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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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REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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ARGUMENTS

A. There Are Important and Uncertain Issues Concerning the Filing of Serial Summary Judgment Motions That Are Appropriate for This Court's Review.

1. The Circuit Court and the Court of Appeals Permitted a True "Second Bite at the Apple."

Defendants contend that the Third Motion for Summary Judgment was "not a situation in which Respondents re-filed a previously denied motion with "identical" arguments in hopes of another bite at the apple." (*See* Return to Pet., at 10). However, this is not accurate. A side-by-side comparison between the memoranda supporting the Second Motion for Summary Judgment and the Third Motion for Summary Judgment illustrates that they are practically identical motions, except for the insertion of the "tender back" argument. Aside from that one new argument (and some minor stylistic changes), those summary judgment briefs make the same arguments that Judge Sprouse had previously rejected. Moreover, Defendants Third Motion for Summary Judgment did not make any novel argument that had not been previously made in support of their Second Motion for Summary Judgment. Rather, aside from the "tender back" argument, Defendants made the same arguments and relied on the same facts in connection with both sets of motions.

More importantly, contrary to their arguments in their Return, Defendants proffered ***the exact same evidence*** in support of their Second and Third Motions for Summary Judgment. In support of their contention that the Third Motion for Summary Judgment was proper because it was based on facts different from the Second Motion for Summary Judgment, Defendants include a laundry list of expert reports disclosed, discovery responses served, or depositions taken between May 2021 and the filing of their Third Motion for Summary Judgment. (*See* Return to Pet., at 8-9). However, Defendants did not rely upon, or even cite, any of that evidence in support of their Third Motion for Summary Judgment. For example, they did not argue that the deposition of CFR's former Chief Financial Officer, Jean Hodges, somehow supported their Third Motion for

Summary Judgment. (*See id.*, at 9). They did not reference any evidence that had been obtained after Judge Sprouse denied their Second Motion for Summary Judgment.

Defendants do not specifically state how any evidence or discovery impacted their Third Motion for Summary Judgment. They do not refer to any evidence that they presented to Judge Cole that warranted his decision to conclude—contrary to Judge Sprouse's original ruling—that no genuine issue of material fact exists. Logically, it is difficult to conceive how additional discovery and evidence could have warranted Judge Cole's grant of summary judgment. Specifically, Defendants have made no suggestion of how the introduction of *more evidence* into the case through discovery somehow resolved the issues of fact that Judge Sprouse had concluded required a jury trial.

In their Return, Defendants contend that "[t]he circuit court's acceptance of Respondents' arguments concerning the 'tender back' rule was the primary basis for the September 14, 2022, Order granting summary judgment to Respondents." (*See* Return to Pet., at 10). It must be noted that the "tender back" argument is, by its terms, limited to Mr. White's claim added in the Second Amended Complaint that the General Release was void because of fraud in the inducement.[1] That is the only cause of action that is premised on the invalidity of the General Release. Mr. White's other claims—breach of contract, breach of contract accompanied by a fraudulent act, and South Carolina Uniform Securities Act—all began with the presumption that the General Release was enforceable. Mr. White simply contended that the General Release did not apply to those causes of action.

As a result, even if the Circuit Court agreed with Defendants on the "tender back" argument, the most it could do was grant partial summary judgment as to one of four causes of action. The Circuit Court was only able to enter final judgment against Mr. White because it granted summary judgment on ***all*** of his causes of action; it did so based on precisely the same arguments and evidence that Judge Sprouse had already found to be insufficient to support

[1] Defendants do not dispute that the "tender back" rule *only* applied to Mr. White's claim for fraud in the inducement to enter the General Release.

summary judgment. The inclusion of a new argument to address a new claim does not grant Defendants' license to rehash issues already decided by another judge.

This case presents an important issue for the Court to resolve about when and how parties may file multiple motions for summary judgment. The Court of Appeals' ruling in this matter opens the door for parties to make serial efforts to obtain summary judgment on the same grounds. If they simply add a new argument or suggest that discovery has continued in the interim, this would provide a second (or third) bite at the apple as to their arguments that had previously been rejected. This would further encourage parties to judge shop, refiling essentially the same motion in search of a sympathetic judge. In the interest of ensuring stability and consistency, the Court should hear this case to resolve this important and vital procedural question.

2. <u>The Cases Cited by Defendants and the Court of Appeals Are Inapposite.</u>

Both Defendants and the Court of Appeals cited to a number of cases to support their contention that the Circuit Court did not err in hearing and granting the Third Motion for Summary Judgment. Defendant goes as far as to say that "South Carolina law is clear that Respondents were permitted to file, and the circuit court was permitted to consider," the Third Motion for Summary Judgment. (*See* Return to Pet., at 11). However, the law is not so clear; to the contrary, because of the uncertainty in the current state of the law, courts and practitioners would benefit from this Court's guidance regarding multiple summary judgment motions.

Defendants rely upon *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997), for the proposition that: "A denial of a motion for summary judgment does not establish the law of the case, and the issues raised in the motion may be raised later in the proceedings[.]"[2] (*See* Return to Pet., at 12). However, Defendants conveniently omit the key language from this Court's statement in *Brown*: "A denial of a motion for summary judgment does not establish the law of the case, and the issues raised in the motion may be raised later in the proceedings ***<u>by a motion to</u>***

[2] Defendants also cite *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118 (10th Cir. 1979), an out-of-circuit federal case that this Court cited in *Brown*. In *Lindsey*, however, the court only allowed a second summary judgment motion "if supported by new material." *See id.*, 592 F.2d at 1121 (noting that second motion was supported by "significantly expanded record."

reconsider the summary judgment motion or by a motion for a directed verdict." *See Brown,* 326 S.C. at 416-17, 483 S.E.2d at 481 (emphasis added). Far from supporting serial summary judgment motions, as Defendants contend, *Brown* shows that the issues once rejected in a summary judgment may only be raised again in a motion to reconsider (which would be addressed to the same judge) or at trial.

Defendants also cite *Cresswell Enterps. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992), which permitted "a later motion for summary judgment ***based on matters not involved in the decision*** on the first motion." *See id.*, 309 S.C. at 279, 422 S.E.2d at 159 (emphasis added). Defendants further rely on *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008), in which this Court permitted the refiling of a summary judgment motion "once new evidence is gathered." As set forth above, the majority of Defendants' arguments in the Third Motion for Summary Judgment are identical to those raised in the Second Motion for Summary Judgment. Moreover, Defendants attached precisely the same evidence in support of both motions.

Similarly, the cases that the Court of Appeals cites to affirm the granting of the Third Motion for Summary Judgment are inapposite:

- In *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999), a defendant obtained summary judgment on the statute of limitations. The Court of Appeals reversed the grant of summary judgment, holding that S.C. Code § 15-3-30: (a) was not impliedly repealed by South Carolina Rule of Civil Procedure 3(b); and (b) applied to toll the statute of limitations. On remand to the Circuit Court, defendant filed a second summary judgment motion, arguing this time that Section 15-3-30 was unconstitutional under the Commerce Clause—an issue not addressed in the first motion. This Court concluded that the second motion, which raised only grounds that had not been raised before, was permissible.

- In *Dorrell v. South Carolina Dep't of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004), this Court held that a motion for summary judgment could be renewed "once new evidence came to light." *See id.*, 361 S.C. at 325, 605 S.E.2d at 18. Specifically, "[t]wo months before trial, APAC filed a second summary judgment motion, reiterating the arguments in its initial motion ***and including two additional pieces of evidence: the deposition testimony of expert Parsonson and SCDOT's responses to APAC's requests for admission***." *See id.*, 361 S.C. at 317, 605 S.E.2d at 14 (emphasis added). In this case, Defendants did not present a scintilla of additional evidence with its Third Motion for Summary Judgment that had not been attached to the Second Motion for Summary Judgment.

- In *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994), this Court did not consider serial summary judgment motions, but rather held only that "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." *See id.*, 313 S.C. at 477, 443 S.E.2d at 380 (finding denial of summary judgment not appealable).

In fact, none of the cases that Defendants or the Court of Appeals rely upon is directly on point. In light of the fact that there is no case law on all fours with this case and Mr. White contends that the Court of Appeals has misapplied existing law, this is a good case for the Court to grant certiorari to review and clarify the law. *See Compton v. South Carolina Dep't of Prob., Parole & Pardon Servs.,* 385 S.C. 476, 478, 685 S.E.2d 175, 176 (2009) (granting certiorari "because our opinion . . . is being misinterpreted").

B. <u>Notwithstanding the Arguments in Defendants' Return, the Court Should Grant Mr. White's Petition With Regard to His Argument That the General Release Did Not Discharge the Claims He Asserted Here.</u>

As argued in Mr. White's Petition, there exist, at the very least, issues of fact as to whether the General Release was effective to release Mr. White's claims for breach of contract, breach of contract accompanied by a fraudulent act, and the South Carolina Uniform Securities Act.

Defendants first argue that Mr. White's argument "concerning alleged textual ambiguity is not preserved for review." (*See* Return to Pet., at 14 ("White's argument that the text of the General Release is ambiguous was not raised in his Petition for Rehearing.")). This is not a novel argument. Obviously, the language of the various provisions of the General Release is relevant to the question of whether, in light of Defendants admissions, the General Release is ambiguous or how the Court should construe it.

"A court may admit extrinsic evidence to determine whether a latent ambiguity exists, and if the court finds a latent ambiguity, extrinsic evidence is also permitted to help the court determine the testator's intent." *See Estate of Gill v. Clemson Univ. Found.*, 397 S.C. 419, 426, 725 S.E.2d 516, 520 (Ct. App. 2012) (*citing In re Estate of Prioleau*, 361 S.C. 627, 632, 606 S.E.2d 769, 772 (2004)). "A latent ambiguity is one in which the uncertainty arises, not upon the words of the instrument as looked at in themselves, but upon those words when applied to the object or subject

which they describe." *Kemp v. Rawlings*, 358 S.C. 28, 35, 594 S.E.2d 845, 849 (2004). This Court has held that evidence may be used to help construe a contract when "read in the light of the conditions and circumstances" becomes ambiguous:

> Practically the only question in the case is whether the Court erred in admitting parol evidence to show that the parties intended the policy to cover only the employees of the finishing plant. Appellant admits the general rule, that such evidence is admissible to remove an ambiguity, when a written instrument does not clearly express the intention of the parties, but contends that the policy in question was not ambiguous. If we look to the policy alone, there is no ambiguity. 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.

See Maryland Cas. Co. v. Gaffney Mfg. Co., 93 S.C. 406, 408-09, 76 S.E. 1089, 1090 (1913).

In this case, there is, at a bare minimum, a factual issue based on the evidence and the language of the General Release as to its scope. While it does contain some broad release language, it details releases relating only to employment claims. Mr. White entered into that agreement in the context of the resignation of his employment. Defendants' admissions further confirm that the parties did not intend that the General Release constitute a waiver of claims under the subject note. Judge Cole should have—as Judge Sprouse did before him on the same grounds—allowed this matter to proceed to a jury trial. Nothing in Defendants' Return undermines Mr. White's contention that he should be allowed to present his case to a jury.

C. Notwithstanding the Arguments in Defendants' Return, the Court Should Grant Mr. White's Petition With Regard to the "Tender Back" Rule.

In his Petition, Mr. White details the language of the General Release and his employment agreement. The language of those documents creates, at least, a possibility that the $300,000 paid to Mr. White was ***not*** intended as payment for the release of claims. Rather, as Mr. White has demonstrated in his Petition, the $300,000 paid to him was in exchange for his reaffirmation of his

covenant not to compete and other covenants with Defendants. Defendants' Return does not refute that there are issues for a jury to decide as to whether the "tender back" rule applied and, if so, how much (if any) of the $300,000 paid to Mr. White was in exchange for the release.

There is no evidence that, at the time the parties entered into the General Release, Mr. White had threatened or suggested that he might sue Defendants. There is no evidence that Mr. White was contemplating such a cause of action. There is no evidence that any of the Defendants believed, at the time of the execution of the General Release, that Mr. White might assert a claim against them. Defendants' suggestion that they paid Mr. White $300,000 to release unknown claims that had never been threatened or even mentioned defies logic. It is certainly possible that a jury could conclude that the parties' intent was not for the $300,000 to be payment for a release of unthreatened claims.

There is little South Carolina law interpreting or discussing the "tender back" rule. As a result, there is no guidance as to what should happen in a case like this, where the release was part of a larger agreement. As a result, this case presents an opportunity for this Court to clarify the law in this area.

D. Notwithstanding the Arguments in Defendants' Return, the Court Should Grant Mr. White's Petition With Regard to His Counterclaims.

1. Breach of the General Release

In his Petition, Mr. White argued that the Court of Appeals erred in affirming summary judgment as to Defendants' counterclaim under the General Release because there was insufficient evidence that he breached any specific provision of the General Release. Defendants first respond that Mr. White did not properly preserve issues for review because: (a) "he failed to make this argument in his Petition for Rehearing" and; (b) the Court of Appeals "determined that this issue was not preserved for appellate review." (*See* Return to Pet., at 21). As to Defendants' first contention, Mr. White properly preserved this question in his Petition for Rehearing, when he wrote that he had been "clear that he 'ha[d] not breached any term of the General Waiver and Release Agreement.'" (*See* Pet. for Reh'g, at 2). This makes clear that he intended to raise the

same issues in this Court that he had raised in the Court of Appeals. Second, the Court of Appeals' ruling on preservation was limited to the argument that "the General Release only provided an affirmative defense for Respondents because it was not a covenant not to sue." (*See* Opin., at 4). This is not the issue Mr. White raises in his Petition for Writ of Certiorari.

Defendants next argue in their Return that "the circuit court and Court of Appeals correctly determined that White breached the General Release by filing a lawsuit that raised causes of action that White released. (*See* Return to Pet., at 22 (*citing Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 744 S.E.2d 178 (2013) and *Bradley v. British Fitting Grp., PLC*, 221 Ga. App. 621, 472 S.E.2d 146 (Ga. Ct. App. 1996)). Notably, aside from citing these cases, Defendants make no argument to refute that there are at least questions for trial as to how Mr. White breached the General Release and what provisions he breached.

This Court's opinion in *Menezes* does not support Defendants' argument.[3] There, this Court only addressed the discrete issue of when, under ***Delaware*** law, a breach of fiduciary duty claim arose (and whether it was after the signing of a release):

> The foregoing analysis of Delaware law makes clear that a claim for breach of fiduciary duty accrues at the time of the breach, and that a plaintiff need not show damages in order to bring her claim. In the merger context, this breach takes place when the directors fix or adopt the terms of a merger contract. The facts of the instant case demonstrate that any alleged breach occurred when the SCI Board adopted and publicly announced the terms of the merger with FITG. Following the SCI Board's adoption and announcement of the merger terms, but prior to the merger's completion, Petitioner released all claims he held against SCI. . . . [W]e find that Petitioner held a valid claim at the time he signed the Release, and therefore, his suit cannot be sustained and is dismissed with prejudice. The court of appeals correctly held that trial court erred in dismissing Respondents' defenses and counterclaim relating to the Release.

[3] Likewise, *Bradley*—decided under Georgia law—is distinguishable because, in that case, the plaintiff breached the release by literally refiling the specific released claim (for unfair termination) in another forum. On the other hand, there is no argument that Mr. White breached the General Release by reasserting the precise claim that was to be released.

See Menezes, 403 S.C. at 550. The Court did not analyze the merits of the counterclaim for breach of the release. As a result, *Menezes* does not support the Court of Appeals' conclusion that the filing of a claim potentially within the scope of a release is a ground for a breach of contract claim.

2. Breach of the Subordination Agreement

Defendants first argue that Mr. White failed to preserve this issue for review in this Court. However, in his Petition for Rehearing, Mr. White asserted:

> 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).

(*See* Pet. for Reh'g, at 3). While this may be a brief discussion, it is sufficient to indicate that Mr. White intended to make all of the arguments he had made in his appellate briefing as to the Subordination Agreement.

As set forth in the Petition for Writ of Certiorari, the Subordination Agreement contains language that supports Mr. White's contention that he was entitled to notice of default. (*See* R. p. 1653 ¶ 3 ("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.")).

CONCLUSION

Therefore, for the reasons set forth herein and in his Petition for Writ of *Certiorari*, the Court should grant a writ of *certiorari,* reverse the decision of the Court of Appeals, and vacate the entry of summary judgment.

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