THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-2433

Floyd E. Jernigan and Suzanne Boone Katz,..... Respondents,

v.

Bank of America, N.A.,.....

Appellant,

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Bank of America, N.A. hereby timely appeals from the following Orders of the Honorable J.C. Nicholson, Jr.: Orders of Judgment in favor of Respondents dated December 12, 2011 (the "Trial Orders"); Orders Denying Defendant Bank of America's Motion to Alter or Amend Judgment dated March 22, 2012 (the "Post-Trial Orders"). The orders are attached hereto as Exhibits A-D.

Appellant received written notice of the Trial Orders on December 21, 2012 and timely filed a motion to Alter or Amend Judgment pursuant to Rule 52(b) and 59(e) on December 22, 2012 (attached as Exhibit E). Appellant received written notice of the

formal Post Trial Orders on March 28, 2012.[1] Thus, this appeal is timely served and filed pursuant to Rule 203(b)(1) of the South Carolina Appellate Court Rules.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Appellant

Charleston, South Carolina
April 3, 2012

[1] On February 21, 2012, the Court issued a Form 4 Order denying the Motion to Alter or Amend, but expressly retained jurisdiction for the purpose of entering a formal written order (Form 4 attached as Exhibit F).

CERTIFICATE OF SERVICE

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

Pleadings:

NOTICE OF APPEAL

Counsel Served:

Geoffrey H. Waggoner, Esq.
Waggoner Law Firm
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Attorney for Respondent Jernigan

Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.
The Richter Law Firm
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464
Attorney for Respondent Katz

Lydia Spry
Administrative Assistant

April 3, 2012

Other Counsel of Record:

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April 3, 2012

Via Federal Express
The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Floyd E. Jernigan and Suzanne Boone Katz, Respondents v. Bank of America, N.A., Appellant
Case No.: 2009-CP-10-2433
Our File No.: 05100/02101

Dear Ms. Kitchings:

Enclosed please find the original and one copy of a Notice of Appeal in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via the envelope provided for your convenience. Also enclosed is our Firm's check in the amount of $100.00 as the required filing fee.

By copy of this letter to the Charleston County Clerk of Court and counsel of record, we are serving them with a copy of this notice.

With kind regards, I remain

Sincerely yours,

Merritt G. Abney

MGA:ls
Enclosures

cc: The Honorable Julie J. Armstrong
Geoffrey H. Waggoner, Esq.
Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.

From: (843) 853-5200
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The Honorable Jenny Kitchings
SC Court of Appeals, Clerk
1015 Sumter St Fl 5

Columbia, SC 29201

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FOLD on this line and place in shipping pouch with bar code and delivery address visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 **CP**--10-2433

FILED
2011 DEC 12 PM 3:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Floyd E. Jernigan	Suzanne Boone Katz
	Bank of America, N.A.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Attorney for the Defendant Katz, Aaron E. Edwards	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Floyd E. Jernigan, Plaintiff	Bank of America, N.A., Defendant	$85,000.00
Suzanne Boone Katz, Defendant	Bank of America, N.A., Defendant	$100,000.00
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge 2117 **Judge Code** 12/12/11 **Date**

EXHIBIT
tabbies
A

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
)	CASE NO.: 2009-CP-10-2433
Floyd E. Jernigan,)	
)	
Plaintiff,)	
)	
v.)	ORDER ON DEFENDANT KATZ CROSSCLAIM
)	
Suzanne Boone Katz and)	
Bank of America Corporation,)	
)	
Defendants.)	
)	

FILED
2011 DEC 12 PM 3:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came to me pursuant to a non jury bench trial. After hearing the testimony, witnesses, evidence, the arguments and positions of counsel, the pleadings and other relevant documents and evidence in the record, as well as considering the credibility of the witnesses, I find as follows:

Plaintiff Floyd E. Jernigan ("Jernigan") and Defendant Suzanne Boone Katz ("Katz") were previously husband and wife. Among the issues in their marriage and divorce were financial mistrust between the two, allegations of unauthorized transactions, and other financial issues. During this time, on or about the 5th day of January, 2004, Jernigan and Katz met with Defendant Bank of America ("Bank") employee Michael Boyle at a local branch to sign the documents. Jernigan executed a document entitled "Customer Removal Authorization/Modification Agreement" acknowledging that Jernigan had no interest in the funds in the bank account ending in 8854 and that sole ownership and access to the account, including online access, was to be held by Katz. Katz simultaneously executed a signature card for the 8854 account to obtain sole ownership of the account. During this meeting, Boyle was informed by Katz of many of the

financial issues that existed between Jernigan and Katz and the negative damaging effect these things had upon her mental and emotional well being.

After discussing the financial issues and their damaging effects upon Katz regarding her soon to be ex-husband, Katz was assured by Boyle that Bank of America would take the appropriate steps to prevent Jernigan from accessing or otherwise viewing the account ending in 8854. In fact, it was Bank policy for all access to be removed, including online access, when a customer is removed from a joint account.

Upon receipt of the Customer Removal Authorization/Modification Agreement, the Bank removed Jernigan's name from the 8854 account title, but inexplicably failed to remove Jernigan as co-owner of the account for online and bill-pay purposes, thereby permitting Jernigan to remain able to access and view Katz' accounts electronically.

On or about January 19, 2007, Katz discovered funds missing from the 8854 account. She immediately called the Bank to inquire about the missing funds. After many hours of discussions, phone conversations, the Bank ultimately informed Katz that Jernigan had made online bill payments from the 8854 account, and acknowledged the fact that the Bank erred in failing to remove him from such access in 2004. The Bank further informed Katz that in order to make the online bill payments from the 8854 account, Jernigan had to have knowingly and deliberately accessed her account to make the payments at issue.

At this point, the Bank, against its own policy, refused to reimburse Katz, or to conduct an investigation, and informed her that if she wanted reimbursement, the only way for her to do so would be to file a criminal report and a fraud report. The Bank further informed Katz that she was not to contact Jernigan under any circumstances about this matter. Katz, relying upon the bank, and in compliance with the bank's instructions, reported the incidents to the Charleston

Police Department on or about January 20, 2007, who opened a file and began investigating the matter, and did not discuss the matter with Jernigan.

Later, on or about January 22, 2007, Katz, seeking further information from Bank authorities on how such an egregious error had been committed on behalf of the Bank, met with Bank personnel with her then fiancé, and now husband, Al Katz, in the hopes of getting to the bottom of the situation. During the meting, the Bank employee contacted Jernigan via telephone and Plaintiff agreed to replace the funds that had been withdrawn from her account. However, Katz was given no new information regarding the disputed BillPays and was advised to conduct a further investigation on her own if she desired additional information.

Thereafter, while the criminal investigation remained pending, Katz continued to seek information from the Bank on the specifics on how her account was accessed and how such an egregious error could be committed. Katz was repeatedly informed that, although the Bank permitted him to retain access, Jernigan had to have acted intentionally, deliberately, and knowingly in effectuating the bill payments. At some point during this time, Katz learned that Jernigan (who is not conversant in bank lingo) had disclosed to one of her sons that the bill payments resulted from some form of "overdraft protection." The Bank assured Katz that checking accounts could not be linked for overdraft protection and thus Jernigan's assertions were not true. This caused Katz a considerable amount of additional, unnecessary and undue mental distress, anxiety, and depression and created independent and exacerbated the harm to the relationship between Katz and her ex-husband Jernigan as well as her sons in addition to the harm that was already resulting from the criminal investigation.

The Police department, having conducted an initial investigation of the matter, including interviews with Bank employees who indicated Jernigan must have acted knowingly, concluded

there was probable cause to bring charges against Jernigan. Shortly thereafter, Plaintiff was arrested and charged with obtaining goods under false pretenses by the Charleston Police Department. Unbeknownst to Katz or the Charleston Police Department, however, at about the same time as the disputed bill payments, Plaintiffs own account had been frozen or restricted and that it was possible that the restricted/frozen status of the Plaintiff's own account may have been the cause of the bill payments at issue. The witness testimony and other evidence support the conclusion that had the Bank revealed this information in a timely manner to Katz, she would not have filed a police report.

Katz thereafter continued her effort to obtain full and complete information from the Bank as to how this could have occurred, and was repeatedly told the Jernigan could not have effectuated the bill payments accidentally and that he had to have acted deliberately. She met with Bank employees, spoke with Bank personnel over the phone, and wrote letters to the CEO of the Bank requesting a complete investigation and investigation of the matter.

The Bank acknowledged and knew that the situation was causing her undue distress and other damage, yet refused to conduct a complete investigation and further refused to examine the precise mechanics of how the BillPays at issue were made, despite the ability to do so. Further, the Bank never disclosed to Katz, the Charleston Police Department, or the Charleston County Solicitor's office, that there was any problem whatsoever with Jernigan's own account. At this same time, the Charleston Police Department as well as counsel for Jernigan also sought information from the Bank as to how these events occurred. The precise mechanics of the Bill Pay process were never fully disclosed by the Bank, and the solicitor eventually declined to prosecute the matter.

Thereafter, this civil litigation ensued and only then did the Bank reveal that Jernigan's account ending in 4502 had been frozen or restricted at or near the time of the disputed BillPay transactions, that Jernigan's account status may have contributed to or caused the disputed BillPay transactions, and that the Bank had the ability to examine the precise mechanics of how the BillPays were made.

The record reveals, and I find, that Defendant Bank of America never fully explained to Defendant Katz the Charleston Police Department or Plaintiff Jernigan how the money was removed from the Defendant Katz's account.

Defendant Bank of America never fully investigated whether the money was or could have been removed from Defendant Katz's account due to any computer glitch or other technical issue between Bank of America and the third-party vendor, Check-Free Corp. (Fiserv) used to complete Bank of America's bill pay transactions, despite repeated requests to do so by Katz, Jernigan, and others, despite the ability and wherewithal to do so, and despite the knowledge that refusing to do so was causing Katz damage

Defendant Bank of America neither preserved nor attempted to preserve any electronic information regarding the bill pay transaction associated with the accounts of the customers involved in this suit. Moreover, Bank of America did not request any information from Check-Free Corp. (Fiserv) regarding the bill pay transaction, which is the subject of this suit.

Defendant Bank of America's explanation at trial that Defendant Katz was fully informed about the bank's error is not believable.

Defendant Bank of America's failure to fully explain what they knew or should have known and their failure to cooperate with investigating officer, Sergeant Daquigan of the Charleston Police Department is both absurd and ridiculous. Defendant Bank of America merely

told their customer, Defendant Katz to file a fraud report for her loss with the police. Defendant Bank of America subsequently stonewalled all other requests for information regarding the loss.

Defendant Katz is very believable. She believed Plaintiff Jernigan acted deliberately to remove money from her account despite the fact that Defendant Bank of America informed Defendant Katz that they had failed to remove Plaintiff Jernigan from her account.

I find that Plaintiff Jernigan suffered the following damages: psychological trauma and injury, metal anguish, mental distress, apprehension, anxiety, and emotional injuries.

On Defendant Katz's cross claim, I find that Defendant Katz suffered the following damages: psychological trauma and injury, metal anguish, mental distress, apprehension, anxiety, and emotional injuries. The Bank knew as early as 2004 of the financial issues and mistrust that existed between Jernigan and Katz and the resulting mental and emotional injury was causing Katz. It was therefore reasonably foreseeable that the Bank's failure to secure the 8854 account would result in Katz suffering further emotional or psychological distress, and the record reveals that she did in fact suffer substantial emotional and psychological damage as a result of these BillPays and the resulting Bank conduct.

Katz placed her trust in the Bank and relied upon the Bank to investigate the matter and explain what happened and how it happened. The Bank, however, recklessly refused to investigate and/or conducted its investigation in a negligent manner, and refused to disclose material information such as the frozen/restricted status of Jernigan's account to Katz. Prominent Bank employees acknowledged in writing the fact that the Bank's failure to remove Plaintiff from online access to account 8854 was causing Katz mental and emotional distress and still refused to take appropriate action to prevent further harm and continued their course of conduct in the face of such knowledge. The Bank's conduct directly and proximately caused

Katz's damage in this case, which includes medical/therapy costs as well as intangible mental and psychological damage.

In failing and neglecting to follow its standard procedures for the removal of the Plaintiff from Defendant Katz's account, in failing to properly investigate the circumstances thereof, in failing to communicate with the Plaintiff or Katz, and in leading Defendant Katz and the police to believe that the Plaintiff's Bill Pay transactions could not have been made from Defendant Katz's account without deliberation on the Plaintiff's part, Defendant BOA breached its duties of due care to the Plaintiff as well as Katz, thereby proximately causing Jernigan to be arrested on criminal charges, and proximately causing both Jernigan and Katz tangible and intangible damages.

Accordingly, judgment is hereby rendered in favor of Defendant Suzanne Boone Katz on her cross-claim of Negligence/Gross Negligence/Recklessness against Defendant Bank of America. The Court finds that Defendant Katz has sustained actual damages in the amount of One Hundred Thousand ($100,000) Dollars and this sum is fair compensation for the actual damages sustained by the Defendant Katz. Defendant Bank of America is therefore **ORDERED** to pay Defendant Suzanne Boone Katz the sum of One Hundred Thousand ($100,000.00) Dollars within thirty (30) days of the entry of this order.

AND IT IS SO ORDERED!

The Honorable J. C. Nicholson, Jr.

This 12 Day of December 2011
Charleston, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-2433

Floyd E. Jernigan
PLAINTIFF(S)

Suzanne Boone Katz
Bank of America, N.A.
DEFENDANT(S)

Submitted by: Attorney for the Plaintiff, Geoffrey H. Waggoner

Attorney for : ☒ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

2011 DEC 12 PM 3:49
JULIE J. ARMSTRONG
CLERK OF COURT
FILED

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Floyd E. Jernigan, Plaintiff	Bank of America, N.A., Defendant	$85,000.00
Suzanne Boone Katz, Defendant	Bank of America, N.A., Defendant	$100,000.00
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

J. C. Nicholson, Jr. — **Circuit Court Judge**
217 — **Judge Code**
12/12/11 — **Date**

EXHIBIT
B
tabbies

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2009-CP-10-2433
	)	
FLOYD E. JERNIGAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SUZANNE BOONE KATZ and BANK OF AMERICA, N.A.,	)	
	)	
Defendants.	)	

FILED
2011 DEC 12 PM 3:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Findings of Fact

The Plaintiff, Floyd Jernigan, MD, at all times relevant hereto was a resident of Charleston County, South Carolina.

The Defendant, Suzanne Boone Katz (hereinafter "Katz"), at all times relevant hereto was a resident of Charleston County, South Carolina.

The Defendant, Bank of America, N.A. (hereinafter "BOA"), is a corporation which does business in, and maintains property and employs individuals in Charleston County, South Carolina, and circumstances of which the Plaintiff complained occurred in Charleston County, South Carolina.

The controversy was tried by this Court on September 13-15, 2011, by agreement of the parties.

The Plaintiff and Defendant Katz were married on May 21, 1983. In January 2004, while contemplating a divorce, the parties agreed to have the Plaintiff removed from the joint checking account, 8854, they shared at Defendant BOA.

Plaintiff and Defendant Katz met at a Defendant BOA branch on January 5, 2004, and each executed the required paperwork for the removal of the Plaintiff from the now formerly joint account, 8854.

Thereafter, Defendant BOA, through its employees and agents, failed to follow its internal policies and procedures for the removal of the Plaintiff from the 8854 account.

This failure was not discovered until January 17, 2007, when $1100 of "Bill Pay" payments made by the Plaintiff from his personal account, and intended for his personal expenses, were funded from Defendant Katz's 8854 account.

Upon discovery of the missing funds from her account on the evening of January 18, 2007, Defendant Katz called Defendant BOA and spoke to several individuals about the discrepancy. During the course of the evening's phone calls, Defendant Katz learned that the transactions had been initiated by the Plaintiff and was told by Defendant BOA that the transactions were the result of deliberate action on his part. Defendant Katz was also told by Defendant BOA that to recover the missing funds, she was required to file a report of the incident with police. Defendant BOA also instructed Defendant Katz to avoid communication with the Plaintiff regarding the situation.

After making her report to the police on January 20, 2007, Defendant Katz visited a BOA branch and it was at this time that Plaintiff was first notified of the situation by an employee of Defendant BOA.

Plaintiff immediately reimbursed Defendant Katz's account for the full amount after being notified of the unauthorized transactions by Defendant BOA.

During the course of this litigation, it was discovered by the Plaintiff that at virtually the same time that Plaintiff had made these Bill Pay transactions, his personal BOA account had been restricted by Defendant BOA in connection with an unusually large deposit which had initially been rejected and was subsequently re-deposited by Defendant BOA.

Without knowledge of these circumstances, Defendant Katz spent the next several months investigating and inquiring with Defendant BOA as to how these transactions took place. Defendant Katz was informed that Defendant BOA had failed to remove the Plaintiff from the 8854 account; however, there was no mention of the restricted status of Plaintiff's account at the same time, and Defendant BOA's assertion, and her belief that the transactions could not have occurred without deliberate action on the Plaintiff's part, motivated Defendant Katz to revive the police investigation and pursue criminal charges.

Charged with Obtaining Property By False Pretenses, the Plaintiff was arrested at his home during the early hours of May 25, 2007, in the presence of his minor son, and spent 18 hours in custody, before he was released on his own recognizance.

With the initiation of formal criminal proceedings against him, the Plaintiff and his attorney, Susan Dunn, Esq., made several attempts to inquire with Defendant BOA as to how these transactions occurred, but were not provided complete answers. Ms. Dunn eventually discovered that Defendant BOA out-sources its Bill Pay processing to a third party vendor, Check-Free Corp (otherwise known as Fiserv) and was told that the transactions occurred because the 8854 account was still linked to the Plaintiff's online bill pay, without his knowledge. The coincident restriction of Plaintiff's personal account at the same time was not acknowledged, or volunteered by, Defendant BOA.

The investigating officer, Sgt. Daquigan, testified that he would have interfered with, and recommended against prosecution, if the Defendant BOA representative had told him of the bank failure to remove the Plaintiff from the account four years before, or the restricted status of Plaintiff's account, at the time of the disputed transactions.

[redacted] that Defendant Bank of America never fully explained to Defendant Katz the Charleston Police Department or Plaintiff Jernigan how the money was removed from the Defendant Katz's account.

Defendant Bank of America never fully investigated whether the money was or could have been removed from Defendant Katz's account due to any computer glitch or other technical issue between Bank of America and the third-party vendor, Check-Free Corp. (Fiserv) used to complete Bank of America's bill pay transactions.

Defendant Bank of America neither preserved nor attempted to preserve any electronic information regarding the bill pay transaction associated with the accounts of the customers involved in this suit. Moreover, Bank of America did not request any information from Check-Free Corp. (Fiserv) regarding the bill pay transaction, which is the subject of this suit.

Defendant Bank of America's explanation at trial that Defendant Katz was fully informed about the bank's error is not believable.

Defendant Bank of America's failure to fully explain what they knew or should have known and their failure to cooperate with investigating officer, Sargent Daquigan of the Charleston Police Department is both absurd and ridiculous. Defendant Bank of America merely

told their customer, Defendant Katz to file a fraud report for her loss with the police. Defendant Bank of America subsequently stonewalled all other requests for information regarding the loss.

After the case was assigned to Solicitor Kim Steele, and after she was informed by Defendant BOA that there was no information they could provide to indicate how the disputed transactions had occurred, the charges against the Plaintiff were dropped and eventually expunged.

[redacted] that Plaintiff Jernigan suffered the following damages: psychological trauma and injury, metal anguish, mental distress, apprehension, anxiety, and emotional injuries.

Beyond the $2650 the Plaintiff expended on his criminal defense, and though he did not require professional therapy, as a physician with no experience with the criminal justice system, the Plaintiff was fearful of professional repercussions, and embarrassed in the face of his family, and otherwise emotionally distressed, during the ten month pendency of the proceedings against him.

Based on these Findings of Fact, I make the following

Conclusions of Law

1. This Court has jurisdiction of the parties hereto.

2. In failing and neglecting to follow its standard procedures for the removal of the Plaintiff from Defendant Katz's account, in failing to properly investigate the circumstances thereof, in failing to communicate with the Plaintiff, and in leading Defendant Katz and the police to believe that the Plaintiff's Bill Pay transactions could not have been made from Defendant Katz's account without deliberation on the Plaintiff's part, Defendant BOA breached

its duty of due care to the Plaintiff, and thereby caused his arrest on criminal charges, and the tangible and intangible damages caused thereby.

3. The Court finds that the sum of Eighty Five Thousand ($85,000) Dollars is fair compensation for the actual damages sustained by the Plaintiff and declines to award punitive damages.

Now therefore, it is **ORDERED** that the Defendant BOA pay to the Plaintiff, Floyd Jernigan, the sum of Eighty Five Thousand ($85,000) Dollars actual damages and the costs of this action within thirty (30) days of the date hereof.

AND IT IS SO ORDERED!

The Honorable J. C. Nicholson, Jr.

This 12 Day of December, 2011
Charleston, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009- CP-10-2433

Floyd E. Jernigan
PLAINTIFF(S)

Suzanne Boone Katz, ET AL
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

X **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*) ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE. ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

FILED
2012 FEB 21 PM 5:01
JULIE J. ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Motion for Alter or Amend Judgment by defendant was heard and denied. Judge Nicholson will retain jurisdiction ~~in this case. Formal Order to follow.~~ to sign formal order. JCN

ORDER INFORMATION

This order X ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Notes: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2117
Judge Code

02/15/2012
Date

EXHIBIT
C
tabbies

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Floyd E. Jernigan, Plaintiff, v. Suzanne Boone Katz and Bank of America Corporation, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2009-CP-10-2433 **ORDER**

This matter came to me pursuant to Defendant Bank of America's (the "Bank") motion to alter or amend the final judgments entered in favor of Plaintiff Floyd E. Jernigan ("Jernigan") and Defendant Suzanne Boone Katz ("Katz"). After reviewing the testimony, evidence, the arguments and positions of counsel, the pleadings and other relevant documents and evidence in the record, as well as considering the credibility of the witnesses, I find as follows:

The Bank argues that the only damage to Katz was emotional distress and a party may not recover for a defendant's negligent conduct when the only damage suffered is emotional distress.

The court first notes that Defendant Katz and her husband, Al Katz, both testified that she suffered physical pain and suffering as a result of her emotional distress. Katz further testified that she watched closely over her finances and, when she discovered the Bill pays, she was overcome with fear that her identity had been stolen or her account fraudulently accessed. As articulated in the judgment, Defendant Katz is very believable and the Bank's explanation of the events is not believable. Judging the credibility of

testimony of witnesses is a function of the fact finder as is determining the weight to be given that testimony. Tisdale v. Kerr McGee Chemical Corporation, 266 S.C. 64, 221 S.E. (2d) 531 (1976).

I find no error in the award of damages with respect to Katz's emotional distress. In order to receive bodily injury, it was not necessary that Katz lose a limb, receive a broken bone, or have wounds inflicted on her body. Being made sick, nauseous, and otherwise experiencing physical manifestations of pain and discomfort in the manner she testified and as a consequence of her emotional upset constitutes bodily injury for which Katz is entitled to recover damages. See Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 605-607 (S.C. 1958); See also Murray v. Bank of Am., N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003); Doe v. Greenville Hosp. Sys., 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994); ("the fact that...[plaintiff] may have received no physical injury at the time of the assault is not determinative").

The Bank further argues that expert testimony is required to prove Katz's damages and the evidence at trial was insufficient to prove emotional distress. In the alternative, the Bank argues the damages should be reduced.

"In personal injury actions, great latitude is allowed in the introduction of evidence to aid in determining the extent of damages...any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of defendant's acts is admissible." Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139 (Ct. App. 2011). Katz was not required to submit expert testimony as to her medical expenses and I find no error in admitting her personal testimony as to her injuries and bills. Wilder, 396 S.C. 139. The deposition testimony of Katz's treating psychiatrist,

Dr. Lucy Preyer, M.D., including treatment and billing records, was admitted without objection. Dr. Preyer's deposition testimony indicates that Katz suffered setbacks and exacerbation of her depression and anxiety as a result of the events that transpired. Katz's medication was modified and Katz's treating physician's medical records reflecting these modifications were also admitted into evidence without objection and support the nature and extent of Katz's injuries.

Much of the damages Katz suffered were intangible. One cannot easily or with any mathematical certainty place a value on the amount of a person's emotional and mental well being. Murray v. Bank of Am., N.A., 354 S.C. 337, 345 (Ct. App. 2003); Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000). I find that the evidence and testimony presented reasonably supports the amount of damages sustained by Katz and that $100,000 is fair compensation for the actual damages sustained by the Defendant Katz.

The Bank further argues that Katz may not recover emotional distress damages against the Bank's negligent conduct unless she demonstrated intentional or "outrageous" conduct.

The court notes that the evidence of the existence of physical injury caused by the emotional distress is sufficient to support damages for such mental trauma. Padgett v. Colonial Wholesale Distributing Co., *supra*; F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts (3rd Ed. 2004). Assuming, for argument's sake, there was insufficient evidence of physical injury and, further assuming physical injury is a requirement for the recovery of mental trauma, I find in the alternative that Katz presented evidence sufficient to prove outrageous conduct on behalf of the bank and

sufficient to support a recovery for mental and emotional distress in the absence of physical injury. See Sossamon v. Peeler, 291 S.C. 256, 258 (Ct. App. 1987) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings") *quoting* SCRCP Rule 54(c); *accord* Ringer v. Graham, 293 S.C. 238, 245 (Ct. App. 1987).

It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and where reasonable persons may differ is the question an issue of fact. RESTATEMENT (SECOND) OF TORTS SECTION 46, comment h; Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 167 (Ct. App. 1984)

In Todd v. South Carolina Farm Bureau Mut. Ins. Co., the Court of Appeals articulated that with conduct which has been deemed "outrageous" and thus liability found, the common thread has been the existence of three factors, 1) a pre-existing legal relationship, 2) excessive self-help in asserting a legal right or avoiding a legal obligation flowing out of the relationship, and 3) contemptuous disregard for the plaintiff's emotional suffering either to force the plaintiff to accede to the defendant's wishes or to punish the plaintiff for failure to comply. 283 S.C 169-07.

With this guidance, I find the evidence supports the conclusion that the Bank's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery for Katz. Here, Katz satisfies these three factors by and through her pre-existing banking relationship with the Bank, the Bank's excessive self-help in avoiding disclosure of the Billpay process despite repeated demands to do so by the police, Jernigan, and Katz, and the disregard shown by the Bank with regard to Katz's emotional suffering after the Bank

refused to reimburse her account, required Katz file a police report, and refused to even investigate, much less disclose, other material information relating to the Billpay transfers and accounts at issue. Accordingly, the court rules in the alternative that to the extent Katz did not sufficiently prove physical injury, the evidence supports a judgment for purely emotional and mental distress damages.

Moreover, the record supports the conclusion that Katz, as a result of the Bank's negligence, suffered limitations on her ability to participate in, and derive pleasure from, the normal activities of her daily life. Further, the record indicates that Katz's ability and inclination to pursue her talents, recreational interests, hobbies, and avocations was also negatively impacted. This supports a recovery of damages, separate and apart from pain and suffering and emotional distress, for loss of enjoyment of life. Boan v. Blackwell, 343 S.C. 498, 502 (S.C. 2001). Accordingly, the court rules in the alternative that to the extent Katz did not sufficiently prove physical injury, mental injury, or emotional injury, the evidence supports a judgment for loss of enjoyment of life.

Bank of America also argues that it did not owe a duty of care to Defendant Katz and any duty owed was contractual in nature.

Questions of negligence and proximate cause are ordinarily questions of fact which are not to be disturbed. Davenport v. Walker, 280 S.C. 588, 591 (S.C. Ct. App. 1984). In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002).

An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." Shipes v. Piggly Wiggly St. Andrews 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997).

The case of Murray v. Bank of Am., N.A., 354 S.C. 337 (Ct. App. 2003), is particularly instructive on this issue. In Murray, the Court of Appeals found a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of her account. The Bank failed to follow its own procedures, did not timely close the account, and the account was thereafter fraudulently accessed. Murray, 354 S.C. 337, 343. The Court of Appeals found that this was sufficient evidence to establish the existence of a duty and a breach thereof. Id at 343-44.

I find a relationship between the Bank and Katz arose sufficient to impose upon the Bank a duty of care when Katz went to the Bank seeking closure of her and Jernigan's joint account. After discussing the financial issues and their damaging effects upon Katz regarding her soon to be ex-husband, Katz was assured the Bank would take the appropriate steps to prevent Jernigan from accessing or otherwise viewing the account

ending in 8854. In fact, it was Bank policy for all access to be removed, including online access, when a customer is removed from a joint account. The Bank failed to follow its own procedures, did not timely close the account, and did not notify Katz that the account remained open. I find this to be sufficient evidence to establish a duty of care and determine the Bank breached its duty to Katz after these duties arose, proximately causing Katz's damage.

I further find a relationship between the Bank and Katz arose sufficient to impose upon the Bank a duty of care when Katz discovered the unauthorized Billpay transfers and contacted the Bank seeking assistance and investigation into the matter. The Bank again failed to follow its own procedures regarding fraudulent activity, requiring that she file a police report, refusing to reimburse Katz, and the Bank did not investigate or disclose the mechanics of the Billpay process during the police investigation despite specific requests to do so and, did not investigate or disclose the restriction on Jernigan's account at or around the same time as the Billpay transfers at issue. I find this to be sufficient evidence to establish a duty of care and determine the Bank breached its duty to Katz after these duties arose, proximately causing Katz's damage.

Alternatively, the record supports, and I find, that a fiduciary relationship was created between the Bank and Katz when the Bank advised Katz to file a police report. Rush v. South Carolina Nat'l Bank, 288 S.C. 560, 562 (S.C. Ct. App. 1986). The Bank was in a superior position to Katz with respect to knowledge and information regarding the circumstances with which the Billpay transfers were made. This enabled the Bank to exercise influence over Katz with respect to her actions after the discovery that her account had been accessed. The record indicates Katz placed her confidence and trust in

the Bank in this regard, and I find that she had a reasonable foundation to believe the Bank was acting in her interest, rather than its own, when the Bank led her to believe Jernigan deliberately accessed her account and induced her to file a police report against him in order to be reimbursed. This fiduciary relationship was breached when the Bank failed to investigate or disclose the mechanics of the Billpay process during the police investigation despite specific requests to do so and when the Bank failed investigate or disclose the restriction on Jernigan's account at or around the same time as the Billpay transfers at issue. See Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41 (S.C. 1986).

Accordingly, the court rules in the alternative that the record supports a judgment in favor of Katz for breach of fiduciary duty. See also SCRCP Rule 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings").

Finally, the Bank, referencing Defendant Katz's pleadings, argues that the Katz order should be amended to state only "negligence" and nothing more.

The court first notes "the ultimate viability of any claim is determined by the evidence produced at trial rather than the allegations of the pleadings." Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 168 (S.C. Ct. App. 1984). This notwithstanding, the Cross-Claim pled by Katz stated the Bank owed Katz a duty and breached that duty "by and through it's...**grossly negligent, and/or reckless acts and/or omissions**" (emphasis added). Gross negligence is defined as "the failure to exercise slight care." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999). It has also been defined as "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a

thing intentionally that one ought not to do." Id. Gross negligence "is a relative term, and means the absence of care that is necessary under the circumstances." Id; see also Doe v. Greenville County Sch. Dist., 375 S.C. 63, 71 (S.C. 2007).

Here, written evidence indicates the Bank knowingly refused to provide further information or investigation regarding the Bill pays at issue, the status of Jernigan's account, and the precise mechanics of the Billpay system. The Bank engaged in this conduct after requiring Katz file a police report, refusing to reimburse her account, and with actual knowledge that Katz was being harmed as a result. This and other evidence in the record supports a finding of gross negligence under the circumstances.

To the extent gross negligence and recklessness were not adequately stated in the pleadings, there was no timely objection to the presentation and evidence of gross negligence and recklessness at trial. As such, those issues were tried by the express or implied consent of the parties. See SCRCP Rule 15(b); Crawford v. Crawford, 321 S.C. 511, 514 (Ct. App. 1996); McCurry v. Keith, 325 S.C. 441, 447 (S.C. Ct. App. 1997)(When issues not raised in the pleadings are tried by consent, they will be treated as if they had been raised in the pleadings).

For the reasons set forth on the record, in the judgment, and as articulated herein, Defendant Bank of America's motion to alter or amend the judgment entered in favor of Defendant Katz is hereby **DENIED**.

AND IT IS SO ORDERED!

The Honorable J. C. Nicholson, Jr.

This 20 Day of March, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2009-CP-10-2433
FLOYD E. JERNIGAN, Plaintiff, vs. SUZANNE BOONE KATZ and BANK OF AMERICA, N.A., Defendants.	)	**ORDER DENYING DEFENDANT BANK OF AMERICA'S MOTION TO ALTER OR AMEND JUDGMENT**

FILED
2012 MAR 22 PM 2:35
JULIE ARMSTRONG
CLERK OF COURT
BY

Procedural Background

THIS MATTER came before me for trial on September 13-15, 2011, by agreement of the parties. Based on the evidence presented, the Court found the Defendant Bank of America Corporation (BOA) was negligent in failing to follow its standard procedures, in failing to properly investigate the circumstances thereof, in failing to communicate with the Plaintiff about the consequences of its error, and in leading Defendant Katz and investigating law enforcement to believe that the Plaintiff deliberately misappropriated funds from her account.

As a result of BOA's acts and omissions, Plaintiff was arrested and charged with a crime, and suffered tangible and intangible damages as a result, and was awarded the sum of $85,000 in compensatory damages.

Defendant BOA filed a Motion to alter or amend this judgment on December 22, 2011. This Court heard oral arguments by the parties on February 15, 2012. For the following reasons, Defendant BOA's Motion is DENIED.

EXHIBIT
D

Factual Background

The Plaintiff and Defendant Katz were married on May 21, 1983. In January 2004, while contemplating a divorce, the parties agreed that the Plaintiff should be removed from the joint checking account, 8854, which they shared at Defendant BOA.

Plaintiff and Katz met at a BOA branch on January 5, 2004, and each executed the required paperwork for the removal of the Plaintiff from the now formerly joint account, 8854.

Thereafter, BOA, through its employees and agents, failed to follow its internal policies and procedures for the removal of the Plaintiff from the 8854 account.

This failure was not discovered until January 17, 2007, when $1100 of "Bill Pay" payments made by the Plaintiff from his personal account, and intended for his personal expenses, were funded from Katz's 8854 account.

Upon discovery of the missing funds from her account on the evening of January 18, 2007, Katz telephoned BOA and spoke to several representatives about the concerning transaction. During the course of the evening's phone calls, Katz learned that the transactions had originated with Plaintiff's personal account. Further, it was suggested by BOA that the transactions required deliberate action on his part. Finally, Katz was told that if BOA was to recover the funds, she would have to file a report of the incident with police. BOA also instructed Katz to avoid any communication with the Plaintiff regarding the situation.

Katz made her report to the Charleston Police Department on January 20, 2007, and thereafter visited a BOA branch. It was then that Plaintiff was first notified of the situation

by an employee of Defendant BOA, and immediately reimbursed Katz's account for the full amount.

During the course of this litigation, it was discovered by the Plaintiff that at virtually the same time that Plaintiff had made these Bill Pay transactions, his personal BOA account had been restricted by BOA in connection with an unusually large deposit which had initially been rejected and was subsequently re-deposited by BOA.

Without knowledge of these circumstances, Katz spent the next several months investigating the circumstances of the transaction with inquiries to BOA. She did learn that BOA had failed to remove the Plaintiff from the 8854 account; however, there was no mention of the restricted status of Plaintiff's account at the same time, and BOA's assertion, and her belief, that the transactions could not have occurred without deliberate action on the Plaintiff's part, motivated Defendant Katz to revive the police investigation and pursue criminal charges.

Charged with Obtaining Property by False Pretenses, the Plaintiff was arrested at his home during the early hours of May 25, 2007, in the presence of his minor son, and spent 18 hours in custody, before he was released on his own recognizance.

With the initiation of formal criminal proceedings against him, the Plaintiff and his attorney, Susan Dunn, Esquire, made several inquiries with BOA into the mechanics of the transactions, but were not provided complete answers. Ms. Dunn eventually discovered that BOA engaged a third-party vendor for its Bill Pay processing: Check-Free Corp (otherwise known as Fiserv); and also learned that the transactions occurred because the 8854 account was still linked to the Plaintiff's online Bill Pay, without his knowledge. The coincident restriction of Plaintiff's personal account at the same time was not acknowledged, or volunteered, by BOA.

The investigating officer, Sgt. Daquigan, testified that he would have interfered with, and recommended against prosecution, if the BOA representative had told him of the Bank's inadvertent failure to remove the Plaintiff from the account four years before, or the restricted status of Plaintiff's account, at the time of the disputed transactions.

BOA never fully explained to Katz, the Charleston Police Department, or Plaintiff Jernigan how the money was removed from the Defendant Katz's account.

BOA never fully investigated whether the money was or could have been removed from Katz's account due to any computer glitch or other technical issue between BOA and the third-party vendor, Check-Free Corp. (Fiserv) involved in the processing of Bill Pay transactions.

BOA neither preserved, nor attempted to preserve, any electronic information regarding the Bill Pay transaction associated with the accounts of the customers involved in this suit. Moreover, BOA did not request any information from Check-Free Corp. (Fiserv) regarding the Bill Pay transaction, which is the subject of this suit.

BOA's explanation at trial that Katz was fully informed about the Bank's error is not believable.

After the case was assigned to Charleston County Assistant Solicitor Kim Steele, and after she was informed by Defendant BOA that there was no information they could provide to indicate how the disputed transactions had occurred, the charges against the Plaintiff were dropped and eventually expunged.

As a result of the acts and omissions of the employees and agents of BOA, Plaintiff suffered the embarrassment, distress and related consequences of unexpected physical

arrest and confinement; he also spent $2650 on his criminal defense. Though he did not require professional therapy, as a physician with no experience with the criminal justice system, the Plaintiff was fearful of professional repercussions, and embarrassed in the face of his family, and otherwise emotionally distressed, during the ten month pendency of the proceedings against him.

Arguments of Defendant Bank of America

I. Breaches of Duty

Defendant BOA argues in its motion to alter or amend the Court's judgment that the Plaintiff failed to present evidence that it had a duty to the Plaintiff to remove him from the 8854 account, to investigate the circumstances regarding the transactions, to communicate with the Plaintiff, and to correctly inform Katz and the police as to the circumstances surrounding the transactions. In the alternative, Defendant BOA argues that if such a duty did exist, it did not breach that duty. Defendant BOA's arguments fail as evidence supporting each of those duties, and BOA's breaches of said duties, were made to the Court.

Once it agreed to do so, upon request of the Plaintiff and Katz, BOA had a duty to properly remove Plaintiff from the 8854 account. Neither of its customers could do so. BOA created, controlled, and operated all aspects of the ownership and online access functions. Only BOA could have controlled these issues. However, for reasons which remain unexplained, the request was not properly executed. Such failure resulted not only in Plaintiff's retained ability to view the 8854 account online, but also the continued "linking" of the 8854 account to the Plaintiff's online Bill Pay function. Had it not been for the failure to follow its own procedures, the Bill Pay transaction resulting in Plaintiff's arrest would not have taken place.

BOA further argues that it owed no duty to investigate the circumstances of the disputed transactions. This argument fails to appreciate the special relationship the Bank has with all of its customers as the sole custodian of transactional processes and data. In the present case, such information was necessary to substantiate criminal charges which BOA insisted Katz file so that she could recover the funds missing from her account. Katz was instructed by BOA to file a police report - an action she would not have taken but for the insistence of the Bank. And without which, she was told, the Bank could not have requested the Plaintiff return the funds.

Further, BOA's argument fails because both the Plaintiff and Katz requested explanations of the transaction, and BOA undertook to fulfill that duty when it provided limited answers to Katz. The Court heard evidence that employees for Defendant BOA did not investigate the circumstances surrounding how these transactions occurred until they were preparing for their depositions. Even at the time of trial, BOA had no explanation of the role which the third party vendor, FiServ, might have played in the unauthorized Bill Pay transaction.

BOA also led the investigating police, whose involvement it required as condition of Katz's recovery of her funds, to believe that the actions of the Plaintiff must have been deliberate. During trial, BOA employee Brisson acknowledged that she did not review Plaintiff's account status or review how the transactions may have occurred. Brisson further testified she did not discuss the Plaintiff's account with either Katz or the police. In short, the entity which had required police involvement failed or refused to acknowledge details which only it was privy to.

II. Contractual Claim

BOA argues that any duty to remove Plaintiff from the joint account was owed to Katz as the remaining owner, and not to Plaintiff. Defendant BOA failed to provide any evidence regarding the existence, terms, or applicability of any contractual relationships in this case. Therefore, any argument that the negligence claim is barred by the contractual relationship fails. Further, as discussed previously, the negligence claim relied on facts beyond the failure of BOA to remove the Plaintiff from the 8854 account. The damages sustained by the Plaintiff were the result of Defendant BOA's failure to remove him from the account, investigate the circumstances regarding the transactions, and provide accurate information to Katz and the police.

III. Plaintiff was Comparatively Negligent

BOA argues that even if BOA was negligent, Plaintiff's negligence was greater and should bar recovery. This Court finds that while Plaintiff might have taken steps to ask why he could still view the account to which he had renounced ownership, he had no duty to do so and, in any case, his failure to do so was not a proximate cause of his arrest, or prosecution, or the damages he suffered.

IV. Katz's Intervening Negligence

BOA also argues that Katz's actions were negligent, and superceded any negligence of BOA. Among other evidence, this argument ignores the testimony of Sgt. Daquigan, who was provided incomplete and misleading information when he investigated the matter, as urged by Katz, and as required by BOA. As Sgt. Daquigan made clear from the witness stand, if he had known the facts and circumstances as they were ultimately disclosed, there would have been no arrest.

Finally BOA argues that even if it is liable for damages to the Plaintiff, the amount awarded should be reduced as excessive, or because any damages should be attributed to his own conduct or the conduct of Katz. This Court finds no negligence of Plaintiff that was a proximate cause of his arrest. Further, the Court finds that any acts or omissions of Katz were the result of BOA's requirement of police involvement, combined with an incomplete investigation of, and failure to timely acknowledge or communicate its role in, the disputed transaction.

For the foregoing reasons, Defendant Bank of America's Motion to Alter or Amend the Order dated December 12, 2011, is DENIED.

And it is so ordered!

Hon. J. C. Nicholson, Jr.
Presiding Judge
Ninth Judicial Circuit

March 20, 2012
Charleston, South Carolina

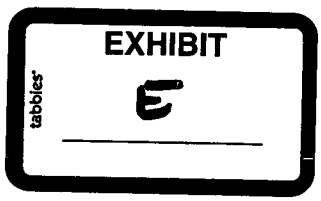
STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

FLOYD E. JERNIGAN,) Civil Action No. 2009-CP-10-2433
)
Plaintiff,)
) **DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO ALTER OR AMEND JUDGMENT**
vs.)
)
SUZANNE BOONE KATZ and BANK OF AMERICA CORPORATION,)
)
Defendant.)

FILED
2011 DEC 22 AM 11:48
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to Rule 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, Defendant Bank of America, N.A. (the "Bank") hereby files this motion to alter or amend the two orders of judgment entered in this case on December 12, 2011. In one of the orders, the Court awarded actual damages to Defendant Suzanne Boone Katz ("Katz") on her claim for negligence against the Bank in the amount of One Hundred Thousand and 00/100 ($100,000.00) Dollars (the "Katz Order"). In the other order, the Court awarded actual damages in favor of Plaintiff Floyd Jernigan ("Jernigan") on his claim for negligence against the Bank in the amount of Eighty-five Thousand and 00/100 ($85,000.00) Dollars (the "Jernigan Order" and, jointly with the Katz Order, the "Orders"). The Court dismissed at trial Jernigan's remaining claims against the Bank for defamation and malicious prosecution. The Court also required Katz to elect recovery on either of her claims for breach of contract or negligence, and Katz elected the latter.

With this motion the Bank requests that the Orders be vacated in their entirety and that the Court instead enter judgment in favor of the Bank on the claims asserted by both Jernigan and Katz. In the event the Court chooses not to vacate the Orders, the Bank requests that the



Court substantially reduce the amount of the judgments to conform to the evidence presented. Specific grounds for this motion follow.

1. The Katz Order should be vacated in its entirety and the Court should enter judgment in favor of the Bank because:

(a) The only damage alleged by Katz or found by the trial court was emotional distress, and a party may not recover for a defendant's negligent conduct – as opposed to intentional or "outrageous" conduct – when the only damage suffered is emotional distress. *Doe v. Howe, III*, 2007 WL 7306130 (S.C.Com.Pl. 2007)("South Carolina law is also clear that, in the absence of actual physical or pecuniary injury, emotional distress damages are recoverable only in limited circumstances where the defendant acts outrageously...South Carolina has not recognized any other theories [other than intentional and negligent infliction of emotional distress] under which a plaintiff, in the absence of a physical injury or economic damages, may recover damages for solely emotional injuries.") *See also, Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (adopting intentional infliction of emotional distress as a cause of action requiring, amongst other elements, "outrageous" conduct on the part of defendant).

(b) There is no claim under South Carolina law for *negligent* infliction of emotional distress under the facts alleged, and Katz did not even plead a claim for negligent or intentional infliction of emotional distress or prove any intentional or "outrageous" conduct toward her by the Bank. *See Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985) (recognizing negligent infliction of emotional distress as a cause of action *only* for bystanders of accidents affecting close relations and *only* in cases manifesting physical symptoms "capable of objective diagnosis"); *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 154, 533 S.E.2d 597, 603 (Ct. App. 2000)(recovery for emotional distress in connection with negligent conduct limited to bystander recovery).

(c) Even assuming South Carolina did permit recovery for negligent infliction of emotional distress under the facts of this case, the evidence at trial was insufficient to meet the required showing that the distress be manifested by physical symptoms and proven with expert testimony. *Doe v. Greenville County School Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (S.C. 2007)(a plaintiff seeking to recover for negligent infliction of emotional distress must show that his emotional distress "manifests itself by physical symptoms

capable of objective diagnosis and established by expert testimony.")

Katz's treating physician testified that: 1) the only medical condition for which she ever diagnosed Katz was "depression" and she made the diagnosis 3 years before the events at issue in this case occurred; 2) she did not recall Katz ever mentioning the events at issue in this case and her treatment notes contain no reference to them; 3) she did not personally observe any physical symptoms in Katz; and 4) her treatment records indicate Katz's condition actually improved over the same time period in which the events at issue in this case occurred.

(d) The evidence was insufficient to establish that any emotional distress suffered by Katz was caused by the Bank's conduct for the same reasons set forth in paragraph (c) above.

(e) Any duties owed by the Bank to Katz were contractual in nature, and therefore Katz should have been limited to damages for breach of contract, for which emotional distress is not recoverable. *See, e.g., Whitten v. Am. Mut. Liab. Ins. Co.*, 468 F. Supp. 470, 473 (D.S.C. 1977) *aff'd*, 594 F.2d 860 (4th Cir. 1979)("[T]he law of this state makes no provision for the recovery of damages for emotional distress or mental anguish resulting from breach of contract, no matter what the intent of the breaching party was in failing to fulfill its obligations.").

(f) Katz's negligence claim was indistinguishable from her claim for breach of contract, such that she may not recover for emotional distress regardless of the Bank's intent. *Whitten*, 468 F. Supp. at 473.

2. The Jernigan Order should be vacated in its entirety and the Court should enter judgment in favor of the Bank because:

(a) The evidence was insufficient to establish that the Bank owed a duty of care to Jernigan in any of the following particulars identified in the Jernigan Order:

i. to follow its standard procedures for the removal of Jernigan's ability to access Katz's account;

ii. to investigate the circumstances regarding how Jernigan made payments from Katz's account;

iii. to communicate with Jernigan regarding Katz's account; or

iv. to communicate with Katz or law enforcement regarding how Jernigan made payments from Katz's account.

(b) The evidence was insufficient to establish that the Bank breached a duty of care to Jernigan in any of the following particulars identified in the Jernigan Order:

i. failing to follow its standard procedures for the removal of Jernigan's ability to access Katz's account;

ii. failing to investigate the circumstances regarding how Jernigan made payments from Katz's account;

iii. failing to communicate with Jernigan regarding Katz's account; or

iv. failing to communicate with Katz or law enforcement regarding how Jernigan made payments from Katz's account.

(c) The Court based its finding that the Bank breached a duty of care to Jernigan in part upon the Bank's failure to eliminate Jernigan's ability to access Katz's account online, but any such duty was contractual in nature and was owed to Katz as the remaining owner of the account, not to Jernigan.

(d) The Court based its finding that the Bank breached a duty of care to Jernigan in part upon the Bank's allegedly untrue statements to Katz and law enforcement regarding how the subject payments occurred, but South Carolina does not recognize a cause of action for "negligent slander" or "negligent prosecution." Indeed, at trial the Court expressly found that Jernigan failed to satisfy the elements of his claims for slander and malicious prosecution, including the requirement that the defendant act with malice, and dismissed those claims.

(e) The Court based its finding that the Bank breached a duty of care to Jernigan in part upon the Bank's allegedly untrue statements to Katz and law enforcement regarding how the subject payments occurred, but the evidence was insufficient to establish any untrue statement made by the Bank in connection with this matter.

Katz testified that the Bank informed her at the time she reported the disputed payments: 1) that Jernigan made the payments; 2) he made them through the billpay system; 3) that he had to have selected her account for payment in order to make them; and 4) that he was able to make them because the Bank failed to remove

his ability to access the account online. There is no evidence that any of these statements were untrue or that the no-check activity restriction placed on Jernigan's account and referenced in the Orders had any impact whatsoever on the disputed payments.

(f) The only reasonable inference that could be drawn from the evidence is that any negligence by the Bank was outweighed by Jernigan's own negligence, and Jernigan may recover damages only if his own negligence is not greater than that of the Bank. *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 193, 691 S.E.2d 170, 175 (Ct. App. 2010)(a plaintiff may only recover damages if his or her own negligence is not greater than that of the defendant).

Jernigan testified that: 1) he accessed Katz's account on multiple occasions prior to the dates of the disputed transactions at issue in this case; 2) he knew at the time that he should not be able to access her account; and 3) that he told no one at the Bank about his continued ability to access the account. If he had merely informed the Bank of his continued ability to access the account, the disputed payments would not have occurred. The Court indicated at trial that it believed these facts significant, but the Jernigan Order does not even address them or mention the Bank's affirmative defense of comparative fault.

Additionally, after the disputed payments occurred and Jernigan learned that Katz was pressing charges against him, he never contacted the Bank or Katz prior to his arrest to discuss his theory regarding how the transactions occurred or the alleged impact of the restriction placed on his account.

(g) The only reasonable inference that could be drawn from the evidence is that any injury to Jernigan was independently caused by the intervening acts of Katz in seeking to have him arrested. *Bishop v. South Carolina Dept. of Mental Health*, 331 S.C. 79, 83, 502 S.E.2d 78, 89 (S.C. 1998)(unforeseeable intervening acts by third party excuse defendant from liability).

The evidence at trial established that Katz: 1) initially reported the matter to the Charleston Police Department ("CPD"); 2) requested the investigation be reopened after CPD initially closed it and the disputed funds had been returned to her; 3) told CPD that Jernigan wouldn't call them back if they contacted him over the phone about serving a warrant and wouldn't answer the door if they came to his house; 4) pressured the Charleston County Assistant Solicitor Kimberly Steele ("Steele") to prosecute the matter after the Solicitor repeatedly told her the charge against Jernigan was not one she could prove; and 5) requested that Bank employee William

Nevarez ("Nevarez") put in writing that Jernigan made payments from her account on purpose despite the fact that Nevarez told her the payments could have been an "honest mistake" and he could not comment on Jernigan's state of mind in making the payments. Indeed, Steele testified that it was her discussion with the Bank in which she received substantially the same information Nevarez gave Katz that ultimately caused her to decide to *drop* the charge against Jernigan.

3. If the Court declines to grant the relief detailed above, the amount awarded to Katz should be reduced because an actual damages award of $100,000.00 to Katz is excessive and unsupported by any evidence. Because Katz produced no evidence of any actual harm, the damage award should at least be reduced to a nominal sum.

4. Similarly, if the Court does not enter judgment for the Bank, the amount awarded to Jernigan should also be reduced because:

(a) An actual damages award of $85,000.00 to Jernigan is excessive and unsupported by the evidence because Jernigan established no quantifiable damages other than the minimal amounts he paid to make bail and to his criminal defense attorney to get the criminal charge expunged, which totaled $2,650.00. He also testified that he suffered no emotional distress that required therapy, medication or any treatments whatsoever.

(b) The only reasonable inference that could be drawn from the evidence is that Jernigan contributed to the circumstances that resulted in his alleged harm and the damage award should be reduced in proportion to the amount of Jernigan's contributory negligence.

(c) The only reasonable inference that could be drawn from the evidence is that any damages resulting solely from Jernigan's arrest and the manner in which it occurred were independently caused by Katz and not the Bank as set forth in paragraph 2(g) above, and the amount of these damages should be deducted from the award.

5. Further, to the extent that the Court declines to vacate the Katz Order, it should amend it to accurately state that the award was on Katz's claim for "negligence," not "negligence/gross negligence/recklessness," because, as is shown by the Complaint, the claims

pled by Katz were for "negligence" and "breach of contract". Moreover, the evidence at trial was insufficient to establish any grossly negligent or reckless conduct by the Bank, and the Court expressly declined to award any punitive damages. Thus, the language pertaining to gross negligence and recklessness should be removed.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Defendant Bank of America, N.A.

December 22, 2011

Charleston, South Carolina

CERTIFICATE OF SERVICE

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

Pleadings:

DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO ALTER OR AMEND

Counsel Served:

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FILED
2011 DEC 22 AM 11:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Administrative Assistant

December 22, 2011

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009- CP-10-2433

Floyd E. Jernigan — PLAINTIFF(S)

Suzanne Boone Katz, ET AL — DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

X **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE. ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

FILED
2012 FEB 21 PM 5:01
JULIE J. ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Motion for Alter or Amend Judgment by defendant was heard and denied. Judge Nicholson will retain jurisdiction ~~in this case. Formal Order to follow.~~ to sign formal order. JCN

ORDER INFORMATION

This order X ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstracters and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2117
Judge Code

02/15/2012
Date

SCRCP Form 4C (10/2011)

EXHIBIT F

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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April 13, 2012

Bryson M. Geer, Esquire
Merritt G. Abney, Esquire
Nelson Mullins Riley
& Scarborough LLP
PO Box 1806
Charleston, SC 29401-2239

Re: Jernigan, Floyd v. Katz, Suzanne Boone
Case Tracking #: **2012210729**
2009-CP-10-02433

Dear Counsel:

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. Failure to file in the proper court may result in the dismissal of your appeal. 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 bar number and firm name of any counsel shown must be included in his or her address.

Upon review, the caption should read as follows:

Floyd E. Jernigan, Respondent

v.

Suzanne Boone Katz and Bank of America, Defendants,

of Whom Suzanne Boone Katz is Respondent

and Bank of America is the Appellant.

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

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.

I further 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

Jenny Abbott Kitchings
CLERK

JAK/laf
cc: Aaron E. Edwards, Esquire
Lawrence E. Richter, Jr.,Esquire
Geoffrey H. Waggoner, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

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ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,[1] documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:[2]

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.

2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.

3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.

4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

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1 See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

2 This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

Nelson Mullins

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April 13, 2012

Via U.S. Mail
Phyllis Norton, CVR
100 Broad Street, Suite 236
Charleston, SC 29401

RE: Floyd E. Jernigan v. Suzanne Boone Katz and Bank of America, N.A.
Case No.: 2009-CP-10-2433
Our File No.: 05100/02101

Dear Ms. Norton:

Please allow this letter to serve as our formal request for a copy of the transcript from the final hearing held before the Honorable J. C. Nicholson, Jr. on February 15, 2012 at 9:30 a.m. in the above-referenced matter. This request is made pursuant to South Carolina Court Rule 207.

Of course, our firm agrees to reimburse you for reasonable costs associated with this request.

Thank you in advance for your assistance with this matter. Please do not hesitate to contact me or my paralegal Lauren Lynch at (843) 534-4803 with any questions or concerns.

Very truly yours,

Merritt G. Abney

Merritt G. Abney

MGA:ll

cc: The Hon. Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals
Rosalyn W. Frierson, Director of South Carolina Court Administration
Geoffrey H. Waggoner, Esq.
Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.

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April 17, 2012

Melissa Raye Singletary
2797 State Road
Summerville, SC 29483

RE: Floyd E. Jernigan v. Suzanne Boone Katz and Bank of America, N.A.
Case No.: 2009-CP-10-2433
Our File No.: 05100/02101

Dear Ms. Singletary:

Please allow this letter to serve as our formal request for a copy of the transcript from the hearing held before the Honorable J. C. Nicholson, Jr. on October 24, 2012 in the above-referenced matter. This request is made pursuant to South Carolina Court Rule 207.

Of course, our firm agrees to reimburse you for reasonable costs associated with this request.

Thank you in advance for your assistance with this matter. Please do not hesitate to contact me or my assistant Lydia Spry at (843) 534-4849 with any questions or concerns.

Very truly yours,

Merritt G. Abney

MGA:dh
cc: The Hon. Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals
Rosalyn W. Frierson, Director of South Carolina Court Administration
Geoffrey H. Waggoner, Esq.
Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.