IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

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Case No. 2018-CP-46-1592

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Karen K. Baber ..... Appellant,

v.

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

of whom

Summit Funding, Inc.; Allen Tate Co., Inc.; Colleen Coesens; Jonathan Garvey; Robert Ouzts; and Connie Delaney are the ..... Respondents.

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# FINAL BRIEF OF RESPONDENTS ALLEN TATE CO., INC., COLLEEN COESENS, JONATHAN GARVEY, ROBERT OUTZS AND CONNIE DELANEY

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## QUESTIONS PRESENTED

Whether the Trial Court properly granted summary judgment and dismissed all of Appellant's claims against Respondents Allen Tate Co., Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts and Connie Delaney (collectively, "Tate Respondents")[1] when Appellant failed to demonstrate any issue of material fact relating to the effect of her clear, unambiguous written release of all claims against the Respondents.

Whether the Trial Court properly granted summary judgment and dismissed Appellant's first cause of action against the Tate Respondents when Appellant conceded in her deposition that she had no evidence to support it.

Whether the Trial Court properly granted summary judgment and dismissed Appellant's second, third, fourth, eighth and eleventh causes of action when she failed to respond to Requests for Admission sent by the Tate Respondents that established 1) Appellant was aware before she closed on the purchase of the Property that no termite inspection or home inspection (other than an appraisal) had been performed on the Property; and (2) she told one or more of the Respondents that she did not want to pay for a home inspection or termite inspection.

Whether the Trial Court properly granted summary judgment in favor of the Tate Respondents on the basis of Appellant's own testimony, her verified complaint, and her failure to respond to requests for admission and when the claims were based, in part, on negligence, and while discovery was not completed.

Whether the Trial Court properly denied Appellant's Motion to Reconsider, Alter and Amend Judgment when Appellant failed to demonstrate any reason to alter or amend the order granting summary judgment in favor of the Tate Respondents.

[1] When referred to individually in this brief, the Tate Respondents are known as follows: Allen Tate Co., Inc. ("Allen Tate"), Colleen Coesens ("Coesens"), Jonathan Garvey ("Garvey"), Robert Ouzts ("Ouzts") and Connie Delaney ("Delaney")

## STATEMENT OF THE CASE

1. Procedural History

Appellant/Plaintiff Karen K. Baber ("Baber") filed her complaint pro se on May 29, 2018, against the Tate Respondents as well as Summit Funding, Inc. ("Lender"), Appraisal Innovations, LLC and Brian L. Blue (collectively, "Appraiser"), the Gillen Law Firm, P.A. and Michael F. Gillen (collectively, "Closing Attorney") and Gloria Long-Robinson ("Seller"), seeking damages for various claims arising from Baber's purchase of a house located at 255 Rolling Ridge Road, Rock Hill, South Carolina. ("Property"). Baber's complaint contained six (6) causes of action against the Tate Respondents, including claims for fraud, civil conspiracy, negligent misrepresentation, professional negligence, breach of contract and declaratory relief. (R. pp. 30-65).

The Trial Court dismissed all of Baber's claims against the Seller by order dated January 2, 2019 and all of the claims against the Closing Attorney by order dated January 28, 2019. The Trial Court also dismissed Baber's claims against Lender for breach of contract and declaratory relief by order dated January 31, 2019. Baber did not appeal any of these orders. (R. pp. 2-5).

The Tate Respondents filed their Answer on July 30, 2018 raising, among other things, the affirmative defense that Baber signed a waiver and release of all claims against the Tate Respondents. (R. pp. 66-86). On March 5, 2019, over nine months after the case was filed, the Tate Respondents filed their Motion for Summary

Judgment and supporting materials ("Tate Motion"). (R. pp. 454-840). On March 15, 2019, Lender filed a Motion for Summary Judgment ("Summit Motion") on the one remaining claim against it. (R. pp. 841-843). The Trial Court heard both the Tate Motion and Summit Motion on April 3, 2019. (R. p 96). On May 29, 2019, the Honorable Daniel D. Hall entered an Order Granting Motion for Summary Judgment ("Tate Order"), which granted summary judgment in favor of the Tate Respondents and dismissed all of Baber's claims against the Tate Respondents, with prejudice. (R pp. 6-17). Judge Hall also granted summary judgment in favor of Lender on the one remaining claim against it ("Summit Order"). (R. pp. 18-25). Baber filed a Motion to Reconsider, Alter and Amend Judgment ("Motion to Reconsider") on June 6, 2019. (R. pp. 1191-1192). Finding no basis for granting the Motion to Reconsider, Judge Hall denied Baber's motion by order entered on July 29, 2019 ("Reconsider Order"). (R. p. 26). Baber served her Notice of Appeal on August 28, 2019. (R. p. 1206-1209). Baber's claims against the Appraiser remain pending.

2. Factual Summary

Baber is a former South Carolina licensed real estate broker who has also worked for attorneys in handling real estate closings. (R. pp. 477-478). In January, 2015, Baber was searching for a home to purchase in Rock Hill, South Carolina. At the time, she was working with Garvey (one of the Tate Respondents), who served as her real estate agent pursuant to an Exclusive Right to Buy Buyer Agency Contract signed by both Baber and Garvey. (R. pp. 491, 739-740).

Between January 9, 2015 and January 11, 2015, Baber and Garvey exchanged several e-mails about the Property (R. pp. 741-752). The Property was owned at the

time by Seller, who was represented in the sale by Ouzts and Delaney (two of the Tate Respondents). (R. pp. 524-525). As part of those e-mails, Baber questioned Garvey about certain issues with the Property that she identified when she walked through the Property, including the condition of the air conditioning, water heater, gas pack, deck, stove, siding, bedroom ceiling, windows, and roof shingles, among other things. (R. pp. 741-752). As part of this exchange, Garvey provided Baber with the Residential Property Condition Disclosure Statement ("Disclosure Statement") signed by Seller. (R. pp. 514-515, 745-752).

In the Disclosure Statement, Seller represented that *she had actual knowledge of problems with twelve of the fourteen systems described on page 2 of the Disclosure Statement*, including: the water supply, water quality, water pressure, sanitary sewer, roof system, gutter system, plumbing system, electrical system, appliances, built-in systems and fixtures, heating system and cooling system. (R. p. 747). Seller also disclosed on page 3 of the Disclosure Statement that she was aware of problems caused by water during her ownership. (R. p. 748). Many of the systems Seller identified in the Disclosure Statement as having problems were the same conditions that Baber had already observed and questioned in her e-mail exchange with Garvey between January 9 and January 11. (See, R. pp. 741-752).

Shortly thereafter, Baber submitted a proposed Agreement/Contract to Buy and Sell Real Estate to Seller in which she offered to purchase the Property for $145,000.00. (R. p. 530). The offer included, among other things, a requirement that Seller pay for a home warranty for Baber. (R. p. 756, § 14). Seller ultimately did not

agree to purchase a home warranty on the property. (R. p. 530). After Seller refused to purchase a home warranty, Baber testified that Garvey agreed to pay for a home warranty, but admitted that "well, if you don't, I will, because we need one." (R. p. 531).

On or about February 19, 2015, Baber and Seller entered into an Agreement/Contract to Buy and Sell Real Estate ("Purchase Contract") pursuant to which Baber agreed to purchase the property for $145,000.00. (R. pp. 761-770). The Purchase Contract clearly indicated that Baber was purchasing the property "As-Is, Where Is, With all Faults" and the sale was contingent on Seller's lender approving a short sale of the Property. (Id. § 28 and Short Sale Addendum). The Purchase Contract did not require that a home warranty be purchased. (Id. § 14).

The Purchase Contract gave Baber the right to inspect the condition of the Property and to have the property inspected for wood infestation. (Id. §§ 8 and 11). Most of Baber's claims against the Tate Respondents are based on alleged representations made by the Tate Respondents and others prior to closing that termite and home inspections had been performed and came back clear or that such inspections were a condition on her closing of the loan. Baber claims that had she known the true condition of the Property, she would not have purchased it. (See, e.g., R. pp. 54, 58, 62 (Complaint ¶¶ 106, 135, 165)).

Baber testified in her deposition that when she received the original appraisal of the Property on March 5, 2015 (R. pp. 773-794), she immediately questioned the accuracy of the appraisal because it did not identify the defects in Property she had

spotted in January. (R. pp. 565-568). More specifically, she was concerned that appraisal did not address:

> a hole I thought I saw in the roof from the outside, two rusted holes in the air conditioner, the rotten and unsafe deck which I did not think met FHA standards, the rotten wood around the windows, window seals, overhangs, doors and signing, the gutters that were falling off and water spots in the ceiling.

(R. pp. 567-568, 795-796).

Baber closed on her purchase of the Property on May 29, 2015. (R. p. 577). Immediately prior to closing, Baber notified the paralegal for the Closing Attorney by e-mail that she "didn't have a termite inspection done" and "did have an inspection/appraisal" which had been paid for. (R. p. 772). Baber admitted in her deposition that she never received any bill for any inspections or any invoices for repairs to the Property prior to closing. (R. p. 545, 549).

As part of the closing, Baber concedes that she executed a Walk-Through Acknowledgment ("Acknowledgement") in which she represented that she "accepts the repairs and condition of the property." (R. pp. 578-579, 806). She also executed a Professional Services Disclosure and Election ("Professional Services Disclosure") in which she did not indicate that she had selected anyone to perform a home inspection or a wood infestation inspection. (R. pp. 584, 807-808).

Baber testified that within the first few days of her purchase of the Property on March 29, 2015 she was aware of the majority of the problems with the Property of which she now complains. (R. pp. 585-586). She demanded a meeting with Coesens, Garvey and others at Allen Tate to discuss the Property and the fact that she did not receive a home warranty on the Property. (R. pp. 588-589). Baber testified that she

met with Coesens, Garvey and Ouzts on June 29, 2015. (R. pp. 591-592). During that meeting, Allen Tate offered to pay Baber $409.00 towards the cost of a home warranty and asked her to sign a release of claims against Allen Tate and its agents in exchange for that payment. (R. pp. 592-593).

On June 30, 2015, Baber purchased a home warranty (R. pp. 810-811). She received the $409.00 payment and signed a General Release ("Release") in which she released "Allen Tate Co., Inc., its parent entities, predecessors, successors and assigns, officers, directors, brokers, agents, employees and related and affiliated companies" (which includes all of the Tate Respondents) from:

> any and all manner of, disputes, actions claims, demands, and liabilities whatsoever in law or equity, including complaints to any professional association or commission, and all claims for contribution and indemnification, arising from and by reason of any and all known and unknown, foreseen and unforeseen, injuries and damages, and the consequences thereof, related to and associated with the Offer to Purchase and Contract dated February 15, 2015 and any and all transactions and circumstances regarding the property located at 255 Rolling Ridge Road, Rock Hill, South Carolina.

(R. pp. 593, 809). Baber admitted in her deposition that she signed the release, received the payment and gave up all rights and claims against the Tate Respondents. (R. pp. 594-595). Baber further conceded in her deposition that she gave the Tate Respondents the Release in exchange for the Tate Respondents providing her with the funds to purchase a home warranty. (See, R. pp. 594-595, 596).

Baber filed this action, pro se, on May 29, 2018 and alleged that the Tate Respondents and others failed to disclose material information concerning the condition of the house, that many people made false representations about what inspections were required, that inspections were performed that showed no issues

with the house and Baber was ultimately fraudulently induced to purchase the property through a conspiracy among the defendants.[2] On August 8, 2018, the Tate Respondents served Requests for Admission on Baber pursuant to Rule 36, SCRCP. (R. pp. 812-834). Baber failed to timely respond to the requests for admission and failed to timely either seek an extension of time to respond or seek relief from the effects of Rule 36. (R. pp. 835-840).

## STANDARD OF REVIEW

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the Trial Court under Rule 56(c), SCRCP." Woodson v. DLI Props., LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014)). "Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Id.

The party seeking summary judgment "has the initial burden of demonstrating the absence of a genuine issue of material fact." George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500, 505 (2001). However, once the moving party carries its initial burden, the opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. The party opposing

[2] All of Baber's claims against Allen Tate are based on the alleged acts of Coesens, Ouzts, Delaney and Garvey. (R. pp. 32-33 (Complaint ¶ 7-11)). Baber does not allege any independent acts by Allen Tate.

summary judgment cannot simply rest on mere allegations or denials contained in pleadings." Id. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009).

## ARGUMENT

**Notably, nowhere in Baber's brief does she demonstrate any issues of material fact relating to the grounds on which the Trial Court granted summary judgment: (1) her post-closing execution of the Release of all claims against the Tate Respondents; (2) her failure to respond to requests for admission; and (3) her testimony that she had no evidence to support her first cause of action. On these grounds alone, this court should affirm the decision of the Trial Court.**[3] Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")

1. BABER FAILS TO DEMONSTRATE ANY ISSUE OF MATERIAL FACT RELATING TO THE EFFECT OF THE CLEAR, UNAMBIGUOUS LANGUAGE OF HER WRITTEN RELEASE OF ALL CLAIMS AGAINST THE RESPONDENTS.

All of Baber's claims against the Tate Respondents arise from her purchase of the Property on May 29, 2015, or from her execution of the Release shortly after

[3] Critically, Baber also fails to argue in her brief that the Court erred in not granting her relief from the Requests for Admission. Therefore, this issue has not been preserved for appeal. See, First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

closing. (R. pp. 54-56, 58, 62, 64 (Complaint ¶¶ 106, 115, 125, 135, 165, 180)). Baber testified that she was aware of the vast majority of alleged defects in the Property of which she now complains within a few days of closing and before she signed the Release. (R. pp. 585-587). Baber admitted in her deposition that she signed the Release in exchange for a payment of $409.00 for a home warranty, that she received the funds and purchased the home warranty. (R. pp. 594-595). Therefore, Baber knowingly and voluntarily released all of the claims against the Tate Respondents relating to the purchase of the Property, which includes all of the claims contained in her Complaint. Therefore, the Trial Court properly granted summary judgment on Baber's claims against the Tate Respondents.

Baber confirmed in her deposition that her understanding was that the Tate Respondents were providing her with the funds to purchase a home warranty in exchange for the Release:

> Q What's your understanding of the effect of Exhibit 22? The release.
>
> A That they were going to honor Jonathan's promise to pay for the warranty.
>
> Q Okay. And they paid you money that you used to buy a warranty; correct?
>
> A Correct.
>
> Q And in exchange, you were doing what?
>
> A Sign away my last child and everything else.
>
> Q Giving up all rights and claims against them?
>
> A Yes.

(R. pp. 594-595). However, in her complaint, Baber attempts to circumvent the effect of the Release by alleging in her Eleventh Cause of action that she executed the release based on "repeated representations from the Tate employees that Baber would be provided a copy of the CL-100 report and the home inspection report . . . ." (R. p. 64 (Complaint ¶ 180)). Baber also raised these representations during her deposition testimony, but ultimately conceded that she gave the Release in exchange for payment that she received to pay for a home warranty:

> Q But you had an agreement where if they bought you a home warranty, you would sign a release?
>
> A Right. And when I discovered it was based on fraud --
>
> Q What's the fraud? They bought you a home warranty. You signed the release.
>
> A They did.
>
> Q Where's the fraud?
>
> A I think we'll probably get there.
>
> Q No. I'm asking you. Where's the fraud?
>
> A What's the fraud? The fraud is -- the first place was they did it under false pretense.
>
> Q What false pretenses? They paid you the money.
>
> A They paid me the money.
>
> Q You signed a release.
>
> A I did.

(R. p. 596).

The clear, unambiguous language of the Release confirms Baber's deposition testimony and her understanding that she released all claims against the Tate

Respondents based on a payment of $409.00 for a home warranty, not based on any representations that Baber would be provided with copies of non-existent inspection reports. See, Maw v. McAlister, 252 S.C. 280, 284-85, 166 S.E.2d 203, 204 (1969) (Concluding that Plaintiff could not raise fraud as a defense to a release barring future claims when "the truth could have been ascertained by reading the instrument" and further advising that "one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning." (citations omitted)).[4] Therefore, the Trial Court properly granted the Tate Respondents' motion for summary judgment and dismissed Baber's claims against the Tate Respondents, with prejudice.

2. BABER TESTIFIED THAT SHE HAS NO EVIDENCE TO SUPPORT HER FIRST CAUSE OF ACTION.

The Tate Respondents are also entitled to summary judgment on Baber's first cause of action because Baber has conceded that she has no evidence to support it. Baber's first Cause of Action alleges that Seller, Delaney, Ouzts and Allen Tate knew that the Disclosure Statement omitted material information concerning the condition of the Property. (R. pp. 53-54 (Complaint ¶ 100-110)). However, Baber admitted in her deposition that she had no evidence to support her First Cause of Action that Delaney and Ouzts knew that material information had been omitted from the Disclosure Statement. In her testimony, she conceded:

[4] Interestingly, Baber contradicts her own testimony by first stating that she did read the release before signing it (R. p. 593) and later claiming "Did I read it? No." (R. p. 595).

Q. In Paragraph 103 of the complaint, you say, "Seller, Delaney, Tate and Ouzts knew the property was suffering from material injuries and damages and needed significant repairs that were not disclosed."

How do you know that Ms. Delaney and Mr. Ouzts knew that there were repairs that were not disclosed in Exhibit 7?

A. It would be their job, as the realtor, to know. And there are -- as we went along in the process, they knew.

Q. How do you know they knew?

A. Well, I had never talked to them, so I do not know firsthand they knew.

(R. p. 525-526). Based on this testimony alone, Baber cannot support the allegations contained in her First Cause of Action and the Tate Respondents are entitled to summary judgment on those claims. As the South Carolina Court of Appeals has said:

> However, even assuming the substantive information about flooding in the Disclosure was inaccurate or incomplete, and further assuming Realtor knew the Property had flooded in the past, it would not necessarily follow that Realtor knew Sellers' statements in the Disclosure about the Property's flooding history were inaccurate or incomplete. As stated above, if the owner of a property provides the purchaser with a disclosure form that contains false, incomplete, or misleading information, the real estate licensee is not liable unless he or she knew or had reasonable cause to suspect the information in the disclosure form was false, incomplete, or misleading. [S.C. Code Ann. § 27-50-70] is concerned with whether a real estate licensee knows the statements in a disclosure form are false, not simply whether the licensee knows of a defect in the property. Therefore, to survive summary judgment, Buyers must present evidence that raises a question of fact as to whether Realtor knew or should have known that the statements in the Disclosure were inaccurate.

Chastain v. Hiltabidle, 381 S.C. 508, 520-21, 673 S.E.2d 826, 832-33 (Ct. App. 2009).

Baber has failed to provide any evidence that Delaney or Ouzts knew that the

statements in the Disclosure Statement were inaccurate, so Baber's First Cause of Action should be dismissed.

3. THE TRIAL COURT ALSO PROPERLY DISMISSED APPELLANT'S SECOND, THIRD, FOURTH, EIGHT AND ELEVENTH CAUSES OF ACTION WHEN APPELLANT FAILED TO RESPOND TO REQUESTS FOR ADMISSION THAT ESTABLISHED: (1) APPELLANT WAS AWARE, BEFORE SHE PURCHASED THE PROPERTY ON MAY 29, 2015, THAT NO TERMITE INSPECTION OR HOME INSPECTION HAD BEEN PERFORMED ON THE PROPERTY; AND (2) SHE TOLD ONE OR MORE OF THE RESPONDENTS THAT SHE DID NOT WANT TO PAY FOR A HOME INSPECTION OR TERMITE INSPECTION.

Finally, the Trial Court determined that the Tate Respondents were also entitled to summary judgment on Baber's second, third, fourth, eighth, and eleventh causes of action as a result of Baber's admissions arising from her failure to respond to Requests for Admission. On August 8, 2018, the Tate Respondents served Requests for Admission on Baber pursuant to Rule 36, SCRCP. (R. pp. 812-834, 835-840). Baber failed to timely respond to the Requests for Admission and, at the time the Tate Motion was filed, had failed to either seek an extension of time to respond or seek relief from the effects of Rule 36. (R. pp. 835-840).

The Requests for Admission contain the following requests:

> 8. Admit that you knew before you purchased the Property on May 29, 2015 that no termite inspection had been performed on the Property.
>
> 9. Admit that you knew before you purchased the Property on May 29, 2015 that no CL-100 Official South Carolina Wood Infestation Report existed relating to the Property.
>
> 10. Admit that you knew before you purchased the Property on May 29, 2015 that no home inspection (other than the appraisal performed by Brian Blue of Appraisal Innovations, LLC) had been performed on the Property.

> 11. Admit that you knew before you purchased the Property on May 29, 2015 that the appraisal performed by Brian Blue of Appraisal Innovations, LLC was the only inspection performed on the Property prior to closing.
>
> 12. Admit that you told one or more of the Tate Respondents that you did not want to pay for a home inspection.
>
> 13. Admit that you told one or more of the Tate Respondents that you did not want to pay for a termite inspection.

(R. pp. 813-814).

Since Baber failed to timely respond to the Requests for Admission, it is now deemed admitted that: (1) she was aware before she purchased the Property that no termite inspection or home inspection had been performed on the Property; (2) she knew prior to closing that no CL-100 existed relating to the Property; and (3) she told one or more of the Tate Respondents that she did not want to pay for a home inspection or termite inspection. See, Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 269-70, 356 S.E.2d 115, 116 (1987) ("Under Rule 36(a), SCRCP, all matters contained in a Request for Admission are admitted unless the party serves answers or objects within a certain time.").

Plaintiff's claims against the Tate Respondents in her Second, Third, Fourth, Eighth, and Eleventh causes of action are each based on alleged misrepresentations concerning whether a termite inspection or home inspection had been performed and the results of those inspections. (R. pp. 54-57, 61-62 (Complaint ¶¶ 112, 126, 132, 164, 180)). Based on Baber's admissions, she was fully aware those inspections had not been performed and had told the Tate Respondents that she was not willing to pay

for those inspections. Therefore, the Trial Court properly granted summary judgment on those claims.

4. NONE OF APPELLANT'S ARGUMENTS SUPPORT BABER'S REQUEST THAT THE TRIAL COURT'S DECISION BE OVERTURNED.

Baber raises the same arguments in her Appellant Brief as she did in her brief in support of the Motion to Reconsider. As discussed below, none of these arguments require that the Trial Court's decision be disturbed. Essentially, Baber argues in generalities: (1) there are issues of material fact surrounding her purchase of the property (Issues 1 and 5); (2) discovery was not completed when the Trial Court heard the Tate Motion (Issue 2); (3) summary judgment is inappropriate in negligence cases (Issue 3); (4) the verified complaint was not considered as an affidavit (Issue 4); and (5) Baber should have known the condition of the house before she purchased it "as-is" (Issue 6). However, Baber fails to identify any issues of material fact or any discovery that would change her testimony and admissions upon which the Trial Court granted summary judgment in favor of the Tate Respondents.

i. <u>There are no issue of material fact as to Baber's execution of the Release.</u>

Baber argues in her first and fifth issues that the Trial Court erroneously granted summary judgment because there are genuine issues of material fact. In support of this argument, she lists seventeen items that she claims are disputed issues of fact. (App.'s Initial Br. pp. 13-14). All of the factual "issues" relating to the Tate Respondents purportedly occurred prior to closing. However, Baber fails to identify any issues of material fact as to the validity of the Release she signed after closing that released all claims against the Tate Respondents in exchange for

payment for a home warranty. The Trial Court properly granted summary judgment, in part, on the basis of this release.

Additionally, many of the factual issues raised in Baber's brief contradict her admissions in the Request for Admissions. Notably, any issues she identifies in her brief relating to whether she knew that there was no termite inspection or home inspection or whether she told any of the Tate Respondents that she did not want to purchase a termite inspection or home inspection are contradicted by the admissions in the Requests for Admission. Scott v. Greenville Hous. Auth., 353 S.C. 639, 646, 579 S.E.2d 151, 154–55 (Ct. App. 2003) ("[O]ur courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial, regardless of whether the admission concerns a matter responded to in a party's pleadings."). Therefore, the Trial Court properly granted summary judgment and denied the Motion to Reconsider.

ii. The Trial Court based summary judgment on Baber's own testimony, so further discovery was not needed.

Baber claims in her second issue that summary judgment was inappropriate because responses to outstanding discovery would have shown that she never received a termite inspection. (App.'s Initial Br. p. 10). Again, Baber ignores that the Trial Court granted summary judgment on the basis of her post-closing Release of all claims against the Tate Respondents, not on the question of whether she received a termite inspection. The Tate Respondents based their motion for summary judgment on the clear, unambiguous language of the Release, Baber's own deposition testimony confirming the purpose of the Release, and Baber's failure to respond to

Requests for Admission. Baber fails to advance any good reason why further discovery was likely to uncover issues of material fact or relevant evidence with regards to her post-closing execution of the Release. See, Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 440 (2003) (Upholding summary judgment in light of argument that opposing party did not have a full and fair opportunity for discovery because "further discovery was unlikely to create any genuine issue of material fact."). See also, Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009) ("A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.") and Schmidt v. Courtney, 357 S.C. 310, 322, 592 S.E.2d 326, 333 (Ct. App. 2003) ("The non-moving party in a motion for summary judgment must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition.") (citations omitted). Therefore, the Trial Court's decision should be upheld.

iii. Summary judgment is appropriate for contract cases.

Baber alleges in her third issue that summary judgment is inappropriate under Schmidt v. Courtney, 357 S.C. 310 (S.C. App. 2003), because her claims for negligence "concern the reasonableness of a party's conduct, foreseeability, and proximate cause." (App.'s Initial Br. p. 11). However, the Trial Court granted summary judgment, in part, because Baber had signed the Release, which released

her claims against the Tate Respondents. Summary judgment is wholly appropriate to determine the effect of a clear, unambiguous contract like the Release Baber signed. Hansen ex rel. Hansen v. United Servs. Auto. Ass'n, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct.App.2002) (quoting Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A., 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct.App.1995)) ("The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment."). See also, McCune v. Myrtle Beach Indoor Shooting Range, Inc., 365 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005) (Affirming summary judgment based on a release signed by plaintiff prior to participating in paintball game). Therefore, the Trial Court properly granted summary judgment in favor of the Tate Respondents and denied the Motion to Reconsider.

iv. The Trial Court did consider the Verified Complaint.

In Baber's fourth issue, she claims that "it does not appear the verified complaint was considered as an affidavit during the summary judgment proceedings." (App.'s Initial Br. p. 12). However, the Trial Court's Order makes it clear that its decision is based on "the Court's review of the documents submitted by the parties, *the pleadings in the Court's file* and the arguments of counsel and Baber . . . ." (R. p. 8) (emphasis added). Additionally, the Trial Court said during the hearing, "I will need to decide this based on what you're [sic] complaint and what . . . you have filed." (R. p. 129). Therefore, the Court did consider the Verified Complaint in its decision and the Trial Court's decision should be upheld.

v. Baber's argument concerning accepting the property "as-is" ignores her subsequent execution of the Release.

In her sixth issue, Baber says "The Plaintiff cannot reasonably be expected to accept the home in its 'as-is' condition without first knowing the 'as-is' condition." (App.'s Initial Br. p. 15). In her argument, Plaintiff again ignores her post-closing execution of the Release of all claims against the Tate Respondents in exchange for payment of the home warranty. Therefore, this argument does not support overturning the Trial Court's decision to grant summary judgment or deny the Motion to Reconsider.

## CONCLUSION

For the foregoing reasons, the Tate Respondents respectfully request that this Court affirm the Honorable Daniel D. Hall's decisions to grant Summary Judgment in favor of the Tate Respondents and deny the Motion to Reconsider.

Respectfully Submitted,

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June 24, 2020
Charlotte, North Carolina

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

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Case No. 2018-CP-46-1592

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Karen K. Baber ..... Appellant,

v.

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

of whom

Summit Funding, Inc.; Allen Tate Co., Inc.; Colleen Coesens; Jonathan Garvey; Robert Ouzts; and Connie Delaney are the ..... Respondents.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

June 24, 2020

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that true copies of the Final Brief Of Respondents Allen Tate Co., Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts And Connie Delaney in the above-referenced case have been served upon opposing counsel by depositing in the United States mail addressed to the parties below on this 24th day of June, 2020.

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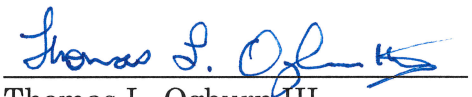

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