THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr, Circuit Court Judge

Case No. 2009-CP-10-2433

Floyd E. Jernigan ..... Respondent,

v.

Suzanne Boone Katz and Bank of America, N.A..... Defendants,

Of Whom Suzanne Boone Katz is..... Respondent,

And Bank of America, N.A. is..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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I. JERNIGAN'S ARGUMENT I

A. Jernigan's Negligence Claim Is Subsumed by His Claims for Defamation and Malicious Prosecution.

In *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d at 653 (2006), the South Carolina Supreme Court held that a claim based upon an allegedly defamatory statement must satisfy the elements of defamation, rather than the more lenient requirements of a claim for negligence. *Id.* at 482, 629 S.E.2d at 674. Jernigan concedes that the record contains no evidence of actual malice by the Bank. (Initial Br. of Jernigan, at 2) ("Respondent Jernigan concedes for purposes of this appeal that the Bank's actions, while highly negligent, were without actual malice, and that the causes of action for slander and malicious prosecution require a showing of malice."). He also acknowledges that absent evidence of actual malice he cannot recover in malicious prosecution or defamation for the Bank's statements regarding the Disputed Payments because the statements were privileged. (Initial Br. of Jernigan, at 18, n. 6) (recognizing that an actual malice requirement exists "for statements made under a privilege, such as the bank had with its complaining customer [Katz] or for its statements to police").

Despite these concessions, he argues that he should nevertheless be able to recover against the Bank for the same conduct under a simple negligence theory. He attempts to distinguish *Erickson* on the basis that in that case "the newspaper had no connection to the plaintiff other than the publishing of the derogatory truths," whereas the Bank and Jernigan had prior dealings and a relationship that allegedly gave rise to various affirmative duties in negligence to preserve data, investigate the incident and report accurate information. (Initial Br. of Jernigan, at 3, 19). That is, Jernigan apparently

argues that 1) the *Erickson* rule is limited to situations, such as the media reporting context, where the publisher typically has no connection to the plaintiff other than by virtue of the allegedly defamatory publication; and 2) *Erickson* is inapplicable because the Bank's allegedly negligent acts were not limited to the statements it made about the Disputed Payments.

Responding to Jernigan's first argument – that *Erickson* is limited to claims related to media reports or situations in which the parties had no prior relationship – *Erickson* supports no such limitation. In affirming dismissal of the negligence claim in that case, the Supreme Court unambiguously stated that "[a] claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common and constitutional law." *Id.* at 482, 629 S.E.2d at 674. The rule focuses on the nature of the claim alleged, not the relationship between the plaintiff and the defendant. Where the essence of the claim sounds in defamation – i.e. it is based upon an allegedly untrue communication causing reputational harm – the common law and constitutional defenses to a claim for defamation apply, regardless of the relationship between the parties or how the plaintiff has styled the claim. *Id.* at 482, 629 S.E.2d at 674; *see also, Ross v. Gallant, Farrow & Co., P.C.*, 551 P.2d 79, 82 (Ariz. App. 1976).

Moreover, the public policy considerations that underpin the *Erickson* rule apply with equal force outside the media reporting context. Like constitutional privileges, common law privileges for allegedly defamatory statements are based upon a public policy that encourages certain communications, even at the risk of uncompensated harm to the subject of the communication. 50 Am. Jur. 2d, *Libel & Slander* § 255 (2006). It

further recognizes that promotion of free and unrestricted communication requires latitude for honest mistakes. *Id.* Thus, it protects communications of misinformation where the falsity is the product of mere negligence, rather than malice. That policy is no less compelling where the relationship between the parties may give rise to other legal duties between them.

If an attorney, for example, negligently informs law enforcement that his client is engaged in an ongoing fraud, the communication is privileged under the law of defamation, regardless of the fact that the attorney-client relationship is a fiduciary one. If a judge or jury subsequently decides that the attorney's statement to law enforcement was untrue, the client could not recover against the attorney without proving that he made the report with actual malice, as opposed to mere negligence. Jernigan's proposed rule would allow the plaintiff to circumvent the privilege by permitting recovery in negligence or breach of fiduciary duty based on the same conduct, simply because the attorney had a prior relationship to the client that gave rise to certain duties of care. That is not the law. As *Erickson* and the other cases cited in the Bank's Initial Brief make clear, if a communication is qualifiedly privileged, it cannot be the basis for liability under any theory absent a showing of actual malice.

Nor is it the case, as Jernigan suggests, that courts apply the principle established in *Erickson* only in the media context or in cases where the parties had no prior connection. (Initial Br. of Jernigan, at 19). Several other cases cited in the Bank's Initial Brief involved claims against defendants other than the news media and in which the plaintiff had some prior connection to the defendant. *See, e.g., Talbert v. United States*, 932 F.2d 1064 (4th Cir. 1991) (employee's claim against employer for negligent

maintenance of personnel records dismissed because it sounded in libel); *Boykin Anchor Co., Inc. v. AT & T Corp.*, 825 F.Supp.2d 706 (E.D.N.C. 2011) (manufacturer's claim against user of manufacturer's product for negligent statements about product dismissed because claim sounded in defamation); *Felton v. Schaeffer*, 229 Cal. App.3d 229, 238-39 (Cal. App. 1991) (claim against physician for negligence related to pre-employment examination dismissed because claim was in reality one for defamation); *Ross*, 551 P.2d at 82 (claim by manager of local union against union's accountants in connection with negligent audit of union funds dismissed because claim sounded in defamation and statements were qualifiedly privileged). In each of these cases, the defendant had a prior relationship with the plaintiff and subsequently made false statements about him resulting in reputational harm. That is precisely the situation here. The fact that Jernigan was a customer of the Bank when the allegedly defamatory statements were made does not change the nature of his claim or the standard of proof.

Jernigan also attempts to circumvent *Erickson* by pointing to allegedly separate acts and omissions by the Bank as the basis for liability. These acts and omissions include the Bank's alleged failures: 1) "to admit that the entire incident may have been entirely due to its mistakes, rather than to leave the impression that its customer must have acted with fraudulent intent"; 2) "to protect the data that would show conclusively what occurred to cause the transfers"; and 3) to "investigate and to report accurately," having allegedly advised Katz not to speak to Jernigan about the transactions. (Initial Br. of Jernigan, at 3).

These alleged acts and omissions are so intertwined with the Bank's communications regarding how the Disputed Payments occurred as to be

indistinguishable from them. Jernigan's argument that the Bank failed to "investigate and report accurately" or to admit that the entire incident may have been a mistake merely restates his claim that the Bank made misleading statements in the first place. At most, it amounts to a claim that the Bank failed to retract or clarify the prior misleading statements. In another case applying the *Erickson* rule, a federal district court in North Carolina rejected a similar attempt by the plaintiff to avoid the rule by distinguishing between a defamatory statement and allegedly negligent omissions related to it. *Boykin Anchor Co.*, 825 F.Supp. 2d at 712 ("The court must also reject plaintiff's attempts to draw a distinction between libelously publishing the false statements and 'negligently' failing to retract them"). Thus, the allegedly separate acts on which Jernigan now seeks to base liability were part and parcel of the Bank's communications and should be judged by the same standard of proof, which requires evidence of actual malice.

Moreover, the Bank's alleged failure to conduct a thorough investigation or to preserve data related to the Disputed Payments did not proximately cause the alleged harm. If the Bank caused any harm, which it denies, the communications regarding how the payments occurred caused the injury. Other courts, including the trial court in *Erickson*, have refused to distinguish between a defamatory statement and the failure keep accurate records or to conduct a thorough investigation in connection with it, holding that the latter conduct was not the proximate cause of any harm. *Erickson v. Jones Street Publishers, LLC*, 2002 WL 34129778, *3 (S.C. Com. Pl. 2002) ("[Publisher's] (sic) failure to properly investigate, if that is the case, was not the proximate cause of the alleged injury to Plaintiff . . . . It was when Publisher published the alleged false statements about Plaintiff that resulted from alleged improper

investigation which caused the injury."); *Talbert*, 932 F.2d at 1066 ("Talbert insists that the gravamen of his claim is not the communication of defamatory materials but the actionable breach of a duty to use reasonable care in maintaining the accuracy of his personnel records: . . . Because the damages Talbert alleges appear to flow from past or future communication of the contents of the personnel files and the resulting injury to Talbert's reputation, the gravamen of Talbert's negligence claim is the government's untrue statements about Talbert."). Similarly, because the gravamen of Jernigan's claim was the allegedly defamatory communications about the Disputed Payments, this Court should reject his effort to hold the Bank liable in negligence for related conduct that did not proximately cause him harm.

B. South Carolina Law Does Not Recognize the Affirmative Duties that Jernigan Seeks to Impose.

Even if Jernigan's negligence claim is not subsumed by his claims for defamation and malicious prosecution, South Carolina law does not recognize the three affirmative tort duties that Jernigan seeks to impose upon the Bank. Under South Carolina law the relationship between a bank and its customer is one of creditor-debtor and ordinarily does give rise to duties of care in tort. *See Regions Bank v. Schmauch*, 354 S.C. 648, 671, 670 S.E.2d 432, 443-44 (Ct. App. 2003). Jernigan nevertheless identifies three affirmative duties that he asks this Court to adopt.[1]

[1] Jernigan argues that the Bank owed him the affirmative duties 1) "to admit that the entire incident may have been entirely due to its mistakes, rather than to leave the impression that its customer must have acted with fraudulent intent"; 2) to "investigate and to report accurately," having allegedly advised Katz not to speak to Jernigan about the transactions, and 3) "to protect the data that would show conclusively what occurred to cause the transfers". (Initial Br. of Jernigan, at 3).

1. The Bank Did Not Owe Jernigan an Affirmative Duty to State that the Disputed Payments Did Not Indicate Fraud.

Jernigan first argues that the Bank had an affirmative duty in negligence not to leave the impression that its customer made the Disputed Payments with fraudulent intent. Despite Jernigan's efforts to paint the alleged duty as something less radical, it amounts to nothing less than an *affirmative duty of perfect accuracy* on the part of a bank when discussing suspicious activity on an account, even in the context of a privileged communication. If Jernigan's proposed duty was the law, the only advice counsel could give a bank regarding how to respond to an impacted customer or law enforcement about suspicious account activity is: "say nothing". Under such a regime, the Bank could be held liable – no matter what the Bank believes about how the transactions occurred – if a judge or jury later concludes the statement was not perfectly accurate. It is precisely this concern that underpins the common law privileges applicable in this case and requires a showing of actual malice before liability may attach.

Moreover, the cases Jernigan cites in support of such a duty are inapposite. Jernigan relies primarily upon *Murray v. Bank of America, N.A.*, 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003), in which this Court held that a bank could be liable in negligence for enabling imposter fraud. *Id.* at 344, 580 S.E.2d at 198. The plaintiff, Murray, lost her driver's license, which an imposter then used to open a checking account at the defendant bank. *Id.* at 341, 580 S.E.2d at 196. The imposter subsequently wrote sixty checks from the account, totaling about $7,500. *Id.* When Murray realized that her identity had been stolen, she notified the bank of the fraud and requested that the account be closed immediately, but the Bank failed to do so and the imposter continued to write

fraudulent checks on the account. *Id.* at 342, 580 S.E.2d at 197. The Court affirmed the judgment against the bank for negligence. *Id.* at 344, 580 S.E.2d at 344.

After *Murray* was decided, however, the South Carolina Supreme Court in a similar case refused to recognize the duty imposed on the bank in *Murray*. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 334, 585 S.E.2d 275, 278 (2003). In *Huggins*, the plaintiff became the victim of identity theft when a "John Doe" requested credit cards from the defendant banks using Huggins' name and personal information. *Id.* at 331, 585 S.E.2d at 276. The banks issued the credit cards and the imposter used them and failed to pay the resulting credit card bills. *Id.* Huggins pled various theories of negligence against the issuing banks and sought damages consisting of impaired credit, harassment by creditors, emotional distress, embarrassment, and the time and effort exerted to rectify the situation. *Id.*

After the banks filed motions to dismiss on the ground that they owed no duty of care to Huggins, the federal District Court asked the South Carolina Supreme Court to determine whether or not South Carolina would recognize Huggins' negligence theory, and if so, to establish the necessary elements to prove the claim. *Id.* at 332, 585 S.E.2d at 276. The Supreme Court analyzed the required elements of negligence and noted that for negligence liability to attach, "the parties must have a relationship recognized by law as the foundation of a duty of care", and the mere fact that an injury was foreseeable does not give rise to a duty of care in the absence of such relationship. *Id.* at 333, 585 S.E.2d at 277. In holding that the bank owed no duty of care to Huggins, the Court announced its agreement with the New York appellate court decision in *Polzer v. TRW, Inc.*, 256 A.D.2d 248, 248 (N.Y. App. Div. 1998), which held that no "special relationship" giving

rise to a duty of care exists between a bank and its customer, whose relationship is merely that of debtor and creditor.

Moreover, *Murray* was also decided before this Court's decision in *Schmauch*, which reaffirmed prior South Carolina appellate court holdings that "the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature" and that banks owe no general tort duty of care to their customers. 354 S.C. 648, 668-671, 670 S.E.2d at 443-444. Thus, while *Murray* has not been overruled expressly, it has been abrogated by more recent holdings from the Supreme Court and this Court.

More instructive for purposes of the instant case – which involves allegedly defamatory statements by a bank about its customer – is the Fourth Circuit Court of Appeals' decision applying South Carolina law in *Beattie v. Nations Credit Financial Services Corp,* 69 Fed. Appx. 585 (4th Cir. 2003). The plaintiffs, the Beatties, brought an action in which they alleged that the defendant bank wrongly reported that the plaintiffs' house was in foreclosure when it was not, thus causing them damage including impaired credit. *Id.* at 587. The Beatties claimed that they had repeatedly attempted to contact the bank by telephone and in writing about the status of their account, but never received a response. *Id.* at 585. They brought numerous claims against the bank, including one for negligence based upon the allegedly false statements about their account. *Id.* at 585. The district court dismissed the negligence claim, holding that the only relationship between the Beatties and the bank arose from contract – the loan documents – and therefore they could not state a negligence claim without showing that the bank had a duty to them independent of its contractual commitments. *Id.* at 585. The Court of Appeals affirmed,

expressly holding that the plaintiffs failed to show any actionable duty independent of the loan contract. *Id.* at 592.

Because South Carolina law does not recognize the duty Jernigan seeks to impose and compelling policy considerations counsel against its adoption, this Court should reject it.

2. The Bank Did Not Owe Jernigan an Affirmative Duty to Investigate and Report Accurately, Having Advised Katz Not to Speak to Jernigan.

As a presumably more limited alternative to the first proposed tort duty, Jernigan asks the Court to find that a duty to "investigate and report accurately" arose once the Bank allegedly advised Katz not to speak to Jernigan about the Disputed Payments.[2] (Initial Br. of Jernigan, at 3). Jernigan cites no authority for the existence of such a duty and does not directly explain why it should have arisen at that particular point in time. He suggests the reason is that, by advising Katz not to speak to Jernigan, the Bank prevented him from having the chance to tell Katz his side of the story and therefore incurred a duty to speak for him. (*See* Initial Br. of Jernigan, at 20) ("once the bank tells the merchant not to speak to the customer, the bank becomes liable to speak in the customer's stead, to either state that no fraud can be assumed from the facts known to it, or to investigate if more facts are required."). However, Katz acknowledged at trial that she and Jernigan do not speak to each other at all, and Jernigan admitted that he never

[2] Katz testified that, at the same time she was advised not to speak to Jernigan, the Bank also told her to report the matter to law enforcement. (R. p. 158, lines 2-7). Bank employees testified at trial that the Bank's policy is to advise customers to report *any* suspicious account activity to law enforcement. (R. p. 308, line 3–p. 309, line 5). The purpose of the policy is to allow the authorities trained to investigate potential criminal activity to do their jobs rather than having customers take matters into their own hands. (*Id.*).

once attempted to contact Katz during the three-month period between the time he learned that Katz had reported the Disputed Payments to law enforcement and the time of his arrest. (R. p. 176, lines 6-11); (R. p. 141, line 11–p. 142, line 17). Their reasons for not speaking had nothing to do with the Bank.[3] Had Jernigan wanted to speak to Katz about the Disputed Transactions, he obviously could have done so at any time. Moreover, Jernigan testified that he did explain his version of events to the police. (R. p. 141, lines 11-24). The Bank's advice to Katz therefore did not prevent Jernigan from telling her or law enforcement his version of the events, so no duty of care should arise specifically as a result of that fact.

3. The Bank Did Not Owe Jernigan an Affirmative Duty to Preserve Data.

Jernigan next argues that the Bank had an affirmative obligation in tort to "protect the data that would show conclusively what occurred to cause the transfers". (Initial Br. of Jernigan, at 3). Again, Jernigan cites no authority from any jurisdiction for the existence of such a duty. Even if such a duty existed in theory, there is no evidence in the record on *any* of the following issues: 1) that "data" ever existed that would definitely establish whether Jernigan selected the 8854 Account or the 4502 Account as the Pay From Account in Bill-pay (or that such data is ever created in connection with Bill-pay); 2) that the Bank ever had possession of any such data; 3) that any data was lost; 4) that the Bank could have prevented its loss; or 5) what reasonable steps the Bank could have taken to preserve it (i.e. a standard of care).

[3] Katz testified that law enforcement also advised her not to speak to Jernigan about the Disputed Payments. (R. p. 176, lines 12-14).

Jernigan baldly states in his brief that "when on-line bill pay is used, data is created which demonstrates the mechanism for payments." (Initial Br. of Jernigan, at 8). However, the entire paragraph in which this statement appears is noticeably bare of a single reference to the record. The only testimony related to this issue was that of Bank employee Jeffrey Mitchell, who stated that he was not aware any such data existed, but that, if it did, it would have been in possession of the Bank's third-party vendor, Fiserv. (R. p. 577, line 5-p. 578, line 23). From Mr. Mitchell's testimony that he did not *personally* ask Fiserv whether such data existed, Jernigan leaps to the unsupported conclusion that it existed and that the Bank failed to preserve it.[4] (Initial Br. of Jernigan, at 28). Jernigan subpoenaed Fiserv, and they produced no such data. If he believed the production was incomplete or wanted further information about the creation and preservation of any transaction-related data, he had every opportunity to take further discovery from Fiserv or to introduce expert or other testimony regarding this issue. He chose not to conduct such discovery and failed to introduce any authority or a shed or evidence to support the existence of any such duty or its breach. Thus, the Bank's alleged failure to preserve data cannot form the basis of liability.

[4] The Bank did produce records and data related to the Disputed Payments, its investigations regarding them, and Jernigan's account activity for the same time period, much of which appears in the record on appeal. (*See, e.g.,* R. pp. 830-844; R. pp. 864-870). As discussed in the Bank's Initial Brief, the Bank's witnesses explained why Jernigan's selection of the 8854 Account as the Pay-From Account is the only viable explanation of how the Disputed Payments occurred and went through the records step-by-step to explain how they demonstrate that fact. (Initial Br. of Bank, at 7-9). Other than a screen shot of Jernigan's computer screen at the precise moment he made the Disputed Payments online, which does not exist, the Bank is unaware of what additional data could definitively confirm or disprove what the existing records indicate – that Jernigan made the payments by clicking on the 8854 Account as the Pay-From Account.

C. The Bank's Arguments Related to Malicious Prosecution Are Preserved for Review.

Jernigan also argues that, to the extent the Bank maintains that his negligence claim is subsumed by his claim for malicious prosecution (as opposed to defamation), that argument is not preserved for review. (Initial Br. of Jernigan, at 20). Jernigan correctly points out that the Bank's primary argument all along has been that, in order to recover against the Bank, Jernigan must meet the elements of a claim for defamation. He is also correct that the Bank sought dismissal of the malicious prosecution claim on the ground that Katz, not the Bank, made the initial police report, caused law enforcement to re-open the investigation after it was initially closed, and told the warrants officer that Jernigan would avoid him. However, the Bank also argued below that the malicious prosecution claim failed, like the claim for defamation, because there is no evidence of actual malice. (R. p. 1288) ("Jernigan's claim for malicious prosecution also fails, like the claim for defamation, because there is no evidence that the Bank's alleged statements to Katz were made with malice or without probable cause.").

The Bank's argument is not that malicious prosecution is the appropriate cause of action here. The Bank's argument is that, regardless of whether Jernigan is seeking to hold the Bank liable for defamatory statements (defamation) or statements leading to his arrest (malicious prosecution), the fatal defect in his case is the absence of actual malice, and he cannot cure that defect by restyling the claim as one for simple negligence. The Bank made that argument below in its 1) trial brief (R. p. 1289); 2) opening argument (R. p. 87, lines 5-14); 3) motions for non-suit at the close of Katz's case (R. p. 476, line 18–p. 477, line 1) and at the close of its own case (R. p. 593, line 18-p. 594, line 2); and 4) post-trial motion (R. p. 1301) ("South Carolina law does not recognize a cause of action for

"negligent slander" or "negligent prosecution"). The argument is preserved. As for Jernigan's complaint that the Bank cites to cases and statutory law for its arguments that were not cited below, preservation rules do not prevent a litigant from citing additional authority on appeal in support of an argument made below.

II. JERNIGAN'S ARGUMENT II

Jernigan also states that the Bank has taken the position on appeal that his claims are barred by contract and that this argument is not preserved. (Initial Br. of Jernigan, at 31). He complains that because the Bank has not identified any limitations of liability contained in the contract he has not had opportunity to argue whether or not they are unconscionable. (Initial Br. of Jernigan, at 32). Jernigan simply misunderstands the Bank's argument. The Bank did not take the position below that the terms of any contract bar Jernigan's claims, and it does not take that position now.

As Jernigan points out, the Bank *has* argued from the outset of this case that it owed no affirmative duty to Jernigan related to the claims he asserted against the Bank. (Jernigan Brief p. 32). The Bank also argued that, to the extent it did owe any duties to Katz or Jernigan, they were merely contractual in nature. The Bank argued this position to the trial court during its motion for a non-suit and, as Jernigan acknowledges, in its motion to alter or amend the judgment. (R. p. 477, lines 2-6) ("If the of duty is the failure to remove Dr. Jernigan, I mean, *that duty is a contractual duty under the deposit account agreement* and it's not [owed] to Dr. Jernigan, it would be [owed] to Ms. Katz") (emphasis added); (R. p. 1301). While it is true that the Bank spent significantly more time arguing this position in connection with Katz's claims (R. p. 478, line 13–p. 479,

line 15), the argument was presented in connection with Jernigan's claim as well. (R. p. 477, lines 2-6); (R. p. 1301).[5]

In any event, even if it were the case that the Bank did not move for judgment on the specific ground that any duties owed to Jernigan were merely contractual, under Rule 52(b) SCRCP this Court may nevertheless find on that basis that no evidence of a tort duty exists. Rule 52(b) SCRCP provides in part:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised *whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.*

(emphasis added). This Court has held that, under this rule, it is unnecessary in a non-jury trial for a party to make a motion for judgment (directed verdict) before the Court will address an issue on appeal. *Norell Forest Products v. H & S Lumber Co.*, 308 S.C. 95, 99, 417 S.E.2d 96, 99 (Ct. App. 1992*), aff'd in part, reversed in part on other grounds by* 310 S.C. 368; 426 S.E.2d 800 (1993). The argument was raised and ruled upon below, but even if the Court finds otherwise, it may nevertheless reverse the trial court on this basis.

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[5] Jernigan incorrectly claims that the Bank never referenced any contractual agreements between Jernigan and the Bank at trial. To the contrary, the Bank referenced the Deposit Account Agreement (R. pp. 892-912; R. pp. 913-952), albeit not by specific exhibit number, on multiple occasions during the argument on the Bank's motion for a non-suit. (R. p. 477, lines 2-6; R. p. 478, line 13–p. 479, line 15). Moreover, the Customer Removal Agreement between Jernigan and the Bank (R. pp. 1131-1132) was introduced into evidence by *Jernigan* during his direct examination at trial. (R. p. 107, line 22–p. 108, line 2). Obviously, there was no need to bring particular terms of these agreements to the Court's attention because the Bank never argued that the agreements bar Jernigan's claim.

III. KATZ'S ARGUMENT I

A. The Bank Did Not Owe Katz a Duty of Care, and Even if It Did, the Bank Satisfied any Such Duty.

In support of her argument that the Bank owed her a duty of care in tort, Katz, like Jernigan, relies heavily on *Murray*, which, as discussed above, is inconsistent with the subsequent holdings of this Court in *Schmauch* and the South Carolina Supreme Court in *Huggins*. *See* Section I.B.1 above. However, even if *Murray* remains good law, it is factually distinguishable from Katz's allegations. The plaintiff in *Murray* informed the bank that a fraud was being perpetrated on her and the institution. The bank's duty, according to the Court, was the failure to close the fraudulent account once it learned of the imposter fraud, which enabled it to continue. In the instant case, by contrast, it is undisputed that once Katz informed the Bank of the Disputed Payments, the Bank *immediately* eliminated Jernigan's ability to access the 8854 Account. (R. p. 316, lines 10-25). Thus, to the extent that a duty of care arose once the Bank learned of a potential fraud, the Bank immediately discharged that duty by eliminating Jernigan's ability to access the 8854 Account online. Consequently, to the extent that *Murray* governs the instant case, the evidence established that the Bank satisfied any extra-contractual duties to Katz.

B. Katz's Alleged Injuries Are Not Physical Injuries, and, Therefore, She Must Satisfy the Elements of a Claim for Negligent or Intentional Infliction of Emotional Distress.

The Bank sufficiently addressed Katz's arguments regarding her alleged injuries in its Initial Brief. (Initial Br. of Bank, at 23-30). However, it bears repeating that if the depression and anxiety allegedly suffered by Katz constitutes physical injury for which she may recover in negligence, then the entire body of South Carolina law related to

intentional and negligent infliction of emotional distress is superfluous. Katz's alleged injury represents the quintessential emotional distress claim. As set forth in the Bank's Initial Brief, the law draws a distinction between physical and emotional harms, and to the extent that Katz suffered any harm at all, it was clearly the latter. In order to recover, her claim must satisfy the well-established elements of a claim for negligent or intentional infliction of emotional distress.

C. The Record Contains No Evidence that the Bank Caused Katz Any Cognizable Harm.

Katz argues that the deposition testimony of her treating physician, Dr. Lucy Preyer, M.D., establishes that the Bank's conduct caused her injuries. (Initial Br. of Katz, at 12). As discussed in the Bank's Initial Brief, Dr. Preyer's testimony establishes just the opposite – that Katz's condition (diagnosed four years before the Disputed Payments occurred) actually improved in the period after the Disputed Payments occurred. (Initial Br. of Bank, at 37-40). Neither Dr. Preyer's testimony nor her medical records establish that Katz suffered "setbacks and exacerbation of her depression and anxiety" as a result of the Disputed Payments, and Katz does not provide a single specific citation in her Brief either to Dr. Preyer's testimony or her treatment records to establish otherwise.[6] Moreover, the treatment records of Annette Bilton, M.D., establish *nothing* as she did not testify and the trial court sustained the Bank's hearsay and lack of authentication objections to the records and required the redaction of any opinion or conclusions contained therein. (R. p. 434, line 8–p. 441, line 22). The record contains no expert medical evidence from which the trial court could conclude that the Bank caused any

[6] Katz's citations to the record on this issue consist of a blanket citation to the Preyer deposition transcripts and treatment records, along with citations to a dialogue between the Bank's counsel and the Court about the transcript. (Initial Br. of Katz at 12).

injury to Katz, much less that her emotional distress produced any physical symptoms. *Doe v. Greenville County School Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (S.C. 2007) (plaintiff seeking to recover for negligent infliction of emotional distress must show that his emotional distress "manifests itself by physical symptoms capable of objective diagnosis and established by expert testimony").

IV. KATZ'S ARGUMENT II

Katz's arguments that she should be allowed to recover under an intentional infliction of emotional dismiss cause of action, which she did not plead and never even referenced until submission of her proposed order denying the Bank's post-trial motions, are sufficiently addressed in the Bank's Initial Brief and require no further argument.

CONCLUSION

For the foregoing reasons, and those stated in the Bank's Initial Brief, this Court should reverse the judgment of the trial court and render judgment for the Bank, or failing that, reduce the amounts of the judgments, or failing that, remand to the trial court for reduction of the amounts.

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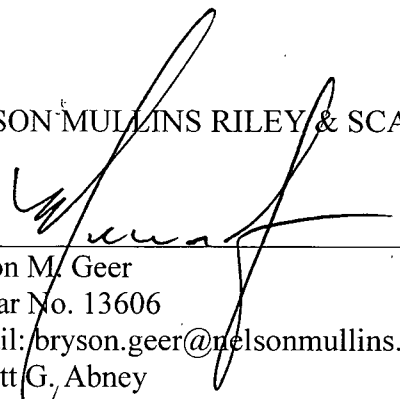

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May 30, 2013

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr, Circuit Court Judge

Case No. 2009-CP-10-2433

Floyd E. Jernigan ..... Respondent,

v.

Suzanne Boone Katz and Bank of America, N.A..... Defendants,

Of Whom Suzanne Boone Katz is..... Respondent,

And Bank of America, N.A. is..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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Proof of Service

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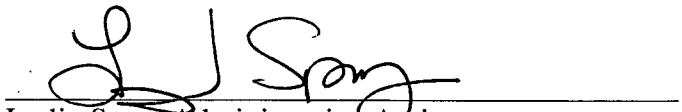

Lydia Spry, Administrative Assistant

May 30, 2013