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 . . . . . Respondents.

FINAL BRIEF OF RESPONDENT SOUTH MARKET

Margaret A. Collins
Elizabeth D. Moore
Palmetto State Law Group, LLC
2241 Bush River Road
Columbia, SC 29210
meg@pslawsc.com
lizzy@pslawsc.com

TABLE OF CONTENTS

Table of Authorities.....i

Questions Presented.....1

I. Did the trial court err in finding there was no genuine issue of fact, or error at law in finding a release and waiver may be prospective, without accepting Appellant's argument that they must be retrospective only, and that the language was intended to release the Respondents for a statement that Appellant argues could have been construed to be a misrepresentation by Respondents?

II. Did the trial court err in finding Appellant's claim fell squarely within the scope of the Disclaimer and Release?

III. Did the trial court err in finding Respondent Caldera was not an agent of Respondent South given that Appellant failed to provide any evidence of agency and relied solely on allegations contained in her Complaint?

IV. Was Appellant denied her constitutional right to a jury trial on the remainder of the Respondents' counterclaims?

Statement of Facts/Procedural History.....2

Standard of Review.....5

Arguments.....6

I. The trial court properly found that there was no genuine issue of fact, or error at law in finding a release and waiver was prospective, without accepting Appellant's argument that they must be retrospective only, and that the language was intended to release Respondents for the facts alleged. 6

II. The trial court did not err in finding that Appellant's claim fell squarely within the scope of the Disclaimer and Release.....10

III. The trial court did not err in finding Respondent Caldera was not an agent of Respondent South given that Appellant failed to provide any evidence of agency and relied solely on allegations contained in her Complaint.....11

IV. Appellant is not entitled to a jury trial for a determination of indemnification amount because the remedy is equitable in nature and not subject to jury trial.....14

Conclusion.....15

TABLE OF AUTHORITIES

Cases

Doe v. Spartanburg County School District Three, 314 F.R.D. 174, 93 Fed. R. Serv. 3d 968, 329 Ed. Law Rep. 922 (Dist. Ct. 2016).....6,7

Gardner v. City of Columbia, 216 S.C. 219, 57 S.E. 2d 308 (1950).....6,7,8

Huckaby v. Confederate Motion Speedway, Inc., 276 Sc. 629, 281 S.E. 2d 223 (1981).....8,9

Fernander v. Thigpen, 278 S.C. 240, 293 SE2d 424 (1982).....12

Defender Properties, Inc. v. Doby, 307 SC 336, 415 S.E.2d 383 (1992).....14

Fleming v. Rose, 350 S.C. 488, 567 S.E. 2d 857 (2002).....5

Handcock v. Mid-South Management Co, Inc., 381 S.C. 326, 673 S.E. 2d 801 (2009).....5

Maybank v. BB&T Corporation, 416 S.C. 541, 787 S.E.2d 498(2016).....7,8,9

First-Citizens Bank & Trust Co. v. Conway Nat. Bank, 282 S.C. 303, 317 S.E.2d 776 (Ct. App. 1984.....7

Gathers v. Harris Teeter Supermarket, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984).....12

O.C. Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13. 419 S.E.2d 795 (Ct. App. 1992).....11

Campbell v. Beacon Mfg Co, Inc., 313 SC 451, 438 SE2d 271 (Ct. App. 1993).....15

Strickland v. Madden, 323 S.C. 63, 448 S.E. 2d 581 (Ct. App.1994).....6

Loyola Federal Sav. Bank v. Thomasson Properties, 318 S.C. 92, 456 S.E.2d 423 (Ct. App. 1995).....14,15

Fraiser v. Palmetto Homes of Florence, Inc., 323 S.C. 40, 473 S.E.2d 865 (Ct. App. 1996)....12

Harrington v. Mikell, 321 S.C. 518, 469 S.E. 518 (Ct. App. 1996).....11

Nelson v. Charleston County Parks & Recreation Com'n, 362 S.C. 1, 605 S.E. 2d 744 (Ct. App. 2004),.....6

McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E. 2d 462 (Ct. App. 2005).....7,8,9

Handcock v. Mid-South Management Co, Inc., 381 S.C. 326, 673 S.E. 2d 801 (2009).....6

Froneberger v. Smith, 406 S.C. 37, 748 S.E. 2d 625 (Ct. App. 2013).....6, 13

Martin v. County of Los Angeles, 59 Cal Rptr 2d 303 (1996).....14

Constitutional Provision

U.S. Const. amend. VII.....15

S.C. Const. art. I § 3.....15

Statutes

S.C. Code §27-50-80.....9

SC Code §40-57-30 et seq.....14

Rules

Rule 56, SCRCP.....5

QUESTIONS PRESENTED

I. Did the trial court err in finding there was no genuine issue of fact, or error at law in finding a release and waiver may be prospective, without accepting Appellant's argument that they must be retrospective only, and that the language was intended to release the Respondents for a statement that Appellant argues could have been construed to be a misrepresentation by Respondents?

II. Did the trial court err in finding Appellant's claim fell squarely within the scope of the Release and Waiver?

III. Did the trial court err in finding a real estate licensee was not an agent of the broker?

IV. Was Appellant denied her constitutional right to a jury trial on the remainder of the Respondents' counterclaims?

STATEMENT OF FACTS/PROCEDURAL HISTORY

Noel Owens ("Appellant") brought suit on March 21, 2018 against Mountain Air Heating and Cooling ("Mountain"), South Market Real Estate ("Respondent South Market"), Demetra Caldera ("Respondent Caldera"), and Robert E. Gilmer ("Gilmer"). Appellant had purchased a house in 2015 from Gilmer, using Respondent Caldera, acted as the buyer's agent who was an Associated Licensee with Respondent South Market as the Broker-in-Charge. After the purchase, issues with the HVAC system were discovered, notwithstanding an HVAC inspection by Mountain. Numerous causes of action were alleged against Respondent South Market, and Gilmer and Mountain are not involved in the appeal.[1]

Respondent South Market filed a Motion to Dismiss on August 24, 2018, and Respondent Caldera filed a Motion for Summary Judgment on February 26, 2019. Respondent South Market filed a subsequent Amended Motion to Dismiss, Motion for Judgment on the Pleadings and Motion for Summary Judgment on April 23, 2019. Supporting Memoranda were filed by both Respondent South Market and Appellant. Oral arguments were held October 17, 2019 and counsel for all parties were present. An Order granting Motion for Summary Judgment was issued for Respondents South Market and Caldera, with such order including indemnification for Respondents South Market and Caldera by Appellant. Appellant filed a Motion to Reconsider on November 11, 2019, with Respondent South Market filing a Return to Motion on November 15, 2019. A subsequent Order Denying Motion was issued December 19, 2019. This appeal followed.

[1] Petitioner and Respondent Gilmer filed a Stipulation of Dismissal as to Mountain Heating and Air only. Respondent is informed and believes that Mountain and Petitioner settled. Filed 11/19/2018. The First and Fourth Causes of Action relate to Gilmer. The Sixth Cause of Action relates to Mountain. As such, only the Second (SCUTPA), Third (Negligence Misrepresentation by Omission), Fifth (Negligence); Seventh (Breach of Agency Duties) and Tenth (sic)(breach of Contract accompanied with Fraud) are the causes of actions that relate to this Respondent. Proof of Delivery on the South Carolina Attorney General was never filed in accordance with S.C. Code Ann. §39-5-140(b).

On or about April 3, 2015, Appellant engaged Respondent Caldera to assist in the purchase of real estate. As a part of engaging Respondent Caldera, the Appellant read and signed an Exclusive Buyer Agency Agreement and a Disclaimer and Release of Liability Sheet ("Disclaimer"). The Disclaimer and Release specifically provided that (1) the buyer makes the election on which companies or individuals to hire for inspections; (2) Respondent South Market gave no warranty, expressed or implied, as to the condition of the HVAC, the reliability of those selected by, hired by or consulted by the buyer for such inspection' and (3) Respondent South Market was not liable for any mistake, act or omission on the part of any inspector. Importantly, Respondent Caldera signed the document as "Licensee" of Respondent South Market, as it was on South Market stationery. The Disclaimer is a one-page document with each section denoted by the appropriate heading. The Appellant signed the Disclaimer on April 3, 2015 and it is part of the record in Respondent Caldera's Motion to Dismiss. The Caldera Motion to Dismiss also contains Appellant's Responses to the Request for Admissions, which established that Appellant freely and voluntarily signed the Disclaimer.

Specifically, the Disclaimer's applicable provisions read as follows:

> *Disclaimer*
>
> *In the State of South Carolina, it is always the buyer's decision which inspections the buyer elects to conduct the on the property and which companies, individuals, or entities to they hire to conduct inspections and perform these services. South Market Real Estate and its licensees advise the buyer than all inspection results and verification of information deemed important to the buyer be received and documented in writing from the providing source.*
>
> *The buyer acknowledges that South Market Real Estate and its licensees give no warranty of any kind, expressed or implied as to: (1) the physical condition of the property or as to the condition of or existence of improvements, services or systems including but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage/septic, electrical systems or to structure; (2) the reliability or accuracy of any individual, company, entity, or governmental agency selected by, hired by, or consulted by the buyer to perform any inspection, provide consultation, or verify information pertaining to property.*

Release of Liability

> *The buyer hereby releases, indemnifies and holds harmless South Market Real Estate and its licensees from and of any and all actions, claims, or demands regarding: (1) the recommendation of and selection of inspectors, contractors, and service providers (including but not limited to mortgage lenders and closing attorneys); (2) the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers (including but not limited to mortgage lenders and closing attorneys); (3) the verification of property information.* (R, p. 29).

Appellant initially found the house during a "drive by" and she informed Respondent Caldera that she wished to view the 8025 Nightingale Drive Property ("the Property"). (R, p. 11). Respondent Caldera scheduled a viewing and a Contract to Purchase was entered into with a standard due diligence period for inspections.

As a part of the due diligence period and during the inspections of the home, Appellant claims Respondent Caldera requested, and Respondents aver that Appellant selected Mountain from a list of HVAC providers, the list of which was provided by Respondent Caldera. A list of providers was submitted for Appellant's review. Such list indicated "****THIS IS JUST A LIST PLEASE FEEL FREE TO USE ANYONE YOU ARE COMFORTABLE WITH." (sic). (R., p. 54). Importantly, such list did not contain Respondent South Market's logo or name on it and was not the business stationary. (*Id.*). Appellant claims in her Initial Brief that "Caldera hired Respondent Mountain Air to perform an inspection." Respondent South Market does not believe that happened, given its history of dealing with Defendant Caldera. At a minimum, Appellant's acquiescence of Mountain Heating and Air was received by Respondent Caldera in the selection of Mountain to perform the HVAC inspection, given the applicable standard of providing Appellant the benefit of all inferences in disputed facts.

The entirety of their diagnostic was a standard inspection report that simply indicated, as of the date of the inspection, the HVAC system was operational, with certain system components

further denoted as "good." (R, p. 116). Respondent Caldera indicates that there were no additional inferences of the unit's history or condition, other than reporting the representations of the HVAC inspector, Mountain. Further, Respondent Caldera suggested, and Appellant obtained a home warranty that potentially provided coverage for HVAC system repair or replacement per the terms of the home warranty. Information regarding the home warranty claim is not in the record.

The HVAC inspection invoice stated, "Performed single system HVAC inspection. Found everything is working well at this time." The HVAC letter stated "Good" next to every item under the check list. Respondents Caldera's alleged representations that the HVAC system 'looked good' were merely Respondent Caldera summarizing the HVAC Inspection Letter, and not a separate representation. (R, p. 99-100; *see also* p. 116 and 121). Respondent South Market also believes this is true for the email referenced by Appellant. (R, p. 121), and both "representations" were mere parroting of the HVAC inspector's report and reporting to a customer the results of her requested inspection. Caldera's transmittal email for the inspection report stated, "[t]he heating and air looks good the inspector said it is well taken care of." (sic). (R, p. 121). As such, this was not a "representation," but again, merely the reporting of the HVAC inspection findings. Nothing is in the record, and it is not alleged that the HVAC inspector did not, in fact, make the statement about the unit receiving good care.

The Appellant proceeded to purchase the house. Sometime after closing, the Appellant alleges that she discovered that the HVAC system had several problems. Respondent South Market is unsure of how long after closing these issues came to the Appellant's attention or what home warranty coverage existed; however, the result was the Appellant replacing the HVAC system. Respondent South Market believes that Appellant made a claim against her Home Warranty and was successful.

STANDARD OF REVIEW

A motion for summary judgment is proper when the movant can show that there is no genuine issue as to any material fact, and that they are entitled to a judgment as a matter of law. *SCRCP 56.* Appellate review of a summary judgement requires the same standard be applied. Fleming v. Rose, 350 S.C. 488 (2002). "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Nelson v. Charleston County Parks & Recreation Com'n, 362 S.C. 1, 4-5 (Ct. App. 2004).

Where the burden of proof is a preponderance of the evidence, the nonmoving party must show a "mere scintilla of evidence" in order to survive the motion for summary judgment. Handcock v. Mid-South Management Co., Inc., 381 S.C. 326, 330 (2009). In reviewing a motion for summary judgment, a Court may go beyond just the pleadings, and review depositions, answers to interrogatories, admissions, and affidavits. *SCRCP 56.* However, "[i]t is well settled in South Carolina that a party 'may not rest upon the mere allegations or denials of his pleading' to defeat a motion for summary judgment." Froneberger v. Smith, 406 S.C. 37, 50 (Ct. App. 2013), citing to Rule 56(e) and Strickland v. Madden, 323 S.C. 63, 68 (Ct. App. 1994).

ARGUMENTS

I. The trial court properly found that there was no genuine issue of fact, or error at law in finding a release and waiver was prospective, without accepting Appellant's argument that they must be retrospective only, and that the language was intended to release the Respondents for the facts alleged.

The terms "release" and "disclaimer" are used widely and variably. When applied to contracts, they may operate in different fashions, depending upon the circumstances. In Appellant's Brief, she cites to case law indicating that a party cannot disclaim a claim that has yet to arise. However, such case appears to be limited to the specific facts of a retrospective release for litigation

applying to subsequent attorney fees and costs. This holding may be true as applied to general waivers in settlement agreements and offers of settlements. *Doe v. Spartanburg County School District Three*, 314 F.R.D. 174 (Dist. Ct. 2016) and *Gardner v. City of Columbia*, 216 S.C. 219 (1950). However, application to prospective liability waivers would result in the absurdity that liability cannot be released until after all relevant actions and one simply cannot sign a prospective release for a subsequent activity that may involve substantial risk, or a financial transaction that has yet to occur. If this were the case, releases for inherently dangerous activities, such as medical procedures, parachuting, SCUBA diving, or children's fun parks would never be allowed or recognized under the law. Also, releases for financial transactions, such as investments in high risk ventures, would also be without recognition.

Prospective waiver of liability that seeks to disclaim liability for a future acts or transactions are clearly valid and recognized under South Carolina law. *Huckaby v. Confederate Motion Speedway, Inc.*, 276 S.C. 629 (1981); *Maybank v. BB&T Corporation*, 416 S.C. 541 (2016); and *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242 (Ct. App. 2005). "[T]he legal effect of a contract may be gathered from the four corners of the instrument itself. *First-Citizens Bank & Trust Co. v. Conway Nat. Bank*, 282 S.C. 303 (Ct. App. 1984). If not recognized, the effect on a good number of transactions would be detrimental to our commerce and even healthcare system. However, Appellant does not cite these prospective waiver cases in her brief and limits them to only specific retroactive release cases.

In both *Doe* and *Gardner*, the waivers were after commencement of litigation and in consideration of resolution of the cases. *Doe* deals with an offer of settlement and the court reviews the settlement's applicability to other defendants in a case, as well as ambiguity and validity of the release. *Doe* is distinguishable from Respondent South Market's Disclaimer in that *Doe* was in the

context of an offer of settlement after commencement of litigation. Based on the events being previous in time, the general release's intent was for retrospective application only.

This retrospective application was the case in *Gardner* as well. There, the respondent had entered into a settlement agreement releasing a company from "any trouble whatsoever," and the appellant contended it was not a full release of their claims. The Court disagreed and found that respondent executing the release also "destroyed the appellant's right of subrogation." *Gardner* at 223 and 225. Again, this release of claims, based on the four corners of the document, was generally retrospective and therefore distinguishable from Respondent South Market's pre-transaction release.

In *Huckaby*, *Maybank*, and *McCune*, like in Appellant's case, the disclaimers are prospective and seek to waive liability for a future event or transaction. In *McCune*, appellant signed before, and as a condition of, playing paintball. The Court upheld it, finding that the waiver was signed voluntarily and that the release was not ambiguous or overbroad. *McCune* at 249 and 251. No issue was found with its prospective application. In fact, it was characterized in the case as a "standard waiver." *Id.* Similarly, in *Huckaby*, appellant signed a release prior to being permitted on the speedway and the release was again prospective. The Court upheld the release as voluntarily signed. There was no holding in either case that release could not be prospective because it is understood that in some circumstances, they must be. *Maybank* also had a forward-looking release of liability that was upheld, and examined whether the release was unconscionable, and it was found that the language was clear and unambiguous. *Maybank* at 515-516.

Respondent South Market's Disclaimer is similar to *Huckaby*, *Maybank*, and *McCune*. It is prospective and seeking to release liability for a future transaction. Respondent avers that language taken from *Doe* and *Gardner* to the case at hand is misplaced and strains a holding in caselaw not applicable to the situation at hand. The release that Respondent South Market utilized was a release in contemplation of a future transaction – the selection and purchase of a residential property. While

the transaction was not an activity involving an element of danger like in *Huckaby* and *McCune*, it was a transaction of a more financial nature, as in *Maybank.*

Respondent South Market acknowledges that issues of public policy and unconscionability were looked at in Respondent Caldera's brief and in the case law of *Huckaby*, *McCune*, and *Maybank*. However, this Respondent avers that these issues were not raised by Appellant at any time in the Civil Litigation, nor in the Motion to Reconsider. As such, Respondent South Market does not believe these issues are preserved for appeal. However, the effects on public policy if this Court adopted Appellant's view would be far-reaching and deserves scrutiny. Further, Respondent South Market joins in Respondent Caldera's arguments that the prospective release does not fail the two tests used to review these types of releases. The disclaimer signed by Appellant did not violate any notions of public policy, and in fact, specific provisions of the statutory scheme governing real estate professionals supports the Disclaimer. Further, the Disclaimer is not unconscionable given that it was contained on a single sheet of paper and there was no element of surprise. As Respondent Caldera stated in her brief on page 10, "The terms are routine in real estate agent representation agreements and the homebuying process in general and exist to simply protect real estate agents from acts of third parties that are beyond their control." This also appears consistent with legislative intent established in S.C. Code Ann. §27-50-80 (1976), wherein the purchaser of real estate's obligation to inspect property and the listing and selling agent specifically have no such duty.

Further, Respondent again reiterates the public policy argument that the effect on commerce if one was unable to limit liability would be unreasonably restrained. In the case at hand, a broker, working for a relatively small commission compared to the purchase price and paid by the seller, would not undertake the liability of the total transaction based on the compensation paid without some limitation of liability. Further, South Market Carolina has always had a broad policy of *caveat emptor* relating to the second-market real estate industry, albeit subject to real estate disclosure laws.

Adoption of the interpretation proffered by Appellant would, in fact, overturn this approach and allow not only the seller to be liable, but also third-party inspectors, brokers and those similarly situated, liable for the entire amount of the transaction. Again, the effect of Appellant's construction of waivers and releases not being applicable in a prospective manner would severely affect health care, financial advising, and many other industries. Standard industry waivers and liability limitations would severely be uprooted, if the interpretation of releases proffered by Appellant was adopted by this Court.

II. The trial court did not err in finding that Appellant's claim fell squarely within the scope of the Disclaimer and Release.

A party who asserts claim for negligent misrepresentation must show that his reliance on misrepresentation was reasonable and that he actually relied upon the statement. Further, no liability accrues for casual statements, or matters which plaintiff could ascertain on his own in exercise of due diligence. *Harrington v. Mikell,* 321 S.C. 518, 522 (Ct.App.,1996), *citing O.C. Gruber v. Santee Frozen Foods, Inc.,* 309 S.C. 13 (Ct.App.1992). In *Harrington*, the Court of Appeals upheld summary judgment for a real estate broker failing to disclose a party did not, in fact, have the requisite Power of Attorney or the right to sell property. *Harrington* specifically holds that, although brokers have a duty to avoid fraudulent conduct and misrepresentation, they do not owe a generally duty to verify information. Absent a showing of bad faith by petitioner or evidence of knowledge of the falsity of the representation, summary judgment is proper in favor of a broker. Most importantly, the *Harrington* Court holds that the judge did not improperly rule on and decided contested issues of material fact. The Court specifically held that the analysis and finding no evidence of bad faith is dispositive. This is consistent with the case at bar. There is no evidence of bad faith, misrepresentation or fraud, other than a blanket allegation of fraud and misrepresentation

by Appellant that is not supported by any facts in the record. As such, the granting of Summary Judgement, as to Caldera and South Market was proper.

Appellant further argues that the Disclaimer did not apply to any representations by Respondent Caldera. Specifically, Appellant claims Respondent Caldera's representations were not verifying information about the property from the HVAC inspector, but rather claims it is a direct misrepresentation by Respondent Caldera about the condition of the property by Caldera herself, but does not cite any supporting facts of this allegation. In turn, this alleged misrepresentation fell outside the scope of the Disclaimer. There is no evidence in the record that Respondent Caldera knew of any falsity of any statement or that Caldera made any statements *sue sponte* and independent of Mountain first indicating such a condition. Since the statement about the HVAC being "good" was established in the record as having actually been made by Mountain, the only other statement at issue would be Respondent Caldera's email indicating "the inspector says it is well taken care of" (sic) as the alleged negligent or fraudulent representation. Again, there is not a scintilla of evidence in the record that the HVAC inspector did not, in fact, say such a statement to Caldera other than the mere allegation of Appellant, which is not sufficient to withstand Summary Judgment.

Additionally, this representation would not appear be one that Appellant could argue she justifiably relied upon such a statement when one considers that Mountain Heating's statement, in terms of the inspection report, were also present. Also, there is no evidence that there is causation between this statement and Appellant's alleged pecuniary loss, again especially when one considers the HVAC report itself weighed in on Appellant's reliance. On the face of the email in evidence, Respondent Caldera clearly repeated the HVAC inspector's statement and there is no evidence that it was an independent "representation" by Caldera. Rather, she was performing her duties and reporting the information received. Appellant has failed in its burden of establishing any evidence that the representation was not made by Mountain, but rather Respondent Caldera.

In this case, there is simply no evidence presented that the broker knew the HVAC system had not been well maintained, or that such a statement was a mere fabrication by the broker. Clearly, Appellant also had access to the HVAC inspector and could have inquired into the condition or attended the inspection herself, as her statutory duty seemed to indicate was required. As such, she had equal access to this information. Or, she could have contacted the HVAC inspector herself, as she was the ultimate customer. Therefore, Summary Judgement was properly issued, and the analysis undertaken by the trial court was sufficient for finding in favor of Respondents.

III. The trial court did not err in finding Respondent Caldera was not an agent of Respondent South Market given that Appellant failed to provide any evidence of agency and relied solely on allegations contained in her Complaint.

In Appellant's Motion to Reconsider and during oral arguments for the Summary Judgment Motion, Appellant raises the issues of the ability of a release to be prospective; the inability of a party to be released from their own negligence; the standard of review for summary judgment; and the right to a jury trial for the indemnity clause. The argument that Respondent South Market was Respondent Caldera's principal was not raised and therefore abandoned. Respondent South Market avers this issue is not preserved for appeal.

If not deemed abandoned, Respondent South Market would aver that, based upon the foregoing, the Court properly held that there was no liability of Respondent Caldera, and therefore, the issue of agency and vicarious liability are deemed moot.

Generally, agency is a question of fact. *Gathers v. Harris Teeter Supermarket,* 282 S.C. 220 (Ct.App.1984). Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. *Fernander v. Thigpen,* 278 S.C. 240 (1982); *see also Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244 (S.C.App.,1996). To assert agency as a basis of liability requires

that the appellant prove a scintilla of fact the supports the existence of such agency. Ultimately, agency has to be clearly established by the facts. *Fraiser* at 244. In dealing with the agent, it is up to the appellant to determine the scope of authority the agent has. *Id.* "The doctrine of apparent authority provides that the principal is bound by acts of his agent when he has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom, is led to believe the agent has certain authority and in turn deals with the agent based on that assumption." *Id.*

First, the two instances of Respondent Caldera using any semblance of Respondent's South Market logo or letterhead cannot be interpreted in a vacuum and must consider be considered as a person of ordinary prudence, and reasonably familiar with the business customs of the residential real estate industry. The Court received an Affidavit of Tonya Graves, the principal of Respondent South Market, wherein it clearly indicated Respondent Caldera was not an employer of Respondent South Market. Rather, the relationship between the two was that of "standard independent contractor licensed sales agent and compensated through a 1099, and not a W2."

Ms. Graves' affidavit references these customs in the residential real estate industry and established that Respondent Caldera was in such customary position and not an employee-agent of Respondent South Market. Discussions were also held at the hearing about common practices in the real estate industry of licensees not being the agents of the brokers. Also, such activity is specifically regulated by the South Market Carolina Real Estate Commission, wherein the brokers in charge only have limited supervisory obligations. Further, South Market retained the information relating to this transaction only as Broker in Charge and the fiduciary over deposited funds, not as supervising Respondent Caldera. A reasonably prudent person familiar with the real estate industry, as well as the limitation denoted in the release would clearly support the Court's holding that there was an independent contractor relationship, and not one of agency.

A purported principal must *consciously or impliedly represented* another to be his agent." (emphasis added)). Froneberger at 47-48. Further, apparent authority *must be established based upon the manifestations of the principal, not the agent.* Id. Appellant has not established any evidence of a manifestation of Respondent South Market that supports a finding of agency. In fact, the opposite has been established in the clear notation that Respondent Caldera signed the release only as a licensee and not an agent. The only other evidence proffered by Appellant is the email. Although the signature block indicates Respondent Caldera was associated with Respondent South Market, it was sent from a Yahoo account, and not an email provided by Respondent South Market. Further, such email denotes Respondent Caldera's web URL as http://www.demetracaldera.com. This fails to support any evidence that Respondent South Market has done any implicit or conscious act to allow Respondent Caldera to proffer herself as Respondent South Market's agent.

As additional evidence, brokers are generally not liable for a realtor's actions the way an employer of an employee would be. *See S.C. Code §40-57-30 et. seq.* There is a statutory scheme in place that directly defines and determines the relationship between a real estate "agent" and the Broker-in-Charge. Id. IRS Publication 15-a provides further description of this relationship and establish that if there is no behavioral control, no implements of work or benefits or other elements of common law employment. Further, Ms. Graves also indicates that Respondent South Market merely provided "Broker in Charged (sic) services only, which again, is standard throughout the residential real estate industry."

IV. Appellant is not entitled to a jury trial for determination of the indemnification amount because the remedy is equitable in nature and not subject to a jury trial.

It is pervasively know that equitable relief is not subject to a jury trial, even if legal relief was initially requested. Loyola Federal Savings Bank v. Thomasson Properties, 318 S.C 92 (Ct. App. 1995), (*negative treatment by the California Appellate Court in* Martin v. County of Los

Angeles, 59 Cal. Rptr.2d 303 (1996)). Appellant raises a U.S. Constitutional right to jury trial; however, this is first raised in Appellant's brief and was not raised at the Summary Judgment hearing or the Motion to Reconsider. As such, the issue is not preserved. To the extent that this Court determines that the issue is ripe, the law clearly indicates that equitable relief is an exception to a right to jury trial.

The *Loyola* court reversed a trial courts failure to strike a jury trial request for a determination of indemnification amount. *Id.* at 92-93. The appellant was seeking indemnity from a co-defendant and the respondent requested a jury trial. Appellant moved to strike, and the trial court denied the appellants motion. *Id.* The appellate court held that "[i]f the claim is equitable, there is no right to a jury trial." *Id.* citing *Defender Properties, Inc. v. Doby*, 307 S.C. 336 (1992). The court reasoned that indemnity was a remedy that arose out of a contract or by "operation of law as a matter of equity." *Id.* citing *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 451 (Ct. Appt. 1993). The appellate court discounted respondent's argument that he was entitled a jury trial because the underlying action was legal in nature.

As determined in the *Loyola* case and cases before it, indemnity is an equitable action not subject to jury trial requirements. The issue of entitlement to a jury trial does not even arise in this instance. The Appellant is afforded an opportunity to defend herself as required by Article 1, Section 3 of South Carolina's Constitution requiring due process of law prior to deprivation of life, liberty, or property. The damages hearing would be Appellant's due process. But to the extent that Appellant also argues entitlement to a jury trial based on the Seventh Amendment of the U.S. Constitution, Appellant is seeking to upend a wealth of case law and years of precedent on an issue not properly before the Court.

CONCLUSION

Appellant has failed to show that the granting of summary judgment by the trial court was improper. The case law relied on Appellant in contesting the Disclaimer is inapplicable as Appellant has confused releases associated with settlement agreements with those executed in anticipation of a transaction. Further, Appellant has failed to show any fact tending to support bad faith, a misrepresentation or fraud on the part of Caldera relating to any representations. Appellant relies only on her allegations alone to support the contention that Respondent South Market and Respondent Caldera were agent/principal while failing to acknowledge clear limitations of authority in the Release and failing to show any implicit or overt act of Respondent South Market supporting a finding of agency. Finally, Appellant tries to raise a claim for jury trial for an equitable remedy where no right to a jury trial exists. Even if properly raised and preserved on appeal, the trial court properly concluded that summary judgment was appropriate, and that Respondents are entitled to an award of indemnification. The Order granting Summary Judgment should be upheld.

Palmetto State Law Group, LLC

//s//Margaret A. Collins
Margaret A. Collins, Bar No. 13290
Elizabeth D. Moore, Bar No. 103671
2241 Bush River Road
Columbia, South Carolina 29210
803-708-7442
lizzy@pslawsc.com
meg@pslawsc.com

December 9, 2020
Columbia, South Carolina