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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Derham Cole, Circuit Court Judge

Common Pleas Case No. 2019-CP-23-06915

Appellate Case No. 2023-000155

RICHARD D. WHITE,

Appellant,

v.

FT ACQUISITIONS, LLC; COMMERCIAL FOOD SERVICE REPAIR, INC.; and KURT HERWALD,

Respondents.

Initial Reply Brief of Appellant Richard D. White

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Appellant Richard D. White respectfully submits the following Reply Brief.

ARGUMENT

I. One Circuit Judge Should Not Grant Summary Judgment on Grounds Already Rejected by Another.

A. The Issue Was Preserved for Appeal.

Contrary to Respondents' claim, no preservation problems exist with respect to this issue. The error-preservation rules only require a litigant to "fairly raise the issue," but a litigant need not "use the exact name of a legal doctrine." *State v. Brannon*, 388 S.C. 498, 502 (2010) (citations omitted). *Accord, e.g.*, *Herron v. Century BMW*, 395 S.C. 461, 466 (2011) (explaining that all that a litigant need do is present its argument "so that it can be reasonably understood by the judge" (citation omitted)). As required for issue preservation, Mr. White argued to Judge Cole that he should deny summary judgment on issues already presented to Judge Sprouse because the evidentiary record had not changed. *See, e.g.*, [5/9/22 Mot. Tr. p. 27 ("Your Honor, there's nothing different about the case as it exists today than as it existed nearly one year ago…. But, regardless, even if the Court were inclined to look at this anew, there still exists these genuine issues of material fact are being presented once again.")]. Indeed, Mr. White specifically argued at the hearing that "under the *Dorrell v. South Carolina Department of Transportation* case renewed motions for summary judgment are predicated on the discovery of new evidence." [*Id.* p. 26]. The *Dorrell* case relied upon before Judge Cole below was likewise relied upon in the Brief of Appellant. *See* [Br. of Appellant. p. 8]. That Mr. White did not specifically cite to R. 43(l), SCRCP, at oral argument is irrelevant under our error-preservation rules.

B. The Re-Litigation of the Summary Judgment Motion Was Improper.

Respondents unsuccessfully claim that they were not in effect appealing Judge Sprouse's determination that genuine issues of fact existed in the evidentiary materials that he reviewed. Yet they do not dispute that they tendered Exhibits A-K to Judge Sprouse and again tendered Exhibits A-K to Judge Cole.[1] Therein lies the problem. It is difficult to understand how Respondents can seriously contend that they were doing anything other than trying to obtain a different ruling "upon the same set of facts," using the language of R. 43(l), SCRCP; or trying to renew a motion for summary judgment despite no "*new* evidence [coming] to light." *Dorrell v. S.C. DOT*, 361 S.C. 312, 325 (2004) (citation omitted) (emphasis added).

Insofar as Respondents invoke *Pruitt v. Bowers*, 330 S.C. 483 (Ct. App. 1998) and *Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contactors., LLC*, 394 S.C. 97 (Ct. App. 2011), those cases have no relevance here. Mr. White fully concedes that South Carolina allows litigants to file repeated motions for summary judgment—whether or not the pleadings are amended—so long as the moving party designates additional evidence that it claims shows that prior material issues of fact no longer remain. The problem for Respondents here is not that they filed another motion for summary judgment; it is that they relied on the same set of facts and the same legal

[1] Page 15 of Respondents' brief lists post-summary judgment discovery items with no citation to the Record on Appeal, in violation of R. 208(b)(1)(E), SCAR ("A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal…."). More critically, they do not claim that any of those items was ever presented to Judge Cole for his consideration when deciding whether to grant summary judgment.

arguments before Judge Cole as they already had before Judge Sprouse. In contrast, they did adduce new evidence for their arguments under the tender-back rule (which relied upon an affidavit from Kurt Herwald averring that no repayment had been made, [4/6/22 Motion for Summary Judgment with Affidavit]); accordingly, Mr. White has not contended that Judge Cole was prevented from deciding the tender-back issue. But he should not have reconsidered what Judge Sprouse had already considered.

With respect to Mr. White's Second Amended Complaint in particular, Respondents have failed to explain how its content can have any legal bearing to the summary-judgment calculus. The proposed amended pleading was already filed and thus available to Judge Sprouse to consider if he found it relevant. *See* [5/14/21 Motion to Amend Complaint with Proposed Pleading]. But Mr. White could never have generated a genuine issue of fact through mere allegations in a complaint that were not supported by affidavits and other actual evidence at the summary-judgment hearing. *See* R. 56(e), SCRCP ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading [in response to a motion for summary judgment]….").

If Respondents want our Supreme Court to abandon R. 43(l), SCRCP, and *Dorrell*, 361 S.C. 312, so as to allow litigants to re-litigate the same summary-judgment theories on the same set of evidentiary materials, Respondents are free to ask the Supreme Court to do so. But unless and until the Supreme Court does so, this Court should hold that only the tender-back rule was properly before Judge Cole.

II. It Was an Error to Have Granted Summary Judgment on Any Ground.

A. Summary Judgment Was Improper on Mr. White's Claims.

1. The Release Was Ambiguous.

a. The Issue Was Fully Preserved for Appeal.

Respondents incorrectly suggest that the issue of contract ambiguity is somehow not preserved. Below, Mr. White explicitly invoked the doctrine of ambiguity. He both requested that the court construe ambiguities against Respondents as the drafters, [5/16/21 White Opposition to Summary Judgment Memo, p. 21], and asked that the jury hear evidence of the parties' intent and decide the question, [5/9/22 Tr. 28]. That Mr. White did not specifically say "patent" or "latent" is irrelevant. *Brannon*, 388 S.C. at 502 (not requiring a party "use the exact name of a legal doctrine"). Indeed, this Court has specifically held that merely advocating competing interpretations of a contract preserves the antecedent question of whether the contract's language is ambiguous. *Wallace v. Day*, 390 S.C. 69, 75 & n.3 (2010) (rejecting preservation challenge where appellant below did not even argue ambiguity and explaining as follows: "[A] contract's interpretation necessarily subsumes the primary question of whether the contract's language is clear or ambiguous…. [W]e have not only the authority but also the responsibility to recognize an ambiguity in a contract when determining whether the trial court appropriately relied on the contract's language in granting summary judgment.").

b. Genuine Issues of Fact Existed as to the Parties' Intent.

Black-letter law forbids summary judgment on ambiguous contract. *Wallace* 390 S.C. at 76 ("[T]he determination of the parties' intent at the time they executed the contract is a question of fact that should not have been decided on summary judgment." (citation omitted)). Summary judgment cannot issue because "[a] contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623 (2001) (citation omitted). The competing reasonable interpretations necessarily constitute an issue of fact that the jury must resolve.[2]

This Court need not decide whether the ambiguity here is latent or patent. Both are present.

In terms of latent ambiguity, no dispute exists that the November 2017 Agreement explicitly refers to Mr. White as "Executive" and not "Executive/Investor," its recitals only specifically acknowledge the prior employment relationship and not any investor

[2] Contrary to Respondents' claim, [Init. Br. of Resp. p. 27 n.5], this Court has made clear that patent ambiguities are now to be submitted to the jury for resolution. *Harbin v. Williams*, 429 S.C. 1, 8 (Ct. App. 2019) (noting that recent Supreme Court case law has "discarded the distinction between patent and latent ambiguities in determining whether the interpretation of a document is for the court or the jury"). *Accord Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 325 (1923) ("As a general rule, contracts are to be construed by the Court; but where a contract is not clear, or is ambiguous and capable of one or more constructions, what the parties really intended, as a matter of fact, should be submitted to a jury."). If patent ambiguities were properly for the judge alone, Respondents do not explain why Judge Cole's resolution of the question should trump Judge Sprouse's—the latter of whom would have granted summary judgment had he believed that Respondents' interpretation was the only reasonable one.

relationship, and none of the specific examples set forth in the document mention securities or fraud law. [November 2017 Agreement]. Yet all parties agree that Mr. White also had an investor relationship. Thus, even assuming that Respondents were correct that November 2017 Agreement's language literally purported to release both employment and investor claims, *Maryland Casualty Co. v. Gaffney Mfg. Co.*, 93 S.C. 406 (2013), would control. A latent ambiguity exists because the document does not contain "sufficient internal evidence" acknowledging the dual roles that Mr. White had—such that that the parties unambiguously intended the release language to apply to both employment and investor claims—*id.* at 408 (acknowledging that the plain text of the insurance policy extended coverage to all employees but holding that properly admissible extrinsic evidence existed "that the parties intended that [the] policy should cover only the employees of mill No. 3."). Indeed, Respondents do not deny, much less explain away, the contemporaneous and post-signing statements that *Respondent Herwald* made that are flatly inconsistent with Respondents' argument that November 2017 Agreement extinguished investor claims, too. Given that contracts are predicated upon "an actual meeting of the minds of the parties," *Caulder v. Knox*, 251 S.C. 337, 344 (1968), it would seem strange to say as a matter of law that a contract means more than what the actual signatories thought it meant.

Respondents' argument concerning Mr. White's shares is telling. [Resp. Init. Br. p. 32]. Those shares gave him a percentage ownership claim in the enterprise, as Respondents do not dispute. Yet Respondents continue to maintain on the one hand that the November 2017 Agreement extinguished and all claims, yet on the other

hand maintain that it "did not dispossess him of his shares." [*Id.*]. Respondents do not and cannot point to any language in the November 2017 Agreement that would both permit Mr. White to maintain claims to proportional ownership—such as a right to obtain declared dividends or bring shareholder derivative suits—while also releasing all claims.

In terms of patent ambiguity, "all" does not always mean "all," as *McDuffie v. McDuffie*, 313 S.C. 397 (2003), shows. There, the Supreme Court found patently ambiguous a parent's promise to pay "all college expenses," the true meaning of which could only be resolved through consideration of extrinsic evidence. *Id.* at 400 (holding that extrinsic evidence established that promise to pay "all" expenses nonetheless did not include "transportation and incidental expenses or spending money"). Here, Mr. White was referred to as "Executive" and explicitly signed above "Executive Signature." [November 2017 Agreement p. 1, 6]. It is thus reasonable to interpret the document as only applying to him in his capacity as an executive, rather than as an investor.

Maybe the jury in this case will consist of twelve people like Judge Cole, who accept Respondents' interpretation of the November 2017 Agreement. Or maybe the jury will have twelve members like Judge Sprouse, who necessarily acknowledged the potential evidentiary merit in Mr. White's interpretation when he denied summary judgment.

2. Genuine Issues of Fact Existed Concerning the Tender-Back Rule.

Respondents' argument about the tender-back rule is dependent upon the premise that the $300,000 severance payment was given in exchange for the release provision in the November 2017 Agreement. After all, they agree that the tender-back rule can only ever require the "return or offer to return the consideration received *in exchange for* the execution of a release…." [Rep. Init. Br. p. 33 (emphasis added)].[3] Thus, Respondents do not dispute that South Carolina's tender-back rule does not require return amounts that a party would be entitled to receive even absent a release. *See Taylor*, 196 S.C. at 200-01 (noting that no tender is required where a plaintiff "would be entitled in any event to retain the money or the property received, and admittedly due" (citation omitted)). Summary judgment was improper here because a genuine dispute exists whether the $300,000 payment was made in consideration for the release language or whether that amount was allocated to other promises from Mr. White.

Respondents are wrong to claim that "[n]othing in the [November 2017 Agreement] indicates that the severance payment was somehow divisible between the various obligations contained in the [November 2017 Agreement]." [Resp. Init. Br. p. 37]. The November 2017 Agreement has several provisions, including: a promise of

[3] If nothing was given in exchange, there can be nothing to return. That is how Mr. White understands *Taylor v. Palmetto State Life Insurance Company*, 196 S.C. 195 (1940) (requiring only "the return of whatever has been received by him *under such compromise*" (emphasis added)). It is not clear how his understanding differs from that of Respondents.

$300,000 to Mr. White, a one-sided release from Mr. White, a non-competition promise by Mr. White, and a non-disparagement promise by Mr. White. [November 2017 Agreement ¶¶1,3,8,10]. It would be perfectly consistent with the parties' agreement for a jury to allocate *all* $300,000 to Mr. White's non-competition and/or non-disparagement obligations. After all, the November 2017 Agreement's severability clause does not condition payment upon the efficacy of the release provision:

> 17. **Severability.** If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the Agreement shall remain in full force and effect and shall be in no way affected, impaired or invalidated.

[November 2017 Agreement ¶17]. Likewise, Respondents do not dispute that Mr. White would have been required to return the entire $300,000 if he had breached the non-competition provisions after his departure. [Employment Agreement ¶6(d)]. Furthermore, insofar as Respondents claim that Mr. White's resignation rather than termination removed any connection between his employment agreement and the release, [Resp. Init. Br. p. 35], Respondents overlook the express connection in the November 2017 Agreement, which provided that the payments were being made "[p]ursuant to Section 6(b) of the Executive's July 28, 2014 Employment Agreement…." [November 2017 Agreement ¶1(a)].[4] Thus, at least a scintilla of evidence exists that none of the $300,000 was actually in exchange for the execution of [the] release…"

[4] Section 6(b) of the Employment Agreement refers to disability payments, which have no relation to this case. Presumably, Respondents made a scrivener's error and meant to reference Section "6(d)." But if not, that reference to Section 6(b) constitutes yet another ambiguity for the jury to untangle.

[Rep. Init. Br. p. 33], so as to trigger the tender-back rule.[5] And if no consideration was actually given for a release, it cannot be enforced, as Respondents do not dispute. *See Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735, 741 (D.S.C. 2001) ("Like any contract, a release given without consideration is void.").[6]

In short, Judge Cole should have allowed this case to proceed to trial so that the jury could determine whether *any* consideration was actually required to be returned.

3. Genuine Issues of Fact Existed as to Whether There Was Fraud in the Inducement.

Insofar as Respondents claim that Mr. White somehow disavowed that any representations were made to him about resuming note payments, they ignore the emails that were in the summary judgment record. Any silence from Respondents about the explicit scope of the release must be viewed in tandem with Respondent Herwald's explicit and undisputed promises that payments on the existing Note obligations would resume, including the following:

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[5] Respondents incorrectly claim that "[t]o accept White's arguments, this Court would have to find that none of the $300,000 severance payment applied to the Release Provision…." [Resp. Init. Br. p. 37]. But that claim confuses the role of the jury at trial with this Court's role, which is limited to deciding whether even a *scintilla* of evidence exists on an issue of material fact.

[6] Thus, Respondents cannot rely upon the release language, whether procured through fraud or not, if it was not obtained with consideration. But, as shown in the next section, Mr. White does contend that evidence exists that it was obtained through fraud. Respondents' claim that he has not asserted fraud on appeal is incorrect. *See* [Resp. Init. Br. p. 38 n.7].

From: Herwald, Kurt
Sent: Wednesday, November 29, 2017 12:15 PM
To: White, Rick
Subject: Re: Stock Certificate

I was not sure if that was still how you wanted to proceed on the old loans. Interest should resume after the first of the year, as that s when MCP is expecting to get back on interest, and they are linked.

I will try and give you a call this afternoon. Trying to finish off the A & M stuff as fast as I can so we can finalize something with MCP and the bank.

Kurt Herwald | President

[…]

From: Herwald, Kurt
Sent: Wednesday, November 29, 2017 2:31 PM
To: White, Rick
Subject: Re: Stock Certificate

That is fine, but I cannot make interest payments until we clear the hold with MCP. That is the terms of their notes and yours. For me to pay interest before then would be fraud, and they would demand it back from you in any event. Believe me, if I could do otherwise, I would.

Kurt Herwald | President

[November 29, 2017 email string]. Those explicit assurances were made *on the same day* that Respondent Herwald signed the November 2017 Agreement containing the disputed release language:

IN WITNESS WHEREOF, the parties have executed this Agreement on the date(s) set forth herein below:

COMMERCIAL FOODSERVICE REPAIR, INC.

By: DocuSigned by: [signature] 85F3A9CDA1AB45F...

Its: CEO

Date: 11/29/2017

[November 2017 Agreement, p. 6]. That "White has repeatedly argued that he never thought the scope of the Release Provision in the [November 2017 Agreement] applied to the Note," [Init. Resp. Br. p. 40], is precisely the point. He never thought so precisely because of what Respondent Herwald said to him, lulling him into believing that the release language had nothing to do with his investment; if the release were actually meant to bar the then outstanding payments under the Note, Respondent Herwald's statements would then be fraudulent, particularly given the expansive range of actionable fraud in this state.[7] *See generally Sullivan v. Calhoun*, 117 S.C. 137, 139 (1923) ("Fraud assumes so many hues and forms that Courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the Court or jury in determining its presence or absence." (quotation omitted)).

With respect to an intent to deceive, Respondents make no attempt to offer any innocent explanation for Respondent Herwald's deposition admission that he intentionally selected release language that would extinguish claims under the Note and how that specific intent conflicts with his email statements to Mr. White. [Herwald Dep. P. 159:3-7 ("Q: Okay. So is it your testimony that at the time this document was being drafted, its intended purpose was to relieve CFR's obligation under the

[7] Of course, if the release language does not actually bar Mr. White's claims, then the alternative claim of fraud would be moot.

subordinated note? A: It was intended to make it that we couldn't be pursued for it.")]. At least a scintilla of fraudulent intent thus exists.

Contrary to Respondents' claims, Respondent Herward's email assurances were not only implicit present statements about the scope of the release language, as shown above, but were also actionable as future promises made with no intent to keep. Respondents do not dispute that Respondents never intended to resume any payments. Insofar as Respondents claim that the future aspect of those statements was not presented below, they are incorrect. In his memorandum to Judge Sprouse, Mr. White explicitly argued that fraud was shown in part because "Herwald made repeated assurances to Plaintiff that the payments required under the Note were set to resume at the first of the year after Defendants cleared a 'hold' with McClarty." [5/16/21 Memo in Opposition, p. 10].

Given the issues of fact that exist as to Respondents' fraudulent conduct, summary judgment was improper.

B. Summary Judgment Was Improper on the Counterclaims.

1. Summary Judgment was Improper on the First Counterclaim (Breach of the November 2017 Agreement)

a. The Filing of the Lawsuit Was Not a Breach of Contract.

i. The Issue Was Preserved.

On appeal, Mr. White has shown that genuine issues of fact exist as to whether he committed a breach of contract when he filed this action, whether or not the release in the November 2017 Agreement is valid. A failure-to-show-breach argument was

raised below in his memorandum to Judge Sprouse. [5/16/21 White Memorandum in Opposition, p. 22 ("Plaintiff has not breached any term of the General Waiver and Release Agreement.")]. Thus, Respondents are wrong claim that he did not argue failure to establish a breach below, [Resp. Init. Br. at 42].

ii. No Term of the Release Prohibits Filing a Lawsuit.

Even though contracts are enforced based upon the "terms" that the parties have chosen, *e.g.*, *S. Atl. Fin. Servs. v. Middleton*, 356 S.C. 444, 447 (2003) (citations omitted), Respondents point to no actual contractual language affirmatively prohibiting the filing of this lawsuit. Rather, Respondents want South Carolina law to blue-pencil a release to automatically encompass a covenant not to sue. Respondents can point to no decision under *South Carolina* law that so holds. Their citation to *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522 (2003) is irrelevant here because the Supreme Court was applying "Delaware law," *id.* at 525. The release language in the November 2017 Agreement here, however, must "be interpreted and enforced according to the laws of the State of South Carolina…." [Release, p. 5]. The great weight of authority, summarized in Mr. White's Brief of Appellant, establishes that bargaining for a release in a contract only gets a party a defense to a lawsuit, not a contractual promise not to sue. *See, e.g.*, *Bukuras v. Mueller Grp., LLC*, 592 F.3d 255, 266 (1st Cir. 2010) ("A release is an affirmative defense; it does not supply a defendant with an independent claim for breach of contract." (collecting cases)).

iii. No Attorney's Fees Have Been Yet Awarded for a Supposed Breach of the Release Because No Trial Has Been Held Nor Any Motion for Costs Filed.

Judge Cole below approved liability for fees and costs as a consequence of "[h]aving entered summary judgment in favor of [Respondents]" on their counterclaims, [9/14/22 Summary Judgment Order]. Accordingly, Mr. White noted in his Brief of Appellant that reversing the grant of summary judgment order would necessarily reverse liability for attorney's fees, whether via a motion for costs or as an element of damages. While Respondents claim that Mr. White has somehow not contested his liability for fees, [Resp. Init. Bri. at 44], they ignore that he argued below and has argued here on appeal that he should have a trial on his claims and/or on the counterclaims, where he expects to prevail. A successful appeal of an order that forms a basis for an award of fees necessarily moots present liability for fees predicated upon that reversed order; nothing is needed to preserve that issue other than successfully appealing the order itself. *See, e.g.*, *Camburn v. Smith*, 355 S.C. 574, 581 (2003) ("An award of attorney's fees will be reversed where the substantive results achieved by counsel are reversed on appeal." (citation omitted)); *Callawassie Island Members Club, Inc. v. Dennis*, 429 S.C. 493, 501-502 (Ct. App. 2019) ("Because of our reversal of the grant of summary judgment to the Club, we also reverse the award of attorney's fees to the Club." (citation omitted)).

2. Genuine Issues of Fact Existed on the Counterclaim for an Alleged Breach of the Subordination Agreement.[8]

Respondents cannot and do not dispute that "[c]ommon sense and good faith are the leading touchstones of [contract interpretation]. Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." *Farr v. Duke Power Co.*, 265 S.C. 356, 362 (1975). Despite that black-letter law, Respondents urge the Court to adopt a reading of a contract that would be neither "reasonable, fair, [nor] just." *Id.*

Respondents advance no business reason why the other signatory lenders or Mr. White would have wanted to prohibit Mr. White from receiving funds from Respondent Commercial Food Service Repair, Inc., ("CFR"), in the event of CFR's default to those lenders—while not also guarantying Mr. White notice of that default that suspended CFR's ability to pay. Even Respondents admitted that, prior to filing this action, Mr. White had not received any notice of CFR's default, from the lenders or from CFR itself. [Ex. 6 to Opp. to Motion for Summary Judgment (Herwald depo) p. 115 ("Q Okay. Do you have any personal knowledge, as you sit here today and as a 30(b)(6) deponent, as to whether this Notice of Default was forwarded to Mr. White? A I do

[8] Because summary judgment only issued below as to a "find[ing] that White breached Paragraph 9 of the Subordination Agreement," Judge Cole did not find, much less award, any damages. [9/14/22 Summary Judgment Order, p. 23]. The issue of damages will be taken up at a separate hearing. [*Id.* at p. 24]. *See also* R. 56(c), SCRCP ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone….").

not know that it was. I would expect not.")]. Particularly given that Mr. White's promises in the Subordination Agreement were made "[t]o induce Senior Lender and Junior Lender…to … enter into various credit facilities for the making of loans and extension of credit to and/or for the benefit of CFR…", [Subordination Agreement p. 1], rather than to induce any action on Respondent CFR's part, Respondents' invocation of the non-suit provision without notice from the lenders rings hollow.[9]

Respondents cite no case law that would require this Court to look at the provisions of Paragraph 9 in a vacuum, without reference to the notice provision of Paragraph 3. They cannot; "a contract must be read as a whole, giving appropriate weight to all provisions." *Yarborough v. Phx. Mut. Life Ins. Co.*, 266 S.C. 584, 592 (1976). To that end, consider *S. Atl. Fin. Servs. v. Middleton*, 356 S.C. 444 (2003), which involved a contract that read in part as follows:

> If I am in default, the Note Holder **may** send me a written notice telling that if I do not pay the overdue amount by a certain date, the Note Holder **may** require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date **must** be at least 30 days after the date of which the notice is delivered or mailed to me.

Id. at 446 (original emphasis). Our Supreme Court held that the conflicting entitlement to notice rendered the contract "patently ambiguous" because "[w]hile it is possible to construe the note as simply giving rise to an option on the part of Southern to give notice of default, the fact that it sets forth a mandatory notice provision

[9] Perhaps not surprisingly those other lenders have not joined this litigation to complain about Mr. White's suit.

renders it susceptible of another construction [as to whether notice was required before acceleration]." *Id.* at 446. Likewise, here, Respondents should not be able to jettison the notice provisions in Paragraph 3.

A genuine issue of fact thus exists as to whether the failure to serve the contractual notice of default excuses his filing of this action. Judge Sprouse necessarily thought so, or else he would have granted Respondents summary judgment when they asked him to do so. Judge Cole should have likewise found genuine issues of fact remained.

CONCLUSION

Because summary judgment improperly issued, this Court should reverse the judgment below and remand for further proceedings.

Dated this 7th day of August, 2023

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