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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000054

Noel Owens,...…………………………………………………..……...Appellant,

v.

Mountain Air Heating & Cooling, South Market Real Estate, Demetra Caldera, and Ronald Gilmer, Defendants,

Of whom South Market Real Estate and Demetra Caldera are the............Respondents.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant, Noel Owens (hereinafter "Owens"), hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. A rehearing *en banc* would be best.

ARGUMENT[1]

I implore the judges of this court to read this petition and analyze it carefully. The published opinion issued by this court is dangerously wrong.

[1] Owens, in an effort to keep this petition succinct, incorporates into her argument here by reference her previously submitted briefs. This includes her arguments about the temporal and substantive scope of a release that purports to absolve parties of their own negligent conduct.

Owens sued the Respondents, real estate brokerage South Market Real Estate (hereinafter "South Market") and its real estate agent Demetra Caldera (hereinafter "Caldera"), for falsely and negligently representing to her that the heating and air conditioning system in the house she had under contract was in good condition. (R. pp. 11-17.) Caldera, who was Owens' realtor, had sent an email to Owens in which Caldera told Owens that "[t]he heating and air looks good" – as this court noted. (R. pp. 119, 121.) Owens' reliance on that representation cost her money. (R. pp. 119-20, 127.) The heating and air system was in anything but good condition and shortly after the purchase of the house stopped working altogether. (R. pp. 119-20, 127.) Owens had to buy a new HVAC unit and pay to get the air ducts repaired. (R. pp. 120, 127.)

In Owens' suit, South Market and Caldera counterclaimed for contractual indemnity and moved for summary judgment on the basis of a document Owens signed when she engaged them to provide her with realtor services, signed before the misrepresentation about the HVAC system was ever made. (R. pp. 44-71.) That document contained release and indemnity language, but that language did not purport to cover affirmative misrepresentation about the condition of the real estate. (R. p. 53.) The language in question purported to release and indemnify Caldera and South Market for claims arising from the "recommendation of and selection of inspectors, contractors, and service providers[,]" from "the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers[,]" and from "the verification of property information." (R. p. 53.)

Owens opposed the motions for summary judgment with an affidavit, a copy of which is in the record on appeal but is also filed with this petition for the court's

ease of reference. (R. pp. 118-27.) As discussed below and at length in the briefs, this affidavit and its attachments contained more than enough factual material to demonstrate a genuine issue of material fact on all points subject of the summary judgment motions. See Kitchen Planners, LLC v. Friedman, Op. No. 28173 (S.C. Sup. Ct. filed Aug. 23, 2023) (Howard Adv. Sht. No. 33 at 11, 17) (clarifying that "proper standard is the 'genuine issue of material fact' standard set forth" in Rule 56, SCRCP).

The judicial system failed Owens with regard to the summary judgment motions, ruling against her when palpable issues of material fact were obvious from the record. The lower court issued an order granting both motions for summary judgment, ruling as a matter of law that Caldera was not an agent of South Market, that Owens prospectively released her claims against the Respondents, that Owens' claims against Caldera and South Market fell within the scope of the release and indemnification language, that Owens is liable to South Market and Caldera on their indemnification counterclaims, and that Owens was not entitled to a jury trial on the counterclaims against her. (R. pp. 1-5.)

Now that this court's decision has been issued, this state's judicial system has failed Owens once again. On this appeal from the grant of summary judgment, the court has, strangely, characterized Owens' use of factual material in the record as mere reliance on her own pleadings, and the opinion bends over backward to view the record in the light most favorable to the Respondents – the parties that *moved* for summary judgment. In other words, the review has been the opposite of what the standard of review requires. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008) ("[w]hen determining if any triable issues of fact

exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party"); Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (standard of appellate review of summary judgment same as in trial court). This incorrect review has produced an erroneous, illogical decision that furthers a most unfair result for Owens and forecasts warped rulings going forward in this state's civil lawsuit system.

It would be appropriate for this court as a whole, *en banc*, see S.C. Code Ann. §§ 14-8-80 & -90, to review the decision in this case, which flies in the face of how summary judgment review is supposed to work and which disregards Owens' basic constitutional right to a jury trial on the contested at-law counterclaims the Respondents have against her. See S.C. Const. Art. I, § 14. This court has not just failed Owens. To say that the decision in this case has made bad law is an understatement.

A court that ignores the record loses its legitimacy. A court that knows the law but refuses to uphold it loses its legitimacy. I do not want that to happen to this court. More importantly, the people of South Carolina need that not to happen to this court.

I. Owens did not rely on her pleadings and presented factual material showing a genuine issue of material fact about whether Caldera misrepresented the condition of the heating and air system.

This court's opinion is written as though it relies on an absence of evidence in the record of things that were required to get past summary judgment. This court has written that "[w]e find no evidence in the record establishes Caldera affirmatively represented the condition of the HVAC system to Owens" and that "Owens's contention that Caldera's email affirmatively represented the condition of the HVAC

system 'simply rests[s] on mere allegations or denial contained in the pleadings.'" This court wrote that "[w]e conclude Caldera's email to Owens unambiguously relayed the thoughts of Mountain Air's inspector and included attached documents related to the inspection. Therefore, there was no genuine issue of material fact."

The undersigned is at a loss to see how this court could conclude that there is no evidence in the record that Caldera made an affirmative representation about the condition of the heating and air system. One thing that is expressly contained in factual material in the record – in a document Caldera herself wrote – is that Caldera made an affirmative representation that the heating and air system looked good. (R. p. 121.) This statement comes from an email message Caldera authored that was authenticated by Owens' affidavit and was a part of the record before the lower court and before this court. (R. pp. 119, 121.) It was discussed extensively at oral argument and was mentioned in the opinion in this case.

Nor did Caldera's email "unambiguously relay[]" the inspector's thoughts. If Caldera knew the condition of the property, this misrepresentation was willful, and, if she did not know the condition of the property, it was negligent of her to make this misrepresentation without having factual knowledge to back it up. As pointed out at the hearing on these motions, Caldera did not say that she was *told* that the heating and air system looks good. (R. p. 10 ln. 11-12, p. 15 ln. 8-12, p. 121.) She did not say that the documents provided by the inspector said the system looked good. (R. p. 10 ln. 11-12, p. 15 ln. 8-12, p. 121.) She made an affirmative representation that it did look good. (R. pp. p. 10 ln. 11-12, p. 15 ln. 8-12, p. 121.)

The interpretation of this statement given by the court's opinion only one interpretation of this statement (and not the most reasonable one). It is entirely

reasonable for someone to interpret this statement as Owens did, as an affirmative statement by Caldera about the condition of the heating and air system. Owens is entitled to the benefit of "all reasonable inferences" from the record, which "must be viewed in the light most favorable to the non-moving party" – Owens. Englert, 377 S.C. at 133-34.

An examination of Owens' affidavit also further shows the error in the court's conclusion that she has "simply rest[ed] on mere allegations or denials contained in the pleadings." Owens set out detailed facts in her affidavit, but that is not all she did. Her affidavit also verifies the allegations of her complaint, noting that "[t]he facts stated in the complaint in this case are correct." (R. p. 118.) Our Supreme Court has held that "a verified complaint is an acceptable substitute for an affidavit at the summary judgment phase as long as the pleading satisfies Rule 56(e)[,]" Dawkins v. Fields, 354 S.C. 58, 67, 580 S.E.2d 433 (2003), and the factual allegations of this pleading do. (R. pp. 10-18.)

There is factual evidentiary material in this record that supports Owens' point that Caldera made an affirmative, false, and at least negligent representation about the condition of the HVAC system. (R. pp. 119, 121.) It is this court's conclusion, not Owens' case, that the record does not support.

The court must have overlooked or misapprehended the law, the record, or both in reaching its decision in this regard, and rehearing should be granted.

II. Owens' claim is not within the scope of the release and indemnification provision.

Owens' case against Caldera and South Market has never fallen within the scope of the release and indemnity language at issue. South Market's release and indemnification document purported to release and to obligate Owens to indemnify

Caldera and South Market for claims arising from the “recommendation of and selection of inspectors, contractors, and service providers[,]” from “the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers[,]” and from “the verification of property information.” (R. p. 53.) Owens did not sue Caldera and South Market for recommending or selecting a bad inspector. (R. pp. 10-18.) She did not sue them for something the inspector did or did not do. (R. pp. 10-18.) She did not sue them for an error in verification of property information. (R. pp. 10-18.) She sued them for their misrepresentation that “[t]he heating and air looks good[.]” (R. pp. 10-18.)

Caldera’s representation, viewed in the light most favorable to Owens, did not verify information about the property; rather, it was a direct misrepresentation about the condition of the HVAC system. (R. p. 121.) If Caldera knew the condition of the HVAC system, this misrepresentation was willful, and, if she did not know the condition of the HVAC system, she had no business making such a representation and the misrepresentation was negligent. As pointed out at the hearing below, Caldera did not say that she was told that the heating and air system looks good. (R. p. 10 ln. 11-12, p. 15 ln. 8-12, p. 121.) She made an affirmative representation that it did look good. R. pp. p. 10 ln. 11-12, p. 15 ln. 8-12, p. 121.)

The evidence in the record of and about this statement demonstrates the genuine issue of material fact Owens needed to show to require the lower court to deny these motions for summary judgment and to require this court to reverse summary judgment. <u>See</u> <u>Kitchen Planners</u>, (Howard Adv. Sht. No. 33 at 17). The lower court seemed to think that because Caldera’s email *could* be interpreted as merely relaying what the HVAC inspector told her (which is not a very reasonable

interpretation of Caldera's statement), that is how it must be interpreted. This court appears to agree. That analysis has turned the summary judgment standard on its head. See Englert, 377 S.C. at 133-34. Per Supreme Court precedent, this court was required to recognize that there is a reasonable interpretation of this evidence in Owens' favor, and that precludes summary judgment. Id.

The court must have overlooked or misapprehended the law, the record, or both in reaching its decision in this regard, and rehearing should be granted. There is at least a genuine issue of material fact about whether Owens' claims against South Market and Caldera fall within the scope of the release and indemnification language. That issue requires reversal of the lower court. Id.

III. Owens relied on South Market's representations that Caldera was its agent.

The opinion issued in this case states that the record contains no evidence of either an actual or apparent agency between South Market and Caldera. Again, the opinion ignores material issues of fact found in the record and continues, bizarrely, to state that Owens "relies on the allegations in her pleadings" for things that are plainly shown by the factual record.

What the record, viewed in the light most favorable to Owens, actually shows is that, at all times until after being sued in this case, South Market held Caldera out to be its agent. (R. pp. 11, 118-19.) Based on this representation and Owens' reasonable belief in that representation, Owens signed up with South Market. (R. pp. 118-19.)

In South Carolina, "[a]n agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or

effects legal relationships between the principal and third parties." Peeples v. Orkin Exterminating Co., 244 S.C. 173, 180, 135 S.E.2d 845, 848 (1964). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

Our state's law has been clear that "[a]gency is a question of fact." Id. at 49 (quoting Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984)). "Usually, whether an agency relationship exists and the scope of the alleged agent's authority are questions of fact for the jury." Holmes v. McKay, 334 S.C. 433, 439, 513 S.E.2d 851, 854 (Ct. App. 1999) (citing American Fed. Bank v. Number One Main Joint Venture, 321 S.C. 169, 173-74, 467 S.E.2d 439, 442 (1996); Hiott v. Guaranty Nat'l Ins. Co., 329 S.C. 522, 530, 496 S.E.2d 417, 421 (Ct. App. 1997)). An agency relationship does not require "express appointment and acceptance" to be created; rather it "may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case." Id. (quoting City of Greenville v. Washington Am. Baseball Club, 205 S.C. 495, 504-05, 32 S.E.2d 777, 780-81 (1945); Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962)). "The agent must have assumed to represent the principal and to have performed the acts in his name and on his behalf." Id. at 440. Parties may have an agency relationship even where they have expressly agreed to the contrary. Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982).

The fact that the release and indemnification document and Caldera's email signature bore South Market's name arguably validates that Caldera was South

Market's agent with authority to speak on its behalf, at least with respect to the document. (R. pp. 53, 121.) Although the release and indemnification document refers to Caldera as South Market's "licensee" and not as an agent, what the parties call themselves does not matter and has no real bearing on whether there is an agency relationship between them. Fernander, 278 S.C. at 143. South Market made both implicit and explicit representations to Owens to the effect that Caldera was its agent and that Owens, based on them, believed Caldera to be South Market's agent. (R. pp. 118-19, 123-25.) South Market evidently gave Caldera the authority to act as its agent for getting its self-exculpatory form signed. (R. p. 53, 118-19.) Caldera evidently worked out of South Market's office and transferred calls within it to a South Market employee, who then transferred Owens' call back to Caldera, all, one would reasonably infer, using the same telephone line. (R. p. 118.) The presence of South Market's mark on Caldera's email signature and on top of the release document are representations by South Market to the effect that Caldera was South Market's agent. (R. pp. 53, 118-19, 121.) Tonya Graves' extensive communications with Owens in attempt to address the very issue that gave rise to this litigation belie South Market's contention that Caldera was merely an independent contractor. (R. pp. 119, 123-25.) Graves, broker-in-charge at South Market, stated that South Market was engaging in behavior that showed a right to control how Caldera did her job: calling Caldera in to explain herself and noting that it appeared that Caldera had done everything "by the book[,]" i.e., in accordance with South Market's procedures Caldera was required to follow. (R. p. 124.) That is evidence of right to control, the touchstone of agency. See, e.g., Bank of N.Y. Mellon Trust Co. v. Grier, 416 S.C. 63, 70, 785 S.E.2d 208, 212 (Ct. App. 2018). Even the description that South

Market's broker-in-charge gave of Caldera, "standard independent contractor licensed sales agent[,]" contains the word "agent." (R. p. 110.) At all times relevant to this case, Caldera transacted business in the name of South Market. South Market held Caldera out to be its agent. Given these facts, South Carolina's well-settled case law on the matter, and the summary judgment standard, this conduct is some evidence of an agency relationship between Caldera and South Market.

The court's opinion points out that Caldera received a 1099 tax form from South Market and not a W-2, but the type of income tax form is not dispositive of whether she was an agent of South Market, as is well settled under South Carolina law. See Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 475–76, 753 S.E.2d 416, 419 (2013); Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). This does not do away with the agency evidence in the record, nor does it do away with the law, which is that parties may have an agency relationship even where they have expressly agreed to the contrary. Fernander, 278 S.C. at 143.

But even if there were no evidence of actual agency here, there most certainly is evidence of apparent agency – when the record is viewed in the light most favorable to Owens.

> Under South Carolina law, "[t]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Graves v. Serbin Farms, Inc., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). "Apparent authority to do an act is created as to a third person by written or spoken words or *any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consent to have the act done on his behalf by the person purporting to act for him." Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240,

> 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996). “Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.” Id. at 245, 473 S.E.2d at 868.

Froneberger, 406 S.C. at 47 (emphasis in original).

Here, South Market consciously *and* impliedly represented Caldera to be its agent. Again, in all relevant email communications between Owens and Caldera, Caldera’s signature stated her name along with “South Market Real Estate, LLC.” (R. p. 121.) South Market held Caldera out to be its agent. (R. pp. 118-19, 124, 125.) Owens “signed up with South Market on a South Market form” after her initial meeting with Caldera. (R. p. 118.) The release and indemnification document bears South Market’s letterhead. (R. p. 53.) Following her discovery of the issues with the heating and air system, Owens had multiple communications with Tonya Graves, another associate of South Market, who never disclaimed that Caldera was South Market’s agent. (R. p. 123-25.)

Under these circumstances and the summary judgment standard, the record supports a conclusion that South Market consented to have Caldera act on its behalf. As noted in her affidavit, Owens relied on the representations that Caldera was an agent of South Market and that South Market was a “stable” real estate business, and this reliance led to Owens signing up to have South Market real estate agent Caldera be her realtor. (R. pp. 118-19.) Additionally, Owens relied on Caldera’s representation that the heating and air system were in good condition. (R. pp. 119, 123.) This reliance was to Owens’ detriment, as she had to replace the system. (R. pp. 119-20.) The presence of all this in the record demonstrates the falsity of the

opinion's conclusion that "Owens failed to show any reliance and change of position she had on South Market's alleged representation of apparent authority."

The court must have misapprehended the law or the record in this regard. The record simply cannot support summary judgment here when the law is applied. The agency issues in this case are genuine issues of material fact.

IV. The conclusion that Owens is not entitled to a jury trial ignores the state constitution and is unsupported by any authority.

Citing no authority for the proposition, the court's opinion concludes that since "the only amount of indemnification would be attorneys' fees and costs," it was somehow not error for the lower court to deny her a jury trial on the remaining contested parts – the amount of damages – of Caldera and South Market's claims against her. This holding is unconstitutional.

The indemnity claim is an at-law claim, and the opinion does not state any disagreement with that. There is a fundamental difference between an action to enforce a claimed right to equitable indemnification and one to enforce a contract of indemnity: the former sounds in equity, and the latter is an action at law for breach of contract. Johnson v. Little, 426 S.C. 423, 430, 827 S.E.2d 207, 211 (Ct. App. 2019) ("right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party"). An action seeking to enforce a contractual indemnity provision is a "breach of contract action" that is "an action at law." Id. at 426, 428.

Under the South Carolina Constitution, as it similarly is under the Seventh Amendment to the Constitution of the United States, "[t]he right of trial by jury is preserved inviolate." S.C. Const. art. I, § 14. "The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the

parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived." Rule 38(a), SCRCP. "This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868." Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997).

It is well settled that such cases include breach of contract actions, which is what South Market's claim for contractual indemnity is. A breach of contract action is an action at law for the recovery of money. E.g., Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010); Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009). "Under the common law, legal actions for the recovery of money were triable by a jury." Cooper, 326 S.C. at 48.

Below, South Market conceded that Owens is entitled to a jury trial the contractual indemnity claims, even if all that remains of them is the damages portion. In its response to Owens' motion to reconsider, South Market states that it "does not deny that [Owens] is entitled to a jury trial. . . . If [Owens] wishes to respond to that request [for a damages hearing] with a demand for jury trial, that is her right." (R. pp. 136-37.) Owens had already demanded a jury trial on South Market's counterclaim in her reply to it. (R. p. 38.) Accordingly, she had already done everything she needed to do to preserve her right to a jury trial on the contractual indemnity claim. Rule 38(b), SCRCP.

The court has plainly misapprehended the law and the record in this regard. The Supreme Court's decisions bind this court as precedent, S.C. Const. Art. V, § 9,

and those decisions have already established Owens' right to a jury trial here. E.g., Cooper, 326 S.C. at 48.

V. Rehearing *en banc* would be proper. If left to stand, the decision in this case will invite misuse.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

As discussed above, the opinion issued in this case is at odds with this court's previous decisions and with Supreme Court precedent. If this opinion stands, it is virtually certain that it will be the basis of erroneous – and unjust – trial court decisions going forward. Proper jury demands will be denied. On summary judgment motions, the interpretation of release language will be treated as being outside the principle that the record and all reasonable inferences from it must be construed in the light most favorable to the non-moving party. A 1099 will trump all evidence of agency to the contrary and be treated as establishing independent contractor status as a matter of law. Interpretation of representations in favor of summary judgment movants, rather than summary judgment opponents, will result in orders that end cases despite the presence of genuine issues of material fact, bucking Supreme Court precedent. Kitchen Planners, (Howard Adv. Sht. No. 33 at 17).

This court should rehear this case *en banc*. A different result – reversal – is required for Owens to get justice for the way Caldera and South Market did her wrong, but there is much more here. This court should take the opportunity to stop the spread of the dangerous principles enshrined in the opinion in this case. A different opinion, with a lawful analysis and a result that acknowledges what is

actually in the record, should be issued. Not least among the reasons why is to protect the future of this state's law. Members of the full court, please step in and correct the error of the subject opinion before it infects the system on a much larger scale. Nothing good will come from letting this opinion stand. Protect the people of this state and the legitimacy of our institutions.

WHEREFORE, Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

/s/ Andrew S. Radeker
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September 7, 2023

ELECTRONICALLY FILED - 2019 Oct 16 6:45 AM - RICHLAND - COMMON PLEAS - CASE#2018CP4001561

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS CASE NO. 2018-CP-40-01561
Noel Owens, Plaintiffs, vs. Mountain Air Heating & Cooling, South Market Real Estate, Demetra Caldera, and Ronald E. Gilmer, Defendants.	AFFIDAVIT OF NOEL OWENS

Personally appeared before me Noel Owens, who, first being duly sworn and under penalty of perjury, deposes and says as follows:

1. My name is Noel Owens. I am the plaintiff in this case. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. The facts stated in the complaint in this case are correct. In 2015, I wanted to purchase a home. I knew Demetra Caldera from going to high school with her, so I contacted her when I needed a realtor to help me get a house. When I first spoke to her, I called her at South Market Real Estate. Demetra transferred me over to another South Market Real Estate employee, Chris, in her office, for him to check out if I qualified for a loan and in what amount. Chris did that and transferred me back to Demetra.
3. Demetra represented to me that she was capable and qualified to act as a real estate agent on my behalf in purchasing a home. I told Demetra that I did not have much experience in the area of buying houses, and she told me not to worry and that she would take care of everything. She told me that she would take care of inspections, the closing, and anything else that was needed. I trusted her to take care of everything.
4. I signed up with South Market on a South Market form when I first met with Demetra about this, which was on or around April 3, 2015. Based on South Market Real Estate having acted like Demetra was their agent, I believed that she was their agent. They

seemed like a stable, going concern as a real estate business, so, relying on that and Demetra's representations, I signed up.

5. Not long after that, I found a house I wanted to look at, the house involved in this case. I went and looked at it with Demetra, the seller (Mr. Ronald Gilmer), and the seller's realtor. The power in the house was not on at that time, and the seller evidently didn't live there. I signed up to buy the house on or around April 12, 2015. The contract had an inspection period that allowed me to walk away from the contract.
6. Demetra never showed me a document titled "real property condition disclosure statement" or anything like that for the house, and neither did anyone else.
7. Demetra ordered a general inspection of the house, and we talked about the inspection report and several things in it. She negotiated a few repair items as a result of the report.
8. Demetra chose the HVAC inspector, ordered the HVAC inspection, told me she was there for the inspection (which I could not make because of some work scheduling conflict), and told me that it had been done and that "[t]he heating and air looks good[,]" as shown on Exhibit A to this affidavit, which is an email from her to me that was sent on April 13, 2015.
9. The fact that Demetra ordered the inspection is further shown by Exhibit B to this affidavit, which is a document I got from Mountain Air Heating & Cooling after I started looking into this matter.
10. In fact, the HVAC unit for the house didn't work basically at all, which I discovered only a while after I moved into the house, after the weather started getting warmer. I had the unit and ducts inspected. I discovered that the ducts were improperly installed and that the HVAC unit had multiple problems and was incapable of working correctly.
11. I contacted South Market Real Estate about this, as shown by Exhibits C and D to this affidavit, which are emails between me and Tonya Graves with South Market Real Estate. I was told she was Demetra's boss, the broker in charge. She was no help to me.
12. Exhibits E and F to this affidavit are reports of HVAC inspections that were done after I discovered the HVAC wasn't working. Exhibit F accurately states the condition of the HVAC system at my house when it was sold to me.

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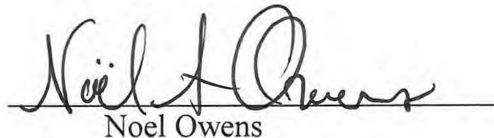
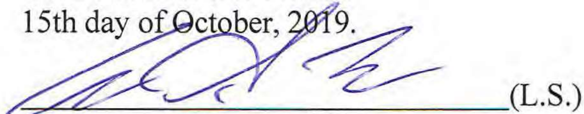
13. I suffered through tremendous Columbia heat for quite some time. I spent about $100.00 on a window unit, which didn't help much but was all I had for air conditioning until I got a new HVAC unit and got the ducts repaired. That cost me about $8,400.00.

FURTHER AFFIANT SAYETH NOT.



Noel Owens

SWORN to before me this
15th day of October, 2019.


(L.S.)
Notary Public for South Carolina
My Commission Expires: 3/29/27

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From: Demetra Caldera <demetracal@yahoo.com>
Sent: Monday, April 13, 2015 11:25 AM
To: noel@brbdumpster.com
Subject: HEATING AND AIR INSPECTION AND INVOICE
Attachments: HVAC-8025 NIGHTINGALE04132015.pdf

The heating and air looks good the inspector said it is well taken care of. But you do have a home warranty so if anything happens they will repair or replace if needed ;) I will have the other inspections soon and will send to you.

Demetra Caldera
South Market Real Estate, LLC
803-920-5720 Cell
http://www.demetracaldera.com

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Owens prod 000006

4611 Hardscrabble Rd, Suite 314
Columbia, SC 29229
803-767-2694

HVAC Inspection Letter

Date 4/13/15 Address Of Property 8025 Nightingale Dr Cola SC 29206

Payment 100.00 Cash, Check, Credit Card

Realtor / Requested by: Demetra Caldera

Make Goodman Model PGB042100-1 Serial 9906605572

Make ______ Model ______ Serial ______

Make ______ Model ______ Serial ______

Make ______ Model ______ Serial ______

Check List:

Check Pressures Good

Check Heat Exchanger Good

Coil Condition Good

Indoor Unit Good

Outdoor Unit Good

Duct Issues Good

Thermostat Good

(Pass) / Not Pass

Recommendations ______

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noel@brbdumpster.com

From: noel@brbdumpster.com
Sent: Friday, June 19, 2015 5:59 PM
To: 'Tonya D Graves'
Cc: 'tonyzamm'
Subject: RE: 8025 Nightingale Drive

Hey Tonya,

Hope this letter finds you cool. Lol
I did sign on the house on the 12th. I work from 7am to 7pm Monday through Friday and most Saturdays so it did take me some time to move in but I did spend my first night on Friday the 22nd . I thought the air was not working due to a user error because of the 4 settings on the thermostat. I finally gave up attempting to reset the air and called in my home warranty.
My air has not worked since I moved in and I was under the impression that the unit was in working condition. I did buy a house that was advertised as having working HVAC. It seems to me that if you buy a house with AC, the AC should work. I am not in your line of business but it just seems that it would work that way. Demetra definitely gave me the impression that the " The heating and air looks good the inspector said it is well taken care of. But you do have a home warranty so if anything happens they will repair or replace if needed ;) " I truly was under the impression that I had a working/running ac unit. I had no idea it was full of rust and the duct work was on the ground. The unit is definitely not well taken care of and the home warranty is definitely not taking care of any problems and I definitely cannot afford to fix the unit.
I did call Mountain air to let him know the findings from both companies and his response was "I have worked with Cool Care. *They try to find problems*. This is an older house so it does not have to be up to code. This is a waste of your time because it is not applicable because the house is old."
I wish I had known that the person Demetra chose for my HVAC inspection was not searching for problems. I thought the inspection report was to "inspect" and find problems any problems that the soon to be home owner should be aware of.
As far as getting a fourth opinion, I am out of money. It cost me $100 for the home warranty- LCB, Cool Care, and my initial inspection from Mountain Air. That's $300. Two out of three inspectors said my house was not up to code. The only one who said it was good/passed/ up to code was Mountain Air.
I do appreciate your time and advise.

Truly hot,
Noel

From: Tonya D Graves [mailto:tonyadgraves@gmail.com]
Sent: Friday, June 19, 2015 3:37 PM
To: Noel
Subject: 8025 Nightingale Drive

Noel,

Please know I am not an attorney nor I am giving legal advice. I am providing you my opinion and recommendation. If I were you and wanted assistance with the HVAC I would start by contacting Mountain Air and sharing the other reports with them. Find out their opinion of current reports. You have 3 very different reports which indicates to me one or me may be incorrect or misleading. I have reviewed the documents listed below:

- Disclaimer provided to you by Demetra Caldera dated April 3rd 2015
- List of service providers w/disclaimer at bottom
- Home Inspection report dated April 13th 2015
- Heating/Air Inspection dated April 13th 2015
- 2-10 Warranty brochure
- Heating/Air Inspection dated June 4th 2015
- Heating/Air Inspection dated June 12th 2015

The main issue I see here is the amount of time between initial inspections and the present. You closed on the house May 12, 2015 which means you had owned it more than 3 weeks when 2-10 sent a vendor out. Any issues at that time would be yours to handle for your property.

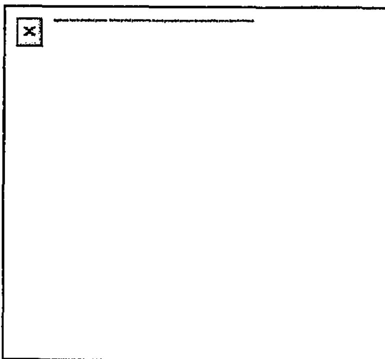
I would also read over warranty brochure very carefully and contact them. Try to get a supervisor on the phone. Find out why the issue isnt covered, if anything didnt seem right when LCB was there tell them and ask for another vendor to be dispatched.

It is important to understand that a heating and air letter is an explanation of a heating/air system at the time the letter is written. With time, usage of the unit, activity or persons in the crawl space, and other miscellaneous factors, the condition of a unit will change. It is then up to the property owner to elect who fill fix the problem and to compensate that vendor/individual for the work or however they arrange.

In closing I wish to tell you I am very sorry for this inconvenience for you. I have checked all the documents in this transaction and spoken with Demetra several times. I find that Demetra did everything by the book and went above and beyond after the closing to try and help with this issue.

Sincerely,

Tonya D. Graves
Direct: 803.238.8612
Office: 803.470.6001
E: info@TonyaGraves.com
W: www.SouthMarketRE.com



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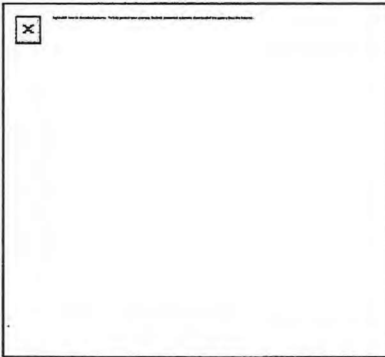
noel@brbdumpster.com

From:	noel@brbdumpster.com
Sent:	Monday, June 22, 2015 2:07 PM
To:	'Tonya D Graves'
Subject:	RE: 8025 Nightingale Drive

I appreciate any help you can offer and hopefully a quick resolve.
Still boiling ☺,
Noel

From: Tonya D Graves [mailto:tonyadgraves@gmail.com]
Sent: Monday, June 22, 2015 12:31 PM
To: Noel
Subject: Re: 8025 Nightingale Drive

Tonya D. Graves
Direct: 803.238.8612
Office: 803.470.6001
E: info@TonyaGraves.com
W: www.SouthMarketRE.com



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On Mon, Jun 22, 2015 at 12:19 PM, Tonya D Graves <tonyadgraves@gmail.com> wrote:
Noel,

Just sending you a quick note to let you know I have not forgotten about you. Client satisfaction is the most important thing. I believe some in the service industry have forgotten this fact. With regards to your circumstance I have little control but I will do what I can. I plan to let Mountain Air know about my disappointment, at a minimum, with the handling of your complaint/issue. I plan to also share with them the importance of reputation in a small market. My hope is they will assist you w/your HVAC and additionally that they will provide excellent customer service in the future.

Sincere Regards,

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Office Phone: 803-800-1516
Office Fax: 888-308-3730
Email: info@lcb-contracting.com
www.lcb-contracting.com

LCB Contracting Solutions
Columbia Division
PO Box 291388
Columbia, SC 29229

6-4-15

Name: Noel Owens		Bill To: C.O.D Trade Fee 100.00	
Address: 8025 Nightingdale Dr		Address: 2-10 H.B.W.	
City: Cola	State: S.C. Zip Code: 29209	City:	State: Zip Code:
Home Phone:	Other:	Home Phone:	Other:
System: Goodman Gas Pack	Model: PGB042100-1 Rev A Serial Number: 9906605572	Service(s) Requested: wo# 5082934 not cooling	
System:	Model: Serial Number:	Service(s) Performed: Charged unit with 2lbs of R-22.	
Filter Sizes:			
DIAGNOSIS: Found unit low on charged Also found Return 16" Duct messed up under house.		Checked Return Duct + all other Duct. Main Return Line is no longer good.	
RECOMMENDATIONS: Charge unit with R-22 Replace 16" Return Duct to improve air Flow			
QUOTE FOR REPAIRS:		Paid in Full By:	Total 100.00
		Cash	Tax
		Check	Amount Paid
		Technician Musa	Home Owner

PLAINTIFF'S EXHIBIT E

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Cool Care, Inc.

P. O. Box 6764
Columbia, SC 29260
Phone: (803)772-7715 Fax: (803)782-5518

Noel Owens
8025 Nightingale Dr
Columbia, SC 29209

Noel Owens
8025 Nightingale Dr
Columbia, SC 29209

37202	6/12/2015	S-13375	06/12/2015	**Amount Paid**	

CallSlip Number	Invoice Date	Invoice Number	Due Date
37202	6/12/2015	S-13375	06/12/2015

1999 Goodman Gaspac
Model # PGB042100-1 REV A
Serial # 9906605572

Checked 1999 10 SEER 3.5 ton 100,000 BTU Goodman Gaspac for no cooling. The condenser is extremely dirty and the evaporator coil is dirty. The unit top is missing insulation and the compressor has weak valves. This system has multiple issues and is not cooling or heating properly at this time. The gas line is improperly installed. The gas line is in contact with the ground and is supposed to be either 12" above ground or 18" below. That code precedes 1999 when this unit was manufactured. Code requires that gas line be hard pipe through unit casing, this system has flex gas line through casing. Numerous sections of supply ducts are missing insulation. The main supply and return trunk lines need to be replaced and hung off the ground. Shipping holes in Gaspac base should be filled to prevent rodent infestation under house. Flashing should be waterproof to keep duct insulation dry and in tact. PLEASE NOTE: Existing work does not have to be brought up to current code requirements but does have to meet code requirement from the time it was installed. Air conditioning duct supplies have always been required to be insulated and ductwork has never been allowed to be in contact with the ground. The gas line issues on this property were not up to code at the time of installation.

Due to the age and condition of the unit, we recoommend the unit be replaced and that duct work be repaired to meet code requirements. This duct system is not that old but was improperly installed.

Please let us know if we can be of further service to you.

As Agreed	100.00
Subtotal	100.00
Tax	0.00
Grand Total	100.00

All payments are due upon completion of work.

The greatest compliment our customers can give us is the referral of their family and friends.
Thank you for allowing Cool Care to serve your heating and air conditioning needs.

www.coolcarehvac.com

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000054

Noel Owens,...Appellant,

v.

Mountain Air Heating & Cooling, South Market Real Estate, Demetra Caldera, and Ronald Gilmer, Defendants,

Of whom South Market Real Estate and Demetra Caldera are the..............Respondents.

PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing or rehearing *en banc* in this case by providing a copy of it by email to opposing counsel at the email address(es) shown below and on the date shown below:

Margaret A. Collins, Esq., at meg@pslawsc.com;
Elizabeth D. Moore, at lizzy@pslawsc.com; and
William R. Padget, Esq., at Bill@HHPLawGroup.com

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Appellant

September 7, 2023