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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Derham Cole, Circuit Court Judge

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

Appellate Case No. 2023-000155

RICHARD D. WHITE,

Appellant,

v.

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

Respondents.

Final Brief of Appellant Richard D. White

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STATEMENT OF ISSUES ON APPEAL

1. Where a party has already sought and been denied summary judgment from one circuit judge, can the party successfully ask a second circuit judge to grant summary judgment on grounds, facts and evidence that had already been refused by another?

2. Did the Circuit Court err in granting summary judgment even though genuine issues of material fact existed on each claim and counterclaim?

STATEMENT OF THE CASE

This case involves a commercial dispute involving damages in excess of $1,000,000 due to a failure to pay a Junior Subordinated Promissory Note (the "Note"), fraud, including securities fraud, and related claims and counterclaims.

On November 26, 2019, Richard D. White, the Appellant here, filed a civil action in the Court of Common Pleas of Greenville County against FT Acquisitions, LLC ("FTA"); Commercial Food Service Repair, Inc., and Kurt Herwald. [R. pp. 39-51]. An Answer was filed denying liability and raising various affirmative defenses, including release, and asserted counterclaims. [R. pp. 52-101].

On March 9, 2020, Mr. White filed an Amended Summons & Complaint, still against FT Acquisitions, LLC ("FTA"); Commercial Foodservice Repair, Inc. ("CFR"),[1] and Kurt Herwald ("Herwald"). [R. pp. 102-23]. Mr. White asserted six causes of action: (1) breach of contract concerning the failure to make payments on the Note and for allowing Herwald's ownership interest in FTA to fall below 51%; (2) breach of contract, represented in the Note, accompanying by a fraudulent act; (3) fraud in the inducement of the Note; (4) fraud concerning the scope of a release in an agreement on November 29, 2017 (the "November 29, 2017 Agreement"); (5) intentional misrepresentation concerning the Note; and (6) a violation of the South Carolina Uniform Securities Act of 2005, S.C. Code §§ 35-1-101 *et seq.* in connection with Mr. White's purchase of stock. [*Id.*]. An Answer was filed and raised various affirmative defenses,

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

including release. [R. pp. 124-178]. Three counterclaims were asserted: (1) breach of contract of the November 2017 Agreement; (2) breach of a non-competition agreement; and (3) breach of a subordination agreement. [*Id.*]

Mr. White filed his reply to the counterclaims on June 3, 2020. [R. pp. 179-187]. He denied liability and asserted various affirmative defenses. [*Id.*]. Respondents alleged his reply was untimely and an entry of default was originally entered [R. p. 1]. In advance of a default damages hearing, the Respondents here (and Defendants below) moved for summary judgment in their favor on all claims and counterclaims. [R. pp. 291-295].

On July 24, 2020, after a hearing on the matter, the Circuit Court (via Judge Gravely) entered an order relieving Mr. White of the entry of default and deeming the reply to the Counterclaims timely. [R. p. 5]. That order denied the pending summary judgment motion, as having been predicated upon the entry of default, which had been set aside. [*Id.*].

Thereafter, summary judgment was sought by Respondents on all claims and counterclaims, except for the counterclaim for breach of the non-competition agreement, which had been dismissed with prejudice by stipulation [R. p. 188, pp. 298-300]. Mr. White also sought summary judgment on Respondents' here (and Defendants' below) counterclaims. [R. pp. 296-97]. On May 14, 2021, prior to the hearing on summary judgment, Mr. White filed a Motion to Amend Complaint, along with a copy of his proposed Second Amended Complaint. On that same day Respondents filed a Memorandum in Opposition to Mr. White's Motion for Summary Judgment on

Respondents' counterclaims, as well as a Memorandum in Support of Summary Judgement on Mr. White's claims, including Mr. White's claim for Fraud in the Inducement on the General Waiver and Release contained in the proposed Second Amended Complaint. White filed a written opposition to the motion. [R. pp. 584-1555]. Judge Sprouse held a summary judgment hearing on May 21, 2021. [R. pp. 2639-92]. The Form 4 issued after the hearing denied summary judgment to all parties because "the Court finds that there exists a genuine issue of material fact in this case and that both Plaintiff's and Defendant's motion are denied." [R. p.7]. No formal order issued.

On July 19, 2021, after Respondents withdrew their objection to Mr. White's Motion to Amend following the hearing before Judge Sprouse, Mr. White filed his Second Amended Complaint, as originally proposed on May 14, 2021, against FTA, "CFR", and Mr. Herwald. [R. pp. 190-206]. It alleged only four causes of action, rather than the six raised in the prior pleading: (1) breach of contract concerning the missed Note payments, (2) breach of contract accompanied by a fraudulent act, (3) fraud in the inducement, directed to the November 2017 Agreement, and (4) violation of the South Carolina Uniform Securities Act of 2005, S.C. Code §§ 35-1-101 *et seq.* An Answer was filed and raised various affirmative defenses, including release. [R. pp. 207-49]. Additionally, the Respondents here (and Defendants below) re-asserted counterclaims for breach of the November 2017 Agreement and for breach of the Subordination Agreement. [*Id.*]. In the timey filed reply, Mr. White denied liability and asserted various affirmative defenses. [R. pp. 250-56].

Respondents here (and Defendants below) again moved for summary judgment on the claims and counterclaims. [R. pp. 1556-63]. Judge Cole heard that motion on May 9, 2022. [R. pp. 2693-757]. Via Form 4, Judge Cole granted summary judgment on all claims and counterclaims in favor of Respondents here (and Defendants below). [R. p. 10]. A formal written order issued on September 14, 2022. [R. pp. 12-36].

Mr. White timely filed a motion to alter or amend. [R. pp. 1707-843]. A hearing on the Motion was held on December 2, 2022. At the hearing, Mr. White referenced specific arguments made previously before Judge Sprouse from the transcript of the prior summary judgment hearing, as well as the same facts and evidence presented to Judge Sprouse in support of those arguments. [R. pp. 2693-757]. It was denied via a Form 4 on January 13, 2023. [R. pp. 37-38]. That Form 4 indicated that no formal order would follow. [*Id.*]

Mr. White timely filed a notice of appeal on January 30, 2023. [R. p. 257].

ARGUMENT

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

A. Standard of Review

Whether to permit a party to file a second motion for summary judgment is committed to the discretion of the Circuit Court. *E.g.*, *Dorrell v. S.C. DOT*, 361 S.C. 312, 325 (2004) ("The trial judge had the discretionary authority to hear [the party's] renewed motion for summary judgment.").

B. Statement of Additional Facts

When the Respondents filed their motion for summary judgment on March 10, 2021, which was eventually assigned to Judge Sprouse for hearing, they attached no exhibits. [R. pp. 298-300]. Attached to their later filed memorandum, however, the Respondents attached eleven exhibits, Exhibits A-K. [R. pp. 301-445]. Mr. White also submitted a memorandum with exhibits in opposition to Respondents' Motion for Summary Judgment. [R. pp. 584-1555, 2804-10].[2]

When the Respondents filed their motion for summary judgment on April 6, 2022, which was eventually assigned to Judge Cole, Respondents included an affidavit from Mr. Herwald dated evenly with the motion, which indicated that Mr. White had not tendered back payments made to him under the November 2017 Agreement. [R. pp. 1556-63]. In connection with their later-filed memorandum, Respondents again tendered Exhibits A-K. [R. pp. 1591-706].

Respondents' arguments before Judge Cole re-asserted their previous arguments before Judge Sprouse, except for a newly made argument concerning tender back. *Compare* [R. pp. 1708-36], *with* [R. pp. 301-24]. Given the overlap, Mr. White received permission to incorporate his prior memorandum with exhibits submitted to Judge Sprouse. [R. p. 2738 ("THE COURT: No. I don't believe it's required that you resubmit a brief in response to the same argument that's being made again....").

[2] Due to their size, the exhibits were emailed.

C. Re-litigation of the Same Issues Before a New Judge Was Improper.

Although the circuit judges in this State rotate, each speaks for the Court of Common Pleas, with no right of appeal from one judge to another:

> The Court of Common Pleas is a unity, although its jurisdiction is administered by a number of judges who are, in some sense, the exponents of the court. When one of these judges makes a decision upon the merits of a matter within his jurisdiction, that is not merely the personal opinion of the judge, but a judgment of the Court of Common Pleas, which exhausts the power of the court upon that subject and must stand until reversed or set aside in the manner prescribed by law. There is no appeal from one Circuit Judge to another. All are of equal dignity and have the same right to pronounce the judgments of the court. One Circuit Judge upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit.

Graham v. Loris, 272 S.C. 442, 449 (1978) (quotation and emphasis omitted). The principle that one circuit judge may not "step on the toes" of another and rule differently based upon "the exact same facts, the exact same evidence," [R. pp. 2718-19], "is so obvious" that no "express enactment" would be required to implement it, *Steele v. C. C. & A. R. Co.*, 14 S.C. 324, 330 (1880). Yet the Supreme Court has nonetheless, "for the sake of symmetry and convenience", *id.*, also expressly included it in the civil rules, R. 43(l), SCRCP ("If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action").

Certainly, in the exercise of the judge's discretion, a judge can deny summary judgment without prejudice to refile it at some future date without running afoul of the rule against lateral appeals. *See, e.g., Johnston v. Bowen*, 313 S.C. 61, 63 (1993) ("The motion was denied; however, on a motion to reconsider, the trial court amended the

order to provide that the motion for summary judgment was denied pending further discovery with leave to refile."). But before another motion may be heard without leave from the original judge the party must adduce new evidence. *See, e.g.*, *Dorrell*, 361 S.C. at 325 ("That a different trial judge previously denied the motion did not preclude [the party] from renewing its motion *once new evidence came to light*." (emphasis added)). Relitigating the same evidence as before is, however, improper. *See Steele*, 14 S.C. at 330 ("We cannot see that the facts of this case were changed in any important particular between the first application and the last. When the motion was made before Judge Wallace, *the facts*, which the affidavits did not touch, were the same as when Judge Aldrich refused the original motion." (original emphasis)). Where, "in substance *really*," the renewed motion is "an appeal from the judgment of one judge to that of another," *id.* (original emphasis), the second motion must be denied.

Here, two, lengthy summary judgment hearings were held, one before Judge Sprouse and another before Judge Cole. The issues raised by Respondents before Judge Cole included those previously raised before Judge Sprouse, including:

- that the November 2017 Agreement released all claims that predated its execution, thereby precluding Mr. White's claims, [R. pp. 309-17];
- that the release contained in the November 2017 Agreement was not procured through fraud, thereby requiring it to be enforced, [R. pp. 318-20];

- that the filing of this action breached the November 2017 Agreement, thereby entitling Respondents to summary judgment on liability as to their counterclaim for breach of that agreement, [R. pp. 320-22]; and
- that the filing of this action breached the Subordination Agreement, thereby entitling Respondents to summary judgment on liability on their counterclaim for breach of that agreement, [R. pp. 322-23].

Those arguments, essentially verbatim, were reasserted before Judge Cole, plus an additional argument that the tender-back rule should bar Mr. White's claims. *See* [R. pp. 1564-90].

Summary judgment "is a drastic remedy...[and] should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644 (2004) (citation omitted). That judicial hesitation ought to be doubly strong where one judge has already looked at a record and determined that genuine issues of fact exist with respect to arguments that a party has asserted at length. While Respondents would certainly be entitled to be heard before Judge Cole concerning new facts or evidence which had not previously been specifically placed before Judge Sprouse, as noted above, this simply was not the case here. Respondents previously argued in favor of summary judgment, based on the same facts and evidence, as to Mr. White's claims, including specifically his claim for fraud in the inducement as to the General Waiver and Release. [R. pp. 301-24; 2639-92]. This Court should hold that it was an abuse of discretion to have granted the renewed motion for summary judgment based on the facts

and evidence previously submitted to Judge Sprouse. Those previous facts and evidence had previously been heard and rejected by another circuit judge. Indeed, if it was not an abuse of discretion here, it is difficult to see when it could ever be one.

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

A. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP: Summary judgment is properly upheld when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Peterson v. W. Am. Ins. Co.*, 336 S.C. 89, 94 (Ct. App. 1999) (citations omitted). The non-moving party is entitled to the benefit of "all ambiguities, conclusions, and inferences arising in and from the evidence...." *Willis v. Wu*, 362 S.C. 146, 151 (2004) (citation omitted). Even where the parties agree on the relevant facts, just not the conclusions that flow from them, summary judgment is inappropriate. *Nelson v. Charleston Cty. Parks & Rec. Comm'n*, 362 S.C. 1, 5 (Ct. App. 2004) (citation omitted).

B. Statement of Additional Facts

1. Mr. White Signs a Note and a Subordination Agreement.

In 2014, Mr. White and the other shareholder in a company called Foodservice Technologies, Inc. ("FT"), agreed to sell FT to Respondent CFR (through its subsidiary, Respondent FTA) for $14,000,000. [R. p. 13]. Under the terms of the deal, $13,000,000 was paid at closing. [*Id.*]. The remaining $1,000,000 would be paid pursuant to a July 2014 Junior Subordinated Promissory Note (the "Note"), with Mr.

White receiving 55% of those payments. [*Id.*]. [R. pp. 1592-95]. That Note's terms included the following:

> The principal sum of this Note shall bear interest at a per annum rate of five percent (5.00%) until fully paid. Upon any default under this Note by the Maker which is not cured within any applicable cure period, and so long as such default is continuing, the principal sum of this Note shall bear interest at a per annum rate of seven percent (7.00%).
>
> If and to the extent then permitted under the Subordination Agreement, this Junior Subordinated Promissory Note (this "Note") shall be payable (i) in monthly installments of principal and interest equal to $18,871.24 per month, commencing on September 1, 2014, and continuing on the 1st day of each month thereafter until paid in full. All remaining principal and accrued but unpaid interest shall be due on August 1, 2019.

[R. pp. 1592].

Mr. Herwald signed the Note, as manager of FT. [R. p. 1595]

Mr. White was also a signatory to a subordination agreement (the "Subordination Agreement"), which was executed the same day as the Note. [R. pp.1651-61]. He signed that Subordination Agreement with PNC Bank and Leeds Novamark Capital I, L.P. along with their assigns (the "Senior Lenders"), as did Mr. Herwald on behalf of Respondents CFR and FTA and non-party FT. [R. p. 1661]. It had several terms relevant to this appeal. Paragraph 3 included a reduction in the principal and interest payable under Mr. White's Note until the Senior Lenders' debts had been satisfied. [R. p.1653 ¶3]. And it suspended Note payments "[u]pon the occurrence of a [default on the Senior Lienholders' debts] and receipt [of a written notice of default on the Senior Lienholders' debts], until that default had been cleared or waived. [*Id.*] In a different paragraph, Paragraph 9, he agreed that he would "not commence any action or proceeding at law or equity against Borrowers, or any of them, to recover all or any part of [his Note] not paid when due..., unless and until the [Senior Lenders' debts]

shall be indefeasibly paid and satisfied in full in cash...." [R. p. 1654 ¶9]. Finally, Paragraph 16 included a list of addressed for "[a]ll notices, demands, requests, consents, approvals and other communications required or permitted" under the Subordination Agreement. [R. p. 1656 ¶16]. Notices to Mr. White were to be sent to him personally with a copy to his counsel. [R. p. 1657].

Fifth Third Bank and McLarty Capital Partners later became the Senior Lenders via assignment. [R. p. 22].

2. Mr. White Signs an Employment Agreement.

In connection with his sale of FT, Mr. White signed an employment agreement with CFR, to become its vice-president of operations (the "Employment Agreement"). [R. 1689-99]. It included a three-year non-competition period following Mr. White's cessation of employment, for which he could be compensated subject to the need to return all such payments if were found to have breached the non-competition provisions:

> (d) *Severance/Non-Compete Payments.* Following Termination of Employment pursuant to Section 6(c) for any reason other than Death or Disability, and prior to Employee's sixtieth birthday, upon execution of a general release acceptable to the Company, Employee shall be paid $100,000 per year for three years as severance and as compensation for his continued compliance with the terms of this Agreement and the NON-COMPETITION AGREEMENT of even date. These payments shall be in the amount of $8,333.33 per month, paid on the Company's regular payroll schedule for three years following the Termination Date. Upon Employee's breach or threatened breach of the restrictive covenants in the NON-COMPETITION AGREEMENT or Sections 8, 9, 10, 11, and 12 of this Agreement (the "Protective Covenants"), these payments shall cease and Employee shall return any payments already made pursuant to this Section. Should Employee file a lawsuit or arbitration proceeding challenging the validity or enforceability of any of the Protective Covenants, these payments shall cease pending the court's or

> arbitrator's final order. If the court or arbitrator enters a final order holding that the Protective Covenants are not enforceable or that the Protective Covenants are enforceable and Employee has breached them, then the Employee shall return any payments already made, and no further payments under this provision shall be made. If the court or arbitrator finds that the Protective Covenants are enforceable and Employee has not breached them, the severance/non-compete payments shall resume.

[R. pp. 1690-91 § 6].

3. Mr. White Invests $550,000 in CFR.

Mr. White received 34 of the 59 monthly payments called for under the Note, totaling $641,622.16. [R. p. 13]. The last payment made under the Note was on July 5, 2017. [*Id.*].

After no Note payment was made in August and September 2017, Mr. White sought an explanation. [R. p. 650 ln.14 – p. 651 ln. 8]. Although accounts payable had actually been instructed not to pay Mr. White, Mr. Herwald told Mr. White that he didn't realize that the payments had been missed. [*Id.*]. Mr. Herwald said that they had "a little problem with [their] credit line and it's going to be solved here in a couple of weeks, a couple months." [R. p. 650 ln.25 – p. 651 ln. 2]. In that conversation, Mr. Herwald also suggested that Mr. White invest some of his personal funds in CFR in exchange for some CFR stock. [R. p. 651]. Mr. White did just that following the call; on September 11, 2017, he invested $550,000. [R. pp. 651, 789].

4. Mr. White Resigns and Signs the November 2017 Agreement.

Amid disagreements over CFR's day-to-day operations, Mr. White eventually decided to resign from his employment with CFR. [R. pp. 774-76]. On November 28, 2017, the day before Mr. White's official resignation date, Mr. Herwald emailed Mr.

White regarding the delay in issuing Mr. White's stock certificates in CFR under his investment. [R. p. 1414 ("Sorry to take so long, but there is more to doing this than meets the eye. I had a little confusion as I forgot you did $550,000 versus $500....")]. Mr. White and Mr. Herwald traded emails about missed Note payments. [R. pp. 1411-14]. In response to a November 29, 2017, email confirming that instead of converting the Note to stock he would "prefer to just get the payments," Mr. Herwald replied a few minutes later, at 2:31 p.m., as follows: "That is fine, but I cannot make interest payments until we clear the hold with MCP [McLarty Capital Partners]. That is the terms of their notes and yours." [R. p. 1411].

The same day as Mr. Herwald's email that Note payments could not resume until the hold from McLarty Capital Partners was lifted, Mr. White signed, on November 29, 2017, a document called "General Waiver and Release Agreement" (the "November 2017 Agreement"). The General Waiver and Release Agreement was specifically contemplated in his Employment Agreement. [R. p. 1675]. It provided for "Severance/Non-Compete Payments" totaling $300,000 during the three-year non-compete period. [*Id.* at § 1(a)]. Paragraph 3 of that document provided for a release of "any and all actions, causes of action, demands, losses, claims for attorney's fees and other forms of civil damages, occurrences, and liabilities of any kind whatsoever," including but not limited to a nineteen bullet-pointed list of claims involving employment laws. [*Id.* § 3]. Paragraph 4 of the document included a covenant not to sue: "Executive...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." [R. p. 1676 ¶4]. Paragraph 8 "re-affirm[ed]" Mr. White's non-competition obligations, which were "not intended to be, and shall not be, superseded or impaired by this Agreement." [*Id.* ¶8].

5. 2019 Attempts to Resume Note Payments.

On February 25, 2019—well after the execution of the November 2017 Agreement—Mr. Herwald discussed with Mr. White repayment of the balance of the Note. [R. p. 1268 (depo p.168:8-10)]. Mr. Herwald did not suggest at that time that the November 2017 Agreement had released all obligations under the Note. [R. p. 1268 (depo p. 168:11-14)]. In fact, Mr. Herwald indicated that "McLarty is holding fast on its ability to block. I asked in Q4 if we could reinstate payments and they expressed shock that I would ask." [R. p. 1268].

6. Mr. White Did Not Receive a Notice of Default Pursuant to the Subordination Agreement Before Filing This Action.

Mr. White did not receive the written notice of default contemplated under the Subordination Agreement prior to the filing of this action. [R. p. 832]. *See also* [R. p. 1240 (depo p. 56:9-12) ("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."); R. p. 1225 (depo p. 115:11-14) ("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.")].

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

1. A Jury Should Decide the Scope of the Release in the 2017 Agreement.

The Circuit Court erred in holding that the language in November 2017 Agreement released, as a matter of law, any of Mr. White's claims, much less all of them.

"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). In this regard, 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, e.g., Soil Remediation Co. v. Nu-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)).

Our Supreme Court has recognized that what appears at first blush to be an unambiguous contract can actually be an ambiguous one. In *Md. Cas. Co. v. Gaffney Mfg. Co.*, coverage under an insurance contract was at issue—specifically, whether the policy at issue covered all the insured's employees or only those working at its "mill No. 3." 93 S.C. 406, 407-408 (1913). The Supreme Court found the policy ambiguous under the circumstances surrounding its execution, specifically including a prior policy that had been issued that was not mentioned in the policy at issue:

> Upon its face, it appears to cover all of defendant's employees. But, *when read in the light of the conditions and circumstances existing when it was issued*, it becomes exceedingly doubtful if the instrument does not bear

> *sufficient internal evidence*, aided and explained by such facts and circumstances, to show that the parties intended that it should cover only the employees of mill No. 3. Therefore, the evidence shows a case of latent ambiguity, which renders parol evidence of the intention of the parties admissible—just as there is no ambiguity in a grant of "Black Acre," until it is shown by extrinsic evidence that the grantor owned two tracts of that name.

Id. at 408-09 (emphasis added).

Here, the Circuit Court erred holding that the November 2017 Agreement was unambiguously a release of both employment-related and non-employment claims. As Mr. White argued below, the underlying context of the execution of the November 2017 Agreement creates at least a scintilla of evidence that the parties did not intend for it to extend to claims involving the Note. [R. p. 604]. The document includes 19 bullet-pointed examples of claims that were to be released, all of which are employment related. [R. p. 1676]. Further, nothing in the November 2017 Agreement acknowledged that two months prior, Mr. White had invested over a half million dollars in CFR. Indeed, the document refers to Mr. White as "Executive" in its text, rather than as "Executive-Investor," for example.

Evidence outside the November 2017 Agreement is relevant to the background circumstances surrounding the parties' intent. The same day that both Mr. White and Respondent Herwald signed the 2017 Agreement that supposedly also released claims regarding his investment (and others), Respondent Herwald emailed Mr. White that "interest payments [under the Note cannot resume] until we clear the hold with MCP. That is the terms of their notes and yours." [R. p. 1411]. Even after execution, in February 2019, Respondent Herwald told Mr. White that he had asked

McLarty for permission for him "to reinstate payments" but that McLarty was "holding fast in its ability to block." [R. p. 1268]. Those statements of a party opponent confirm Mr. White's understanding that the November Agreement 2017 only related to claims about his employment and had no impact on the other claims asserted in this action. [R. p. 1641 (indicating his understanding that "this release only relates to [his] employment")].

Furthermore, even as Respondents claim that the November 2017 Agreement was meant to constitute a general release of every potential claim—supposedly including releasing all "liabilities of any kind whatsoever," [R. p. 1676]—even they acknowledge some limits. They concede that the supposedly full, general release did not "dispos[ess] White of his shares in CFR...." [R. p. 2613]. Shares are, of course, contractual rights to corporate property. *See, e.g.*, S.C. Code § 33-1-400(33) ('Shares' mean the units into which the proprietary interests in a corporation are divided.").

"Common sense and good faith are the leading touchstones of construction of the provisions of a contract." *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n.*, 296 S.C. 373, 377 (1988) (citation omitted). Consequently, the law favors contract constructions that are "reasonable, fair and just" over those that are "unusual or extraordinary." *Id.* (quotation omitted). *Cf. generally also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Scalia, J.) ("Congress, we have held, does not...one might say, hide elephants in mouseholes. Respondents' textual arguments ultimately founder upon this principle." (citations omitted)). Given "the conditions and circumstances existing" at the time of the execution of the November 2017

Agreement, which are not acknowledged via "sufficient internal evidence" within the document, *Gaffney Mfg. Co.*, 93 S.C. at 408, the scope of the release in the November 2017 Agreement was ambiguous and thus subject to construction by a jury at trial. Not surprisingly, Judge Sprouse rejected Respondents' claims that the release in the 2017 Agreement unambiguously applied to any claim in this action. [R. p. 7]. Judge Cole should have done so as well.

2. The "Tender Back" Rule Was Not a Basis for Summary Judgment.

Below, the Circuit Court erroneously held that because Mr. White had not tendered back the $300,000 that he received following the execution of the November 2017 Agreement, Mr. White could not avoid the release as to any of his claims that fell within its scope.[3] [R. pp. 24-29]. The basis for that holding is the common-law tender-back rule.

Generally, "one who seeks to avoid the effects of a release must first return or tender consideration paid therefore." *State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 102 (Ct. App. 1990) (citation omitted). This tender-back rule is only designed to unwind the "compromise" of liability that the parties had reached. *Taylor v. Palmetto State Life Ins. Co.*, 196 S.C. 195, 200-01 (1940) (citation omitted). *See also Haller v. Borror Corp.*, 552 N.E.2d 207, 211 (Ohio 1990) ("[T]he law favors the prevention of litigation by the compromise and settlement of controversies..... [A] releasor ought

[3] As indicated previously, Mr. White respectfully submits that a genuine issue of fact exists as to whether any of his claims raised in this action were intended to be released.

not be allowed to retain the benefit of his act of compromise and at the same time attack its validity...." (citations omitted)). Where nothing was received for the compromise, nothing need be returned. *See Taylor*, 196 S.C. at 200-01 (noting that no tender is required "where the party seeking rescission would be entitled in any event to retain the money or the property received, and admittedly due" (citation omitted)). Indeed, a release without legally valid consideration is no release at all. *See Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735, 741 (D.S.C. 2001) ("Like any contract, a release given without consideration is void.").

Here, the Circuit Court erred in finding, as a matter of law, that "no language in the General Release allocates any portion of the severance consideration given by Defendants, including the $300,000 Severance Payment, to White's reaffirmation of his restrictive covenants, as opposed to the Release Provision." [R. p. 27 (footnote omitted)]. At least a scintilla of evidence to the contrary does, however, so exist; nothing more is required to preclude summary judgment. The November 2017 Agreement itself calls the payment "Severance/*Non-Compete* Payments." [R. p. 1675 (emphasis added)]. Indeed, under the Employment Agreement's non-competition provisions—those that Circuit Court said were "simply reaffirm[ed]" in the November 2017 Agreement, [R. p. 27 n.5]—Mr. White would have been required to return *all* $300,000 paid if he had been found to have breached the non-competition provision in this action. [R. pp. 1876-77 § 6(d) ("Employee shall be paid $100,000 per year for three years as severance and as compensation for his continued compliance with the terms of this Agreement and the NON-COMPETITION AGREEMENT of even date.... Upon

Employee's breach...of the restrictive covenants...Employee shall return any payments already made pursuant to this Section.")].[4] Particularly in the absence of evidence of any threatened litigation at the time of the November 2017 Agreement, at least a scintilla of evidence exists that the entire $300,000 was allocated to the non-competition agreement and not to a release of any claim.

At least for summary judgment purposes, no portion was required to be returned in advance of filing suit as no consideration was paid to obtain the release.

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

Mr. White's third cause of action was for fraud in the inducement concerning the November 2017 Agreement.[5] Judge Sprouse previously held that a genuine issue of material fact existed as to whether any fraud in that regard had occurred. [6/1/2021 Form 4 Denying Summary Judgment]. But the Circuit Court, now via Judge Cole, determined that the same evidence could establish no fraud as a matter of law. That was error.

Fraud requires clear and convincing evidence of eight elements:

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[4] Respondents previously asserted a counterclaim for a supposed breach of the non-competition provision, which was dismissed with prejudice, after its three-year term had already expired. [R. pp. 188-89; R. p. 1876].

[5] If the jury ultimately concludes that Mr. White's claims were not ever actually released under the November 2017 Agreement, this claim would be moot and tender back would not apply. If the jury concludes, however, that his claims were released, the fraud alleged in this Count Three would be the fraud allowing recission—provided that no consideration was allocated to the release, as explained above. Mr. White cannot, however, receive a judgment on Count Three while also receiving a judgment on any of his other counts. He would have to elect his remedy.

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

M. B. Kahn Constr. Co. v. S.C. Nat'l Bank, 275 S.C. 381, 384 (1980) (citation omitted).

Judge Cole determined that no actionable statement of fact occurred, because the promises that payment would resume under the Note were statements related to future events. [R. p. 32]. *See* [R. p. 1411]. Yet in this State, a future promise is actionable if—as the case that the summary judgment order itself cited makes clear— the unfulfilled promises "were made by a party who never intended to fulfill the promise and only made it to induce the performance of another party." *Brown v. Stewart*, 348 S.C. 33, 42 (Ct. App. 2001) (quotation omitted). *See* [R. p. 31 (citing *Brown*, 348 S.C. 33)].[6]

Likewise, at least a scintilla of reliance was also present. The assurances that Note payments would resume intentionally reinforced Mr. White's understanding that only employment claims—and nothing like the sort that he has asserted here—were impacted by the November 2017 Agreement. *See* [R. p. 1640 ("Q. Do you believe that the claims that you're asserting in this lawsuit were released by this agreement? A. No.")]. That no statements were made to him specifically about the scope of the release language once transmitted was, thus, part of the plan, *see* [R. p. 1636 ln. 6-9]. His understanding of the release scope was made in reliance upon the emails with

[6] The same fraud in the inducement for Count 3 serves as the fraudulent act that accompanied the breach of the Note for Count 2.

Mr. Herwald that preceded the transmission of the November 2017 release. *See* [R. p. 1411 (stating that payments cannot resume "until we clear the hold with MCP)].

Judge Cole's alternative holding, an absence of an intent to deceive, *see* [R. p. 31], was also incorrect. A jury could find that Respondents wanted to induce Mr. White to walk away from his investment, trading dollars for dimes: "Q: Okay. So is it your testimony that at the time this document was being drafted, its intended purpose was to relieve CFR's obligation under the subordinated note? A: It was intended to make it that we couldn't be pursued for it." [R. p. 1266].

Accordingly, summary judgment on fraudulent inducement was improper.

D. Summary Judgment Was Improper on Respondents' Counterclaims.

1. No Summary Judgment Should Have Issued on the Counterclaim for an Alleged Breach of the General Release.

As demonstrated above, a genuine issue of fact exists as to whether the November 2017 Agreement was supported by any consideration at all. If the jury ultimately so concludes, the release would be invalid. *See, e.g., Hyman,* 142 F. Supp. at 741 ("Like any contract, a release given without consideration is void."). Likewise, as shown above, a jury could conclude that the November 2017 Agreement was voidable due to fraud. Thus, the genuine issue of fact discussed above precluded summary judgment on the counterclaim for alleged breach of the release.

Another, independent basis existed to have (re)denied summary judgment on the counterclaim: The record, when viewed in Mr. White's favor as required, failed to establish a breach of the November 2017 Agreement. "Where the terms of a contract are clear and unambiguous as a matter of law, its construction is for the court, but

where the terms are ambiguous, the question of the parties' intent must be submitted to the jury." *Holcombe v. Orkin Exterminating Co.*, 282 S.C. 104, 105 (Ct. App. 1984) (citation omitted).

While the summary judgment order on appeal found that Mr. White was liable for breaching the November 2017 Agreement, it does not quote, much less cite, the specific language that he is alleged to have breached. *See* [R. p. 32]. Instead, it appears to have assumed that filing a lawsuit on (an allegedly) released claim constitutes a breach of contract. That view is, however, mistaken.

Although a release and a covenant not to sue are both designed to provide peace to a defendant, "a release and a covenant not to sue are different types of instruments with different legal consequences." *Kunza v. St. Mary's Reg'l Health Ctr.*, 747 N.W.2d 586, 591 (Minn. Ct. App. 2008).[7] The effect of a release "is to extinguish the cause of action.... A covenant not to sue, on the other hand, is not a present abandonment or relinquishment of the right or claim, but merely an agreement not to enforce an existing cause of action." *Simpson v. Plyler*, 258 N.C. 390, 394 (1963) (quotation omitted). The two provide different procedural methods for obtaining the bargained for peace: Releases only provide an affirmative defense, whereas covenants not to sue are enforced through an action for breach of contract. *See, e.g., Bukuras v. Mueller*

[7] In support of its ruling, the trial court also cited to *Bradley v. British Fitting Grp., PLC*, 221 Ga. App. 621 (Ga. Ct. App. 1996), which allowed a breach of contract suit on a release. Georgia appears to have "abolished the distinction between releases and covenants not to sue." *Thortnton v. Ware County Hospital Authority*, 450 S.E.2d 260, 262 (Ga. Ct. App. 1994) (citation omitted). The November 2017 Agreement at issue here is not, however, governed by Georgia law.

Grp., LLC, 592 F.3d 255, 266 (1st Cir. 2010) ("A release is an affirmative defense; it does not supply a defendant with an independent claim for breach of contract." (collecting cases)); *S. Cal. Edison Co. v. Harnischfeger Corp.*, 99 Cal. App. 3d 9, 14 (1979) ("A covenant not to sue, like a release, is negotiated. Unlike the release, plaintiff does not relinquish his right to sue by the covenant but subjects himself to an action for breach of the covenant should he continue suit." (citation omitted)).

The only South Carolina decision that the trial court cited below purportedly allowing a breach-of-contract suit on a release, *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522 (2013) is not to the contrary. *See* [R. p. 32]. The settlement agreement at issue there had language consistent with the generally accepted distinction between releases and covenants not to sue. It not only included language that "extinguished all of Petitioner's claims," but it also "specifically barred Petitioner from bringing any claim as an owner of any stock or interest arising prior to the Release's execution and from pursuing any claims made, or that could have been made, in his employment lawsuit." *Menezes*, 403 S.C. at 528.

Here, the November 2017 Agreement contains multiple paragraphs. [R. pp. 1675-80]. Paragraph 3 states the scope of the release. [R. p. 1675 ¶3]. Paragraph 4 includes a covenant not to sue that, in relevant part, provides that 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...." [R. p. 1676 ¶4 (emphasis added)].

Mr. White's claims involve breach of the Note and thus are claims as an investor and/or creditor—and thus are not claims as a former employee seeking to recover for unpaid wages, employment discrimination, or workplace injury. Accordingly, the November 2017 Agreement did not "specifically bar[him] from bringing" them, *Menezes*, 403 S.C. at 528 and, as argued below, he necessarily "has not breached any term" of the November Agreement as a matter of law, [R. p. 605]. If Respondents want to argue that his claims, as a matter of fact, fall within the parties' intentions concerning the covenant not to sue or that the parties somehow intended the covenant not to sue to be co-extensive with the scope of the release,[8] Respondents must do so to a jury. Holding here that, as a matter of law, claims falling within the release language but not that of the covenant not to sue would give Respondents more than what they bargained for. *See generally Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 797 (7th Cir. 2005) ("Because the Release was a release of claims and not a covenant not to sue, Schneider did not breach the Release with his suit. Allstate received the benefit of its bargain – an affirmative defense." (footnote omitted)).

As Judge Sprouse already correctly found, genuine issues of fact existed concerning this counterclaim. *See* [R. p. 7]. Judge Cole should have done so too.[9]

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[8] As shown above with respect to the improper grant of summary judgment on Mr. White's own claims, genuine issues of fact exist as to whether any of the claims fall within the release language.

[9] The authorization for attorney's fees was predicated upon a grant of summary judgment under the November 2017 Agreement. [R. p. 35]. The reversal of the grant of summary judgment necessarily reverses the authorization for attorney's fees at this juncture, as Respondents are no longer prevailing parties on the counterclaim.

2. No Summary Judgment Should Have Issued on the Counterclaim for an Alleged Breach of the Subordination Agreement.

Judge Sprouse also correctly found genuine issues of fact precluded summary judgment on the counterclaim that Mr. White breached the Subordination Agreement when he filed this action, *see* [R. p. 7]. Those issues of fact remained at the time summary judgment was granted below.

Under Paragraph 3 of the Subordination Agreement, the parties agreed that, absent a written notice of default on obligations to the Superior Lenders (i.e., FTB and McClarty), nothing in the Subordination Agreement stopped Respondents from making payments to Mr. White under the Note, subject to certain payment ceilings. [R. p. 1653 ¶3]. The written language states:

> 3. 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 to Senior Lenders' satisfaction, with respect to a Superior Default under the Senior Agreement, and Junior Lenders' satisfaction, with respect to a Superior Default under the Junior Agreement, in either case pursuant to written agreement with Senior Lender or Junior Lender, as applicable, Borrowers shall not pay, including set-offs against the Seller Unsecured Subordinated Note of amounts owed under such Seller Unsecured Subordinated Note pursuant to Section 5 thereof, and Seller Noteholder shall not accept (subject to Section 4 below), any payments of any kind associated with Seller Subordinated Debt. To the extent any amounts owing on the Seller Subordinated Debt are not paid as a result of the provisions of this Section 3 (the "Deferred Amount"), at such time as Borrowers are permitted to resume payments on the Seller Subordinated Debt, the Deferred Amount plus any interest owing as a result of the non-payment at the rate specified in the Seller Unsecured Subordinated Note shall be due and payable.

[R. p. 1653 ¶3]. The Subordination Agreement does specifically provide the delivery addresses for "[all] notices...required or permitted" under the Subordination Agreement. [R. p. 1656 ¶16]. That list of notice recipients included both Mr. White, at his home address, and his counsel. [*Id.*].

In Paragraph 9 of the Subordination Agreement, Mr. White agreed that after receipt of such Notice he would not file suit to collect on the Note until the Superior Lenders had been fully paid. [R. p. 1654 ¶9].

Judge Cole provided two reasons why he found "no genuine issue of material fact that on November 26, 2019, when White filed this action, CFR's debts to its senior lender and mezzanine lender were not satisfied, and thus the Conditions Precedent which would have permitted him to file suit under the Subordination Agreement had not been fulfilled." [R. p. 34]. Both reasons were inappropriate for a grant of summary judgment.

First, he thought that Paragraph 3 unambiguously denied Mr. White the right to receive a copy of the written notice of the default that authorized the cessation of Respondents' payments to Mr. White. But as indicated previously, "[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 a party of the right to receive otherwise contractually obligated payments without notice would, however, be "unusual or extraordinary" and thus should not have been adopted as the only legally permissible 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" (citations omitted)). Indeed, even Respondent Herwald conceded in his deposition that Mr. White was entitled to notice of default, sent in accordance with Paragraph 16. [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.")]. No evidence was adduced that notice was sent prior to the institution of this action. [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.")].

As his second reason for holding that the filing of this action in November 2019 breached the Subordination Agreement, Judge Cole believed that any notice to Mr. White required 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." [R. p. 34]. But "[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 was thus an error to have viewed Paragraph 9 in isolation.

In short, two readings of the Subordination Agreement are possible. One entitles Mr. White to written notice before Respondents invoke it to stop payments owing under his Note. The other does not. A jury should decide which way the parties

wanted to proceed and whether, "on November 26, 2019, when White filed this action...[he] breached the Subordination Agreement." [R. p. 34].[10]

CONCLUSION

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

Dated this 22nd day of September, 2023

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[10] Reversing the grant of summary judgment on liability necessarily also reverses the Respondents' entitlement to damages at this juncture.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Derham Cole, Circuit Court Judge

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

Appellate Case No. 2023-000155

RICHARD D. WHITE,

Appellant,

v.

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

Respondents.

R. 211, SCACR Certification

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I hereby certify that the Final Brief of Appellant and the Final Reply Brief comply with R. 211(b), SCACR.

Dated this 22nd of September, 2023.

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