THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2023-000155

Richard D. White, ……Appellant,

v.

FT Acquisitions, LLC; Commercial Food Service Repair, Inc.; and Kurt Herwald, ...Respondent.

RECORD ON APPEAL
VOLUME VII

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Subject: RE: White v. FT Acquisitions, LLC et al 2019-CP-23-06915
Date: Tuesday, May 18, 2021 at 9:15:02 AM Eastern Daylight Time
From: Giles Schanen
To: Brandi Larobardiere, rssprousesc@sccourts.org
CC: Devon Puriefoy, Kimberly Thomason, Susan Zeigler, Elizabeth Edmondson
Attachments: image001.png

Good morning,

Given that this corrected Exhibit 11 was not attached to Plaintiff's brief and we could not address it in full at the hearing, we feel compelled to provide a brief response regarding this exhibit.

This email thread provides no evidence that the General Waiver and Release was procured by fraud, and provides no basis to set aside the General Waiver and Release.

First, to establish a claim for fraud in the inducement, Plaintiff "must prove the nine elements of fraud as well as the following three 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 [them]; and (3) that [they] had a right to rely on the representation made to [them].' " *Moseley v. All Things Possible, Inc.*, 694 S.E.2d 43, 45 (2010) (quoting *Darby v. Waterboggan of Myrtle Beach, Inc.*, 344 S.E.2d 153, 155 (S.C. Ct. App. 1986)). Further, a fraudulent representation must relate to a present or pre-existing fact and cannot ordinarily be based on unfulfilled promises or statements as to future events. *Emerson v. Powell*, 283 S.C. 293, 321 S.E. (2d) 629 (Ct. App. 1984).

The statements by Mr. Herwald contained in the corrected Exhibit 11 are not statements as to a present or pre-existing fact, and thus they are not actionable as fraud. In the thread, Mr. Herwald stated that he believed interest payments to Mr. White on the Note would resume, but confirmed that the payments could not resume unless cleared by the senior lender. These are not only statements as to anticipated future events, which cannot as a matter of law be fraud, but there also is no evidence that the statements were false. In fact, as discussed at the hearing, Mr. Herwald fully intended for CFR to resume making payments on the Note if the senior lender permitted that to occur, which never happened. Plaintiff has not identified any evidence in the record to the contrary, and none exists. Whether CFR intended to resume payments on the note if permitted by the senior lender is a very different issue than whether the existing legal claim for breach of the Note was released when Mr. White executed the release on November 30, 2017, which it was.

Furthermore, even if the statements in Exhibit 11 could be the basis for a fraud in the inducement claim, Plaintiff is required to present evidence that those statements were relied on by Mr. White in making the decision to sign the General Waiver and Release. Here, there is simply no evidence in the record that Mr. White relied on any statements in Exhibit 11 in deciding whether to execute the General Waiver and Release. In fact, the deposition testimony of Mr. White, which we cited extensively in our brief, makes clear that he did not consider any statements by CFR at all in deciding to sign the General Waiver and Release, much less any statements relating to the Note, which he did not even view as relating to the General Waiver and Release.

For these reasons, the corrected Exhibit 11 provides no basis to set aside the General Waiver and Release.

Thank you for your consideration of these points.

-Giles

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From: Brandi Larobardiere <brandi@truluckthomason.com>
Sent: Monday, May 17, 2021 11:08 AM
To: rssprousesc@sccourts.org
Cc: Devon Puriefoy <devon@truluckthomason.com>; Giles Schanen <giles.schanen@nelsonmullins.com>; Kimberly Thomason <kim@truluckthomason.com>
Subject: White v. FT Acquisitions, LLC et al 2019-CP-23-06915

◀External Email▶ - From: brandi@truluckthomason.com

Good morning,

Attached find the correct version of Exhibit 11 regarding the Memo in Opposition to Defendants' Motion for Summary Judgment in the above captioned matter.

Very respectfully,

Brandi Larobardiere
Legal Assistant

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truluckthomason.com
864-331-1751
brandi@truluckthomason.com
864-243-8115

THE LAW OFFICES OF
TRULUCK THOMASON, LLC

Rick@MyTech24.com
FW: Stock Certificate
November 29, 2017 at 2:44 PM EST
To: rwdiver@msn.com

Rick White | Executive V.P. Field Operations

Tech-24

A Commercial Foodservice Repair, Inc. Company
410 E. Washington Street
Greenville, SC 29601
www.mytech24.com

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

A Commercial Foodservice Repair, Inc. Company
Mobile 864.353.6136
410 E. Washington Street
Greenville, SC 29601
http://www.mytech24.com

From: Rick White < Rick@MyTech24.com > >
Date: Wednesday, November 29, 2017 at 2:10 PM
To: Attached List < Kurt@MyTech24.com > >
Subject: RE: Stock Certificate

I prefer to just get the payments if that is ok with you.

Can you please call JC about this loan thing? He is asking me questions about it and I don't have the answers.

I appreciate it.

Rick White | Executive V.P. Field Operations
Tech-24
A Commercial Foodservice Repair, Inc. Company
410 E. Washington Street
Greenville, SC 29601
www.mytech24.com

From: Herwald, Kurt
Sent: Wednesday, November 29, 2017 1:22 PM
To: White, Rick
Subject: Re: Stock Certificate

It is not a problem for me, I just wanted to be sure you still wanted to do that. I can handle it easy enough.

Kurt Herwald | President

A Commercial Foodservice Repair, Inc. Company
Mobile 864.353.6136
410 E. Washington Street
Greenville, SC 29601
http://www.mytech24.com

From: Rick White < Rick@MyTech24.com > >
Date: Wednesday, November 29, 2017 at 12:57 PM
To: Attached List < Kurt@MyTech24.com > >
Subject: RE: Stock Certificate

I'm sorry Kurt I don't understand. Jean didn't pay the loan payment 2 months in a row and when I called you about it I thought we agreed to convert it to stock. JC was thinking of doing the same thing but I'm not certain what you are saying, I'm confused on this. I feel that if you are not wanting to convert then we need to get paid up to date ASAP. Please explain this I'm not trying to be difficult.

Thanks Kurt,

Rick White | Executive V.P. Field Operations
Tech-24
A Commercial Foodservice Repair, Inc. Company

410 E. Washington Street
Greenville, SC 29601
www.mytech24.com

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

A Commercial Foodservice Repair, Inc. Company
Mobile 864.353.6136
410 E. Washington Street
Greenville, SC 29601
http://www.mytech24.com

From: Rick White < Rick@MyTech24.com > >
Date: Wednesday, November 29, 2017 at 11:03 AM
To: Attached List < Kurt@MyTech24.com > >
Subject: RE: Stock Certificate

I just told James that I was taking a break for a while. I saw him on Thanksgiving. He seemed ok.
Did you do the stock certificates for the loan balances for JC and me? We haven't gotten a payment since August.

I would also like to talk with you so please call when you can.

Thanks,

Rick White | Executive V.P. Field Operations

Tech-24

A Commercial Foodservice Repair, Inc. Company
410 E. Washington Street
Greenville, SC 29601
www.mytech24.com

From: Herwald, Kurt
Sent: Tuesday, November 28, 2017 2:37 PM
To: White, Rick
Cc: Miller, Gordon
Subject: Stock Certificate

Rick: Sorry to take so long, but there is more to doing this than meets the eye. I had a little confusion as I forgot you did $550,000 versus $500. Share are $80, as previously discussed, $20 below the last sales.

Gordon is working to get the other documents finished. The lawyers seem to be running slow, but should be done NLT tomorrow.

Did you get a chance to discuss with James?

Kurt Herwald | President

TECH24

A Commercial Foodservice Repair, Inc. Company
Mobile 864.353.6136
410 E. Washington Street
Greenville, SC 29601
http://www.mytech24.com

Subject: Richard D. White v. FT Acquisitions, LLC, et al., Civil Action No. 2019-CP-23-06915
Date: Monday, May 9, 2022 at 4:31:33 PM Eastern Daylight Time
From: Elizabeth Edmondson
To: JColeLC@sccourts.org
CC: Giles Schanen, Laurie Jerome, Devon Puriefoy, Kimberly Thomason

Dear Mr. Henderson:

We are writing in follow up to the summary judgment hearing today in the matter of *Richard D. White v. FT Acquisitions, LLC, et al.*, Civil Action No. 2019-CP-23-06915. Giles Schanen and I represent the Defendants in this matter, and all counsel of record are copied on this email.

One of the issues that came up during the hearing today was whether or not Mr. White had received the full severance payments of $300,000.00 from Defendant Commercial Foodservice Repair, Inc. Before the hearing, that question had never been in dispute. Thus, although we included the relevant deposition testimony excerpts in the materials submitted to the Court, we did not cite directly to it in our briefing. The relevant testimony is at page 172 of Mr. White's deposition, which is included in the materials submitted to the Court and which provides as follows:

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.
Q. Okay. Did they make these payments on time?
A. Yes.
(Deposition of Richard White at 172:20-173:2, attached as Exhibit B to Defendants' Memorandum in Support of their Motion for Summary Judgment.)

Because this was an important issue that Judge Cole focused on during the hearing today, we wanted to make sure the Court was aware of this testimony. If the Court needs any additional information, please let us know.

Respectfully,

Elizabeth Edmondson

ELIZABETH EDMONDSON ASSOCIATE
elizabeth.edmondson@nelsonmullins.com
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Subject: White v. Commercial Foodservice Repair et al - 2019-CP-23-06915
Date: Thursday, December 1, 2022 at 8:50:40 PM Eastern Standard Time
From: Giles Schanen
To: Cole, J. Derham Law Clerk (Mary Martin), Cole, J. Derham Secretary (Sue Pardue), jcolej@sccourts.org
CC: Laurie Jerome, Fran Smith, Devon Puriefoy, Elizabeth Edmondson
Attachments: 2022.05.09 Hearing Transcript (Judge Cole) - 4864-4361-7849 1.pdf

Dear Judge Cole:

At the close of today's hearing on Mr. White's Motion to Alter and Amend, Mr. Puriefoy provided the Court with copies of three cases which he stated support his contention that in South Carolina, *in the context of a motion for summary judgment,* one circuit court judge cannot overrule the prior order of another circuit court judge unless new facts are present. Mr. Puriefoy had not previously cited these cases, and therefore, Defendants did not have an opportunity to review these cases prior to the hearing. Your Honor allowed us to note the case citations and stated that we could provide further analysis of the same. We have now had the opportunity to review these three cases. All three are distinguishable from the case before the court and do not stand for the proposition stated by Mr. Puriefoy. We have provided a short analysis below of these cases.

- *Hoyt v. CollaborativeMed, LLC*, Appellate Case No. 2019-000965, 2022 WL 2156226 (Ct. App. June 15, 2022) (unpublished)
    - As an initial matter, this case is unpublished and therefore has no precedential value. Rule 268(d), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.") Further, this case did not involve a motion for summary judgment, but concerned one circuit judge's review of the transcript of a trial conducted before another circuit judge. The case does not address a party's ability to file a subsequent motion for summary judgment after an earlier motion was denied, and does not support plaintiff's argument that "new facts" must exist in order for a party to file a subsequent motion for summary judgment.

- *Brandt v. Gooding*, 368 S.C. 618, 630 S.E.2d 259 (2006)
    - In this case, the South Carolina Supreme Court noted the existence of "authority that prohibits one circuit court judge from reversing the standing order of another circuit court judge." The Supreme Court was examining a situation in which a circuit court judge delayed a hearing on a motion for a rule to show cause on the basis that it was premature and then established a procedure to determine a certain document's authenticity. Once that procedure had been followed, the defendant filed a subsequent motion for a rule to show cause, which the second circuit court judge granted. The Supreme Court was not reviewing a situation in which a second motion for summary judgment was filed after an earlier motion was denied, and it does not state a requirement that "new facts" be present in order for a party to file a subsequent motion for summary judgment.

- *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008)
    - In this case, the South Carolina Supreme Court reviewed various orders concerning class certification under Rule 23, SCRCP, and procedures related to the same. One of the appellants argued that a certain procedural requirement instituted by one circuit court judge effectively overruled a previous ruling from another circuit court judge regarding scheduling of the trial and class certification. The Court noted that "one circuit court judge may not overrule another," and found that rule was not violated. However, none of the underlying orders were ruling on a

motion for summary judgment, and the Court did not discuss any requirement that "new facts" be present in order for a party to file a subsequent motion for summary judgment.

For the reasons listed above, each of these additional cases are factually and legally distinguishable and do not stand for the proposition stated by Plaintiff's counsel. As we explained in our brief and noted during the hearing, because the denial of a motion for summary judgment does not establish the law of the case, courts in South Carolina expressly permit a party to file a subsequent motion for summary judgment that argues the same issues presented in a previous motion for summary judgment. *See e.g., Blyth v. Marcus*, 335 S.C. 363, 366-67, 517 S.E.2d 433, 434 (1999) (holding that "[a] defendant can bring a subsequent summary judgment motion after his first motion had been denied," and further holding that it was not improper for the appellant to raise an issue in a subsequent motion for summary judgment that was raised in an earlier motion for summary judgment). In contrast to *Blyth* and the other cases cited by Defendants in their opposition brief which are directly on point (see Defendants' Opposition at pp. 3, 4), the additional cases provided by Plaintiff's counsel are inapposite and should have no influence over the Court's ruling on Plaintiff's Motion to Alter and Amend. In any event, Defendants' motion for summary judgment did not ask the Court to "overrule" Judge Sprouse's prior ruling on an earlier motion for summary judgment. Instead, it was a new motion, filed after around 10 months of additional fact and expert discovery. It was filed on a different operative complaint that included a new claim for fraud in the inducement, and it included a new legal argument addressing that claim – the applicability of the tender back rule. The Court properly considered Defendant's renewed motion for summary judgment, and there is no basis to alter or amend the Court's Order.

Unfortunately, there is a second issue that we are compelled to raise because of the attack on my credibility that was made during today's hearing. At the very beginning of his prepared argument, Mr. Puriefoy stated that during the May 9, 2022 hearing before your Honor, *on about 6 separate occasions* your Honor asked me whether a certain argument had been presented to Judge Sprouse during the 2021 hearing, and that each time I said no, the argument had not been presented during that hearing. Mr. Puriefoy then attempted to show that, in contrast to my supposed representations to your Honor, various arguments were in fact made to Judge Sprouse during the 2021 hearing. Very clearly, the intent of Mr. Puriefoy's statements was to suggest that I intentionally misled the Court during the May 9 hearing so that the Court would consider Defendants' renewed motion for summary judgment.

When I had the opportunity to speak, I explained that I never made any such statement to the Court during the May 9 hearing, and that I took offense to Mr. Puriefoy's misrepresentations. However, the accusations were so troubling that, immediately upon arriving home, I thoroughly reviewed the transcript of the May 9 hearing, which I have attached for the Court's convenience. The transcript confirms that <u>not once</u> did the Court ask me whether an argument had been presented during the 2021 hearing, and <u>not once</u> did I make any statement about whether any argument had been presented during that hearing. *In fact, neither the Court nor I ever mentioned the 2021 hearing or Judge Sprouse at any point during the May 9 hearing.* Judge Sprouse was mentioned 5 times during the hearing, each time by Mr. Puriefoy. Those references are at pp. 21:11, 21:13, 26:20, 29:2, and 42:7 of the hearing transcript. Put simply, Mr. Puriefoy's very specific accusations about my conduct during the hearing (i.e., that about *6 times* the Court asked me if an argument had been made to Judge Sprouse, and all 6 times I said no) were completely false, and it is inexplicable that they were made in open court.

It is extremely troubling that Mr. Puriefoy would begin his prepared argument to the Court by making demonstrably false accusations about my conduct in a prior hearing. The misrepresentations are particularly concerning because they go directly to my honesty and integrity, and because they appear to have been made to gain a strategic advantage in today's hearing. It is not my practice to call out other lawyers. However, as someone who regularly appears before the South Carolina judiciary, my reputation for honesty and candor is of the utmost importance, and I take any attack on my credibility very seriously. As a result, I feel that I am

compelled to raise this issue in order to protect my reputation, and to ensure that the misrepresentations made today do not prejudice my clients.

Sincerely,

Giles Schanen

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

RICHARD D. WHITE, PLAINTIFF, -VS- FT ACQUISITIONS, LLC, COMMERCIAL FOODSERVICE REPAIR, INC., AND KURT HERWALD, DEFENDANTS.	)	2019-CP-23-06915 TRANSCRIPT OF RECORD

MAY 9, 2022
GREENVILLE, SOUTH CAROLINA
VIA WEBEX

B E F O R E:

THE HONORABLE J. DERHAM COLE

A P P E A R A N C E S:

ATTORNEY FOR PLAINTIFF:

DEVON M. PURIEFOY, ESQ.

ATTORNEYS FOR DEFENDANTS:

GILES M. SCHANEN, JR., ESQ.
ELIZABETH C. EDMONDSON, ESQ.

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

IN D E X

E X H I B I T S

NO	DESCRIPTION	ID	EVIDENCE

(No Exhibits Were Presented During This Hearing)

THE COURT: Next is White v. FT Acquisitions.

MR. SCHANEN: Thank you, Your Honor. This is Giles Schanen for the Defendants.

THE COURT: All right.

MR. SCHANEN: Your Honor, I think the first motion is our motion for summary judgment. With me today is Elizabeth Edmondson, who's an associate in our office.

And we're here today, Your Honor, to ask the Court to enforce a full release of claims that the Plaintiff, Rick White, voluntarily executed in return for a payment of three hundred thousand dollars ($300,000.00). Mr. White signed the release, Your Honor, he took the three hundred thousand dollars ($300,000.00), he's kept every penny and yet he still sued our clients on claims that fully accrued prior to the date he signed the release.

Our clients lived up to their side of the bargain, Your Honor. They paid Mr. White the three hundred thousand (300,000) in severance that they promised him, but Mr. White doesn't want to live up to his side of the deal. He wants to keep the three hundred thousand dollars ($300,000.00) but disregard the release he signed.

And there's an expression for that, Your Honor, apologize, but he wants to have his cake and eat it, too. And, fortunately, Your Honor, that isn't how the law works. The contracts that parties sign have consequences. And that's

particularly true for highly sophisticated parties like Rick White.

In this case the consequence of Mr. White signing the release and keeping the three hundred thousand dollars ($300,000.00) that he was paid for doing so is that he doesn't have the right to go to trial on the claims that he released and that he's brought in this case. Discovery's complete, Your Honor. We're approaching trial.

And to allow Mr. White to go to trial on these released claims would deny my clients the benefits of the bargain that they struck and that they've lived up to. And, respectfully, Your Honor, that can't be permitted to happen.

I'll be very brief in talking about the facts of this case. Most of these are just background facts because the enforceability of this release doesn't involve the determination of many facts.

Mr. White's a highly successful businessman from Virginia. He built up a company in the food service repair industry. And he was the majority partner in that business.

In 2014 he and his minority partner sold the company to our client, CFR, for fourteen million dollars ($14,000,000.00). Thirteen million (13,000,000) of that fourteen million (14,000,000) was paid at closing. Mr. White and his partner received it. And the last million was to be paid over time pursuant to a note that was split between Mr.

White and his partner.

After the sale back in 2014 Mr. White also came to work for CFR. He was the second highest person in the company, second only to the CEO. And he was over all of the company's operations.

So fast-forward from that sale in 2014 to July 2017, three years later, Mr. White's still working for CFR. The company's struggling financially. It can't make payments to its suppliers. The suppliers stop extending credit to the company. It can't make payments to its lenders. So the lenders order CFR to stop making payments to Mr. White on that note.

Now at that point in time, Mr. White was still owed about two hundred and fifty thousand dollars ($250,000.00) on the note. So keep in mind, Your Honor, thirteen million (13,000,000) paid at closing, a million (1,000,000) on the note and now that obligation to Mr. White's been reduced down to about two hundred and fifty thousand dollars ($250,000.00).

So the last payment to Mr. White was made in early July of 2017. He was told around July 5th, 2017 that no more payments would be made until the situation with the lender was resolved. Those monthly payments weren't made and they never resumed. The company wasn't allowed by the lender to make those payments. They never were.

A couple of months later and the situation hadn't

improved. The company still wasn't being permitted by its lenders to make those last few payments to Mr. White under the note. And the company still wasn't able to pay its suppliers. It dramatically needed a cash infusion.

So on September 11th, 2017 both the CEO, Kurt Herwald, who's a Defendant in this case, and Mr. White, the number two man in the company, put in some of their own money. Mr. White put in five hundred and fifty thousand dollars ($550,000.00) to help the problem. It was a simple, private investment, two leaders of the company, and in return they received common stock.

So two months later in November of 2017 things have just gotten worse. Mr. White decided he wanted out. He asked the CEO if he could have a change in title and increased responsibility. And when he didn't get those things, he submitted his written resignation and quit.

Under Mr. White's employment agreement he wasn't owed any severance. The severance obligation only kicked in if he was terminated without cause. And, of course here, he quit. So he would not have received severance under that agreement.

But despite that, CFR decided to offer him three hundred thousand dollars ($300,000.00) in severance. And in return they received a full release of claims. Standard severance agreement, you receive your severance payment, you give a full release of claims, you wipe the slate clean.

Now it's undisputed that to receive the three hundred thousand dollars ($300,000.00) in severance Mr. White was required to sign the severance agreement, which is titled General Labor and Release. We attached that to our brief as exhibit G. And I'll share the relevant provisions here shortly.

Mr. White was instructed in writing to review the release with his lawyer. And the release states on its face that he had 21 days to consider it. And if he signed it, he still had seven days to revoke the release. Mr. White actually signed the release twice. He first signed it on November 30th with an e-signature. And then he signs again in wet ink on December 5th, 2017.

Now after he signed the release, the severance payments started. There's no dispute in this case that he signed the release and then he received all three hundred thousand dollars ($300,000.00) in severance that's called for in the release.

Then over two years after signing that release Mr. White filed this suit against our clients in this case. And his claims relate to two things. First, he claims that the Defendants breached his note by failing to make that last two hundred and fifty thousand dollars ($250,000.00) of payments.

Second, he claims that CFR, my client, didn't provide him with enough information about the company's financial

situation before he put that five hundred thousand dollars ($500,000.00) in on September 11th, 2017, that private investment. He makes that claim even though he was an insider in the company and he put the money in to help the operations out knowing full well the company was in poor financial conditions to the point that his payments had been blocked. But still, we don't have to get into that factual issue.

With respect to the release what's important is Mr. White does not dispute and cannot dispute that all of the claims in this case had fully accrued by the time he signed that general release in December of 2017. He can't contest that.

He also doesn't dispute that CFR fully lived up to its side of the bargain under the release. CFR's only obligation was to pay Mr. White the three hundred thousand (300,000) in severance. And it paid that amount. And we're a few weeks from trial, Mr. White has kept every penny.

He only raises two arguments as to why the release doesn't bar his claims in this case. First, Your Honor, he claims the release only bars employment related claims and doesn't cover the types of claims that he's making in this case. And we'll come back to that when we look at the release.

And, second, he claims that CFR made false statements to him in order to get him to sign the release and because the release was shared by fraud, it can't be enforced. And that

second argument can be disposed of easily, Your Honor, as a matter of South Carolina law.

First of all, and the Court doesn't have to determine this, but he admitted at his deposition that there were no representations made to him about the release. It was emailed to him with no explanation. He read it. He reviewed it. He knew he had time to consider it. He didn't ask any questions, he just signed it. So there can't be any fraud in the procurement of that release.

But what's even more fundamental is the Court doesn't have to get to that question because South Carolina law is very clear that a party to a release agreement cannot keep the consideration that he received for signing the release and then claim that the release isn't valid. That's been the law in South Carolina since 1900, Your Honor.

It's called the Tender-Back Rule. If a party wants to claim the release agreement is invalid, he can do that, but he's first got to give back the money he received for signing the release, then he can challenge it.

We cited a number of cases in our brief. The most recent one, I think, is the Brewer case. In there the court summarized the law. And I'll quote, in South Carolina it is well settled that one who seeks to avoid the effects of a release must first return or tender consideration paid therefore. And it's cited, the Court of Appeals case in State

Farm Mutual Insurance Company versus Turner from 1990.

And then the court continued, a release induced by fraud is not void but voidable. Thus, where a releasor after discovering the fraud does not repay or offer to repay the consideration he received from the releasee, he will thereby be held to have waived the tort and affirmed the contract. And that is the law in South Carolina since 1900s. It is as black letter as it gets.

A party to a settlement agreement and released, he can't keep the settlement payment and then claim you're getting bound by the release. And a party to a severance agreement, like we have here, can't keep all the severance payments and then claim, well, the release was procured by fraud, so I'm not bound by that.

And the policy behind that law is obvious, Your Honor. It prevents a party from keeping the benefit of his bargain by depriving the other party the benefit of theirs. In other words, it prevents a party from doing exactly what Mr. White is doing here, which is trying to have his cake, the three hundred thousand dollars ($300,000.00), and eat it, too, by not being bound by the release that he entered into.

Now, Mr. White was required to sign that release to receive the three hundred thousand (300,000) in severance. He signed it, he received those payments, and he's kept every penny. And under South Carolina law he simply cannot claim

that the release isn't valid. He's affirmed that release, and he has to live by its terms.

And so, Your Honor, the only question remaining for the Court to consider on this summary judgment motion is whether the claims that Mr. White raised are within the scope of the release so that those claims are barred? And, Your Honor, the plain and unambiguous language of this general release shows that that is absolutely the case.

Elizabeth is going to share on the screen, if she can do that, so that the Court can see the highlighted text, but it's also attached to our brief as exhibit G.

MS. EDMONDSON: There is a button to share my screen, and now I can click it. Okay.

(Pause)

MR. SCHANEN: Your Honor, can you see that?

THE COURT: I can see that, yes.

MR. SCHANEN: Okay. So I'll start with the title, Your Honor, there in bold and all caps, General Labor and Release Agreement. Please read carefully. That's not a limited release, it's a general release.

And then if we'll scroll down, an actual release provision is in section 3, titled Release. And what it says, Your Honor, is that it's the release of all claims. And then it says after the words collectively the company, from any and all actions, causes of actions, claims, demands, losses,

claims for attorney's fees and all other forms of civil damages, occurrences and liabilities of any kind whatsoever, both known or unknown, both known or unknown arising out of any matter, happening or thing from the beginning of time of the date of this agreement is signed by executive, specifically including, but not limited to, and then it lists a number of specific claims, one of which is local -- plans arising under local state or federal common law, statute, regulation or ordinance.

And then if we scroll down we see 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 any other claims whether in tort, contract or equity under federal, or state statutory or common law.

Then the next paragraph it says in the highlighted text, it is the party's intent to release all claims which can be legally released, but no more than that.

And then if we keep going down near the bottom of the agreement we put this, you know, there in section 19 it said execution of this agreement in the full release herein.

And then I think even most important, we go down, if all that isn't enough, in this highlighted bold text box at the bottom of the agreement it says, please read this agreement carefully. It contains the release of all known and unknown

claims. You agree that you receive 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.

Then it says in the next, you've been provided at least 21 days within which to consider this agreement and waive and release all claims and rights.

Your Honor, the language we looked at -- this is a general release. It applies to all claims. There's nothing in what we saw that limits the operation of this release only to employment related claims, it's a general release of all claims.

Now I asked Mr. White about this at his deposition. I asked him if he could point to any language in this release that stated that it was limited to employment claims as opposed to a release of all claims. And he admitted he couldn't.

Here is -- here's his testimony. And I say, 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? And he says, we'll just have to disagree, man. I don't agree with you.

And I said, I'm asking. 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. And he says, I can't point to one.

And I say, okay. It actually says that you're releasing all claims against the company, doesn't it? And he says, that's what it says.

And I say, and, in fact, it says all claims from the beginning of time to the date of this agreement, right? Yeah, it says that.

And scroll down. And he says -- he admits here that agreement had been intended to release only employment claims. It could have said that.

And then he talks about the box at the bottom. Please read this carefully. And he says he sees that. And he acknowledges that.

You can scroll down, Elizabeth. It contains the release of all known and unknown claims. And he said, yeah.

Now, remarkably, Your Honor, Mr. White testified that the reason he doesn't think his claims are released by this agreement are just because a person can't release their claims. He said, yeah, a person can't just sign away their claims. That's what the court system's for. So he believes he can receive the three hundred thousand dollars ($300,000.00), but he's just not bound by the release.

Here's the language where he testified to that in deposition. Can you scroll down, Elizabeth? Keep scrolling, please.

MS. EDMONDSON: Oh, okay.

MR. SCHANEN: I don't believe I can sign my rights away. If somebody does something wrong, you can't just make -- sign and say I don't want to sue you. I think that's ridiculous. That's what the court system is for.

So Mr. White acknowledges that the release is a release of all claims. He acknowledges he signed it and he received the three hundred thousand dollars ($300,000.00). He just doesn't think anybody can waive their rights by signing a release.

And, Your Honor, that's just not the case. We know that's not the case. Contracts people sign do have consequences. He signed a release and he received three hundred thousand dollars ($300,000.00). And he can't avoid it just because he doesn't think it should apply.

Your Honor, and Mr. White has excellent counsel in this case. But Mr. Puriefoy also isn't going to be able to point to a single sentence in that release that states it applies only to employment claims. He just can't because there's not one there.

I expect he will point to the fact that there's a list of long employment claims that are released. And, of course, those are in there because this is a document that was created to be given to someone who was a former employee. So, yes, it's going to list some employment claims, but right above that it says including, but not limited to.

And then it talks about a whole other plethora of claims that are released and makes clear in numerous instances that this is a general release of all claims. It could not be anymore clear in advising Mr. White of that.

This is -- this contract, Your Honor, is as plain and unambiguous as it gets. It's not open to multiple interpretations. It's not capable of an interpretation that this is just a release of employment claims. It's only capable of one interpretation, which is that it's a general release of all claims.

And, Your Honor, there's no question that in return for paying Mr. White three hundred thousand dollars ($300,000.00) that it had no obligation to pay, my client bargained for and received a general release of claims, a release that wiped the slate clean and that prevented Mr. White from suing on the claims that arose in the past.

South Carolina law is very clear, Your Honor, that a release is a contract. And the court's role is to give effect to the intentions of the parties as expressed to the clear and unambiguous language of the contract itself. We don't have to get into secret intentions of the parties. When you have a clear contract, you enforce that contract.

And, Your Honor, there's nothing here for a jury to determine. It's simply a matter of the Court giving effect to the plain language in the release, the language that Mr. White

agreed to and accepted payment for.

Your Honor, releases are critical documents in the legal world and the business world because they provide certainty and predictability. As Your Honor knows, releases are entered into all the time as part of settlements, litigations. In return for a payment to the plaintiff, the defendant gets a release. And then he has certainty, hey, I'm not going to get sued anymore by that plaintiff.

And like here, releases are entered into all the time in connection with severance agreements. The company says, look, if I'm going to pay you this money, I'm going to have an obligation to pay you after you leave, then we're going to wipe the slate clean. I'm going to get a release so that you can't then come back and sue me.

And what makes those agreements work is the certainty that goes along with it. Parties are willing to pay to settle cases and willing to pay severance to employees because they get the benefit of a release. They know that if they're sued on something that happened in the past, the release will be enforced and the claims will be summarily dismissed. They won't have to go through a trial of those claims.

If parties pay in return for a release and then the releases aren't enforced in court, that certainty goes out the window. That's bad for business. It's bad for judicial economy and the court system. And it's bad for employees

since without that certainty of release parties won't be likely to pay severance. The whole system works that way and depends on that certainty.

Why should they if the only thing they're getting in return for the release, for the payment, the release won't be enforced, why should parties pay severance if they're not getting anything for it? If Mr. White's view of the world is correct, that a person can't sign away legal rights, where would that leave us?

So, Your Honor, I fully expect that Mr. White's counsel's about to give the Court his spin on a lot of disputed facts about the merits of the claims in this case. And I suspect he's going to throw a lot of accusations against the wall to make the Court believe that my client took advantage of Mr. White. And if this case went to trial, of course we would have to be in the position of disputing those things.

But they don't have any bearing on this case. They don't have any bearing on -- the only two issues that the Court has to determine in ruling on this motion, which is, one, did Mr. White keep the three hundred thousand dollars ($300,000.00) so that he can't as a matter of law say that this release is invalid? And, two, are the claims that he brings in this case within the scope of the release? And if the Court finds that those two things are true, then the only proper result is summary judgment on all of Mr. White's claims.

Your Honor, I'm about to close. Mr. White is a sophisticated businessman. And he's received the benefit of his bargain in this case. My client paid nearly fourteen million dollars ($14,000,000.00) for Mr. White's company. It paid him a generous salary to run the company's operations for three years until he decided to resign.

And then without any obligation to do so, it paid him three hundred thousand dollars ($300,000.00) in return for a full release of claims to wipe the slate clean. And he has kept every last cent of that three hundred thousand dollars ($300,000.00).

Mr. White's received the benefit of his bargain. And all we're asking is that we get the benefit of our bargain, too, that Mr. White be held to the release he voluntarily entered into and that he was paid for. We simply ask that the Court enforce the release and enter summary judgment so that my clients can get what they paid for, that they can get the benefit of their bargain just as Mr. White has.

And one last point, Your Honor, under South Carolina Rules, when a summary judgment motion is made, lawyer argument isn't enough to refute the motion. The rules and the case law is clear that the non-movant has to provide to the Court by affidavit or other evidence specific facts showing that there's a genuine issue for trial and that if a party doesn't do that, summary judgment's required.

We filed our brief 10 days ago per Judge Maddox's instructions. Mr. White hasn't filed a brief in this case, hasn't submitted an affidavit, hasn't submitted any evidence. And so for that additional reason, Your Honor, we believe that summary judgment is appropriate. Thank you.

THE COURT: Mr. Puriefoy, have you been convinced?

(Whereupon Mr. Puriefoy's microphone was muted)

MR. PURIEFOY: --- to the issue of judicial economy. Your Honor, I think it's extremely important to note that Mr. Schanen submitted these exact same arguments in front of Judge Sprouse almost exactly one year ago. It was this month that we were on a summary judgment on these exact same issues.

At that time Judge Sprouse reviewed over 50 pages of briefing and heard arguments for nearly an hour from counsel on these very issues. He took the summary judgment under advisement and determined that based on everything that had been presented to him there existed a genuine issue of material fact.

Your Honor, the only new argument that is being presented by counsel in this case is this Tender-Back doctrine, which there's a fundamental misunderstanding of the application of that theory to the present case. As a preliminary matter, Your Honor, the Tender-Back doctrine requires that the consideration paid for the release to be tendered back.

And what Mr. Schanen failed to inform the Court of during

his arguments was that in July of 2014, Your Honor, Mr. White, at the time that he sold his business, executed an employment agreement. And inside of this employment agreement, Your Honor, which was submitted as an exhibit to our prior summary judgment, Mr. White was bound by certain restrictive covenants. And this was a separate contract that was executed at the time that he sold his business.

The non-compete, Your Honor, that was contained in the employment agreement specifically said that in exchange for non-compete/severance payments of three hundred thousand dollars ($300,000.00) you are subject to the restrictive covenants contained herein of not competing and not soliciting for a period of three years.

Your Honor, that agreement was -- there were certain promises that were made by Mr. White, there were certain promises that were made by the Defendant. And those promises constituted a single agreement. And in exchange for Mr. White's promise not to compete, he was to be paid three hundred thousand dollars ($300,000.00).

Now, Your Honor, this is important because the general release that Mr. Schanen referenced related to the three hundred thousand dollars ($300,000.00). It is the Defendants' position that the consideration of three hundred thousand dollars ($300,000.00) was paid for the general release. However, using the Defendants' own words, the plain reading of

the general release specifically says that the severance/non-compete payments pursuant to section 6(b) of the executive's employment agreement required the payment of three hundred thousand dollars ($300,000.00) to Mr. White.

Your Honor, Rule 56 -- a motion for summary judgment requires that there be no genuine issue of material fact. There is a glaring issue of material fact here that only a jury should be able to determine. And that is, Your Honor, was the general release that was executed nearly three years after the employment agreement, did it have consideration? Was there consideration paid for those new promises?

And this is an extremely important fact, Your Honor, in the employment agreement and the non-competition agreement, Mr. White says and promises not to compete and not to solicit. In exchange for that promise CFR, the Defendant in this case, said we will pay you three hundred thousand dollars ($300,000.00) over the course of three years not to compete with us. And those were the promises that were made at the time the employment agreement was executed.

Three years after the execution of the employment agreement Mr. White was presented with a general release and there were more promises that he had to make. He had to promise not to file suit, not to bring a lawsuit against CFR arising under what he believed to be employment issues, but accepting as true that it covered all claims, there was an

additional promise that he made.

The problem, Your Honor, is that three years later the Defendants rely on the very consideration from the non-compete to act as consideration on the new general release. The question for the jury, Your Honor, is what consideration was paid for which contract?

Because in this situation we have -- one of two scenarios have to be true. Either the non-compete agreement was not supported by adequate consideration or the general release was not supported by consideration. And I -- it's not the adequacy, Your Honor, it's whether there was any consideration paid at all for the general release.

These are arguments that have already been presented to the court. The court has already ruled on these issues and determined that there certainly exists a genuine issue of material fact.

Your Honor, beyond that, the Defendants have also argued that under the Tender-Back Rule Mr. White is required to give back the money. As I've already indicated, there's a question as to what the consideration was paid for because a plain reading of the employment agreement makes clear that the three hundred thousand dollars ($300,000.00) was paid in exchange for a non-compete, which, Your Honor, Mr. White performed under.

He did not compete or solicit customers of CFR for a

three year period. In fact, that claim was brought and it was ultimately dismissed voluntarily by the Defendants because they knew that he did not violate the terms of that non-compete agreement. And so, Your Honor, that's the first part.

The second part -- and Mr. Schanen harped on the fact that Mr. White retained the benefit of the payments. Again, that argument is premature, Your Honor, because the Defendants in this case are unilaterally electing the remedy for the Plaintiff.

As Your Honor knows, it's well settled that when you have a fraud in the inducement claim, there's two avenues of relief. You can either return the consideration and rescind the contract or you can keep the consideration and sue on damages. That question, Your Honor, is not answered until after the return of a verdict by a jury. It is at that time that, in this particular case, the Plaintiff, would have to choose his remedy.

The Defendants in this case have argued and just unilaterally assumed that the Plaintiff is looking for a recision of the contract, which is not necessarily the case. We can have it determined that there is a valid general release, which, of course, requires a determination that there was consideration paid. That's step one.

And in the event it is determined that consideration was paid, the next step is were you fraudulently induced into

executing that document? If we are successful in arguing that position, Your Honor, we then have the ability to elect our remedy. Either we return the consideration and rescind the contract, which makes no sense in the present case, or we keep the consideration and sue on damages.

Your Honor, that proposition has been law in South Carolina. Mr. Schanen pointed to a 1900 case. Bank of Johnson v. Jones is 1927. And to quote, it says, the frauded party to a contract may tender-back consideration and sue for recision or retain consideration and sue for damages. That is an election of remedies question.

Your Honor, there exists a plethora of issues in this case. On the fraud in the inducement, Your Honor, what was previously submitted to the Court and, quite frankly, Your Honor, the reason why we did not brief this again is because under the Dorrell v. South Carolina Department of Transportation case renewed motions for summary judgment are predicated on the discovery of new evidence.

What Mr. Schanen is asking is that you step on the toes of Judge Sprouse, who's already ruled in this case. There has been no new evidence that has been discovered. The only fact witness that Mr. Schanen relies on in support of his motion for summary judgment, that deposition was taken nearly three months before the filing of his first motion for summary judgment.

Your Honor, there's nothing different about the case as it exists today than as it existed nearly one year ago. Your Honor, it's the exact same facts, the exact same evidence and the exact same arguments are being presented once again.

But, regardless, even if the Court were inclined to look at this anew, there still exists these genuine issues of material fact. And although the Defendant in this case continues to argue that a general release is a general release is a general release, there are claims and defenses that have been brought that makes that question much more complicated. And the facts of this case require that.

Again, Your Honor, I believe under Rule 56 all that is -- all that's required is that we demonstrate that there is an issue for the jury to determine. And if the Court were to look at the evidence that has been submitted in this case and what have been provided to the Court in this case, I think that it has to find that there exists a genuine issue of material fact.

Not to beat a dead horse, but the issue of consideration is an extremely important question that has to be answered. If a jury determines that Mr. White executed an employment agreement, was promised three hundred thousand dollars ($300,000.00) to -- in exchange for his non-compete, that he actually did not compete, which that is undisputed that he did not compete with CFR for those three years, and that's what he

was paid on, Your Honor. That is well within the province of the jury to make that determination. And if they do that, then the terms of the general release and waiver are of no consequence, Your Honor.

I can certainly point to additional instances where there are questions, genuine issues of material fact, but the reality is, Your Honor, Mr. White was entitled to a million dollars ($1,000,000.00) on a subordinated note. Nearly three hundred thousand dollars ($300,000.00) of that was outstanding at the time that he executed this release. He had also invested five hundred and fifty thousand dollars ($550,000.00) in the company in September of 2017 about two months before he resigned his position.

Your Honor, the position that the Defendants are taking at this juncture is that he was walking away from eight hundred thousand dollars ($800,000.00) in exchange for three hundred thousand dollars ($300,000.00) to be paid on the severance. The testimony in this case, Mr. White's testimony in this case certainly refutes that position, Your Honor.

And I don't think that there could be a bigger question of fact for the jury to have to answer than what was the understanding of the parties? What were their beliefs? Does the general release contemplate the release of securities claims when you've just invested two months before that over five hundred thousand dollars ($500,000.00)?

Your Honor, there are tons of questions in this case that only a jury can answer. Judge Sprouse was presented with all of these arguments. He had time to contemplate, review the briefs, and review the evidence, and he came back on June -- on June 1st of 2021 and ordered, after reviewing 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 -- and Defendants' motions are denied.

Your Honor, we are positioned exactly the same today as we were one year ago. Mr. Schanen may have argued new arguments today, but it was on facts and evidence that existed over a year ago. So, Your Honor, for those reasons we believe -- this trial is slated to begin in three weeks. And we believe that there exists a genuine issue of material fact that these issues need to be submitted to a jury, Your Honor.

THE COURT: Just a minute. Let me ask Mr. Puriefoy this. Is it -- is it your client's position -- has he provided sworn testimony by way of deposition or otherwise that he has not received three hundred thousand dollars ($300,000.00) in return for this release?

MR. PURIEFOY: I want to make sure I understand your question, Your Honor.

THE COURT: Well, here's the question. As I understand it, the consideration for the release was three hundred

thousand dollars ($300,000.00). And Mr. Schanen said that's been paid.

So my question is is your client's position he never received three hundred thousand dollars ($300,000.00) for signing that release?

MR. PURIEFOY: Not for signing that release, Your Honor. And that's the question for the jury. Mr. White signed ---

THE COURT: No, forget about the jury. My question to you is did your client -- has he taken the position by way of affidavit, answer, testimony, deposition, whatever, has he said I've never received three hundred thousand dollars ($300,000.00) in return for signing that release?

MR. PURIEFOY: Absolutely, Your Honor. Absolutely.

THE COURT: Okay.

MR. PURIEFOY: Absolutely.

THE COURT: All right.

MR. SCHANEN: That's not true, Your Honor.

THE COURT: That's all I needed. Mr. Schanen's next.

MR. SCHANEN: Yes, Your Honor. Your Honor, that is absolutely and unequivocally false. That is a total falsehood.

Mr. White has admitted on multiple occasions that he received that three hundred thousand dollars ($300,000.00). What Mr. Puriefoy is trying to tell you is that the three hundred thousand (300,000), I mean, he received the three

hundred thousand dollars ($300,000.00) that's called for in this document. Mr. Puriefoy will admit that.

But ---

THE COURT: Well, he just denied it. That's why I'm asking the question.

MR. SCHANEN: He's trying ---

MR. PURIEFOY: Well, Your Honor, I need to -- I need to clarify, Your Honor, because -- because the question I believe that Your Honor asked was has Mr. White said that he did not receive the three hundred thousand (300,000) for the general release? He has said he did not receive three hundred thousand (300,000) for the general release.

His testimony in his deposition was I received three hundred thousand dollars ($300,000.00) because I was not competing. My non-compete stated that I can't compete for three years and in exchange for me not competing, I did receive my three hundred thousand dollars ($300,000.00) not in exchange ---

MR. SCHANEN: Your Honor, this is ---

THE COURT: Well, wait a minute. Whoa. Hey, hey, stop.

MR. SCHANEN: I'm sorry.

THE COURT: We have a court reporter here trying to take this down. So we're going to all take turns or I'm shutting this down, okay?

MR. SCHANEN: Your Honor, I'm sorry. I had a lag. And

I'm -- it was hard to tell that he wasn't finished. I apologize.

THE COURT: Well, you can apologize to the court reporter. She's the one trying to take this down for y'all's benefit, by the way.

MR. SCHANEN: Yes, sir.

THE COURT: All right. So my question -- well, I guess I need to know, and I'd have to review it, I guess. But there was a non-compete agreement signed -- when was that signed?

MR. PURIEFOY: Your Honor, that was signed three years before the general release. That was signed on July 28th of 2014.

THE COURT: All right. And when was the general release signed?

MR. PURIEFOY: November 29th of 2017.

THE COURT: All right. And when was three hundred thousand dollars ($300,000.00) paid to your client?

MR. PURIEFOY: Following -- so when my client resigned his position, which it's defined in his employment agreement that if he resigns his position, it's called a voluntary termination of employment. But after his voluntary termination of employment, that's when he began to receive the non-compete payments, what he calls the non-compete payments. And I believe the documents are clear that that's what it was for.

THE COURT: All right. Mr. Schanen.

MR. SCHANEN: Your Honor, this is so indicative of the problem here because what happened, and it's very straightforward, in 2014 when Mr. White sold his company for all this money and came on to work, he signed an employment agreement. And as you would expect, it had non-compete provisions in it.

Now it also had a severance provision in it. And what it said was in the severance provision that if you're let go without cause, then you get three hundred thousand dollars ($300,000.00), right? Well, that didn't happen. But, regardless, the company gave him the three hundred thousand dollars ($300,000.00) through this severance agreement.

Now that is referenced in the severance agreement. I mean, in this agreement it's as clear as day that he's getting three hundred thousand dollars ($300,000.00). It's at the very beginning of the agreement.

He's getting the three hundred thousand dollars ($300,000.00), we're getting a release, there's some other provisions in there. It says mutual consideration. It's your standard severance agreement. And there's absolutely no dispute in this case that after he signed that agreement, Mr. White received that three hundred thousand dollars ($300,000.00).

And, Your Honor, you don't have to take my word for it.

I have his testimony. If Elizabeth could share it.

THE COURT: Well, I assume that was filed with the motion, wasn't it?

MR. SCHANEN: It is, but I have it ready. It's right here. And ---

THE COURT: Okay. Well, ---

MR. SCHANEN: --- it ---

THE COURT: --- I've got to look at it anyway.

MR. SCHANEN: You could have chosen not to sign that document, right? Yeah. I wouldn't have gotten my severance money. But, yeah, right. But you wanted the three hundred thousand dollars ($300,000.00)? Right. And so you signed the release agreement? Yes.

And Mr. Puriefoy will not deny and cannot deny that that three hundred thousand dollars ($300,000.00) was paid to Mr. White. He got it. What Mr. Puriefoy's trying to say is, well, that three hundred thousand dollars ($300,000.00) was for something other than the release. And that -- it just -- it's just a way to try to circumvent the release and get out of it. And it's something that doesn't exist.

And he's talked about these non-compete obligations. Your Honor, he was bound by those non-compete obligations when he signed the employment agreement back in 2014. And if we go to the provision -- there's a provision in the severance agreement. It says all I'm doing is reaffirming -- I'm

reaffirming my obligations not to compete under the employment agreement. Those were obligations that existed regardless of whether he ever signed this severance agreement or not.

On the other hand, the three hundred thousand dollars ($300,000.00) if he wanted that, he had to sign the release. And that's what he did. And that's consideration. His argument that somehow the release isn't supported by consideration or the three hundred thousand dollars ($300,000.00) wasn't for the release is just something that's made up to avoid it. And there's no -- there's no basis in the record for it.

And so that's the problem here. The severance agreement on its face was signed in return for the three hundred thousand dollars ($300,000.00). We got the three hundred thousand (300,000) -- we paid the three hundred thousand dollars ($300,000.00), we got the release. It's as plain as day.

He doesn't deny that we paid the money to him. He wants to keep the money, but not be bound by the release, which plainly applies to all claims. And there's no -- there's no ...

(Pause)

MR. SCHANEN: Hello? Can y'all hear me?

THE COURT: I can.

MR. SCHANEN: Oh, for some reason the video dropped. But

-- okay.

Your Honor, a party shouldn't be able to not present any evidence and just make a bunch of lawyer arguments and avoid the consequences of a release by just throwing a bunch of stuff against the wall. And that's what we have here.

He didn't -- he didn't -- this notion that somehow there's no consideration for the release when he got the three hundred thousand dollars ($300,000.00) that's called for in the release, that doesn't make any sense. He admits that if he wanted the three hundred thousand dollars ($300,000.00), he had to sign the release.

And he also admits, and we've cited it in our brief, that he was paid the three hundred thousand dollars ($300,000.00). It's all there.

Your Honor, we just are asking for the, you know, this isn't the man who hadn't gotten what he bargained for. He got almost fourteen million dollars ($14,000,000.00) for his company, was paid to work there for three years and then he got three hundred thousand dollars ($300,000.00) for a release. And he shouldn't be able to bring these claims.

You didn't hear Mr. Puriefoy say that the claims didn't arise prior to him signing the release. There's no question. He shouldn't be allowed to have his cake and eat it, too. And we shouldn't have to go through a jury trial for that to be determined.

MR. PURIEFOY: Your Honor, just ---

THE COURT: Well, if you -- if you had a cake, why wouldn't you be able to eat it?

MR. SCHANEN: I've never understood ---

THE COURT: I've never understood that thing. Who would want a cake if you couldn't eat it? There's no point in that.

All right, Mr. Puriefoy. Now, Mr. Schanen, you understand, is going to get the last argument because it's his motion? So -- but you can tell me what you want to.

MR. PURIEFOY: Yes, Your Honor. And I'll try to be very brief.

Your Honor, the record is riddled with supporting documents for the position that I've taken. I think Your Honor asked the right question, when was the employment agreement executed that contained the non-compete language? Your Honor, that was a bargained-for document.

Mr. White executed an employment agreement that specifically said you are bound for a period of three years to not compete with CFR. And in exchange for your commitment to not compete you get three hundred thousand dollars ($300,000.00). There was a promise not to compete and a promise to pay. That was the bargained-for exchange between the parties. I promise not to compete, and I promise to pay.

Three years later, Your Honor, a new document was presented to Mr. White, which was the general relief -- the

general release that's been attached as an exhibit to the Defendants' motion where there were new promises, a separate contract. It doesn't not say as a continuation of.

The employment agreement doesn't say that there's an adoption by reference to. These are two independent contracts, each of which have to be supported by their own valuable consideration.

We know for a fact that three years prior to presenting the general release there was a promise not to compete and a promise to pay for that non-compete. Three years later, Your Honor, a new contract was presented to Mr. White saying do not sue us. This general relief -- this general release is telling you you cannot sue us.

And so now Mr. White has taken on another affirmative obligation to not file a lawsuit. That's what -- that's what the argument is being made by the Defendants for this general release.

The inherent problem, Your Honor, is that there is no new consideration paid for the general release. The general release says pursuant to your employment agreement here's your three hundred thousand dollars ($300,000.00). And in the employment agreement it says for non-compete you get three hundred thousand dollars ($300,000.00).

Your Honor, either the employment agreement did not -- was not supported by consideration and Mr. White did not

compete for a period of three years and did not receive the bargained for consideration that he thought he was entitled to or the general release was not supported by any separate and independent consideration, which it has to -- that is a question for the jury to determine. It is not as straightforward as Mr. Schanen's making it seem.

And if we want to talk about common sense, Your Honor, the common sense, no one would execute a general release. Mr. Schanen has already admitted that Mr. White was entitled to almost three hundred thousand dollars ($300,000.00) that was still due to him under the terms of a promissory note which finalized the transaction where he sold his business. Almost three hundred thousand dollars ($300,000.00) he was entitled to just under that note alone at the time. He had also invested five hundred and fifty thousand dollars ($550,000.00) just two months prior.

Under Mr. Schanen's rationale in the arguments that's being presented, Mr. White waived his rights to recover money under the promissory note and he waived his investment of five hundred and fifty thousand dollars. The common sense argument, if that's the route that we're going to go, Your Honor, there would be no set of circumstances, no situation where Mr. White would say, I am paying you eight hundred and fifty thousand dollars ($850,000.00) in exchange for three hundred thousand dollars ($300,000.00), and I walk away from

everything else.

That's the position that's being -- that's being argued by the Defendant, that Mr. White was owed eight hundred and fifty thousand dollars ($850,000.00) by this company, which no one can dispute. There is no testimony. There's no evidence that Mr. White was not entitled to the three hundred thousand dollars ($300,000.00) on his note and there's absolutely no testimony that Mr. White invested five hundred and fifty thousand dollars ($550,000.00) in this case.

Your Honor, I think the wrinkle in this is there's been a claim for a securities fraud violation. Your Honor, what we've not discussed is that at the time that Mr. White invested his five hundred and fifty thousand dollars ($550,000.00) into CFR, CFR had received in July of 2017, so about two or three months before Mr. White's investment, they received notice from their mezzanine and senior lenders that they were being called on a twenty million dollar ($20,000,000.00) default. They had credit agreements with a senior and mezzanine lender. Those lenders called those notes and held them in false -- false default for twenty million dollars ($20,000,000.00).

Mr. White was never informed of this. And he invested company -- he invested over a half a million dollars in a completely defunct company. The company was completely upside down and has, in fact, since been sold, Your Honor. And so to

give more context to this investment and how we got to where we are, I think that's important to note.

That the Defendants are taking the position that through this general release and despite having no knowledge of a twenty million dollar ($20,000,000.00) default, Mr. White walked away from a five hundred and fifty thousand dollar ($550,000.00) investment in exchange for three hundred thousand dollars ($300,000.00). Your Honor, that's simply not the case.

The question that has to go to the jury, I believe, Your Honor, respectfully, I believe, goes to the jury is the question of consideration, what was the consideration paid for? Because there is evidence in the record that Mr. White did not compete for a period of three years. He did not work in the industry that he had been working in for over three decades because of this non-compete agreement. And he was paid.

Your Honor, the benefit that the Defendant received in this case was the result of the employment agreement where Mr. White said I will not compete, I will not solicit, I will not go after customers that were mine for 30 years and in exchange for that I get three hundred thousand dollars ($300,000.00). The jury has to determine what that consideration was paid for, Your Honor.

And the court's already considered this. The court has

heard these arguments. The court has heard all of these positions. There's no new facts, there's no new evidence, there's been nothing submitted today that did not either exist at the time that Mr. Schanen filed his original summary judgment or was actually presented to the court because the lion's share of what's been presented to Your Honor was also presented to Judge Sprouse.

Your Honor, this case is ripe for trial. There are so many questions and so many unknowns in this case, Your Honor, that I believe it has to proceed to a jury trial.

THE COURT: All right. I'm going to let you finish, Mr. Schanen, but let me ask you this. What's this company producing or doing? What's this company about?

MR. SCHANEN: CFR is a company that goes onsite to convenience stores, restaurants, anywhere that has kitchen equipment, you know, or commercial food service equipment and services their facilities and their equipment. And it's ---

THE COURT: They sell the equipment and then service it or they just ---

MR. SCHANEN: No, they just service it. It's ---

THE COURT: Okay.

MR. SCHANEN: It's just ---

THE COURT: I'm just curious. All right, Mr. Schanen.

MR. SCHANEN: So, Your Honor, it's very difficult when the other side doesn't submit a brief. Mr. Puriefoy hasn't

submitted this employment agreement so the Court can actually see it. And the statements that have been made about it, it is not an exaggeration to say that those are just blatant misrepresentations. It's just not true. What he's saying is just not true.

The employment agreement is just as you would imagine. He's coming to work, he has a job, he gets a salary, he's the second highest paid person in the company, and in return for that he signs non-compete obligations. He has restrictive covenants.

There's nothing about him being paid three hundred thousand dollars ($300,000.00) in order for those restrictive covenants to be binding. There's another provision that deals with severance.

And it says, first of all, it only applies if Mr. White is terminated without cause. Of course that's a very common thing in severance agreements. If someone quits, they don't get severance. But if they're terminated by the company without cause, you know, the agreement would say they get severance.

And that's what this agreement says, if he's terminated without cause, which never happened here, that never happened here, then he gets three hundred thousand dollars ($300,000.00) in severance conditioned upon -- and it says this in the employment agreement, conditioned upon him signing

a general release of claims. It says he gets the three hundred thousand dollars ($300,000.00) conditioned upon him signing a general release of claims.

And then in that severance provision it does go on to link his continued receipt of that payment to his continued compliance with the non-compete obligations so that if he doesn't comply, we can stop the payments. Again, that's very common.

But there is absolutely no interpretation of that employment agreement where you can say, oh, in order for those non-compete provisions to be binding, he had to receive three hundred thousand dollars ($300,000.00). That's absolutely not the case. It's severance payments. And it says in the employment agreement that the only way he's entitled to get those severance payments is if he signs a general release.

And so that provision was never triggered because he quit. That provision never came into play because he quit. But, regardless, we gave him severance. We drew up a severance agreement for him.

And it says in the agreement consideration is, you know, you get three hundred thousand dollars ($300,000.00) in severance payments. You get three hundred thousand (300,000) in severance payments in return for the promise as given herein. And the promises given herein are a total release of claims.

This notion that the three hundred thousand dollars ($300,000.00) wasn't for consideration for the release is -- I don't have any words for it, Your Honor. But, Your Honor, ---

THE COURT: Well, no, you think it's ludicrous. I get it. All right. Anything else y'all need to tell me?

MR. SCHANEN: One other thing. Just this notion that Mr. Puriefoy brought up that, you know, why would Mr. White have signed a release releasing eight hundred thousand dollars ($800,000.00) of claims in return for three hundred thousand dollars ($300,000.00) ---

THE COURT: Well, you don't even need to argue about that. That's what we call -- that's another Proverb, a bird in a hand is worth two in a bush.

MR. SCHANEN: Absolutely, Your Honor. And ---

THE COURT: I mean, people can see money -- if they, you know, the known is better than the unknown, as they say.

MR. SCHANEN: Yes, sir, Your Honor. I agree with that.

And I think, Your Honor, that in our brief we, you know, we cite the case that's most on point, which ---

THE COURT: I'm going to read everything.

MR. SCHANEN: Okay. Thank you, Your Honor.

THE COURT: Yeah, I'm going to read it all for sure.

Let me ask you this. This case is scheduled for what week?

MR. SCHANEN: June ---

THE COURT: What?

MR. SCHANEN: June 1st.

THE COURT: June 1st? Okay. I'm going to try to have it resolved this week, but I'll have to review it. And I'm supposed to be over there trying a case, so we'll see how it works out. But I'll do it as quick as I can anyway.

MR. SCHANEN: Thank you, Your Honor. I apologize again to you and the court reporter. That was a technology error, and that's my fault.

THE COURT: You need to talk to Ms. Hudgins about that. I'm fine with it.

MR. PURIEFOY: And, Your Honor, just to make sure I'm clear on something. Would Your Honor like me to resubmit the brief that I had previously submitted that has these exhibits that I've -- the only reason I didn't resubmit these briefs, Your Honor, is because it's already part of the record. We submitted all of our exhibits previously, and I didn't want to burden the Court with an additional 200 pages of documents.

THE COURT: No. I don't believe it's required that you resubmit a brief in response to the same argument that's being made again. So, no. Whatever's in the record is in the record, and I'll consider that, too.

MR. PURIEFOY: Thank you, Your Honor.

THE COURT: Okay. Thank y'all.

MR. SCHANEN: Your Honor, there's one more motion on this

case.

THE COURT: Oh, all right.

MR. PURIEFOY: There is, Your Honor.

MS. EDMONDSON: And that is my cue. Your Honor, again, my name is Elizabeth Edmondson.

And today you've heard argument on Defendants' motion for summary judgment. But the Defendants have also filed a motion to exclude Plaintiff Richard White's expert named Mr. R. Wayne Klein. And that is what I'm here to argue today.

You previously heard information from Mr. Schanen and Mr. Puriefoy regarding the factual background of this case. I won't re-explore all of that information in detail, but just go over very briefly the key points relevant to this motion.

Very briefly, as you heard the crux of this action is that Plaintiff Richard White is a former employee of CFR. He founded the predecessor company and it was called Tech-24. He sold his business to CFR in 2014.

Now in September of 2017 Mr. White invested five hundred and fifty thousand dollars ($550,000.00) in CFR in exchange for common stock. One of his claims in this action is related to what information was or was not disclosed to him in connection with that investment.

In November of 2017, as you heard previously, Mr. White resigned his employment from CFR and in connection with that resignation was given severance payments in exchange for his

execution of that general release.

Now on July 19th of 2021 Mr. White filed his second amended summons and complaint wherein he raised four causes of action; First, for breach of contract, second, breach of contract accompanied by a fraudulent act, third, fraud in the inducement, and, fourth, violation of the South Carolina Uniform Securities Act of 2005.

Now, this Securities Act claim specifically arises under the fraud provision in the Act found at South Carolina Code Section 35-1-501. This provision makes it unlawful for a person, in connection with the offer, sale, or purchase of a security, to either directly or indirectly employ a device, scheme, or artifice to defraud, to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading or to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person. Now that's a direct quotation from the Act.

So what is at issue in connection with this securities cause of action is what information was or was not disclosed or available to Mr. White prior to his investment in CFR. It really is not more complicated than that. And these are factual questions for the jury.

Now, Mr. White retained an expert. His name is Mr. R.

Wayne Klein to testify regarding securities laws in connection with this fourth cause of action under the South Carolina Uniform Securities Act. Mr. Klein is an attorney from Salt Lake City, Utah.

Now on June 8th of 2021 Mr. Klein issued an expert report. And that's attached to Defendants' motion as exhibit A for the Court's reference. And Mr. Klein's opinions set forth in his expert report and further explored in his deposition simply are improper and inadmissible under South Carolina law. And portions of those deposition excerpts are also attached to Defendants' memorandum as exhibit B for the Court's reference.

Now throughout his expert report, Mr. Klein opines as to what the law is according to him. That improperly invades the role of the judge. Mr. Klein further offers opinions as to what ultimate conclusions should be -- should be reached by the finder of fact. And that improperly invades the role of the jury.

And, finally, Mr. Klein's opinions are frequently based on inapplicable or incorrect law, which is irrelevant testimony under Rule 402 of the South Carolina Rules of Evidence. And Rule 702 of the South Carolina Rules of Evidence sets forth the applicable standard for admissibility of expert testimony. That Rule states that, quote, if scientific, technical or other specialized knowledge will

assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

And there are three factors a court must consider when determining whether expert testimony is admissible. These three factors are well established under South Carolina law.

First, whether the subject matter is beyond the ordinary knowledge of the jury. Second, whether the expert acquired the requisite knowledge and skill to qualify as an expert in the subject matter. And, third, whether the substance of the testimony is reliable. And you have to have all three. Those factors are set forth by the South Carolina Supreme Court in the Graves versus CAS Medical Systems case. Now, in this case Mr. Klein's opinions and testimony cannot meet that standard.

Now, Mr. Klein offered six opinions in his June 8th, 2021 expert report. And I'll briefly go through each of those opinions.

The first opinion is on page 3 of the report. And it reads, "state and federal securities laws impose significant obligations on persons offering and selling securities to others. Sellers owe duties to fully disclose all material facts to purchasers of securities. These disclosure obligations exist regardless of whether the securities are registered, exempt from registration or unregistered. Full

disclosure is required for all persons and do not otherwise have all the information that would be contained in a prospectus. The burden is on sellers to disclose information, not on purchasers to seek information. The purchaser's status as an accredited investor does not excuse the seller's obligation to provide full disclosure." So that is Mr. Klein's first offered opinion.

Skipping ahead to his fifth opinion, I'm going to kind of group these together. His fifth opinion states, certain types of statements made before and after the sale of securities can be deemed "in connection with the sale of securities."

Now, both of these opinions do nothing more than attempt to explain Mr. Klein's interpretation of the law to the jury. It's not the expert's law [sic] to explain the law to the jury or to the court. It's the judge's role to explain the law to the jury. And that's well established under South Carolina law.

In the O'Quinn versus Beach Associates case, that's found at 272 S.C. 95. The South Carolina Supreme Court examined a similar issue. In that case a legal expert's testimony was being offered to explain whether a particular offering constituted an investment contract under federal law.

The trial court excluded that testimony on this point. And in so doing provided the following explanation which is pertinent here. So I'll just read it into the record.

Quote, I know of no precedent that would permit an expert witness to testify from this witness stand and by said testifying to give his interpretation of the law that would appertain in this case. That's what you are asking the expert to do. You are asking him to relate to this court his understandings and his interpretation of the law that would be applicable to the facts and issues here. And I know of no authority in this state, nor statute or by the case law which permits that to be done. This court has a responsibility to determine the law involved in this case. And in my judgment, that responsibility would be diminished if this court would permit evidence into the record of this case by an expert witness as to what the law is in this case. Now the Supreme Court upheld that rationale and upheld that ruling.

In Mr. Klein's first and fifth opinions presented in his expert report just do that, do exactly what the South Carolina Supreme Court has said is not -- is not appropriate. He states what he thinks the law is according to him, which is not the role of a testifying expert.

This testimony does not help the jury understand the facts at issue. And these two opinions are analogous to those offered in the O'Quinn case, and the result here should be the same. Mr. Klein's opinions should be excluded.

Now he also offers additional opinions in his second, third and fourth opinions that suffer from similar

deficiencies as the first and fifth opinions. In the process of explaining what he thinks the law is, Mr. Klein also explains what conclusions he believes the jury should reach as to the ultimate issues in this case.

And I'll ...

(Pause)

MS. EDMONDSON: Sorry. I heard -- I didn't know if I was being interrupted.

Mr. Klein's second, third, and fourth opinions, like I mentioned, suffer from similar deficiencies. And I'll read those into the record.

Mr. Klein's second opinion states, statements made by Defendant Herwald to Plaintiff White listed in part five of the expert report, in proving to have been made and to have them inaccurate were material. Mr. Klein then moves on to list certain statements without any citations to the record for all but one of those statements that he opines constitute, quote, material misrepresentations.

In his third opinion Mr. Klein states "information that should have been provided by Defendants to Plaintiff in connection with White's purchase of CFR securities is described in part five of the expert report. The identified information would be important for an investor to know and is material." Mr. Klein further explains the basis for this opinion later on in the report.

And then, finally, his fourth opinion states, quote, the practice enlisted in part five of the report, if proven to have occurred, were acts, practices in a course of business that would operate as a fraud. And he then goes on to explain the basis for that opinion later on in the report.

Now, these opinions are not designed to assist the jury in understanding certain facts. Neither is their legal arguments about why certain legal conclusions should be reached by the jury in this case about what statements qualify as material, about what practices will constitute fraud. And it's not the place of a testifying expert to provide testimony about these ultimate conclusions. The South Carolina Supreme Court has examined analogous situations in other cases, primarily in the Green versus State case, in the Dawkins versus Field case.

In Green versus State the South Carolina Supreme Court examined the issue of whether expert testimony from a criminal defense attorney on whether trial counsel was deficient could be admitted at a PCR hearing. Now the court held that the testifying legal expert's testimony fell outside of Rule 702 and was not admissible.

There the court specifically held "the expert offered no factual evidence. He proffered his opinion assuming certain facts. The trial counsel's actions fell below the acceptable legal standards of competence. The testimony was not designed

to assist the PCR court to understand certain facts, but rather with legal argument as to why the PCR court should rule as a matter of law that trial counsel's actions fell below an acceptable standard of competence."

Now, likewise, in the Dawkins versus Field case, kind of the leading case on this kind of issue, shareholders in the company sued the company's directors and officers alleging a breach of fiduciary duty and a number of other violations. And at summary judgment the shareholders presented an affidavit from their expert, a law professor.

A trial court refused to rely on that affidavit because it improperly attempted to explain the law to the trial court. The South Carolina Supreme Court affirmed that decision and concluded that because the expert's affidavit, quote, primarily contained legal arguments and conclusions, a trial court properly refused to consider it.

And, importantly, the court noted in that case that while an expert is permitted to offer testimony that embraces an ultimate issue, that ultimate issue is to be decided by the trier of fact. And a testifying expert is not permitted to usurp the trial court's role in determining the ultimate issues.

So in reviewing the applicable case law set forth in these cases I've discussed in O'Quinn, in Green, and in Dawkins, it's clear that courts have uniformly excluded these

types of opinions that are offered by Mr. Klein in his report when those types of opinions are only trying to explain the law to the court and attempting to assume certain facts and instruct the jury what ultimate conclusion should be reached.

And when you review Mr. Klein's report, that's what it appears to be. It reads like a legal brief. It's not explaining concepts that would be difficult for a jury to understand. It's not offering independent facts. It's offering legal analysis. And that's totally inappropriate.

And, finally, Mr. Klein offers his sixth opinion, which relies on inaccurate case law, it misstates the law and should not be admitted in this proceeding because it was only designed to confuse the jury. That opinion's also found on page 3 of the report.

And it states "agreements that purport to have investors waive their rights to assert that securities laws were violated are void as against public policy and unenforceable." And then Mr. Klein goes on to apply that statement of law to a legal conclusion that he would advise the jury to reach and concludes that these anti-labor provisions and federal securities laws render the release provision in the general waiver and release void as against public policy.

Now, as you've heard earlier in the summary judgment portion of argument, Defendants have taken the position that Mr. White did, in fact, release this cause of action to the

extent it existed by signing the general release.

Now, Mr. Klein has, on his own and for the first time in this action, concluded that federal law renders the general release void. And in so concluding he relies on a case from the Second Circuit Court of Appeals called Pasternack versus Shrader. That's found at 863 F.3d 162.

And Pasternack prohibits parties from entering into labor agreements, entering into simultaneously or in conjunction with a sale of securities. And in relying on this case, the Pasternack case, Mr. Klein ignores applicable law from the Fourth Circuit, from the District in South Carolina and also ignores the plain language of the federal provisions that he cites.

So, again, this opinion suffers from the similar deficiencies that I've discussed in connection with his first and fifth opinions. He not only attempts to explain his view of the law to the jury, but then he also tells the jury how to apply that law. And that's plainly inappropriate.

In addition, as I mentioned case law from the District of South Carolina, in the Fourth Circuit expressly states that a securities claim can properly be released by a general release agreement. And those cases are Moseman versus Van Leer at 263 F.3d 129, and House versus Aiken County National Bank at 956 F. Supp. 1284.

And both of those cases allow parties to enter into a

release agreement and release securities claims. And Mr. Klein does not discuss those cases in his report. He did not discuss those cases in his deposition testimony. He stated that he relied on the Pasternack case simply because it was from the Second Circuit out of New York and thought that might be more influential. Those were his words.

In addition, the general release that we've been discussing was executed in conjunction with White's resignation from employment. That occurred on November 29th, 2017 not in conjunction with his investment with the company that happened over two months prior on September 11th, 2017.

And an additional point, the federal anti-labor statutes only apply to blanket releases that accompany the sale of securities. And here we have that, that time gap between the investment and when the release was entered into. So it's undisputed that the general release did not accompany the sale of these securities.

In addition, the federal anti-labor provisions, rather expressed terms, only apply to avoid certain waivers of federal securities claims. We have no federal securities claims in this action. We have a claim of South Carolina Uniform Securities Act.

And the two provisions that Mr. Klein cites are found at 15 U.S.C. section 78 CC subsection (a) and 15 U.S.C. section 77 N. And both of these provisions specifically state that

they apply to any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder. Now, both provisions use that same language and plainly apply to federal securities claims, not state securities claims.

Now, even in Mr. Klein's deposition testimony he conceded that this opinion, quote, went too far. And that section of deposition testimony is attached as an exhibit to our brief. But specifically he said that, quote, I state that the labor is voided by the anti-labor provisions of federal securities laws. And what I should have said that a court or jury would be justified in finding that. So I went further than I should have in that instance.

So while we contend that any testimony concerning this point is improper, Mr. Klein also concedes that what he wrote in that report went too far. It's not admissible expert deposition testimony.

And I think it helps to consider the bigger picture in this case. As I've explained, there are numerous legal reasons under the applicable rules of evidence under Rule 702, under Rule 402 and under South Carolina case law that has been well established for many years.

Why Mr. Klein should not be allowed to testify at the trial of this matter? And that boils down to three common things. First, the testifying expert, it's not his role to

explain the law. That's the role of the judge.

Second, the testifying expert doesn't testify about what legal conclusions the jury should reach. That's the role of the jury.

And, third, the testifying expert should not be permitted to explain incorrect law to the jury only to confuse them.

Beyond these legal reasons, just looking at the big picture, effect of what Mr. Klein's testimony would have on this trial illustrate the rationale opining the Rules of Evidence in South Carolina case law. It demonstrates why the Court should grant Defendants' motion to exclude Mr. Klein's testimony.

In the event Mr. Klein is allowed to testify at trial, Defendants have also retained an expert. His name is Professor Martin McWilliams from the University of South Carolina School of Law.

And Defendants had to retain him. They retained him in response to the opinions presented by Mr. Klein. So Mr. McWilliams' opinions directly respond to the opinions presented by Mr. Klein.

If both of these experts are permitted to testify at trial, we're going to have a big problem. We're going to have a circus. The court will be presented with a situation in which Mr. Klein is telling the jury one version of the law and Mr. or Professor McWilliams will necessarily be responding

with another version of the law. And then the court will be charged with instructing the jury on yet another version of the law.

And that is only going to serve to create confusion. It's going to confuse the issues. It's going to lead to objections back and forth. It's going to distract the jury. It's not going to assist them in determining any fact issue in this case, which is the standard under Rule 702.

And during Professor McWilliams' deposition Plaintiff's counsel spent much time asking him to admit that it was improper to explain the law to the jury or to suggest how the jury should view the facts. And that's -- we are essentially on the same page with Mr. White's counsel. It is not the role of the experts to explain what the law is or what conclusions the jury should reach.

And, you know, these are issues the jury will be able to understand, what information was presented to Mr. White, what information was not presented to Mr. White. And we don't need experts to confuse these issues and, you know, over-complicate the trial for what should be fairly straightforward issues.

Now, the courts in the cases I've mentioned previously recognized the danger that these kind of experts, you know, pose to trials and recognize the impropriety of such expert's testimony and properly excluded it. So Defendants would respectfully request that this Court follow precedent in this

case, follow the O'Quinn, Green and Dawkins cases and exclude all of the opinions of Mr. Klein at the trial of this matter.

And one -- one last point. If the Court does grant Defendants' motion to exclude Plaintiff's expert, then Defendants will have no need to present Professor McWilliams as an expert witness. Thank you.

MR. PURIEFOY: Your Honor, I guess to begin, I am rather confused by Ms. Edmondson's motion to exclude. The cases that were cited by Ms. Edmondson highlight that this is more appropriate as a trial objection to the scope of expert testimony.

Rule 702 ---

THE COURT: Mr. Puriefoy, you don't have to go any further with that. I agree. The trial judge is in a better position than the pre-trial judge to decide whatever is sought to be admitted because it depends on the context of the case. Some things can be determined ahead of time, sometimes things cannot. Might be some portion of the witness' testimony that's improper, other portions would be proper.

Excluding the witness from testifying completely has got to be inappropriate unless everything he's testified to is simply a legal conclusion. Is that what you're telling me?

MS. EDMONDSON: Yes, Your Honor, that's our position. If you read his expert report, it reads as a legal brief only as to, you know, what the law is and what conclusions should be

reached.

THE COURT: All right. So there's nothing in his testimony that would be helpful to the jury? It's all just a legal conclusion?

MS. EDMONDSON: That is our argument, Your Honor. Yes.

MR. PURIEFOY: Your Honor, that's simply untrue. As by way of example, very few attorneys know what a security is, let alone 12 members of a juror -- of a jury. To explain what a security is to a jury to better help them understand how this fits in the context of a ---

THE COURT: I don't -- I don't need to -- I don't disagree with that. I don't disagree. There are a lot of things that the trial judge is going to have to determine. Who is the trial judge in this case?

MS. EDMONDSON: Judge Gravely.

THE COURT: All right. Here's what y'all need to do. Y'all need to be getting in touch with Judge Gravely. And, I mean, I've got to decide the summary judgment motion first.

But in the meantime or certainly shortly thereafter, y'all need to get in touch with Judge Gravely since he's the trial judge and see if you can't address this motion ahead of the trial. But he's the one that's going to be stuck with a ruling assuming he accepts my ruling.

You know, if I -- if I granted the motion to exclude the witness, you can still present it to Judge Gravely and he can

say, what was Derham Cole thinking about that? I'm going to let that witness testify. And so we would have just wasted all of this time.

So -- or if he says, well, Judge Cole heard it. I'm going to adopt it or accept it. Well, then if that's an error, he's stuck with it, not me. So, you know, it doesn't make sense to have these types of evidentiary issues addressed by some judge who ain't going to try the case.

So I don't need to hear anymore about that. Y'all need to talk to Judge Gravely about addressing this motion in the event I do not grant the motion for summary judgment. And I'm hoping I'll have that resolved by the end of this week if at all possible. So that'll give you plenty of time to address that should you need to. All right?

MR. PURIEFOY: I appreciate it. Thank you.

MS. EDMONDSON: Thank you, Your Honor.

THE COURT: Okay. Anything else?

MR. PURIEFOY: No, sir. Thank you, Your Honor.

MS. EDMONDSON: Thank you, Your Honor.

MR. SCHANEN: No, sir. Thank you, Your Honor.

THE COURT: Okay. Thank you. Y'all have a good afternoon.

MR. SCHANEN: Thank you. You, too.

(Hearing Ended at 3:27 pm)

(End of Requested Transcript of Record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record to the best of my ability as being held via webex of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 9th day of May 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 14, 2022

s/Susan W. Hudgins

_____

Circuit Court Reporter

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Dated this 1st day of September, 2023

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