THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge, Circuit Court Judge

Case No. 2012-212283

Dr. Joseph G. Carew and Dr. Karen Carew,................ Appellants,

v.

RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank, Clifton W. Hall, Hall Builders, LLC, Mid Carolina Appraisal Company, LLC, and Teresa Addy Haltiwanger,.. Defendants

Of Whom, RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank are .... Respondents.

Final Brief of Respondents

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Statement of Issues on Appeal

I. The law of the case doctrine bars several of the Carews' arguments on appeal.

II. The trial court correctly granted summary judgment to RBC on the Carews' claims related to construction progress inspections because RBC owed no them no duty as a matter of law.

III. The trial court properly found summary judgment was proper because the Carews released RBC from liability related to construction progress inspections.

IV. The trial court correctly granted summary judgment to RBC on the Carews' claims of negligent disbursement of loan proceeds.

V. The trial court properly granted summary judgment as to the Carews' claims that RBC negligently authorized construction draws.

VI. The trial court properly granted summary judgment as to the Carews' breach of contract claims because the Carews failed to establish the requisite elements.

Statement of the Case

This lawsuit arises from the construction of a $1.4 million lake house and the loan obtained to finance same. {Complaint; R. 25-44}. Appellants Dr. Joseph and Dr. Karen Carew (hereinafter collectively "the Carews" or individually by name) initiated this action by filing their Complaint on January 29, 2010. {Id.}. The Complaint named the following parties as defendants: (1) RBC Bank (USA),[1] the bank that provided a loan to fund construction (hereinafter "RBC"); (2) Mid-Carolina Appraisal Co., LLC and Teresa Addy Haltiwanger (collectively referred to herein as "Appraiser"), the parties that conducted progress inspection reports; and (3) Clifton W. Hall and Hall Builders, LLC, the builder retained by the Carews (collectively "Hall Builders"). {Id.}. In their Complaint and subsequent Amended Complaint, the Carews alleged that RBC breached a contract with them and acted negligently in servicing the loan while the home was being constructed. {Id.; Amended Complaint; R. 25-44}. RBC timely answered and denied all allegations of wrongdoing. {Answer; R. 45-58}.[2]

Appraiser filed a Motion for Summary Judgment. {Order granting Appraiser's Motion for Summary Judgment; R. 2-12}. In its motion, Appraiser argued summary judgment was proper on the Carews' claims because the Construction Loan Agreement did not create any duty owed to the Carews. {Id.}.

On July 27, 2011, the trial court issued an order granting the Appraiser's motion for summary judgment (hereinafter the "July 27 Order"). {Order Granting

[1] RBC Bank (USA) is incorrectly identified in the pleadings as "RBC Centura Bank" and "RBC Bank as successor in interest to RBC Centura Bank." Moreover, as of March 2, 2012, the current name for RBC Bank (USA) became "PNC Bank, National Association, successor to RBC Bank (USA)."

[2] During the course of discovery, the trial court struck Hall Builders' Answer and entered default judgment against Hall Builders.

Appraiser's Motion for Summary Judgment; R. 2-12}. The Carews failed to appeal from the July 27 Order and, therefore, the July 27 Order constitutes the law of the case in this matter.

RBC filed its Motion for Summary Judgment on January 6, 2012. {Motion for Summary Judgment of January 6, 2012; R. 59-60; 61-130} The trial court heard RBC's Motion for Summary Judgment on April 9, 2012. {Transcript; R. 298-338}. The trial court granted RBC's Motion as to each of the Carews' claims on May 17, 2012 (the "May 17 Order"). The trial court held that RBC was entitled to judgment as a matter of law on each of the Carews' claims for negligence and breach of contract because the Construction Loan Agreement did not create any duty owed to the Carews. {Order Granting RBC's Motion for Summary Judgment dated May 17, 2012; R. 13-24}. The Carews timely filed and served their notice of appeal of this Order. {Notice of Appeal dated June 21, 2012}.

Statement of Facts

On January 23, 2008, the Carews purchased a residential lot located at 34 Edens Point Road in Lexington County. {Amended Complaint; R. 25-44}. The Carews then entered into a contract with Hall Builders on January 30, 2008. {Id.}. In that contract, Hall Builders agreed to build the Carews a home on the Lexington County property. {Id.}.

On February 29, 2008, the Carews entered into a construction loan agreement with RBC ("the Construction Loan Agreement"). {Id.; Construction Loan Agreement dated February 29, 2008; R. 527-37}. Under the terms of the Construction Loan Agreement, RBC would provide a loan to the Carews, and the Carews would use the

proceeds of the loan to purchase and build a house on the Lexington County property. {Construction Loan Agreement dated February 29, 2008; R. 527-37}. The Carews admitted they signed and initialed each page of the Loan Agreement. {The Carews' Responses to Appraiser's First Requests for Admission; Transcript of J. Carew Depo. p.79, line 8 - p.80, line 3; R. 412-13}. However, Joseph Carew testified that he did **not** read the Loan Agreement before signing it. {Trans. of J. Carew Depo. p.81, lines 18-23; R. 414}.

The Construction Loan Agreement set forth the contract terms in an eleven page agreement, and included, among other things, the duties and responsibilities of RBC as the construction lender. The references to "you" or "your" in the Loan Agreement referred to RBC, and the references to "I," "me" or "my" referred to the Carews. {Construction Loan Agreement dated February 29, 2008; R. 527-37}. Section 7.2.2 of the Loan Agreement, entitled "Inspection" stated:

> Before you make a disbursement on the basis of a Draw Request, either or both you and the Construction Monitor may perform an on-site inspection of the Premises. If you request, the General Contractor, if there is one, and I will be present when such inspections are undertaken. **You (RBC) will not be under any obligation to make inspections and you will not be under any obligation to instruct the Construction Monitor to conduct inspections. All inspections made by you (RBC) and all inspections made by the Construction Monitor will be for your (RBC) sole and exclusive benefit and they may not be relied upon in whole or in part by me (Carews) or any other person.**

{Construction Loan Agreement dated February 29, 2008; R. 529 (emphasis in original)}.

Section 8.4 of the Construction Loan Agreement, entitled "Inspection of Construction" provided as follows:

> You (RBC) and the Construction Monitor, either together or separately, may enter upon the Premises at any time either you or the Construction Monitor desire for the purposes of inspecting the construction of the Improvements. I agree that your failure or the Construction Monitor's failure (1) to discover defects in the Improvements, including errors or omissions in design, workmanship, materials, supplies, fixtures, parts, products or equipment, or (2) to otherwise reject design, workmanship, materials, supplies, fixtures, parts, products or equipment due to non-compliance with the Construction Documents, or due to defects in any of the foregoing, will not make either you or the Construction Monitor liable to me and will not make either you or the Construction Monitor liable to any other person on account of such deficiency; and I agree that any prior failure will not constitute a waiver of your right to subsequently reject any such design, workmanship, materials, supplies, fixtures, parts, products and equipment. **I agree that all inspections conducted by you (RBC) or the Construction Monitor are for your (RBC's) sole and exclusive benefit, and I may not, nor may any other person, rely upon such inspections and I am not nor is any other person a third party beneficiary of such inspections. I agree, for myself and for all other persons other than you, to waive and I do hereby waive any present or future rights, if any, I or any of such other persons may have relating to or arising out of inspections made by you (RBC) or the Construction Monitor – it being understood and agreed that such waiver is material to you (RBC) and a material inducement to you (RBC) entering into this Agreement with me and making the Loan to me on the terms and conditions set forth herein and in the other Loan Documents.**

{Construction Loan Agreement dated February 29, 2008; R. 531} (emphasis in original).

RBC retained the Appraiser to (1) perform a "subject-to" completion appraisal and (2) conduct periodic appraisal inspections during construction for RBC. {Construction Loan Agreement dated February 29, 2008; R. 527-37}. The Construction Loan Agreement defined the term "Construction Monitor" to encompass the Appraiser as follows:

> "Construction Monitor" means a Construction inspector or monitor, or other persons designated by you to monitor and otherwise inspect the construction of the improvements, including reviewing and approving all Draw Requests and performance of on-site inspections. The Construction Monitor will be an independent contractor, and I will pay the costs and expenses associated with the Construction Monitor.

{Construction Loan Agreement dated February 29, 2008; R. 534}.

The Appraiser prepared the subject-to completion appraisal and performed a number of construction progress inspections in its role as the Construction Monitor during the construction of the Carews' home between June 18, 2008 and June 12, 2009. {Amended Complaint; R. 27}.

In February 2009, Hall Builders encountered financial troubles. {Amended Complaint; R. 29}. Hall Builders' financial problems were so severe that, on February 11, 2009, the principal of Hall Builders advised the Carews that it would not be able to complete the construction of the home. {Amended Complaint; R. 29}. Hall Builders released the Carews from the construction contract that same day. {Id.}.

Because of the inability of Hall Builders to complete the construction, several complications arose in the construction of the home. First, the Carews retained a new builder to complete the construction of their home. {Id.}. Second, Hall Builders had

failed to pay certain subcontractors for work performed. {Id.}. Therefore, some mechanics liens were filed. {Id.}. Third, because Hall Builders had not used all of the funds it received from the Carews to complete the project, the percentage of completion was less than the percentage of loan proceeds disbursed. {Id.}. Accordingly, the Construction Loan Agreement required the Carews to use their own funds to bring the level of completion up to the level of funds disbursed. {Construction Loan Agreement dated February 29, 2008; R. 527-37}. Once the mechanics liens were satisfied and the requisite level of construction completion was achieved, RBC released additional loan proceeds and the home was completed. {Id.}.

Scope of Review

Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Hamiter v. Retirement Division of the South Carolina Budget and Control Board, 326 S.C. 93, 484 S.E.2d 586 (1997). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id.

Argument

I. The law of the case doctrine bars several of the Carews' arguments on appeal.

Before the hearing on RBC's motion for summary judgment, the trial court had issued the July 27 Order granting summary judgment to the Appraiser. The July 27 Order contained rulings on several issues identical to those raised by RBC in its Motion for Summary Judgment. Specifically, the July 27 Order expressly rejected the Carews'

claims that RBC owed them a contractual or other duty. The July 27 Order specifically held RBC owed **no** duty, contractual or otherwise, to the Carews. The Carews have admitted that they did not appeal the July 27 Order. See Appellant's Initial Brief p. 2. Accordingly, the law of the case doctrine bars the Carews from arguing that such a duty exists in the present appeal. This Court should, therefore, affirm the trial court's grant of summary judgment on this issue.

The law of the case doctrine applies where a party a does not challenge an issue on appeal when there has been an opportunity to do so. Bone v. U.S. Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012). A party may not seek relief from an unappealed, prior order because that order becomes law of the case. Judy v. Martin, 381 S.C. 455, 458, 674, S.E.2d 151, 153 (2009). An unappealed order, right or wrong, is the law of the case. Ables v. Gladden, 378 S.C. 558, 569, 664 S.E.2d 442, 448 (2008); Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 525 S.E.2d 869, 871 (2000); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646, 648 (1993) (holding that the trial judge's unappealed ruling is the law of the case).

First, the Carews claim the trial court improperly granted RBC summary judgment on the issue of whether RBC owed the Carews any duty regarding construction progress reports. See Appellants' Initial Brief at p. 6-7. Importantly, the trial court ruled on this exact issue the trial court's July 27 Order. The trial court held:

> Without question, the language in the Construction Loan Agreement makes it absolutely clear that RBC had **no duty** to even conduct inspections during the construction of the Plaintiffs' home. In fact, RBC could have, if it so desired, relied entirely on the payment applications

> submitted by the builder, Hall Builders, LLC, for purposes of disbursing the construction loan proceeds. The inspections were for the "**sole and exclusive benefit**" of RBC.
>
> The rights and responsibilities of RBC regarding the inspections are clearly defined and conspicuous in the Construction Loan Agreement. In particular, as shown in the Findings of Fact, certain portions of these terms in the Construction Loan Agreement are in bold, thereby highlighting certain terms in the Construction Loan Agreement.
>
> Section 8.4 of the Construction Loan Agreement reiterates that the inspections are exclusively for the benefit of RBC and are not to be relied upon by the Plaintiffs.

{July 27, 2011 Order p. 5-6; R. 6-7} (emphasis in Construction Loan Agreement). Thus, the July 27 Order expressly held that RBC did not have a contractual or other duty to the Carews regarding construction progress. The Carews did not appeal the July 27 Order and are now barred from challenging this issue in this appeal. As a result, this Court should affirm the trial court's grant of summary judgment on this issue.

Second, the Carews argue on appeal that RBC "failed to properly monitor the level of completion of the home and disbursed funds above and beyond the percentage of completion." See Appellants' Initial Brief p. 8. This argument is also barred by the law of the case doctrine. The trial court's unappealed July 27 Order specifically held that RBC did **not** owe the Appellants any duty with regard to progress inspection reports or the loan disbursements that resulted from the reports. More specifically, the trial court held that:

> Without question, the language in the Construction Loan Agreement makes it absolutely clear that RBC had **no**

> **duty** to even conduct inspections during the construction of the Plaintiffs' home. In fact, RBC could have, if it so desired, relied entirely on the payment applications submitted by the builder, Hall Builders, LLC, for purposes of disbursing the construction loan proceeds. The inspections were for the **"sole and exclusive benefit"** of RBC.

{Construction Loan Agreement Section 7.2.2; R. 529} (emphasis in original).

The Carews failed to appeal this finding from the July 27 Order. Because the Carews failed to appeal the trial court's previous ruling that no contractual or other duty exists, the law of the case doctrine now bars the Carews from challenging the trial court's grant of summary judgment to RBC on their claims of negligent disbursement of loan proceeds. This Court should affirm the trial court's grant of summary judgment on this issue.

Third, the Carews argue on appeal that RBC negligently authorized construction draws. See Appellants' Initial Brief p. 10. This argument is also barred by the law of the case doctrine. The Carews failed to appeal from the trial court's July 27 Order (1) specifically holding that RBC did not owe the Carews any duty with regard to progress inspection reports or the loan disbursements that resulted from the reports, and (2) holding that "RBC could have, if it so desired, relied entirely on the payment applications submitted by the builder, Hall Builders, LLC, for purposes of disbursing the construction proceeds." {July 27 Order; R. 2-12}. The Carews did not appeal either of these rulings from the July 27 Order, and the law of the case doctrine now bars the Carews from challenging the trial court's grant of summary judgment to RBC on this basis. This Court should also affirm the trial court's grant of summary judgment on this issue.

II. The trial court correctly granted summary judgment to RBC on the Carews' claims related to construction progress inspections because RBC owed them no duty.

The Carews' argument that the trial court improperly granted summary judgment to RBC on this issue is without merit for several reasons. First, the law of the case doctrine bars the Carews' argument. Second, the two-issue rule likewise precludes the Carews' argument. Third, even assuming the Carews properly presented this issue to this Court, the trial court correctly applied settled South Carolina Supreme Court precedent to find RBC owed the Carews no duty as to construction progress inspections. As a result, this Court should affirm the trial court's grant of summary judgment to RBC.

a. The law of the case doctrine bars the Carews' claims related to construction progress inspections.

As noted in Section I, supra, the Carews failed to appeal the trial court's July 27 Order that RBC did not owe the Carews any duty regarding construction progress reports. Accordingly, the Carews are barred from arguing that such a duty exists in the present appeal. This Court should, therefore, affirm the trial court's grant of summary judgment on this issue.

b. The two-issue rule bars the Carews' argument that the Construction Loan Agreement was a contract of adhesion and/or unconscionable.

This Court should also affirm the trial court's grant of summary judgment on this ground based on the two-issue rule. The trial court granted summary judgment to RBC on the Carews' negligence cause of action on two independent grounds. {Order Granting RBC's Motion for Summary Judgment dated May 17, 2012 at p. 7; R. 19}. The trial court held that (1) the Construction Loan Agreement did not constitute an

unenforceable contract of adhesion **and** (2) the terms of the Construction Loan Agreement were not unconscionable so as to render it unenforceable. {Id.}. The Carews failed to appeal the second ground that formed the basis of the grant of summary judgment. Thus, this Court must affirm pursuant to the two-issue rule.

Under the two issue rule, "when a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). The two-issue rule applies to grants of summary judgment. Jones, 387 S.C. at 346, 692 S.E.2d at 903 (affirming the grant of summary judgment when appellant failed to appeal both grounds set forth by the trial court). In Jones, the trial court granted summary judgment based on two independent grounds. The Supreme Court applied the two-issue rule to affirm when appellant failed to appeal both grounds. The court reasoned that:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts . . . the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Id.

Here, the Carews failed to appeal one of the grounds that the trial court based the grant of summary judgment. Specifically, the Carews failed to appeal the trial court's ruling that the terms of the Construction Loan Agreement were not unconscionable so as to render it unenforceable. That ruling is now the law of the case,

and summary judgment must be affirmed. See, e.g., First Union Nat'l Bank v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is law of the case and requires affirmance").

c. The trial court correctly granted summary judgment because RBC owed the Carews no duty as to construction progress inspections.

In addition to the plain language of the Construction Loan Agreement and the law of the case cited above, South Carolina case law also supports the finding that RBC owed Appellants no duty in regard to progress inspection reports. Because RBC did not owe any duty to the Carews, the trial court properly granted RBC summary judgment as a matter of law. This Court should affirm.

In order to prevail in a negligence action, a plaintiff must prove the following requisite elements: "(1) defendant owed a duty of care to the plaintiff (2) defendant breached the duty by a negligent act or omission (3) defendant's breach was the actual and proximate cause of the plaintiff's injury and (4) the plaintiff suffered injury or damages." Jackson v. Swordfish Investments, L.L.C., 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005); Dorrell v. South Carolina Dept. of Trans., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). Thus, before a negligence cause of action can be pursued, a plaintiff must establish the essential element that there was a duty owed to him by the defendant. Rogers v. South Carolina Dept. of Parole & Cmty. Corr., 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995); Wyatt v. Fowler, 326 S.C. 97, 101, 484 S.E.2d 590, 592 (1997). Notably, if such a duty is absent, then "there can be no actionable negligence." Id. at 255, 464 S.E.2d at 332.

The determination of a whether there was a duty is a matter of law for the court, not an issue of fact for the jury, because our Supreme Court has established that "[w]hether the law recognizes a particular duty is an issue of law to be determined by the court." Ellis v. Niles, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law. Id.; Byerly v. Conner, 307 S.C. 441, 415 S.E.2d 796 (1992).

The Supreme Court has addressed the Carews' negligence claims in an analogous context and held:

> The builder of a house [i.e. the Carews] is entitled to make his own contract with the construction company. In like fashion, a lending institution [i.e RBC] is entitled to make its own contract with one who is building a house. Traditionally, lenders, in making a construction loan, make periodic inspections to assure that the construction loan advancements are being applied appropriately. **This is fundamentally for the protection of the lending institution and does not impose upon the lending institution a duty to see that [the borrower] is getting a job free of defects**. Both the lender and the borrower have a common interest in seeing that the construction company builds a building free of defects but, absent a contract, the builder has no common law duty to protect the lender and the lender has no common law [duty] to protect the builder.

Roundtree Villas Association, Inc. v. 4701 Kings Corp. , 282 S.C. 415, 422, 321 S.E.2d 46, 50 (1984) (emphasis and bracket language added). Therefore, the Supreme Court has definitively held that construction loan agreements, such as the one at issue in this matter, do not impose a duty on the lender, such as RBC, to ensure there are no defects in the construction. The trial court correctly applied this precedent to find that

RBC owed no duty to the Carews regarding progress inspections during construction. Accordingly, this Court should affirm the grant of summary judgment to RBC.

III. The trial court correctly granted summary judgment to RBC because the Carews released RBC from liability related to construction progress inspections.

The Carews also expressly released any claims against RBC related to the construction progress inspections. Therefore, the trial court properly granted summary judgment to RBC on this issue. This Court should affirm.

Section 8.4 of the Construction Loan Agreement states, in pertinent part, as follows:

> I [the Carews] agree that your [RBC's] failure or the Construction Monitor's [Appraiser's] failure (1) to discover defects in the Improvements, including errors or omissions in design, workmanship, materials, supplies, fixtures, parts, products or equipment due to non-compliance with the Construction Documents, or due to defects in any of the foregoing, will not make either you or the Construction Monitor liable to me. . . .

{Construction Loan Agreement; R. 531}. The plain and unambiguous language of this provision establishes that, by signing the Construction Loan Agreement, the Carews expressly agreed to release RBC from any liability related to construction defects or defects in the construction progress inspections.[3] Accordingly, the trial court's grant of summary judgment based on release must be affirmed.

IV. The trial court properly granted summary judgment to RBC on the Carews' claims of negligent disbursement of loan proceeds.

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[3] The Carews' admission that Mr. Carew failed to read the Loan Agreement does not affect the enforceability of the release provision. See Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("a person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it").

The Carews' argument that summary judgment was improper on this issue fails for two primary reasons. First, the law of the case doctrine bars their arguments. Second, even assuming the Carews properly presented this issue to this Court, the Construction Loan Agreement establishes that RBC owed no duty to the Carews. Therefore, the trial court properly granted RBC summary judgment on this issue. This Court should affirm.

a. The law of the case doctrine bars the Carews' appellate arguments regarding their negligent disbursement claims.

As noted in Section I, supra, the Carews failed to appeal the trial court's July 27 Order that held RBC did **not** owe the Appellants any duty with regard to progress inspection reports or the loan disbursements that resulted from the reports. Accordingly, the Carews are barred from arguing that such a duty exists in the present appeal. This Court should, therefore, affirm the trial court's grant of summary judgment on this issue.

b. The trial court correctly granted summary judgment to RBC on the Carews' claims regarding the negligent disbursement issue.

In addition to the law of the case, the express language of the Construction Loan Agreement firmly supports the trial court's grant of summary judgment as it relates to the Carews' negligent disbursement claims. As more fully set forth in Section II(c), supra, the Construction Loan Agreement makes it clear that although RBC could consider the inspection reports in determining the disbursement process, neither the Carews nor any other person could rely on those reports:

> Before you make a disbursement on the basis of a Draw Request, either or both you and the Construction Monitor

> may perform an on-site inspection of the Premises. If you request, the General Contractor, if there is one, and I will be present when such inspections are undertaken. **You [RBC] will not be under any obligation to make inspections and you will not be under any obligation to instruct the Construction Monitor to conduct inspections. All inspections made by you [RBC] and all inspections made by the Construction Monitor will be for your [RBC] sole and exclusive benefit and they may not be relied upon in whole or in part by me [Carews] or any other person.**

{Construction Loan Agreement; R. 529} (emphasis in original but language in brackets added).

Moreover, the only evidence in the record regarding the way disbursements were made undercuts the Carews' position. The undisputed evidence presented to the trial court established that RBC released the funds for disbursement directly to the Carews, who in turn chose what to pay their builder, as was the case for each construction disbursement or draw in this case. {Deposition of Kathy Robertson; R. 287-88; 291-93}. Additionally, the "double disbursement" claimed by the Carews fails to advance their position. More specifically, the Carews claim that RBC paid the same draw request twice, thereby causing them harm.[4] However, as noted above, the Carews—not RBC—paid their builder twice for the same work. {Deposition of Kathy Robertson; R. 287-88; 291-93}. Moreover, the only evidence before the trial court was that RBC restored the funds the Carews paid the second time so the Carews would be able to draw against the full amount for future disbursements, and, as a result, the Carews suffered no loss at all. {Id.}.

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[4] See Appellants' Initial Brief p. 9-10.

V. The trial court properly granted summary judgment on the Carews' claims that RBC negligently authorized construction draws.

The Carews argue that the unappealed July 27 Order, the express language of the Loan Agreement, and RBC's testimony that it has sole discretion over disbursement of loan proceeds "lead[s] to an absurd result which should not be allowed to stand." (Initial Brief of Appellants p.10). This argument fails for three reasons.

First, as discussed in Section I, supra, this argument is not properly before this Court. The July 27 Order held that that RBC did not owe the Carews any duty with regard to progress inspection reports or the loan disbursements that resulted from the reports. Thus, the law of the case doctrine now bars the Carews from challenging the trial court's grant of summary judgment to RBC on this basis.

Second, the Carews failed to properly preserve this argument for appeal. "Preserving issues for appellate review is a fundamental component of appellate practice." Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). "The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. Id.; Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (holding the appellate court will not address an issue unless the issue was raised to and ruled upon by the trial court). The first step in preserving an issue for appellate review is to

actually raise it to the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The trial court must also rule upon the issue for it to be preserved for review. Id.; see also Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000).

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly." I'On, 338 S.C. at 422, 526 S.E.2d at 724. Importantly, "[i]t prevents a party from keeping an ace card up his sleeve-intentionally or by chance-in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

Here, the Carews neither raised this issue (i.e., whether the express language of the Loan Agreement, and RBC's testimony that it has sole discretion over disbursement of loan proceeds, leads to an absurd result which should not be allowed to stand), to the trial court in their opposition to RBC's Motion for Summary Judgment, nor did they raise this claim at argument on the Motion. Moreover, the trial court's Order granting RBC summary judgment does not address or rule on the Carews' argument that "[t]he extension of RBC's position leads to an absurd result which should not be allowed to stand." Thus, the issue was neither raised to, nor ruled upon, by the trial court. Therefore, the issue is not preserved for appellate review by this Court.

Lastly, as fully discussed in Section II above, the Carews released RBC from all claims and liability related to the progress inspection reports. The Carews contractually

agreed that RBC could rely on the inspection reports. {Construction Loan Agreement; R. 527-37}. RBC made loan disbursements based upon the Appraiser's progress inspection reports. Despite the Carews' allegation that disbursements were improperly made due to defects with the construction, the release provision in the Construction Loan Agreement bars any recovery from RBC because RBC disbursed the funds as a result of the reports. {Construction Loan Agreement Section 8.4; R. 531}. Accordingly, the trial court's grant of summary judgment on the issue of negligent authorization of construction draws should be affirmed.

VI. The trial court properly granted summary judgment on the Carews' breach of contract claims.

The Carews lastly claim the trial court improperly granted summary judgment because RBC breached Sections 5, 6.2, 7, and 10.3 of the Construction Loan Agreement. See Appellants' Initial Brief p. 11-13. This argument is without merit for two reasons. First, the argument is not preserved for review by this Court. Second, the trial court properly found that RBC did not breach any contractual provision. This Court should affirm the grant of summary judgment to RBC.

First, the Carews' argument is not preserved for appellate review. In their brief, the Carews assert—for the first time—that the trial court improperly granted summary judgment because RBC was "more than a mere lender since it [was] aware of defects related to the home." See Appellants' Initial Brief p. 11. Consequently, the Carews argue that RBC is liable for the construction defects caused by Hall Builders. {Id.}. However, the Carews failed to raise this argument to the trial court. Also, the trial court did not rule on this argument. Thus, it is not preserved for review. See,

e.g., Phillips, 318 S.C. at 456 458 S.E.2d at 430 (holding the appellate court will not address an issue unless the issue was raised to and ruled upon by the trial court).

Second, the trial court properly found RBC adhered to the terms of the Construction Loan Agreement. The Carews alleged that RBC Bank breached Section 6.2 of the Construction Loan Agreement, which governs the completion of improvements to the property. That provision states that the improvements "must be Completed" and that RBC Bank is entitled to receive "final lien waivers/releases from the General Contractor." This provision does not place any obligations on RBC Bank and, therefore, cannot support a claim for breach of contract. Thus, the trial court properly rejected the Carews' argument as a matter of law.

The Carews also claim that RBC breached Section 10.3 of the Construction Loan Agreement, which gives RBC Bank "the right, **but not the obligation**," to take possession, use, operate, construct, complete, preserve, or control any of the collateral for the loan. {Construction Loan Agreement; R. 532} (emphasis added). As the plain language of this provision established, Section 10.3 outlines RBC's **rights** with relation to the collateral for the loan, and does not impose upon RBC Bank any **obligations** in that respect. Therefore, this provision cannot support a claim for breach of contract, and the trial court properly granted summary judgment to RBC.

The Carews next allege that RBC breached Sections 5 and 7 of the Construction Loan Agreement, which govern the disbursement of loan proceeds. Section 5 did not obligate RBC to perform any actions before disbursing loan proceeds, but instead gave RBC the right to disburse loan proceeds when it is satisfied with the progress of construction. Similarly, Section 7.2 of the Construction Loan Agreement gave RBC

the right to determine the amount of loan proceeds to be disbursed. Section 7.4 expressly gave RBC the right to disburse loan proceeds to the contractor without the Carews' prior approval and without prior notice.

These provisions are for the benefit of RBC alone and do not impose upon it any duties or obligations to the Carews regarding the distribution of loan proceeds. Indeed, as discussed above and in the July 27, 2011 Order, "RBC could have, if it so desired, relied entirely on the payment applications submitted by the builder, Hall Builders, LLC, for purposes of disbursing the construction proceeds." {July 27 Order at p. 5; R. 6}. Accordingly, Sections 5 and 7 cannot support a claim for breach of contract. The trial court properly granted summary judgment on these claims.

Finally, the Carews allege that RBC breached Section 8 of the Loan Agreement, which related to the performance of construction progress inspections. As discussed herein, the law of the case is that under the Construction Loan Agreement expressly provided that (1) RBC had no obligation to conduct any inspections; (2) all inspections were for RBC's sole benefit; and (3) the Carews had no right to rely on any such inspections. Accordingly, Section 8 cannot support a claim for breach of contract, and the trial court properly rejected this argument.

Conclusion

Based on the foregoing, this Court should affirm the trial court's grant of summary judgment in favor of RBC.

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June 25, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2010-CP-32-00442
Appellate Case No. 2012-212283

Dr. Joseph G. Carew and Dr. Karen Carew, ... Appellants,

v.

RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank, Clifton W. Hall, Hall Builders, LLC, Mid Carolina Appraisal Company, LLC, and Teresa Addy Haltiwanger, ... Defendants

Of Whom, RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank are .... Respondents.

Certificate of Compliance

The undersigned certifies that this Final Respondent's Brief complies with Rule 211(b), SCACR.

{Signature Page Follows}

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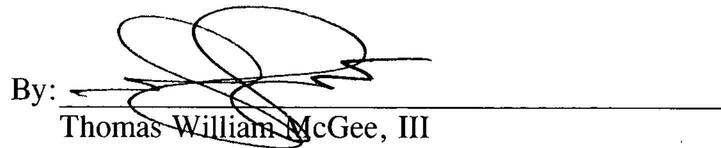
By: 

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for RBC Centura Bank, 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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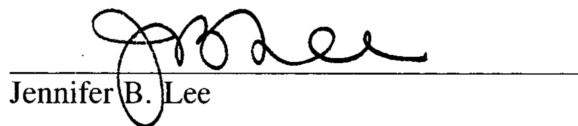

Jennifer B. Lee

June 25, 2013