

The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1080
FAX (803) 734 1499
www.sccourts.org

May 09, 2012

Curtis Lee Coltrane
PO Drawer 8008
Hilton Head Island SC 29938

Michael W Mogil
2 Corpus Christie Place
Ste 303
Hilton Head Island SC 29928

Re Harbourside v Stalliard, Alphonse
Appellate Case No 2011-195508

Dear Counsel

The above case appeared on an earlier preliminary list, but was not scheduled for argument. The matter will likely be scheduled for September, 2012. The Court will hold arguments on September 18, 19 and 20.

Very truly yours,

CLERK

MOGIL LAW FIRM

MICHAEL W MOGIL
Admitted in SC NY FL and PA
ROBERT G SABLE OF COUNSEL
Admitted in SC PA
RICHARD H BATEMAN
Admitted in NH not admitted in SC

2 Corpus Christie Place • Suite 303
Hilton Head Island SC 29928
T 843 785 8110 F 843 785 9676
www.mogillaw.com

Email mmogil@mogillaw.com

April 30, 2012

Daniel E Shearouse
Clerk of Court
South Carolina Supreme Court
P O Box 11330
Columbia, SC, 29211

RECEIVED

MAY 08 2012

S.C. SUPREME COURT

Via fax (803)734-1499 and U S Mail

Re June Preliminary List -- Harbourside v Stalliard, Alphonse

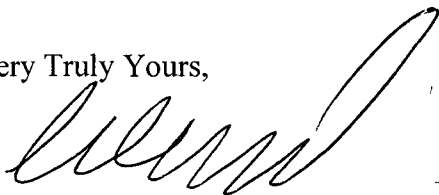
Dear Mr Shearouse,

In response to your letter dated April 24, 2012 regarding scheduling the above-referenced case for hearing at the June 2012 term of the South Carolina Supreme Court, please note that I have the following potential scheduling conflict(s), subject to the Court's instruction on the matter

June 5, 6, and 7 I am scheduled to appear in Immigration Court in Charlotte, North Carolina on June 4, and I have depositions scheduled in Hilton Head, South Carolina June 6 It is unlikely the Immigration Court would grant a continuance, as a request for continuance has already been granted in that case Given the need to travel before and after my June 4 appearance, and prepare in advance of the June 6 depositions, I respectfully request that the Supreme Court hearing not be scheduled for June 5, 6 or 7

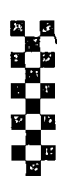
Thank you for your attention in this matter

Very Truly Yours,



Michael W Mogil

Cc Curtis L Coltrane
Alford, Wilkins & Coltrane, L L C
18 Executive Park, Building 1
Hilton Head Island, SC 29928



MOGIL LAW FIRM

2 Corpus Christie Place Suite 303
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MICHAEL W. MOGIL
Admitted in SC NY FL and PA
ROBERT G. SABLE, OF COUNSEL
Admitted in SC PA
RICHARD H. BATEMAN
Admitted in NH not admitted in SC

Email mmogil@mogillaw.com

April 30, 2012

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RECEIVED

APR 30 2012

S. C. SUPREME COURT

Via fax (803)734-1499 and U S Mail

Re June Preliminary List – Harbourside v Stalliard, Alphonse

Dear Mr. Shearouse,

In response to your letter dated April 24, 2012 regarding scheduling the above-referenced case for hearing at the June 2012 term of the South Carolina Supreme Court, please note that I have the following potential scheduling conflict(s), subject to the Court's instruction on the matter:

June 5, 6, and 7 I am scheduled to appear in Immigration Court in Charlotte, North Carolina on June 4, and I have depositions scheduled in Hilton Head, South Carolina June 6. It is unlikely the Immigration Court would grant a continuance as a request for continuance has already been granted in that case. Given the need to travel before and after my June 4 appearance and prepare in advance of the June 6 depositions, I respectfully request that the Supreme Court hearing not be scheduled for June 5, 6 or 7.

Thank you for your attention in this matter.

Very Truly Yours

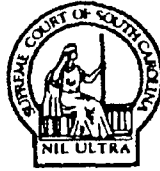
Michael W. Mogil

RECEIVED

APR 30 2012

S.C. SUPREME COURT

Cc Curtis L Coltrane
Alford Wilkins & Coltrane L L C
18 Executive Park, Building 1
Hilton Head Island, SC 29928



The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

PO BOX 11330
COLUMBIA S C 29211
PHONE NO 734 1080

To Curtis L Coltrane Esquire
From Daniel E Shearouse
Date April 24 2012
RE June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of June 5 6 7 19 and 20. Please notify this office in writing prior to May 1 2012 as to any scheduling conflicts for the June term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict please advise as to the specific nature of the conflict.

Harbourside v Stalliard, Alphonse



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Michael W. Mogil Esquire
From Daniel E. Shearouse
Date April 24, 2012
RE June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5, 6, 7, 19, and 20. Please notify this office in writing prior to May 1, 2012, as to any scheduling conflicts for the June term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Harbourside v. Stalliard, Alphonse

The Supreme Court of South Carolina

Harbourside Community Bank,
As Servicing Agent for The
Savannah Bank, N A , Respondent,

v

Alphonse Stalliard, Oldfield
Club, and Oldfield Community
Association, Inc , Defendants,

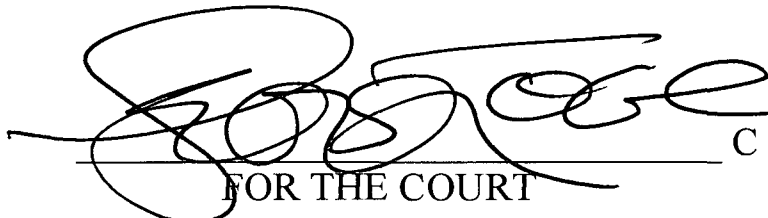
Of Whom Alphonse Stalliard is
the, Appellant

The Honorable Marvin H Dukes, III
Beaufort County
Trial Court Case No 2009-CP-07-03945

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules,
this appeal is hereby certified for review by the South Carolina Supreme
Court Upon receipt of this order, the Court of Appeals is hereby directed to
forward the case file, all records and briefs and any exhibits on file to this
Court

IT IS SO ORDERED


C J
FOR THE COURT

Columbia, South Carolina

March 20, 2012

cc Michael W Mogil, Esquire
Curtis L Coltrane, Esquire
The Honorable Tanya Gee



The South Carolina Court of Appeals

TANYA A GEE
CLERK
V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
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January 5, 2012

Michael W Mogil, Esquire
Law Ofc of Michael W Mogil, P A
2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928

Re Harbourside v Stallhard, Alphonse
2011195508

Dear Mr Mogil

The following Order has been endorsed on your Motion to Serve and File Out of Time in the above entitled case on appeal

“Granted

John Cannon Few C J
For the Court

By s/ V. Claire Allen
Deputy Clerk

January 05, 2012 ”

Please be advised that the Record on Appeal and all Final Briefs will be submitted for the Court’s consideration

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf
cc Curtis L Coltrane, Esquire

ALFORD, WILKINS & COLTRANE, L L C
ATTORNEYS AT LAW

POST OFFICE DRAWER 8008
HILTON HEAD ISLAND, SC 29938
(843) 842-5500
(843) 842-8400 (FAX)
www.awc-lawfirm.com

RECEIVED

DEC 16 2011

SC Court of Appeals

Curtis L Coltrane
E-Mail curtis@awc-lawfirm.com

Gregory M Alford*
John W Wilkins
Curtis L Coltrane+
Scott M Wild
Mitchell J Thoreson
*Also Member Georgia Bar
+Also Member Virginia Bar

December 12, 2011

Hon Tanya A Gee
SOUTH CAROLINA COURT OF APPEALS
Post Office Box 11629
Columbia, SC 29211

RE Harbourside v Stalliard
Case Tracking Number 2011195508

Dear Ms Gee

Enclosed, you will find an unbound original and 14 bound copies of the Final Brief of Respondent in connection with the above-referenced case. You will also find the Rule 211(b), SCACR, Certification and a Certificate of Mailing, showing service of the Final Brief and Rule 211(b), SCACR, Certification on Michael W Mogil, Esq, counsel for the Appellant. I thank you for your help with this matter, and would ask that you let me know if anything further is needed in connection with this matter at this time. I am,

Sincerely,

ALFORD, WILKINS & COLTRANE, L L C


Curtis L Coltrane

CLC/c
enc As Stated
cc Michael W Mogil, Esq
Diane Sala

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H Dukes, III, Master-In-Equity for Beaufort County, South Carolina

Case No 2009-CP-07-03945

Harbourside Community Bank,
As Servicing Agent for
The Savannah Bank, N A ,

Respondent,

RECEIVED

DEC 19 2011

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc

Defendants

SC Court of Appeals

Of Whom Alphonse Stalliard is the

Appellant

MOTION TO FILE AND SERVE OUT OF TIME

Appellant Alphonse Stalliard moves the Honorable Court for an Order permitting the filing of his Final Brief and Final Record on Appeal with the Court based on the following particulars

1 Appellant's counsel did not properly review Rule 210, which required service of the Record on Appeal within 30 days from the date that Appellant was served with the Respondent's Initial Brief and thus had not calculated and calendared the deadline date for serving the Record on Appeal Respondent's initial brief was served on Appellant on or about October 7, by mail Appellant's counsel was notified by Respondent's counsel

regarding the November 6 due date as a courtesy, on or around November 6. Thereafter, Appellant's counsel worked diligently to compile the Record on Appeal in coordination and in communication with the Respondent. Appellant's counsel was covering federal bankruptcy hearings in Charleston November 6 and 8 for his colleague, and could not complete the Record on Appeal, with proper indexing, until the end of the week. Thereafter, Counsel served the Record on Appeal by hand delivery on Monday, November 14, 2011 per the attached Proof of Service.

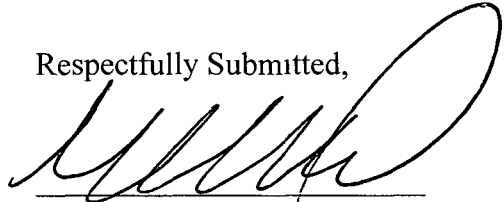
2 Rather than asking Respondent's counsel for additional time as a courtesy, Appellant's counsel should have filed the within Motion to File and Serve Out of Time with this Court. 3 Appellant's counsel request unto the Honorable Court to grant Appellant the extension of time requested herein and prays that Respondent is not prejudiced by the one week delay in its service of the Final Record on Appeal.

4 Appellant's Final Brief and the Final Record of Appeal were sent for filing with this Court by overnight mail, express delivery on December 6, 2011. The twentieth day, pursuant to Rule 211, fell on December 5, 2011. Upon learning that the binding company had not completed the order, counsel requested an extension of time to opposing counsel due to the delay, which was not opposed. The Final Brief and Final Record of Appeal were served on Respondent by hand delivery the same day, being December 6, 2011.

5 Therefore, Appellant prays that this Honorable Court excuse the additional one day delay in filing and serving the Final Record on Appeal and Final Brief, as noted herein.

December 16, 2011

Respectfully Submitted,



Michael W Mogil #11933
Law Office of Michael W Mogil, P A
2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928
Tel (843) 785-8110
Attorney for Appellant

GRANTED
JOINT MOTION FOR
RECONSTRUCTION

By V. Clause Allen
(Clerk) (Deputy Clerk)

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H Dukes, III, Master-In-Equity for Beaufort County, South Carolina

Case No 2009-CP-07-03945

Harbourside Community Bank,
As Servicing Agent for
The Savannah Bank, N A ,

RESPONDENT
DEC 19 2011

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc

DEMANDANT
SC COURT OF APPEALS

Of Whom Alphonse Stalliard is the Appellant

PROOF OF SERVICE

I, Lorraine Evans Wilson, employed by the Law Office of Michael W Mogil, P A , do hereby certify that on December 16, 2011, I served a true and accurate copy of the Appellant's Motion to Serve and File Out of Time in the above matter, by depositing a copy of the same with the United States Postal Service with first class postage prepaid, addressed to the following

Curtis L Coltrane
Alford, Wilkins & Coltrane, L L C
18 Executive Park, Building 1
Hilton Head Island, SC 29928
Attorney for Respondent Harbourside
Community Bank



Lorraine Evans Wilson

Sworn to Before Me this 16
day of December, 2011

Daniel H. Hanson
Notary Public for South Carolina

My Commission Expires 10 29 2014

LAW OFFICE OF MICHAEL W MOGIL, P A

2 Corpus Christie Place, Ste 303

Hilton Head Island, SC 29928

Telephone (843) 785-8110

Fax (843) 785-9676

Email mmogil@mogillaw.com

December 16, 2011

The Honorable Tanya Gee
South Carolina Court of Appeals Clerk of Court
PO Box 11629
Columbia, SC 29211

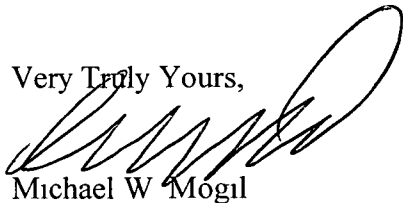
Via US Mail

Re Harbourside Community Bank v Alphonse Stalliard, et al Appeal #2011195508

Dear Ms Gee,

Enclosed for filing please find one original and six copies of the Motion to File and Serve out of Time and Proof of Service(s) for the Motion to File and Serve out of Time, the Record on Appeal and the Final Record on Appeal in this matter

Very Truly Yours,



Michael W Mogil

Cc Curtis L Coltrane

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DEC 19 2011

SC COURT OF APPEALS



The South Carolina Court of Appeals

TANYA A GEE
CLERK

CLAUDE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMNER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
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December 9, 2011

Michael W Mogil, Esquire
Law Ofc of Michael W Mogil, P A
2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928

Re Harbourside v Stalliard, Alphonse
2010195508

Dear Mr Mogil

We have received the Record on Appeal and Appellant's Final Brief in the above case
However, our records indicate the Record on Appeal was to be served by November 4, 2011
Therefore, you must file a Motion to Serve and File Out of Time within ten (10) days of this
letter

Furthermore, the caption should read

Harbourside Community Bank, As Servicing
Agent for The Savannah Bank, N A ,

Respondent,

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc ,

Defendants,

Of Whom Alphonse Stalliard is the,

Appellant

Please arrange for a representative from your office to come to the Court of Appeals filing desk on
the 1st floor of the Edgar A Brown Building to make the required corrections to the record and brief
**We request that you notify this office when someone will be arriving to make the corrections so
the documents will be available without delay**

Very truly yours,

CLERK

TAG/laf

cc ~ Curtis Lee Coltrane, Esquire

MOGIL LAW FIRM

MICHAEL W MOGIL

Admitted in SC NY FL and PA

ROBERT G SABLE OF COUNSEL

Admitted in SC PA

RICHARD H BATEMAN

Admitted in NH not admitted in SC

2 Corpus Christie Place • Suite 303
Hilton Head Island SC 29928
T 843 785 8110 F 843 785 9676
www.mogillaw.com

Email mmogil@mogillaw.com

December 6, 2011

V Claire Allen
Deputy Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Harbourside v Stalliard, Alfonse
Court of Appeals Docket No 2011195508

Dear Ms Allen,

Enclosed for filing please find the unbound original and fourteen bound copies of the Appellant's Final Brief and Record on Appeal in this matter, as well as Proof of Service and a Certificate Final Brief Complies with Rule 211(b)

Thank you for your attention in this matter

Very Truly Yours,


Michael W Mogil

Cc Curtis L Coltrane
Alford, Wilkins & Coltrane, LLC
Post Office Drawer 8008
Hilton Head Island, SC 29928

RECEIVED

DEC 07 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK
V
CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
WWW SCCOURTS.ORG

October 26, 2011

Michael W Mogil, Esquire
Law Ofc of Michael W Mogil, P A
2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928

Curtis Lee Coltrane, Esquire
One Town Center Ct
Hilton Head Island, SC 29928

Re Harbourside v Stalliard, Alphonse
Case Tracking # **2011195508**

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address, 1205 Pendleton Street, Columbia, S C 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

You are reminded that the caption should read as follows:

Harbourside Community Bank, As Servicing
Agent for The Savannah Bank, N A ,

Respondent,

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc ,

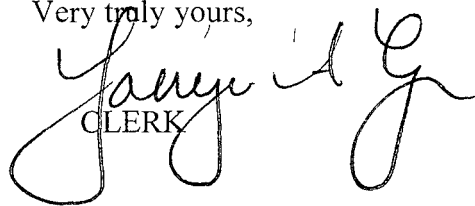
Defendants,

Of Whom Alphonse Stalliard is the,

Appellant

Any future filings by any party to this appeal must feature the above caption

Very truly yours,


CLERK

TAG/laf

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

HON MARVIN H DUKES, III, MASTER-IN-EQUITY

Case Number 2009-CP-07-3945

RECEIVED

OCT 10 2011

SC Court of Appeals

HARBOURSIDE COMMUNITY BANK, As Servicing Agent for
THE SAVANNAH BANK, N A ,

RESPONDENT,

vs

ALPHONSE STALLIARD, OLDFIELD CLUB, and
OLDFIELD COMMUNITY ASSOCIATION, INC ,

Of Whom ALPHONSE STALLIARD is the

APPELLANT

RESPONDENT'S DESIGNATION OF MATTER TO
BE INCLUDED IN RECORD ON APPEAL

Pursuant to Rule 209, SCACR, the Respondent designates the following to be
included in the Record on Appeal

- 1 May 14, 2010, Consent Order Bifurcating case
- 2 Savannah Bank's May 18, 2010, Amended Complaint
- 3 November 10, 2010, Consent Scheduling Order

- 4 Stalliard's November 15, 2010, Amended Answer
- 5 Savannah Bank's November 17, 2010, Reply and Restatement of Affirmative Claim
- 6 Savannah Bank's March 15, 2011, Notice of Motion and Motion for Summary Judgment
- 7 March 10, 2011, Affidavit of Sally A Gardocki Esq , with all Exhibits
- 8 March 15, 2011, Affidavit of Diane Sala, with all Exhibits
- 9 Savannah Bank's April 8, 2011, Notice of Hearing
- 10 Stalliard's May 2, 2011, Motion to Enlarge Time for Discovery and to Continue Hearing on Savannah Bank's Motion for Summary Judgment
- 11 Savannah Bank's May 11, 2011, Return to Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank's Motion for Summary Judgment
- 12 June 2, 2011, Order of Hon Marvin H Dukes, III, Granting Summary Judgment
- 13 Deposition Transcript of Alphonse Stalliard
- 14 Deposition Transcript of Susan Keiffer with Exhibits
- 15 May 13, 2011, Affidavit of Alphonse Stalliard, Excluding Paragraph 6

Respectfully Submitted

ALFORD, WILKINS & COLTRANE, L L C

By



Curtis L. Coltrane
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for the Respondent

Hilton Head Island, South Carolina

This 21 Day of October, 2011

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

HON MARVIN H DUKES, III, MASTER-IN-EQUITY

RECEIVED
OCT 10 2011
SC Court of Appeals

Case Number 2009-CP-07-3945

HARBOURSIDE COMMUNITY BANK, As Servicing Agent for
THE SAVANNAH BANK, N A ,

RESPONDENT,

vs

ALPHONSE STALLIARD, OLDFIELD CLUB, and
OLDFIELD COMMUNITY ASSOCIATION, INC ,

Of Whom ALPHONSE STALLIARD is the

APPELLANT

CERTIFICATE OF MAILING

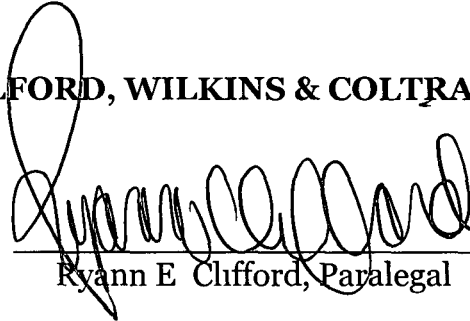
I, Ryann E Clifford, Paralegal with the law firm of Alford, Wilkins & Coltrane, L L C , certify that I have this date, served one (1) copy of the Initial Brief of Respondent and one (1) copy of the Respondent's Designation of Matter to be Included in Record on Appeal, by depositing the same at the United States Post Office, Hilton Head Island, South Carolina,

with first class postage affixed thereto as follows

Michael W Mogil, Esq
LAW OFFICE OF MICHAEL W MOGIL, P A
2 Corpus Christie Place, Suite 303
Hilton Head Island, SC 29928

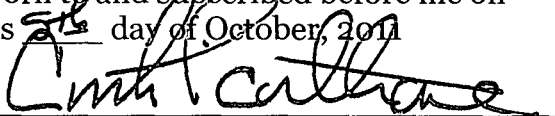
ALFORD, WILKINS & COLTRANE, L L C

By



Ryann E Clifford, Paralegal

Sworn to and subscribed before me on
this 5th day of October, 2011



Notary Public for South Carolina
My Commission Expires 3 12 2012

ALFORD, WILKINS & COLTRANE, L L C
ATTORNEYS AT LAW

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(843) 842-8400 (FAX)
www.awc-lawfirm.com

Curtis L Coltrane
E-Mail curtis@awc-lawfirm.com

Gregory M Alford*
John W Wilkins
Curtis L Coltrane+
Scott M Wild
Mitchell J Thoreson
*Also Member Georgia Bar
+Also Member Virginia Bar

October 5, 2011

Hon Tanya Gee
SOUTH CAROLINA COURT OF APPEALS
Post Office Box 11629
Columbia, SC 29211

RE Harbourside Community Bank v Stalliard
Case Number 209-CP-07-3945
Case Tracking Number 2011195508

RECEIVED
OCT 10 2011
SC Court of Appeals

Dear Ms Gee

In accordance with the requirements of Rule 208 (a)(2), SCACR, you will find enclosed one copy of the "Initial Brief of Respondent", the "Respondent's Designation of Matter to Be Included in Record on Appeal", and Proof of Service of the same on counsel to the Appellant

I thank you for your help with this matter, and would ask that you please let me know if anything further disputed in connection with this case at this time I am,

Sincerely,

ALFORD, WILKINS & COLTRANE, L L C


Curtis L Coltrane

CLC/c
enc As Stated
cc Michael W Mogil, Esq
Diane Sala

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

HON MARVIN H DUKES, III, MASTER-IN-EQUITY

Case Number 2009-CP-07-3945

HARBOURSIDE COMMUNITY BANK, As Servicing Agent for
THE SAVANNAH BANK, N A ,

RESPONDENT,

vs

ALPHONSE STALLIARD, OLDFIELD CLUB, and
OLDFIELD COMMUNITY ASSOCIATION, INC ,

Of Whom ALPHONSE STALLIARD is the

APPELLANT

INITIAL BRIEF OF THE RESPONDENT

ALFORD, WILKINS & COLTRANE, L L C
Curtis L Coltrane
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for the Respondent

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TABLE OF AUTHORITIES

CASE LAW

Bean v Carolina Cent Railroad Company, Inc , 392 S C 532, 709 S E 2d 99 (SCApp 2011) 6, 13

Cafe Associates Limited v Gengross, 305 S C 6, 406 S E 2d 162 (1991) 12

Dawkins v Fields, 354 S C 58, 580 S E 2d 433 (S C 2003) 12, 21

Doe ex rel Doe v Batson, 435 S C 316, 548 S E 2d 854 (S C 2001) 21

Ellis v Davidson, 358 S C 509, 518, 595 S E 2d 817, 822 (SCApp 2004) 11

Graves v Horry-Georgetown Technical College, 391 S C 1, 704 S E 2d 350 (SCApp 2010) 11

Jones v Lott, 387 S C 339, 692 S E 2d 900 (S C 2010) 6, 13

McKnight v South Carolina Dept of Corrections, 385 S C 380, 684 S E 2d 566 (SCApp 2009) 17

Normandy Corp v South Carolina Department of Transportation, 386 S C 393, 688 S E 2d 136 (SCApp 2009) 6, 13

P P G Industries, Inc v Orangeburg Paint & Decorating Center, Inc , 297 S C 176, 375 S E 2d 331 (SCApp 1988) 12, 14-17

Priest v Brown, 302 S C 405, 396 S E 2d 638 (SCApp 1990) 12, 17

Redwend Limited Partnership v Edwards, 354 S C 58, 581 S E 2d 496 (SCApp 2003) 12

Wilder Corp v Wilke, 330 S C 71, 497 S E 2d 731 (S C 1998) 13

COURT RULES

Rule 56, SCRCF 1, 11, 12, 16

Rule 56(f), SCRCF 1, 20, 21, 23

Rule 208(b)(1)(B), SCACR 1, 6, 7, 13

Rule 208(b)(1)(C), SCRCF 8, 13

Rule 210(h), SCACR	13
Rule 212, SCACR	13

STATEMENT OF ISSUES ON APPEAL

- 1 When the Appellant's "Statement of Issues Presented" fails to include any complete or specific assignments of error, should the Court of Appeals dismiss the appeal pursuant to Rule 208(b)(1)(B), SCACR?
- 2 Where the Appellant has failed to appeal from separate rulings of fact and law of the Trial Judge that support the judgment, must the Court of Appeals affirm the Trial Judge's Order?
- 3 Where the Appellant failed to offer evidence that supports each of the elements of his claim or defense, was summary judgment properly granted by the Trial Court under RULE 56, SCRCP?
- 4 When the Appellant failed to comply with the requirements of Rule 56(f), SCRCP, by failing to submit affidavits explaining why discovery was not completed within the time limits of the Scheduling Order, why the Motion for Continuance was not timely served, or what relevant evidence the Appellant believed the delays would enable him to uncover, did the Trial Judge properly deny the Appellant's Motion for Continuance?

STATEMENT OF THE CASE

This action was commenced by Harbourside Community Bank, as servicing agent for the Savannah Bank, N A (hereinafter, the "Savannah Bank"), seeking to enforce a note and foreclose a mortgage given by Alphonse Stalliard (hereinafter, "Stalliard"), on August 24, 2009. Stalliard filed his answer on or about January 5, 2010, in which he denied the material allegations of the Savannah Bank's Complaint, and alleged certain affirmative defenses. On May 14, 2010, a Consent Order for Bifurcation was entered that bifurcated the trial of the mortgage foreclosure action from the trial related to the Savannah Bank's claim for a deficiency judgment and Stalliard's defenses to it.¹ The Savannah Bank filed its Amended Complaint on May 18, 2010.² The trial of the foreclosure case was held on June 25, 2010, and resulted in an Order of Judgment and Foreclosure, in the amount of One Million Eight Hundred Thirty Four Thousand Five Hundred Four and 41/100 (\$1,834,504 41) Dollars. The subject property was thereafter sold on August 2, 2010, to the Savannah Bank, and the bid at the foreclosure sale was Six Hundred Fifty Thousand and no/100 (\$650,000 00) Dollars.

On November 10, 2010, a Consent Scheduling Order was entered in the case that set the following deadlines:

1. Stalliard was required to file an answer to the Amended Complaint of the Savannah Bank on or before November 15, 2010.
2. Stalliard was required to identify his experts by December 1, 2010.
3. The Savannah Bank, was required to identify its experts by January 1, 2011.

¹ See May 14, 2010, Consent Order of Bifurcation (R ____)

² See May 18, 2010, Amended Complaint (R ____)

- 4 Stallhard and the Savannah Bank were required to complete discovery by February 15, 2011, and the time to respond to discovery is twenty (20) days upon penalty of sanctions in the amount of Five Hundred and no/100 (\$500 00) Dollars per day for every day this Court adjudged the discovery to be late
- 5 Stallhard and the Savannah Bank were required to file all pretrial motions by March 15,2011³

Stallhard filed his Answer to the Amended Complaint on November 15, 2010 The Savannah Bank filed its Reply and Restatement of Affirmative Claim on November 17, 2010 and on March 15, 2011, the Savannah Bank filed its Notice of Motion and Motion for Summary Judgment, supported by Affidavit of Sally A Gardocki, Esq , the Affidavit of Diane Sala, and the Affidavit of Attorneys Fees of the Savannah Bank's counsel⁴ On April 8, 2011, a hearing was noticed on the Savannah Bank's Notice of Motion and Motion for Summary Judgment⁵

On May 2, 2011, Stallhard filed his Motion to Enlarge Time for Discovery and to Continue Hearing on Plaintiff's Motion for Summary Judgment⁶ On May 11, 2011, the Savannah Bank filed its Return to Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank's Motion for Summary Judgment⁷ The Savannah Bank's Motion for Summary Judgment was heard on May 16, 2011, and on June 2, 2011, the Hon

³ See November 10, 2010, Consent Scheduling Order (R ____)

⁴ See March 15, 2010 Notice of Motion and Motion for Summary Judgment, Affidavit of Sally A Gardocki Esq , Affidavit of Diane Sala, and, Affidavit of Attorney s Fees (R ____)

⁵ See April 8, 2011 Notice of Hearing on Plaintiff's Summary Judgment Motion (R ____)

⁶ See May 2, 2011, Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank s Motion for Summary Judgment (R ____)

⁷ See May 11, 2011, Return to Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank s Motion for Summary Judgment (R ____)

Marvin H Dukes, III, entered his Order granting the Savannah Bank's motion ⁸

Stallhard timely served his Notice of Appeal on July 5, 2011 ⁹

⁸ See June 2, 2011, Order Granting Summary Judgment (R ____)

⁹ In his 'Statement of the Case', Stallhard makes statements that are not supported by the record for this case. Specifically on page 3 of the Initial Brief of the Appellant, Stallhard alleges that his attorney spoke to a material witness who was then a criminal defendant in a pending case before the United States District Court. There is nothing in the record that supports the statement concerning any criminal prosecution of and alleged witness

STATEMENT OF FACTS

Insofar as is necessary for a resolution of this appeal, the Savannah Bank has set forth the facts it believes to be relevant in the arguments that appear below ¹⁰

¹⁰ In his Statement of the Facts, Stalliard makes statements that are unsupported by the Record. In the last paragraph on page 4 of the Initial Brief of the Appellant, Stalliard includes text related to criminal proceedings against an individual. The record does not contain evidence in support of this statement. In addition, on page 5, Stalliard alleges that the loan that he obtained from the Savannah Bank was ‘ a strawman loan similar to loans the media and Federal indictments have described in similar Beaufort County transactions involving the same person(s) involved in Stalliard’s loan. There is nothing in the record to support the statement. Finally, on page 6 of the Initial Brief of the Appellant, the following statement appears: Mr. Stalliard testified that he gave S.C. a power of attorney, but a copy of that document is not in the bank file or closing file, and it is believed the power of attorney was for another property in New Jersey. This statement is supported only by text in an affidavit submitted by Stalliard (See May 13, 2011, Stalliard Affidavit, R. ____) at the hearing on the Motion for Summary Judgment. The Trial Judge specifically stated that he was not accepting this particular statement, and Stalliard has not appealed from that ruling (See June 2, 2011, Order Granting Summary Judgment, pp. 5-6, note 10, R. ____). Accordingly, there is nothing in the record to support this statement in the Statement of Facts.’

ARGUMENT NUMBER 1

STALLIARD'S STATEMENT OF ISSUES ON APPEAL DOES NOT SPECIFY THE ERROR OF LAW OR FACT THAT STALLIARD APPEALS FROM THE STATEMENT OF ISSUES ON APPEAL VIOLATES RULE 208(b)(1)(B), SCACR, AND THE APPEAL SHOULD BE DISMISSED

In his Initial Brief, Stallhard states the following as the "Issues on Appeal"

- 1 DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT
- 2 DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE¹¹

Rule 208(B)(1)(B), SCACR, reads as follows

(B) Statement of Issues on Appeal A statement of each of the issues presented for review The statement shall be concise and direct as to each issue, and may be stated in question form Broad general statements may be disregarded by the appellate court Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal

Rule 208(B)(1)(B), SCACR, requires an appellant to state in concise terms the precise issue that the appellant wishes for the appellate court to review The appellate court will not consider any point not set forth in the Statement of Issues on Appeal¹²

Rule 208(B)(1)(B), SCACR, has been interpreted to require that each ground be "so distinctly stated that the reviewing court may at once see the point at which it is called on to decide without having to "grope in the dark" to ascertain the precise point at issue"¹³

Stalliard has failed to state any legal or factual point in the "Statement of Issues on Appeal" Under the express language of Rule 208(B)(1)(B), SCACR, "Ordinarily, no point

¹¹ See Initial Brief of Appellant, p 3

¹² Rule 208(b)(1)(B), SCACR, *Bean v Carolina Cent Railroad Company, Inc* , 392 S C 532, 709 S E 2d 99 (SCApp 2011), *Normandy Corp v South Carolina Department of Transportation*, 386 S C 393, 688 S E 2d 136 (SCApp 2009)

¹³ *Jones v Lott*, 387 S C 339, 692 S E 2d 900 (S C 2010)

will be considered which is not set forth in the statement of the issues on appeal ”

Because Stallhard has failed to state any legal or factual issue with any degree of particularity, his appeal should be dismissed under the authority of Rule 208(b)(1)(B), SCACR

ARGUMENT NUMBER 2

BECAUSE STALLIARD FAILED TO APPEAL FROM FINDINGS IN THE TRIAL JUDGE'S ORDER THAT INDEPENDENTLY SUPPORT THE JUDGMENT, THE OTHER FINDINGS ARE NOW THE LAW OF THE CASE, AND STALLIARD'S APPEAL SHOULD BE DISMISSED UNDER THE "TWO ISSUE RULE"

In his June 2, 2011, Order, the Trial Judge found that Stalliard's loan with the Savannah Bank, and the construction of the house that was accomplished with the proceeds from the loan, were handled on Stalliard's behalf by individuals Stalliard authorized to act on his behalf ¹⁴ The Trial Judge found, based on Stalliard's own testimony, that individuals named Steve Corba and Blair Witkowski were acting with his authorization and on his behalf in their dealings with the Savannah Bank in connection with this loan. The essence of Stalliard's argument is that the Savannah Bank relied on bad information when it made the loan to Stalliard. That is of no avail to Stalliard, though, because the only evidence in the record is that the information, bad or not, was supplied by those Stalliard put in position to provide the information, and who were acting on Stalliard's behalf ¹⁵ The Trial Judge so found and Stalliard has not appealed from this finding. Further, there is no

¹⁴ See June 2, 2011, Order of Hon. Marvin H. Dukes, III, Paragraphs 3, 5, 18, 19, 21, 22, 23, 24 and 25 (R. ____)

¹⁵ Indeed, Stalliard admits as much. In his Statement of Facts in the Initial Brief of the Appellant, the following statement appears:

Mr. Stalliard did not deny that he was aware that S. C. and B. W. were securing a loan to purchase property in his name and construct a residence, and he did not deny that he executed a power of attorney giving his settlement agent the authority to close the transaction.

Under Rule 208(b)(1)(C), SCRCP, the following appears:

any matters stated or alleged in appellant's statement shall be binding on appellant.

evidence in the record to contradict the Trial Judge's finding¹⁶

The Trial Judge also credited the testimony of Sally A Gardocki, who closed the loan for Stalliard under the authority of a Power of Attorney given by Stalliard. Ms Gardocki testified that Stalliard was made aware of the form and content of the closing documents, and that he approved the same. Ms Gardocki's testimony was

Mr Stalliard was made aware of the form and content of the closing documents, including but not limited to the Note, Mortgage and HUD-1 Closing Statement, and Alphonse Stalliard approved the same and authorized the closing.¹⁷

Stalliard did not raise any issue related to this finding in his "Statement of Issues on Appeal, and did not appeal this finding

The Trial Judge found that Stalliard signed a loan modification document eight (8) months after the closing of the loan in which he expressly affirmed the validity of the loan made to him by the Savannah Bank.¹⁸ Among other things, the Trial Judge based his finding that Stalliard's defenses failed based on the finding related to the loan modification.¹⁹ Although Stalliard mentions this finding in his Initial Brief, he raised no

¹⁶ Stalliard went so far as to testify that Steve Corba was acting pursuant to a power of attorney given to him by Stalliard in connection with this matter (See Deposition of Alphonse Stalliard, p 29, l 24 to P 30, l 25, R ____). In an Affidavit that was not served until the day of the Summary Judgment hearing, Stalliard attempted to repudiate his own testimony on this point. While the Trial Judge accepted the late-filed affidavit, he did so stating that the proffered testimony relating to Mr Corba and the power of attorney would not be accepted or considered by him. Stalliard has not appealed from that ruling of the Trial Judge. See June 2, 2011, Order of Hon Marvin H Dukes, III, pp 5-6, Note 10, Paragraph 3 (R ____), Deposition of Alphonse Stalliard, p 30, l 21-25 R (____)

¹⁷ Affidavit of Sally A Gardocki, Paragraph 5 (R ____). Stalliard admits that he signed the Power of Attorney, and that he knew Ms Gardocki would use it to close the loan. See Deposition of Alphonse Stalliard, p 11, l 24, to p 12, l 25, p 17, l 17 to p 18, l 14, Affidavit of Sally A Gardocki, Paragraphs 4 and 5 (R ____). Stalliard did not dispute Ms Gardocki's affidavit testimony quoted above. He testified that he did not recall. See May 13, 2011, Affidavit of Alphonse Stalliard, paragraph 4 (R ____)

¹⁸ See Affidavit of Diane Sala, Paragraphs 3, 5 and Exhibit B

¹⁹ See June 2, 2011, Order of Hon Marvin H Dukes, III, Para 6, 7, 26 and 27 (R ____)

issue concerning it in his “Statement of Issues on Appeal” Further, he does not challenge the finding, and does not challenge the finding that he executed the Loan Modification so that he could continue to receive the benefits of the loan ²⁰ Indeed, in Stalliard’s own argument, he asserts that he signed the Loan Modification to ensure that the construction of the house would be completed ²¹

Stalliard did not appeal from this finding of the Trial Judge ²² The only mention that Stalliard makes of this finding is as follows

Harbourside argued at hearing that independent of whether it had any duty to verify the income and loan application data, Stalliard are expressly ratified the loan by executing a loan modification tendered to him in 2008 toward the end of the construction In fact Stalliard testified that the loan modification document was tendered to him not by the bank, but through B W , with whom the bank was corresponding, and that he was led by B W to believe that he had to sign the modification document to ensure that the construction would be finished ²³

Each of these unchallenged findings forms a separate and independent basis for the granting of the Motion for Summary Judgment filed by the Savannah Bank Stalliard did not file an appeal from these findings, and these findings are now the law of the case

Under the two issue rule, where a decision is based on more than one ground, the

²⁰ See June 2, 2011, Order of Hon Marvin H Dukes, III, paragraphs 6, 7 and Note 18 (R ____)

²¹ See Initial Brief of Appellant, pp 8 and 9 This is consistent with Stalliard s testimony in his affidavit, as follows

I executed a loan modification documented in this matter in May, 2008 because I was informed by e-mail from Blair Witkowski that Harbourside s personnel had contacted him and that the execution of the document was necessary to ensure funding and completion of the construction of the home on the property

See May 13 2011, Affidavit of Alphonse Stalliard, paragraph 10 (R ____)

²² No issue related this finding of the Trial Judge is by Stalliard in his Statement of Issues on Appeal See Argument Number 1 above

²³ See Initial Brief of Appellant, pp 8-9

appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case ²⁴ Further, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted ²⁵

²⁴ *Graves v Horry-Georgetown Technical College*, 391 S C 1, 704 S E 2d 350 (SCApp 2010)

²⁵ Rule 56, SCRCF, *Ellis v Davidson*, 358 S C 509, 518, 595 S E 2d 817, 822 (SCApp 2004)

ARGUMENT NUMBER 3

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT STALLIARD'S ARGUMENT THAT ANY ACT OF THE SAVANNAH BANK CONSTITUTED LENDER NEGLIGENCE, OR THAT SUCH IS RECOGNIZED AS A DEFENSE TO A SUIT TO ENFORCE A NOTE AND MORTGAGE

Under Rule 56, SCRPC, Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law²⁶ In determining whether any material issues of fact exist, the evidence and all inferences that can be drawn from the evidence must be viewed in the light most favorable to the party resisting the motion²⁷ The purpose of Summary Judgment is to expedite the disposition of cases that do not require the services of a fact finder²⁸ Summary Judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ It is not sufficient that one create an inference that is not reasonable, or an issue of fact that is not genuine²⁹ For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action³⁰

In his second argument, Stalliard argues that there is evidence in the record of "lender negligence", "unconscionable conduct", and "unclean hands" on the part of the

²⁶ *Cafe Associates Limited v Gengross*, 305 S C 6, 406 S E 2d 162 (1991)

²⁷ *Redwend Limited Partnership v Edwards*, 354 S C 58, 581 S E 2d 496 (SCApp 2003)

²⁸ *Dawkins v Fields*, 354 S C 58, 580 S E 2d 433 (2003)

²⁹ *Priest v Brown*, 302 S C 405, 396 S E 2d 638 (SCApp 1990)

³⁰ *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, 297 S C 176, 375 S E 2d 331 (SCApp 1988)

Savannah Bank sufficient to defeat the Motion for Summary Judgment ³¹ Stalliard's argument fails for the following reasons

1 Parts of Stalliard's argument are based on material that is not in the Record for this case. The entire first paragraph appearing under Stalliard's "Argument II" consists of matters that were not argued to the Trial Judge, and which do not appear in the record for this case. The Court of Appeals should disregard this text, under the authority of Rule 210(h), SCACR, which reads

Except as provided by Rule 212 and Rule 208 (B)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the record on appeal.

Also, an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review ³²

2 Stalliard's argument that an issue of fact exists is based on the deposition testimony of Susan Kieffer, a former employee of the Savannah Bank. Ms. Kieffer's testimony does not reveal any evidence to support Stalliard's claims. With respect to Ms. Kieffer's testimony, Stalliard raises 3 points, as follows

(a) Stalliard's first point is that Ms. Kieffer did not have a strong recollection of the detail of what she or her superiors did to verify the information contained on Stalliard's

³¹ The Savannah Bank responds to Stalliard's second argument reserving its rights under the arguments presented under Argument Number 1 above. The Savannah Bank reiterates that Stalliard raised no issue concerning lender negligence, unconscionable conduct, and 'unclean hands' in his Statement of Issues on Appeal, and these arguments should be disregarded by this Court. Rule 208(b)(1)(B), SCACR, *Bean v. Carolina Cent. Railroad Company, Inc.*, *supra*, *Normandy Corp. v. South Carolina Department of Transportation*, *supra*, *Jones v. Lott*, *supra*.

³² *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (S.C. 1998). We point out again that no issue concerning this text was raised in Stalliard's Statement of Issues on Appeal. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal. Rule 208(b)(1)(B), SCACR.

loan application ³³ Stalliard does not point to any authority for the proposition that the mere fact that a particular witness may not have a strong recollection on a given point is sufficient to create a genuine issue of material fact That is especially so in this case, since Stalliard has failed to point to any authority for the proposition that the matters and things testified to by Ms Kieffer are evidence of the existence of any of the elements of the defenses asserted by Stalliard ³⁴

(b) Stalliard's second point relates to a notation on an "Underwriting Approval Sheet" that was made by a person other than Ms Kieffer ³⁵ Ms Keiffer's testimony was

Q Okay On number 8 there's something on the next page It says handwritten stated income next to the typewritten verbal VOE, which I assume is verification of income, within 14 days of closing Who would have written stated income?

A I'm not sure on that one

Q And what does stated income mean in your banking parlance?

A Stated income, he stated his income

Q What does that mean? Why would somebody write that next to verbal verification of income within 14 days?

Mr Coltrane object to the form of the question You're asking the witness to speculate about something somebody else did You can answer it if you can
By Mr Mogil

Q And I'll restate it to say it says on here stated income Do you know why it says stated income next to verbal VOE?

A No ³⁶

In the absence of some evidence as to who made the notation that Ms Kieffer was

³³ See Initial Brief of Appellant, p 8

³⁴ Stalliard offered no expert testimony, by way of affidavit or otherwise, that any act of the Savannah Bank was evidence of any misfeasance or malfeasance on the part of the Savannah Bank, and offered no testimony from any witness that any of the things testified to by Ms Keiffer are evidence of any misfeasance or malfeasance on the part of the Savannah Bank As was stated above, an issue is material only if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, supra

³⁵ See Initial Brief of Appellant, p 8

³⁶ See Deposition of Susan Keiffer, p 40, l 4 to p 41, l 2, Exhibit (R ____)

questioned about, for what reason the notation was made, and some testimony that the indication of “stated income” on the “Underwriting Approval Sheet” is evidence of “lender negligence”, “unconscionable conduct”, or “unclean hands” on the part of the Savannah Bank, Ms Keiffer’s testimony is insufficient to create any genuine issue of material fact ³⁷

(c) Stallhard’s third point also relates to the “Underwriting Approval Sheet” that is Exhibit 1 to Susan Keiffer’s deposition ³⁸ Stallhard argues that Ms Keiffer’s inability to explain why one item was not initialed by Ms Keiffer creates an issue of fact sufficient to preclude summary judgment ³⁹ Ms Keiffer’s testimony on this point was

- Q The last item says number 30, compliance to be reviewed and confirmed accurate to the processor for P but no initials next to that
- A Alright Compliance to be reviewed and confirmed accurate Well–
- Q And that’s the only item on this sheet that has the P in it that’s not initialed Do you remember why that was initialed on this one?
- A No Compliance to be reviewed would be a processors–it would be underwriting–I mean compliance
- Q It says P there next to 30, right?
- A I know
- Q Are you saying that’s abnormal, it shouldn’t say P?
- A Yes
- Q Who would have created this form?
- A I’m not sure who created it
- Q Who normally created when you were working there?
- A I guess the compliance officer, I’m not sure
- Q Earlier you testified that the underwriter would have typed in these conditions?
- A Yes
- Q But the form itself in terms of whose job it was you don’t know who created that?
- A The underwriter would have done this

³⁷ An issue is material only if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc supra*

³⁸ See Deposition of Susan Keiffer, Exhibit 1 (R ____)

³⁹ See Initial Brief of Appellant, p 8

- Q So on this one you believe the underwriter put P when it normally would be something else?
- A Yeah
- Q And who was the underwriter on this file?
- A Kris Parker
- Q Do you recall any other loans, just out of your recollection where you worked on, where it would have said P there?
- A No, I can't remember ⁴⁰

As with the previous testimony of Ms Keiffer, the absence of some evidence as to who made the notation that Ms Kieffer was questioned about, for what reason the notation was made, and some testimony, expert or otherwise, that the notation is evidence of a "lender negligence", "unconscionable conduct", or "unclean hands" on the part of the Savannah Bank, there is simply no evidence that creates any genuine issue of material fact ⁴¹

Stalliard concludes his argument with the following assertion " In sum, [Appellant] argues that Harbourside owed him a duty of care to properly underwrite his loan, verify the information on his loan application including his income, and make the loan according to the conventional loan underwriting guidelines in force at the time "⁴² Stalliard fails to provide any evidence from any expert or any other person that any of the acts complained of by Stalliard are evidence that the Savannah Bank failed to do these things Because Stalliard has failed to offer evidence in support of these arguments, there is no genuine issue of material fact present with respect to them ⁴³

⁴⁰ See Deposition of Susan Keiffer, p 43, l 19 to P 45, l 11 (R ____)

⁴¹ Again, an issue is material only if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, *supra*

⁴² See Initial Brief of Appellant, p 9-10

⁴³ Rule 56, SCRPC, *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, *supra*

Because there is no evidence in the record that any of the things complained of by Stalliard are evidence of some misfeasance or malfeasance on the part of the Savannah Bank, Stalliard's argument is simply conjecture and speculation that the a jury could find Ms Keiffer's testimony to be evidence of something Arguments that are based on conjecture and speculation are insufficient to create a genuine issue of material fact ⁴⁴

⁴⁴ *McKnight v South Carolina Dept of Corrections*, 385 S C 380, 684 S E 2d 566 (SCApp 2009), *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, *supra*, *Priest v Brown*, *supra*

ARGUMENT NUMBER 4

STALLIARD MOVED FOR A CONTINUANCE OF THE SCHEDULED HEARING ON THE SAVANNAH BANK'S MOTION FOR SUMMARY JUDGMENT BUT DID NOT SUBMIT ANY AFFIDAVIT EXPLAINING WHY DISCOVERY WAS NOT COMPLETED WITHIN THE TIME LIMITS OF THE SCHEDULING ORDER, WHY THE MOTION WAS FILED MORE THAN TWO MONTHS AFTER THE DISCOVERY DEADLINE PASSED AND MORE THAN ONE MONTH AFTER THE SAVANNAH BANK FILED ITS MOTION FOR SUMMARY JUDGMENT, OR WHAT RELEVANT EVIDENCE STALLIARD BELIEVED THE DELAY WOULD HAVE ENABLED HIM TO UNCOVER UNDER RULE 56(F), SCRPC, THE TRIAL JUDGE PROPERLY DENIED THE MOTION

The Record for this case reveals the following time line of the various actions undertaken by the parties to this case is relevant to Stalliard's Motion to Enlarge and for Continuance ⁴⁵ The time line is as follows

- 1 This case was commenced by the filing of a Summons and Complaint on August 24, 2009
- 2 Stalliard filed his Answer and asserted Affirmative Defenses on January 5, 2010
- 3 Stalliard filed Interrogatories and a Notice to Produce on January 7, 2010
- 4 The Savannah Bank responded to the Interrogatories and Notice to Produce on February 16, 2010, and supplemented the interrogatory answers on March 9, 2010
- 5 The Savannah Bank and Stalliard entered in to a Consent Order to Bifurcate Stalliard's defenses/counterclaims from the Foreclosure action on May 13, 2010
- 6 The foreclosure action was heard on Jun 25, 2010, and the subject property was sold on August 2, 2010
- 7 On November 10, 2010, the Savannah Bank and Stalliard entered into a Consent Scheduling Order which set the following deadlines
 - (a) Stalliard was required to file an answer to the Amended

⁴⁵ The Savannah Bank makes this argument reserving its arguments presented under Argument Number 1 above

Complaint of the Savannah Bank, on or before November 15, 2010

- (b) Stalliard was required to identify his experts by December 1, 2010
 - (c) The Savannah Bank was required to identify its experts by January 1, 2011
 - (d) The Parties were required to complete discovery by February 15, 2011. The time to respond to discovery was shortened to twenty (20) days
 - (e) The Parties were required to file all pretrial motions by March 15, 2011
- 9 The Savannah Bank served its interrogatories and notice to produce on Stalliard on November 16, 2010
- 11 Stalliard did not respond to the discovery requests in 20 days, and on January 3, 2010, the Savannah Bank filed its Motion to Compel
- 12 Prior to the February 15, 2011, deadline for completion of discovery, Stalliard noticed the depositions of Judd Tracy and Susan Keiffer. Although the depositions were noticed prior to the deadline, the depositions were taken subsequent to the discovery deadline in order to accommodate the witnesses. No party objected to taking the depositions subsequent to the discovery deadline.
- 14 On March 15, 2011, the Savannah Bank filed and served its Motion for Summary Judgment on Stalliard.
- 15 On May 2, 2011, more than two months after the discovery deadline passed, and more than one and one half months after the Savannah Bank served its Motion for Summary Judgment, Stalliard moved to extend the time for discovery and to continue the hearing on the Savannah Bank's summary judgment motion.⁴⁶

In the Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank's Motion for Summary Judgment, Stalliard made the following claims,

⁴⁶ See May 11, 2011, Return to Stalliard's Motion (R ____)

none of which were supported by an affidavit

1 Stalliard had recently contacted an unidentified “material” witness, said to be previously “believed to be unavailable.” No facts were provided by affidavit as to what efforts to contact this witness had been made in the 16 months that had elapsed since Stalliard first appeared in this case, and no facts were provided by affidavit as to what relevant information was learned from the unidentified witness, or what relevant information he believed would be uncovered through further discovery.⁴⁷

2 That he tendered supplemental discovery requests to the Savannah Bank. These requests were served April 25, 2011, in violation of the Scheduling Order, without leave of Court.⁴⁸

3 Stalliard made reference to material he contended should have been produced by the Savannah Bank in response to his discovery requests. No explanation was given as to why a motion to compel was never filed, or why Stalliard did not raise this issue for more than a year after the Savannah Bank responded to Stalliard’s discovery requests.⁴⁹

4 Stalliard stated he wished to depose an additional unidentified officer of the Savannah Bank, without a supporting affidavit identifying the officer, stating why the

⁴⁷ The bare assertions of Stalliard’s Motion were not a sufficient basis for the Court to grant it. Under Rule 56(f), SCRCP, a party must file affidavits setting forth the reasons he has been unable to secure evidence. Rule 56(f), SCRCP, reads:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just

⁴⁸ Again, Stalliard failed to submit an affidavit indicating what evidence he believed would be revealed through the late filed discovery requests.

⁴⁹ No facts are provided by affidavit as to why the information Stalliard sought would have been relevant.

deposition was not taken between January 5, 2010, when he appeared in the case, and February 15, 2011, when the deadline for discovery passed, or what evidence he believed would be revealed through the deposition

5 Item number 6 in Alphonse Stalliard's motion revealed his intent. Having seen the Savannah Bank's summary judgment motion, he wished to engage in a fishing expedition in effort to find some way to controvert the motion. Stalliard wished to engage in discovery to " fully determine *if there are material fact issues* " (emphasis supplied) ⁵⁰ Under Rule 56(f), SCRPC, Stalliard was required to show by affidavit what relevant evidence he believed to exist, and he did not do so ⁵¹

Stalliard failed to provide any basis for the Trial Judge to grant his Motion, and he failed to comply with the requirements of Rule 56(f), SCRPC. In order to have made the showing necessary to extend the discovery period and continue the hearing on the Savannah Bank's Motion for Summary Judgment, Stalliard was required to file an affidavit or affidavits showing facts that were sufficient to justify the same ⁵²

Because Stalliard failed to show any facts by affidavit as to why discovery was not completed within the time limits of the Scheduling Order, why his Motion was filed more than two months after the discovery deadline passed and more than one month after the Savannah Bank filed its Motion for Summary Judgment, or what relevant evidence the

⁵⁰ See Stalliard's Motion to Enlarge Time for Discovery and to Continue Hearing on Plaintiff's Motion for Summary Judgment, page 2, paragraph 6

⁵¹ Stalliard has not filed any affidavit demonstrating any likelihood that further discovery will uncover any relevant evidence, which was necessary in order for the Trial Court to have granted his motion. See *Dawkins v Fields*, 354 S C 58, 580 S E 2d 433 (S C 2003)

⁵² *Doe ex rel Doe v Batson*, 435 S C 316, 548 S E 2d 854 (S C 2001)

delays would have enabled him to uncover, the Trial Judge properly denied the Motion ⁵³

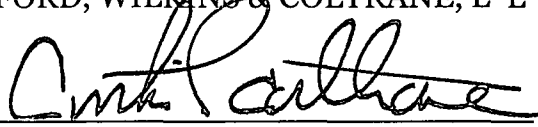
⁵³ See June 2, 2011, Order of Hon Marvin H Dukes, III, p 5, n 9 (R____)

CONCLUSION

Stalliard has failed to demonstrate the existence of any genuine issue of material fact upon which this Court could reverse the Trial Judge's Order granting Summary Judgment. In addition, Stalliard has failed to appeal alternate findings of the Trial Judge that support the Trial Judge's Order. For these reasons, the Savannah Bank urges this Court to dismiss this appeal and affirm June 2, 2011, Order of the Hon. Marvin H. Dukes, III.

Respectfully Submitted,

ALFORD, WILKINS & COLTRANE, L L C

By 

Curtis L. Coltrane
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for the Respondent

Hilton Head Island, South Carolina

This 5th Day of October, 2011

The South Carolina Court of Appeals

Harbourside Community Bank, As
Servicing Agent for The Savannah
Bank, N A , Respondent,

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc , Defendants,
Of Whom Alphonse Stalliard is the, Appellant

The Honorable Marvin H Dukes, III
Beaufort County
Trial Court Case No 2009-CP-07-03945

ORDER

For good cause having been shown, the time for the Respondent's Initial Brief and Designation of Matter to be served and filed in the above entitled matter is hereby extended until October 6, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc Michael W Mogil, Esquire
Curtis Lee Coltrane, Esquire

FILED

Warter 9/7/11

ALFORD, WILKINS & COLTRANE, L L C
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Gregory M Alford*
John W Wilkins
Curtis L Coltrane+
Scott M Wild
Mitchell J Thoreson
*Also Member Georgia Bar
+Also Member Virginia Bar

September 2, 2011

Ms Lori Fields
SOUTH CAROLINA COURT OF APPEALS
Post Office Box 11629
Columbia, SC 29211

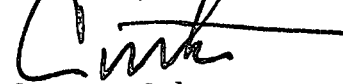
Re Harbourside Community Bank v Stallhard
Tracking Number 2011195508

Dear Ms Fields

I am counsel for Harbourside Community Bank in the above captioned appeal My initial brief and designation of matter is you next Wednesday, September 7, 2011 I am writing to request a 30 day extension of time to file the initial brief and designation of matter on behalf of the respondent Harbourside Community Bank I have discussed this request with the Appellant's attorney, Michael W Mogil, and he has authorized me to advise you that he does not object to my request I have also enclosed a filing fee in the amount of \$25 to cover this request I thank you for your help with this matter, and look forward to hearing from you soon I am,

Sincerely,

ALFORD, WILKINS & COLTRANE, L L C



Curtis L Coltrane

CLC/bms
enc As Stated
cc Michael W Mogil Esq

9-6-11 1st motion
10-6-11

LAW OFFICE OF MICHAEL W MOGIL, P A

2 Corpus Christie Place, Ste 303

Hilton Head Island, SC 29928

Telephone (843) 785-8110

Fax (843) 785-9676

Email mmogil@mogillaw.com

August 11, 2011

V Claire Allen
Deputy Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

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SC Court of Appeals

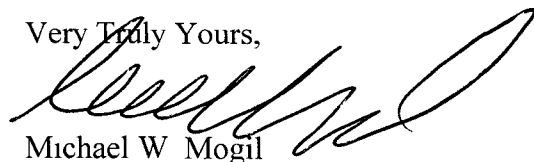
Via Fax 803-734-1839 and US Mail

Re Harbourside v Stalliard, Alphonse
Court of Appeals Docket No 2011195508

Dear Ms Allen,

In response to your letter of August 10, 2011 regarding ordering the transcript for the above-referenced appeal, no record was taken during the summary judgment hearing in the case of Harbourside Community Bank v Stalliard, 2009-CP-07-03945, in Beaufort County. Therefore, no transcript is available.

Very Truly Yours,



Michael W Mogil

cc Curtis Coltrane, Esq



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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August 10, 2011

Michael W. Mogil, Esquire
Law Office of Michael W. Mogil, P.A.
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928

Re: Haibourside v. Stalliard, Alphonse
2011195508

Dear Mr. Mogil:

We have received your Appellant's Initial Brief in the above case. However, we have not received notification of the transcript being ordered or received. Please notify this office of the date the transcript was ordered and received within ten (10) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Curtis Lee Coltrane, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H Dukes, III, Master In Equity for Beaufort County, South Carolina

Case No 2009-CP-07-3945

HARBOURSIDE COMMUNITY BANK

Respondent,

v

ALPHONSE STALLIARD, et al

Defendants,

Of Whom Alphonse Stalliard is the,

Appellant

DESIGNATION OF MATTER TO BE INCLUDED ON THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal

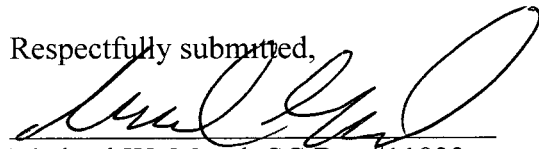
- 1 Deposition transcript of Alphonse Stalliard
- 2 Deposition transcript of Susan Keiffer
- 3 Susan Keiffer Deposition Exhibits 1, 2 and 3
- 4 Memorandum in Opposition to Summary Judgment
- 5 Stalliard Affidavit of May 13, 2011 with email from B W attached thereto
- 6 Motion to Enlarge filed by Appellant and dated May 2, 2011

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AUG 08 2011
SC Court of Appeals

I certify that this designation contains no matter which is irrelevant to this appeal

August 5 , 2011

Respectfully submitted,



Michael W Mogil, SC Bar #11933
Law Office of Michael W Mogil, P A
2 Corpus Christie Place, Ste 303
(843) 785-8110
Hilton Head Island, SC 29928
Attorney for Appellant

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Honorable Marvin H Dukes, III, Master-In-Equity for Beaufort County, South Carolina

Case No 2009-CP-07-03945

Harbourside Community Bank,
As Servicing Agent for
The Savannah Bank, N A ,

Respondent,

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc ,

Defendants,

Of Whom Alphonse Stalliard is the,

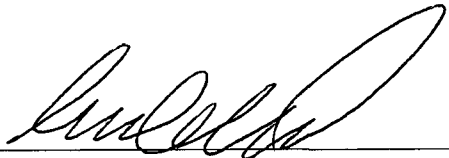
Appellant

PROOF OF SERVICE

I, Michael W Mogil , attorney for the Appellant, hereby certify that, on this 5th day of August, 2011, I served a copy of the Initial Brief of Appellant and Designation of Record on Appeal upon the Respondent, via US Mail, first class, postage pre-paid to the following

Curtis L Coltrane
Alford Wilkins and Coltrane LLC
PO Drawer 8008
Hilton Head Island, SC 29938-8008

August 5 , 2011


Michael W Mogil

2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928
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AUG 08 2011

SC Court of Appeals

LAW OFFICE OF MICHAEL W MOGIL, P A

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August 5 , 2011

The Honorable Tanya Gee
South Carolina Court of Appeals Clerk of Court
PO Box 11629
Columbia, SC 29211

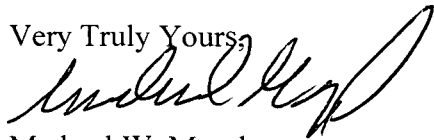
Via US Mail

Re Harbourside Community Bank v Alphonse Stalliard, et al Appeal #2011195508

Dear Ms Gee,

Enclosed for filing please find one copy of the Initial Brief and the Designation of Matter to Be Included in the Record on Appeal, along with Proof of Service on Curtis L Coltrane, attorney for the Respondent, in the above-referenced case

Very Truly Yours,



Michael W Mogil

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H Dukes, III, Master-In-Equity for Beaufort County, South Carolina

Case No 2009-CP-07-03945

Harbourside Community Bank,
As Servicing Agent for
The Savannah Bank, N A ,

Respondent,

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc

Defendants

Of Whom Alphonse Stalliard is the

Appellant

INITIAL BRIEF OF APPELLANT

Michael W Mogil #11933
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Tel (843) 785-8110
Attorney for Appellant

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- 1 DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT
- 2 DID THE TRIAL COURT ERR IN DENYING APPELLANT’S MOTION FOR A CONTINUANCE

STATEMENT OF THE CASE

Harbourside Community Bank, as servicing agent for The Savannah Bank, N A (hereinafter “Harbourside” or “Respondent”) commenced this case on August 24, 2009 seeking to foreclose on a mortgage secured by real property titled in the name of the Appellant, Alphonse Stalliard, and seeking a deficiency judgment against Stalliard on its promissory note. The case was bifurcated by Consent Order entered May 14, 2010 wherein the parties agreed that the mortgage foreclosure would be tried first and any issues relating to the deficiency judgment and related claims or defenses would be tried separately. The mortgage foreclosure resulted in an Order of Judgment and Foreclosure in favor of the Plaintiff/Respondent in amount of \$ 1,834,504.48. Thereafter, on August 2, 2010 the subject property was sold at foreclosure sale, and the Respondent was the high bidder at \$ 650,000.

The parties entered into a Consent Order Scheduling Order dated November 10, 2010 and the case proceeded with additional discovery. Respondent filed a motion for summary judgment which was argued on May 16, 2011. Prior to the hearing, Appellant filed a Motion to Enlarge seeking time for additional discovery and requesting a continuance of the hearing based on newly obtained evidence and basis for conducting additional discovery as a result thereof. Specifically, Counsel for the appellant had located and talked to a material witness, who was then a criminal defendant in a pending case before the United States District Court. As a result of the information obtained from the witness, counsel sought to conduct additional discovery of witnesses and

information which had not been noticed by counsel before the discovery cut off The trial court denied the Motion to Enlarge and for a continuance and the hearing proceeded

After the hearing, the trial court granted summary judgment in favor of the Respondent bank The Appellant herein on appeal contends that summary judgment was not proper because deposition testimony solicited in the case¹ together with documents produced by the Respondent reflected that Respondent may not have taken proper of sufficient steps to verify the income demonstrated by Appellant's loan application, or to otherwise conduct full due diligence for the loan Appellant argues there exist material issues of fact which if proven at trial would support a defense of contributory negligence, or common law negligence, to the enforce ability of the note and loan Thus, Appellant argues that summary judgment was premature, and that the trial court should have permitted additional discovery on those facts and defenses

STATEMENT OF THE FACTS

Alphonse Stalliard was a 26 year old resident of New Jersey in 2007 when his name, social security number, and credit profile were used by third parties to secure a loan to purchase a lot at 10 Indigo Plantation Drive in Oldfield Plantation, Beaufort County for \$ 215,000 with a construction loan feature which resulted in a total loan of \$ 1,600,000 At lease one of those third parties, B W, has plead guilty to federal loan fraud charges in South Carolina relating to charges for using "straw men" borrowers to obtain purchase money and construction loans A second person whom Mr Stalliard identified in his deposition as S C is believed to be the additional defendant named in a recent indictment filed in New Jersey

¹ The deposition of Susan Keiffer was taken by consent just two business days prior to the summary judgment hearing and the transcript was not yet available at the time of hearing but the trial court permitted Appellant to proffer the relevant portions of Ms Keiffer s testimony

At the time of the loan was made in 2007, Mr Stalliard had worked in the United States in New York City for two years and according to his testimony, had never earned in excess of \$ 100,000 in one year Further, until his deposition in this case in February, 2011, Mr Stalliard had never been to Beaufort County, South Carolina The subject loan was a “straw man” loan similar to loans the media and federal indictments have described in similar Beaufort County transactions involving the same person(s) involved in Stalliard’s loan To wit, according to his deposition testimony and affidavit, Mr Stalliard’s loan application was submitted by individuals named S C , a resident of New Jersey, and B W , a resident of South Carolina ² Further, the loan application was managed by S C and Stalliard testified that B W made all payments due under the loan, directly to Harbourside, with funds that were not attributable to Mr Stalliard

The loan itself was closed with a power of attorney granted to a Hilton Head Island attorney, Ms Sally Gardocki Mr Stalliard did not allege or testify that Ms Gardocki breached any duty of care or was involved in any way with the wrongdoing by S C or B W Mr Stalliard did not deny that he was aware that S C and B W were securing a loan to purchase property in his name and construct a residence, and he did not deny that he executed a power of attorney giving his settlement agent the authority to close the transaction Mr Stalliard denied that he had any knowledge that the loan application prepared by Harbourside that S C allegedly executed for Mr Stalliard stated a monthly income of \$ 35,000 per month, and Mr Stalliard further denied that he was aware that false tax returns, showing 2005 and 2006 gross income in excess of \$ 350,000 per year, were submitted on his behalf

² Due to the fact that S C and B W are known to be the subject of ongoing federal criminal cases and investigations their full names are not used here and counsel will not use their full names pending further instruction from this Court

Ultimately construction was completed on the home using Harbourside's funds in the form of loan draws made directly to the builder(s), and the home was listed for sale Mr Stalliard defaulted on the Note, and the loan came due before the property could be sold

Mr Stalliard's asserted as a defense to the deficiency judgment in excess of one million two hundred thousand (\$ 1,200,000) dollars that Harbourside itself was negligent in making the loan to him because the bank failed to verify the information stated on the false loan application submitted to it by third party(s) and further failed to verify the data stated on the false tax returns submitted in support of that application Mr Stalliard also asserted at the summary judgment hearing that Harbourside should be barred from obtaining a judgment against him because its actions were unconscionable He was not qualified for a \$ 1.6 million loan and the loan should not have been made based on the communications between the bank and third parties Mr Stalliard testified that he gave S C a power of attorney, but a copy of that document is not in the bank file or closing file, and it is believed the power of attorney was for another property in New Jersey³

ARGUMENT

I STANDARD OF REVIEW FOR SUMMARY JUDGMENT

When reviewing a grant of summary judgment, the Court of Appeals applies the same standard that governs the Court of Common Pleas, namely, that summary judgment is proper as a matter of law only when there is no genuine issue as to any material fact Fleming v Rose, 350 S C 488, 493, 567 S E 2d 857, 860 (2002), see also Rule 56 (c) S C R C P On review, the appellant court will review "all ambiguities, conclusions, and inferences arising in and from the evidence in

³ Stalliard did not produce the Power of Attorney during discovery but rather testified that he had given a power of attorney and thus the trial record does not reflect that it actually exists or for what purpose it was given

a light most favorable to the appellant ” Willis v Wu 362 S C 146, 151, 607 S E 2d 63, 65 (2004) Thus, summary judgment is only appropriate when “plain, palpable, and indisputable facts exist on which reasonable minds cannot differ ” Byer v Connor, 307 S C 441, 445 415 S E 2d 796, 799 (1992) Conversely, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law, and summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is disagreement as to the conclusion to be draw from those facts Mulhern-Howell v Cobb, 362 S C 588, 608 S E 2d 587 (Ct App 2004), *citing*, Medical University of South Carolina v Arnaud, 360 S C 615, 602 S E 2d 747 (2004)

As set forth below, Appellant believes that based on the fact record before the trial court, trier of fact could determine that Respondent failed to exercise due diligence when underwriting and making the subject loan, and acted unconscionably Thus, Appellant requests this court set aside the Order of Summary Judgment herein, and remand the case for further proceedings

II THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT BECAUSE A TRIER OF FACT COULD DETERMINE THAT THE FACT THAT THE LOAN WAS APPLIED FOR BY THIRD PARTIES, TOGETHER WITH SUSAN KEIFFER’S TESTIMONY AND THE UNDERWRITING DOCUMENTS PRODUCED BY THE BANK ALL REFLECT THAT THE BANK DID NOT CONDUCT REASONABLE DUE DILIGENCE AND DID NOT VERIFY APPELLANT’S INCOME OR ABILITY TO PAY WHEN MAKING THE SUBJECT LOAN

The Dodd-Frank Wall Street Reform and Consumer Protection Act signed into law on July 21, 2010 (the “Dodd Frank Act”) codified what has long been the common law duty of lenders to verify the income data and supporting documents given to them in connection with a federally insured loan Similarly, the Federal Reserve Board’s Revised Regulation Z, 2008, imposes a firm

duty on lenders to verify data in FHA loans. The subject loan given to Stalliard was, by the bank's documentation, a "conventional loan" (Uniform Underwriting and Transmittal Summary Bates 0011). Thus common law underwriting duties and industry standards of care apply to this loan.

In fact, the record at the time of the summary judgment hearing reflected that no meaningful verification of the data provided by S C and B W to Harbourside took place. Susan Keiffer, the former Harbourside loan processor responsible for the Stalliard file testified at deposition that did not have strong recollection of the detail of what she or her superiors did to verify the information on Stalliard's loan application. Further, it was noted on the Underwriting Approval Sheet checklist for the loan that where verbal verification of income ("VOE") was instructed, someone at the bank wrote in "stated income" in its place ("Prior to Close Conditions, Item 9, Underwriting Approval Sheet, Bates 0468,0469 as part of the Record on Appeal in this case).

Further, where the checklist designated that the processor function was "Compliance to be reviewed and confirm accurate", Ms Keiffer could not explain why this one item on the page did not bear her initials, as did all of the other functions designated to the processor ("Prior to Close Conditions, Item 30, Underwriting Approval Sheet, Bates 0468,0469 as part of the Record on Appeal in this case). A trier of fact could reasonably conclude, for the purpose of a summary judgment motion, that the lender compliance and underwriting was not reviewed and confirmed as accurate in this case and that no income or data were verified. This failure would be and is lender negligence, which Stalliard argues should have defeated summary judgment in the trial court.

Harbourside argued at hearing that independent of whether it had any duty to verify the income and loan application data, Stalliard expressly ratified the loan by executing a loan modification agreement tendered to him in 2008 towards the end of the construction. In fact,

Stalliard testified that the loan modification document was tendered to him not by the bank, but through B W , with whom the bank was corresponding, and that he was led by B W to believe he had to sign the modification document to ensure that the construction would be finished

The South Carolina Court of Appeals has found that where a lender has engaged in conduct with unclean hands, that conduct can sustain a cause of action for lender liability even where the subsequent acts of the borrower are wrongful or negligent Wachovia Bank v Coffey, 389 S C 68, 698 S E 2d 244 (S C App 2010) Stalliard argued that Harbourside acted with unclean hands—to wit, the loan to Stalliard was negligently underwritten because Harbourside did not communicate directly with him at any point prior to the loan, because Harbourside did not verify his income or tax return date, and given that he had no ability to repay the loan, the loan was unconscionable There is recent precedent, albeit under New York State Law, that a lender making a loan to a borrower who cannot support the loan with his income can be found to be engaging in unconscionable conduct Emigrant Mortgage Company v Fitzpatrick, (Opinion No 09-10577, Supreme Court of New York, August 11, 2010) In the subject case, the loan underwriting documents in the lender's file reflected that the loan given to Stalliard required a monthly borrower contribution, described as a "negative cash flow" of \$ 10,241 63 (Uniform Underwriting and Transmittal Summary Bates 0011, inclusive in the Record on Appeal) The requirement to fund an outflow of \$ 10,241 63 required far more income than Stalliard had ever made

In sum, Respondent argues that Harbourside owed him a duty of care to properly underwrite his loan, verify the information on his loan application including his income, and to make the loan according to the conventional loan underwriting guidelines in force at the time This duty is particularly relevant and important in this case, where the person submitting the loan application was

not the actual borrower, a fact unknown to the borrower and probably unknown to the bank ⁴

III THE MOTION TO ENLARGE AND REQUEST FOR CONTINUANCE SHOULD HAVE BEEN GRANTED BECAUSE IT WOULD HAVE ENABLED FULL AND COMPLETE DISCOVERY TRIGGERED BY NEWLY OBTAINED FACTS, AND WITHOUT UNNECESSARY PREJUDICE TO THE RESPONDENT BANK

In or about late April, 2011, the undersigned counsel [for Appellant in the trial proceedings] read a local newspaper article which described the ongoing federal criminal case against B W and noted that B W had been interviewed. Counsel had previously believed that B W was incarcerated and unable to meaningfully testify due to the pending criminal matters. Counsel contacted B W's defense counsel, whom gave him permission to contact B W directly, which counsel did by telephone. Based on the telephonic interview, counsel learned of additional information and potential witnesses which might be useful to Appellant's defense. As the agreed upon and court ordered discovery deadline had passed, and Respondent's Motion for Summary Judgment had already been filed, Appellant moved for an Order enlarging the time for discovery. Counsel did not request to depose B W, but rather additional witnesses whom had been employed by the Respondent who could better explain what Respondent had done to verify the loan and who Respondent had interacted with. Counsel also wanted to time to review the retention of an expert witness.

The trial court denied the Motion. Although Appellant asserts that the record herein demonstrates sufficient material facts in dispute such that summary judgment is premature, Appellant further argues that further discovery to clarify the facts in advance of a summary judgment motion was appropriate in this case. Appellant was unduly prejudiced by the denial of the Motion.

⁴ The loan originator who worked the bank Judd Tracy, testified that he had never met Stalliard but that he believed he or his superior had talked with Stalliard. However, Stalliard testified that had no verbal or direct contact with the bank while the loan was underwritten and that the email address attributed to Stalliard being thefiat@yahoo.com was not Stalliard's email address but was probably created and used by B W or S C.

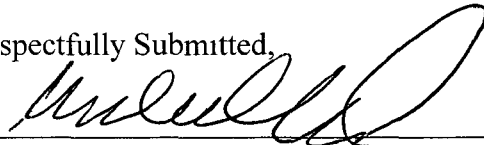
to Enlarge because discovery of the additional witnesses, and potentially the retention of an expert witness, could have bolstered Appellant's defense, without unnecessary prejudice or harm to the Respondent, who had already foreclosed upon and sold the subject property

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court

August 5, 2011

Respectfully Submitted,



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2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928
843-785-8110
Attorney for Appellant



The South Carolina Court of Appeals

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July 21, 2011

Michael W Mogil, Esquire
Law Ofc of Michael W Mogil, P A
2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928

Re Harbourside v Stalliard, Alphonse
2011195508
2009-CP-07-03945

Dear Mr Mogil

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Upon review, the caption should read as follows

Harbourside Community Bank, As Servicing
Agent for The Savannah Bank, N A ,

Respondent,

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc ,

Defendants,

Of Whom Alphonse Stalliard is the,

Appellant

Any future filings by any party to this appeal must feature the above caption

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,

V. Clause Allen, Deputy
Tanya A. Gee
CLERK

TAG/laf

cc Curtis Lee Coltrane, Esquire
The Honorable Jerri Roseneau



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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July 21, 2011

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2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928

Re Harbourside v Stalliard, Alphonse
2011195508
2009-CP-07-03945

Dear Mr Mogil

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf
cc Curtis Lee Coltrane, Esquire

PM 7-14-11
POS 7-5-11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H Dukes, III, Master In Equity for Beaufort County, South Carolina

Case No 2009-CP-07-3945

HARBOURSIDE COMMUNITY BANK

Respondent,

v

ALPHONSE STALLIARD, et al

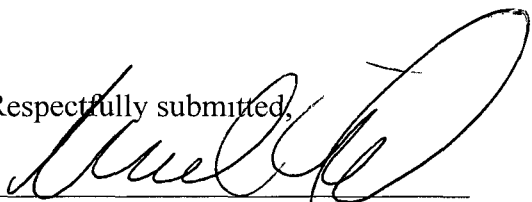
Appellant

NOTICE OF APPEAL

Appellant Alphonse Stalliard appeals the Order granting summary judgment issued by the Honorable Marvin H Dukes, III entered June 7, 2011 Appellant received written notice of entry of this Order on June 28, 2011

July 5, 2011

Respectfully submitted,



Michael W Mogil, SC Bar #11933
Law Office of Michael W Mogil, P A
2 Corpus Christie Place, Ste 303
Hilton Head Island, SC 29928
Attorney for Appellant
Alphonse Stalliard

Other Counsel of Record

Curtis L Coltrane
Alford, Wilkins & Coltrane, L L C
P O Drawer 8008
Hilton Head Island, SC 29938-8008
Attorney for Respondent Harbourside Community Bank
(843)842-5500

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JUL 18 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Honorable Marvin H Dukes, III, Master In Equity for Beaufort County, South Carolina

Case No 2009-CP-07-3945

HARBOURSIDE COMMUNITY BANK

Respondent,

v

ALPHONSE STALLIARD, et al

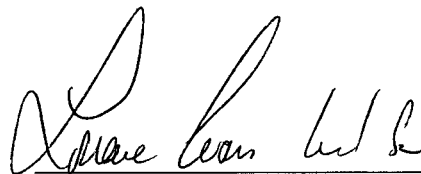
Appellant

PROOF OF SERVICE

I, Lorraine Evans Wilson, associated with the Law Office of Michael W Mogil, P A , hereby certify that, on this 5th day of July, 2011, I served a copy of Appellant Alphonse Stalliard's Notice of Appeal and this Proof of Service,, addressed to the following

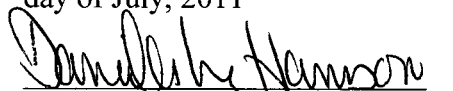
Curtis L Coltrane
Alford, Wilkins & Coltrane, L L C
18 Executive Park, Building 1
Hilton Head Island, SC 29928
Attorney for Respondent Harbourside
Community Bank

by facsimile to 843-842-8400 and by hand delivery



Lorraine Evans Wilson

Sworn to Before Me this 14
day of July, 2011


Notary Public for South Carolina

My Commission Expires 10 29 2014

LAW OFFICE OF MICHAEL W MOGIL, P A

Ste 303, 2 Corpus Christie Place
Hilton Head Island, SC 29928
Telephone (843) 785-8110
Fax (843) 785-9676
Email mmogil@mogillaw.com

July 14, 2011

The Honorable Tanya Gee
South Carolina Court of Appeals Clerk of Court
PO Box 11629
Columbia, SC 29211

By US Mail

Re Harbourside Community Bank v Alphonse Stalliard, et al 2009-CP-07-3945

Ms Gee,

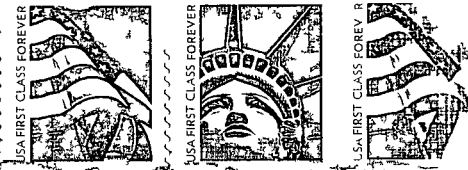
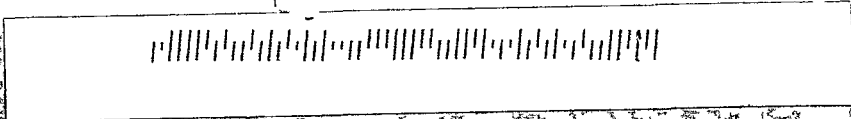
Enclosed for filing please find the original and one copy of the Notice of Appeal of the Order granting Summary Judgment issued by the Honorable Marvin H Dukes III in the above-referenced case, a copy of said Order, Proof of Service upon the Respondent , and the \$100 appeal filing fee

Very Truly Yours,


Michael W Mogil

cc Curtis L Coltrane, Esq

RECEIVED
JUL 18 2011
SC Court of Appeals



SAV PDF 314

THU JUN 21 2011

Law Office of Michael W Mogil, P.A.
2 Corpus Christie Place Suite 303
Hilton Head Island SC 29928

The Honorable Tanya Gee
South Carolina Court of Appeals Clerk of Court
PO Box 11629
Columbia, SC 29211

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT)	CASE NUMBER 2009-CP-07-3945
)	
HARBOURSIDE COMMUNITY BANK, As)	
Servicing Agent for The Savannah Bank, N A ,)	
)	
Plaintiff,)	
)	
vs)	ORDER GRANTING
)	SUMMARY JUDGMENT
)	
ALPHONSE STALLIARD, OLDFIELD CLUB,)	
AND OLDFIELD COMMUNITY)	
ASSOCIATION, INC ,)	
)	
Defendants)	

RECEIVED
 JUL 18 2011
 SC Court of Appeals

This case is before the undersigned on a Motion for Summary Judgment filed by the Plaintiff herein on March 15, 2011. The Motion for Summary Judgment was set a hearing to commence at 9:30 o'clock, A.M., on Monday, May 16, 2011, at the Beaufort County Court House. At the appointed time, Curtis L. Coltrane, attorney for Harbourside Community Bank, As Servicing Agent for The Savannah Bank, N.A. (hereinafter, the "Savannah Bank"), appeared for the Plaintiff, and Michael W. Mogil, attorney for Alphonse Stalliard (hereinafter, "Stalliard"), appeared for the Defendant.

RELEVANT BACKGROUND

This case was referred to the undersigned as Master In Equity by an Order of the Hon. Jerri Ann Roseneau, dated January 6, 2011. This case was originally commenced as a mortgage foreclosure. By a Consent Order dated May 13, 2010, and filed on May 14, 2010, the Parties agreed to bifurcate the proceeding as follows:

1. The mortgage foreclosure would be tried first, and,
2. Any issues related to a deficiency judgment or fraud related claims or

✓

defenses would be tried second ¹

The mortgage foreclosure proceeded to trial on June 25, 2010 ² In the Order of Judgment and Foreclosure, the debt owing to the Savannah Bank was established at the sum of One Million Eight Hundred Thirty Four Thousand Five Hundred Four and 48/100 (\$1,834,504 48) Dollars ³ Thereafter, on August 2, 2010, the subject property of the mortgage foreclosure was sold by the undersigned at the regularly scheduled foreclosure sale for Beaufort County, South Carolina At the August 2, 2010, sale, the Savannah Bank was the high bidder, and its bid was in the amount of Six Hundred Fifty Thousand and no/100 (\$650,000 00) Dollars ⁴

Thereafter, on November 10, 2010, a Consent Scheduling Order was filed that set out the following deadlines for the completion of the case

- (a) Alphonse Stalliard must file an answer to the Amended Complaint of The Savannah Bank, N A , on or before November 15, 2010
- (b) Alphonse Stalliard must identify his experts by December 1, 2010
- (c) The Savannah Bank, N A , must identify its experts by January 1, 2011
- (d) The Parties hereto must complete discovery by February 15, 2011, and the time to respond to discovery is twenty (20) days upon penalty of sanctions in the amount of Five Hundred and no/100 (\$500 00) Dollars per day for every day this Court adjudges discovery to be late

¹ See Consent Order of Bifurcation, dated May 13, 2010, which is of record

² Stalliard did not appear at the mortgage foreclosure hearing, or otherwise contest the right of the Savannah Bank to foreclose its mortgage

³ See Order of Judgment and Foreclosure, dated June 25, 2010, which is of record

⁴ See Master's Report on Sale and Disbursements and Order Confirming Sale and Satisfying Liens, dated September 13, 2010, which is of record No appraisal action under S C Code Ann § 29-3-680 (Supp 2010), was commenced by Stalliard

- (e) The Parties hereto must file all pretrial motions by March 15, 2011
- (f) The trial of this case will be set by the Court for April 1, 2011, or as soon thereafter as the Court's schedule will permit⁵

CLAIMS OF THE PARTIES

As was required by the terms of the November 10, 2010, Consent Scheduling Order, Stalliard filed his "Amended Answer" on November 15, 2010. In his Amended Answer, Stalliard denied the material allegations of the Complaint, and asserted the following General and Affirmative Defenses

- 1 The mortgage loan given to Stalliard by the Savannah Bank was closed by a person acting under a Power of Attorney, and that the person exceeded the scope of the power of Attorney, and Stalliard did not agree to or understand the terms of the Power of Attorney⁶
- 2 Stalliard did not qualify for the loan documented by the Note and Mortgage under conventional loan protocols, and as a result, entry of a deficiency judgment against Stalliard would be unconscionable
- 3 The claim of the Savannah Bank is barred by estoppel
- 4 The Savannah Bank is barred from seeking a deficiency against Stalliard because the Savannah Bank, or its agents, participated in a fraudulent scheme which caused Stalliard to become a party to the loan contract
- 5 The Savannah Bank assumed the risk of the transaction
- 6 The contributory negligence of the Savannah Bank is the proximate cause of the damages claimed by the Savannah Bank
- 7 Stalliard did not fill out or execute the loan application made to the Savannah Bank on or about July 20, 2007
- 8 The loan and construction draws were processed in concert between the Savannah Bank, its agents and third parties not operating with

⁵ See Consent Scheduling Order, dated November 10, 2010, which is of record

⁶ See Amended Answer, paragraph 4

authorization or under the authority or under the control of Stalliard

In response to the Amended Answer, the Savannah Bank filed its Reply on November 17, 2010. In so far as it is material to the Summary Judgment Motion, the Savannah Bank denied the material allegations of the Amended Answer, and affirmatively alleged that the loan in question was closed under a recorded Power of Attorney given by Stalliard to one Sally A Gardocki, Esq, which authorized the attorney to

“ execute as my act and deed any documents including, but not limited to the Note, the Mortgage, all additional loan documents, the settlement statement and all other such documents necessary or appropriate to complete this transaction, deliver and/or record all documents so executed and disburse all funds relative to this transaction ”⁷

SUMMARY JUDGMENT STANDARD

As was required by the November 10, 2010, Consent Scheduling Order, the Savannah Bank filed its Notice of Motion and Motion for Summary Judgment on March 15, 2011, seeking Summary Judgment in favor the Savannah Bank, pursuant to Rule 56, SCRPC. The Savannah Bank's Motion was supported by affidavits and references to deposition testimony taken in the case.⁸

Under Rule 56, SCRPC, Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Café Associates Limited v Gengross*, 305 S C 6, 406 S E 2d 162 (S C 1991). In determining whether any material issues of fact exist, the evidence and all inferences that can be drawn from the evidence must be viewed in the light most favorable to the party resisting the

⁷ See Reply and Restatement of Affirmative Claim, paragraphs 19 and 20

⁸ See Affidavit of Sally A Gardocki, Esq, dated March 10, 2011, Affidavit of Diane Sala, dated March 15, 2011, and Affidavit of Attorney's Fees of Curtis L Coltrane, dated March 15, 2011, all of which are of record

motion *Redwend Limited Partnership v Edwards*, 354 S C 58, 581 S E 2d 496 (Ct App 2003) The purpose of Summary Judgment is to expedite the disposition of cases that do not require the services of a fact finder *Dawkins v Fields*, 354 S C 58, 580 S E 2d 433 (2003) For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action *PPG Industries, Inc v Orangeburg Paint & Decorating Ctr , Inc* , 297 S C 176, 375 S E 2d 331 (Ct App 1988) Once the moving party has met its burden of demonstrating that no genuine issue of material fact exists, "A party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact " As Rule 56(e), SCRPC, states, a party "may not rest upon the mere allegations or denials of his pleading[s]" *Hoard ex rel Hoard v Roper Hospital, Inc* , 387 S C 539, 694 S E 2d 1 (S C 2010)

FINDINGS AND CONCLUSIONS

As was mentioned above, the Motion for Summary Judgment came to be heard on May 16, 2011⁹ The Savannah Bank supported its motion with affidavits and the deposition testimony of Stalliard At the hearing, Stalliard's counsel presented the Affidavit of Alphonse Stalliard Counsel for the Savannah Bank objected to the Affidavit as the same was not filed in compliance with the requirements of Rule 56(c), SCRPC, and because certain statements in the Affidavit contradicted the deposition of testimony of Stalliard Although I admitted Stalliard's Affidavit over the objection of the Savannah Bank, I did so

⁹ Previously, on May 2, 2011, Stalliard filed a "Motion to Enlarge Time for Discovery and to Continue Hearing on Plaintiff's Motion for Summary Judgment" A hearing was conducted on this motion on May 11, 2011 At the conclusion of the hearing, the motion was denied under the authority of Rule 56(f), SCRPC, *Doe ex rel Doe v Batson*, 435 S C 316, 548 S E 2d 854 (S C 2001), and, *Dawkins v Fields*, 354 S C 58, 580 S E 2d 433 (S C 2003)

with the qualification that I would not consider Paragraph 6 of the Stalliard Affidavit ¹⁰

Having reviewed the affidavits and other evidence submitted, it appears that the evidence in the record, and the inferences that can be drawn from that evidence is as follows

1 On or about August 23, 2007, Stalliard executed and delivered his written Promissory Note to the Savannah Bank, in the original principal amount of One Million Six Hundred Thousand (\$1,600,000 00) Dollars ¹¹

2 The August 23, 2007, Note was executed by Sally A Gardocki, Esq , under the authority of a written Power of Attorney executed and delivered to her by Stalliard Stalliard does not dispute that he executed and delivered the Power of Attorney to Sally A Gardocki, or that he understood Ms Gardocki would utilize the Power of Attorney to facilitate the closing of the loan by signing all of the loan documents on his behalf ¹²

¹⁰ Specifically, the statements made in Paragraph 6 of Stalliard s Affidavit directly contradict Stalliards deposition testimony at Page 30, Lines 21-25, and at Page 42, Line 11 through Page 44, Line 4 Although I accepted the Affidavit over the Plaintiff's objection, I did so stating that I would not consider any part of Paragraph 6

¹¹ See Affidavit of Diane Sala, Paragraph 2, Exhibit A to Affidavit of Diane Sala, Deposition of Alphonse Stalliard, Page 11, Line 24, to Page 12, Line 25, Affidavit of Sally A Gardocki, Paragraph 5

¹² See Deposition of Alphonse Stalliard, Page 11, Line 24, to Page 12, Line 25, Page 17, Line 17 to Page 18, Line 14, Affidavit of Sally A. Gardocki, Paragraphs 4 and 5 In Paragraph 4 of his affidavit, Stalliard states

I do not recall my power of attorney, Ms Gardocki, reviewing my application with me before she signed it in her office at closing Had I seen this document, I would have corrected it

This statement does not create any issue of fact, because Stalliard states that he does not recall going over the loan application document with Sally A Gardocki Significantly, he does not deny that such an event occurred In Paragraph 5 of the Affidavit of Sally A Gardocki, the following appears

Mr Stalliard was made aware of the form and content of the closing documents, including but not limited to the Note, Mortgage and HUD-1 Closing Statement, and Alphonse Stalliard approved the same and authorized the closing

Again, Stalliard does not deny this, he only states that he does not recall it That is insufficient to create an issue of fact

3 Stalliard testified that he never had any direct communication with the Savannah Bank concerning the origination of the loan, and did not testify as to any purported facts or representations made to him by the Savannah Bank. His testimony was that the communications with the Savannah Bank were handled by a Mr. Steve Corba, who was acting pursuant to a Power of Attorney given to him by Stalliard.¹³

4 After the closing of the of the loan on August 23, 2007, Stalliard was provided a copy of all of the executed closing documents.¹⁴ There is no evidence in the record that Stalliard raised any question about the documentation concerning the loan.¹⁵

¹³ See Deposition of Alphonse Stalliard, Page 30, Lines 21-25, which is as follows

- Q All right. Who else did you have contact with in connection with the construction of the house at 10 Indigo Plantation Drive?
- A Steve Corba.
- Q All right. And at the time was Mr. Corba in New Jersey still?
- A Yes.
- Q All right. And what was the nature of your contact with Mr. Corba concerning the construction of the house at 10 Indigo Plantation Drive?
- A I have--Corba would have had Power of Attorney.
- Q Power of Attorney to do what?
- A To act on my behalf.
- Q In connection with the construction of the house at 10 Indigo Plantation Drive?
- A I believe it was Corba who had Power of Attorney for the actual application --
- Q Uh-huh.
- A --with the bank.
- Q All right. So then when Mr. Corba provided documents including the initial loan application to the bank, he was doing so under a Power of Attorney from you?
- A Yes.

To survive a motion for summary judgment, the resisting party must offer some evidence that a genuine issue of material fact existed as to each element of fraud and negligent misrepresentation. See *Steele v. Rogers*, 306 S.C. 546, 413 S.E.2d 329 (Ct.App. 1992). Mr. Stalliard's own testimony negates an element of his claim that the Savannah Bank acted improperly in connection with the loan. Further, it undoes the testimony in Paragraphs 1, 2, 3, 4, 5 and 8 of Stalliard's Affidavit. In his Affidavit Stalliard states that he did not provide the Savannah Bank with information concerning the loan, or sign documents given to the Savannah Bank in connection with it. While that may be true as far as it goes, it doesn't have any bearing on the outcome of the case, since by Stalliard's own testimony, the person who Stalliard claims to have done these things did them with Stalliard's authority.

¹⁴ See Affidavit of Sally A. Gardocki, Paragraph 6.

¹⁵ See Affidavit of Sally A. Gardocki, Paragraph 7.

5 After the loan closing, the proceeds were used for the construction of a residence
Stalliard's testimony was that the construction was supervised on Stalliard's behalf by an
individual named Blair Witkowski ¹⁶

6 On May 6, 2008, the August 23, 2007, Promissory Note was modified by a Loan
Modification Agreement executed and delivered by Stalliard Stalliard himself executed and
delivered the Loan Modification Agreement The Loan Modification Agreement was
recorded on June 27, 2008, in the Office of the Register of Deeds for Beaufort County,
South Carolina in Official Record Book 2739 at Page 1123 ¹⁷

7 The Loan Modification Agreement contains the following express affirmation of the
validity of the August 23, 2007, Promissory Note, and the debt owing from Stalliard to the
Savannah Bank

¹⁶ Stalliard's testimony was as follows

Q Following the closing of the loan, was it your understanding that a house was going
to be built on the property?

A Yes

Q And how, to the best of your recollection, was that going to occur? In other words,
who was in charge of building the house?

A That house should have been built by a builder who - - Blair Witkowski would have
been in contact with the builder regarding the house

Q All right And was Mr. Witkowski's contact with the builder on your behalf?

A I would - - can I have a moment to ask my attorney a question?

Q You cannot ask your attorney a question in the context of what I have asked you at
this time

A Okay I'm not - - when you say, on my behalf, do you mean like as in Power of
Attorney?

Q No I'm asking was Mr. Witkowski acting on your behalf in his dealings with the
contractor to get the house built at 10 Indigo - -

A Yes Blair Witkowski coordinated the building of the house

Q All right And as a part of what Mr. Witkowski was doing, did he also coordinate
with the Bank?

A Yes

See Deposition of Alphonse Stalliard, Page 26, Line 21, to Page 28, Line 2

¹⁷ See Deposition of Alphonse Stalliard, Page 23, Line 14, through Page 24, Line 3, Affidavit
of Diane Sala, Paragraph 3

WHEREAS, Borrower is justly indebted unto Lender as evidenced by a Promissory Note dated AUGUST 23, 2007, in the original principal sum of ONE MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars (\$1,600,000 00), which Note bears interest at the original rate of SIX AND SEVEN TENTHS percent (6 700%) per annum and which Note provides for payment in full on SEPTEMBER 1, 2037,¹⁸

8 The Note and Loan Modification Agreement were assigned to The Savannah Bank, N A , as evidenced by the Corporation Assignment of Mortgage dated April 1, 2009, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina on April 13, 2009, in Official Record Book 2831 at Page 1424¹⁹

9 Stalliard defaulted on his obligations under August 23, 2007, Promissory Note and the May 6, 2008, Loan Modification Agreement, because Stalliard did not make the payments of principal and interest required under the terms and conditions of the August 23, 2007, Promissory Note and the May 6, 2008, Loan Modification Agreement²⁰

10 The Savannah Bank gave Stalliard notice of his default and a right to cure the same²¹

¹⁸ See Affidavit of Diane Sala, Paragraph 5, Exhibit B to Affidavit of Diane Sala In Paragraph 10 of his Affidavit, Stalliard states as follows with respect to the loan modification

I executed a loan modification document in this matter in May, 2008 because I was informed by email from Blair Witkowski that HarbourSide's personnel had contacted him and that he execution of the document was necessary to ensure funding and completion of the construction of the home on the property His email is attached hereto

This statement creates no issue of fact, because Stalliard does not deny his execution of the Loan Modification, and Stalliard does not deny the truth or accuracy of the statements contained in it Fairly read, this statement is an affirmation that Stalliard signed the Loan Modification so that he could continue to receive the benefits of the loan This does not support any element of Stalliard s defenses, and it does not negate any element of the Savannah Bank's claim

¹⁹ See Affidavit of Diane Sala, Paragraph 6, Exhibit C to Affidavit of Diane Sala Stalliard does not challenge this

²⁰ See Affidavit of Diane Sala, Paragraph 7 Stalliard does not challenge this

²¹ See Affidavit of Diane Sala, Paragraph 8, Exhibit D to Affidavit of Diane Sala Stalliard does not challenge this

11 Stalliard did not cure his default under the terms and conditions of the August 23, 2007, Promissory Note and the May 6, 2008, Loan Modification Agreement ²²

12 As of March 14, 2011, after application of all credits and payments due to Stalliard, the amount due and owing from Stalliard to the Savannah Bank, exclusive of attorney's fees and costs, is

Principal	\$	1,038,815 75
Interest	\$	97,534 57 ²³
Accumulated Late Charges	\$	6,075 05 ²⁴
Other Fees	\$	10 04
TOTAL	\$	1,142,435 41 ²⁵

13 The per diem interest on the amount due from March 16, 2011, and thereafter is Three Hundred Sixty Nine and 49/100 (\$369 44) Dollars ²⁶

14 The terms and conditions of the August 23, 2007, Promissory Note and the May 6, 2008, Loan Modification Agreement, include the following in Article 7(E) thereof

²² See Affidavit of Diane Sala, Paragraph 9 Stalliard does not contend otherwise

²³ The interest calculation is

Judgment Amount - \$1,834 504 48
\$29,925 34 Interest of 81 days (6/25-9/13) @ 7 25% on Judgment amount
(650,000 00) Foreclosure Bid Amount
\$67,609 13 Interest of 183 days (9/14-3/15) @ 7 25% on Judgment minus Bid

Stalliard does not challenge the calculation of the interest

²⁴ The August 23, 2007, Promissory Note contained the following term

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5 0000% of my over due payment of interest, during the period when my payment is interest only and of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

²⁵ See Affidavit of Diane Sala, Paragraph 10 Stalliard does not challenge the calculation of the debt

²⁶ See Affidavit of Diane Sala, Paragraph 11 Stalliard does not challenge the calculation of the per diem rate

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately and in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney's fees.

15 The costs and attorney's fees incurred by the Savannah Bank from the commencement of this action through the filing of the Motion for Summary Judgment, and those anticipated to be incurred through the conclusion of the action, total of Twenty One Thousand One Hundred Eighteen and 74/100 (\$21,118 74) Dollars ²⁷

16 As was stated above, Stallhard asserted the following defenses

- 1 The mortgage loan given to Stallhard by the Savannah Bank was closed by a person acting under a Power of Attorney, and that the person exceeded the scope of the Power of Attorney, and Stallhard did not agree to or understand the terms of the Power of Attorney
- 2 Stallhard did not qualify for the loan documented by the Note and Mortgage under conventional loan protocols, and as a result, entry of a deficiency judgment against Stallhard would be unconscionable
- 3 The claim of the Savannah Bank is barred by estoppel
- 4 The Savannah Bank is barred from seeking a deficiency against Stallhard because the Savannah Bank, or its agents, participated in a fraudulent scheme which caused Stallhard to become a party to the loan contract
- 5 The Savannah Bank assumed the risk of the transaction
- 6 The contributory negligence of the Savannah Bank is the proximate cause of the damages claimed by the Savannah Bank
- 7 Stallhard did not fill out or execute the loan application made to the Savannah Bank on or about July 20, 2007
- 8 The loan and construction draws were processed in concert between

²⁷ See Affidavit of Attorney's Fees of Curtis L. Coltrane, which is of record

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the Savannah Bank, its agents and third parties not operating with authorization or under the authority or under the control of Stalliard

17 With respect to the first defense, there is no evidence to support it. As was shown above, Stalliard does not dispute that he executed and delivered the Power of Attorney to Sally A. Gardocki, or that he understood Ms. Gardocki would utilize the Power of Attorney to facilitate the closing of the loan by signing all of the loan documents on his behalf. There is no evidence that Sally A. Gardocki exceeded the scope of the Power of Attorney, or that Stalliard did not understand and agree to the terms of it.²⁸

18 With respect to the second defense, there is no evidence in the record demonstrating that Stalliard did not qualify for the loan. In his affidavit, Stalliard contends that the information upon which the Savannah Bank based its decision was not accurate. This is of no avail to Stalliard, however, because the only evidence in the record is that the information was supplied by persons acting under Stalliard's authorization.

19 With respect to the third defense, there is no evidence to support Stalliard's claim that the Savannah Bank is estopped to enforce Stalliard's note. The Savannah Bank's ²⁹ claims are not barred by the doctrine of estoppel. The elements of estoppel are

(a) With regard to the party estopped (1) conduct amounting to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert, (2) the intention or expectation that such conduct shall be acted upon by the other party, and (3) actual or constructive knowledge of the real facts

(b) With regard to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and

²⁸ See Deposition of Alphonse Stalliard, Page 11, Line 24, to Page 12, Line 25, Page 17, Line 17 to Page 18, Line 14, Affidavit of Sally A. Gardocki, Paragraphs 4 and 5

(3) prejudicial change in position

State Accident Fund v South Carolina Second Injury Fund, 388 S C 67, 693 S E 2d 441
(Ct App 2010)

There is no evidence that the Savannah Bank engaged in any conduct amounting to a false representation or concealment of material facts, no evidence that the Savannah Bank intended for the false information to be acted on by Stalliard, or that the Savannah Bank had any actual or constructive knowledge of the real facts. The only evidence in the record is that the information regarding the loan was provided by persons authorized by Stalliard to act on his behalf. With respect to the closing documentation, Stalliard never raised any question concerning it.

With regard to Stalliard, there is no evidence that he lacked knowledge of the truth, relied on any false information from the Savannah Bank or changed his position in reliance on any false information from the Savannah Bank. Indeed, the only evidence is precisely the opposite. All of the information regarding the loan was provided by persons authorized by Stalliard to act on his behalf.

21 With respect to the fourth defense, there is no evidence in the record that the Savannah Bank acted in concert with anyone to cause Stalliard to become a party to the loan. The only evidence in the record is that Stalliard authorized others to act on his behalf in connection with this transaction. While Stalliard may now contend that some of those persons did not act properly, the only evidence is that Stalliard placed them in a position to act on his behalf, and there is no evidence that the Savannah Bank had anything to do with their actions.

22 With respect to the fifth defense, there is no evidence that the Savannah Bank

knowingly assumed any risk beyond the normal risk present in any loan transaction. As has been pointed out, the only evidence in the record is that all of the information regarding the loan was provided to the Savannah Bank by persons authorized by Stalliard to act on his behalf.

23 With respect to the sixth defense, there is no evidence that the Savannah Bank was negligent at all. Again, all of the information regarding the loan was provided by persons authorized by Stalliard to act on his behalf. In his affidavit, Stalliard suggests that there are other actions that the Savannah Bank could have taken, but there is no evidence that the actions of the Savannah Bank were negligent in any way.²⁹

24 With respect to the seventh defense, the only evidence in the record is that Stalliard authorized others to act on his behalf in connection with this transaction, and that these persons submitted the information and signed the documents Stalliard now complains of. While Stalliard may now contend that some of those persons did not act properly, the only evidence is that Stalliard placed them in a position to act on his behalf in connection with this transaction.

25 With respect to the eighth defense, the only evidence in the record is that a person acting with Stalliard's authority managed the construction of the residence and the dealings with the Savannah Bank in connection with that. Again, while Stalliard may now contend that the person did not act properly, the only evidence is that Stalliard placed him in a

²⁹ Stalliard argued that two exhibits from the Deposition of Susan Keiffer created an issue of material fact. The transcript of the testimony was available at the hearing, but Stalliard was permitted to argue regarding two exhibits to the Susan Keiffer deposition. Stalliard argued that certain things Stalliard claims to be deficiencies in the documentation create an issue of fact with respect to Stalliard's claim of "negligent lending." First, there is no testimony in the record that the state of the documentation reveals any negligence. Second, Stalliard points to no South Carolina authority for the proposition that a cause of action or affirmative defense for "negligent lending" is recognized in South Carolina.

position to act on his behalf, and there is no evidence that the Savannah Bank had anything to do with his actions

26 Finally, In 2008, Stalliard signed a modification of the loan in which he expressly affirmed the validity of the loan

27 For the foregoing reasons, I find that Stalliard's defenses fail

28 In addition to the total amount that is due and owing under the terms and conditions of the August 23, 2007, Promissory Note and the May 6, 2008, Loan Modification Agreement, I have considered the six factors set out in *Baron Data Systems v Lote*, 297 S C 382, 377 S E 2d 296 (S C 1989), as follows

- 1 The nature, difficulty and extent of the legal services rendered This case involved a foreclosure of a mortgage and enforcement of a note totaling more than One Million One Hundred Thousand Dollars Successfully prosecuting a mortgage foreclosure involves the examination of loan documents, examination of the title to real property, preparation of all pleadings necessary to bring the case to trial, appearing at trial and presentation of evidence, preparation of sale notice, attending foreclosure sale, conducting discovery and depositions, preparing motions and affidavits, and appearing at the hearings on the Motions
- 2 The time and labor devoted to the case The affidavit of fees set out in detail the amount of time spent by counsel in prosecuting this case No evidence was presented to show that the time was not actually spent, or that the amounts of time spent were unreasonable
- 3 The professional standing of counsel The Plaintiff's attorney has been a member of the South Carolina Bar for 28 years He has tried many foreclosure cases as well as other types of cases He is experienced with real estate and title matters His professional standing with the bar is good
- 4 The contingency of compensation This case was not a contingency fee matter
- 5 The fee customarily charged in the locality for similar services The rates charged by the Plaintiff's attorney's law firm are as follows

- | | | | |
|-----|-------------|----|--------------------------|
| (a) | Para-legals | \$ | 45 00 Per Hour |
| (b) | Associates | \$ | 175 00 Per Hour |
| (c) | Partners | \$ | 175 00 - 250 00 Per Hour |

These rates are in line with those charged by law firms in Beaufort County, South Carolina, for this type of service

- 6 The beneficial results obtained The attorney has successfully prosecuted this case, and has obtained a beneficial result for the Savannah Bank

29 I find that the attorney's fees and expenses in the amount of Twenty One Thousand One Hundred Eighteen and 74/100 (\$21,118 74) Dollars are reasonable for the work performed to date, and for the work necessary to conclude this case

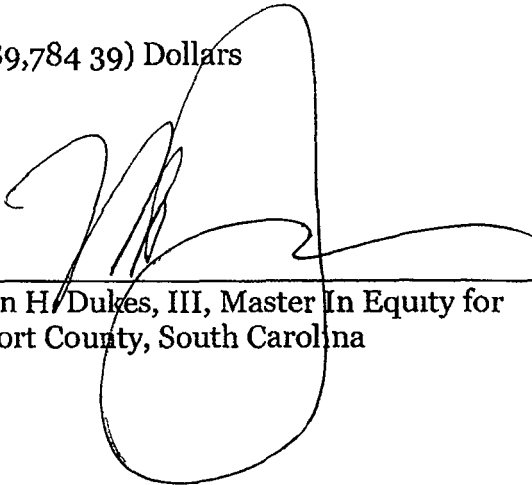
CONCLUSION

There is no evidence in the record for this case to raise any material question of fact on the claims of the Savannah Bank or the defenses of Alphonse Stalliard The only evidence in the record supports the claim of the Savannah Bank that Stalliard is justly indebted to the Savannah Bank in the amount of One Million One Hundred Forty Two Thousand Four Hundred Thirty Five and 41/100 (\$1,142,435 41) Dollars, as of March 16, 2011, with interest from March 16, 2011, through the date hereof in the amount of Twenty Six Thousand Two Hundred Thirty and 24/100 (\$26,230 24) Dollars and attorney's fees and costs in the amount of Twenty One Thousand One Hundred Eighteen and 74/100 (\$21,118 74) Dollars

Accordingly, under Rule 56, SCRPC, and *Cafe Associates Limited v Gengross*, supra , *Redwend Limited Partnership v Edwards*, supra , *Dawkins v Fields*, supra , *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc* , supra , *Hoar d ex rel Hoar d v Roper Hospital, Inc* , supra , for Harbourside Community Bank, As Servicing

Agent for The Savannah Bank, N A , is hereby awarded judgment against Alphonse Stallhard, in the amount of One Million One Hundred Eighty Nine Thousand Seven Hundred Eighty Four and 39/100 (\$1,189,784 39) Dollars

IT IS SO ORDERED




Marvin H. Duker, III, Master In Equity for
Beaufort County, South Carolina

Beaufort, South Carolina

This 2 Day of June, 2011

SEEN

LAW OFFICE OF MICHAEL W MOGIL, P A

By 
Michael W Mogil, Attorney for
Alphonse Stalliard