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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

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

In Re: Kathryn Taillon, Appellant.

Appellate Case No. 2021-000341

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Case No. 2008-CP-23-3665

APPELLANTS' PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Jeffrey P. Dunlaevy (SC Bar No. 16978)
Dunlaevy Law Firm
37 Villa Road, Suite 440
Greenville SC 29615
864.208.9305
Counsel for Appellant Kathryn Taillon

Micajah P. Caskey, IV (SC Bar No. 100350)
Caskey Law Firm, P.A.
146 State Street
West Columbia, South Carolina 29169
Phone: 803-724-3624
Counsel for Appellant Arthur M. Field

Pursuant to Rules 219(b), 221(a), and 240, SCACR, Appellants Arthur M. Field and Kathryn Taillon request rehearing or rehearing en banc of the Panel’s Opinion No. 2025-UP-022, filed January 29, 2025. The Opinion: (1) affirmed the Circuit Court’s ruling that the Global Settlement Agreement (GSA) and Addendum thereto do not prevent Respondents from pursuing an action to collect a civil judgment arising from Field’s unpaid restitution in a related criminal case; and (2) reversed the Circuit Court’s order awarding liquidated damages against Field. Appellants request rehearing or rehearing en banc as to the first of these rulings.

ARGUMENT

Appellants respectfully submit the Panel Opinion failed to consider key facts in the Record, misapplied the law to the facts it did consider, and failed to address several arguments raised by Appellants. The Panel’s decision effectively carves out a unique set of legal rules for this case that clash with existing precedent. Specifically, the Panel Opinion would (1) permit a South Carolina trial court to give an advisory opinion to a federal court sitting in diversity; (2) permit a binding settlement agreement to be amended 8 months later without the signatures of all parties, contrary to Rule 43(k) and without notice to class members under Rule 23; (3) permit a party to establish a claim under the South Carolina Uniform Declaratory Judgment Act (SCUDJA) without filing the proper pleading(s), permitting discovery, or holding a trial or any evidentiary hearing; (4) redefine the term “claim” so as to permit the continued litigation of a dispute that was settled, on the novel theory that waiving a “claim” does not waive the right to collect money derived from that claim; and (5) ignore substantial contemporaneous evidence that neither the parties nor the trial court intended the federally mediated GSA to permit enforcement of a civil judgment arising from the same allegations that gave rise to the settled lawsuits.

This matter should be set for rehearing en banc. En banc rehearing is appropriate to “secure or maintain uniformity of [this Court’s] decisions” and because “the proceeding involves a question of exceptional importance.” SCACR 219(b). Both factors are implicated here. The Panel Opinion clashes with existing precedent under the SCUDJA, Appellate Court Rule 244, and Rules 23 and 43(k) of the Rules of Civil Procedure. In addition, this case seeks to reopen a settlement that should have ended a tortured decade of litigation. Had the settlement proceeded as the parties intended and as was represented to the class members at the Rule 23 approval hearing, class members would have received virtually all of the settlement funds in 2017. By correcting the Panel Opinion and directing the trial court to dismiss this case, this Court can ensure the class members receive the benefit of their bargain in the 2017 settlement, even if nearly a decade late.

A. The Panel Erred in Concluding that the Trial Court Had Jurisdiction Over this Case.

This matter is before the Court on a motion purportedly brought under the SCUDJA, SC Code § 15-53-10, *et. seq.* To seek relief under SCUDJA, a plaintiff must satisfy a threshold requirement: “all persons shall be made parties who have or claim any interest which would be affected by the declaration.” SC Code § 15-53-80. Appellants pointed out that none of the requirements for relief under the SCUDJA were met: several parties to the GSA were neither served nor even notified of Respondents’ motion, no pleading was filed, discovery was not permitted, and Appellants were not given a trial by jury. (Field Br. 17; Taillon Br. 22.) Indeed, the trial court did not receive evidence or hold a hearing before summarily ruling in CIF’s favor.

The Panel Opinion seeks to sidestep these problems by endorsing the trial court’s conclusion that the invocation of the SCUDJA was a mere technical glitch; this matter was really a motion to enforce a settlement. (Panel Op. 5.) As such, the Panel Opinion concludes, the trial court had jurisdiction even though the purported basis for same – the SCUDJA – was so obviously

lacking. (Id.) The Panel Opinion holds that because one of the cases settled pursuant to the GSA was never formally dismissed despite Respondents' covenant to do so, it remained available as a vehicle for Respondents to swoop in and obtain relief by motion over two years later.¹ (Id.) To the extent the Panel Opinion cites authority for this conclusion, it misinterprets the applicable law.

The Panel cited *Kumar v. Third Generation*, 324 S.C. 284, 290, 485 S.E.2d 626, 629 (Ct. App. 1995), for the proposition that a trial court retains jurisdiction to enforce a settlement even after a final order is entered in a case. (Panel Op. 6.) But here the dispute was not over whether the settlement was enforceable, but over the meaning of specific terms in the settlement agreement. As the Panel notes, settlement agreements are treated as contracts. (Id.) Thus, this is quintessentially a SCUDJA case – a request by a party to a contract for a definitive resolution of dispute over what the contract means.

Next the Panel cites *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992), for the proposition the trial court retains jurisdiction to enforce a settlement. (Id.) Again, however, the issue here is a dispute over the GSA's terms, not its existence.

The Panel's reliance on those cases is misplaced. Both *Kumar* and *Rock Smith* involved disputes over whether the parties had settled. Each Court was asked to restore those cases to the active trial roster. The *Kumar* court refused to do so based on the dismissal; the *Rock Smith* court affirmed a trial court order vacating the settlement. *Kumar*, 324 S.C. 284, 289-90; *Rock Smith*, 309 S.C. 91, 93. Clearly, a trial court has authority to determine whether an enforceable settlement

¹ This conclusion is precisely the opposite of that reached by then U.S. Magistrate Judge Jacquelyn Austin. Following Field's timely removal of this case to federal court, Judge Austin remanded the case, concluding that the 2008 case was closed, having been dismissed with prejudice pursuant to the GSA. (R. 94-99.) The Panel Opinion makes no attempt to explain its deviation from Judge Austin's ruling, resulting in the unlawful denial of Field's right to remove this case.

agreement exists. But here, the Panel Opinion would greatly expand this authority to authorize some sort of perpetual jurisdiction over what the settlement agreement means. There is no precedential support for such a broad extension of the limited authority obliquely recognized in *Kumar* and *Rock Smith*, neither of which construed, or even enforced, at settlement agreement.

It is notable here that the vehicle for the trial court's ruling was the 2008 *Tomz* case. Appellant Taillon was not a party to that case, nor were the following additional parties to the GSA: Harold Brooks, Benjamin Brooks, Sharon Finch, Allyson Field, *pro se* Davyd Field, *pro se* Kirsten White, Bart Kelley, Brad Kelley, or some 22 corporate entities. (R. 154, 167-69.) None of these parties were served with Respondents' motion. Therefore none were properly before the trial court when it ruled. (Taillon Br. 22.) Even if the Panel Opinion was correct that the trial court had some sort of perpetual jurisdiction to resolve disputes over the GSA, it would have at least been necessary to serve notice on the parties to the GSA who were not parties to the 2008 *Tomz* case, yet provided substantial consideration to facilitate the 2017 settlement. The trial court's and Panel Opinion's solution to this problem was to ignore the requirements of the SCUDJA and call this an "interpretation and enforcement" action. (Panel Op. 5.) But that does not cure the problem. The trial court never obtained jurisdiction over those parties.

To summarize the procedural irregularities, which rose to the level of a denial of due process under the circumstances, the trial court:

- Did not require the filing or service of any pleadings;
- Did not ensure that all parties to the GSA had notice of the proceeding or the opportunity to be heard, despite actual notice in Appellants' filings (R. 185-86, 208-09, 218-20) that numerous parties had not been served;

- Did not permit discovery concerning the crucial events surrounding the execution of the GSA, the partial execution of the Addendum, and Judge Miller’s approval thereof; and
- Denied Field’s motion to dismiss the SCUDJA action and granted all requested relief to Respondents on motion papers, without holding a hearing or creating a record of any kind.

The Panel Opinion ignores the express language of the GSA calling for dismissal of the 2008 case, instead claiming the record does not contain evidence of any dismissal notices.² (Panel Op. 5.) It is peculiar for the Panel to blame Appellants for the non-filing of dismissal notices because SCRCP Rule 41(a) clearly contemplates filing of notices of dismissal “by the Plaintiff.” Taillon was not a party to the 2008 case at all; she never had standing to demand the filing of a dismissal notice in that case. Field was a Defendant in that case; he was not, and could not have been, the party responsible for filing a dismissal notice when it settled initially in 2009, or again in 2017. The Panel Opinion therefore erred in concluding that Respondents were entitled to profit from their noncompliance with the GSA by litigating this matter under the 2008 case, ten years after it originally settled and should have been dismissed, or in 2017 from the GSA.

Finally, the Panel Opinion’s conclusion on the jurisdiction issue ignores the posture in which this case came to the trial court. Respondents sued Appellants in Florida in an attempt to seize their home. (Field Br. 8-9; Taillon Br. 16.) Appellants defended that action, arguing *inter alia* that the GSA does not permit Respondents to collect on the civil judgment arising from Field’s unpaid restitution and certainly not against Taillon. (Id.) It was not until Respondents thought they might lose on that issue in Florida that they asked for a stay there so they could switch judges.

² All the cases were dismissed except the 2008 case, which is a matter of which the Court may take judicial notice. Rule 201, SCRE; *Sloan v. Greenville Cty.*, 380 S.C. 528, 537, 670 S.E.2d 663, 668 (Ct. App. 2009) (taking judicial notice of docket and records of prior appeal). Moreover, *contra* the Panel Opinion, the Record plainly shows that the 2014 *Brooks* case and the 2015 *CIF* case (the only settled case to which Taillon was a party) were in fact dismissed. (R. 90, 146.)

This is not the normal process for handling federal diversity cases. Federal courts routinely decide issues of state law in diversity cases. But for the parties' choice of Judge Miller per the GSA, the Florida federal court exercising diversity jurisdiction would not have stayed the case and farmed out the GSA interpretation issue to a state court judge. South Carolina courts have a specific procedure for taking up certified questions of state law. (SCACR 244; Field Br. 22; Taillon Br. 20.) There is no procedure for obtaining ad hoc advisory opinions by trial court judges. When Judge Miller recused himself, this case should have been dismissed. The Panel Opinion does not address this.

B. The Panel Erred in Concluding the GSA and Addendum Unambiguously Permit the Receiver to Enforce the Civil Judgment Arising from Unpaid Restitution

A South Carolina contract is to be read as a whole, so as to give effect to each provision thereof. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). It is not appropriate to read particular clauses in isolation and out of context, without regard to their effect on the instrument as a whole. *Alexander's Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010). It is presumed that all portions of a contract are inserted for a purpose and should be given appropriate weight in determining the meaning of the contract. *Yarborough v. Phx. Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976).

The release language of the GSA appears in paragraphs 4, 5 and 14(I)(v) of the GSA, none of which were altered in any way by the Addendum:

This Agreement settles with prejudice all claims of every kind and nature which were raised or could have been raised in any above-identified litigation, including any and all causes of action, direct claims, cross-claims, counter-claims, rights of offset, **grievances, complaints, and any other rights and actions otherwise derived from such**, between and among all undersigned parties and all identified parties herein . . .

The parties to this Agreement do hereby release all other parties and their respective officers, directors, employees, agents, attorneys, and affiliates, of and from any and

all suits, legal actions or **claims of any nature whatsoever, known or unknown,** up to and including the present time, including, but not limited to, claims described in Paragraph 4 of this Agreement . . .

...

The parties agree that any payment made by Taillon, Allyson Field, Arthur Field, or any entity or trust related to any of them, in cash or in kind, tangible or intangible . . . shall serve as sufficient consideration for (1) all releases running to all of the named parties or entities under Paragraphs 3, 4 and 5; and (2) all dismissals with prejudice of **any past, pending or future matter,** ...

(R. 155, ¶¶ 4, 5; 166, ¶ 14(I)(v) (emphasis added).)

The Panel Opinion found that this broad and comprehensive language somehow skipped over a civil judgment arising from unpaid restitution in Field's 2012 criminal case. First, the Panel Opinion noted that restitution or a possible civil judgment arising therefrom was not specifically mentioned in the GSA releases. (Panel Op. 6 ("neither the GSA nor the Addendum contain any language specifically stating that Field was to be released from his restitution obligation or the Receiver would not collect on the civil judgment.") But the purpose of a broad, global release is to be all-encompassing. It turns ordinary contract interpretation rules on their head to conclude that when a broad subject is identified, a particular sub-category of that subject must have been meant to be excluded. Thus, where the GSA's release language clearly reached any claim against Field based on any "past, pending or future matter," it was error for the Panel Opinion to conclude that a claim based on Field's 2012 restitution, which everyone knew could be converted to a civil judgment, must have been omitted. SC Code §17-25-323(B).

Next, the Panel Opinion cites SCRCP 43(k) as authority in support of its position, apparently as a justification for not considering the wealth of extrinsic evidence demonstrating that counsel for all parties knew and intended that any civil judgment arising from the restitution award would not be enforceable by the parties to the GSA. (Panel Op. 6.) However, even evaluating the

four corners of the GSA and Addendum without any extrinsic evidence, it is clear that the release was broad enough to cover the civil judgment.

The Panel Opinion also holds that collection of the civil judgment is not a “claim as contemplated by the GSA Although the GSA contains three releases, the releases refer to claims or actions that were or could have been raised *in the five listed actions* up to and including that time.” (Panel Op. 6 (emphasis in original).) Respectfully, this is simply false.

The Release in Section 4 references claims that were raised or “could have been raised” in any of the then-pending civil cases. (R. 155.) Because the civil cases covered the same alleged wrongs that led to the restitution award in the criminal cases, it would not be accurate to say that this release carved out the collection of a future civil judgment derived from unpaid restitution. The claims arose from the same alleged wrongs. (Field’s Br.15, 23-24 (explaining that significant portions of the 2012, 2013, 2014, and 2015 state and federal civil complaints repeat the allegations of the 2012 criminal indictment almost verbatim and claim the identical relief as to Field’s real property, as does the 2019 Florida case).)

Even if Section 4 did not reach a restitution-based claim, Section 5 was even broader in scope. It reached claims “**including, but not limited to,** claims described in Paragraph 4 of this Agreement.” (R. 155 (emphasis added).) This language rebuts the Panel Opinion’s contention that all three release provisions “refer to claims or actions that were or could have been raised in the five listed actions.” Section 5 explicitly went further than Section 4.

Section 14 sweeps more broadly still. It reaches “all dismissals with prejudice of **any past, pending or future matter,**”³ (R. 166 (emphasis added).) Once again, the plain language of

³ As an alternative basis for its decision, the Panel Opinion contends that because it concludes the civil judgment was excluded from the release *sub silentio*, the right to collect on it amounts to “enforcement of the obligations of the GSA.” (Panel Op. 6.) This is perfectly circular

the releases does not fit the Panel Opinion’s description. The parties clearly intended to release any claim against Field that could be released, including all future rights derived from past alleged wrongs. The possibility, indeed the virtual certainty, of a future civil judgment arising from unpaid restitution per the applicable statute fits squarely into the scope of this release language.

The Panel Opinion offers no authority for its novel definition of the term “claim.” When used in a similar context, it has generally been held to encompass contingent rights to relief and not merely those rights which have ripened into viable causes of action. *See, e.g.*, 11 U.S.C. § 101(5)(A) (defining “claim” as “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured”). *Accord, Beach First Nat’l Bank v. Gurnham (In re Estate of Gurnham)*, 407 S.C. 194, 208-09, 754 S.E.2d 875, 882-83 (2014) (under the Probate Code, the definition of “claim” includes assertion of rights “dependent on some future event that may or may not happen” and that are “uncertain in amount or unenforceable until the happening of the event”); *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 362-63, 613 S.E.2d 757, 759-60 (Ct. App. 2005) (upholding release of future claims). The Panel Opinion departs from this common understanding and creates a new definition of “claim” for this case that conflicts with the language of the GSA.

The Panel Opinion fails to address the only case truly on point, *Huml v. Vlazny*, 716 N.W.2d 807 (WI 2006). The release language in *Huml* is strikingly similar, covering “past, present and future claims” and “all claims, whether known or unknown.” *Id.* at 811. The court found that such language encompassed a civil judgment that was entered based on unpaid restitution after the settlement. *Id.* at 820. The court concluded that “[i]n using such sweeping words as ‘any,’ ‘all,’

logic. Obviously, whichever side prevails as to the meaning of the GSA can claim, in some sense, to have been enforcing the terms thereof. But this cannot supply a rule as to how the GSA should be interpreted in the first place.

and ‘whatsoever,’ the settlement is ‘global’ in its coverage” and thus applied to the civil judgment even though the civil judgment was not referenced specifically and did not yet exist as of the date of the settlement. *Id.* A more thorough evaluation of *Huml*, and the authorities above addressing the meaning of “claim,” might have led the Panel to a different outcome in this case and one that better fit the language of the GSA.

C. The Panel Erred in Relying on the Language of the Addendum Without Addressing Several Disqualifying Legal Defects Precluding its Enforceability

The Panel Opinion leans heavily on the Addendum to the GSA, holding that its express language acknowledging the Attorney General’s right to convert unpaid restitution to a civil judgment shows that the parties intended the Receiver to be entitled to enforce such a judgment. (Panel Op. 7.) There are two core problems with this approach: (1) the Panel Opinion erred by conflating the Attorney General’s right to convert restitution to a civil judgment with the Receiver’s right to collect such a judgment; and (2) the Panel failed to consider and discuss several critical legal impediments to enforcing the Addendum in the manner contemplated.

The Panel Opinion notes that nothing in the GSA or Addendum states that “Field’s restitution would be satisfied in full by fulfilling his obligations under the GSA.” (Panel Op. 7.) Further, the Panel concludes that the language of the Addendum “clearly evinces the parties’ intent not to *eliminate* Field’s restitution obligation.” (*Id.* (emphasis in original).) This observation misses the point. Appellants have consistently argued that the Addendum was designed to clarify only the Attorney General’s right to handle the restitution as he wished in accordance with statute, as all parties agreed that the sole purpose of the Addendum was to satisfy the Attorney General that he was not limited or bound by the settlement. (Taillon Br. 11-13.) That is an entirely different question from what the rights of the GSA parties were. The Addendum was never designed to add to the Receiver’s recovery. Rather, like most civil settlements, this one was a trade-off: the

Receiver would take a fixed amount in 2017 instead of continuing to litigate in the hope of a potentially larger but less certain recovery. The Addendum changed nothing about this basic bargain. (Taillon Br. 37-38.)

Huml sets forth a compelling legal argument as to why a broad and global release should be construed as waiving the right to collect a future civil judgment arising out of an existing restitution award. The court noted the public policy advantages of allowing such an arrangement:

Allowing a victim to negotiate to extinguish his or her interest in a judgment derived from a restitution order as part of a global settlement is consistent with the legislature's desire to afford respect to the dignity of victims.

...
[T]here is considerable value in permitting a victim to release her interest in a judgment derived from a restitution order because it allows the victim to settle the case and replace an uncertain, future recovery with a certain, immediate recovery.

Huml, 716 NW2d at 816, 819.

Here, the actions of the parties, Judge Miller and Judge Maddox all weigh in Appellants' favor as well. To summarize, the Attorney General opposed the modification of restitution in Section 8 of the GSA. (R. 82-83.) Judge Maddox noted that "the civil plaintiffs and Receiver remained in favor of accepting the GSA." (R. 83.) The Receiver's lawyers unilaterally prepared an Addendum⁴ to reflect the compromise reached before Judge Maddox, which they circulated without prior notice in a hearing before Judge Miller on November 27, 2017 at which only Field and his attorney were present. (R. 251-54.) The Addendum revised only language pertaining to the criminal case *vis-à-vis* the Attorney General. It did not modify any of the release language in the original GSA. It removed a single phrase from the broad release language in Par. 14 relating

⁴ Ambiguous language in a contract should be interpreted strongly in favor of the non-drafting party. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009); *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003).

to taxation, but left the balance untouched. (R. 170-71.) The Panel Opinion’s reliance on the lack of any mention of the restitution award in the release language therefore has it backwards. Such a provision would have been superfluous, merely reiterating what was already clear to all the parties.

The Receiver understood at the time the Addendum was proposed that he was not gaining a new source of future recovery. His lawyers told Judge Maddox that the consideration negotiated under the GSA in March 2017 was “the best they felt they could get from Defendant Field.” (R. 82.)⁵ The Receiver did not send a second notice to the class members about the Addendum, per SCRCF Rule 23(c), which would have been inexplicable if he believed he was going to pursue another million dollar recovery 2 years after the settlement was approved. (Taillon Br. 15.) Basic fiduciary principles required him to inform the class they were going to keep waiting while he litigated in Florida. That never happened. Instead, the Receiver allowed the 640 class members to assume the GSA brought about the end of the case, allowing him to finally wind up the affairs of CIF in early 2018 and distribute the settlement proceeds to the noteholders.

Perhaps the most compelling proof that the Receiver released the right to enforce any future civil judgment is the handling of the approval of the GSA by Judge Miller. Judge Miller expressly stated in his approval order that the Addendum “**does not affect any other party to the GSA other than Arthur Field.**” (R. 82 (emphasis added).) He approved the Addendum following a hearing at which none of the other 21 GSA parties were present, without notice to the class

⁵ Had the Addendum been intended to increase the Receiver’s settlement proceeds by the amount of unpaid restitution at the end of Field’s period of probation, such a change would have materially altered the GSA. Yet the Receiver provided no new consideration for the Addendum. This would render the Addendum *nudum pactum* – unenforceable for want of consideration. *Sanders v. Bagwell*, 32 S.C. 238, 10 S.E. 946 (1890) (addendum materially changing the original agreement but not supported by consideration was *nudum pactum* and thus unenforceable); *Margeson v. Artis*, 776 N.W.2d 652 (IA 2009) (addendum not supported by new consideration was unenforceable). 17A C.J.S. Contracts §411(1999).

members, and based on an Addendum drafted by the Receiver's lawyers but not circulated in advance to any other parties. Judge Miller literally had to order copies made during the hearing. (R. 251-54.) He then simply ordered all 21 original signatories to the GSA to sign the Addendum. (R. 32.) Despite this demand, the Addendum remains unsigned by various parties and counsel.⁶ (R. 170-84.) This renders it unenforceable under both Rule 23(c), SCRCP, and Rule 43(k), SCRCP. *See, S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 519-21, 846 S.E.2d 861, 866-67 (2020) (finding that "substantial compliance" with Rule 43(k) is not enough and that signatures of all parties and counsel are required by the Rule). *Accord, Lucas v. State Farm Mut. Auto. Ins. Co.*, No. 2025-UP-011, 2025 S.C. App. Unpub. LEXIS 14 (Ct. App. Jan. 15, 2025).

If the Addendum contemplated a new revenue source for the Receiver, and somehow, *sub silentio*, carved out that revenue source from the scope of paragraphs 4, 5 and 14(I)(v), Judge Miller's handling of the approval process is inexplicable. SCRCP Rule 23(c) requires notice to class members of the material terms of a settlement. The GSA 'defendant' signatories would have lost the consideration they bargained for in the original GSA pursuant to an Addendum they never signed, approved without notice to them. This is not the sort of change to which Judge Miller could simply demand everyone agree. And when he became aware that almost all the parties did not agree, he would not have been free to proceed as though they had. Thus, Judge Miller's contemporaneous actions in approving the GSA and Addendum strongly indicate that all the parties understood the Receiver was releasing all claims against Field, including the right to enforce any future civil judgment arising from unpaid restitution.

⁶ Those not signing included Taillon and her attorney, Class Counsel Connell and all the other 'defendant' parties and their attorneys including all the *pro se* parties. 19 of 23 signatures missing.

To summarize, if the Addendum merely updated the GSA to acknowledge the Attorney General's entitlement to handle any unpaid restitution as he saw fit pursuant to the relevant statute, the failure to obtain all party signatures, and failure to hold a second class notice hearing, would not matter. The Addendum merely acknowledged a legal reality: the settling parties had no control over the Attorney General. However, if the Addendum adjusted the substantive rights of the parties by carving out a future civil judgment from the claims released, as the Panel Opinion holds, it was void under Rules 23(c) and 43(k).

The Panel Opinion also failed to acknowledge or address several significant problems with the civil judgment itself. The October 2018 judgment was inexplicably entered *ex parte* in favor of the Receiver, contrary to the statements in Judge Maddox's November 2017 Order making clear that the civil plaintiffs and the restitution beneficiaries were two distinct groups. (R. 80 ("some" of civil plaintiffs "are the victims in this criminal action"); R. 81 (the civil plaintiffs "represent some of the victims").) The Receiver was not the "victim" in the criminal case, nor was CIF. Nothing in the November 2017 Order suggested in any way that the contemplated civil judgment would be entered in favor of the Receiver without a hearing or notice to Field, the denial of which was a clear due process violation.

Moreover, the 2018 judgment was plainly entered in violation of the statutory requirements. First, the defendant must be in default in making restitution payments to trigger the civil judgment provision. S.C. Code § 17-25-323(B). Field was not in default. Rather, having been found in violation of his probation due to a contempt citation procured by the Receiver, he was serving a portion of his active sentence. A civil judgment may not be entered when the defendant is serving his active sentence. *State v. Gulledge*, 321 S.C. 399, 405, 468 S.E.2d 665, 669 (Ct. App. 1996). Moreover, Field's monthly restitution payments had been suspended in lieu

of paying his obligations under the GSA (R. 85-86). Thus, there was no instance of default to trigger the civil judgment provision of the statute.

It is also apparent that issuing a civil judgment in favor of the Receiver rather than the actual victims was impermissible under the statute. The relevant language provides that the court must enter “judgment in favor of each person entitled to restitution for the unpaid balance if any restitution is ordered plus reasonable attorney's fees and cost ordered by the court.” S.C. Code § 17-25-323(B)(2). The Receiver was not a victim. By issuing the entire judgment in favor of the Receiver, Judge Maddox placed defendant CIF’s lawyers in a position to control the amount, timing and nature of any recovery by the victims in the criminal case, in violation of the statute.

Because the Panel ignored Appellants’ arguments about the defects of the civil judgment, its status is unclear. Those same arguments will have to be litigated in Florida, which makes little sense if the very purpose of this proceeding is to resolve questions of South Carolina law. The Panel Opinion should be clarified to address the legal defects afflicting the Addendum and the civil judgment. Without such clarification, the Florida court will be faced with numerous questions of South Carolina law that have not been resolved here.

CONCLUSION

For the reasons set forth herein, Appellants respectfully request the Panel Opinion be withdrawn and this matter set for rehearing or rehearing en banc.

/s Jeffrey P. Dunlaevy
Jeffrey P. Dunlaevy (SC Bar No. 19678)
Dunlaevy Law Firm
37 Villa Road, Suite 440
Greenville SC 29615
864.208.9305
Counsel for Appellant Kathryn Taillon

Micajah P. Caskey, IV (SC Bar No. 100350)
Caskey Law Firm, P.A.
146 State Street
West Columbia, South Carolina 29169
Phone: 803-724-3624
Counsel for Appellant Arthur M. Field

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

Case No. 2008-CP-23-3665

PROOF OF SERVICE

I certify that I have served the following on the below-listed Counsel of Record by electronic mail on February 12, 2025: Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc.

February 12, 2025

s/ Jeffrey P. Dunlaevy
Jeffrey P. Dunlaevy (SC Bar No. 16978)
Dunlaevy Law Firm
37 Villa Road, Suite 440
Greenville SC 29615
864.208.9305

Counsel Served:

Micajah P. “Micah” Caskey, IV
micah@caskeylawfirm.com

George Brandt, III
gbrandt@hbvlaw.com

Stanley T. Case
scase@butlermeans.com

Gene M. Connell, Jr.
gconnell@classactlaw.net