THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Daniel Dewitt Hall, Circuit Court Judge

RECEIVED
MAR 08 2023
SC Court of Appeals

Karen K. Baber,

Appellant,

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, of which Summit Funding, Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts, Connie Delaney, and Gloria Long-Robinson are the Respondents.

C/A No.: 2018-CP-46-01592

MOTION FOR REHEARING
and
MOTION FOR REHEARING EN BANC

Karen K. Baber
Appellant, *pro se*
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Pursuant to Rules 221 and 219 of the South Carolina Rules of Appellate Procedure, Appellant Karen K. Baber, acting *pro se*, hereby moves this Court to rehear this matter and to reconsider Unpublished Opinion No. 2023-UP-064 filed February 22, 2023 ("Opinion"). Appellant further requests that the rehearing be conducted *en banc* because the same is necessary to secure uniformity in its decisions and/or it presents a question of exceptional importance.

The grounds for these motions are that the Opinion is in error in the following respects:

1. The Court erred in holding that Appellant's counsel had not reserved the issues on appeal when he filed Appellant's Initial Brief; and thus pursuant to the "two-issue rule" the Court need not hear the appeal.

2. As to the affirmance of the summary judgment in favor of Defendant/Respondent Summit Funding, Inc.:

   a. The Court wrongly held that violation of FHA underwriting requirements for an FHA-insured mortgage loan confers no private right of action on a borrower who is injured by the issuance of a loan for real property that is not sound or habitable in violation of FHA requirements; particularly where, as here, those requirements were incorporated into the loan agreements and where the lender's officers and employees repeatedly admitted that compliance with FHA-regulations regarding a CL-100 termite inspection report and a valid appraisal were ***conditions of the loan***.

   b. The Court wrongly held that there was no breach of the subject loan agreement because Summit Funding, Inc. provided the funds for the loan. The agreement was not simply to borrow a sum of money, but to borrow the money to purchase a home which met FHA

safety, suitability, and habitability requirements. Summit Funding breached that agreement.

c. The Court erred in holding that a three-year statute of limitation barred Appellant's Verified Complaint because Appellant presented unanswered arguments that a 20-year statute of limitation governed her breach of contract claims; and even if the three- year statute did apply, it only began to run after Appellant knew or should have known that her agreement had been violated. Substantial evidence was presented showing that she was not aware that the contract with Summit had been breached until March or April 2016, and that the filing of her Verified Complaint in May 2018 was well within that three-year statute of limitation.

3. As to the affirmance of the summary judgment in favor of Allen Tate Co., Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts, and Connie Delaney (the "Tate Realty Defendants"):

a. The Court erred in finding that there were no factual disputes regarding the circumstances as to Appellant's signing of a General Release in the Tate Realty Defendants' favor, when Appellant presented evidence that misrepresentations and omissions of material fact were made by the Tate Realty Defendants which induced Appellant to sign the Release, and which rendered it void and unenforceable under South Carolina law.

b. The Court erred in upholding the circuit court's decision that Appellant was deemed to have admitted several outcome determinative facts when she initially failed to answer requests for admission when: (1) competent testimony was provided that the Appellant did not receive the requests for admission when allegedly sent to her; (2) when she did

receive the requests for admission, she timely responded to them; (3) she had already provided testimony under oath in Verified Complaint and in her deposition where she denied the facts asserted in the requests for admission; (4) the Tate Defendants had emails and other evidence in their possession contradicting the admissions; (5) the denials of the facts in the requests for admission were provided prior to the Tate Realty Defendants filing their motion for summary judgment; (5) the merits of the dispute were subserved by allowing Appellant to withdraw her "deemed admitted" facts in favor of the substantial evidence that existed to support her case; and (6) the Tate Realty Defendants showed no prejudice in allowing Appellant to have the benefit of her denials of the requests for admission.

4. The Court failed to rule on whether the circuit court erred in granting the Motions for Summary Judgment when the Appellant had issued outstanding discovery to the Defendants which would have borne on every issue presented to the lower court.

Appellant also moves to have the rehearing heard *en banc* because the Opinion is at odds with prior rulings of this Court regarding the a litigant, especially one acting *pro se*, to withdraw admissions under the circumstances of this case; which statute of limitations applies to mortgage contract disputes; when the statute of limitations begins to run in a breach of contract action; and whether releases procured by fraud are valid under South Carolina law. This appeal also presents a significant question as to whether a lender such as Summit Funding is required to comply with FHA regulations when issuing an FHA-insured mortgage loan and

whether when it fails to do so, whether a borrower has standing to recover damages and/or to rescind the loan agreement.

DATED this 7th day of March, 2023.

/s/ Karen K Baber

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C/A No.: 2018-CP-46-01592

MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING and MOTION FOR REHEARING EN BANC

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INTRODUCTION

Pursuant to Rules 221 and 219 of the South Carolina Rules of Appellate Procedure, Appellant Karen K. Baber, acting *pro se*, has moved this Court to rehear this matter and to reconsider Unpublished Opinion No. 2023-UP-064 filed February 22, 2023 ("Opinion"). Appellant further requested that the rehearing be conducted *en banc* because the same is necessary to secure uniformity in its decisions and/or it presents a question of exceptional importance. This Memorandum is respectfully submitted in support of those motions.

BACKGROUND

Appellant has been the victim of mortgage fraud conducted against her by the defendants in this case. She 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 requirements regarding the condition of real property for which it insures payment. Among other things, it requires a termite/wood infestation report showing that the Property is free of termite or wood rot damage; it requires that appliances, HVAC systems, utilities, and plumbing be operating; it requires that the roof be structurally sound, etc.; all of which are to be certified by the appraiser of the Property in connection with his valuation of the Property.

Appellant relied upon these assurances that the Property would meet FHA regulations before closing the loan and purchasing the Property. Appellant was clearly aware of some defects in the Property, but if the Property had to meet FHA underwriting guidelines, then she would have been assured that the Property did not have any ***material*** defects that impacted

the soundness of the Property, its habitability, or its value. If the Property did not meet these requirements, then Appellant would not have purchased the Property.

No party to this lawsuit had the right to waive FHA requirements of a CL-100 wood infestation report or a valid appraisal verifying that the Property met FHA underwriting guidelines. Moreover, compliance with the FHA requirements was required under the subject agreements because it was an FHA-insured loan; FHA regulations were referenced; and Summit Funding's own officers ***repeatedly admitted to Appellant that a termite inspection and home inspection were required as conditions for the loan closing.*** Summit Funding is estopped from now contending that Baber cannot complain if FHA loan requirements were not met.

But Appellant was not merely seeking a loan which was funded, which was one of the grounds asserted by this court as to why summary judgment against Summit Funding was appropriate. Appellant was seeking an FHA-insured loan because she knew of the underwriting guidelines that would provide assurance that the Property she would be purchasing was sound. Summit Funding 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.

The Property did not meet FHA underwriting guidelines. In fact, among many other things, the Property had significant termite damage, 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]

Had a CL-100 wood infestation inspection, a home inspection and/or a valid appraisal been performed showing the extent of the material defects in the Property, Appellant would not have purchased it, FHA would not have approved the loan, and she would not have incurred substantial expense trying unsuccessfully to make the Property safe and sound for herself, daughter and two grandchildren.

The record reflects that Appellant was repeatedly assured by her realtor, defendant Jonathan Garvey of Tate Realty, that he had obtained the South Carolina and FHA-required CL-100 Wood Infestation Report and home inspection report. She was repeatedly assured both before and for many months after the loan closing by Summit Funding's loan officer and other Summit officers and employees that the subject loan could not have closed without a CL-100 Report showing that the Property was free of termite or wood rot damage or without a valid appraisal showing that the Property met FHA requirements ***and that they had both been provided.*** These facts are not just based upon the unsupported testimony of the Appellant -- they are repeatedly confirmed in numerous emails with the Appellant that were presented to the circuit court and are part of the record on appeal.

Shortly after the closing, Appellant was induced to provide the Tate Realty defendants a release 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

[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.

inspection report to Appellant so that Appellant could pursue liability claims against those inspectors for their failures to detect the material defects. Ten months later, Coesens finally admitted to Appellant that Garvey and Tate Realty 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.

In the nearly seven years since the closing, Appellant has never been provided a copy of the termite report because her realtor and Tate Realty never got one despite Garvey's repeated representations to Appellant, Summit Funding, and the closing attorney that he had obtained the CL-100 termite inspection report and the home inspection. There was no CL-100 report, there was no home inspection, and there was no valid appraisal. Each of the defendants – Summit Funding, the Tate Realty defendants, the closing attorney and his paralegal, and the appraiser all have known since 2015 and 2016 that the required CL-100 and valid appraisal were never provided, yet they refused to report to the FHA that the subject mortgage loan was non-conforming, and they have refused to unwind this transaction.

Those are the undisputed, 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, on March 5, 2019, the Tate Realty defendants filed a motion for summary judgment with affidavits and exhibits (R. 454 – 840). On March 15, 2019, Summit Funding 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' motions for summary judgment, ***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 improperly granting summary judgment. As to the Tate Defendants, the circuit court ruled:

> The Tate Defendants are entitled to summary judgment on all of Baber's claims against them because ***there are no genuine issues of material fact and the Tate Defendants are entitled to judgment as a matter of law.*** Baber knowingly and voluntarily released all claims against the Tate Defendants when she executed the Release in exchange for the money to purchase a home warranty. As an additional ground for dismissal, the Tate Defendants are entitled to summary judgment on certain of Baber's claims against them because of admissions arising from Baber's failure to respond to Requests for Admissions and on the remaining claim Baber admitted that she had no evidence to support it.

(Emphasis added) (R. 000013 - 14).

As to Summit Funding, the circuit court ruled:

> Plaintiff is incorrect, as a matter of law without any necessity to inquire into facts, that an alleged breach by Summit of any federal regulations enacted pursuant to the National Housing Act resulted in a private right of action on the part of the mortgagor for breach of contract or declaratory relief. Even if such right existed, Plaintiff's cause of action for breach of contract is barred by the applicable statute of limitations. ***Based on the indisputable evidence,*** Summit is entitled to summary judgment as to the Tenth Cause of Action.

(Emphasis added) (R. 000020).

Appellant had been representing herself, but 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. Messrs. Bowens and Coleman did very little on this case since then.

Mr. Bowens drafted the "Appellant's Initial Brief" which was filed on or about January 21, 2020. For unknown reasons, co-counsel Mr. Coleman did not participate in its preparation, make any edits, or suggest any arguments. Neither Mr. Coleman nor Mr. Bowens prepared any Reply Brief. Mr. Bowens and Mr. Creighton simply abandoned the Appellant. For over two years, Mr. Bowens had not responded to a single telephone call or email from the Appellant. On August 17, 2022, this Court allowed Mr. Creighton to withdraw over Appellant's express concerns that she would be unrepresented. On or about December 28, 2022 Appellant wrote this Court expressing her concerns that she was unable to reach Mr. Bowens. On January 27, 2023, this Court entered its Order after determining that Mr. Bowens had "retired" from the practice of law and gave Appellant thirty days to secure new counsel or enter her own appearance, and that during that thirty-day period, this Court would "resume its deliberations."

This Court did not "resume deliberations." Instead, after three years on appeal, this Court, 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.[2]

[2] 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

Purportedly, however, all the Panel's citations to the "facts" on the record before the circuit court was *dicta*, because its affirmance of the Orders for summary judgment was based upon Mr. Bowens' failure "to appeal several of the circuit court's grounds for granting summary judgment ...." As to the Allen 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, 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.

For the reasons stated below, the Panel erred in its rulings, and the rehearing of this matter should be held *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 on all the issues related to the defendants' summary

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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).

judgment motions; (2) whether private parties can waive federal government requirements for the issuance of an FHA-insured loan especially when federal law is 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 (i.e. the ***Verified Complaint*** already contained Appellant's sworn affirmations that the facts deemed admitted by the circuit court were false), where Appellant testified in deposition ***prior to defendants filing their motions for summary judgment*** contrary to the assertions in the requests, and when the defendants failed to show any prejudice if her responses to the Requests for Admission filed in November 2018 had been allowed to stand.

ARGUMENT

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

A. Summary Judgment in Favor of the Tate Realty Defendants Was Error Because the Circuit Court Ignored Significant Disputes of Material Fact Regarding the Invalidity of the Release Due to Tate Realty's False Representations Which Induced Appellant to Sign It; and It Abused Its Discretion in Deeming Certain Facts Admitted Because of Appellant's Late Responses to Requests for Admission When the Presentation of the Case on the Merits Would Have Been Advanced and the Tate Defendants Suffered No Prejudice.

The Circuit Court held Appellant'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 agent, was present when Coesens represented that she would get the two reports for

Appellant, but Garvey remained silent when he had a fiduciary duty to speak and confess that he never did obtain the reports. *See* Verified Complaint ("Complaint") (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 admitted "insofar as the the CL-100, my apologies; however I was mistaken in that I believed that you had such an inspection completed...."(R. 1042, at ¶ 43). Appellant then 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 not finding that there were issues of material fact as to whether false representations induced Appellant to sign the Release. It was thus error for the circuit court to rule to grant summary judgment on that ground.

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) based upon the allegedly untimely response to the Requests for Admission which Tate Realty asserts was mailed to her on August 18, 2018. The circuit erred 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 Tate's counsel asserts they were.

2. When Appellant was provided a copy of the discovery requests on October 25, 2018, she immediately advised Tate's 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 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 Tate's possession 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 office that they were being provided and would be there for the 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 to stand. (R. 1046, at ¶¶ 52 – 54). In *Commerce Center of Greenville, Inc. v. W. Powers McElveen & Associates, Inc.*, 347 S.C. 545, 556 S.E.2d 718, 724 (Ct. App. 2001) the court stated: "The trial court may allow a party to amend or withdraw its answer to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission

cannot demonstrate prejudice because of the amendment." In *Collins Entertainment, Inc. v. White,* 363 S.C. 546, 611 S.E.2d 262, 268 (Ct. App. 2005), the court stated: "There would be reasons to hold that an express admission, later withdrawn, should be treated in the same fashion as a pleading, *but that if the court has permitted an admission through failure to make timely response to be withdrawn, the admission should pass out of the case entirely.*" These cases were cited, but ignored by the circuit court. *See* R. 1046 – 1048, at ¶¶ 52 – 53.

6. Further, consistent with the foregoing case law, Rule 36 of the South Carolina Rules of Civil Procedure provides in relevant part: "Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." *See Commerce Center of Greenville, Inc. v. W. Powers McElveen & Associates, Inc.* (S.C.App. 2001), 347 S.C. 545, 556 S.E.2d 718 at 724 - 725; *U.S. v. Turk,* 139 F.R.D. 615, 617 - 618 (D.Md. 1991) (pro se defendant's failure to respond to requests for admission within 30 days did not require court to deem the matters admitted because it would not further the interests of justice: "The Court, while fully aware that to condone Dr. Turk's lethargy potentially undermines the valuable benefits of Rule 36(a), is reluctant to use Rule 36 procedures as a snare for this unwary pro se defendant."); *Paniagua v. Walter Kidde Portable Equipment, Inc.,* 183 F.Supp.3d 473, 482 (S.D.N.Y. 2016) ("the failure to respond in a timely fashion does not require the court automatically to deem all matters

admitted"); *United States for Graybar Electric Co. v. TEAM Construction, LLC,* 275 F.Supp.3d 737, 743 – 746 (E.D.N.C. 2017) and cases cited therein (Party allowed to withdraw unanswered admissions, and "The party relying on the deemed admission has the burden of proving prejudice.").

7. The merits of Appellant's case would have been subserved by the circuit court's acceptance of Appellant's responses to the Requests for Admission, which she 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 three months prior to their filing their motion for summary judgment, and they took Appellant's deposition wherein she contested the deemed-admitted facts.

8. The Tate Defendants took full advantage of an unrepresented litigant and obtained procedurally what they could not have obtained factually and on the merits. They would have suffered no undue prejudice by accepting Appellant's denials of the dispositive requests for admission. The circuit court abused its discretion in using previously unanswered requests for admission to serve as a basis for granting the Tate Defendants summary judgment.

B. Summary Judgment in Favor of Summit Funding Was in Error Because the Circuit Court Ignored Significant Issues of Material Fact Regarding When the Statute of Limitation Ran on Appellant's Claims, and It Was Incorrect as a Matter of Law that Appellant Had No Standing to Assert Claims Based Upon Violations of FHA Regulations When They Were Also Breaches of Contract.

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. That conclusion was in error for the following reasons:

1. No one seriously can dispute that FHA-loan underwriting guidelines required that before the loan funded, there had to 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 the FHA requirements.*** *See Winnebago Homes, Inc. v. Sheldon,* 139 N.W.2d 606, 610 (Wis. 1966). 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).
2. The purchase of the Property was expressly subject to Appellant obtaining an FHA-guaranteed loan. (R. 898, at ¶ 5c, and R. 919 - 920, at ¶ 7 (purchase contingent on FHA loan from Summit Funding)).
3. From February 11 – 17, 2015; March 6, 2015, April 8 and 9, 2015, May 19, 2015 ***Summit's loan officers*** told Appellant that her loan ***required a termite inspection and home inspection report*** (R. 900 - 901, ¶¶ 7, 8 and R. 929 – 941).
4. 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)

5. 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).

6. 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." 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."

7. Part of the loan closing package ***from Summit Funding*** on 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 …."

8. There simply can be no question but that this was an FHA-insured loan and had to meet FHA requirements. ***Those were contractual requirements, not just a failure of Summit to comply with federal regulations.***

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. 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) (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).

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 issues of fact as to when the statute of limitations began to run even if the three-year statute applied.

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. It 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 after that exchange.*** 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 was patently false.

c. 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 Appellant: "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.

d. 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). 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).

e. Even if South Carolina's three-year statute of limitation 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 reasonable discovered the breach. As the foregoing citations show, there was significant evidence presented disputing Summit's assertion that Appellant knew as of May 27, 2015 that no termite inspection or home inspection was to be provided. The circuit court improperly granted summary judgment on statute of limitations grounds given the disputes of material facts.

II. **Mr. Bowens Preserved All Issues for Appeal.**

Appellant has shown that the summary judgments granted by the circuit court were in error because there were significant disputes of material facts and/or that the defendants' legal arguments were not valid. Nonetheless, the Panel concluded that the Orders granting summary judgment had to be affirmed based upon "the two-issue rule," and Mr. Bowen's alleged failure to appeal those issues. This ruling was in error.

To be candid, Mr. Bowens' draft of the Appellant's Initial Brief is not a paragon of clarity and could have been much better crafted. It is frankly not known why Mr. Bowens simply vanished and ghosted his client for years and why he was finally able to advise this Court that he had retired from practice with no explanation as to why. It also is not known why Mr. Coleman, as co-counsel, did not step in and take over Mr. Bowen's work.

The fact is that Appellant was obviously poorly represented by counsel, but there was still enough within the Brief to put defendants and the Panel on notice as to what issues were being raised on appeal. Appellant should not be denied justice because of the inexplicable failure of her counsel to more competently present her case, especially where every issue was preserved with the circuity court.

With respect to Summit Funding, the Panel concluded that Mr. Bowen's brief failed to address the argument that there was no private right of action for violations of FHA regulations. As shown above, that contention was in error because all the parties in this case were required to comply with FHA regulations. Further, the failure to obtain a CL-100 report or a valid appraisal were breaches of the loan documents themselves which referenced FHA-regulations, expressly incorporated federal law, expressly stated that the termite inspection and home inspection reports were ***required services,*** and Summit's own local, regional, and national officers ***all admitted that the loan was conditioned*** on those reports showing no issues with the Property and a valid appraisal. Based upon those repeated admissions, Summit is estopped from now claiming that it only violated FHA regulations for which Appellant has no cause of action.

These issues were preserved at pages 13 and 14 of Mr. Bowen's Brief on behalf of Appellant: ¶ 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 wee ***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 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 Mr. 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.

Similarly, as shown above, if the 20-year statute did not apply, the three-year statute of limitation for breach of contract does not begin to run until discovery of the breach. The record below showed that Appellant had no notice that her loan agreement with Summit had been breached by Summit's failure to verify receipt of the home inspection and CL-100 reports until April 2016 when Coesens finally admitted that the realtor Garvey had not obtained the CL-100 termite report or the home inspection.

As further shown above, Summit plainly misrepresented facts to the circuit court when it contended that Appellant knew as of May 27, 2015 that no termite report or home inspection report had been obtained. Appellant's affidavit clearly showed email messages later that very same day reassured her that those reports would be coming, and Appellant continued to be reassured that they had been obtained prior to the loan package being mailed off to Summit's regional and/or national offices in North Carolina and California. These issues were preserved at pages 13 – 14 of Mr. Bowen's Brief on behalf of Appellant at paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 15.

With respect to the Tate Defendants, the foregoing establishes that there were issues of material fact concerning the false representations made to induce Appellant to sign the Release. Mr. Bowens argued that the defendants had failed to meet their burden under Rule 56: "First, the documentary evidence referenced by the Defendant in the Motion for Summary Judgment does not establish the absence of genuine issues of material fact; rather the documentary evidence actually establishes the existence of genuine issues of material fact." Brief, at p. 9. The Tate Defendants failed to show that the Release was not procured by Ms. Coesens false representations that she would obtain the CL-100 termite inspection and home inspection and Garvey's silence as Coesen's made those statements when he knew he had failed to procure either such report.

The circuit court also deemed that Appellant admitted certain facts because she did not timely respond to the Requests for Admission. Appelllant had clearly disputed the dispositive facts deemed admitted that she was aware prior to closing that there was no termite inspection or home inspection reports and that she had asked that they not be prepared because she did not want to spend the money. She disputed those facts in her Verified Complaint, in her deposition, and in her responses to the Requests for Admission after she actually received them. She did not receive the Requests for Admission in August 2018, but did answer them timely when they were first presented to her at the end of October 2018. She denied the factual subjects of the Requests for Admission ***before*** the circuit court deemed them admitted. The ruling in *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537, 542 (1991) is fully applicable to this case:

> 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.***

As in *Baughman,* the Tate Defendants could show no prejudice and the merits of the case were subserved by allowing Appellant's responses to the Requests for Admissions to stand, as she specifically requested. (R. 1046 – 1048, at ¶¶ 52 - 53). Appellant clearly preserved that issue for appeal, and the record on appeal so shows. The circuit court's ruling that the facts were deemed admitted was a clear abuse of discretion.

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.

III. The Opinion Failed to Rule on the Issue of Whether Plaintiff Should Have Been Permitted to Take Discovery.

One of the issues raised on appeal was whether summary judgment was appropriate when the Plaintiff's discovery was not completed. *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 including the date of discovery of Summit's breach of contract and the circumstances of Appellant executing the Release in the Tate Realty defendants' favor and then her subsequent rescission of that Release. The circuit court's grant of summary judgment was premature given the Appellant's outstanding discovery to the defendants.

IV. This Motion for Rehearing Should Be Granted and Be Heard *En Banc*.

For the reasons stated above, the Panel's Opinion was in error, and this Court should rehear the appeal, *en banc*. As the above-cited cases show, the Opinion is now in conflict with prior settled South Carolina decisions regarding allowing a party to withdraw admissions particularly where requests for admission were unanswered; where the deemed admissions are dispositive and do not serve the presentation of the case on the merits; and where the adverse party has not shown any prejudice by allowing responses to the requests for admissions to be filed.

Given the great number of FHA-insured loans in the state, the full court should also consider the question of whether lenders in South Carolina are required to comply with FHA underwriting guidelines for the benefit of the FHA ***and the borrowers to ensure that they are purchasing a sound home.*** The Panel's decision on this question makes no sense given the repeated references in the purchase agreement, the repeated representations by the lender's

agent that, in this case, a CL-100 and home inspection report were required, and in the language of the loan documents themselves which were subject to federal law, made repeated references to FHA requirements, and closing documents indicated that those inspection reports were required.

The Opinion wholly failed to address an issue on appeal that the circuit court prematurely granted summary judgment when Appellant had outstanding discovery against the Defendants that would have provided evidence relevant to her case.

CONCLUSION

Based upon the foregoing, Appellant's motion for reconsideration to be heard *en banc* should be granted.

DATED this 7th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2023, that I caused copies of the foregoing Motion for Rehearing and Motion for Rehearing En Banc and Supporting Memorandum to the following via first-class mail, postage prepaid.

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