THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No.: 2012-CP-42-02714

Arthur State Bank .... Respondent

v.

Quentin S. Broom, Jr., Amy B. Broom a/k/a Amy Broom,
Ann G. Broom, and Russell A. Broom .... Appellant.

INITIAL BRIEF OF APPELLANT

L. Lee Plumblee
Eppes & Plumblee, PA
P.O. Box 10066
Greenville, SC 29603
(864) 235-2600
Attorney for Appellant

Louise Myers Johnson
Haynsworth Sinkler Boyd, PA
P.O. Box 11889
Columbia, SC 29211
(803) 540-7863
Attorney for Respondent

RECEIVED
FEB 03 2014
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii
Statement of Issues on Appeal 1
Statement of the Case 1
Arguments
1. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIMS OF DEFENDANTS BECAUSE THE PLEADINGS AND EVIDENCE SUBMITTED TO THE COURT ALLEGE AND DEMONSTRATE THAT PLAINTIFF VIOLATED FEDERAL LAW BY DISCLOSING TO NON-AFFILIATED THIRD PARTIES PRIVATE BANKING RECORDS OF THE DEFENDANTS 4
2. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIMS OF DEFENDANTS BECAUSE THE PLEADINGS AND EVIDENCE SUBMITTED TO THE COURT ALLEGE AND DEMONSTRATE THAT PLAINTIFF BREACHED STATE CONTRACT AND COMMON LAW DUTIES OWED TO APPELLANTS 13
Conclusion 18

TABLE OF AUTHORITIES

CASES

Brown v. Leverette, 291 S.C. 364, 353 S.E. 2d 697 (1987)....................................4
Dunmire v. Morgan Stanley, 475 F. 3d 956 (8th Cir. 2007)....................................11, 12, 13, 17
Erickson v. Pardu, 551 U.S. 89 (2007)....................................4
French v. American General Financial Services, 401 B.R. (U.S. Bankruptcy Ct., E.D. Tenn. 2009)....................................12, 13
Hancock v. Mid-South Management Co., 2009 LEXIS 18 (2009)....................................4
Knife Source, LLC v. Wachovia, N.A., 2007 WL 232892 (2007)....................................9, 10, 11
Marks v. Global Mortgage Group, Inc., 218 F.R.D. 492 (S.D.W.VA. 2003)....................................9, 10, 11
Rycroft v. Gaddy, 281 S.C. 119, 314 S.E. 2d 39 (Ct. App. 1984)....................................13, 14, 15
Staples v. Duell, 329 S.C. 503, 494 S.E. 2d 639 (Ct. App. 1997)....................................16

STATUTES

15 U.S.C.A. § 6801(a)....................................5, 10
15 U.S.C.A. § 6809(4)....................................5
15 U.S.C.A. § 6802(a)....................................5, 6, 7, 15
15 U.S.C.A § 6802(e)....................................7, 12

OTHER AUTHORITIES

S.C.R.C.P. 12(b)(6)....................................4
S.C.R.C.P. 56....................................4
S.C.R.C.P. 45....................................15
H.R. CONFERENCE REPORT NO. 106-434 (1999)....................................5
H.R. CONFERENCE REPORT NO. 106-74 (1999)....................................5
RESTATEMENT (SECOND) OF TORTS § 323(a)....................................16

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DISMISSING THE AMENDED COUNTERCLAIMS OF APPELLANTS WHERE THE PLEADINGS AND EVIDENCE SUBMITTED TO THE COURT ALLEGE AND DEMONSTRATE THAT RESPONDENT VIOLATED FEDERAL LAW BY DISCLOSING TO NON-AFFILIATED THIRD PARTIES PRIVATE BANKING RECORDS OF THE APPELLANTS?

II. DID THE TRIAL COURT ERR IN DISMISSING THE AMENDED COUNTERCLAIMS OF APPELLANTS WHERE THE PLEADINGS AND EVIDENCE SUBMITTED TO THE COURT ALLEGE AND DEMONSTRATE THAT PLAINTIFF BREACHED STATE CONTRACT AND COMMON LAW DUTIES OWED TO APPELLANTS?

STATEMENT OF THE CASE

Respondent (Plaintiff below) filed its action on June 27, 2012, seeking foreclosure of the following notes and mortgages: (1) Home Equity Line Note from Appellant (Defendant below) Quentin Broom, Jr. to Plaintiff dated September 30, 2003, in the original principal amount of $117,000.00 ("Note-1"), which was secured by a mortgage executed and delivered by Quentin Broom to Respondent and recorded on October 2, 2003 in the office of the Spartanburg County Register of Deeds ("Mortgage-1"); and (2) Home Equity Line Note from Quentin Broom to Respondent dated April 26, 2006, in the original principal amount of $585,000 ("Note-2"), which is secured by a mortgage executed and delivered by Appellants and properly recorded in the office of the Spartanburg County Register of Deeds ("Mortgage -2"). Respondent also seeks a deficiency judgment against Appellant Quentin Broom. Complaint and Exhibits thereto.

Appellants timely served their Answer and Counterclaim on September 28, 2012, in which Appellants alleged that Respondent breached its statutory and common law duties to Appellants by disclosing private, personal financial information of Appellants to an unauthorized third party.

Respondent timely replied to the Answer and Counterclaim on November 9, 2012 and filed Respondent's Motion to Dismiss the counterclaims on March 4, 2013.

On or about April 5, 2013, Appellants filed a Motion to Amend their Answer and Counterclaim ("Motion to Amend"). Appellants Motion to Amend contained and incorporated by reference Appellant's proposed Amended Answer and Counterclaims ("Amended Counterclaims"). In their Amended Counterclaims, Appellants asserted the following causes of action: (1) Violation of the Gramm-Leach-Bliley Act, 15 U.S.C.A. Sections 6801, et. seq. (the "Act"); (2) breach of contract by Respondent arising out of the loan documents and the privacy policy of the Respondent incorporated therein regarding disclosure of nonpublic financial information of bank customers; and (3) negligence on the part of Respondent in disclosing nonpublic financial information of Appellants. Motion to Amend and Amended Counterclaims.

Prior to the hearing before the trial court, Respondent consented to Appellants' proposed Amended Counterclaims. The trial court heard and considered arguments with regard to the Amended Counterclaims and issued its ruling based upon the allegations of the Amended Counterclaims. Order of Honorable J. Derham Cole, August 26, 2013 (the "Order").

As alleged in the Amended Counterclaims, on and before September 2011, the Appellant Quentin S. Broom, Jr. was involved in a lawsuit with third parties Ten State Street, LLP, Timothy D. Scrantom, Mark Broadwater, and H. Hugh Andrews. In conjunction with said litigation, the parties adverse to Quentin Broom, Jr. served upon Respondent certain subpoenas for the records of various bank accounts maintained at Resondent's bank.

Quentin S. Broom, Jr. and other members of his family were the account holders whose records were subpoenaed. With the exception of Quentin S. Broom, Jr., none of the other family

members were parties to the litigation giving rise to the subpoena.

On or about September 16, 2011, Patrick E. Knie, Esquire, counsel for Broom, Jr., wrote to Respondent informing Respondent's representative that the subpoenas issued requested bank records for non-litigants in that action and requested that the bank notify each account holder that the subpoenas had been issued and give them an opportunity to seek independent legal counsel with respect to the exposure of their financial records which, according to Appellant Broom, Jr. and Mr. Knie, were not pertinent to the litigation.

The bank ignored the request of Defendant Broom, Jr. through his counsel Mr. Knie and disclosed the individual records of Defendant Broom, Jr. and of the other Appellants who were non-litigants in that subject litigation.

Appellants allege that the Respondent's unauthorized disclosure violated their statutory and common law rights and caused them damage. Amended Counterclaims.

Prior to the hearing before the trial court, Appellants submitted affidavits in support of their Motion to Amend and in opposition to Respondents' Motion to Dismiss. The Affidavits attest to the allegations of the Amended Counterclaims, and attached as exhibits: 1. the subpoena served upon Respondent by Ten State Street, LLP; 2. the letter of Patrick Knie, counsel for Quentin Broom in the Ten State Street case, to Kelly Banks, President of Respondent bank, notifying Banks that the subpoena had been served on bank customers who were non-parties to the Ten State Street case, and requesting that the customers be given notice of the subpoena and an opportunity to contest the disclosure of their financial information; and 3. the Respondent's Notice of Privacy Policy issued to Appellants.

The Court considered the Appellants' affidavits, as well as an affidavit submitted by Kelly

Banks, thereby converting the Respondent's motion to one for summary judgment. Order.

The trial court then issued its Order, granting Respondent's Motion to Dismiss and for Summary Judgment.

Appellant timely noticed this appeal on September 10, 2013.

Appellants' brief addresses both the standard for a motion to dismiss as well as for a motion for summary judgment.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIMS OF DEFENDANTS BECAUSE THE PLEADINGS AND EVIDENCE SUBMITTED TO THE COURT ALLEGE AND DEMONSTRATE THAT PLAINTIFF VIOLATED FEDERAL LAW BY DISCLOSING TO NON-AFFILIATED THIRD PARTIES PRIVATE BANKING RECORDS OF THE DEFENDANTS.

Standard of Review

South Carolina Rule of Civil Procedure 12(b)(6) permits actions to be dismissed for failure to state a cause of action. SCRCP 12(b)(6). The courts may grant motions to dismiss only where the facts alleged in the challenged pleading, which must be accepted as true, would not allow the party seeking relief to recovery under any theory of liability. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987); Erickson v. Pardus, 551 U.S. 89 (2007).

Rule 56, SCRCP provides for judgment as a matter of law where "there is no genuine issue of material fact for trial." In ruling on a motion for summary judgment, the court must view all of the facts in a light most favorable to Plaintiff. A non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Management Co., 2009 S.C. LEXIS 18 (2009).

In light of this standard of review, and for the reason stated below, the trial court's order

dismissing Appellants' Amended Answer and Counterclaim should be reversed.

In 1999, Congress passed the Gramm-Leach-Bliley Act,(hereafter referred to as the "Act"), for the primary purpose of enhancing competition between financial institutions by allowing for affiliation between various banks, securities firms, insurance companies, and other service providers. H.R. Conference Rep. No. 106-434 (1999). Congress recognized that the passage of the Act could exacerbate the concerns of consumers regarding the dissemination of information that financial institutions possess regarding consumers' personal financial information and spending habits. The uncontrolled dissemination of this personal information could subject the consumer to embarrassment as well as to unwanted solicitation. H.R. Conference Rep. No. 106-74 (1999). Section 6801 of the Act sets forth the legislative policy for protecting consumers. "It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic information." 15 U.S.C.A. Section 6801(a).

The Act defines "nonpublic information" as "personally identifiable financial information [('PIFI')](i) provided by a customer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution." 15 U.S.C.A. Section 6809(4).

In furtherance of the Congressional policy regarding consumer privacy, Section 6802 of the Act provides for the protection of nonpublic information as follows:

(1) In general

> A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless –

> (A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under Section 6804 of this title, that such information may be disclosed to such third party;
>
> (B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and
>
> (C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option. 15 U.S.C.A. 6802 (a).

As alleged in Appellants'Amended Answer and Counterclaims, and as attested to in the affidavits of Appellants, Ten State Street, LLP requested deposit information and copies of checks for accounts held by all of the Appellants. (Amended Complaint, Paragraphs 41-46; 49-51; Subpoena of Ten State Street, Exhibit A to Affidavits of Quentin Broom, Jr., Amy Broom, and Ann Broom). The requested information clearly falls withing the definition of "nonpublic" under the Act.

After receipt of this subpoena, counsel for Appellant Quentin Broom, Jr. wrote to Respondent and requested that Appellants/account holders whose nonpublic information was subpoenaed be notified and given the opportunity to respond. (See Amended Answer and Counterclaim, Paragarphs 41-46; Patrick Knie letter to Kelly Banks dated September 16, 2011, Exhibit B to Quentin Broom, Jr. affidavit). Respondent failed to notify any of the Appellants that their private banking records had been subpoenaed and failed to give the Appellants the opportunity to direct that such information not be disclosed. Further, Respondent failed to give Appellants an explanation of how Appellants could exercise their nondisclosure options. Accordingly, it is undisputed that Respondents did not comply with the requirements of Section 6802(a).

Respondents contend that they were not required to comply with the provisions of Section 6802(a), because the request for disclosure of Appellants' private information fell within a statutory

exception to the general rule that nonpublic information must be protected.

Section 6802(e) provides as follows:

> (e) General exceptions
> Subsections (a) and (b) of this section shall not prohibit the disclosure of nonpublic personal information--
>
> **(8)** to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or *subpoena or summons by Federal, State, or local authorities*; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

15 U.S.C.A. 6802(e)(8) (emphasis supplied).

Respondents posit that sub-section (e)(8) to 6802 provides that responding to any subpoena constitutes an exception to the privacy notice requirements of the Act. At the hearing before the trial court, counsel for Respondent argued as follows:

> "...on page two of this statute it says, section (e) at the top, general exceptions, and it says subsection (a) and (b) ... 'Shall not prohibit the disclosure of nonpersonal – nonpublic personal information." And it goes all the way down to the bottom – 'to comply with federal, state or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by federal, state, or local authorities.' Therefore there is an exception under Graham-Leach-Bliley that protects responding (sic) a subpoena by a bank in response to that subpoena." Tr. pages 6-7.

Respondent's position, however, is inconsistent with the plain language of Section 6802(e)(8). That language set forth 3 circumstances under which banks may disregard the privacy requirements of the Act, each circumstance being set apart by semi-colons:

1. To comply with Federal, State, or local laws, rules, and other applicable legal requirements;

2. To comply with a properly authorized civil, criminal, or regulatory investigation or

subpoena or summons by Federal, State, or local authorities; or

3. To respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

All of the exceptions to the general rule that nonpublic information must be protected anticipate a situation in which a court or a governmental agency is seeking the information in order to further an investigation or to insure compliance with laws and regulations governing the financial industry.

The subpoena served on Respondent requesting the nonpublic information of Appellants was not served by "federal, state, or local authorities." It was not issued by a judge. It was served by a private attorney representing Ten State Street, LLP in that company's action against Appellant Quentin Broom. Accordingly, disclosure of nonpublic information by Respondents in this case was not excepted from the provisions of Section 6802(a) of the Act requiring that notice and an opportunity to contest the disclosure be provided to Appellants.

On its surface, Appellants' position regarding who issued this subpoena may seem overly technical. However, there is a substantial difference between subpoenas issued by federal, state, and local authorities charged with regulating financial institutions and investigating criminal activity and subpoenas signed by trial lawyer in civil cases. In the former, a public imperative to make financial institutions safe and sound and to provide security to the community outweighs a consumer's right to privacy. Additionally, disclosure in the context of a regulatory or criminal investigation has little risk of getting into the hands of telemarketers or internet SPAM operators.

On the other hand, there is no overriding public policy supporting a private attorney's attempts to acquire the private information of bank customers who may be strangers to that

attorney's lawsuit. When nonpublic information is disclosed to private attorneys in a civil action, there are no restrictions on what use may be made of the information disseminated. Inadvertent, or perhaps purposeful, communication of the information by attorneys, staff, or adverse litigants are foreseeable occurrences. Civil litigants are granted broad latitude in the discovery process, a fact well established at the time that Congress passed the Act. The Act was designed specifically to address risks such as fishing expeditions undertaken in the civil discovery process.

Accordingly, the broad public policy supporting the Act to protect private financial information is buttressed by Appellant's position in this action but would be undermined substantially should Respondent's argument be found persuasive.

At the hearing, Respondent cited the unpublished opinion in KnifeSource, LLC v. Wachovia, N.A., 2007 WL 2326892, in support of its argument that subpoenas issued to non-litigants by private attorneys fall within the exception permitting disclosure of nonpublic consumer information. The KnifeSource case is distinguishable from the case before this Court. In that case, KnifeSource alleged that Wachovia had deposited checks drawn on KnifeSource accounts that were forged or altered or which bore forged endorsements. KnifeSource alleged that the checks were stolen by its former employee, Laura Dorn, who deposited the checks into her account with Wachovia. KnifeSource requested production of Dorn's bank records in order to determine if any checks had been so deposited. Wachovia objected to production of the information on grounds that Dorn's records were protected by the Act. Citing the case of Marks v Global Mortgage Group, Inc., 218 F.R.D. 492(S.D. W. Va. 2003), the court in KnifeSource found that requests for production served in that proceeding constituted "judicial process" as that term is used in Section 6802(e). The Court also went on to hold, however, that the parties had consented to a protective order in that case that

protected the confidentiality of the bank records requested by KnifeSource. KnifeSource, LLC.

The protective order in KnifeSource effected the purpose of the Act as stated in Section 6801 to "respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic information." 15 U.S.C.A. Section 6801. With that order in place, there were no concerns that the information would be disseminated in a fashion so as to embarrass the consumer or to subject her to unwanted solicitation.

It also is important to note that the bank was an adverse party in the case and that the "consumer" whose nonpublic information was requested, apparently had been charged criminally in connection with questioned transactions, and her records turned over to the Greenville County Sheriff's Department by Wachovia.[1]

If, indeed, Ms. Dorn's bank records still were "nonpublic" after her prosecution and at the time of the ruling in KnifeSource, the protective order signed by the District Court protected her privacy more effectively than any right to protest disclosure of her records pursuant to the Act.

The KnifeSource case is a perfect example of the type of exception that the Act anticipates. The discovery requests in that case were subject to judicial oversight, and that oversight allowed for protection of the private financial information as required by the Act.

Those same judicial protections do not exist in the case of a subpoena issued to a non-litigant by a private attorney.

---

[1] One of the requests for production to which KnifeSource sought to compel responses was for "All check copies, correspondence, and other documents [Wachovia] has given to or exchanged with the Greenville County Sheriff's Office and/or the Greenville County Solicitor's Office regarding Laura Dorn."

The KnifeSource case simply is not analogous to the case before this Court. [2]

Respondent violated the provisions of the Act by disclosing to a private attorney in a civil action nonpublic information belonging to Appellants in violation of Gramm-Leach-Bliley.

Respondent argued at the hearing before the trial court that, even if Respondent violated the Act, the Act does not provide a private right of action to parties such as Appellants. As authority for this position, Respondent cites case from the Eighth Circuit and from the bankruptcy court for the Eastern District of Tennessee. Tr. pp. 7-8.

No cases decided by the Courts of South Carolina or by District Courts within the Fourth Circuit have addressed the issue of whether the Act provides a private right of action to parties similarly situated to Appellants. Once again, the cases relied upon by Respondent are inapposite to the facts of the case before this Court.

In Dunmire v. Morgan Stanley, 475 F.3d 956 (8th Cir. 2007), the court held that the Act did not provide a recovery for Plaintiff where Defendant Morgan Stanley had served upon Plaintiff's estranged wife a demand letter seeking collection on a margin account with Morgan Stanley. In that case, the Court ruled that the information contained in the demand letter was not "nonpublic" and

---

[2] The KnifeSource Court cites as authoritative the case of Marks v. Global Mortgage Group, Inc., 218 F.R.D. 492 (S.D. W. Va. 2003). In Marks, the District Court of West Virginia held that the privacy provisions of Gramm-Leach-Bliley Act did not preclude a financial institution from disclosing non-public personal financial information of its customers to comply with discovery requests by a non-affiliated third party in an action accusing the institution of predatory lending practices, *where a protective order prevented the third party from disclosing information.* Again no protective order provided Appellants the assurance that their nonpublic information would not be improperly used or disclosed. The Marks case, just like the KnifeSource case, is distinguishable from the case at bench.

that its dissemination did not violate the Act, because 15 U.S.C.A. Section *6802(e)(1)* authorizes disclosures of nonpublic information "as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer." Dunmire, 474 F.3d at 960, citing 15 U.S.C.A. Section 6802(e) (1). The Dunmire court held that the exception contained in Section 6802(e)(1) permitted Morgan Stanley to disclose nonpublic information in an attempt to collect a legitimate debt owed as a result of transactions between Morgan Stanley and Dunmire.

Section 6802(e)(1) has no bearing on the case before this Court. Noone, not even Respondent, has claimed that it does. The claimed exception to the privacy requirements of the Act relied upon by Respondents in this case arise under 6802(e)(8). Accordingly, Dunmire is distinguishable insofar as it does not deal with the provision under the Act that Respondent relies upon in this case.

In support of its position that the Act provides no private right of action, the Dunmire court cites cases from other states, principally New York. The court, however, does not discuss at all what policy reasons would prohibit such private rights of action. The court did not have to examine those issues, because the principal claims raised by the plaintiff/appellant in that case were pursuant to state law. The court recognized that violations of the Act may provide a basis for actions brought pursuant to state law, which is discussed in Appellants' second argument, below. The significant fact for purpose of this case is that Dunmire offers no supporting rationale for why Congress's intent in passing the most sweeping of privacy laws would include prohibiting an aggrieved consumer from protecting their own rights.

Respondent also relies upon the case of French v. American General Financial Services, 401 B.R. 295 (U.S. Bankruptcy Ct., E.D. Tenn. 2009). In that action, Plaintiff, a debtor in bankruptcy,

filed an adversary proceeding against the Defendant, a creditor, alleging several grounds upon which the creditor's claims in bankruptcy should be disallowed. One of the grounds was that the filing of the claim with the court unlawfully disclosed nonpublic financial information in violation of the Act. In its seventeen (17) page opinion, the court spent exactly three paragraphs discussing the Act. While the court did hold that the Act does not provide a private right of action, in doing so, it relies primarily upon the Dunmire case, and it does not discuss why the stated policy reasons behind the Act would not allow a private right of action. In short, there is nothing about the French case that casts any edifying light on why South Carolina or the Fourth Circuit should disallow private actions pursuant to the Act.

The trial court's ruling that there has been no violation of the Act should be reversed, and its ruling that the Act provides no private right of action should be reversed.

II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIMS OF DEFENDANTS BECAUSE THE PLEADINGS AND EVIDENCE SUBMITTED TO THE COURT ALLEGE AND DEMONSTRATE THAT PLAINTIFF BREACHED STATE CONTRACT AND COMMON LAW DUTIES OWED TO APPELLANTS.

The trial court relied upon the 1984 Court of Appeals decision in Rycroft v. Gaddy, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984), a case decided fifteen (15) years before passage of the Gramm-Leach-Bliley Act, to hold that the Amended Answer and Counterclaim failed to state a cause of action for, and that Appellants failed to create a genuine issue of fact as to, any breach of duties owed to Appellants pursuant to South Carolina state law.

The trial court stated:

> From a review of the loan documents attached as exhibits to Plaintiff's Complaint and the Privacy Notice submitted in the Affidavits, the Court finds nothing that states

> or provides that Plaintiff (Respondent) agrees *not* to comply with a duly issued subpoena in a judicial proceeding. Rather, the Privacy Notice expressly states and reserves the right to disclose information, "as permitted by law." Without an order quashing the subpoena, Plaintiff not only is and was well within its rights, but was obligated to comply with the subpoena. (Order, p. 7).

The trial court stated further:

> The Rycroft court held that the bank was not negligent in failing to inquire beyond the face of a valid subpoena to determine if litigation was ongoing and if the records were requested for a valid purpose before responding to said subpoena, because a bank could not refuse to give information concerning an account when questioned in response to a lawful subpoena.
>
> The facts presented in this case are almost identical to those in the Rycroft case and should be analyzed under the same standard. In this case, it is undisputed that Plaintiff (Respondent) was presented with a subpoena in the Unrelated Action, and that no motion or order quashing the subpoena was ever filed. Plaintiff had no duty to do anything other than to comply with and respond to the subpoena. (Order, p. 8).

Appellants concede that Respondent did not agree specifically with Appellants as a part of the loan documents and privacy policy that Respondent would not comply with subpoenas. However, this point is irrelevant. Respondent *did* agree only to disclose information pursuant to a subpoena when to do so is "permitted by law."

The Rycroft court held that the Plaintiff in that case had failed to state a claim under state law where the former C&S Bank disclosed Rycroft's personal banking information to an adverse litigant pursuant to a subpoena. In Rycroft, the parties tried their case to the master-in-equity, who then issued his report to the circuit court. Between the time of the master's report, which was not excepted to by either party, and the final adoption of the master's report as a judgment, the party adverse to Rycroft issued subpoenas to Rycroft's bank, received Rycroft's records, and then moved to reopen the case. Rycroft contended that the bank had a duty to inquire into the status of the pending litigation prior to complying with the subpoena. The court ruled that, in the absence of a

motion to quash, no such duty existed. Rycroft, 314 S.E.2d at 42-43.

Had the present case been before this Court in 1984, prior to the adoption of the Act, and, prior to the adoption of the Rules of Civil Procedure, the Respondent's argument may be more persuasive. However, the Act changed the landscape regarding disclosure of private financial information. Prior to passage of the Act, the recipient of a subpoena either had to comply with it, or, in the absence of a motion to quash, refuse to comply and risk being held in contempt of court, a fact recognized by Rycroft. Id. [3]

The Act gives a bank receiving a subpoena protection from this dilemma. Pursuant to Section 6802(a), the bank would give notice of the subpoena to the owner of the nonpublic financial information. The risk of non-compliance with the law shifts at that point to the consumer, who may, at their peril, instruct the bank not to respond. It is not the bank refusing to comply, but rather the consumer.

The trial court held that the only appropriate procedure for contesting the disclosure of nonpublic information pursuant to a subpoena is a motion to quash. In so holding, the trial court ignored the fact that, in this case, Defendant/Appellants Ann Broom, Amy Broom, and Russell Broom were not litigants in the action in which the subpoena was issued and were not served with the subpoena. For this reason, Quentin Broom's attorney, Patrick Knie, wrote to Respondents President to request that notice of the subpoena be given to those parties. It never was. (Quentin Broom Affidavit and Exhibit B, thereto). Accordingly, the non-litigant Appellants were not offered the opportunity to file a motion to quash. Had notice been given as requested by Mr. Knie, and as

---

[3]It also is important to note that at the time of the Rycroft decision, SCRCP 45, governing subpoenas, had yet to be adopted. Attorneys at that time requested subpoenas which then were issued by the Court.

mandated by Section 6802(a) of the Act, these Appellants could have taken steps to protect their financial records.

In their Amended Answer and Counterclaims, Appellants allege that, in providing information to the attorney for Ten State Street, LLP, Respondent violated contractual duties owed to Appellants arising out of the loan documents and the bank's privacy policy proximately causing damage. Appellants also allege that the bank assumed a duty to Appellants, pursuant to its privacy policy, not to disclose their private financial information except where permitted by law. (Amended Answer and Counterclaims, Paragraph 45-47; 53-55; 57-58).

The courts of South Carolina long have held that, one who undertakes to render services to another which he should recognize as necessary for the protection of the other's person or things is liable for harm resulting from his failure to exercise reasonable care if (1) his failure to exercise such care increases the risk of such harm; or (2) harm is suffered because of the other's reliance upon the undertaking. Staples v. Duell, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997) citing Restatement (Second) of Torts Section 323(a).

Appellants received from Respondent notices regarding the Respondent's policy concerning the protection of Appellants' private banking information. The Notice provided as follows:

YOUR INFORMATION AND OUR AFFILIATES

> We may disclose information about you to our affiliates.
> Federal law allows us to disclose the information listed above to our affiliates. You do not have a right to opt out of the disclosure of this information.
>
> **Types of Affiliates**
> We may disclose information about you to the following types of affiliates:
> - Financial service providers, such as:
> - Banks

YOUR INFORMATION AND OTHER PARTIES

> We will not disclose information about you to anyone except as disclosed int his policy or as permitted by law.
> (Exhibit C to Quentin Broom, Jr. Affidavit, Amy Broom Affidavit, Ann Broom Affidavit).

In exchange for the business of Appellants, Respondent undertook to protect the privacy of Appellants' nonpublic financial information.

Ten State Street, LLP, the party to whom Appellants' nonpublic financial information was provided, was not an affiliate of the Respondent nor an employee or agent of Respondent. Accordingly, the disclosure of the nonpublic information was in violation of Respondent's policy, unless the disclosure was "permitted by law."

In order for the disclosure to have been "permitted by law," it would have had to comply with the provisions of the Act. As set forth in Argument I, above, it did not. Accordingly, the Amended Complaint and the Affidavits of Appellants allege and demonstrate that Respondent violated its own policies in producing Appellants' nonpublic financial information in response to Ten State Street's subpoena, thereby breaching their contractual and common law owed to Appellants pursuant.

In Dunmire, the Eighth Circuit recognized that improper disclosure of nonpublic information in violation of the Act could give rise to state law actions. After concluding that the Act, in and of itself, did not provide a private right of action to Mr. Dunmire, the court went on to state as follows:

> Nonetheless, Dunmire, in his amended complaint, based his state law claims on the allegation that Morgan Stanley's conduct violated the GLBA (Gramm-Leach-Bliley Act). Accordingly, we must address whether the district court properly concluded that no violation of the GLBA occurred ....
>
> Dunmire, 475 F.3d at 960.

As stated in Argument I, above, the Dunmire court found no violation of the Act, because

the financial information in that case was disclosed pursuant to an exception that does not apply in the case before this Court. However, the seminal case relied upon by Respondent for the proposition that Appellants have no claims in this matter specifically recognizes that state law claims can exist where the Act is violated.

As alleged in the Amended Answer and Counterclaim, Respondent failed to follow its own internal policies and disclosed Appellants' private financial information to an unauthorized party in violation of the law. If proven at trial, these acts would result in liability on the part of Respondent under Appellants claims for breach of contract and for negligence. Accordingly, Appellants have stated causes of action under state law against Respondent and have demonstrated genuine issues of material fact regarding the Respondent's liability.

The order of the trial court should be reversed.

CONCLUSION

The Amended Complaint and Counterclaims of Appellants allege that the Respondent, a financial institution subject to the provisions of the Gramm-Leach-Bliley Act, violated the provisions of that act by disclosing Appellant's private financial information to a private litigant in an unrelated lawsuit in response to a subpoena that was not issued by any Federal, State, or local authority nor pursuant to any judicial process or investigation by a governmental agency. The Amended Complaint and Counterclaims also allege that Respondent breached contractual duties and duties of care assumed through the establishment of banking accounts with Appellants and policies for the protection of Appellants' privacy in relation to those accounts. The Amended Complaint and Counterclaim specifies the factual basis for these claims. Further, affidavits and exhibits thereto submitted and considered by the Court attest that Respondent received actual notice from counsel

for Appellant Quentin Broom that a private attorney representing a third-party in a unrelated civil case had subpoenaed private financial information belonging to Appellants, who were non-parties in that unrelated litigation. Counsel requested that notice and an opportunity to contest that subpoena be given to those Appellants. Respondent ignored this request, ignored its own internal privacy policy, and ignored the privacy protections of the federal Gramm-Leach-Bliley Act by supplying nonpublic financial information to Ten State Street, LLC, a private, civil litigant.

If Appellants have not stated a cause of action or demonstrated genuine issues of material fact in this action, it is difficult to imagine what a bank would have to do to violate the privacy rights of its customers.

The Order of the trial court should be reversed, this case remanded, and the Appellants allowed to pursue discovery and to prosecute their claims.

Respectfully submitted.

L. Lee Plumblee
EPPES & PLUMBLEE, P.A.
P.O. Box 10066
Greenville, S.C. 29603
(864) 235-2600
(864) 235-4600 FAX
lplumblee@eppesandplumblee.com
Attorney for Appellants

January 27, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No.: 2012-CP-42-02714

Arthur State Bank .... Respondent

v.

Quentin S. Broom, Jr., Amy B. Broom a/k/a Amy Broom,
Ann G. Broom, and Russell A. Broom .... Appellant.

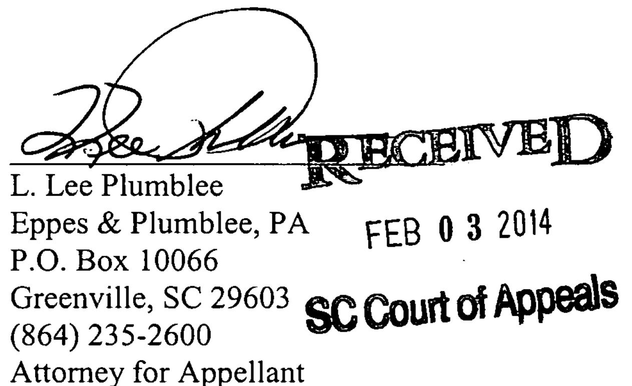
DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Complaint and Exhibits;
2. Answer and Counterclaims and Exhibits;
3. Amended Answer and Counterclaims and Exhibits;
4. Motion to Dismiss;
5. Motion to Amend;
6. Affidavit of Quentin Broom, Jr. and Exhibits;
7. Affidavit of Amy Broom and Exhibits;
8. Affidavit of Ann Broom and Exhibits;
9. Kelly Banks Affidavit;
10. Order Granting Motion to Dismiss;
11. Transcript of Hearing held on April 16, 2013.

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

January 27, 2014



L. Lee Plumblee
Eppes & Plumblee, PA
P.O. Box 10066
Greenville, SC 29603
(864) 235-2600
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

Appellate Case Number: 2013-001967

Arthur State Bank .... Respondents

vs.

Quentin S. Broom, Jr. And Amy B. Broom a/k/a Amy Broom, Ann G. Broom, and Russell A. Broom.................................... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for the Respondent with the INITIAL BRIEF OF APPELLANT AND APPELLANTS DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL by mailing a copy of the same by United States Mail with first class postage prepaid to the following address.

Louise M. Johnson, Esquire
HAYNSWORTH, SINKLER, BOYD, P.a.
Post Office Drawer 11889
Columbia, S.C. 29211-1889

L. Lee Plumblee
Eppes & Plumblee, P.A.

January 27, 2014
Greenville, SC

EPPES & PLUMBLEE, P.A.
ATTORNEYS AND COUNSELORS AT LAW
1225 SOUTH CHURCH STREET, 29605
P.O. BOX 10066
GREENVILLE, SOUTH CAROLINA 29603
TELEPHONE (864) 235-2600
FACSIMILE (864) 235-4600
WWW.EPPESANDPLUMBLEE.COM

FRANK L. EPPES*†
L. LEE PLUMBLEE

FRANK EPPES
(1922-2002)

* ALSO ADMITTED IN NEW YORK
† ALSO ADMITTED IN NORTH CAROLINA

January 27, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

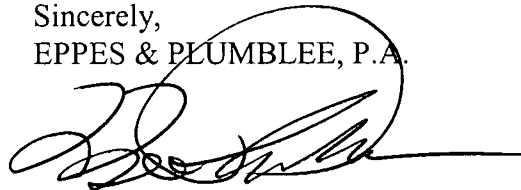
RE: Arthur State Bank vs. Quentin S. Broom, Jr., Amy B. Broom a/k/a Amy Broom, Ann G. Broom, and Russell A. Broom
Appellate Case Number: 2013-001967

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal in regard to this case. I have also enclosed proof of service of these documents which I am serving by copy of this letter on counsel for the Respondent. Please return the filed copy to my office in the envelope provided.

Thank you for your attention to this matter. If you need anything further from me please do not hesitate to contact me.

Sincerely,
EPPES & PLUMBLEE, P.A.



L. Lee Plumblee

LLP/lah
cc: Louise M. Johnson, Esquire

RECEIVED
FEB 03 2014
SC Court of Appeals