IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-000760

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S.C. SUPREME COURT

Karen K. Baber ..... Petitioner,

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.

RETURN OF RESPONDENTS ALLEN TATE CO., INC., COLLEEN COESENS, JONATHAN GARVEY, ROBERT OUTZS AND CONNIE DELANEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

I. Procedural History

Petitioner/Plaintiff Karen K. Baber ("Baber") filed her complaint pro se on May 29, 2018, against the Respondents Allen Tate Co., Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts and Connie Delaney (collectively, "Tate Respondents")[1] 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

[1] When referred to individually in this Return, 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").

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 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. pp. 1206-1209). The Tate Respondents, Lender, and Baber filed initial and final appellate briefs.

The Court of Appeals filed its decision on February 22, 2023, in which it affirmed the Trial Court's decisions to grant summary judgment in favor of the Tate Respondents, to grant summary judgment in favor of Lender, and to deny Baber's motion to reconsider. Baber v. Summit Funding, Inc., Op. No. 2023-UP-064 (S.C.Ct. App. filed Feb. 22, 2023). Baber petitioned the Court of Appeals for rehearing, which

was denied by the Court of Appeals in an Order filed on April 11, 2023. Baber then filed the present Petition for Writ of Certiorari on May 10, 2023 ("Petition").

II. 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, such as 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. (See e.g., R. pp. 54, 58, 62 ¶¶¶ 106, 135, 165)). Baber claims that had she known the true condition of the Property, she would not have purchased it. (Id.).

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 elected not to have a home inspection or a wood infestation inspection performed on the Property. (R. pp. 584, 807-808).

Baber testified that within the first few days of closing on the Property on May 29, 2015, she was aware of the majority of the problems with the Property of which she now complains. (R. pp. 292, 585-586). She demanded a meeting with Coesens, the Broker-in-Charge of Allen Tate's offices in Rock Hill at the time of the sale of the Property, 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] (R. pp. 30-65). On August 8, 2018, the Tate Respondents served Requests for Admission (the "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, SCRCP. (R. pp. 835-840).

[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 ¶ 7-11). Baber does not allege any independent acts by Allen Tate.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED[3]

I. THERE ARE NO "SPECIAL AND IMPORTANT" REASONS FOR THE PETITION TO BE GRANTED AND THE ISSUES PRESENTED ARE NOT CLEAR UNDER SCACR 242(D)(4).

A. The Court of Appeals' decision does not conflict with a prior decision of the Supreme Court.

B. This matter does not present novel questions of law.

II. BABER FAILED TO PRESERVE THREE ARGUMENTS ON APPEAL AND THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON ALL OF HER CLAIMS.

A. There are no issues of material fact as to Baber's execution of the Release and summary judgment was proper (Petition Argument Section I (A)).

B. Baber failed to seek relief from the Requests for Admission (Petition Argument Section I(B)).

C. Baber's incomplete discovery is irrelevant (Petition Argument Section III).

D. Baber's allegations of ineffective assistance of counsel cannot serve as grounds for appeal (Petition Argument Section IV).

ARGUMENT

I. THERE ARE NO "SPECIAL AND IMPORTANT" REASONS FOR THE PETITION TO BE GRANTED AND THE ISSUES PRESENTED ARE NOT CLEAR UNDER SCACR 242(D)(4).

[3] The Petition combines Baber's arguments seeking to overturn the Court of Appeals' decision to affirm the circuit court's granting of summary judgment in favor of both the Tate Respondents and Summit. In this Return, the Tate Respondents are only responding to those arguments in the Petition concerning the Tate Respondents.

South Carolina Appellate Court Rule 242(b) provides that a writ of certiorari is not a matter of right, but is only granted when there are "special and important reasons." Rule 242(b), SCACR. Specific examples of special and important reasons for which the Court might grant certiorari include (1) a novel question of law; (2) a dissent in the decision of the Court of Appeals; (3) a conflict between the Court of Appeals' decision and a prior decision of the Supreme Court; (4) a substantial constitutional issue is directly involved; or (5) a conflict between a decision of the Court of Appeals and a decision of the United States Supreme Court regarding a federal question. Rule 242(b), SCACR. None of these situations are present in this case, nor has Baber presented any other special and important reason in her Petition which would form a sufficient basis under the high bar of Rule 242 for this Court to grant certiorari.

Additionally, Rule 242(d)(4), SCACR, provides "[f]ailure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Rule 242(d)(4), SCACR. Baber's Petition is unclear and overreaching. It's difficult to decipher the issues actually presented for consideration as it ranges from broad statements claiming "nearly every basis for the superior court's rulings were tainted" to irrelevant allegations of ineffective assistance of counsel. (Petition p. 2). Due to the failure to comply with Rule 242(d)(4) and these immediately apparent deficiencies, the Petition must be denied.

A. <u>The Court of Appeals' decision does not conflict with a prior decision of the Supreme Court.</u>

Baber argues that the Court of Appeals' decision is in conflict with prior decisions of this court that 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, or other evidence contradicts those admissions, and there is no prejudice to the moving party." (Petition p. 1.)[4] Baber ignores that as a result of her failure to appeal the circuit court's grounds for granting summary judgment that (1) she knowingly signed the general release; and (2) failed to respond to requests for admission, those grounds became the law of the case. Baber, Op. No. 2023-UP-064 at *3.

In addition, the Court of Appeals found that under the two-issue rule, Baber's failure to appeal several of the circuit court's grounds for summary judgment is dispositive of the appeal. Id. Therefore, all of the other issues Baber raised in the Court of Appeals are irrelevant. The Court of Appeals did not contradict any ruling of the Supreme Court in making this decision

B. This matter does not present novel questions of law.

[4] Baber does not cite to any specific Supreme Court decisions that she claims conflict with the Court of Appeals' ruling. Instead she makes sweeping generalizations regarding her understanding of the law.

Baber also argues that this case presents two novel questions of law pertaining to her claims against the Tate Respondents.[5] Those appear to be: (1) the effect of the Court of Appeals' decision to not consider the issues raised on appeal when Baber failed to appeal all grounds upon which the circuit court granted summary judgment; and (2) how specific Baber's issues on appeal should be under Rule 208(b)(1)(B), SCACR, when she fails to appeal all grounds upon which the circuit court granted summary judgment and when Baber does not believe that her counsel provided adequate representation.

Neither of these issues constitute novel questions of law. As discussed above, Baber simply failed to appeal the grounds on which the circuit court granted summary judgment and cannot at this point contest the circuit court's decision.

II. BABER FAILED TO PRESERVE THREE ARGUMENTS ON APPEAL AND THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON ALL OF HER CLAIMS.

Baber's Petition should be denied under Rule 242(b), SCACR alone. However, pursuant to Rule 242(f), SCACR, the Tate Respondents respond to the arguments raised in the Petition relating to the claims against them.[6]

A. There are no issues of material fact as to Baber's execution of the Release and summary judgment was proper (Petition Argument Section I(A)).

[5] The second novel issue Baber raises pertains only to her claim against Summit and is not addressed here.

[6] The arguments in Section II of the Petition (pp. 14-18) relate to Baber's claims against Summit only and are not addressed here.

Baber argues that the "circuit court ignored significant disputes of material fact in granting summary judgment" for the Tate Respondents, especially with regards to her execution of the Release. (Petition pp. 10-11). As the Court of Appeals noted, Baber made no mention of the Release in her appeal. "Baber failed to appeal the circuit court's rulin[g] that [the Tate Respondents] were entitled to summary judgment because (1) Baber knowingly signed the general release and gave up her claims against them . . .." Baber, Op. No. 2023-UP-064 at *3. 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). Therefore, Baber cannot seek relief from this Court with regards to this issue. See Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

Even if Baber had preserved this issue for appeal, summary judgment was proper as there is no issue of material fact as to Baber's execution of the Release. Baber attempts to circumvent the effect of the Release by restating her allegation contained in her Complaint that she executed the Release based on "false representations" that she would be provided with "a copy of the CL-100 report and the home inspection report after the Release was signed." (R. p. 64 ¶ 180); (Petition p. 10). 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. 311).

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)).[7] Therefore, even if this issue was not barred by Rule 242(d)(2), SCACR the Tate Respondents' motion for summary judgment was properly granted.

B. Baber failed to seek relief from the Requests for Admission (Petition Argument Section I(B)).

Baber again ignores her failure to raise this issue in the Court of Appeals and disregards the parameters of Rule 242(d)(2), SCACR by including this argument relating to her failure to reply to the Requests for Admission. Baber's appellate briefs did not contain any mention of the Requests for Admission or any argument that the Court erred in not granting her relief from the Requests for Admission. 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."). The Court of Appeals noted that Baber did not appeal the circuit court's rulings that the Tate Respondents were entitled to summary judgment due to her failure to respond to the Requests for Admission. Baber, Op. No. 2023-UP-064 at *3. Because this issue was not raised in the Court of Appeals it cannot serve as grounds for the Petition to be granted under Rule 242(d)(2), SCACR.

Even if this issue had been raised in the Court of Appeals, Baber would not have prevailed. Baber alleges in her Petition that the circuit court erred in deeming

[7] Interestingly, Baber contradicts her own testimony by first stating that she did read the release before signing it (R. p. 308) and later claiming "Did I read it? No." (R. p. 310).

certain facts admitted as a result of her failure to respond to the Requests for Admission served by the Tate Respondents. She claims that the facts deemed admitted were otherwise contradicted and that she never received copies of the original Requests for Admission. However, the circuit court found in granting summary judgment in favor of the Tate Respondents that Baber had 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. p. 13 ¶ 15). Therefore, Baber is bound by those admissions. See Rule 36(a), SCRCP; Bakala v. Bakala, 352 S.C. 612, 630–31, 576 S.E.2d 156, 166 (2003)(noting party's failure to respond to request to admit and to preserve allegation of improper service of request to admit resulted in the fact being deemed admitted under Rule 36(a)).

C. Baber's incomplete discovery is irrelevant (Petition Argument Section III).

Baber claims that summary judgment was inappropriate because the "circuit court ignored Petitioner's request for completion of discovery, and the court of appeals completely ignored this issue." (Petition p. 18). Although this argument is one that was preserved on appeal, it holds no weight as the Trial Court granted summary judgment on the basis of the clear, unambiguous language of the post-closing Release, Baber's own deposition testimony confirming the purpose of the Release, and Baber's failure to respond to the Requests for Admission. (R pp. 6-17). Even if there were not separate bases for relief, Baber did not show there would be additional relevant evidence or explain her delay in pursuing discovery. 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."); 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, any incomplete discovery is irrelevant. As the Court of Appeals explained, "Baber's failure to appeal several of the circuit court's grounds for granting summary judgment to the Allen Tate Respondents…is dispositive." Baber, Op. No. 2023-UP-064 at *3. Baber fails to advance any good reason why further discovery was likely to uncover issues of material fact and cannot refute the well-established case law cited by the Court of Appeals in support of its clear ruling and reasoning for not addressing this point in Baber's appeal.

D. Baber's allegations of ineffective assistance of counsel cannot serve as grounds for granting the Petition (Petition Argument Section IV).

Baber argues that she should be able to pursue issues not preserved on appeal due to alleged ineffective work by her counsel in drafting the appellate briefs. Even if

Baber had any legitimate basis for a claim of ineffective assistance by her counsel in this matter, it would not be a proper basis for appellate review in the civil context. See Nelson v. Boeing Co., 446 F.3d 1118, 1119 (10th Cir. 2006) ("The general rule in civil cases is that the ineffective assistance of counsel is not a basis for appeal or retrial. If a client's chosen counsel performs below professionally acceptable standards, with adverse effects on the client's case, the client's remedy is not reversal, but rather a legal malpractice lawsuit against the deficient attorney"); State v. Carpenter, 277 S.C. 309, 310, 286 S.E.2d 384, 384 (1982) (providing claims of ineffective assistance of counsel must be asserted under the Post-Conviction Relief Act); S.C. Code Ann. 17-27-20 (Post-Conviction Relief Act applies to persons convicted of or sentenced for a crime). Baber voluntarily chose her attorney as her representative in this action and she "cannot now avoid the consequences of the acts or omissions of this freely selected agent" Link v. Wabash R. Co., 370 U.S. 626, 633–34, 82 S. Ct. 1386, 1390, 8 L. Ed. 2d 734 (1962). "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent…" Id. Additionally, this issue was not preserved on appeal so cannot serve as grounds for the Petition under Rule 242(d)(2), SCACR. See Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (concluding issue was not properly before the Supreme Court of South Carolina where it was raised for the first time in a petition for rehearing and was not addressed by either the trial court or the Court of Appeals).

CONCLUSION

For the foregoing reasons, the Tate Respondents respectfully request that this Court deny Baber's Petition for Writ of Certiorari.

Respectfully Submitted,

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