

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Walter V. Davidson, Jr. and
Salley B. Davidson,

Davidsons,

v.

Charleston County, a body politic; Andrew C. Smith, County Treasurer; Mary Scarborough, Delinquent Tax Collector and Wachovia Mortgage Corporation,

Defendants.

Wells Fargo Bank, N.A.,

Plaintiff,

v.

Salley B. Davidson; Walter V. Davidson, Jr.,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No. 2009-CP-10-6184

ORDER GRANTING
WELLS FARGO'S
MOTION FOR SUMMARY
JUDGMENT

Case No. 2010-CP-10-1843

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These consolidated cases involve residential property in Charleston County owned by Walter V. Davidson, Jr. and Salley B. Davidson, husband and wife (the "Davidsons"). Wells Fargo Bank, N.A. (successor by merger to Wachovia Mortgage Corporation, "Wells Fargo") is the holder of the note and mortgage on the property. Case No. 2009-CP-10-6148 is a negligence action brought by the Davidsons in which they allege that Wells Fargo was negligent in redeeming the property after it had been sold by Charleston County at a tax sale. Case No. 2010-CP-10-1843 is a foreclosure action initiated by Wells Fargo as a result of Salley Davidson's

default under the terms of the note and mortgage.¹ In response to the foreclosure complaint, the Davidsons asserted an affirmative defense and counterclaim identical to the negligence claim asserted in their other case.

On November 25, 2013, based on new evidence, Wells Fargo renewed its previous motion for summary judgment on the Davidsons' claims. The cases were set for a date certain trial to begin on December 9, 2013. The Davidsons failed to appear for the trial and any pre-trial matters, including the Court's consideration of Wells Fargo's summary judgment motion. The Court continued the cases and, by order dated December 9, 2013, rescheduled a hearing on all outstanding motions, including Wells Fargo's summary judgment motion, for December 20, 2013 at 11:00 am. The Davidsons were served a copy of the December 9th Order and notice of this hearing.

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The motions hearing went forward on December 20th at the scheduled time. Shawn French, Sr. appeared and argued on behalf of Mrs. Davidson. Mr. Davidson, a pro se litigant in this case, did not appear. Charles J. Baker III and Michael S. Cashman appeared and argued on behalf of Wells Fargo. Having carefully considered the pleadings, briefs, supporting affidavits, and oral arguments of the parties, the Court grants Wells Fargo's Motion for Summary Judgment for the following reasons.

UNDISPUTED FACTS

On June 15, 2005, Salley Davidson executed a note (the "Note") for \$330,000.00 with Wachovia Mortgage Company. (Wells Fargo Mot. S.J., filed Nov. 26, 2013, Exhibit 2, Note; Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 1st

¹ Walter Davidson acquired an ownership interest approximately one year and five months after Salley Davidson executed the note and mortgage in favor of Wells Fargo.

Req. Admit, ¶ 2.) The Note was secured by a mortgage (the "Mortgage") on the structure and property located at 35 Legare Street, Charleston, South Carolina, 29401 (the "Property"). (Wells Fargo Mot. S.J., filed Nov. 26, 2013, Exhibit 3, Mortgage; Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 1st Req. Admit, ¶ 10.) Mrs. Davidson's loan was not escrowed, so that she was responsible for paying property taxes on the Property. (*Mortgage* at 4; Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 2nd Req. Admit, ¶ 17; Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 1st Req. Admit, ¶ 8.) Section 9 of the Mortgage specifically provided that, in the event taxes were not paid, Wells Fargo had the right to pay the amounts owed in order to protect its interests in the property. (*Mortgage* at 9, "Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument ...").

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In the years preceding 2006, the Davidsons paid the property taxes. (Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 1st Req. Admit, ¶¶ 14, 16 & 18.) On or about December 19, 2006, the Davidsons initiated an appeal from Charleston County's assessment of property taxes for 2006 on the grounds that the Charleston County Assessor had overvalued the Property. (Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 2nd Req. Admit, ¶¶ 3.) The Assessor denied the appeal on February 6, 2007, having "determined that no change in value should be made." *Id.* at ¶ 1.

At this same time, the Davidsons also sought an exemption from the 2006 property taxes. (Davidsons' Am. Compl. ¶ 12.) Specially, the Davidsons alleged that Mr. Davidson had been declared "100% permanently and totally disabled due to service connected disabilities effective

2/23/06 and [Mrs. Davidson had deeded him an interest in the Property as a joint tenant on] December 27, 2006." Id.

In 2007, Charleston County began sending notices of delinquency to the Davidsons for their failure to pay the 2006 property taxes. (Davidsons' Am. Compl., filed Dec. 4, 2009, ¶ 6.) On April 23, 2007, Charleston County informed the Davidsons that, while their appeal was pending with the South Carolina Department of Revenue for an exemption for the 2006 property taxes, they should pay the taxes and, if found eligible for the exemption, they would receive a refund. (Wells Fargo Mot. S.J., filed Nov. 26, 2013, Exhibit 9, April, 23, 2007 E-mail from L. Schulze.) Charleston County further informed the Davidsons that they could request and pay a reduced amount while their appeal was pending. Id. The Davidsons never informed Wells Fargo of any dispute with Charleston County over the 2006 property taxes. (Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 2nd Req. Admit, ¶ 16.)

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By letter dated April 2, 2007, the South Carolina Department of Revenue ("SCDOR") denied the Davidsons' request for an exemption for the 2006 property taxes. (Wells Fargo Mot. S.J., filed Nov. 26, 2013, Exhibit 1, April 2, 2007 letter from SCDOR.) On November 16, 2007, the Charleston County Board of Assessment Appeals ("BAA") denied the Davidsons' request for a reassessment of the 2006 property taxes. (Wells Fargo Mot. S.J., filed Nov. 26, 2013, Exhibit 8, Nov. 16 letter from the BAA.) The Davidsons did not appeal the decisions of either the BAA or SCDOR.

Without payment, Charleston County sold the Property at a tax sale on October 1, 2007. (Davidsons' Am. Compl. ¶ 9). While the Davidsons claim they had no notice of the tax sale, they admit that Wells Fargo had no prior notice. (Id.; Davidsons' Affidavit in Opposition to S.J., filed October 19, 2010, ¶ 5.) Subsequent to the tax sale, and in order to protect its interests,

Wells Fargo "was forced to redeem [the Property] by paying claimed outstanding taxes in the amount of \$9,117.45 and further interest as a result of said tax sale in the sum of \$18,367.90." (Am. Compl. ¶ 10; Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 2nd Req. Admit, ¶ 18.)

The Davidsons originally also brought claims against Charleston County in this lawsuit. (Davidsons' Am. Compl., ¶¶ 1-14.) In suing Charleston County, the Davidsons allege that Wells Fargo "paid into the County the sum of \$27,485.35 and has now made a claim against [the Davidsons] to reimburse said sums unto it and has threatened foreclosure of [the Property]." *Id.* at ¶ 13. The Davidsons and Charleston County settled their claims by consent order dated September 4, 2013. (Consent Order of Settlement & Dismissal of Charleston County Defendants., ("Consent Order"), Sept. 4, 2013.) In that Consent Order, Charleston County agreed to void the tax sale and pay the Davidsons \$21,000. *Id.*² The Consent Order did not find that the Davidsons were entitled to an exemption for the 2006 property taxes, or that they did not owe the 2006 property taxes. See generally id. The Order did release Charleston County from all claims. *Id.* at 5. Further, the Davidsons have admitted that, if they are successful in their

²At a status conference before the undersigned on October 7, 2013, Charleston County was asked whether its settlement position in voiding the tax sale was an admission that the tax sale was improper and, therefore, should be voided. Counsel for Charleston County responded that:

At the time the County entered into the consent order, discovery had not been completed and the County had not yet made a determination of whether it had strictly complied with the pertinent statutes. The County executed the consent order agreeing that nothing contained in the order was to be interpreted or construed as an admission or acknowledgment of any of the parties of any wrongdoing, or that any of the allegations made by any party were true. We were simply attempting to settle the case and have not yet determined whether we strictly complied with the pertinent statutes in reference to the subject tax sale.

(Wells Fargo S.J. Hearing Exhibit 14, October 7, 2013 E-mail from Brad Mitchell to Judge Nicholson.)

claims against Charleston County, Wells Fargo "is entitled to receive such sums that are awarded to the Plaintiffs by the Charleston County Defendants as were paid unto the County as set forth [in the Davidsons' Amended Complaint.]" (Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 1st Req. Admit, ¶¶ 10.)

SUMMARY JUDGMENT STANDARD

In evaluating a motion for summary judgment, the Court must view "the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party." Hansson v. Scalise Builders of S.C., 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). If, after granting such deference to the non-moving party, it is apparent that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact," and the moving party is entitled to judgment "as a matter of law," the Court should grant summary judgment. Id. (quoting S.C. R. Civ. P. 56(c)).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) citing Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). A party's response to a motion for summary judgment "must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial If he does not so respond, summary judgment should be entered against him." Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (1988) (citations omitted). Moreover, if the plaintiff fails to establish a genuine issue of fact as to just one essential element necessary to the cause of action, the existence of factual issues relating to other elements becomes immaterial and therefore subject to summary judgment. See Fender & Latham, Inc. v. First Union Nat'l Bank, 316 S.C. 48, 446 S.E.2d 448, 449 (1995).

DISCUSSION

“To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach of duty.” Fowler v. Hunter, 388 S.C. 355, 361, 697 S.E.2d 531, 534 (2010) (citing Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000)). “The court must first determine whether a duty arises in one party to exercise reasonable care for the benefit of another under the facts of a given case.” *Id.* The existence and scope of the duty are questions of law. Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). In this case, as a matter of law, Wells Fargo did not owe the Davidsons the duty they have alleged was breached. Further, there is no genuine issue of material fact as to any damages alleged by the Davidsons against Wells Fargo. Therefore, Wells Fargo’s motion for summary judgment is granted.

A. WELLS FARGO OWED NO DUTY AS ALLEGED BY THE DAVIDSONS.

The common law does not impose a duty to act affirmatively absent a duty imposed by statute, contract, status, property interest, or some other special circumstance. Vaughan v. Town of Lyman, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006) (citing Jensen v. Anderson County Dep’t of Soc. Serv., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991)).

The Davidsons claim that Wells Fargo had an affirmative duty to protect their interest in the Property by making the redemption payment to Charleston County “under protest.” (Davidsons’ Am. Compl. ¶ 16). The Davidsons, however, are unable to point to any “statute, contract, status, property interest, or some other special circumstance” from which that duty emanates. See Vaughn, 370 S.C. at 446, 635 S.E.2d at 637.

South Carolina courts have made clear that duties between a creditor and debtor do not arise unilaterally. Steele v. Victory Sav. Bank, 295 S.C. 290, 294 (S.C. Ct. App. 1989). Further, our courts have found that the relationship between a lender and borrower is one of creditor and debtor and, as a matter of law, is not fiduciary in nature. Regions Bank v. Schmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); American Fed. Bank, FSB v. Parker, 301 S.C. 509, 513, 392 S.E.2d 798, 801 (Ct. App. 1990); see also Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 251, 734 S.E.2d 161, 164 (2012) (no duty of care on the part of a bank in the processing of a loan application), Huggins v. Citibank, N.A., 355 S.C. 329, 334, 585 S.E.2d 275, 277 (2003) (no duty on a bank that issues credit cards to those individuals whose identities may be stolen); Citizens & Southern National Bank of South Carolina v. Lanford, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994) (no duty on a bank to tell the guarantor of a loan that his liability was for the entire loan amount, where that fact was clearly expressed in the loan agreement). A bank does not owe a customer a special duty of care based purely on his or her status as a customer. Toney v. LaSalle Bank Nat. Ass'n, 896 F. Supp. 2d 455, 480 (D.S.C. 2012). As the normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature, the facts cannot support a separate claim for negligence as alleged in this case.

The duties owed in this case were defined by the contract between the parties. Nothing in the pleadings or the facts presented show that Wells Fargo did anything other than what it was allowed to do under the Note and Mortgage. The Davidsons have admitted that they were responsible for the payment of the property taxes. (Wells Fargo Mot. Part. S.J., filed July 25, 2011, Ex. 3, 2nd Req. Admit, ¶ 17). They have admitted that they never informed Wells Fargo that they had any dispute as to the property tax assessment. (Wells Fargo Mot. S.J., dtd July 25,

2011, Ex. 3, ¶ 16). And they have admitted that Wells Fargo did not learn that the property tax sale had occurred until six months later when it was forced to redeem the Property to protect its security interest. (Am. Compl. ¶ 10). There is no factual basis on which to find that Wells Fargo owed any duty to support a negligence cause of action. See Regions Bank v. Schmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003)

Moreover, under the terms of the Mortgage, which Mrs. Davidson admits to have executed, (Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 1st Req. Admit, ¶ 1), Wells Fargo did what it was allowed to do under the terms of that security instrument, which provides:

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9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding.

...
Any amount disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest as the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

(Id., Ex. 3, 1st Req. Admit, Ex. A, p.7.) (emphasis supplied.)

The applicable duties in this case arise from the Note and Mortgage and provide Wells Fargo with the right to redeem the Property following the tax sale to protect its interest in the Property. The Davidsons cannot bring a negligence claim against Wells Fargo in this case for

doing what it was contractually allowed to do. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995); Seebaldt v. First Federal Sav. & Loan Ass'n, 269 S.C. 691, 692-693, 239 S.E.2d 726, 727 (1977).

B. THE DAVIDSONS WERE NOT HARMED BY WELLS FARGO.

Summary judgment is also appropriate because the Davidsons have suffered no damages as a result of any act or omission of Wells Fargo. Actual damage is the very essence of negligence. See Gray v. So. Facilities, Inc., 256 S.C. 558, 566, 183 S.E.2d 438, 442 (1971) ("It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another.") Thus, the plaintiff must show the existence of actual damages because "[i]t is elementary law that there is no such thing as 'negligence in the air.'" South Carolina Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 176, 348 S.E.2d 617, 620 (Ct. App. 1986).

The Davidsons admit that Wells Fargo had no knowledge of their dispute with Charleston County over the 2006 property taxes and no knowledge of the tax sale until some six months after the tax sale had occurred. (Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 2nd Req. Admit, ¶ 16; Davidsons' Am. Compl. ¶ 10-11.) The Davidsons' own pleadings specifically state that the damages they seek were caused by Charleston County and were not the result of Wells Fargo's acts or omissions:

TENTH: Subsequent to said tax sale October 1, 2007, the Defendant Wachovia Mortgage Corporation was ultimately notified as to the tax sale of the subject property and was *forced to redeem* the same by paying *claimed outstanding taxes* in the sum of \$9,117.45 and *further interest as a result of the said tax sale* in the sum of \$18,367.90 for a total of \$27,485.35 . . .

ELEVENTH: *As a result of the tax collecting Defendants' failing to properly notify* the Defendant Wachovia Mortgage Corporation, an unnecessary tax sale took place and funds in excess of the claim for past due taxes were paid to the Charleston County Treasurer . . .

(Davidsons' Am. Compl. ¶ 10-11) (emphasis added).

Wells Fargo's alleged failure to pay the redemption amount "under protest", in itself, caused the Davidsons no damage. South Carolina law sets out the procedure under which property owners may dispute the assessment of property taxes, which the Davidsons failed to comply with. Under the statute, the property owner may dispute an assessment by filing an appeal and paying the taxes when due. S.C. Code Ann. §12-60-2140 (appeals to SCDOR) and §12-60-2550 (appeals to BAA). If the appeal is successful, the property owner is entitled to a refund of the tax payments previously paid.

Wells Fargo's payment of the redemption amount did not deprive the Davidsons of any rights to pursue their appeals to SCDOR and the BAA or to challenge the validity of the tax sale. If, in fact, any appeal rights were lost, they were lost by the Davidsons' failure to comply with the property tax appeal procedures. Further, even if the Davidsons had properly preserved their rights to appeal, they did not qualify for the property tax exemption which was the basis for their appeal, and therefore, they owed the taxes regardless. (Wells Fargo Mot. S.J., filed Nov. 26, 2013, Exhibit 1, April 2, 2007 letter from SCDOR.)³

In order to qualify for a property tax exemption, a fully-disabled veteran must be deemed disabled and own the property for which the exemption is sought as of December 31st of the year prior to the year in which an exemption application is filed. *Id.* The Davidsons did not qualify for a property tax exemption in 2006 because Mr. Davidson did not receive his disability assessment until February 23, 2006 and did not become a joint owner of the Property until December 22, 2006. (Am. Compl., Ex. A, Dept. of Veterans Affairs Letter, Wells Fargo Mot.

³ Whether the Davidsons received proper notice of the tax sale is immaterial since, regardless of the validity of the tax sale, they owed the taxes and Wells Fargo had the right under the Mortgage to pay the tax arrearage to protect its interest in the Property.

Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 2nd Req. Admit, ¶¶ 19-20.) As Mr. Davidson's disability and ownership of the Property was not confirmed prior to or on December 31, 2005, the Davidsons were ineligible for the 2006 property tax exemption. SC Code Ann. § 12-37-610 ("Each person is liable to pay taxes and assessments on the real property that, AS OF DECEMBER 31 of the year preceding the tax year, ...") (emphasis added.); see also Hampton Friends of Arts v. South Carolina Dept. of Revenue, 401 S.C. 372, (2013) citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581(2000).

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The Davidsons also recovered a sum of \$21,000 from the settlement of their claims with Charleston County, which they have not paid to Wells Fargo. (Consent Order, Sept. 4, 2013; Davidsons' Response to Wells Fargo's Mot. Part. S.J., p. 3; "The County of Charleston, pursuant to this litigation, ultimately offered \$21,000.00 to resolve this matter ... which consisted of \$18,367.90 plus interest thereon which said sum was accepted by the [Davidsons.] Not only are the Davidsons not harmed by any action of Wells Fargo, they have been enriched in the amount of \$21,000, as Wells Fargo paid Charleston County to redeem the Property in the amount of \$27,485.35 and that amount remains owing by Mrs. Davidson under the terms of the Loan Documents. (Davidsons' Am. Compl., ¶¶ 10, 16.)

Finally, the Davidsons, in effect, have admitted that they were not damaged as a result of Wells Fargo's conduct. In response to Wells Fargo's First Requests for Admissions, the Davidsons admitted the following:

10. Admit that if the Plaintiffs are successful in their claims against the Charleston County Defendants, Defendant Wachovia is entitled to receive such sums that are awarded to the Plaintiffs by the Charleston County Defendants as were paid unto the County as set forth in paragraph THIRTEENTH of the Plaintiffs' Amended Complaint.

RESPONSE: Admitted.

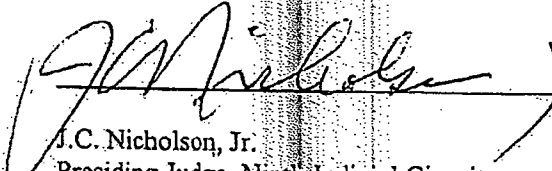
(Wells Fargo Mot. Part. S.J., filed July 25, 2011, Exhibit 3, Davidsons' Resp. Wells Fargo's 1st Req. Admit, ¶¶ 10.) In addition, Paragraph Thirteen of the Davidsons' Amended Complaint alleges that, as a result of Charleston County's conduct, it was Wells Fargo, not them, which paid to the County the sum of \$27,485.35. Thus, the Davidsons admit that any and all damage they suffered was the direct and proximate result of the conduct of Charleston County—not that of Wells Fargo.

CONCLUSION

For the reasons set forth above, Wells Fargo is entitled to summary judgment as to both the Davidsons' negligence claim in the initial action, C.A. No. 2009-CP-10-6184, and the negligence counterclaim in the subsequent foreclosure action, C.A. No. 2010-CP-10-1843.

IT IS SO ORDERED.

January 17, 2014
Charleston, South Carolina


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