THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Case No. 2008-CP-23-3665

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

v.

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

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

In Re: Kathryn Taillon, Appellant.

INITIAL REPLY BRIEF OF APPELLANT KATHRYN TAILLON

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Respondents ignored the arguments in Taillon's Brief. By refusing even to acknowledge the major flaws in the trial court's order raised in Appellants' opening briefs, much less address them, Respondents further reinforce the need for reversal. This Brief is confined to addressing the arguments raised by Respondents rather than rehashing the many arguments they ignored. Respondents raised four flawed legal arguments not supported by the handful of cases they cited.

First, Respondents appear to argue the trial court has exclusive jurisdiction over matters related to the Global Settlement Agreement (GSA) because CIF is in receivership. The scant authority cited by Respondents does not support this proposition.

Second, Respondents claim the trial court had jurisdiction to decide this matter in summary fashion, without the filing of a new pleading or service thereof on all parties to the GSA, an opportunity to conduct discovery, or presentation of evidence, because South Carolina trial courts retain some sort of perpetual authority to enforce litigation settlements. Again, the cited authority does not support such a novel proposition.

Third, Respondents seek to justify the trial court's award of a $250,000 penalty against Appellant Field because, after Judge Miller recused himself, Field supposedly made inaccurate statements at Judge Miller's Judicial Merit Selection Commission hearing. Because Judge Miller was no longer involved in this case at the time of the hearings, this argument cannot be taken seriously, and appears to be simply a pretext to disparage Field.

Finally, Respondents devote a scant three pages of argument to the actual substantive issue: whether their release of all future claims in the GSA included release of the right to enforce a civil judgment arising from unpaid restitution. Respondents repeat the error made by the court below, conflating the undisputed fact that a private settlement cannot extinguish the

state's right to impose restitution obligations in a criminal case with the proposition that a private party cannot release its own right to enforce a civil judgment.

A. CIF's Receivership Does Not Create a Basis for Permanent Jurisdiction

The current chapter of this dispute arose in Florida, where the Receiver attempted to force the sale of Field's and Taillon's home to enforce a judgment against Field. Because the Receiver released all claims against Field pursuant to the GSA, including the judgment in question, Field and Taillon opposed the Florida action. The Receiver then filed the instant case, citing a provision in the GSA calling for any disputes or enforcement actions to be heard by the Honorable Edward Miller:

> All parties previously agreed that interpretation and enforcement of the GSA would be within the sole jurisdiction of the South Carolina Circuit Court, and more particularly Judge Edward Miller . . . Judge Miller has already considered multiple motions to enforce the agreement. Further, Judge Miller is familiar with all parties involved and extensively familiar with the facts of these claims and the procedural history of the GSA.

(M.D. Fla. Case, D.E. No. 22, p. 3-4.).

But Judge Miller recused himself. Accordingly, Taillon argued that the only colorable basis for jurisdiction here, rather than in the Florida court where there is a live controversy, has disappeared. (Taillon Opening Br. 19-22.) Judicial economy and the interest of an expeditious resolution of the Florida Homestead action weigh in favor of this case being sent back to Florida, where the presiding judge can adjudicate the whole case rather than, at most, a single issue.

In response, Respondents cannot and do not dispute that the GSA stipulates the matter will be heard by Judge Miller specifically, rather than South Carolina courts generally. Instead, they offer a brand new basis for jurisdiction: "a court which creates a receivership draws to itself jurisdiction over all controversies concerning the assets and liabilities of the debtor in receivership." (Resp. Br. 9.) Respondents appear to contend that something inherent in the

receivership compelled the Florida court to stay the case there and await an advisory opinion from South Carolina. Respondents offer no authority for the proposition that a proceeding in a foreign jurisdiction must be stayed so an entity in receivership can pick and choose issues to litigate in its home state.

It is of course difficult to find authority directly on point because the CIF receivership, which has now moved into its thirteenth year, has gone so completely off the rails as to be unprecedented. As Taillon noted previously, the CIF receivership began with the troubling instruction that counsel for the plaintiff class – an adverse party – was to "oversee" the receiver. (Taillon Opening Br. 7.) The only distribution of funds to the CIF noteholders was made in December 2014 – almost seven years ago. (Id. 8.) That distribution, $1,000,000 split among roughly 650 noteholders, is strikingly low given that the Receiver paid himself and his lawyers almost $700,000 in the first two years of the receivership (after which he stopped disclosing such payments). (Id.) Since then, the Receiver and his phalanx of attorneys have continued to grind away at CIF's remaining funds, litigating and relitigating overlapping lawsuits in state and federal courts in multiple states.

All of this was supposed to come to an end with the execution of the GSA. The parties and Judge Miller agreed that "time is of the essence." (GSA ¶ 14(I)(vii).) In June 2018, following a dispute over the transfer of real estate by one of the parties to the GSA, the Receiver waxed indignant about the urgent need to get the GSA proceeds into the hands of the CIF noteholders:

> As the GSA stated in bold and as this Court acknowledged, **Time is of the Essence** with regards to all matters concerning this GSA. This term was (and is) a major condition of the GSA, as the GSA was intended to *quickly conclude extremely protracted litigations*, **which bore great financial burden to CIF, but bore greater emotional and financial burden to the 680 Noteholders of CIF, many, if not most, of whom are elderly, and many of whom have passed away**

> **while helplessly hoping for the conclusion of matters**. Respectfully, for the elderly, "**Time is of The Essence"** carries a particularly special and powerful meaning.

(Saad 6/19/18 Affidavit, ¶ 33 (bold and italics in original).)

It is now more than three years later. In that time, the Receiver has not filed a single report on the record concerning the affairs of CIF, the timing of any contemplated distribution of GSA funds, an accounting of the funds spent on himself and/or his lawyers, or whether the latter expenditures have left anything at all for the noteholders. And he has not distributed a penny to the elderly victims for whom he professed such sympathy. Instead, the Receiver's litigation machine rolls on.[1]

Against this factual backdrop, there is something troubling about the Receiver essentially arguing that because he has managed to keep the receivership open for such an unprecedented length of time, he has the right to evade Judge Corrigan's jurisdiction and instead reanimate the 2008 case he promised to dismiss as part of the GSA. Federal Magistrate Judge Jacquelyn Austin certainly did not buy this argument – she remanded this matter after Field's attempted removal because it was obvious that the 2008 case was no longer active. (Austin Order.)

The authorities cited by Respondents merely state, in general terms, that when a court creates a receivership, it has jurisdiction over existing assets and liabilities of the subject corporate entity. Such cases did not hold that when a party in receivership enters into new contracts and legal obligations, and initiates litigation in other jurisdictions, it somehow reserves

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[1] Judge Miller's decision to recuse himself came over the vigorous opposition of the Receiver. In an affidavit opposing recusal, the Receiver hailed Judge Miller as "a picture of judicial decorum," "extraordinarily admirable," "highly intelligent," and "highly skilled." (Saad 10/8/20 Affidavit ¶¶ 6, 9, 16.) Conversely, he described Field as "devious," "dastardly," "vile," and "a master of deception." (Id. ¶¶ 9, 15.) Twelve years of this is enough. Should the receivership in this case continue on remand, it is badly in need of stronger and more transparent supervision, including hard deadlines for taking action that should have been completed over a decade ago.

the option to retreat to South Carolina courts whenever an advantage might be gained from doing so. One of the cases Respondents cite expressly provides that "there is no power in the [receivership] court to alleviate contractual obligations." *Nat'l Cash Register Co. v. Burns*, 217 S.C. 310, 316 (1950). Field and Taillon asserted in the Florida case that a term of the GSA bars the action against it. Respondents' reliance on the receivership as a basis for taking the issue away from Judge Corrigan is thus plainly contrary to *Burns*.

South Carolina courts have been clear that the imposition of a receivership, and decision to continue same, constitutes a "drastic remedy" that is appropriate only under "pressing circumstances." *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 301 S.C. 224, 228 (1989); *Vasiliades v. Vasiliades*, 231 S.C. 366, 376 (1957). The Receiver is not entitled to interpose his unprecedented failure to accomplish the purpose of this meandering receivership after twelve years as justification for dragging it out even further with another round of litigation.

The Receiver chose to pursue litigation in Florida. The purported basis for staying that litigation was a stipulation in the GSA calling for Judge Miller to resolve contractual disputes. With Judge Miller recused, receivership law does not provide an alternative basis for a South Carolina trial court to issue an advisory opinion to a federal district judge in Florida.

B. South Carolina Trial Courts Do Not Retain Perpetual Authority to Adjudicate Disputes Arising from Settlement Agreements Summarily and Without Following the Rules of Civil Procedure

With Judge Miller having recused himself and eliminated the purported jurisdictional basis for this proceeding, Respondents next claim that "a trial court has inherent jurisdiction to enforce settlement agreements entered before it." (Resp. Br. 11.) However, they do not cite any authority for the proposition that a party may return to court years after a settlement was

consummated to litigate disputes over the language of the settlement agreement.[2] It would have made little sense for the parties to have designated Judge Miller to resolve disputes over the GSA if there was already an inherent right to reopen a settled case any time a dispute arose over how the GSA should be interpreted. Likewise, the parties would not have expressly agreed to the dismissal of this action (GSA ¶ 11) if they intended to keep litigating it.

Moreover, for the Court of Common Pleas to gain the authority to litigate a dispute over the terms of the GSA, Respondents were required to bring a proper action under the South Carolina Uniform Declaratory Judgments Act, SC Code § 15-53-10, *et. seq*. (UDJA). Settlement agreements are contracts, and this dispute over the meaning of a settlement agreement is therefore a contract dispute. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241 (Ct. App. 2009). Compliance with the UDJA would have required the filing of pleadings, service on all interested parties, and time to complete discovery. (Taillon Opening Br. 22-23.) Instead, the trial court accepted each of the various representations of fact made by Respondents in their motion papers, rejected contrary evidence submitted by Taillon and Field, and decided the matter without so much as holding a hearing. Several parties to the GSA were neither served nor notified. (Id.)

Even if the trial court retains some authority to enforce settlement agreements, that authority does not override basic principles of due process, contract law, and civil procedure. The trial court's drive-by adjudication of this matter prevented the fair presentation of the facts and law and creation of a record on appeal. As such, barring resolution in favor of Appellants on the merits, this matter should be remanded with instructions to fully litigate the factual issues.

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[2] In the case Respondents do cite, *Kumar v. Third Generation*, 324 S.C. 284, 290, 485 S.E.2d 626, 629 (Ct. App. 1995), this Court affirmed the denial of a motion to restore a settled case to the active docket.

C. Respondents' Unsubstantiated New Allegations Against Field Cannot Substitute for Competent Proof That He Attempted to Revoke or Disqualify Any Term of the GSA

Respondents candidly admit that the original basis for their demand for a $250,000 penalty against Field was "the filings and conduct of [Field] related to the Florida collection action." (Resp. Br. 6.) As explained in Taillon's opening brief, this allegation plainly does not amount to an allegation that Field sought to "revoke or disqualify" any term of the GSA. Field's position that the Receiver released the right to enforce the civil judgment was an attempt to enforce a provision of the GSA. It is also notable that Respondents fail to identify which "filings or conduct" in the Florida action were objectionable. The trial court also failed to identify any specific conduct to justify its award of the penalty amount. (Am. Order 7-8.)

Even if Field's "filings and conduct" in Florida were somehow improper, that was an issue for the presiding judge there. A South Carolina trial court has no authority to usurp a United States District Judge's right to control his own courtroom. Judge Corrigan is perfectly capable of enforcing rules of conduct against any of the parties, including enforcement of standards imposed by the GSA itself.

Evidently realizing, however belatedly, that policing Judge Corrigan's courtroom is not the proper role of the South Carolina courts, Respondents attempt to swap in another new argument. Now they claim that Field made inaccurate statements when he testified in Judicial Merit Selection Committee hearings regarding the reappointment of Judge Miller. (Resp. 15-17.) In lieu of citations to the record, every factual assertion in this section of Respondents' Brief is to one of their memoranda in the trial court. (Id.) As such, there is no competent proof concerning the alleged inaccuracy of whatever Field said in the hearings. *State v. Parker*, 391 S.C. 606, 615 (2011) (facts not in the record on appeal are not to be considered).

Even if properly supported with competent evidence, Respondents' complaints about Field's hearing testimony fail as a matter of law to warrant award of a penalty under the GSA. Judge Miller recused himself from this case sometime prior to November 9, 2020, when Chief Judge Beatty appointed Judge Toal to replace him. (Beatty Order dated November 9, 2020; filed November 12, 2020.) The hearings in question took place on November 18 and November 28, 2020. (Resp. Br. 15-17.) Thus, at the time of Field's testimony, Judge Miller had already recused himself. It is not possible that Field's testimony in the hearings about a judge everyone knew was no longer involved in this case could in any way amount to an attempt to "revoke or disqualify" the GSA. There remains no legitimate basis for the trial court's assessment of a $250,000 penalty against Field and in favor of Respondents.

D. The Release Language in the GSA Bars the Receiver from Enforcing the Civil Judgment

Respondents' argument concerning the core issue in this case consists mainly of reproducing passages from Judge Toal's order and declaring them to be correct. (Resp. Br. 17-20.) The only thing that might be said to constitute a legal argument is Respondents' contention that *State v. Morgan*, 417 S.C. 338 (2016), precludes any release of a judgment derived from unpaid restitution. However, Taillon has thoroughly explained why *Morgan* does not apply to civil judgments, which explanation Respondents did not refute or even address.

Morgan held that an agreement between private parties cannot operate to relieve a criminal defendant from the requirement of paying restitution for the very simple reason that restitution is part of a criminal sentence imposed by the state. *Id.* at 342-44. Without the state's approval, a defendant is no more able to cancel restitution than he would be to cancel an active jail sentence. There is no dispute on this point and there never has been.

The *Morgan* rule was so obvious and well-accepted that the parties expressly planned for it in the original GSA. The parties provided as a term of settlement that Field would ask the state to revise his restitution obligations. (GSA ¶ 8.) If the state agreed, the settlement would move forward and restitution would end. (Id.) If the state did not agree, the deal was off. (GSA ¶ 10.)

The state did not agree to the proposed revision. Because the private litigants still wished to settle, they crafted a compromise. Rather than simply eliminating restitution, the state would convert it into a civil judgment. (Addendum ¶ 1(A)(iv).) That way, the state was not a party to any reduction in restitution. At the same time, the private parties preserved the essence of their original deal. The civil judgment arising from unpaid restitution would be treated the same way as all of Respondents' other claims – it would be released in full in exchange for the consideration Field and his family members and associated parties were providing in the GSA. (GSA ¶¶ 4, 5, 14(I)(v).)

As discussed at length previously, the language of the GSA and Addendum fully supports this description of events. None of the sweeping release language in the original GSA was revised or modified by the Addendum and no exception to the release was made for the judgment arising from unpaid restitution. (Taillon Br. 24-29.) In addition, in the only case to decide this precise issue, *Huml v. Vlazny*, 716 N.W.2d 807 (WI 2006), the Wisconsin Supreme Court held that even though restitution may not be modified without permission of the state, a private party remains free to release any civil judgment in its favor, including a future civil judgment that may arise when a defendant's sentence ends without payment of the full balance of restitution. Unable to distinguish *Huml*, Respondents pretend it does not exist.

There is no South Carolina authority suggesting our Supreme Court would depart from the *Huml* standard. It reflects a general consensus that civil judgments arising from unpaid

restitution may be waived to the same extent as other civil judgments. *See, e.g., Utah v. Laycock,* 214 P.3d 104, 114 (UT 2009) (noting that once a restitution award is reduced to a civil judgment, "a serious question will arise over whether [the victim] may execute on her judgment when she has released [the criminal defendant] from all of her claims against him"); *Wisconsin v. Muth,* 945 N.W.2d 645, 676 (WI 2020) (following *Huml* and concluding that "because the claims belong to the victims, [they may] release them just like any other claim"). Respondents' misreading of *Morgan* cannot supply a basis for ignoring this consensus and creating a special rule for post-restitution judgments that no other jurisdiction recognizes.

Respondents have likewise failed to reconcile the trial court's ruling with the circumstantial evidence, including the contemporaneous actions of the parties. The trial court's ruling renders the original bargain reached in the GSA a nullity and interposes in its place a deal that Field, Taillon and the other parties who provided consideration to the Receiver would have been fools to accept. The original GSA was a typical settlement – a fixed amount of consideration on a fixed schedule in exchange for a complete release of present and future claims. The Receiver got a guaranteed recovery in exchange for giving up the right to try to recover more through litigation. According to the trial court's and Respondents' interpretation of the Addendum, the deal was then changed so that the Receiver got <u>both</u> the up-front consideration <u>and</u> the right to harass Field and Taillon forever, armed with the civil judgment.

Had anyone believed this was the meaning of the Addendum at the time, they would have acted differently. Judge Miller surely would have ensured that all the parties actually signed the Addendum, which is plainly required if it was to materially modify the original agreement.[3]

[3] The trial judge attempted to support her finding that Judge Miller's handling of the Addendum was good enough with a conclusory reference to Rule 43(k), SCRCP. (Am. Order 3, fn. 2.) The rule stipulates that an agreement is binding if signed by counsel and entered into the

But Judge Miller, acknowledging that the Addendum "does not affect any other party to the GSA other than Arthur Field" (Miller 12/1/17 Order p. 3), summarily approved it following a hearing at which several of the original parties were not present (some of whom were *pro se*), without notice to the class members, and based on an Addendum not circulated in advance. Judge Miller literally had to order copies made during the hearing. (11/27/17 Hearing Transcript p. 15-18.) The Addendum remains unsigned by various parties and counsel and was never attached to Judge Miller's Order approving the GSA. (Addendum; Miller 12/1/17 Order.) This calls its validity and enforceability into question under both Rule 23(c), SCRCP, and Rule 43(k), SCRCP. *See, S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 521, 846 S.E.2d 861(2020).

Moreover, if the Addendum fundamentally changed the original bargain so as to add more than $1,000,000 to the Receiver's potential recovery, it would be void for lack of consideration. The parties who provided consideration under the GSA, Taillon included, received no new consideration pursuant to the Addendum. Absent consideration, a contractual modification is not enforceable. 17A C.J.S. Contracts §411 (1999); 1A Corbin on Contracts §175 at 114 (1963); *Lokan v. Am. Beef Processing, LLC,* 311 P.3d 1285, 1289 (Wash.App. 2013) ("A party does not provide new consideration when it reiterates a promise to do what it is already obligated to do pursuant to the contract."); *Youree v. Eshagoff,* 256 S.W.3d 551 (Ark.App. 2007) (refusing to enforce contractual addendum for lack of new consideration); *Margeson v. Artis,* 776 N.W.2d 652 (IA 2009) (same); *Allington Towers North, Inc. v. Rubin,* 400 So.2d 86 (FL

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record, made in open court and noted on the record, or signed by the parties and counsel. Here the Addendum was not signed by all parties or all counsel. The hearing at which it was discussed was not attended by all parties, and some of those absent were *pro se*. Although this was a class action case, the class was not given notice of the Addendum or the hearing at which it was presented. And it was not attached to the order approving the GSA. (Taillon Opening Br. 12-14.) Thus, it is manifestly not compliant with the terms of Rule 43(k).

App. 2007) (same). The only construction of the Addendum consistent with basic contract law is one in which the relevant change was a technical one to accommodate the Attorney General, not a *sub silentio* gutting of the release.

E. The Trial Court Erred by Summarily Resolving Factual Issues in Favor of Respondents and Ignoring Relevant Legal Standards

As argued previously, this case should be decided in Field's and Taillon's favor based on the plain language of the GSA and Addendum alone or in combination with evidence of the contemporaneous actions and statements of the parties. However, in the event this Court believes issues of fact must be resolved, it should remand the case for discovery and a jury trial.

While the construction of an unambiguous contract is a matter of law, *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234 (Ct. App. 2009), there was simply no way for the trial court to conclude that the language of the GSA – which contained broad and comprehensive releases untouched by the Addendum – unambiguously carved out a right to enforce the civil judgment. Because the GSA did not unambiguously carve out the civil judgment, the trial court did not merely resolve an issue of law but rather granted summary judgment to Respondents. This was erroneous because the trial court resolved factual issues in favor of the moving party (Respondents) and refused to permit Appellants to conduct discovery. *Baird v. Charleston Cty.*, 333 S.C. 519, 529 (1999) (summary judgment appropriate only in the absence of any issue of material fact, viewing the facts in the light most favorable to the non-movant, and permitting the parties to engage in discovery).

Specifically, the trial court vaguely relied on "the sequence of hearings to obtain final approval" of the GSA as somehow providing factual support for Respondents' interpretation of the Addendum. (Amended Order 10.) It also held that the failure of numerous parties to execute the Addendum was excused because it did not impact those parties. (Amended Order 8.)

Several parties to the GSA not only declined to execute the Addendum but were not even served with notice of the current litigation. The trial court's resolution of these factual issues in favor of Respondents was erroneous.

Likewise, the trial court ignored the legal standards applicable to liquidated damages agreements (see Taillon Opening Brief 43-44), breezily concluding that because Field agreed to the amount in the GSA, he was bound by it. (Amended Order p. 8.) This is of course true in every dispute over whether a liquidated damages amount is void as an unlawful penalty. The issue is whether the amount was intended as an estimate of damages or as a penalty; it is a given that the amount was agreed to by the parties. *DD Dannar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 20, 846 S.E.2d 883, 889 (Ct. App. 2020); *quoting ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011). The trial court completely missed the point.

The trial court effectively granted summary judgment without following required and well-established procedural steps. In the event this Court does not reverse the trial court on the merits – which reversal is amply justified – it should remand this case for discovery and a trial.

CONCLUSION

For the reasons set forth herein and in her opening brief, Taillon respectfully requests that this matter be dismissed or remanded with instructions that the trial court enter judgment against the Receiver on all claims. In the alternative, this matter should be remanded for discovery and a trial on the merits of the Receiver's claims.

November 19, 2021

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant Kathryn Taillon on the below-listed Counsel of Record by electronic mail (copy attached) on November 19, 2021.

November 19, 2021

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Attachments: Appellant Taillon's Initial Reply Brief and COS.pdf

Dear Counsel:

Please find attached Appellant Kathryn Taillon's Initial Reply Brief in the above-referenced matter.

Respectfully,

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