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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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**PETITIONER'S REPLY TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI FILED BY RESPONENTS ALLEN TATE CO. INC., COLLEEN COESENS, JONATHAN GARVEY, ROBERT OUZTS, AND CONNIE DELANEY**

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**Appellate Case No.: 2023-000760**

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Karen K. Baber, ……Appellant/Petitioner,

vs.

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

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**REPLY TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI FILED BY RESPONDENTS ALLEN TATE CO. INC., COLLEEN COESENS, JONATHAN GARVEY, ROBERT OUZTS, AND CONNIE DELANEY**

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## INTRODUCTION

Pursuant to Rule 242(g) of the SCACR, Petitioner/Appellant, Karen K. Baber ("Baber") acting pro se, hereby files her Reply to the Return to Petition for Writ of Certiorari (the "Return") filed on behalf of Allen Tate Co. Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts, and Connie Delaney ("the Tate Defendants"). The Tate Defendants citation to certain facts could not more amply demonstrate why the Circuit Court[1] was in clear error when it granted summary judgment in this case. Those facts also demonstrate why the Tate Defendants so vehemently seek to uphold the dismissal of Baber's claims on procedural rather than substantive grounds.

The Tate Defendants refer to "alleged" statements made by Allen Tate Co.'s employee and Baber's realtor, Jonathan Garvey. They are more than just "alleged." Garvey deliberately misrepresented that he had arranged and obtained a home inspection report and a termite inspection report (the "CL-100") on the "Property" (as defined in Baber's Petition) and that he would bring those reports to the loan closing. He further represented that both reports showed no material issues with the Property. Garvey made those misrepresentations not just to Baber, but also to Summit Funding and the closing attorney's office. In addition, the Tate Defendants do not deny that at the time that Baber provided the Release to the Tate Defendants, she was induced to do so by Colleen Coesens' representations that she would provide Baber with the CL-100 so that Baber could pursue remedies against the person who had supposedly conducted that inspection and missed substantial termite and wood rot damage.

[1] On Friday, June 16, 2023, Baber filed her reply to Summit Savings, Inc.'s Return. In that reply she mistakenly referred to the Circuit Court as the "Superior Court". She apologizes for any confusion.

As to those facts asserted in the Tate Defendants' Reply, there are countervailing facts and context which should have been left to the trier-of-fact at trial rather than the Circuit Court trying the case on papers. As examples:

1. The Tate Defendants claim that Baber was aware of defects with the Property and cite a Residential Property Disclosure Statement (R. 1052 – 1056) which disclosed issues with all the various structures and systems which Baber now asserts made the Property ineligible for an FHA-insured loan. The Tate Defendants failed to point out to this Court, however, that the Disclosure Statement provided that: "If a question is answered 'yes' or asks for a description, ***then owner must explain or describe the issue or attach a descriptive report from an engineer, contractor, pest control operator, expert, or public agency….***" The Seller checked "Yes" boxes, but gave only three explanations. Under the category of roof issues, the Seller wrote: "Laundry room. Leak was near pipe that opens on roof." Under "Describe HVAC system approximate age and any other HVAC system(s)," the Seller wrote "1 A/C bought new in 2007." In the space provided for explanations, the Seller stated: "Bathroom hose broke. Replaced flooring on 1st level except family room." (R. 1055).

Those "disclosures" did not meet the requirements of describing the material defects that actually existed in the Property as recited in Baber's Verified Complaint and as she described in her Petition for Writ of Certiorari. Apparently acknowledging the ineffectiveness of the Seller's disclosures; Steve Reynolds, the Summit Funding loan officer, told Baber that he was calling Garvey to get the reports required by the Seller's disclosure on all the items that had been marked "Yes." (R. 1035-36, ¶ 28b). Garvey never obtained or provided them.

Finally, the observations that Baber made about the condition of the Property are what led her to request the home inspection report and the FHA-required CL-100.[2] Garvey repeatedly misrepresented that he had obtained those and that they showed the Property to be free of material defects.[3]

2. The Tate Defendants also point to the fact that Baber was acquiring the Property "as-is". The Tate Defendants fail to disclose, however, that Baber also knew that the Property would have to be sound in order to meet FHA underwriting guidelines. *See* R. 211:10-24; R:214:12-14; 241:17-20; and 295:6-296:19.

3. As did Summit Savings, the Tate Defendants point to an email dated May 27, 2015 in which Baber allegedly acknowledged that there was no termite inspection performed. That assertion is false, but serves a notable example of how the defendants and the Circuit Court overlooked clear disputes of material fact.

Baber was saying ***at that time,*** she had not yet gotten the termite inspection report. Mere hours later, on that same day, the closing attorney's paralegal, Ms. Mattingly, wrote Baber stating: "I called Jonathan [Garvey] and ***he said there was a termite and home inspection which is good because we cannot close without theml He has sent them to Steve Reynolds*** [loan officer]. ***He said to put them as paid POC.***" *See* R. 1103, 1036-1038, ¶¶29-32. Baber was repeatedly told that these reports were conditions to be met before her loan could close. R. 270:13-271:14, 272:11-19. The email about no termite inspection yet explained.

[2] The State of South Carolina also requires CL-100 reports on the purchase of existing homes. *See Dixon v. Ford,* 362 S.C. 614, 608 S.E.2d 879, 881 (Ct.App. 2005), *McAlahy v. Carter*, 415 S.C. 54, 781 S.E.2d 105, 108 (Ct.App.2015).
[3] *See*

4. The Tate Defendants point to a "Professional Services Disclosure" (R. 584, 807-09) and falsely contend that Baber elected to not get a home inspection or termite inspection report. They fail to point out that this document is not dated, but appears to have been signed in January 2015, at least four months prior to the loan closing. Regardless of the date, the record clearly reflects that Garvey was tasked with, promised to get, and falsely represented that he had obtained the home inspection and termite inspection reports. Most importantly, the bank, the Tate Defendants, and Baber had no right to waive what the FHA required in its underwriting guidelines for Baber to get an FHA-insured loan, which was an express condition of the Purchase Agreement.

5. Regarding the Release (R. 594-595), the Tate Defendants contend that Baber waived claims for tens of thousands of dollars by signing the Release for $409 so that she could obtain an after-the-fact home warranty (that ended up having little benefit for the existing conditions on the Property). The Tate Defendants fail to disclose that there was a significant dispute of fact regarding Baber being fraudulently induced to sign the Release based upon the broker-in-charge Coesens' false representations that she would get Baber the CL-100 and the home inspection reports so that Baber could pursue claims for negligence against the person who performed the inspection. Coesens represented that she would get those reports because Baber had to have had them because the loan could not closed without them. Garvey, who was at the same meeting did not say a word to correct Coesens even though he had a fiduciary duty to Baber and he knew he never obtained those reports. Based on that, it never occurred to Baber that there were no reports and that there was a fraudulent appraisal." *See* R. 307:4-23; 310:9-311:4; R.1040-1042,

¶¶38-39, 42.[4] Upon ultimately learning from Coesens in on email on April 18, 2016 that, in fact, Garvey had lied and never got the reports, Baber immediately rescinded the Release. *See* R. 1042 – 1043, ¶¶ 43 – 45, and R. 1122.

6. Further with respect to the Release, the Tate Defendants seem to have deliberately omitted relevant deposition testimony, just as they did before the Circuit Court which stated Baber's claim for fraudulent inducement to sign the Release. Baber testified that at the meeting in which she agreed to sign the Release, she was still under the belief that the termite and home inspections had been performed and Coesens promised to get them for her because the loan could not have closed without them. R. 310:12-19.

The Tate Defendants also failed to cite the additional deposition testimony:

> Q: What false pretenses? They paid you the money.
> A: They paid me the money.
> Q. You signed a release.
> A. I did.
> Q. What's the false pretenses?
> A. Because when we sat there, we discussed the termite report, the home inspection report, and that this was simply an unfortunate situation that happened. And they were – basically their apologies these things did not show up on the report.

R. 311:17-312:1 *See also,* Baber's affidavit in opposition to the Tate Defendants' motion for summary judgement. R. 1027-1029, ¶¶11-14 wherein she expressly testifies that she was misled into signing the Release because Coesens said the CL-100 and home inspection had to have been obtained or the loan could not have closed.

[4] Releases obtained by fraud are unenforceable. *Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120, 122 (1978); *Floyd v. New York Life Ins. Co.,* 110 S.C. 384, 96 S.E.912, 915 (1918).

7. Finally, with respect to the requests for admissions, the Tate Defendants don't even attempt to justify the Circuit Court's decision to hold Baber to admissions which she did not answer. The Circuit Court's decision constituted an abuse of discretion when: (a) she did not receive them when alleged; (b) as soon as she did receive them, she timely filed her responses; (c) the responses were received by the Tate Defendants prior to their filing their motion for summary judgment; and (d) they had taken Baber's deposition in which she disputed the facts that she was deemed to have admitted. It was simply an abuse of discretion by the Circuit Court and should be addressed by this Court and contrary to the caselaw of this State for which a writ of certiorari should be issued.

## ARGUMENT

### I. Factual Issues Did Exist Regarding the Tate Defendants' Inducement for Baber to Sign the Release.

The Tate Defendants argue that Baber's testimony shows that she released all claims against them in exchange for a $409 belated home warranty that Garvey was supposed to have obtained prior to closing and for which Baber would pay for if Garvey did not. He failed to get that warranty, just as failed to get the home inspection report and the CL-100 wood infestation report. Baber's testified in her deposition that she signed the Release and received $409 as quoted in the Tate Defendants' Return. What the Tate Defendants fail to cite to this Court, however, were other portions of her deposition testimony and her affidavit opposing the Tate Defendants' motion for summary judgment in which she clearly testified that she was induced to sign the Release based on Coesens' false representations that she would get a copy of the CL-100 for Baber, which was coupled with Garvey's silence when he was sitting at the table when Coesens made that representation with full knowledge that no CL-100 or home inspection existed

because he had never obtained them (despite his representations to Baber, the bank, and the closing attorney's paralegal).

## II. Baber Did Seek to Have Her Actual Answers to the Tate Defendants' Requests for Admissions to Stand.

The Tate Defendants allegedly issued a set of discovery to Baber, including a set of requests for admissions, to Baber. Baber who was home recovering from surgery around that time, would have known if they were delivered, but she never received them. When the Tate Defendants' counsel demanded responses to the discovery, including a copy thereof, Baber saw them for the first time, and she then timely responded to those requests. *See* R. 1128 - 1138. After the Tate Defendants received those responses, they then took her deposition in which she also denied many of the subjects of the requests that were deemed admitted by the Circuit Court. R.1029, ¶ 14; R. 1045-1048, ¶¶50-53.

In her affidavit in opposition to the Tate Defendants' motion for summary judgment, Baber explained that she never received the Tate Defendants' discovery requests, answered them timely when she was actually provided a copy, and expressly requested the Circuit Court to relieve her of any deemed admission based upon her failure to respond to the August 8, 2018 requests that she never received:

> ***Based on the foregoing, I am hereby formally applying to the Court to be relieved of any admission made as a result of a failure to respond to them within 30 days of the time that Allen Tate's lawyers claim they send [the first set of requests for admission] on August 8, 2018.***

R. 1046, ¶ 52.

Baber then cited South Carolina and other authorities which held that a party should be relieved of "deemed" admissions under such circumstances. *See Collins*

*Entertainment, Inc. v. White,* 363 S.C. 546, 611 S.E.2d 262, 268 (Ct.App. 2005); Wright & Miller, *Federal Practice and Procedure: Civil* § 2264 at 579 (1994); *Commerce Center of Greenville, Inc. v. W. Powers McElveeen & Associates, Inc.,* 347 S.C. 545, 556 S.E.2d 718, 724 (Ct.App. 2001). R. 1046, ¶¶ 52 - 53. The appellate court's decision upholding the Circuit Court's summary judgment based on deemed admissions conflicts with these cases.

Based on those cases, the Circuit Court abused its discretion in not allowing Baber's actual responses to the Requests for Admissions to stand rather than her unanswered ones being held against her, especially when (1) Baber was representing herself pro se; (2) Baber had not received the Tate Defendants' first set of discovery, including the requests for admissions when stated; but when she did get finally get them, she timely responded; (3) there was absolutely no prejudice to the Tate Defendants since they knew Baber disputed those matters which formed the basis of their summary judgment motion and they had taken her deposition. Similarly, the appellate court upholding the Circuit Court's grant of summary judgment based upon those deemed admissions was contrary to other appellate court decisions which should now be resolved by this Court.

## III. **The Court's Failure to Allow Baber to Receive Responses to Baber's Outstanding Discovery to the Tate Defendants Adversely Affected All Issues Upon Which the Trial Court Granted Summary Judgment**.

No Respondent in this case has disputed that they received Baber's discovery requests to them well prior to their filing motions for summary judgment. No Respondent filed any responses to Baber's discovery requests. No Respondent has pointed to any scheduling order

that said that Baber was required to have filed her discovery requests any sooner than she did, which again were filed well before the Respondents filed their motions.

Baber specifically advised the Circuit Court that that there was outstanding discovery to the Tate Defendants and that pursuant to Rule 56(f), requested additional time to respond to the motion for summary judgment until the Tate Defendants responded to that discovery. R.1029-30, ¶15.

Baber's discovery to the Tate Defendants, R. 1139-1175, if answered truthfully by them, would have elicted admissions that:

1. The Seller's Disclosures also required reports or descriptions of any defects in the Property for which "yes" boxes had been checked and that there were no such reports contained in the Seller's disclosures to Baber. *See* Request for Admissions ("Requests") Nos. 1 – 4.

2. The purchase contract was "contingent upon approval and acceptance of the lender," which in this case meant that the Property had to meet FHA underwriting guidelines, which meant that Summit Funding required a CL-100 and a home inspection report. Requests No. 11 - 15.

3. The appraisal that had been performed on the Property was grossly inaccurate, even to the point of it being fraudulent. *See* Requests Nos. 18 – 35.

4. The Tate Defendants knew that a home inspection report would have revealed many needed repairs on the Property; that they were aware of and liable for such failure to disclose the needed repairs, and that Garvey owed Baber a fiduciary duty. Requests Nos. 36 – 40.

5. Garvey did not get a termite or home inspection report despite representations that he would do so. Requests No. 47 – 48.

6. A CL100 was required to meet FHA/FNMA underwriting guidelines. Request Nos. 52 – 54.

7. Garvey represented that he had obtained a home warranty and was going to deliver it to Baber. Request Nos. 63 – 64.

8. Garvey represented that Robert Evans would perform the CL-100 and home inspection reports and the price would be included in the other work for remodeling that Evans was going to perform. Request Nos. 65 – 67.

9. Coesens admitted to Baber that a CL-100 was required in order to close the loan and that FHA appraisals require closer inspection of the Property. Request No. 71.

Other Requests to the Tate Defendants addressed other issues in this case. Baber also followed up with interrogatories requiring explanations as to any denials and seeking information which would have revealed the depth of the Tate Defendants knowledge of the defects with the Property. *See* Interrogatory Nos. 8 – 12.

Thus, had Baber been able to obtain those admissions or complete her discovery, she would have obtained information relevant to every issue in the lawsuit especially those upon which summary judgment was based. The Circuit Court again abused its discretion in not allowing the discovery to take place, which issue was clearly preserved on appeal.

As stated in her Petition for Writ of Certiorari, this appears to be a novel question of law, i.e. what is to be done when the appellate court itself fails to decide an overarching issue on appeal.

## IV. **In the Face of Potential Lack of Effort by and Unannounced Mental Withdrawal of Her Counsel, the Court Should Interpret the Issues Raised on Appeal Broadly to Allow Her to Have Her Day in Court Rather than Her Claims Being Dismissed on Procedural Grounds**.

Baber is aware that there is not necessarily a civil equivalent for raising an "ineffective assistance of counsel" defense in the same sense as in a criminal case. It is clear from the record, however, that Baber's counsel Creighton Coleman did absolutely nothing in preparation of Baber's appellate brief and was allowed to withdraw from the case over Baber's concerns that

she was unrepresented because she had not been able to communicate with co-counsel Glenn Bower for a substantial period of time.

Worse, Glenn Bowen's work on the appellate brief left much to be desired; especially when Baber's own affidavit had responded to each of the factual and legal arguments made. Mr. Bowens had not communicated with Baber prior to the filing of the brief, never showed her a draft, never spoke with her afterwards, and the appellate court itself could not reach Mr. Bowens and found out that he had "retired" from the practice without ever advising the courts, opposing counsel. It is respectfully suggested that Mr. Bowens had mentally "retired" prior to the preparation of the appellate brief.

It does little good to say that Baber should be bound to Bowens' actions under these circumstances. She did choose him and Mr. Coleman to represent her and neither one did on her appeal. If her Petition for Writ of Certiorari is not granted, then attempts will likely be made to foreclose on the Property; she, her daughter, and her two grandchildren will be evicted and given Baber's inability to work because of physical issues, will not have the ability to acquire a new home.

Rule 208(b)(1)(B) provides that "***Ordinarily***, no point will be considered which is not set forth in the statement of the issues on appeal." In her Petition, Baber cites other decisions by this Court which allow appellants more leeway in which the basis of their issues on appeal are made clear from the context of the remainder of the brief.

In this case, the existence of disputed facts concerning the execution of the Release, i.e. whether Baber was induced to sign it based upon false representations and silence from Garvey when there was a fiduciary duty to disclose that he had never obtained the termite or home

inspection reports would be included within the Issues on Appeal "1. Whether the Trial Court Erroneously Granted Summary Judgment" and "5. Whether There Are Disputed Issues of Fact."

The deemed admissions issue falls under the Issue of "1. Whether the Trial Court Erroneously Granted Summary Judgment."

At this point, Baber cannot deny that the appellate brief that Mr. Bowen prepared was sloppily and hastily and unprofessionally prepared. "Ordinarily," it should have more clearly delineated more issues, and it should have presented more arguments, including those set forth in Baber's opposing affidavits and Verified Complaint, e.g. the arguments as to why parties should be relieved of deemed admissions when they were not received, when a party is acting pro se, when they are answered, and the issuing party can show no prejudice.

But even given Mr. Bowens' failure to do more things that could have been done, Mr. Bowens did clearly preserve the issue of "2. ***Whether the Summary Judgment was Appropriate When the Plaintiff's Discovery was not Completed***." As discussed above, had the Circuit Court properly granted Baber's request to allow that discovery to take place, further evidence would have been obtained from the Defendants supporting her case and which would have presented even more disputes of material facts on all issues thus causing the Circuit Court to deny the Tate Defendants' motion for summary judgment. It also would have precluded arguments based on the deemed admissions because further evidence would have been provided disputing the admissions, and the Tate Defendants would have been even less able to show prejudice if the deemed admissions were withdrawn in favor of Baber's actual responses.

In short, the court below short circuited the discovery process. Far from being "irrelevant" as argued by the Tate Defendants, that failure was overarching and negatively impacted Baber

on every other issue relied upon by the Circuit Court and the appellate court in dismissing her case. It caused the premature rulings on the motions for summary judgment.

Thus, it is this issue which is the ***most relevant*** and should be decided since the appellate court chose not to review that issue. The appellate court completely failed to rule on this issue, which presents a novel question of law to this Court and thus the Petition for Writ of Certiorari should be granted.

**CONCLUSION**

Baber was wronged. Summary judgment should never have been granted. She should be entitled to present her case to a jury. As the next stage in that process, this Court should grant the Petition for Writ of Certiorari with respect to issues raised by the Tate Defendants so that:

1. The appellate court's decisions are in conflict with prior decisions of this court which hold that (a) summary judgment may not be granted when there are disputes of material facts and (b) a party should be allowed to withdraw deemed admissions where the requests were not received, they were answered timely when re-sent, the party was acting pro se, and there was no prejudice to the issuing party.
2. The Court may address the novel question of the effect of the appellate court's failure to address a dispositive issue which would have denied the grant of summary judgment.
3. Decide how detailed the description of the of "Issues on Appeal" must be when:

   (a) The Circuit Court's decisions grossly failed to acknowledge numerous disputes of material facts such that nearly every basis for the superior court's rulings were

tainted. In that context, leeway should be granted for more broadly defined "Issues on Appeal" which might otherwise be barred by application of the "two-issue rule."

(b) When evidence is presented to the appellate court itself that a party had received really inadequate representation on the appeal and her attorney had abandoned her both before and after the filing of the initial brief, should the adequacy of the wording of Issues on Appeal be reviewed more leniently in the application of the "two-issue rule."

DATED this 19th day of June, 2023.

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