THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Appellate Case No. 2020-000054

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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.

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# FINAL BRIEF OF APPELLANT IN REPLY TO RESPONDENT CALDERA

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**II. Did the lower court err in granting summary judgment on the basis that the Appellant's claim was not beyond the scope of the release language at issue?**

**III. Did the lower court err in finding that summary judgment was proper on the question of whether Respondent Caldera was an agent of Respondent South Market?**

**IV. Did the lower court err in finding that Appellant was not entitled to a jury trial on the remainder of the Respondents' claims?**

## ARGUMENT

### I. When viewed in the light most favorable to Owens, as required, Caldera's representation about the status of the HVAC system is negligent and outside the scope of the release language.

Perhaps unsurprisingly, Respondent Demetra Caldera (hereinafter "Caldera") asks this court to view her statement to the Appellant, Noel Owens (hereinafter "Owens"), in the light most favorable to *Caldera*, rather than, as required, in the light most favorable to Owens. Caldera argues that her poor writing saves her, 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.) For the court to accept Caldera's premise as correct would be to repudiate both English grammar and the standard of review in this appeal.

In reviewing whether summary judgment should have been granted, this court's standard of review requires that "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 5, 605 S.E.2d 744 (Ct. App. 2004). "When 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. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). If "the parties vehemently dispute the inferences and conclusions

to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

A reasonable way – indeed, the most reasonable way – to see Caldera's words to Owens that "[t]he heating and air looks good the inspector said it is well taken care of" is to see them as two statements, two sentences, albeit so badly written that there is no punctuation between them. (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. There are two of these in Caldera's words quoted above: "The heating and air looks good" and "the inspector said it is well taken care of." (R. p. 121.) "The heating and air looks good" is an assertion. (R. p. 121.) It stands alone as an assertion and is not dependent upon or modified by the separate, different assertion that "the inspector said it is well taken care of." (R. p. 121.) The two different assertions expressed by Caldera are not joined by any linking verbiage, such as a conjunction. (R. p. 121.) There is no reason to think that they express one thought. Rather obviously, they express two thoughts: one thought that "[t]he heating and air looks good" and a different thought, that "the inspector said it is well taken care of." (R. p. 121.)

The fact that Caldera made a grammar error by failing to place a period between these two sentences does not mean that she *really* made the statement, as she now argues, that the inspector said the heating and air looks good. Caldera did not say that the inspector said the

heating and air looks good. (R. p. 121.) Instead, she took it upon herself to make the affirmative assertion that "[t]he heating and air looks good[.]" (R. p. 121.) Even if one could reasonably interpret Caldera's words as meaning that the inspector said that the heating and air looks good – and that would be a stretch at best – the standard in this appeal would require the court to take a different view and accept Caldera's words as meaning what they literally state, that Caldera is making her own assertion of the status of the HVAC system. See, e.g., 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.

The release language does not cover Caldera's misrepresentation about the status of the HVAC system – certainly not when the record is viewed, as it must be, in the light most favorable to Owens. The release language states only that it applies to "(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 dosing attorneys); (3) the verification of property information." (R. p. 53.) Caldera's statement does not fall within those categories. (R. p. 93 ln. 5-15.) If the court, however, sees some interpretation of the facts that could put Caldera's statement within one of those categories, the court is bound by the standard of review to acknowledge that there is a way to see the record that does *not* place Caldera's words within any of those categories. See, e.g., Englert, 377 S.C. at 133-34. That makes summary judgment improper. See id.

**II. The cases cited by Caldera do not save her from liability.**

Caldera cites two cases in which prospective releases have been recognized as valid, Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281 S.E.2d 223 (1981), and McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005). The problem with that for Caldera is that case law about prospective releases indicates that they have requirements that the instant release does not meet.

Huckaby was a 1981 decision, and, if the case law had stopped there, it would be a stumbling block for Owens. 276 S.C. at 630. In Huckaby, a case about an injury during automobile racing, the language of the release was not even described by the court. Id. The law in this area, however, did not stop with Huckaby. It is interesting that Caldera cites McCune, because the passages from that opinion quoted below do not help Caldera's position:

> 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)).

*The release in the instant case explicitly and unambiguously limited the Range's liability.* Specifically, McCune signed the release, thereby acknowledging *the following pertinent clauses*:

> 1. The risk of injury from the activity and weaponry involved in paintball is significant, including the potential for permanent disability and death, and while particular protective equipment and personal discipline will minimize this risk, the risk of serious injury does exist;
>
> 2. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, *EVEN IF ARISING FROM THE NEGLIGENCE of those persons released from liability below*, and assume full responsibility for my participation; and,
>
> . . .
>
> 4. I, for myself and on behalf of my heirs... HEREBY RELEASE AND HOLD HARMLESS THE AMERICAN PAINTBALL LEAGUE (APL), THE APL CERTIFIED MEMBER FIELD, the owners and lessors of premises used to conduct the paintball activities, their officers, officials, agents, and/or employees ("Releasees"), WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, or loss or damage to person or property, *WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE*, except that which is the result of gross negligence and/or wanton misconduct.
>
> . . .
>
> I HAVE READ THIS RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT, FULLY UNDERSTANDING ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS

BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

The agreement is then signed by McCune and dated the date of the incident.

The above agreement is sufficient to limit the liability of the Range to McCune. The agreement was voluntarily signed and specifically stated: (1) she assumed the risks, whether known or unknown; and (2) she released the Range from liability, *even from injuries sustained because of the Range's own negligence*. It is clear McCune voluntarily entered into the release in exchange for being allowed to participate in the paintball match.

. . .

Furthermore, we find the instant case to be distinguishable from this court's decision in Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). In Fisher, the plaintiff worked on a wrecker crew at the Speedway of South Carolina. In order to work at the Speedway, Fisher was required to sign a release and waiver of liability. During a race, the wrecker on which Fisher was working responded to a crash. While the wrecker was moving towards one of the vehicles, Fisher, who was riding on the back of the wrecker, fell off and suffered severe head injuries. Through a guardian, Fisher brought suit alleging negligence, gross negligence, and recklessness against the driver and the owner of the wrecker as well as the Speedway. The defendants raised the Release as an affirmative defense. All parties filed cross-motions for summary judgment, alleging the Release acted as a complete bar to Fisher's claims. The circuit court judge granted partial summary judgment to Fisher against the driver and the owner of the wrecker on the ground the Release, as a matter of law, did not bar Fisher's claims. Additionally, the court denied summary judgment to the Speedway. The court found an issue of material fact existed as to whether Fisher was an employee of the Speedway.

On appeal, the driver and the owner of the wrecker argued the circuit court erred in finding the Release was inapplicable to them. Specifically, they contended they were released from liability given the Release encompassed "VEHICLE OWNERS, DRIVERS, [and] ... ANY PERSONS IN ANY RESTRICTED AREA." Id. at 294, 584 S.E.2d at 151-52. In analyzing this issue, we found the Release, an exculpatory contract, was ambiguous because the terms, "driver" and "vehicle owner" were "terms of

> art [which were] not used to identify *any* owner or driver of *any* vehicle." Id. at 295, 584 S.E.2d at 152. Additionally, we agreed with the circuit court that the phrase "ANY PERSONS IN ANY RESTRICTED AREA" did not relieve the driver and the owner of the wrecker of liability on the ground it was overly broad and, thus, in contravention of public policy. *Because the contract "did not clearly inform Fisher he would be waiving all claims due to the [driver's and vehicle owner's negligence]," we held the driver and the vehicle owner could not be released from liability "based on the broad 'catch-all' phrase."* Id. at 298, 584 S.E.2d at 153.

McCune, 612 S.E.2d at 465-66 (emphasis added).

The release language at issue here is nowhere near so specific; like the release in Fisher, it simply contains catch-all phrasing. 355 S.C. at 298; (R. p. 53). 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. Caldera did not carry her burden to prove that the general rule did not apply.

Owens is perplexed about why Caldera would cite Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013), which was a case about a clause in a contract for home inspection that limited liability of the inspection company to the amount of the fee paid by the company's client. Id. at 142. It is not about a release or an indemnification provision.

The record in this case can certainly be viewed in such a way that the signing of a very general April 3 release document, which does not say it is to apply to claims arising in the future, did not release a claim based on a negligent misrepresentation made on April 13. (R. pp. 53, 121.) Because the record can be viewed that way, Owens was entitled to have the court rule that way below. See, e.g., Englert, 377 S.C. at 133-34. That precluded a grant of summary

judgment from being the proper ruling. See, e.g., id. The standard of review that applies here requires reversal. See, e.g., id.

### III. Whether Caldera was an agent of South Market has nothing to do with whether Caldera is liable to Owens.

Caldera spends a good bit of her brief arguing that she was not Respondent South Market's agent, despite South Market's conduct in holding her out as such. (R. pp. 118-25.) One must wonder why Caldera does so. An agent's tortious conduct may make her principal liable through *respondeat superior*, but she is of course liable for her own tortious actions. Cravens v. Lawrence, 181 S.C. 165, 186 S.E. 269 (1936); Schumpert v. Southern Ry., 65 S.C. 332, 43 S.E. 813 (1902); Columbia Briargate Co. v. First Nat. Bank in Dallas, 713 F.2d 1052, 1055 (4th Cir. 1983). Whether or not South Market is liable for what Caldera did, Caldera is still liable for what she did herself, regardless of whether she was an agent of South Market.

### IV. Caldera appears to agree that Owens is entitled to a jury trial.

Both Caldera and South Market have refused to give up their indemnification claims, thus necessitating this appeal. Unlike South Market, though, Caldera appears to agree with Owens that Owens has the right to a jury trial on the indemnification claims. Caldera offers no argument against Owens on this issue. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (where respondent fails to respond to issue in respondent's brief, court may treat failure to respond as concession that appellant is correct).

### V. Caldera appears to agree that the indemnification provision will not apply to a claim caused by Caldera's own negligence.

Caldera also makes no argument against Owens' point that the attempt at creating an indemnification obligation for Caldera's and South Market's own tortious acts fails as a matter

of law and that Owens, thus, cannot be obligated to indemnify Caldera. See Hazel v. Blitz U.S.A., Inc., 425 S.C. 361, 372, 822 S.E.2d 338, 344 (Ct. App. 2018); Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). Caldera makes no argument otherwise. She concedes that Owens is right about this. First Union, 321 S.C. at 502.

## CONCLUSION

Applying the summary judgment standard of review, Owens is entitled to reversal. Caldera offers nothing that demonstrates otherwise. Indeed, she appears to agree that Owens is entitled to reversal on at least two points.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

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I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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