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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

The Honorable Derham Cole, Circuit Court Judge

Appellate Case No. 2023-000155
Ct. App. Opinion No. 2025-UP-192
Court of Common Pleas No. 2019-CP-23-06915

Richard D. White ..... Petitioner,

v.

FT Acquisitions, LLC, Commercial Food Service Repair, and Kurt Herwald ..... Respondents

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PETITION FOR WRIT OF *CERTIORARI*

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ISSUES PRESENTED

***Suggested Answer to All Issues*: Yes.**

1. Did the courts below err in failing to conclude that the denial of a Motion for Summary Judgment by one judge forecloses the grant of a second motion for summary judgment on the same grounds and evidence by another judge?

2. Did the courts below err in granting summary judgment based on a release where the contractual language and evidence created an issue as to whether the release was intended to encompass non-employment claims?

3. Did the courts below err in applying the "tender back" rule to grant summary judgment as to a fraud in the inducement claim where the record did not definitively establish that all consideration in the underlying agreement was in exchange for the release of claims?

4. Did the courts below err in granting summary judgment on Defendants' counterclaims where: (a) there is no evidence that Mr. White breached the terms of the release; and (b) the evidence showed that Mr. White had not been provided the notice required by the Subordination Agreement?

STATEMENT OF THE CASE

A. Factual Background Relevant to This Petition

This lawsuit involves a commercial dispute between Plaintiff-Petitioner Richard D. White ("Mr. White") and Defendants-Respondents FT Acquisitions, LLC ("FTA"), Commercial Foodservice Repair, Inc.[1] ("CFR"), and Kurt Herwald ("Herwald") (collectively "Defendants"). Mr. White was in the food equipment and repair industry for nearly thirty years and became the majority shareholder of Foodservice Technologies, Inc., d/b/a Tech24, around 1998. (*See* R. p. 619). In 2014, Mr. White was approached by a business broker, who expressed Herwald's interest in acquiring Tech24 to expand on the services offered through his company Commercial Foodservice Repair, Inc. (*See* R. pp. 640-41). After several months of negotiations, Mr. White decided to step away from the ownership side of the industry that he had been a part of for his entire adult life and agreed to a sale to Herwald. (*See id.*). Mr. White and Herwald ultimately agreed to a purchase price of fourteen million dollars, with thirteen million dollars paid in cash at

[1] This party was originally misnamed as "Food Service Repair, Inc."

closing and the remaining one million dollars being paid in accordance with a certain Junior Subordinated Promissory Note ("Note"). (*See* R. pp. 646, 842-46). The Note provided that FT would pay Mr. White equal monthly installments of $18,871.24 for a period of five years, with the final payment on August 1, 2019. (*See* R. pp. 842-46). Mr. White understood that the Note made the payment of the one million dollars subordinate to two superior lenders, PNC Bank and Leeds Novamark Capital, L.P. (*See* R. pp. 653-54). On or about November 2, 2015, 16 months after the sale of the business, Defendants entered into two new credit agreements ("Credit Agreements") with: (1) Fifth Third Bank; and (2) McClarty Capital Partners, LLC. (*See* R. pp. 860-1224). Mr. White was *not* a party to either of the Credit Agreements, the terms of which were not enforceable against him and were not contemplated by the Note with Defendants. (*See* R. p. 1239). Contemporaneously, Mr. White became a party to a certain Employment Agreement ("Employment Agreement"), under which he agreed to continue serving as Vice President of Operations. (*See* R. pp. 687-88). Between July 2014 and July 2017, Defendants made all required payments under the Note to Mr. White. (*See* R. p. 673). In 2017, Mr. White began hearing that manufacturers and vendors were placing Tech24 on credit holds due to ongoing invoicing issues. (*See* R. pp. 774-75). By August of 2017, Defendants missed their first Note payment; however, understanding that CFR was experiencing normal cash flow issues, Mr. White did not press the issue with Herwald. (*See* R. p. 650). When Defendants failed to pay in September, 2017, Mr. White sought answers, but believed that it had been the result of an error. (*See* R. pp. 650-51). When the director of CFR's accounts payable department told Mr. White that she was instructed to put a payment hold on his monthly Note payments, he discussed the issue with Herwald directly. (*See* R. p. 650). Herwald informed Mr. White that there was a slight issue getting a credit line renewed and that the cash flow issue would be resolved soon. (See R. p. 651). Mr. White accepted Herwald's representations and made no further issue.

Around this time, when Herwald approached Mr. White about investing in CFR and having a small equity interest in the company. (*See* R. p. 719). Despite missing two Note payments, Herwald assured Mr. White that CFR's cash flow issues were the result of a delay in CFR's credit

line renewal, coupled with software integration issues that had plagued CFR for a number of months. (*See id.*). Having experienced the same issues in earlier years, Mr. White reasonably relied upon Herwald's representations. (*See id.*). On September 11, 2017, Mr. White invested $550,000.00 in CFR. (*See* R. p. 789).

In the ensuing months, tensions rose due to what Mr. White viewed as the inability of management to see eye-to-eye on the daily operations of the business. (*See* R. p. 754). When Mr. White realized that he was not being given proper latitude in the operations of CFR, he told Herwald to either give him chief operating officer authority or he would resign. (*See* R. p. 769). Herwald was unwilling to do this, so Mr. White formally resigned his employment with CFR. (*See* R. p. 776). On November 29, 2017, Mr. White executed a General Waiver and Release Agreement ("November 29, 2017 Agreement"), which memorialized the conclusion of the employment relationship between Mr. White and CFR. (*See* R. pp. 792, 1329-35). Contemporaneously, Herwald continued to assure Mr. White that he would work diligently to resume payments on the Note. (*See* R. pp. 776-77).

On January 23, 2018, Mr. White received a troubling Notice to Shareholder correspondence from CFR which detailed CFR's current default status on nearly $20 million owing to McClary and Fifth Third. (*See* R. pp. 1336-37). This was the first time Mr. White learned that CFR was in default as to those lenders and the first time he realized that Herwald had fraudulently induced him into investing $550,000 in an insolvent company. More alarmingly, the Shareholder Notice's acknowledged that Herwald knew about CFR's material default back in June, 2017, nearly three months before Herwald solicited Mr. White's investment. However, Herwald concealed that information when discussing the possibility of Mr. White investing in CFR.

B. Procedural History

1. Pleadings

Mr. White commenced this action on November 26, 2019 by filing his Complaint and Summons. (*See generally* R. pp. 39-51). On February 10, 2020, Defendants filed their Answer to Complaint and Counterclaims. (*See generally* R. pp. 52-101). On March 9, 2020, Mr. White

amended his Complaint as a matter of right. (*See generally* R., at 102-13). On March 24, 2020, Defendants filed their Answer to Amended Complaint and Counterclaims. (*See generally* R. pp. 124-78). On June 3, 2020, Mr. White filed his Answer to Defendants' counterclaims.[2] (*See generally* R. pp. 179-87).

On July 19, 2021, Mr. White filed his Second Amended Summons and Complaint. (*See generally* R. pp. 190-206). In his Second Amended Complaint, Mr. White asserted the following substantive causes of action: (1) Breach of Contract; (2) Breach of Contract Accompanied by a Fraudulent Act; (3) Fraud in the inducement—General Waiver and Release Agreement; (4) Violation of South Carolina Uniform Securities Act of 2005.[3] (*See* R. pp. 199-205). On August 3, 2021, Defendants filed their Answer to Second Amended Complaint and Counterclaims. (*See generally* R. pp. 207-49). Specifically, Defendants asserted counterclaims against Mr. White sounding in: (1) Breach of Contract – General Waiver and Release Agreement and (2) Breach of Subordination Agreement. (*See* R. pp. 222-29). On August 31, 2021, Mr. White filed his Answer to Defendants' counterclaims. (*See generally* R. pp. 250-56).

2. <u>Defendants' Serial Summary Judgment Motions</u>

On June 5, 2020, Defendants filed a Motion for Summary Judgment ("First Motion for Summary Judgment") relying in part on the fact that Mr. White was then in default as to the initial counterclaims against him. On July 21, 2020, Defendants filed a Memorandum in Support of Their Motion for Summary Judgment. (*See generally* R. pp. 291-95). Because, at that time, the trial court had entered a default against Mr. White, Defendants based this First Motion on the contention that Mr. White had admitted the allegations of the first counterclaims. (*See* R. p. 293 ("When an entry of default is made, the party against whom default is entered admits all of the

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[2] On June 4, 2020, the trial court entered an Order of Default and for Hearing on Damages as to the Counterclaims. (*See generally* R. pp. 1-3). On July 24, 2020, the trial court entered a Form 4 Order granting Mr. White's request to set aside the default for good cause. (*See generally* R. pp. 4-6).

[3] Mr. White's First Amended Complaint also asserted claims sounding in fraud in the inducement (as to the Promissory Note), fraud, and intentional misrepresentation. (*See* R. pp. 112-16).

well-pleaded allegations of the pleading. . . . The above admissions are fatal to each and every cause of action raised in White's Complaint.")). Specifically, Defendants contended that the November 29, 2017 Agreement barred Mr. White's claims because they arose after the date of that agreement. (*See* R. p. 294 ("Accordingly, each of the alleged events which serve as a basis for Plaintiff's causes of action occurred on or before November 29, 2017. Thus, the scope of the General Release Agreement covers all claims raised in White's Amended Complaint.")). Because the Honorable Perry H. Gravely granted Mr. White relief from default, he also denied Defendants' First Motion for Summary Judgment. (*See* R. p. 5 ("Since the Defendants' Motion for Summary Judgment and Damages were based on the default, these Motions are denied.")).

On March 10, 2021, Defendants filed another Motion for Summary Judgment ("Second Motion for Summary Judgment"), asserting that "[t]he parties have conducted written discovery, exchanged documents, and conducted depositions of Plaintiff and Defendants" and that based on the information obtained in discovery, "there are no genuine issues of material fact on any of White's claims or on Defendants' counterclaims against White."[4] (*See* R. p. 299). On May 14, 2021, Defendants filed their Memorandum in Support of their Second Motion for Summary Judgment, with numerous exhibits. (*See generally* R. pp. 301-445). In their 24-page memorandum, Defendants argued that: (a) the November 29, 2017 Agreement barred Mr. White's claims; (b) Mr. White did not create a genuine issue of material fact as to his fraud claim relating to the November 29, 2017 Agreement; and (c) by bringing this lawsuit, Mr. White violated the terms of the November 29, 2017 Agreement and the Subordination Agreement. (*See* R. pp. 309-24). The parties engaged in extensive briefing and oral argument on the Second Motion for Summary Judgment. (*See generally* R. pp. 2693-92). After analyzing and considering all of this information, in a Form 4 order signed on May 28, 2021, the Honorable R. Scott Sprouse denied Defendants' Second Motion for Summary Judgment (R. pp. 7-9). (*See* R. p. 7). Tellingly,

[4] On March 8, 2021, Mr. White filed his own Motion for Summary Judgment.

Defendants did not move for reconsideration of Judge Sprouse's Order or ask him to alter or amend that Order.

Nearly a year later, on April 6, 2022[5] (on the eve of trial[6]), Defendants filed yet another Motion for Summary Judgment ("Third Motion for Summary Judgment"). (*See generally* R. pp. 1556-63). The Third Motion for Summary Judgment asserts that "White's third claim [in the Second Amended Complaint] for 'fraud in the inducement – General Release' was not included in the original Complaint or the Amended Complaint." (*See* R. p. 1557). With regard to that cause of action (and the other claims), Defendants asserted in the Third Motion for Summary Judgment that "[b]y retaining the benefits received under the General Release (specifically including the $300,000 Severance Payment), White, as a matter of South Carolina law, affirmed the General Release and waived all the claims he raised in this action." (*See* R. p. 1559). On April 29, 2022, Defendants filed their Memorandum in Support of their Third Motion for Summary Judgment. (*See* R. pp. 1564-1706). A careful comparison between Defendants' Memorandum in Support of their Second Motion for Summary Judgment and Memorandum in Support of their Third Motion for Summary Judgment is telling. By and large, Defendants make the exact same arguments in those memoranda and cite the same evidence and law. The only substantive differences are the inclusion of arguments that: (a) Mr. White's fraudulent inducement claim as to the November 29, 2017 Agreement were barred by the "tender back" rule.[7] (R. pp. 1572-75); and (b) the fraudulent inducement claim fails because there was no issue of fact regarding the making of a fraudulent representation (R. pp. 1583-1586). Aside from these limited differences, the arguments made in Defendant's Third Motion for Summary were identical to the arguments Judge Sprouse rejected

[5] On July 19, 2021 (nearly nine months before the Third Motion for Summary Judgment), Mr. White filed his Second Amended Complaint, which deleted some claims and added a cause of action for fraud in the inducement as to the November 29, 2017 Agreement. (*See* R. pp. 200-03).
[6] (*See* R. p. 1557 ("This matter is currently fourth on the trial roster for the May 31, 2022 term of court.")).
[7] In connection with this argument, Defendants attached the Affidavit of Kurt Herwald, which stated that Mr. White had received and not returned the full $300,000 severance payment. (*See* R. pp. 1562-63). This is the *only* new evidence in the Third Motion for Summary Judgment.

in denying the Second Motion for Summary Judgment and were based on the same evidence and law.

The parties argued the Third Motion for Summary Judgment before the Honorable J. Derham Cole on May 9, 2022. (*See generally* R. pp. 2693-2757). Mr. White's counsel highlighted that most of the Third Motion for Summary Judgment had ***already been decided***:

> Your Honor, I think it's extremely important to note that Mr. Schanen [Defendants' counsel] 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.

(*See* R. p. 2713:9-22). Mr. White's attorney further accurately argued: "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." (*See* R. p. 2719:1-4 (emphasis added)).

On August 22, 2022, Judge Cole entered a Form 4 Order expressing his intention to grant Defendants' Third Motion for Summary Judgment. (*See* R. p. 10). On September 14, 2022, Judge Cole entered a formal Order Granting Defendants' Motion for Summary Judgment. (*See* R. pp. 12-36). Judge Cole ruled "that Defendants are entitled to summary judgment on all of White's claims because (1) White's first, second, and fourth claims were released through White's execution of the General Release, and (2) White's third claim (for fraudulent inducement of the General Release) is barred by South Carolina's 'tender back' rule, and separately fails because White has failed to create a genuine issue of material fact." (*See* R. p. 17). The Court also granted summary judgment in Defendants' favor on their counterclaims. (*See* R. pp. 31-35). Notably,

Judge Cole's Order did not address the argument that Judge Sprouse's denial of the Second Motion for Summary Judgment precluded Defendants' Third Motion for Summary Judgment.

On September 24, 2022, Mr. White filed a Motion to Alter or Amend (R. p. 1707) and Memorandum in Support thereof (R. pp. 1708-2598). In that Motion to Alter or Amend, Mr. White posited: "The third summary judgment motion only serves to pit one Greenville County judge (or, as was in the case in the second Motion for Summary Judgment, a visiting judge) against another. It is well settled that there is a 'general rule prohibiting one circuit court judge from overruling another.'" (*See* R. p. 1715). Mr. White further aptly noted that "Defendants merely wanted another bite at the proverbial apple that Judge Sprouse denied them." (*See id.*). Mr. White's Motion to Alter or Amend further argued, *inter alia,* that the November 29, 2017 Agreement was not a bar to Plaintiff's claims and that the "tender back" doctrine did not apply. (*See* R. pp. 1722-35). Judge Cole denied Mr. White's Motion to Alter or Amend on January 13, 2023. (*See* R. pp. 37-38).

3. The Appeal

On January 3, 2023, Mr. White timely appealed Judge Cole's August 21, 2022, September 12, 2022, and January 13, 2023 Orders to the South Carolina Court of Appeals. On June 11, 2025, the Court of Appeals filed its unpublished Opinion (Opinion No. 2025-UP-192) affirming Judge Cole's orders. On June 26, 2025, Mr. White filed his Petition for Rehearing. The Court of Appeals denied Mr. White's Petition for Rehearing on August 14, 2025. For the following reasons, this Court should grant *certiorari,* reverse the Court of Appeals' decision, and vacate the summary judgment entered against Mr. White.

ARGUMENTS

This Court may grant *certiorari* in appropriate cases, such as "[w]here there are novel questions of law" or "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." *See* S.C.R. App. P. 242(b). For the reasons that follow, this case presents important and novel questions that warrant this Court's examination for the benefit of providing clarity to litigants and attorneys practicing in South Carolina.

A. The Court Should Resolve an Important, Novel Legal Question and Clarify That Rule 43(*l*) and Other Authority Prohibit Serial Motions on Identical Grounds.

Nearly 150 years ago, this Court wrote that a Circuit Court "judge may sometimes reconsider his own orders, but all the authorities agree as to the general doctrine, that the decision of one judge is not subject to be reviewed by another." *See Steele v. Charlotte, Columbia & Augusta R.R.*, 14 S.C. 324, 330 (1880). Unfortunately, Judge Cole ignored this settled principle and granted a summary judgment motion that was nearly identical to a motion that another circuit judge denied a year before. To compound matters, the Court of Appeals affirmed—in an unpublished opinion without oral argument—stating that "the circuit court did not abuse its discretion in granting Respondents' renewed motion for summary judgment." (*See* June 11, 2025 Opinion, at 2). For the reasons that follow, both courts erred in applying South Carolina law in an important way.

As discussed below, governing authority is directly contradictory to Judge Cole's and the Court of Appeals' grant of summary judgment. This Court should grant *certiorari* to correct this misapplication of the law and to provide guidance to attorneys about the circumstances under which a second summary judgment motion before a different judge is permissible. This issue is of great importance, and the bar would benefit from the Court's clarification of when multiple summary judgment motions are permissible.

Specifically, the Court should clarify that, when one judge denies a motion for summary judgment, a party may not file another motion and ask a different judge to overrule the first judge's decision, making identical arguments and citing identical evidence. If the decisions of Judge Cole and the Court of Appeals are allowed to stand, practitioners could argue that they are justified in taking second, third, and fourth bites at the summary judgment apple in the hope of finding a sympathetic judge. That is plainly not consistent with well-settled law protecting Circuit Judges from being second-guessed by their colleagues. If this Court does not intervene, there is a danger that it may encourage multiple identical summary judgment motions to become the norm.

"This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); *accord Rice v. Doe*, 442 S.C. 160, 164, 898 S.E.2d 127, 129 (2024) ("'One Circuit Court Judge does not have the authority to set aside the order of another.'") (*quoting Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986)). Stated otherwise, "the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases where the right to do so has been reserved to the succeeding Judge, when it is allowed by rule or statute, or when the subsequent order does not substantially affect the ruling or decision represented by the previous order." *See Sauner v. Public Serv. Auth. of S.C.*, 354 S.C. 397, 410, 581 S.E.2d 161, 168 (2003) (*quoting Dinkins v. Robbins,* 203 S.C 199, 202, 26 S.E.2d 689, 690 (1943)).

Consistent with this, the Rules of Civil Procedure make explicit that: "[i]f any motion be made to any judge and be denied, . . . ***no subsequent motion upon the same state of facts*** shall be made to ***any other judge*** in that action." *See* S.C.R. Civ. P. 43(*l*) (emphasis added). Notwithstanding Rule 43(*l*), "[t]he fact that a different trial judge previously denied a motion for summary judgment does not preclude the moving party from renewing its motion ***once new evidence is gathered***." *See Smith v. Breedlove*, 377 S.C. 415, 421, 661 S.E.2d 67, 70 (2008) (emphasis added). As this Court has held, this exception to Rule 43(*l*) requires a substantial factual change between the first and second motions. *See id.* at 421, 661 S.E.2d at 70-71 ("The rule requires a different 'set of facts,' which were established due to the substantial amount of discovery that occurred after Breedlove's first summary judgment motion.").

Nothing in the Rules of Civil Procedure permits one judge to overrule another judge's denial of summary judgment. To the contrary, if anyone had the authority to undo Judge Sprouse's denial the Second Motion for Summary Judgment, it was *only* Judge Sprouse. For example, Rule 59, which governs motions for new trials or to alter or amend a judgment, expressly requires that "[a] party filing a written motion under this rule shall provide a copy of the motion ***to the judge*** within ten (10) days after the filing of the motion." *See* S.C.R. Civ. P. 59(g). This rule plainly

envisions the same judge reconsidering his prior ruling. Similarly, Rule of Civil Procedure 54(b) provides that (emphasis added):

> In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is ***subject to revision*** at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Again, this Rule does not permit a second attempt at summary judgment; it only gives judges the discretion to revise their own rulings. Simply put, there is nothing in the South Carolina Rules of Civil Procedure that authorized Judge Cole (or the Court of Appeals) to disregard Rule 43(*l*).

The Second and Third Motions for Summary Judgment predominantly raised identical arguments and relied on identical evidence—aside from those relating to the tender back rule and the fraudulent inducement claim.[8] Both referenced the same deposition testimony and documents. Defendants presented no new evidence justifying the grant of the Third Motion for Summary Judgment on any issue other than the tender back rule. Defendants did not argue that there was an intervening change in the law. Defendants presented nothing whatsoever that would allow Judge Cole to substitute his judgment for Judge Sprouse's. *See Crosswell Enterps. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) ("The ground for Arnold's original motion for summary judgment was that the transfer from Southern to Arnold was not a 'bulk transfer' within the meaning of the Act. The ground for the later motion to dismiss was that a creditor's sole remedy under the Act is to disregard the transfer and levy on the goods in the hands of the transferee. Thus, the original motion was decided on a different ground from the later motion."). If Defendants disagreed with Judge Sprouse's denial of summary judgment, they should have (within

[8] This argument would only be relevant to Mr. White's claims to the extent he argued that the Release was void or voidable because of fraud in its inducement. The tender back rule would not have had any application to Judge Sprouse's ruling that summary judgment was improper as to Mr. White's claims of breach of contract, breach of contract accompanied by a fraudulent act, and violation of the South Carolina Uniform Securities Act of 2005. Additionally, the tender back argument did not apply to Judge Sprouse's denial of summary judgment as to Defendants' counterclaims.

ten days of his ruling) moved to ask *him* to reconsider. There is nothing in the law that would allow them to wait nearly a year and (on the eve of trial) take another swing with new judge.

The Court of Appeals' Opinion cited three cases to support the conclusion that Defendants' *Third* Motion for Summary Judgment was not foreclosed by Judge Sprouse's denial of the *Second* Motion for Summary Judgment (which raised the same issues and evidence, save the "tender back" argument as to fraud in the inducement):

> *Blyth v. Marcus*, 335 S.C. 363, 366, 517 S.E.2d 433, 434 (1999) ("A defendant can bring a subsequent summary judgment motion after his first motion had been denied."); *id*. at 367, 517 S.E.2d at 434 ("The rationale behind these cases is that the denial of a motion for summary judgment is an interlocutory decision which the trial judge can reconsider until the end of the trial."); . . . [*Dorrell v. South Carolina Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) ("That a different [circuit court] judge previously denied the motion [does] not preclude [a party] from renewing its motion once new evidence came to light."); *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict.").

However none of the cases support the Court of Appeals' affirmance of summary judgment.

For example, in *Blyth*, the first motion for summary judgment argued that the statute of limitations had run and that the tolling statute was repealed by the Rules of Civil Procedure. The second motion argued that the statute of limitations had run and that the tolling statute *was unconstitutional*. On appeal, this Court wrote "we hold appellant was not barred from challenging *the validity of the tolling statute* by way of a subsequent summary judgment motion." *See Blyth*, 335 S.C. at 367, 517 S.E.2d at 434 (emphasis added). In other words, the granting of the second motion (constitutionality under the Commerce Clause) was based on a ground *different* from the first motion (repeal by the Rules of Civil Procedure). In this case, however, the Second and Third Motions for Summary Judgment are, in most respects, identical—making the same arguments and relying on the same evidence. The only material difference was the addition of an argument under the "tender back" rule, an argument that limited to the fraud in the inducement claim. *Blyth* is inapposite.

Similarly, in *Dorrell*, the party's first summary judgment motion argued that it was not contractually authorized to rebuild, repair, or maintain the shoulder at issue. Two months before trial, that defendant filed a second summary judgment motion, reiterating its prior arguments, but including *two additional pieces of evidence*: the deposition testimony of an expert and SCDOT's responses to its requests for admission. The trial judge granted the motion "[b]ased on this new evidence." *See Dorrell*, 361 S.C. at 317, 605 S.E.2d at 14. On appeal, this Court affirmed the grant of summary judgment, permitting the filing of a second motion for summary judgment "once new evidence came to light." *See id.* at 325, 605 S.E.2d at 18.

In *Ballenger*, this Court did not even consider a second summary judgment motion. Rather, that case involved a motion to dismiss an appeal from the denial of summary judgment because such orders are typically not appealable. The Court dismissed the appeal, reaffirming that the *denial* of summary judgment is typically not a final appealable order. In support of its conclusion, this Court observed that the denial of summary judgment "does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to ***reconsider the summary judgment*** motion or by a motion for a ***directed verdict***." *See Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380 (emphasis added). This statement by the Court is consistent with Mr. White's arguments. Mr. White does not dispute that *Judge Sprouse* could have changed his mind and later granted summary judgment; however another judge could not interpose his view on the same motion. Additionally, Mr. White does not dispute that a motion for directed verdict at trial would be proper on the same grounds as a denied summary judgment motion, because at the directed verdict stage, the Court is presented with a completely different factual record (*i.e.,* the evidence admitted and the testimony presented at trial). None of the cases cited in the Court of Appeals' Opinion support its conclusion.

For the foregoing reasons, it is beyond doubt that South Carolina law does not support the rulings of Judge Cole or the Court of Appeals. To the contrary, decades of South Carolina expressly prohibit what occurred here.

B. The Court Should Grant *Certiorari* and Reverse the Grant of Summary Judgment as to Mr. White's Claims Because They Were Not Encompassed by the November 29, 2017 Agreement.

Even if Defendants could have filed serial motions for summary judgment making the same arguments based on the same evidence, at the very least, the November 29, 2017 Agreement was ambiguous and the evidence created an issue of fact as to whether it barred the claims at issue. The courts below relied on the following language: "[Mr. White] releases, acquits, and forever discharges the Company . . . from any and all actions, causes of action, claims, demands, losses, claims for attorneys' fees, and all other forms of civil damages, occurrences, and liabilities of any kind whatsoever, both known or unknown, arising out of any matter, happening, or thing, from the beginning of time to the date of this Agreement is signed by Executive." (*See* R. pp. 2014-15 ¶ 3). However, when the language of the November 29, 2017 Agreement is read as a whole, it appears that the intent of the parties was to release only employment-related claims.

"In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Southern Atl. Fin. Servs., Inc. v. Middleton,* 349 S.C. 77, 80-81 (Ct. App. 2002) (citation omitted). This Court must apply the language in a contract if it is unambiguous as a matter of law and, if not, allow the jury to construe it if it is ambiguous. *See Soil Remediation Co. v. Nii-Way Envt'l.,* 325 S.C. 231, 234 (1997) ("Although as a general rule contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to jury." (citation omitted)).

"'Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract.'" *See Silver v. Aabstract Pools & Spas, Inc*., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (*quoting Farr v. Duke Power Co*., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975)). "Further, in determining the intent of the contracting parties, the court should construe the contract as a whole, and read together different provisions dealing with the same subject matter." *Buice v. WMA Sec., Inc*., 380 S.C. 149, 157, 668 S.E.2d 430, 434 (Ct. App. 2008).

Even if Defendants were permitted to assert their Third Motion for Summary Judgment asking Judge Cole to reverse Judge Sprouse's previous denial of summary judgment on the same grounds and record, the lower courts plainly erred in determining that there were not questions for the jury as to the parties' intent in the November 29, 2017 Agreement. There was at least sufficient evidence to warrant a jury trial as to whether the November 29, 2017 Agreement's release language was limited to employment-related claims.

Read as a whole—and not merely focusing on specific words in the release language in isolation—there is at least a genuine issue of material fact as to the parties' intentions. There is significant textual evidence in the November 29, 2017 Agreement to support that the contract focused on the termination of Mr. White's employment and was not intended to govern claims under the Note, securities claims relating to Mr. White's investment in CFR, or other claims relating to the sale transaction. Indeed, the November 29, 2017 Agreement refers to Mr. White as "Executive" in its text, rather than as "Executive-Investor"; the November 29, 2017 Agreement does not reference the sale transaction or the Note. The November 29, 2017 Agreement was specifically contemplated in Mr. White's Employment Agreement. (R. p. 1675). The November 29, 2017 Agreement provided for "Severance/Non-Compete Payments" totaling $300,000 during the three-year non-compete period. (*See id.*¶ l(a)).

Similarly, Paragraph 4 of the November 29, 2017 Agreement was a covenant not to sue specifically focused on "any lawsuit against the Company arising out of or in connection with the employment relationship previously existing between them or the termination of that relationship." (*See* R. p. 1676). Additionally, that provision includes Mr. White's statement that he "has no claims pending or filed with any local, state or federal agency (including the U.S. Equal Employment Opportunity Commission, the U.S. Department of Labor, and any comparable state or local administrative agency) or court against the Company." (*See id.* ¶ 4).

Paragraph 8 of the November 29, 2017 Agreement further "re-affirm[ed]" Mr. White's employment-related non-competition obligations, which were "not intended to be, and shall not be, superseded or impaired by this Agreement." (*See* R. p. 1677 ¶ 8). Under that provision,

Mr. White reaffirmed his covenants not to compete or solicit, as well as his promises of confidentiality, ownership of developments, and return of property, all of which were contained in his Employment Agreement. (*See id.*). The November 29, 2017 Agreement also preserves Mr. White's right to bring discrimination charges with the EEOC and similar agencies (though he released claims for damages). (*See id.* ¶ 5). Paragraph 6 requires that Mr. White be available during the severance period to respond to inquiries concerning business matters. (*See id.* ¶ 6).

Even the language of the release provision of the November 29, 2017 Agreement (Paragraph 3) supports that it is intended to have a more focused scope. Initially, Paragraph 3 of the November 29, 2017 Agreement is not a garden variety release; it is much longer and more complex. Among other things, it specifically identifies nearly 20 statutes or other laws under which Mr. White was releasing claims; ***all*** of those laws related to employment related claims (*e.g.,* Title VII of the Civil Rights Act of 1964). (*See* R. p. 1677). Paragraph 3 additionally contains the following employment-related language:

> 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.
>
> Without waiving any prospective or retrospective rights under the Fair Labor Standards Act ("FLSA"), Executive admits that he has received from Company all rights and benefits, if any, potentially due to him pursuant to the FLSA. Executive states that he is aware of no facts (including any injuries or illnesses) which might lead to his filing of a workers' compensation claim against Company.

(*See id.*).

In addition, the underlying context of the execution of the November 29, 2017 Agreement creates at least a scintilla of evidence that the parties did not intend for it to extend to encompass claims involving the Note. (*See* R. p. 604). The same day that Mr. White and Herwald signed the November 29, 2017 Agreement —which the courts below held also released claims regarding amount due under the Note—Herwald emailed Mr. White stating that "interest payments [under the Note cannot resume] until we clear the hold with MCP. That is the terms of their notes and

yours." (*See* R. p. 1411). Even later, in February 2019, Herwald told Mr. White that he had asked McLarty for permission for him "to reinstate payments" to Mr. White under the Note, but that McLarty was "holding fast in its ability to block." (*See* R. p. 1268). If, as Defendants now contend, the parties intended that the November 29, 2017 Agreement released any claims under the Note, certainly Herwald would not have made statements about making payments under the Note after the release was executed. Those admissions support that the parties intended that the November 29, 2017 Agreement only related to employment-related claims and had no bearing on Mr. White's claims (relating to the Note and the sale transaction). (*See* R. p. 1641 (expressing Mr. White's understanding that "this release only relates to [his] employment")).[9]

For the foregoing reasons, the Court should grant *certiorari* and reverse the entry of summary judgment against Mr. White.

C. The Court Should Grant *Certiorari* and Rule That Summary Judgment Was Improper Under the "Tender Back" Rule.

The Court of Appeals held that Mr. White's "claim for fraud in the inducement of the General Release was barred by the tender back rule. As consideration for the General Release, White received $300,000 in severance payments, which he at no point returned to Respondents." (*See* Ct. App. Opin., at 4). The Court of Appeals based this conclusion on its belief that the November 29, 2017 Agreement "did not indicate the payments applied strictly to the non-compete clause; rather, it stated White agreed [Mr. White] received valuable consideration in exchange for entering the agreement as a whole." (*See id*.). The Court should grant *certiorari* and reverse the Court of Appeals' plainly erroneous decision in this regard.

In the Third Cause of Action of his Second Amended Complaint, Mr. White alleged that Defendants made misrepresentations to induce him to enter into the November 29, 2017 Agreement:

[9] Even as Defendants claim the November 2017 Agreement was a general release of every potential claim by Mr. White against them (including all "liabilities of any kind whatsoever"), they acknowledge the release had some limits. For example, they concede that the supposedly full, general release did not "disposs[ess] White of his shares in CFR." (*See* R. p. 2613).

> 65. Additionally, in the hours leading up to Plaintiff's execution of the aforementioned Release, Herwald repeatedly assured Plaintiff that his Note payments were set to resume at the first of the year, and if it were up to him they would resume immediately.
>
> 66. With Plaintiff's stock certificates in hand, and adequate assurances that Herwald and CFR would be resuming his regularly scheduled Note payments in the very near future, Plaintiff executed the Release and presented the same to Herwald.
>
> 67. However, in an attempt to defraud Plaintiff out of more than half a million dollars remaining to be paid on the Note, and an additional $550,000.00 worth of investments in CFR, Defendants have now taken the very telling position that in getting Plaintiff to execute the Release Plaintiff was actually waiving his rights to demand further payment under the Note and waiving any and all rights he may have to demand a return of his $550,000.00 investment in the company at some later date. This position now comes months after dozens of documented assurances, both before and after Plaintiff ended his employment with Defendants, that Defendants would honor the terms of the Note.

(*See* R. p. 202 ¶¶ 65-67). He alleges that Defendants did so knowing that they would later use the November 29, 2017 Agreement "against Plaintiff at some later date to ensure Defendants were relieved of their obligations under the Note and to relieve Defendants of liability." (*See* R. pp. 202-03 ¶ 69). Mr. White averred that, as a result of the fraudulent inducement to sign the November 29, 2017 Agreement, he sustained "economic harm in the form of actual damages" and that he was entitled to punitive damages. (*See* R. p. 203 ¶ 70).

With regard to fraudulent inducement, South Carolina law permits plaintiffs to pursue a number of alternative forms of relief, including rescission of the underlying contract (in which case the plaintiff is required to return any benefits obtained under the contract):

> [A] party induced to enter a contract by fraud has a choice among causes of action and remedies. If the fraud gives rise to a breach of promise or warranty, he may elect to sue in contract or in tort. *Houston v. Gilbert*, 5 S.C.L. (3 Brev.) 63 (1812). If he sues in contract, he may seek his expectancy damages under the contract or rescission and restitution of the contract price. *Ebner v. Haverty Furniture Company*, 128 S.C. 151, 122 S.E. 578 (1924). At common law, *a party seeking rescission of an executed contract and return of his money must be able to return or tender the benefits he received under the contract*. *Id.*

See Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 472, 309 S.E.2d 763, 766 (Ct. App. 1983) (emphasis added). Under the tender back rule, a plaintiff who retains payments made under a release may not set aside the release:

> We presume that no doubt exists as to the soundness of the general proposition that where a party to a compromise desires to set aside or avoid a release duly entered into and be remitted to his original rights, he must place the other party in *statu[s] quo* by returning or tendering the return of whatever has been received by him under such compromise, if of any value, and so far as possible, any right lost by the other party in consequence thereof. This rule obtains even though the contract of settlement was induced by the fraud or false representations of the other party. The rationale of the doctrine is that by electing to retain the property the party must be conclusively held to be bound by the settlement.

See Taylor v. Palmetto State Life Ins. Co., 196 S.C. 195, 199, 12 S.E.2d 708, 710 (1940); *see also State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 102, 399 S.E.2d 22, 23 (Ct. App. 1990) ("[O]ne who seeks to avoid the effects of a release must first return or tender consideration paid therefore."). For the following reasons, the Court should grant *certiorari* and revered the Court of Appeals' plain error in relying on the tender back rule to enter summary judgment against Mr. White on his fraudulent inducement claim.

First, Judge Cole and the Court of Appeals erred because the evidence and law do not show beyond a genuine issue of material fact that the full $300,000 severance payments were intended to be consideration for the release of claims. This Court has held that "where the party seeking rescission would be entitled in any event to retain the money or the property received, and admittedly due, he need not return or tender back the same as a condition precedent to relief." *See Taylor*, 196 S.C. at 200-01, 12 S.E.2d at 710. The face of the governing documents demonstrates that all of the $300,000 paid to Mr. White was for his commitment not to compete with Defendants; at the very least, the evidence demonstrates that the overwhelming majority of that amount was *not* for the release of Mr. White's claims.

In his Employment Agreement with CFR, Mr. White agreed not to compete with CFR under the following terms:

> During the Employment Period and for a period of three years thereafter, Employee shall not, either on his own account or for any person, firm, partnership, corporation or other entity be engaged in any endeavor, activity or business whose business, products or operations are competitive with or similar to the Business of the Company (as such term is defined in the NON-COMPETITION AGREEMENT of even date) in the area within 100 miles of where Employee worked in a management capacity within the last twelve months of the Employment Period.

(*See* R. p. 852 ¶ 8). Mr. White also agreed not to disclose confidential information or solicit CFR's employees or customers for a period of three years after termination of his employment. (*See id.* 852 ¶¶ 9-10). In the Employment Agreement, the parties agreed that, if CFR terminated Mr. White's employment, upon execution of a "general release acceptable to the Company" he would be paid $100,000 per year for three years "for severance and as compensation for his continued compliance with the terms of this Agreement and the NON-COMPETITION AGREEMENT." (*See* R. p. 850 ¶ 6(d)). While this provision was not technically triggered since CFR did not terminate Mr. White's employment, it demonstrates that Defendants placed a value of $300,000 on Mr. White's reaffirmance of his post-employment promises, including his promise not to compete with Defendants.

The language of the November 29, 2017 Agreement confirms that the $300,000 payments were intended to compensate Mr. White for the reaffirmance of his post-employment promises. In a section headed "Severance/Non-Compete Payments," the November 29, 2017 Agreement provides that "[p]ursuant to Section 6(b) of the Executive's July 28, 2014 Employment Agreement . . . the Company shall pay Executive severance pay in the total gross amount of [$300,000]." (*See* R. p. 1330 ¶ 1(a)). The November 29, 2017 Agreement additionally states:

> ***As a material condition of this Agreement, without which the Company would not enter into this Agreement nor provide the benefits to Executive*** as set forth herein, Executive hereby re-affirms his commitment to honor the covenants set forth In Sections 8 (Non-Competition), 9 (Non-Solicitation), 9 (Confidentiality), 11 (Ownership of Employee Developments) and 12 (Return of Property) of Executive's July 28, 2014, Employment Agreement (inclusive of any and all subsections). Executive further represents and warrants that he has fully complied with each of the above-specified provisions at all times, and acknowledges the validity and reasonableness of each of his promises set forth therein, Executive further acknowledges and agrees that each of the above restrictive covenants, as well as Section 13 (Injunction and Damages), represent continuing obligations that

> survive the termination of Executive's employment and are not intended to be, and shall not be superseded or impaired by this Agreement.

(*See* R. p. 1332 ¶ 8 (emphasis added)). The November 29, 2017 Agreement additionally states that "[o]ther than the Severance/Non-Compete Payments set forth in Section 1 of this Agreement, Executive acknowledges receipt of payment for all wages, salary, benefits, and expenses due to Executive." (*See* R. p. 1330¶ 2). The foregoing provisions of the November 29, 2017 Agreement clarify that the parties intended the $300,000 payments to be severance pay for the reaffirmance of Mr. White's post-employment promises.

On the other hand, the operative releasing language in the November 29, 2017 Agreement does *not* support that Mr. White released claims in exchange for any specific consideration; it certainly does not suggest that CFR paid the full $300,000 for a release of claims. (*See* R. p. 1330-31 ¶ 3). Unlike other provisions of the November 29, 2017 Agreement, Paragraph 3's language does not reference the release being supported by any specific consideration. There is no evidence whatsoever in the record that the parties intended any specific part of the $300,000 payments to constitute consideration for the release.

In light of the foregoing, the Court should grant *certiorari* to reverse the entry of summary judgment as to Mr. White's fraudulent inducement claim.

D. The Court Should Grant *Certiorari* and Reverse the Grant of Summary Judgment as to Defendants' Counterclaims.

1. Alleged Breach of the November 29, 2017 Agreement.

As Mr. White has argued throughout this case, Defendants have not presented any evidence to support that he breached any particular contractual duty under the November 29, 2017 Agreement. As a result, it was obvious error for the Court of Appeals to affirm the grant of summary judgment on that counterclaim.

Paragraph 3 of the November 29, 2017 Agreement states that Mr. White "hereby releases, acquits, and forever discharges" CFR from certain claims. (*See* R. pp. 2014-15 ¶ 3). In this provision, Mr. White did *not* promise not to file a lawsuit against Defendants. To the contrary, the only provision of the November 29, 2017 Agreement in which Mr. White did make such a promise

was limited to circumstances not presented here: "[Mr. White] further agrees that he will not file or participate in any lawsuit against the Company arising out of or in connection with the employment relationship previously existing between them or the termination of that relationship other than one based upon the Company's alleged violation of this Agreement. The foregoing shall be construed as a covenant not to sue." (*See* R. p. 2015 ¶ 4). The claims Mr. White asserted against Defendants did not arise out of the employment relationship and did not relate to that relationship. Rather, Mr. White's claims were focused on Defendants' conduct in connection with sale of the business and failure to fulfill obligations under the Note.

Simply put, neither Defendants, nor Judge Cole, nor the Court of Appeals have cited to any specific provision of the November 29, 2017 Agreement that Mr. White violated. There are, at the very least, genuine issue of material fact for trial as to Defendants' counterclaim under the November 29, 2017 Agreement.

2. <u>Alleged Breach of the Subordination Agreement.</u>

The courts below granted summary judgment against Mr. White on Defendants' counterclaim premised on his alleged breach of the Subordination Agreement because it "prohibited White from filing suit to recover on his Junior Subordinated Promissory Note until the senior debt was satisfied, and White filed the present action before such occurred." (*See* Ct. App. Opin., at 4-5). The Court of Appeals specifically relied on Paragraph 9 of the Subordination Agreement, which states, in relevant part:

> Seller Noteholder will not commence any action or proceeding at law or equity against Borrowers, or any of them, to recover all or any part of the Seller Subordinated Debt not paid when due and shall at no time join with any creditor, in bringing any proceeding against Borrowers, or any of them, under any liquidation, conservatorship, bankruptcy, reorganization, rearrangement, or other insolvency law now or hereafter existing, unless and until the Superior Debt shall be indefeasibly paid and satisfied in full in cash, and Senior Lender has no further obligation to make revolving loans and advances under the Senior Agreement.

(*See* R. p. 1654 ¶ 9). The Court of Appeals (and Judge Cole) relied exclusively on this provision to prohibit any suit by Mr. White to enforce the Note, under any circumstances, until the superior debts were paid.

However, the Court of Appeals did not take into account the provisions of Paragraph 3 of the Subordination Agreement, which states:

> Prior to the receipt by the Seller Noteholder of written notice from a Superior Lender of a Superior Default (**"Superior Default Notice"**), but subject to the balance of this Section 3 and Section 4 below, Borrowers may pay and Seller Noteholder may accept the following payments of interest and/or principal under the Seller Unsecured Subordinated Note: (i) accrued interest at a rate not to exceed five percent (5.0%) per annum, and (ii) annual principal payments not to exceed $200,000. Upon the occurrence of a Superior Default and receipt of a Superior Default Notice, until such Superior Default has been cured or waived . . ., Borrowers shall not pay . . . any payments of any kind associated with Seller Subordinated Debt.

(*See* R. p. 1653 ¶ 3). For the reasons that follow, there are at least genuine issues for trial as to whether Defendants were required to give notice to Mr. White before the prohibition on suit under Paragraph 9 would come into effect.

The lower courts concluded that that Paragraph 3 of the Subordination Agreement unambiguously denied Mr. White the right to receive written notice of default authorizing the cessation of payments under the Note. However, "[w]here a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. An interpretation which involves the more reasonable and probable contract should be adopted." *Farr v. Duke Power Co.,* 265 S.C. 356, 362 (1975) (citations omitted). Depriving Mr. White of the right to receive contractually obligated payments without notice would be "unusual or extraordinary." The lower courts erred in adopting this as the *only* supportable construction of the Subordination Agreement. After all, the right to notice is deeply engrained in American jurisprudence. *Cf Robert K. v. City of Camden Planning Comm'n,* 376 S.C. 165, 171 (2008) (noting that one fundamental requirement of due process is notice). Indeed, even Herwald conceded in his deposition that

Mr. White was entitled to notice of default. (*See* R. p. 1240 ("Q Okay. So, in the event of a default under either the Superior loan or the Junior loan, where was Mr. White to receive that notice? A To either his home or to his law firm.")). There is no evidence that notice was sent prior to the institution of this action. (*See* R. p. 1255 ("Q Okay. Do you have any personal knowledge, as you sit here today and as a 30(b)(6) deponent, as to whether this Notice of Default was forwarded to Mr. White? A I do not know that it was. I would expect not.")).

Additionally, Judge Cole believed that any notice to Mr. White under Paragraph 3 "is separate and distinct from, and does not relate to, Paragraph 9 of the Subordination Agreement, which is the subject of this counterclaim." (*See* R. p. 34). However, "[p]resumably, all portions of a contract are inserted for a purpose and the contract must be read as a whole, giving appropriate weight to all provisions." *Yarborough v. Phx. Mut. Life Ins. Co.,* 266 S.C. 584, 592 (1976). It would be clear error to view Paragraph 9 in isolation and not as part of an entire agreement

In short, reading the Subordination Agreement as a whole, there are two possible reasonable interpretations. One construction entitles Mr. White to written notice before Defendants could invoke Paragraph 9 to stop efforts to collect payments owing under the Note. The other construction does not. A jury should decide which meaning the parties intended and whether, "on November 26, 2019, when White filed this action ... [he] breached the Subordination Agreement." (*See* R. p. 34).

For the foregoing reasons, this Court should grant *certiorari* and reverse the entry of summary judgment against Mr. White on Defendants' counterclaim under the Subordination Agreement.

CONCLUSION

Therefore, the Court should grant Petitioner a writ of *certiorari,* reverse the decision of the Court of Appeals, and vacate the entry of summary judgment against Mr. White as to his claims and Defendants' counterclaims.

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