Therefore, White was *only* entitled to receive severance payments under the terms of the Employment Agreement if he was terminated by FT pursuant to Section 6(c). This provision of the Employment Agreement was never triggered, however, because White voluntarily resigned. (R. __ (Second Am. Compl. ¶¶ 60, 62); R. __ (White's Resp. to Respondents' Interrog. No. 9).) The $300,000 Severance Payment White received was not owed under the Employment Agreement, but was provided voluntarily by CFR in return for execution of the General Release. Further Paragraph 6(f) of the Employment Agreement applied to White's ability to terminate his employment and does not state that White would be entitled to any severance payments in the event he resigned his employment. (R. __.) Thus, White's contention that he was already entitled to severance payments of $300,000 under the terms of the Employment Agreement, and therefore the General Release lacked consideration, plainly fails because White resigned from employment with CFR and Paragraph 6(d) of the Employment Agreement was never triggered. *See Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735, 743 (D.S.C. 2001) (finding that a plaintiff "received

consideration for the General Release because he obtained something of value to which he had no previous right").

White would not have been entitled to receive these severance payments if he did not execute the General Release, which is confirmed by the recitals on the first page of the General Release: "WHEREAS, [White] desires to receive severance payments and other consideration provided pursuant to this Agreement, and the Company is willing to provide these benefits to [White] on the condition that [White] enters into this Agreement." (R. __ (General Release at 1).) Therefore, the General Release expressly acknowledged the conditional nature of the severance payment being offered to White.

In his deposition, White also admitted as much:

> Q. Do you believe that by signing this agreement, CFR became obligated to pay you $300,000 in severance?
> A. Yes.
> Q. If they hadn't paid you that $300,000, do you believe they would have complied with the agreement?
> A. No.
> Q. So you think CFR should be held to the terms of this document that it signed?
> A. Yes.
> Q. Do you think you should be held to the terms of this document you signed?
> A. Yes.

(R. __ (*Id*. at 181:24-182:12).) White also expressly acknowledged in his deposition that (1) he received the full $300,000 of severance payments, and (2) he would not have received the severance payments had he not signed the General Release:

> Q. Mr. White, I have just a couple more questions. The release agreement that we looked at, did you sign that voluntarily?
> A. The separation agreement?
> Q. Yes, the document that's titled, "General Waiver and Release."
> A. Yes.
> Q. Okay. You could have chosen not to sign that document, right?
> A. Yeah, I wouldn't have got my severance money, but, yeah.
> A. Right. But you wanted the $300,000?
> A. Right.

Q. And so you signed the release agreement?
A. Yes.

(R. __ (White Dep. 205:3-17); *see also* R. __ (White Dep. 172:20-173:2 ("Q: Okay. Did CFR make the severance payments to you, as promised in this agreement? A. They did. Q. Okay. All $300,000? A. Yes.")).)

Further, to the extent White argues that the $300,000 of severance payments were only made in consideration of his ongoing non-compete obligations or were somehow not allocated as consideration for the Release Provision, these arguments lack merit. Nothing in the General Release indicates that the severance payment was somehow divisible between the various obligations set forth in the General Release. Instead, the General Release specifically states that the severance consideration was being offered "[i]n consideration for [White's] promises as set forth herein[.]" (R. __ (General Release at ¶ 1).) To accept White's arguments, this Court would have to find that that none of the $300,000 severance payment applied to the Release Provision in the General Release, which is a conclusion that finds no support in the actual language of the General Release.

Moreover, White's argument also fails because the language of the Employment Agreement expressly conditioned White's receipt of the severance payments described in Paragraph 6(d) on White signing a general release of claims that was acceptable to the company. (R. __ (Employment Agreement).) In other words, it does not matter whether White was entitled to the $300,000 under Paragraph 6(d) of the Employment Agreement (which he was not) or whether it was voluntarily offered to him by CFR, because his receipt of the severance payment was always conditioned on White signing a general waiver and release agreement acceptable to the company. (*Id.*)

Based on the foregoing, White's contention on appeal that the Release Provision in the General Release was not supported by consideration because he was already entitled to receive severance payments is not supported by the language of the Employment Agreement or the General Release, and not supported by White's own testimony. The trial court correctly concluded that "no language in the General Release allocates any portion of the severance consideration given by Defendants, including the $300,000 Severance Payment, to White's reaffirmation of his restrictive covenants, as opposed to the Release Provision." (R. __ (Sept. 14, 2022 Order at 16).) Therefore, this Court should affirm the trial court's September 14, 2022 Order.[7]

C. The Trial Court Correctly Determined that No Genuine Issue of Material Fact Existed as to White's Claim for Fraud in the Inducement.

White's third cause of action in the Second Amended Complaint is a claim for fraud in the inducement related to White's execution of the General Release. The trial court concluded that "White's third claim (for fraudulent inducement of the General Release) is barred by South Carolina's "tender back" rule, and separately fails because White has failed to create a genuine issue of material fact that he was fraudulently induced into entering the General Release." (R. __ (Sept. 14, 2022 Order at 6).) On appeal, White contends that "a scintilla of evidence" was present to create a genuine issue of material fact as to (a) alleged representations made to White, and (b) Respondents' intent to deceive. (White Initial Br. at 23-24.) White's arguments have no merit, and he has not carried his burden to demonstrate an error by the trial court.

As an initial matter, White analyzes the elements required to demonstrate a claim for fraud, rather than the elements of a claim for fraud in the inducement. (White's Initial Br. at 23.) To prove

[7] The trial court's September 14, 2022 Order also found that even if the tender back doctrine did not apply, "there is no evidence in the record to support White's contention that the General Release was procured by fraud." (R. __ (Sept. 14, 2022 Order at 18).) Therefore, the trial court identified another independent basis in its determination that the General Release was valid and enforceable.

a claim for fraud in the inducement, a party must show by "clear, cogent, and convincing evidence," the following elements of fraud:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Ardix v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). A party must also establish three additional elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 36, 694 S.E.2d 43, 45 (Ct. App. 2010).

White contends that the trial court had sufficient evidence to discern a genuine issue of material fact as to the existence of alleged false representations made to White. (White's Initial Br. at 23-24.) Despite White's arguments now, at his deposition, White testified that no representations were made to him regarding the General Release:

> Q. So in an e-mail from Gordon Miller to you dated November 29th, 2017, you were forwarded the severance agreement and release, is that correct?
>
> A. Yes.
>
> Q. Okay. And that was sent by Gordon Miller. What was Gordon's position?
>
> A. I think it was director of HR. I'm pretty sure that's what his name is - - his title.
>
> Q. Okay. Other than the communications that we've seen in this thread, did you talk with anyone about your release before it was sent by – what the terms of the severance agreement and release would be before it was sent to you?
>
> A. No, the e-mail - - this e-mail chain is probably it. I might have - - I might have talked to Gordon on the phone, I don't remember, but I didn't talk to anybody else.
> . . . .
>
> Q. . . . What statements or representations, if any, were made to you about the intent of this agreement?

A. None.

(R. __ (White Dep. at 168:21-169:12, 178:6-9).) Therefore, White's contentions on appeal are in direct contrast with his deposition testimony. Further, White has repeatedly argued that he never thought the scope of the Release Provision in the General Release applied to the Note. (R. __ (*Id.* at 183:13-184:12.) Therefore, taking White's position as true, he could not have relied on any statements by Herwald about the Note in deciding to execute the General Release. Reliance is an essential element of a claim for fraud in the inducement, and thus, the trial court correctly held that White failed to create a genuine issue of material fact on that claim.

White further contends that the trial court's holding that "White failed to produce any evidence to establish that Herwald had an intent to deceive White," was incorrect. (Initial Br. at 24.) In a summary fashion, White merely states that "[a] jury could find that Respondents wanted to induce Mr. White to walk away from his investment, trading dollars for dimes," and then quotes several lines from Respondent Herwald's deposition. (*Id.*) However, White still fails to cite any evidence pertaining to Respondent Herwald's alleged intent to deceive White in connection with White's execution of the General Release. White has not carried his burden in demonstrating any error in the trial court's conclusion that White did not produce evidence of Respondent Herwald's intent to deceive, and therefore, his claim for fraudulent inducement fails.

Finally, White contends that a "future promise is actionable if . . . the unfulfilled promises 'were made by a party who never intended to fulfill the promise and only made it to induce the performance of another party.' *Brown v. Stewart*, 348 S.C. 33, 42 (Ct. App. 2001)." (White's Initial Br. at 23.) He then argues that certain statements allegedly made by Respondent Herwald to White about future events qualify as actionable statements under his claim for fraud in the inducement. (*Id.*) However, White has not preserved this argument for appeal. White did not make any arguments about a statement regarding future events being actionable in his Memorandum in

Opposition to Respondents' March 10, 2021 Motion for Summary Judgment (which he relied on at the hearing on Respondents' April 6, 2022 Motion for Summary Judgment), during the May 9, 2022 hearing on Respondents' May 6, 2022 Motion for Summary Judgment, or in White's Motion to Alter and Amend and Memorandum of Law in Support of Plaintiff's Motion to Alter and Amend. Therefore, this argument is not preserved for appeal.

For all these reasons, the trial court correctly concluded that (1) "White failed to produce any evidence that a false representation regarding a preexisting fact was made to him by Defendants regarding the Release Provision in the General Release," and (2) "White failed to produce any evidence to establish that Herwald had an intent to deceive White." (R. __ (Sept. 14, 2022 Order at 19-20).) This Court should affirm the trial court's September 14, 2022 Order.

III. The Trial Court Correctly Granted Respondents' Motion for Summary Judgment as to Respondents' Counterclaims.

The trial court's September 14, 2022 Order concluded that there was no genuine issue of material fact as to Respondents' counterclaims for breach of the General Release and breach of the Subordination Agreement. (R. __ (Sept. 14, 2022 Order at 20-24).) White argues that both of those conclusions are incorrect. For the reasons set forth below, this Court should affirm the trial court's September 14, 2022 Order on both of Respondents' counterclaims.

A. The Trial Court Correctly Found that Respondents Were Entitled to Summary Judgment on their First Counterclaim for Breach of the General Release.

The trial court's September 14, 2022 Order determined that White breached the terms of the General Release by filing this lawsuit. (R. __ (Sept. 14, 2022 Order at 20-21).) White contends that this ruling was made in error because (a) the General Release was not supported by consideration, (b) the General Release was voidable due to fraud, and (c) the record did not establish a breach of the General Release. (White's Initial Br. at 24-28.) Respondents have

addressed White's first and second arguments *supra* and do not repeat those arguments here. White's third argument fails because it (1) is not preserved for appeal, and (2) is legally incorrect.

White argues that the record failed to establish a breach of the General Release, that a release and covenant not to sue are two types of instruments, and that raising a claim covered by a valid release is not a breach of the same. (White's Initial Br. at 25.) White plainly did not preserve this argument for appeal. In response to Respondents' April 6, 2022 Motion for Summary Judgment, White did not submit any new briefing and instead relied on his Memorandum in Opposition to Respondents' March 10, 2021 Motion for Summary Judgment. (R. __ (May 9, 2022 Hr'g Tr. at 46:12-22).) In White's May 16, 2021 Memorandum, during the May 9, 2022 hearing on Respondents' April 6, 2022 Motion for Summary Judgment, in his September 24, 2022 Motion to Alter or Amend, or in the December 1, 2022 hearing on White's Motion to Alter or Amend, White did not argue that a party's filing of claims previously released in a contract does not constitute a breach of that contract, and he never argued that there is a distinction between the breach of a release provision and breach of a covenant not to sue. Therefore, all of White's arguments concerning Respondents' first counterclaim are not preserved for appeal. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Even if preserved, White's argument is legally incorrect. As fully set forth *supra*, the Release Provision in the General Release is enforceable and applies to White's first, second, and fourth causes of action. White has not disputed that the General Release is an enforceable contract. (R. __ (White Dep. at 181:24-182:12).) In the Release Provision, White agreed to release all claims, whether known or unknown, against CFR, FTA, and Herwald, that existed as of the date

of the General Release. (R. __ (General Release ¶ 3).) These claims, to the extent they accrued, accrued prior to White's execution of the General Release. Therefore, by filing this lawsuit and raising claims that, to the extent they accrued, accrued prior to White's execution of the General Release, White has plainly breached the terms of the General Release. *See Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 550, 744 S.E.2d 178, 193 (2013) (holding that, in case in which plaintiff filed lawsuit raising claims that were released under release agreement and defendants filed counterclaim for breach of the release, trial court should not have dismissed defendants' counterclaim); *Bradley v. British Fitting Grp., PLC*, 221 Ga. App. 621, 624, 472 S.E.2d 146, 151 (Ga. Ct. App. 1996) (finding that plaintiff breached release agreement by filing lawsuit regarding claims that had been released).

Relying on non-binding cases from Minnesota, North Carolina, California, the United States Court of Appeals for the First Circuit, and the United States Court of Appeals for the Seventh Circuit, White argues that the trial court erred in determining that White breached the General Release because these jurisdictions have held that raising a released cause of action does not necessarily breach a release provision. (White's Initial Br. at 25-28.) However, no South Carolina case has made such a holding. Further, other jurisdictions, such as Georgia, have expressly held that raising a released cause of action breaches a release. *Bradley v. British Fitting Grp., PLC*, 221 Ga. App. 621, 624, 472 S.E.2d 146, 151 (Ga. Ct. App. 1996) (finding that plaintiff breached release agreement by filing lawsuit regarding claims that had been released). The trial court found this case law persuasive, and this Court should find the same.

Finally, in a footnote, White argues that the award of attorneys' fees must also be reversed because it was dependent on Respondents prevailing on their first counterclaim. (Initial Br. at 28 n.9.) White's argument fails because (1) he has not preserved for appeal any argument about the

attorneys' fee award to Respondents; (2) the trial court found more than one basis to award Respondents' attorneys' fees which White has not contested on appeal; and (3) the attorneys' fee provision in the General Release is not conditioned on the success of Respondents' counterclaim.

First, at no time in White's previous briefing to the trial court, during the hearing on Respondents' April 6, 2022 Motion for Summary Judgment, in White's Motion to Alter and Amended and Memorandum in Support thereof, or during the hearing on White's Motion to Alter and Amend, has White contested Respondents' request for attorneys' fees or the trial court's award of attorneys' fees to Respondents in the September 14, 2022 Order. Accordingly, White has not preserved this issue for appeal. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Second, the September 14, 2022 Order found multiple bases for its award of Respondents' attorneys' fees, which White has not challenged. (R. __ (Sept. 14, 2022 Order at 24).) Specifically, the trial court held that the costs and attorneys' fees incurred by Respondents constituted damages separately from the attorneys' fees provision in the General Release. (R. __ (*Id.* at 21.) Thus, even if the attorneys' fee provision in the General Release did not provide a basis for recovery, the trial court provided another independent basis for recovery, which is not at issue in this appeal. Thus, White's argument fails.

Third, the attorneys' fee provision in the General Release states:

> In the event either party is required to initiate legal action to enforce any provision of this Agreement, the Company and Executive hereby mutually agree that the prevailing party in any such action shall be entitled to recover all reasonable coasts and attorneys' fees incurred by the party in such action, in addition to any and all other available and appropriate legal and equitable relief.

(R. __ (General Release ¶ 18).) Here, Respondents were the prevailing party in the underlying lawsuit (even if their claim for breach of the General Release were to fail), and therefore, the attorneys' fee award to Respondents is appropriate independently from the outcome of Respondents' first counterclaim.

For all these reasons, the trial court correctly concluded that there was no genuine issue of material fact as to Respondents' first counterclaim and properly awarded attorneys' fees to Respondents. Therefore, this Court should affirm the trial court's September 14, 2022 Order.

B. The Trial Court Correctly Found that Respondents Were Entitled to Summary Judgment on Their Second Counterclaim for Breach of the Subordination Agreement.

Respondents' second counterclaim was for breach of Paragraph 9 of the Subordination Agreement. White contends that the trial court incorrectly concluded that he breached Paragraph 9 of the Subordination Agreement, and in so arguing, urges this Court to consider a nonsensical reading of the Subordination Agreement. (White's Initial Br. at 28-31.) White's argument ignores the plain language of the Subordination Agreement and inserts his own unsupported interpretation. White has failed to identify any error in the trial court's conclusion that there is no genuine issue of material fact as to Respondents' second counterclaim, and this Court should affirm the trial court's September 14, 2022 Order.

White executed the Subordination Agreement on July 28, 2014. (R. __ (Subordination Agreement).) At no time has White disputed the Subordination Agreement is a valid and enforceable contract, and has not challenged the trial court's determination that Respondents suffered damages. On appeal, White has only challenged the trial court's finding that he breached the Subordination Agreement. The Subordination Agreement rendered White's Note with CFR subordinate to debts held by CFR's junior and senior lenders. Paragraph 9 of the Subordination Agreement states in its entirety:

> **Seller Noteholder will not commence any action or proceeding at law or equity against Borrowers, or any of them, to recover all or any part of the Seller Subordinated Debt not paid when due** and shall at no time join with any creditor, in bringing any proceeding against Borrowers, or any of them, under any liquidation, conservatorship, bankruptcy, reorganization, rearrangement, or other insolvency law now or hereafter existing, **unless and until the Superior Debt shall be indefeasibly paid and satisfied in full in cash, and Senior Lender has no further obligation to make revolving loans and advances under the Senior Agreement.** Subject to the foregoing, Seller Noteholder may accelerate the Seller Subordinated Debt upon the occurrence of (a) the acceleration of the Superior Debt; and (b) the filing of a petition under the Bankruptcy Code by Borrowers, or any of them; provided that such Seller Noteholder shall reverse such acceleration in the event that (i) the acceleration of the Superior Debt, or any portion thereof, is reversed or (ii) such petition is withdrawn.

(R. __ (Subordination Agreement at ¶ 9 (emphasis added)).) In other words, White (as the Seller Noteholder) agreed that he would not file a lawsuit regarding any unpaid amounts on the Note (as the Seller Subordinated Debt) unless and until CFR's (as Borrower) senior debt, as described in the Subordination Agreement, was fully paid.

White does not dispute (on appeal or at any previous time during this lawsuit) that at the time he filed this lawsuit, the Superior Debt was not "indefeasibly paid and satisfied in full in cash[.]" (*Id.*) In White's deposition, he testified that: (1) White's Note was the Seller Subordinated Debt referenced in the Subordination Agreement (R. __ (White Dep. 45:24-46:3)); (2) in the event that CFR defaulted on its superior debt, CFR could not pay White under the Note until the superior default had been cured (R. __ (*id.* at 46:8-20)); (3) the Subordination Agreement was in effect until the superior debt was paid in full (R. __ (*id.* at 46:21-25)); (4) White, as the seller noteholder, agreed he would not commence any action or proceeding at law against CFR "to recover any part of the note not paid when due until the superior debt was paid in full" (R. __ (*id.* at 47:1-10)); (5) the Note was subordinate to debt owed by CFR to Fifth Third Bank (R. __ (*id.* at 53:9-12)); (6) the "Junior Lender" included Leeds' respective successors and assigns (R. __ (*id.* at 52:11-15)); and (7) at the time he filed this lawsuit, White had no evidence that CFR's debt to Fifth Third Bank

and McLarty had been paid (R. __ (*id.* at 56:22-25)). It is undisputed that on November 26, 2019, when White filed this action, CFR's debts to its senior lender, Fifth Third Bank, and mezzanine lender, McLarty, were not satisfied. Moreover, after White filed this lawsuit in November 2019, but before he filed his Amended Complaint in March 2020, Respondents' counsel informed White's counsel that if White did not agree to dismiss the action without prejudice, he would be in breach of the Subordination Agreement and Respondents would be required to assert counterclaims. (*See* R. __ (Ex. K to Apr. 6, 2022 MSJ).) Despite this notice, White knowingly chose to proceed with this lawsuit anyway.

Instead of addressing these issues, White argues that "[i]n Paragraph 9 of the Subordination Agreement, Mr. White agreed that after receipt of such Notice he would not file suit to collect on the Note until the Superior Lenders had been paid fully." (White's Initial Br. at 29.) The "notice" White refers to is described in Paragraph 3 of the Subordination Agreement. Essentially, White argues that Paragraph 9 of the Subordination Agreement is not applicable unless he received a notice (to be provided by a non-party) under Paragraph 3 of the Subordination Agreement. However, **no provision** in the Subordination Agreement conditions the terms of Paragraph 9 on White's receipt of the Notice described in Paragraph 3.

> Paragraph 3 of the Subordination Agreement states, in pertinent part:
>
> > Prior to the receipt by the Seller Noteholder of written notice from a Superior Lender of a Superior Default ("Superior Default Notice"), but subject to the balance of this Section 3 and Section 4 below, Borrowers **may** pay and Seller Noteholder **may** accept the following payments of interest and/or principal under the Seller Unsecured Subordinated Note: (i) accrued interest at a rate not to exceed five percent (5.0%) per annum, and (ii) annual principal payments not to exceed $200,000.

(R. __ (Subordination Agreement at ¶ 3) (emphasis added).) Paragraph 3, therefore, permitted CFR (as the Borrower) to make certain payments to White (as the Seller Noteholder) prior to White receiving a written notice from a Superior Lender, but did not require such payments to be made.

(*Id.*) There is no language in the Subordination Agreement making White's obligations under Paragraph 9 contingent on the terms of Paragraph 3. White's contention otherwise is simply not true and is not supported by any language in the Subordination Agreement.[8]

Further, White's argument that "two readings of the Subordination Agreement are possible," does not address the plain language of Paragraph 9, in which White expressly agreed he would not file a lawsuit for sums due under the Note unless and until the Superior Debt was satisfied. Further, at no time has White argued that the conditions precedent (i.e. that the Superior Debt was paid in full) set forth in Paragraph 9 of the Subordination Agreement were satisfied to justify filing this lawsuit. Essentially, the question now (and the question that was before the trial court) is this: Were the conditions set forth in Paragraph 9 of the Subordination Agreement satisfied such that White was permitted to file this lawsuit? The plain and undisputable answer is "no." White has failed to show an ambiguity in the Subordination Agreement, and the trial court correctly found that White breached the unambiguous language of Paragraph 9 of the Subordination Agreement by filing this lawsuit. White has failed to meet his burden to demonstrate any error in the trial court's ruling, and this Court should affirm the September 14, 2022 Order.

CONCLUSION

The evidence and arguments presented to the trial court overwhelmingly support the trial court's decision to grant Respondents' April 6, 2022 Motion for Summary Judgment. The trial court did not abuse its discretion in hearing Respondents' April 6, 2022 Motion for Summary Judgment. Further, the trial court correctly granted the April 6, 2022 Motion for Summary

[8] White states that the trial court "thought that Paragraph 3 unambiguously denied Mr. White the right to receive a copy of the written notice of the default that authorized the cessation of Respondents' payments to Mr. White." (White's Initial Br. at 30.) Nothing in the trial court's September 14, 2022 Order contains such an interpretation of the Subordination Agreement.

Judgment as to each of White's claims and each of Respondents' counterclaims. Throughout this case, and in his arguments on appeal, White has taken positions and made arguments that are inapposite, contrary to the facts, and contrary to the law. White has failed to carry his burden on both questions before this Court. Therefore, the trial court's September 14, 2022 Order was correct in all respects and should be affirmed.

Respectfully Submitted,

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