

STATE OF SOUTH CAROLINA )  
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 COUNTY OF HORRY )  
 )  
 Bank of North Carolina, )  
 Successor In Interest To )  
 Beach First National Bank, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Waterfall Investors 2, LLC and )  
 Raymond E. Cleary III )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2011-CP-26-1718

**ORDER DENYING PLAINTIFF'S  
 MOTION FOR NEW TRIAL AND  
 JUDGMENT NOTWITHSTANDING  
 THE VERDICT**

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This matter comes before the Court by way of Waterfall Investors 2, LLC and Raymond E. Cleary III's (hereafter, collectively, "Waterfall" or "Defendants") Motion for New Trial and Judgment Notwithstanding the Verdict. A hearing was held on December 17, 2013 before me. Bradley A. Floyd, Esquire, and Clayton M. Custer, Esquire, appeared on behalf of Bank of North Carolina, Successor in Interest to Beach First National Bank ("hereafter "Plaintiff") and Richard Gleissner, Esquire, appeared on behalf of Waterfall.

Having considered all testamentary and documentary evidence presented at trial, the Motion, memorandums of law submitted by the parties, and arguments from counsel, this Court denies Waterfall's Motion for New Trial and Judgment Notwithstanding the Verdict.

Defendants' Motion is premised on three primary arguments. First, Defendants argue the verdict was "reached as the result of improper motive, reflects the jury's confusion and is unsupported by the evidence." Second, Defendants argue the jury's verdict was tainted by a statement by Plaintiff's counsel in closing arguments. Finally, Defendants argue the jury's verdict was tainted by the already limited testimony of one of Plaintiff's expert witnesses. As set

forth below, each of these arguments lacks merit and is insufficient to warrant a new trial and a judgment notwithstanding the verdict under South Carolina law.

**I. There Was Sufficient Evidence to Support the Verdict and There Was No Evidence of Jury Confusion.**

**A. Defendants' Motion For New Trial is Denied Because There was Sufficient Evidence Presented At Trial to Support The Jury's Verdict.**

Rule 59(a) of the South Carolina Rules of Civil Procedure provides in relevant part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." S.C. R. Civ. P. 59. In ruling on a motion for a new trial, the "trial judge has the discretionary power to grant a new trial absolute or Nisi in a law case upon his disapproval of the verdict on factual grounds, and in this role he has been recognized and designated as the thirteenth juror." *S.C. State Highway Dep't v. Townsend*, 265 S.C. 253, 258, 217 S.E.2d 778, 781 (1975). This is called the thirteenth juror doctrine because it entitles a trial court to sit, in essence, as the thirteenth juror "when it finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." *Youmans ex rel. Elmore v. S. Carolina Dep't of Transp.*, 380 S.C. 263, 273, 670 S.E.2d 1, 6 (Ct. App. 2008) (internal citations omitted).

The Court declines to grant a new trial, finding that there is evidence in the record that supports a jury's verdict for Plaintiff. The jury was presented with ample evidence from both sides, including testimony from Dr. Cleary, Ms. Huntley, and Mr. Wise; and although some testimony differed, the jury was charged to evaluate the evidence and that it may believe any, all, or none of a witness's testimony. After reviewing the record, this Court finds that the jury's verdict in favor of Plaintiff on Defendant's counterclaims is not unsupported by the facts and evidence. Accordingly, Defendant's motion for a new trial is denied.



**B. Similarly, Defendants' Motion For Judgment Notwithstanding The Verdict Is Denied Because The Jury's Verdict Was Reasonably Supported By The Evidence Presented At Trial.**

A motion for judgment notwithstanding the verdict is merely a renewal of the directed verdict motion. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). "When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Id.* Here, while Defendants moved for directed verdict at the close of all evidence as to several affirmative defenses in Plaintiff's Answer to Defendants' Counterclaims, Defendants failed to move for directed verdict as to the Counterclaims themselves. Therefore, any motion for JNOV has been waived and this Court should not review this issue at the post-trial motions stage.

Notwithstanding the foregoing procedural defect, JNOV is not warranted in this case. In considering a JNOV motion all reasonable inferences must be taken in the light most favorable to the nonmoving party. *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The Court must deny a motion for directed verdict or JNOV "where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S. Carolina Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418-19 (Ct. App. 2000).

As discussed in detail in the preceding section, Plaintiff presented ample evidence and testimony to lead a reasonable jury to believe that Defendants failed to meet their burden of



proof. Thus, in light of the relevant law, even if the issue were preserved for post-trial review, Defendants' Motion for JNOV is denied.

**C. There Is No Evidence That The Jury's Verdict Was Either The Result Of Improper Motive or The Product Of Confusion.**

Defendants next take issue with the fact that the jury originally returned a verdict finding in favor of Defendants on the counterclaim for breach of the covenant of good faith and fair dealing, but finding damages in the amount of zero dollars. Citing the Supreme Court's decision in *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 734 S.E.2d 148 (2012), Defendants argue this fact entitles them to a new trial. However, such a conclusion is unsupported by the *Carson* decision, which only serves to affirm the Court's actions in response to the jury's original verdict – actions taken by the Court at Defendants' urging and without objection.

In *Carson*, the personal representative of a vehicle passenger's estate brought a wrongful death and survival action against the railroad defendant following a collision with a train at a crossing that killed the passenger. The jury found the railroad defendant to be 40% negligent in causing the accident, with the remainder allocated to the driver, and awarded zero dollars in damages for conscious pain and suffering and funeral expenses of the plaintiff. The court stated that such a finding was "legally incorrect," and ordered a new trial. *Id.*, 400 S.C. at 242, 734 S.E.2d at 159.

In the present action, had the Court accepted the jury's original verdict, *Carson* might apply. However, at the urging of Defendants and in reliance on two Supreme Court decisions – *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003) and *Stevens v. Allen*, 342 S.C. 47, 52, 536 S.E.2d 663, 665 (2000) (cited in the *Bensch* decision) – the Court instructed the jury that its verdict was inconsistent, and returned it for further deliberations to either find in Plaintiff's favor or award Defendants at least some amount of damages. Such an instruction is not only



consistent with South Carolina law, but it also tracks the language of the Supreme Court in *Stevens*. See *Stevens*, 342 S.C. at 52-53, 536 S.E.2d at 665 (emphasis added) (holding that where “verdicts . . . are facially inconsistent under South Carolina law, . . . the proper remedy, when an objection is raised, is to resubmit the matter to the jury [with the instruction] that *it must either find in the defendant’s favor or award the plaintiff at least some nominal amount of damages*”); see also *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 529, 155 S.E.2d 308, 309 (1967) (holding it appropriate for a trial judge to refuse to receive inconsistent verdicts and recommit the cases to the jury under additional instructions).

It is important to note that Defendants made no objection to the manner in which the Court responded to the original verdict, nor did it object to the Court’s instruction to the jury for additional deliberations. When the jury returned a question asking whether it must find some amount of damages in favor of Defendants or if it could instead find for Plaintiff on the counterclaim for breach of the covenant of good faith and fair dealing, the Court responded in writing that it must either find in Plaintiff’s favor or award Defendants at least some amount of damages – an instruction drafted, again, at the direction of Defendants and without objection. The jury then returned with a verdict in favor of Plaintiff on all counterclaims, including the breach of the covenant of good faith and fair dealing.

Notwithstanding the fact that Defendants failed to object to any of the actions taken by the Court, there is nothing in the record to suggest the manner in which the Court handled this situation was improper or otherwise inconsistent with South Carolina law.<sup>1</sup> Accordingly, Defendants’ claim is without merit.

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<sup>1</sup> Further, there is nothing in the record to support Defendants’ contention that the jury was so “exhausted” that its final verdict should be rendered a nullity. The jury never indicated a desire to adjourn its deliberations to continue the next day, nor did it give any indication that it was “exhausted” or wished to go home. And, importantly, Defendants never requested that the Court stop the jury from further deliberating.

**D. The Comparative Negligence Instruction Was Not Implicated In The Jury's Verdict, And Regardless, Such An Instruction Was Proper In Light Of The Evidence Presented At Trial.**

Defendants also argue there was no evidence presented at trial from fact witnesses who could support a finding of comparative negligence on the part of Defendants, as to their counterclaim for negligent misrepresentation; thus, the jury's finding in favor of Plaintiff on such claim was improper, necessitating a new trial.

There was no finding by the jury that Defendants were comparatively negligent, rather, the jury found in favor of Plaintiff on the negligent misrepresentation counterclaim. Thus, it is unclear how the comparative negligence instruction is at all relevant. Regardless, there was ample evidence presented at trial of Defendants' negligence with regard to the negligent misrepresentation counterclaim. To prove a claim for negligent misrepresentation, a party must establish the following elements:

- (1) the defendant made a false representation to the plaintiff;
- (2) the defendant had a pecuniary interest in making the statement;
- (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff;
- (4) the defendant breached that duty by failing to exercise due care;
- (5) the plaintiff justifiably relied on the representation; and
- (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

*Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010). Plaintiff elicited testimony from Dr. Cleary in cross examination that he performed no due diligence of his own before purchasing an interest in the subject property, or before refinancing and increasing his investment in 2006 and again in 2007. Dr. Cleary never inspected the property himself, did not hire someone to conduct such an inspection, and did not commission anyone to



conduct a wetlands inspection. Dr. Cleary was a Bank Chairman who was familiar with commercial real estate loans and formal wetlands delineations. Such testimony properly supports the Court's instruction of comparative negligence, thus – notwithstanding the fact that such a charge was not implicated in the jury's verdict – the Court of Appeals' holding in *Youmans ex rel. Elmore v. South Carolina Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008), is inapplicable and Defendants' request for a new trial is denied.

**II. Defendants' Contention That Plaintiff's Closing Arguments Were Improper Was Not Preserved For Review And Is Not Grounds for a New Trial**

Defendants' argument that the jury's verdict was tainted by the reference to Dr. Cleary's personal financial information in Plaintiff's closing arguments is similarly without merit because that issue was not properly preserved for review at this stage. Under South Carolina law, an opposing party must immediately object to an improper argument made by counsel during closing argument. *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986) (quoting *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969)). In *Varnadore*, counsel for the objecting party raised his objection after closing arguments and out of the presence of the jury. *Varnadore*, 289 S.C. at 159, 345 S.E.2d at 714. The objecting party requested a curative instruction, and the Supreme Court found that the trial court correctly denied the party's request because the party's objection was not timely. *Id.*

At trial, Defendants failed to object to the statements regarding Cleary's personal financial information at any time during or following closing argument. Instead, they raised the issue for the first time in their post-trial Motion for New Trial. Pursuant to the Supreme Court's holding in *Varnadore*, Defendants' objection has been waived, and the Court should not review this issue at the post-trial motions stage.



Regardless, there was nothing improper about the reference by Plaintiff's counsel in closing arguments to Dr. Cleary's income and net worth. Such information was elicited from Ms. Huntley during questioning as to the underwriting process. Thereafter, counsel for Defendants objected to the introduction of specific dollar amounts for Dr. Cleary's income and net worth, which objection was sustained by the Court. The Court did, however, allow testimony from Ms. Huntley that the loan was approved because of Dr. Cleary's significant income and net worth, sufficient to satisfy payments on the multi-million dollar loan, in the amount of roughly \$20,000.00 per month. Additionally, Defendants failed to move to strike the specific testimony as to Dr. Cleary's income and net worth that had already been introduced into evidence. See *State v. Wingo*, 304 S.C. 173, 177-78, 403 S.E.2d 322, 325 (Ct. App. 1991) (a motion to strike is necessary where a question is answered before an objection may be interposed, even after the objection has been sustained); *State v. Primus*, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000) ("[T]he cases are legion in holding if an appellant objects and the objection is sustained but he does not move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain or appeal."). Thus, even if Defendants had timely objected during Plaintiff's closing argument, Defendants' post-trial objection is nevertheless improper because they failed to move to strike the allegedly objectionable testimony during trial.

**III. Defendants' Argument That The Testimony Of Plaintiff's Expert Witness Was Improper Is Without Merit and Does Not Create Grounds for a New Trial.**

Finally, Defendants' argument that the jury's verdict was tainted by the Court's failure to exclude the testimony of one of Plaintiff's expert witnesses, James Watson, is also without merit. Following the testimony of Katie Huntley and Josh Wise, Plaintiff called as an expert witness Mr. Watson to testify about the use of real estate appraisals by banks during the underwriting



process for commercial loans.<sup>2</sup> Mr. Watson had been disclosed by Plaintiff in discovery in June 2013 – almost five months before trial – as being “expected to testify with regard to the reasons for which a lender is required to order appraisal(s) in commercial loans along with the intended use and purpose of said appraisal(s).” Plaintiff’s Second Supplemental Answers to Defendants’ First Set of Interrogatories, June 19, 2013. During the course of Mr. Watson’s testimony, Defendants objected to questioning about a loan commitment letter from Beach First to Dr. Cleary as outside the scope of Mr. Watson’s designation. The Court granted the motion, in part, allowing Mr. Watson to explain and testify about the contents of the letter, but only as they related to appraisals. Importantly, Defendants objection at trial was not as to any testimony about the loan at issue, as they argue now, but, rather, a more limited objection as to testimony about documents and issues other than the subject appraisals. Thus, Defendants’ present argument that Mr. Watson should not have been allowed to testify about the facts of the case or the subject loan at issue therein was waived and is not preserved for review at the post-trial motions stage.

Regardless, even if a proper objection had been made at trial, the argument is without merit. “Exclusion of a witness . . . is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party.” *Kramer v. Kramer*, 323 S.C. 212, 217, 473 S.E.2d 846, 847-48 (Ct. App. 1996) (citing *Brandi v. Brandi*, 302 S.C. 353, 359, 396 S.E.2d 124, 127 (Ct. App. 1990)). “The exclusion of a witness is a sanction which ‘should never be lightly invoked.’” *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541-42 (1991) (quoting *Kirkland v. Peoples Gas Co.*, 269 S.C. 431, 435, 237 S.E.2d 772, 774 (1977)). Here, the disclosure made by

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<sup>2</sup> Plaintiff also attempted to call David Singleton as an expert witness, but he was excluded by the Court upon motion by Defendants.



Plaintiff was sufficient to put Defendants on notice that Mr. Watson may testify as to the “use and purpose” of “appraisal(s) in commercial loans” as they were used in the underlying loan at issue in the case. Defendants had almost five months in which to depose Mr. Watson, yet failed to do so.<sup>3</sup> Thus, it was well within the Court’s discretion to admit Mr. Watson’s limited testimony.

**CONCLUSION**

For the reasons stated above, Defendants’ Motion for New Trial and Judgment Notwithstanding the Verdict is denied.

**SO ORDERED.**



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The Honorable R. Knox McMahon  
Trial Judge

2-5, 2014

Wintersboro, South Carolina

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<sup>3</sup> Defendants now conveniently claim they chose not to depose Mr. Watson based on the contents of Plaintiff’s disclosure. However, it must be noted that Defendants did not take a single deposition of any witness – expert or fact – in this case.