RECEIVED
Apr 17 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Appellate (Court of Appeals) 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 is the..Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
Post Office Box 6903
Columbia, South Carolina 29260
(803) 500-0891
drew@radekerlaw.com
Attorney for Petitioner

INTRODUCTION

This petition asks this Court to issue a writ of certiorari to review the Court of Appeals' published opinion in Owens v. Mountain Air Heating & Cooling, 442 S.C. 203, 898 S.E.2d 142 (Ct. App. 2023), which upheld a grant of summary judgment against the Petitioner Noel Owens ("Owens") and upheld the circuit court's ruling that Owens was not entitled to . The Court of Appeals' opinion runs afoul of the South Carolina Constitution's guarantee of the right to a jury trial in law cases. S.C. Const. Art. I, § 14. The Court of Appeals' opinion also reads like a list of issues of material fact in the record that require reversal, but the Court of Appeals concluded, perplexingly, that summary judgment was proper. It was not.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on August 23, 2023. Counsel for the Petitioner certifies that the petition for rehearing was served and filed on September 7, 2023. The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on March 18, 2024. This petition for a writ of certiorari is timely served and filed.

QUESTIONS PRESENTED

1) Did the Court of Appeals err in affirming the grant of summary judgment? This includes subsidiary questions:

    a. Did the lower court err in granting summary judgment on the basis that Petitioner's claim was within the scope of the release language at issue?

b. Did the lower court err in granting summary judgment because the court concluded Petitioner had released a claim that had not yet come into being at the time the release document was signed?

c. Did the lower court err in finding that summary judgment was proper on the question of whether Defendant Caldera was an agent of Respondent?

2) Did the Court of Appeals err in affirming the circuit court's decision to deny Petitioner a jury trial?

STATEMENT OF THE CASE

Owens brought suit against Mountain Air Heating & Cooling ("Mountain Air"), South Market Real Estate ("South Market"), Demetra Caldera ("Caldera"), and Ronald E. Gilmer "Gilmer"), making claims relating to representations concerning the state and soundness of the heating and air conditioning system at a house she purchased from Gilmer. (R. pp. 10-18.) As to Caldera and South Market, the complaint alleged that Caldera, working for realty company South Market, was Owens' realtor and materially misrepresented the condition of the heating and air conditioning system of a house that Owens bought, relying on that misrepresentation. (R. pp. 11-12.) The complaint alleged claims that Caldera and South Market violated their agency duties to Owens, engaged in fraud, constructive fraud, and negligent misrepresentation, violated S.C. Code Ann. § 27-50-65 (hereinafter "the Residential Property Condition Disclosure Act"), and violated the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*. (R. pp. 12-17.) Owens demanded a jury trial in her complaint. (R. p. 10.)

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 demanded a jury trial in her reply to the counterclaims. (R. p. 38.)

Caldera and South Market made motions for summary judgment, arguing that Owens released these claims upon signing a document containing release language on April 3, 2015. (R. pp. 44-71.) Owens opposed the motions for summary judgment with an affidavit that verified the allegations of the complaint and provided supporting detail and material. (R. pp. 118-27.)

Following a hearing on the motions, the lower court made an order granting both motions for summary judgment, finding that Caldera was not an agent of South Market, that Owens prospectively released her claims against South Market and Caldera, that Owens' claims against Caldera and South Market fell within the scope of the release and indemnification language, that Owens was liable to South Market and Caldera per their counterclaims, and that Owens was not entitled to a jury trial of the

remaining portion of South Market and Caldera's claims against her, as evidence of their damages was to be either agreed upon or received at a damages hearing. (R. pp. 1-5.)

Owens appealed. The Court of Appeals affirmed the circuit court's decision in all respects. Among other things, the Court of Appeals' opinion states more than once that Owens relied on her pleadings as evidence for matters that were indisputably stated in Owens' affidavit.

Petitioner petitioned for rehearing or rehearing *en banc*. While the petition for rehearing was pending, Owens settled the case with Caldera and stipulated her dismissal from this appeal. After reviewing the petition for rehearing for several months, the Court of Appeals denied it.

This petition for certiorari followed.

STATEMENT OF FACTS

Owens engaged Caldera to act as her real estate agent in purchasing a home. (R. p. 10.) 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.) While Owens discovered the subject property at 8025 Nightingale Drive, Columbia, South Carolina, herself, she nevertheless asked Caldera to arrange a viewing and the eventual sale of the home to her. (R. p. 11.) Owens signed up to buy the subject property on April 12, 2015. (R. p. 119.)

Caldera hired Respondent Mountain Air to perform an inspection on the system in the subject property. (R. pp. 11, 122.) Following the inspection, Caldera represented

to Owens in an email message that "[t]he heating and air looks good[.]" (R. p. 121.) Neither Caldera, South Market, nor Gilmer, at any point relevant to this case, disclosed any concerns regarding the heating and air system. (R. p. 11.) Mountain Air also represented that the system was fine. (R. pp. 12, 122.) Despite these assurances, numerous problems with the heating and air system arose shortly after Owens' purchase of the home. (R. p. 12.) Owens requested another inspection by another company, which found the following:

> 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 [system's] base should be filled to prevent rodent infestation under house. Flashing should be waterproof to keep duct insulation dry and intact . . . . 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 recommend 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.

(R. pp. 12, 127.) Mountain Air, Gilmer, Caldera, and South Market failed to inform Owens of any of these problems, and Owens ultimately had to replace the system altogether. (R. pp. 12, 119-20.) The new unit cost about $8,400.00. (R. p. 120.)

ARGUMENT

As discussed below and at length in the briefs, Owens' 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. Further, she is constitutionally entitled to trial by jury on every undecided portion of South Market's claim against her for breach of a contractual indemnity obligation.

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. Now that the Court of Appeals has issued its decision and declined to grant rehearing on it, this state's judicial system has failed Owens a couple more times. On this appeal from the grant of summary judgment, the Court of Appeals, 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 South Market and Caldera – 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 most appropriate for this Court 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 against her. See S.C. Const. Art. I, § 14.

What is more, this is a published opinion. It now establishes the law for *everyone*. The judicial system has not just failed Owens. To say that the Court of Appeals' decision in this case has made bad law is an understatement.

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.

The Court of Appeals' 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. The Court of Appeals wrote 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.'" Owens, 442 S.C. at 214. That 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." Id.

The undersigned is at a loss to see how the Court of Appeals 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 Court of Appeals' opinion.

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 of Appeals' opinion is 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 and take the statement as meaning what it says, as an affirmative statement by Caldera that the condition of the heating and air system is or appears to be good. 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.

Viewed in the light most favorable to Owens, Caldera either knew her statement was false (since it was) or made it without knowing whether it was true or false. Either

way, her statement was at least negligent, as it was not made with reasonable care. See Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991) (discussing meaning of negligence). She did not know it to be true and, accordingly, had no business making it. She may not have had a duty to tell Owens anything about the state of the HVAC system, but, once she undertook to do so, she took on a duty to use reasonable care to make that statement accurately. See Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 291 (2019) (duty created by voluntary undertaking); Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847 (Ct. App. 1997) (same). Owens relied on her statement in deciding to purchase the house at the price she paid for it. (R. pp. 119, 123.) Whether a party has the right to rely on a statement is ordinarily a fact question for the jury. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368 (Ct. App. 2005) (fact question concerning right to rely). It is here.

An examination of Owens' affidavit also further shows the error in the conclusion that she has "simply rest[ed] on mere allegations or denials contained in the pleadings." Owens, 442 S.C. at 214. 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, a representation on which she reasonably relied to her detriment. (R. pp. 119, 121.) It is the Court of Appeals' conclusion, not Owens' case, that the record does not support.

There are issues of material fact here that required reversal, but the Court of Appeals has ignored them.

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

Owens' case against 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.) (They may have done that in addition to what Owens sued them for, but Owens' case is not about that.) 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.)

About this point, both South Market and Caldera contended that Caldera's poor writing saves them, contending that her words "[t]he heating and air looks good the inspector said it is well taken care of" can *only* be understood as meaning that Caldera was stating that the inspector had said that the HVAC system looks good. (R. p. 121.)

A sentence is defined as follows:

> [A] word, clause, or phrase or a group of clauses or phrases forming a syntactic unit which expresses an assertion, a question, a command, a wish, an exclamation, or the performance of an action, that in writing usually begins with a capital letter and concludes with appropriate end punctuation, and that in speaking is distinguished by characteristic patterns of stress, pitch, and pauses.

Merriam-Webster dictionary, definition of "sentence," available at https://www.merriam-webster.com/dictionary/sentence.

A basic familiarity with English grammar demonstrates that these are two sentences, i.e., two complete thoughts, though the writer has erred by not putting any punctuation between them. "The heating and air looks good" is not written as being dependent upon whether "the inspector said it is well taken care of" – they are just two sentences, two assertions of fact, two complete thoughts unlinked except by their author's failure to punctuate.

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. See Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). 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. The Court of Appeals appears to agree. That analysis has turned the summary judgment standard on its head. See Englert, 377 S.C. at 133-34. Per precedent authored by this Court, the Court of Appeals 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. South Market did not establish that, as a matter of law, Owens released her claims against it.

The general rule is that a release does not operate with regard to claims that have not yet arisen when the release is signed. Gardner v. City of Columbia Police Dept., 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950). Release is an affirmative defense. See id. at 224.

So, under the general rule, it is not possible for Owens to have released claims that had not arisen yet when she signed the release document. Id. Parties *can* craft a release that reaches into the future to operate, but that, as one would expect, has several requirements. McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005).

> Contracts that seek to exculpate a party from liability for the party's own negligence are not favored by the law. Pride[v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964)]. *An exculpatory clause, our supreme court has held, is to be strictly construed against the party relying thereon.* Id. *An exculpatory clause will never be construed to exempt a party from liability for his own negligence "'in the absence of explicit language clearly indicating that such was the intent of the parties.'"* South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984) (quoting Hill v. Carolina Freight Carriers Corp., 235 N.C. 705, 71 S.E.2d 133, 137 (1952)).

Id. at 465 (emphasis added).

Here, there is no explicit language clearly indicating the intent of the parties that this release was to reach into the future to operate upon claims that had yet to arise. (R. p. 53.) South Market was not entitled to judgment as a matter of law that the release operated prospectively.

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

The Court of Appeals' opinion 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. Owens, 442 S.C. at 216. As the undersigned sees it, that is telling: an accurate, truthful reading of the factual material in the record would not support the Court of Appeals' decision.

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. (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's actions communicated to Owens that Caldera was 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 fact that Owens contacted Caldera on the basis of having known her from school does not speak to why Owens agreed to make Caldera her realtor, no matter what the Court of Appeals says. There are issues of material fact here.

V. 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 of Appeals' opinion concludes that since "the only amount of indemnification would be attorneys' fees and costs," Owens, 442 S.C. at 217, 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 on 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 stated 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.

This Court's decisions bind the Court of Appeals 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.

VI. If left to stand, the decision in this case will invite misuse.

As discussed above, the opinion issued in this case is at odds with both the Court of Appeals' previous decisions and with this Court's 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 precedent and the rules of civil procedure. See Rule 56, SCRCP.

This court should grant certiorari and review this case. A different result – reversal – is required for Owens to get justice, but there is also much more here. This Court should take the opportunity to stop the spread of the dangerous principles enshrined in the Court of Appeals' opinion. 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. Please step into what might otherwise be a little case and correct some big errors before they the judicial system on a much larger scale. Nothing good will come from letting this opinion stand. Please protect the people of this state, the integrity of our courts and laws, and our constitution.

CONCLUSION

For multiple reasons, this case is a good candidate for certiorari. Not least among these reasons is that Owens has received nothing but injustice from our courts so far.

WHEREFORE Petitioner prays for an order issuing a writ of certiorari to review the Court of Appeals' decision in this case.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
Post Office Box 6903
Columbia, South Carolina 29260
(803) 500-0891
drew@radekerlaw.com
Attorney for Petitioner

Columbia, South Carolina
April 17, 2024