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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Court of Appeals No.: 2018-CP-46-01592

Karen K. Baber, ……Appellant/Petitioner,

vs.

Summit Funding, Inc; Appraisal Innovations, LLC; Brian L. Blue; The Gillen Law Firm, PA; Michael F. Gillen; Allen Tate Co. Inc.; Colleen Coesens; Jonathan Garvey; Robert Ouzts; Connie Delaney; and Gloria Long- Robinson…… Respondents.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND CERTIFICATION OF APPELLATE COURT'S FINAL RULING

Pursuant to Rule 242, SCACR, Karen K. Baber ("Baber," "Appellant," or "Petitioner"), acting pro se, hereby respectfully petitions this Honorable Court to grant a writ of certiorari to the South Carolina Court of Appeals regarding errors made in Unpublished Opinion No. 2023-UP-064, filed February 22, 2023 ("Opinion"). Petitioner hereby certifies that the Court of Appeals' decision denying her motion for reconsideration was entered on April 11, 2023.

ISSUES PRESENTED IF WRIT OF CERTIORARI IS GRANTED

The writ should be granted because the superior court's grant of summary judgment and the Opinion are in conflict with prior decisions of this Court that clearly hold (a) motions for summary judgment may not be granted if there are disputes of material facts; (b) summary judgment should not be granted if a party has not had the opportunity to take discovery; and (c) a superior court should allow amendment of admissions based upon ***initially unanswered*** requests, especially for *pro se* parties, if there are questions as to whether the requests for admission were actually received, they are later answered, other evidence contradicts those admissions, and there is no prejudice to the moving party.

This case also presents three novel questions of law:

1. What is the effect of the court of appeals' failure to address an issue on appeal (and motion for rehearing) which impacted the other issues upon which the appellate court based its ruling? Prior South Carolina case law has addressed what happens if an issue is ***not*** addressed by ***an appellant*** in the initial appeal and the motion for rehearing. There has been no decision of which Petitioner is aware where this Court has ruled on the impact of the appellate court's failure to address a significant issue that was preserved on appeal and impacted the bases of the court's

other rulings. In this case, one of Baber's grounds for opposing the defendants' motions for summary judgment ("MSJs") was that Baber had issued discovery to the defendants, but to which they had failed to respond prior to their filing their MSJs (or anytime thereafter). Their answers to that discovery would have addressed many issues raised in the MSJs.

2. Whether a South Carolina borrower may assert ***a breach of contract claim*** when the lender fails to comply with Federal Housing Administration ("FHA") underwriting guidelines for an FHA-insured loan. The FHA required a clear CL-100 termite/wood infestation report and a valid appraisal. Summit failed to obtain either. The subject property had significant undiscovered damage by termites and/or other wood rot. Further, the electrical, mechanical, heating, and plumbing systems and appliances were non-working which would have been revealed with a valid appraisal. The subject loan agreement incorporated FHA rules and regulations, including those underwriting guidelines. The superior court ruled that Petitioner had no right to assert such claims. The court of appeals held that this argument had not been preserved on appeal and was barred by the "two-issue rule."

3. How detailed must the description of the of "Issues on Appeal" be when:

(a) The superior court's decisions grossly failed to acknowledge numerous disputes of material facts such that nearly every basis for the superior court's rulings were tainted. In that context, leeway should be granted for more broadly defined "Issues on Appeal" which might otherwise be barred by application of the "two-issue rule."

(b) When evidence is presented to ***the appellate court itself*** that a party had received ineffective assistance of counsel on the appeal and that her attorney had abandoned her both

before and after the filing of the initial brief, should the adequacy of the wording of Issues on Appeal be reviewed more leniently in the application of the "two-issue rule."

STATEMENT OF THE CASE

Appellant purchased real property located in Rock Hill, South Carolina (the "Property"). The loan she obtained to purchase the Property was an FHA-insured mortgage loan. The FHA has strict underwriting requirements regarding the condition of real property for which it guarantees purchase mortgages. Among other things, the FHA underwriting guidelines require a termite/wood infestation report showing that the Property is free of termite or wood rot damage; it also requires an appraisal that has verified that appliances, HVAC systems, utilities, and plumbing are operating; it requires that the roof be structurally sound, etc. The Property had substantial defects, including, but far from limited to termite and wood rot damage.

Thus, Appellant was not merely seeking a loan to buy any house. She was seeking a loan on the Property which she knew would have to be in good enough condition to meet FHA-underwriting guidelines. Summit Funding, Inc. ("Summit") breached that agreement. It loaned the money to purchase the Property, but it failed to comply with the federal law expressly incorporated into the mortgage agreement, i.e. FHA underwriting guidelines.

Appellant relied upon these assurances that the Property would meet FHA regulations. If the Property did not meet these requirements, then the Property would not qualify for an FHA-insured loan, and she would have purchased another home that did meet FHA requirements. Consistent with the foregoing, Summit's own officers at the local, regional, and national levels, ***repeatedly confirmed to Appellant that a termite inspection, home inspection, and valid appraisal were required as conditions for the loan closing.*** They further represented that those

documents ***must have been provided***. Summit should have been estopped from arguing that Petitioner had no standing to complain of Summit's failure to obtain those reports (and a valid appraisal) prior to funding the loan.

The Appellant was repeatedly assured by her realtor, defendant Jonathan Garvey (one of the Tate Defendants), that he had obtained the South Carolina and FHA-required CL-100 Wood Infestation Report and home inspection report and that they were clear.

The Property did not meet FHA underwriting guidelines. In fact, among many other things, the Property had significant termite damage around the doors and windows, there were holes in the roof, the water heater had rusted out so there was no hot water, one of the air conditioning units was completely inoperable because it was rusted out, a garbage disposal was inoperative and was held in place with duct tape, the burners on the oven did not work, and several of the toilets were completely non-functioning. Those defects were not disclosed because there was no home inspection, but more importantly, the appraiser failed to note any of these defects in his Appraisal Report.[1] (R. 1040, ¶ 37). The appraisal on the Property was falsified.

Shortly after the closing, Appellant sought a copy of the CL-100 wood infestation report that everyone was assuring her had to have been provided. She wanted that report so and the home inspection report so that she could bring claims for negligence against the alleged termite

[1] The Appraisal also showed that there were stairs leading to the attic when there was only a hutch, that he examined the crawl space when the house sat on a slab; that the windows were working when they were all nailed shut and several were being held in place by wadded up newspaper placed below the windows; etc. The appraiser lied when he certified that when he returned to the Property a second time that the utilities had been turned so that he could verify that the systems impacted by water and electricity could be verified as working.

and home inspector. The Tate Defendants induced Petitioner to sign a release of all claims based upon assurances and representations by the broker-in-charge, Defendant Colleen Coesens, that she (Coesens) would personally provide copies of the CL-100 report and a home inspection report to Appellant.

Ten months later, Coesens finally admitted to Appellant that Garvey and Allen Tate Company had not obtained the CL-100 inspection or a home inspection. Appellant rescinded her Release when she discovered that she had been lied to in order to obtain her signature on the Release.

To this day, Appellant has never been provided a copies of the termite inspection or home inspection reports because her realtor, defendant Jonathan Garvey, just flat out lied and never obtained them. No valid appraisal was ever obtained. ***Those are the indisputable and unmitigated background facts.***

Procedurally, Appellant filed her Verified Complaint on May 29, 2018. The Tate Defendants issued discovery requests on or about August 18, 2018, but Appellant never received them until they were re-sent on October 25, 2018 (and not received until October 31, 2018). Appellant timely responded to those discovery requests including the Requests for Admissions on November 27, 2018. No additional discovery was sent by any of the defendants.

On February 13, 2019, Appellant issued her first discovery requests to the defendants. The defendants never responded to those discovery requests.

Instead, approximately three weeks later, March 5, 2019, the Tate Defendants filed a motion for summary judgment with affidavits and exhibits (R. 454 – 840). On March 15, 2019, Summit filed its motion for summary judgment with affidavits and exhibits (R. 841 – 889).

Appellant, acting *pro se*, filed her own affidavits and exhibits in opposition to those defendants' MSJs, ***providing testimony and exhibits disputing every material fact raised by those defendants and countering every legal argument made.*** (R. 890 – 1021 and R. 1022 – 1175).

On May 29, 2019, the Hon. Daniel Dewitt Hall, issued two Orders granting summary judgment. As to the Tate Defendants, the circuit court ruled that there were no genuine issues of material facts (a) with respect to Baber having released the Tate Defendants from all claims,[2] and (b) Baber being bound by the deemed admissions (which she had never received) (R. 000013 - 14).

As to the question of Appellant's alleged failure to timely respond to the Tate Defendants' requests for admission, the superior court abused its discretion in holding that alleged failure against Petitioner. In her opposing affidavit, Petitioner stated under oath, that she did not receive those Defendants' discovery requests; but when she did receive a copy, she timely responded to ***all*** the discovery (including disputing the relevant requests for admissions). In addition, her Verified Complaint, her affidavits opposing the motions for summary judgment, and Petitioner's deposition testimony all disputed that facts which the superior court deemed admitted. When Petitioner answered the requests, there was no trial date, and no prejudice to the defendants by allowing Petitioner's actual written responses to the requests for admission to stand. The superior court abused its discretion in deeming all such facts admitted.

[2] That ruling was in error because Baber had submitted her testimony, under oath, that she had been induced to sign the release based upon the false assurances of Colleen Coesens that Coesens would get and provide the CL-100 and also a promised home inspection (in addition to the appraisal).

As to Summit, the circuit court ruled that Petitioner lacked standing to make claims based upon Summit's alleged failure to meet FHA-underwriting requirements and that even if she did have standing, her claims were barred by the applicable statute of limitiations. (R. 000020). That ruling was in error because the FHA-underwriting guidelines were incorporated into the subject loan agreement and Petitioner was entitled to bring ***breach of contract*** claims for Summit's failure to meet those regulations. Numerous courts have recognized this principle, but South Carolina has not yet addressed this question of first impression. Further, the statute of limitations ruling was in error because there disputes of material facts as to when Petitioner knew that her realtor had not provided clear wood infestation and home inspection reports.

Appellant had been representing herself, but after the MSJs were granted, she was finally able to secure counsel on a contingent fee basis. Messrs. Glenn E. Bowens and Creighton B. Coleman entered their appearances and filed a motion for reconsideration in the circuit court, which motion was summarily denied. Coleman did nothing to prosecute Baber's case thereafter, and Bowens did very little.

Bowens drafted the "Appellant's Initial Brief" which was filed on or about January 21, 2020. For never explained reasons, co-counsel Coleman, did not participate in its preparation, make any edits, suggest any arguments, or sign it. Bowens and Creighton simply abandoned the Petitioner. Mr. Bowens never answered a single phone call or email for many months before and never after the filing of the initial brief.

On August 17, 2022, the court of appeals allowed Coleman to withdraw despite Appellant's opposition in which she expressed her concerns that she would be unrepresented because she had been unable to reach Bowens for months. The appellate court granted

Coleman's motion. Again, on or about December 28, 2022, Appellant wrote a letter to the court of appeals expressing her concerns that she had been unable to reach Bowens for a substantial period. On January 27, 2023, the court of appeals entered its Order that Bowens was "relieved as counsel in this appeal" (even though he had not moved to be relieved) after discovering that Bowens had "retired from the practice of law." Bowens' "retirement" had not been disclosed to Petitioner, opposing counsel, or the courts. Petitioner was given thirty days to secure new counsel or enter her own appearance.

Before that 30-day period had even expired, however, the court of appeals, through its panel of Justices Geathers, McDonald, and Hill (the "Panel"), issued its opinion in this matter (the "Opinion"). The Opinion cited a number of facts favorable to the defendants' arguments without citing any of Appellant's evidence in support of her position, several key points of which are cited herein.[3] Purportedly, however, all the Panel's citations to the "facts" were *dicta* because the Panel affirmed the superior court's Orders for summary judgment based upon Bowens' alleged failure "to appeal several of the circuit court's grounds for granting summary judgment …." As to the Tate Defendants, the Opinion states that Appellant's counsel Bowens failed to address Appellant's signing of the Release and her failure to "respond to their requests for admission,

[3] In addition to the specific arguments and record citations herein contesting the defendants' and the Panel's representations as to the "facts," the record shows that Appellant presented evidence demonstrating that ***every*** material fact was disputed including matters as to (1) the completeness of the seller's property condition disclosure statement and her obligations to update such statement; (2) Appellant's alleged failure to receive additional inspections or reports was based upon Garvey's false and fraudulent representations that he had arranged them and that they showed the Property to be free of any material defects; and (3) although the Property was being sold "as-is," Appellant's reliance upon the fact that there would not be any purchase of the Property because it was conditioned upon the Property meeting all FHA requirements (i.e. no material defects impacting the safety or livability of the Property).

resulting in Baber's admission that she knew termite and home inspections were not done prior to closing on the Property."

As to Summit, the Panel held that Appellant failed to appeal the circuit court's ruling that violation of FHA regulations did not create a private cause of action or that the statute of limitation had run on Appellant's claims. Based upon those alleged failures, the Panel held the "two-issue rule" applied and affirmed the circuit court's Orders because Appellant had not appealed from those rulings. The Panel then held "we need not address Baber's appeal." *See* Opinion at "Discussion" section.

Petitioner filed a motion for reconsideration and to have a decision made by the court of appeals *en banc* to overcome apparent bias by the Panel and to address several concerns, which were ***not addressed*** by the Panel: (1) whether summary judgment was appropriate given that Appellant's discovery against the defendants was outstanding – discovery that would have borne weight on all the issues related to the defendants' summary judgment motions; (2) whether private parties can waive federal government requirements for the issuance of an FHA-insured loan especially when those requirements were expressly incorporated into the loan documents; and (3) whether the circuit court erred or abused its discretion in holding Appellant's failure to timely respond to requests for admission against her, when there was overwhelming evidence showing that the facts subject of the requests for admission were disputed. The appellate court denied the request for rehearing.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE TATE DEFENDANTS.

Rule 56 provides that a party is entitled to summary judgment only if "there is no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law." "Summary judgment is a drastic remedy to be invoked cautiously and must be denied if [the non-moving party] demonstrates a ***scintilla of evidence in support of her claims***." *Abdelgheny v. Moody,* 432 S.C. 346, 852 S.E.2d 225 (Ct.App. 2020) (citing *Hancock v.Mid-South Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)); *Madison v Babcock Center, Inc.,* 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006) ("Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues."); The court of appeals was required to "review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Holmes v. East Cooper Community Hosp., Inc.,* 408 S.C. 138, 154, 748 S.E.2d 483, 492 (2014).[4] The court of appeals decision violated this Court's prior case law in affirming the superior courts' orders.

A. The Circuit Court Ignored Significant Disputes of Material Fact In Granting Summary Judgment for the Tate Realty Defendants.

The circuit court held Petitioner's claims were barred by the General Release that she provided to Tate Realty on July 1, 2015 ("Release"). The Circuit Court ignored the facts presented by Appellant that she signed the Release based upon Colleen Coesen's false representations that she would provide the Appellant with a copy of the CL-100 report and the home inspection report after the Release was signed. Moreover, Garvey, Appellant's real estate

[4] In this case, the court of appeals failed to employ this standard, even as to the dicta in its opinion which for the most part only cited "facts" favorable to the defendants.

agent, was present when Coesens represented that she would get the two reports for Appellant, but Garvey remained silent when, as Baber's agent, he had a fiduciary duty to speak and confess that he never did obtain the reports. (*See* R. 30 – 65, at ¶¶ 68 – 70; and R. 1040 - 1042, 1045 at ¶¶ 38 – 42, 45, 47.)

In fact, it was not ***until April 18, 2016*** that Coesens wrote an email to Petitioner and admitted "insofar as the CL-100, my apologies; however I was mistaken in that I believed that you had such an inspection completed…." (R. 1042, at ¶ 43). Upon learning that, Petitioner rescinded the Release. (R. 1042, at ¶ 45 and R. 1121).

As pointed out by the Appellant to the circuit court (R. 1043, at ¶¶ 46 – 47), a release procured by fraud or misrepresentation is invalid. *See Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120, 122 (1978), *and see Floyd v. New York Life,* 110 S.C. 384, 96 S.E. 912, 915 (1918); *Stafford v. Gareleck,* 330 Ga.App. 757, 769 S.E.2d 169, 173-174 (Ga. 2015). The circuit court erred in granting summary judgment given the disputes of fact as to when Baber should have known no reports had been provided.

B. **The Circuit Court Improperly Held that Petitioner Had "Admitted" Certain Disputed Facts When She Did Not Timely Respond to Requests for Admission Which She Did Not Initially Receive, but then Timely Disputed After Receiving the Requests, Provided Affidavits Disputing, and Gave Deposition Testimony Disputing the "Deemed Admitted" Facts.**

The circuit court also erred in deeming certain facts admitted, i.e. that Appellant "was fully aware those [home and termite] inspections had not been performed and had told the Tate Defendants that she was not willing to pay for those inspections," (R. 000015) which was based upon the allegedly untimely response to the Requests for Admission which Tate Realty asserts was mailed to Petitioner on August 18, 2018.

Both Rule 36 and this Court's prior decisions provide that unanswered requests for admissions may be set aside if the presentation of the evidence would subserve the presentation of the case on the merit and if there was no prejudice to the opposing party. The circuit court and the court of appeals erred on this issue for the following reasons:

1. In August 2018, Appellant was home due to health issues and would have been aware of whether Tate Realty's first set of discovery requests, including the requests for admission had been sent. (R. 1045 – 1046, at ¶ 50). They were not sent to Appellant when the Tate Defendants' counsel asserts they were.[5]

2. When Appellant was provided a copy of the discovery requests on October 25, 2018, she ***immediately*** advised the Tate Defendants' counsel that she had not received the discovery earlier, and she timely answered the Requests for Admission and expressly denied the allegations that she knew prior to closing that there was no CL-100 or home inspection or that she told Tate employees that she did not want to pay for a termite or home inspection report. (R. 1046, ¶¶ 51-52, 1128 - 1138).

3. Appellant's ***Verified*** Complaint clearly showed that she was ***not aware*** that there was no termite inspection or home inspection report as of the loan closing. *See e.g.* R. 30 – 65, at ¶¶ 41, 45, 47 - 49, 54, 56 - 59, 62, 68, 69, 82, 94, 95, 97, and 98.

4. Emails and other communications in the Tate Defendants' possession also clearly showed that Appellant ***did not know*** that there was no termite or inspection report because Tate's employee, Garvey, was representing to her, to Summit Funding, and to the closing attorney's

[5] *See Crestwood Golf Club, Inc. v. Potter,* 328 S.C. 201, 219, 493 S.E.2d 826, 836 (1997) (Party allowed to respond to requests for admission when party's counsel stated that he had never received the requests for admission); *Nexstar Media Group, Inc. v. Davis Roofing Group, LLC,* 431 S.C. 593, 848 S.E.2d 597, 602-604 (S.C.App. 2020);

office that those reports ***were being provided,*** and he would bring them to closing. *See* R. 1071, 1085 – 1086, 1088, 1102 – 1103, 1112, 1116 – 1118.

5. The circuit court abused its discretion in not granting Appellant's request that her denials of Tate's requests for admission stand, especially when the Tate Defendants failed to demonstrate any prejudice. (R. 1046, at ¶¶ 52 – 54). That decision, upheld by the appellate court, was contrary to this Court's prior case law. In *Baughman v. American Tel. and Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537, 542 (1991) this Court held:

> Furthermore, Plaintiffs should have been permitted to withdraw the deemed admissions and file the response of October 24, 1988. Rule 36(b), S.C.R.P., sets forth the test for withdrawal of an admission and, by implication, the filing of a late response….
>
> In this case, both requirements of the test are satisfied. First, presentation of the merits will be subserved since the admissions, if not dispositive, involve key factual elements of Plaintiff's causes of action…. Second, since Plaintiff's responses ***were filed even before the requests were ordered admitted, Nassau's defense could not possibly have been prejudiced.***

See also, Commerce Center of Greenville, Inc. v. W. Powers McElveen & Associates, Inc., 347 S.C. 545, 556 S.E.2d 718, 724 (Ct. App. 2001); *Collins Entertainment, Inc. v. White,* 363 S.C. 546, 611 S.E.2d 262, 268 (Ct. App. 2005); *U.S. v. Turk,* 139 F.R.D. 615, 617 - 618 (D.Md. 1991). Several of these cases were cited in Petitioner's opposing affidavit but were overlooked or ignored by the circuit court. *See* R. 1046 – 1048, at ¶¶ 52 – 53.

6. Also pursuant to Rule 36(b), the merits of the case would have been subserved by the circuit court's acceptance of Appellant's later filed responses to the Requests for Admission, which she timely filed after she actually received the Tate Defendants' discovery requests. The Tate Defendants could show no prejudice by allowing Appellant to respond to those requests especially since they received them ***over a month prior to their filing their motion for summary***

judgment, and they had first taken Appellant's deposition wherein she contested the deemed-admitted facts before submitting their motion for summary judgment.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO SUMMIT FUNDING.

A. Summary Judgment in Favor of Summit Funding Was in Error Because the Circuit Court Ignored Significant Disputes of Material Fact and Erred as a Matter of Law.

The circuit court also held that Appellant had no right to complain about Summit's failure to obtain a CL-100 or home inspection report because it violated FHA regulations. It cannot be disputed that in order to fund the loan, FHA-loan underwriting guidelines required that there be a valid wood infestation report and a valid appraisal. See citations and quotations of relevant FHA requirements found at R. 908 - 912, at ¶¶ 30 – 33, and R. 983 - 1013. ***All parties to an FHA-insured loan must meet those FHA requirements.*** *See Winnebago Homes, Inc. v. Sheldon,* 139 N.W.2d 606, 610 (Wis. 1966) (Payment by lender "was necessarily conditioned upon … the lender's obtaining FHA insurance on the loan.").[6] In addition, a CL-100 report is also ***required by South Carolina law***. *See Dixon v. Ford,* 362 S.C. 614, 608 S.E.2d 879, 881 (Ct. App. 2005); *McAlhay v. Carter*, 415 S.C. 54, 781 S.E.2d 105, 108 (Ct. App. 2015). These authorities were cited to the

[6] *See also, Assured Guar. Mun. Corp. v. Flagstar Bank, FSB,* 920 F.Supp.2d 475, 509 (S.D.N.Y. 2013) (Purchaser of mortgage allowed to maintain action for bank's alleged failure to originate loans in accordance with underwriting guidelines.); *Kolbe v. BAC Home Loans Servicing, LP,* 738 F.3d 432, 436 (1st Cir. 2013) ("When interpreting a written contract, we look at text, context, and purpose to discover whether a proffered reading of the contract is reasonable. For contract language mandated by federal regulation, this context includes the regulation and the federal policy underlying the regulatory scheme."); *In re Shelton,* 481 B.R. 22, *30 (Bankr. W.D.Mo. 2012) (breach of contract claim upheld where FHA/HUD regulations were referenced in mortgage loan agreement, "[Plaintiff] has also sufficiently pled that Wells Fargo evaded the spirit of the transaction *and denied her the expected benefit of the HUD regulations incorporated into the contract* …."); *Mullins v. GMAC Mortgage, LLC,* 2011 WL 1298777, at *2 (S.D.W.Va. March 31, 2011) (borrower allowed to pursue breach of contract claim against lender (not an action to become a regulatory enforcer) for violation of HUD regulation); *Overholt v. Wells Fargo Bank, N.A.,* 2011 WL 4862525, *5 (E.D.Tex. Sept. 2, 2011) ("Thus, failure to comply with the regulations made part of the parties agreement may give rise to liability on a contract theory because the parties incorporated the terms into the contract. Indeed, courts have recognized that claims for failure to comply with the HUD regulations in question are best classified as a breach of contract.") (quoting *Baker v. Countrywide Home Loans, Inc.,* 2009 WL 1810336, at *5 (N.D.Tex. June 24, 2009)) .

circuit court but ignored or overlooked. In fact, the superior court never addressed the South Carolina requirement that a wood infestation report be provided before the purchase of any existing home.

Here, Petitioner's purchase of the Property was expressly subject to her obtaining an ***FHA-guaranteed loan***. (R. 898, at ¶ 5c, and R. 919 - 920, at ¶ 7 (purchase contingent on FHA loan from Summit Funding)). An FHA-loan required compliance with FHA underwriting guidelines. The underwriting guidelines required a CL-100 wood infestation report and a valid appraisal.

Thus, it is no surprise that Summit's officers repeatedly confirmed to Petitioner that her loan required that a termite and home inspection report:

a. From February 11 – 17, 2015 and March 6, 2015, April 8 and 9, 2015, and May 19, 2015 ***Summit's loan officer*** told Appellant that her loan ***required a termite inspection and home inspection report*** (R. 900 - 901, ¶¶ 7, 8 and R. 929 – 941).

b. On or about May 22, 2015, Appellant received a copy of the Good Faith Estimate of closing costs ***from Summit*** disclosing that a pest inspection and home inspection were "***Required services***" that had estimated costs of $75 and $450. (R. 901, ¶ 11 and R. 944, Box No. 6).

c. On May 27, 2015, only two days before the loan closing, Summit's loan officer wrote to Appellant stating: "Your termite inspection ***was condition of loan and was with inspection***." (R. 902, at ¶ 14, and R. 947).

d. The mortgage note was identified as ***FHA Case No.*** 481-6145927-703-203B. (R. 952). The Mortgage itself had the same FHA Case No. (R. 955). Paragraph 9(e) of the Mortgage stated that if the Note and Mortgage are not eligible for insurance under the National Housing Act, a letter to that effect from the HUD Secretary would be "be deemed conclusive proof of such ineligibity." No such letter was received confirming that the note and mortgage were eligible for FHA-insurance, i.e. underwriting guidelines had been met.

e. Paragraph 14 of the Mortgage (R. 958) provided "This Security Instrument ***shall be governed by federal law and the law of the jurisdiction in which the Property is located***."

f. In addition, part of ***Summit's*** loan closing package of May 29, 2015 was a schedule entitled "ITEMIZATION OF AMOUNT FINANCED". (R. 967 and 969). Included were lines 1301 – 1303 that again indicated that a pest inspection and home inspection were "***Required Services*** that You Can Shop For …."

There simply can be no question but that Petitioner was obtaining an FHA-insured loan and had to meet FHA requirements including obtaining the CL-100 wood infestation report and a valid appraisal. ***Those were contractual requirements, not just a failure of Summit to comply with federal regulations.*** The circuit court erred as a matter of law in ruling that Petitioner could not bring breach of contract claims for Summit's failure to meet the terms of the loan agreement by complying with FHA underwriting guidelines.

B. The Superior Court Also Improperly Granted Summit Summary Motion Based Upon Application of a Three-Year Statute of Limitation.

Summit also argued that the three-year statute of limitations (S.C. Code Ann. § 15-3-530(1)) had run on Appellant's breach of contract claim. That was the wrong statute of limitation,[7] but even if the three-year statute did apply, Appellant argued to the circuit court (R. 913) that South Carolina law provides that "Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence." *RWE NUKEM Corp. v. ENSR Corp.,* 373 S.C. 190, 644 S.E.2d 730, 733 (2007), *and see Maher v. Tietex Corp.,* 331 S.C. 371, 500 S.E.2d 204, 207 (1998) (date of breach does not start the statute of limitations – it is the date the aggrieved party discovered or should have discovered it). There are substantial disputes of fact as to when the statute of limitations began to run even if the three-year statute applied.

[7] In contrast, Appellant argued that because her claims were based upon a contract in writing secured by a mortgage of real property, the 20-year statute of limitation found at S.C. Code Ann. § 15-3-520 applied. *See National Bank of Aguilla v. Considine,* 268 F.Supp.3d 825, 829 (D.S.C. 2017) (If any doubt as to which of two statute of limitations apply, "doubt must be resolved in favor of the longer period."); *Scovill v. Johnson,* 190 S.C. 457, 3 S.E.2d 543, 545 (1939). (R. 912 - 913).

Appellant's Verified Complaint was filed on May 29, 2018. Summit argued that Appellant knew as of May 27, 2015 that there was no termite inspection or home inspection report. In support of that claim, Summit cited a May 27, 2015 email exchange between Linda Mattison (closing attorney's paralegal) and Appellant:

a. At 2:49 p.m. Mattison wrote: "Did you have a termite and home inspection done? If so, have they been paid or do I need to pay at closing. Need to know today."

b. At 4:03 p.m., Appellant wrote back: "didn't have termite inspection done … did inspection/appraisal and that has been paid for." Appellant was saying that the termite inspection was not done ***yet, not that there would be no termite inspection***.

Summit failed to advise the circuit court that there were several emails immediately following that exchange (and the circuit court failed to read those emails even though they were cited in Petitioner's opposing affidavit).

c. At 5:06 p.m., Mattison wrote Appellant: "Hi Karen. I called Jonathan [Garvey, the realtor] and ***he said there was a termite inspection which is good because we cannot close without them. He has sent them to Steve Reynolds [loan officer]. He said to put them as POC*** [meaning "paid outside of closing"]. Thanks." *Id. See* R. 902 -903 at ¶14(c) and R. 949 – 950.

Thus, Summit's representation to the circuit court that Appellant knew that there was no CL-100 or home inspection report as of May 27, 2015 was patently false.

d. Three days after the May 29, 2015 loan closing (Memorial Day weekend), Mattison emailed Appellant stating that Appellant could come by and pick up copies of the loan closing. More importantly for the purpose of the statute of limitation argument, she also told Petitioner: "Jonathan [Garvey, the realtor] did not bring the inspections on Friday you asked about [i.e. the termite inspection and the home inspection]. ***He is supposed to bring them today… We will mail off the loan package this afternoon after he brings the termite and home inspection.***" (R. 905, at ¶ 22). The loan package was subsequently mailed off to Summit Funding.

e. A year later, May 4, 2016, Macy Smith of Summit's North Carolina office wrote Appellant stating: "***The closing package had the termite report*** and the [house] inspection." (R. 907, at ¶ 26 and R. 977).

f. On July 20, 2016, Summit's California compliance officer wrote Appellant stating: "To explain, ***the loan would not have closed without meeting the Federal Housing Administration's underwriting guidelines***…. ***the loan could not have funded without receipt of this CL100.*"** (R. 907, at ¶ 27 and EXHIBIT 17).

Even if South Carolina's three-year statute of limitation for breach of contract applied, Appellant filed her Verified Complaint exactly three years of the loan closing. But under South Carolina law, the statute did not actually begin to run until Appellant reasonably discovered Summit Funding's breach by failing to hold up the loan closing until at least the CL-100 had been received. She did not know that until 2016. The circuit court improperly granted summary judgment on statute of limitations grounds given the disputes of material facts as to when the statute should have begun to run.

III. As to the Tate Defendants and Summit, Summary Judgment Was Improperly Granted Since Petitioner Was Not Allowed to Complete Discovery; Yet the Court of Appeals Completely Failed to Address This Issue.

This Court has repeatedly recognized that "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Doe v. Batson,* 345 S.C. 316, 548 S.E.2d 854 (2001); *BPS, Inc. v. Worthy,* 362 S.C. at 329-330, 608 S.E.2d at 161. Petitioner was denied that opportunity. The circuit court ignored Petitioner's request for completion of discovery, and the court of appeals completely ignored this issue.

This is one of the issues clearly raised on appeal. *See* Appellant's Brief, at pages 5 and 10. Mr. Bowens cited *Dawkins v. Fields,* 354 S.C. 58, 580 S.E.2d 433, 439 (2003) ("Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery.") (citing *Baughman,* 306 S.C. at 114 – 115, 410 S.E.2d at 545). Appellant sent her discovery requests to the defendants on February 13, 2019 (R. 1139 – 1175). Further, pursuant to Rule 56(f), Appellant expressly requested that she be allowed to conduct

her discovery before any ruling on the motions for summary judgment. *See* R. 914 – 915, at ¶ 38 and R. 1047, at ¶ 54.

There can be no question but that Appellant's issued discovery (R. 1141 – 1175) would have elicited evidence on every issue in dispute. Discovery to Summit would have provided evidence as to the intent of the parties as to whether the loan agreement was simply funding of a loan or funding of a loan to purchase a property that met FHA's quality requirements. It also would have confirmed the numerous affirmations from Summit's local, regional and national bank officers that Petitioner's loan could not have closed without the CL-100 and valid appraisal, thus estopping Summit from taking a contrary position now. Discovery also would have secured admissions from Summit that Baber did not know until well-after May 27, 2015 that there were no termite or home inspection reports, thus eliminating Summit's statute of limitation defense.

Discovery against the Tate Defendants also would have yielded relevant evidence to dispute their asserted facts. Most particularly, discovery would have allowed Petitioner to verify that Ms. Coesens induced Baber to sign the General Release with false assurances that she would provide Petitioner with the CL-100 report, while at the very same time, Garvey was sitting there knowing full well that he had not obtained the CL-100 or home inspection report. The circuit court's grant of summary judgment was premature given the Appellant's outstanding discovery to the defendants.

The court of appeals failed to address this dispositive issue which precluded granting the defendants' motion for summary judgment. In this case, the Supreme Court should address the question of what should be done when the appellate court fails to address a dispositive issue for reversal of a superior court decision. Here, this Court should remand Petitioner's case to the

superior court with an order that the orders granting summary judgment be rescinded and only reconsidered after Petitioner has had an opportunity to conduct discovery against the defendants.

IV. **Mr. Bowens Preserved All Issues for Appeal**; **But If He Did Not, Then Petitioner Should Be Allowed to Pursue Issues Raised in the Superior Court Proceedings But Which Her Attorney May Have Failed to Identify Because of His Ineffective Assistance.**

To be candid, the Initial Brief prepared by Bowens was obviously hastily and sloppily assembled. It is also clear that Bowens co-counsel, Coleman, abandoned the Petitioner and did not take part in the preparation of the initial brief. This was not known by Petitioner, because Bowens never submitted a draft for her to review or talked to her about arguments to be raised. Bowens could have articulated the issues on appeal much more clearly and made better arguments if he had simply incorporated the evidence and legal citations in Petitioner's opposing affidavits which had been prepared when she had been acting pro se. Unfortunately, Bowens did not do that, but what he did write should, under the circumstances of this case, be sufficient for preservation of the issues on appeal.

While generally issues on appeal are to be concisely and directly stated (Rule 208(b)(1)(B) SCACR), this Court has recognized that "When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments." *Greenville Bistro, LLC v. Greenville County,* 435 S.C. 146, 170 – 171, 866 S.E.2d 562, 575 (2021) (quoting *Herran v. Century BMW,* 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). *See Eubank v. Eubank,* 347 S.C. 367, 555 S.E.2d 413, note 2 (Ct.App. 2001). The issues

presented were "reasonably clear" when read in context of the case and other portions of the initial brief.[8]

With respect to Summit, the Panel concluded that Bowen's brief failed to address the argument that there was no private right of action for violations of FHA regulations and failed to address the argument that the statute of limitations had run.

The issue of Baber's standing to assert that Summit's failure to comply with FHA underwriting guidelines was preserved. Bowens stated as one of the Issues on Appeal that the trial court erroneously granted summary judgment. At pages 13 and 14 of Bowen's Brief on behalf of Appellant he further clarified one of the reasons why it was erroneously granted by citing to the FHA-requirements that there be a CL-100 and valid appraisal obtained before a loan could be issued: ¶ 1 - "The Plaintiff was repeatedly told by the Defendants that a home inspection and wood infestation report (termite inspection) ***were required by the FHA*** before the loan could be issued."; ¶ 2 - "The Summit loan officer repeatedly told the Plaintiff that the wood infestation report and home inspection were ***conditions of the loan, the realtor had obtained the reports and would provide the reports before the loan would be funded.***"; ¶ 3 - "The … Summit employees repeatedly told the Plaintiff that a home inspection and termite inspection ***were mandated for her FHA insured loan*** …."; ¶ 8 - "The purchase contract was contingent upon the property being inspected for termites."; ¶ 13 - "The ***good faith estimate*** provided to the Plaintiff by the Defendants one week prior to the closing indicated a wood infestation report and a home inspection report ***were required***."; and ¶ 16 - "At closing the HUD-1 Settlement Statement had

[8] Bowens clearly raised the issue regarding the superior court's premature granting of summary judgment when Petitioner still had relevant discovery outstanding to the defendants which they had failed to answer.

an attached document titled 'Itemization of Amount Financed' which listed the home and termite inspections as being financed either from loan proceeds or paid outside of closing.".

This issue also was preserved at page 15 of the Appellant's Brief wherein Bowen discussed the defendants' representations that the loan would not be issued if the reports showed any major defects, and the acceptance of the Property in its "as-is" condition was contingent upon the home inspection, termite inspection and a valid appraisal showing no major defects so that the loan could be funded. Thus, the issue of whether Petitioner could assert breaches of her loan agreement due to Summit's failure to meet FHA-underwriting guidelines was "*reasonably clear"* from Bowen's arguments and should have caused the superior court's summary judgment order to be reversed.

With respect to the alleged failure to address the statute of limitations defense raised by Summit, Bowens' first issue was "whether the trial court erroneously granted summary judgment," Bowens' fourth issue was "whether the trial court erred in not considering the Verified Complaint as an affidavit, and his fifth issue was "whether there are disputed issues of fact." Paragraph 12 of Page 13 of the Initial Brief also stated "Representations made by the Defendants to the Plaintiff were false." That would include representations that Colleen Coesens, a Tate Defendant, would provide Baber with copies of the CL-100 and home inspection report which would also go to the issue of when the statute of limitations began running. The more detailed bases for those assertions were preserved at pages 13 – 14 of Bowen's Brief on behalf of Appellant at paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 15.

The Verified Complaint that Bowens referred to in his Statement of Issues on Appeal specifically addressed Coesens' false statements that induced Baber to sign the release. (R. 1040

at ¶¶ 38 – 40). The Verified Complaint also reviewed and provided the email communications which showed that Baber expected the termite and home inspection reports to be provided at the loan closing. (R. 1035 – 1038, ¶¶ 28 – 32, 36). As already shown above, Baber's opposing affidavit had many relevant facts that disputed the defendants' narrative of events as to why the statute of limitations supposedly began to run on May 27, 2015. Again, the issues presented were "reasonably clear" when read in context of the case and other portions of the initial brief.[9]

With respect to the Tate Defendants, the issues regarding the general release and the effect of initially unanswered requests for admission "resulting in Baber's admission that she knew termite inspections were not done prior to closing on the Property." (Opinion at "Discussion") were also preserved.

Bowens' issues on appeal included that the trial court had erroneously granted summary judgment and that there were disputed issues of material fact. Baber's Verified Complaint and her opposing affidavits (cited above) clearly created issues of fact showing that the general release was procured from her by false statements that Colleen Coesens would provide her with copies of the termite and inspection reports. Baber's opposing affidavit cited case law that releases induced by false representations were invalid.

As to the initially unanswered requests for admissions, Baber's opposing affidavit, at the very least, created issues of fact concerning whether she received the requests when the Tate Defendants claim they were sent, and she did clearly respond timely when they were provided to her. *See* Opposing Affidavit at ¶¶ 50 – 53 (R. 1045-1047) wherein Petitioner explained the

[9] Bowens clearly raised the issue regarding the superior court's premature granting of summary judgment when Petitioner still had relevant discovery outstanding to the defendants which they had failed to answer.

foregoing and specifically requested that her "admissions" by omission should be deemed withdrawn so that her actual responses could state her position, consistent with South Carolina law and Rule 36(b). In light of the record below, the issues presented were "reasonably clear" as covering the inappropriateness of holding Baber to unanswered requests for admissions.

If this Court believes otherwise, however, the question must be asked as to what is a party to do when her attorneys simply abandon her, and one of them drafts a woefully inarticulate appellate brief that simply fails to address issues that were raised and answered by the Petitioner's own affidavits in the lower court proceedings. Can the interests of justice be accounted for, if in a civil matter, there is the equivalent of "ineffective assistance of counsel"?

Petitioner is now 71-years old, has serious health issues, lives on a small pension and social security and provides housing to her daughter and two grandchildren. She cannot afford counsel to represent her in a malpractice action against her former attorneys.

Her case clearly has merit, and she made that case while acting pro se by filing her Verified Complaint and her affidavits in opposition to the defendants' motions for summary judgment. Those affidavits even included necessary legal citations to dispute defendants' legal arguments. Her counsel, however, did such a rushed job that he didn't include those arguments in drafting the Initial Brief. She never had an opportunity to correct or amend because Bowens never ran a draft of the Initial Brief by her. Some allowance must be made in ***obvious cases*** of ineffectiveness of counsel.

Mr. Bowens raised as issues on appeal that the trial court erroneously granted summary judgment; that the trial court erred in not considering the Verified Complaint as an affidavit; and that there were disputed issues of fact. (*See* Brief, p. 5). All those stated issues go to the circuit

court's decision to deem facts admitted against the Appellant when she had already disputed those facts in her Verified Complaint and in her later filed responses to the Requests for Admission.

CONCLUSION

Based upon the foregoing, Petitioner's request for issuance of a writ of certiorari to the court of appeals should be granted.

DATED this 10th day of May, 2023.

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