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Jun 26 2025

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.

Appellant's Petition for Rehearing

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Argument 1

 I. It Was an Abuse of Discretion for one Circuit Judge to Grant Summary
 Judgment on Grounds that Had Already Been Rejected by Another. 1

 II. Even if Procedurally Proper, Summary Judgment Should Not Have Issued on
 this Record. 1

 A. Summary Judgment on Appellant’s Claims Was Improper..... 1

 B. Summary Judgment on the Counterclaims Was Improper. 2

Conclusion..... 3

TABLE OF AUTHORITIES

Cases

Graham v. Loris, 272 S.C. 442 (1978) 1

Md. Cas. Co. v. Gaffney Mfg. Co., 93 S.C. 406 (1913)..... 2

S. Atl. Fin. Servs. v. Middleton, 356 S.C. 444 (2003)..... 3

STATEMENT OF THE CASE

Pursuant to R. 221, SCAR, Appellant Richard D. White respectfully petitions for rehearing of this Court's Memorandum Opinion entered on June 11, 2025.

ARGUMENT

I. It Was an Abuse of Discretion for one Circuit Judge to Grant Summary Judgment on Grounds that Had Already Been Rejected by Another.

"If any motion be made to any judge and be denied, in whole or in part..., no subsequent motion upon the same state of facts shall be made to any other judge in that action." R. 43(l), SCRCF. *Accord Graham v. Loris*, 272 S.C. 442, 449 (1978) (explaining that one judge may not overrule another) (citations omitted). Nonetheless, the Memorandum Opinion does not identify any additional facts that Judge Cole had that Judge Sprouse lacked, the latter of which found that genuine issues of material fact existed. In fact, Judge Cole included pages of findings of fact in his Order that were previously presented to Judge Sprouse and held to be in dispute. Accordingly, in the absence of any additional facts presented to him, Judge Cole should not have found undisputed what Judge Sprouse found disputed. Summary Judgment was thus improper.

II. Even if Procedurally Proper, Summary Judgment Should Not Have Issued on this Record.

A. Summary Judgment on Appellant's Claims Was Improper.

The Memorandum Opinion determined that the parole evidence rule precluded a finding of ambiguity, the Memorandum Opinion erred as matter of fact and law. As a matter of fact, it did not address the admission of a party opponent, post execution, that the General Release was only limited to employment claims. *See* [R. p. 1268,

1411]. As a matter of law, the Memorandum Opinion failed to follow the Supreme Court's decision in *Md. Cas. Co. v. Gaffney Mfg. Co.*, 93 S.C. 406 (1913). There, the Supreme Court examined an otherwise unambiguous contract in "light of the conditions and circumstances existing when it was [executed]," and found that they created an ambiguity for the jury to resolve. *Id.* at 408. This case is indistinguishable from that one with respect to the General Release and the claims for breach of contract, breach of contract accompanied by fraudulent act, and a violation of the South Carolina Uniform Securities Act of 2005.

As for the claim for fraud in the inducement, the Memorandum Opinion should have found that a genuine issue of material fact existed as to the allocation of payments between the General Release and the severance. After all, Appellant would have been required to return all the \$300,000 upon any breach of the non-competition provision. [R. p. 187-77 § 6(d)]. And there had been no hint of litigation that was being settled by a release, meaning that no consideration had been provided for the release itself that would have had to be returned under the tender-back rule.

B. Summary Judgment on the Counterclaims Was Improper.

The Memorandum Opinion incorrectly determined that Appellant had not preserved his argument that merely filing a lawsuit could not be a breach because, as a matter of law, a release differs from a covenant not to sue. Below, however, Appellant was clear that he "ha[d] not breached any term of the General Waiver and Release Agreement." [R. p. 605].

As for the finding of the breach of the Subordination Agreement, the Memorandum Opinion does not address Appellant's right to notice pursuant to Paragraph 3, a fact which renders the case indistinguishable from *S. Atl. Fin. Servs. v. Middleton*, 356 S.C. 444 (2003) (holding that patent ambiguity arose from conflicting provisions for notice in different parts of the contract).

CONCLUSION

This Court should grant rehearing, hold that summary judgment below improperly issued, and remand for further proceedings.

Dated this 26th day of June, 2025

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PROOF OF SERVICE

I, the undersigned, served a copy of this Petition for Rehearing on the following counsel of record this 26th day of June, 2025, by email to the following email address of record:

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