

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON  
COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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Appellate Case No. 2012-212283

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**RECEIVED**

MAR 05 2014

**SC Court of Appeals**

Dr. Joseph G. Carew and Dr. Karen Carew, Appellants,

v.

RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank,  
Clifton W. Hall, Hall Builders, LLC, Mid Carolina Appraisal Company, LLC, and  
Teresa Addy Haltiwanger, Defendants,

Of Whom, RBC is the Respondent.

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**PETITION FOR REHEARING PURSUANT TO RULE 221, SCACR**

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Petitioner hereby moves to the court to rehear this appeal pursuant to Rule 221, SCACR, on the grounds that the court in Unpublished Opinion No. 2014-UP-069 overlooked or misapprehended the following:

- I. The court failed to recognize that there was evidence in the record that RBC Bank was aware of defects yet continued to disburse loan proceeds to the builder.

The court further failed to recognize the issue was preserved in arguments below because Appellants extensively argued RBC Bank's knowledge of

defects due to RBC's inspections.

- II. The court failed to recognize that evidence in the record demonstrated that RBC Bank admitted to making mistakes in disbursement of the loan proceeds, which evidence should, at a minimum, have precluded summary judgment on the grounds it demonstrates RBC Bank violated its duty of good faith and fair dealing under the construction loan agreement
- III. The court failed to recognize evidence in the record that RBC Bank negligently disbursed loan proceeds in excess of the percentage of completion of the home, which should have precluded summary judgment.
- IV. The court failed to recognize that the Appellants were damaged by RBC Bank's disbursement decisions since those decisions allowed the builder to take funds, abandon the job, and cause Appellants to find a substitute builder to repair damage and complete the project at a cost of \$583,681.93.

## ARGUMENTS AND AUTHORITIES

- I. **The court failed to recognize that there was evidence in the record that RBC Bank was aware of defects yet continued to disburse loan proceeds to the builder. The court further failed to recognize the issue was preserved in arguments below because Appellants extensively argued RBC Bank's knowledge of defects due to RBC's inspections.**

In the record below, Appellants provided evidence that RBC Bank acted as more than a mere lender. Evidence in the form of the inspection records (R. 538-539) established that RBC Bank had knowledge of defects yet continued to disburse construction loan proceeds. By arguing that RBC made decisions to disburse funds for the benefit of the

builder at Christmas time (R. 136-137, 318-320 and 334-335) despite the level of completion of the home, Appellants established evidence that RBC conducted itself as more than a mere lender, which should have precluded summary judgment. If a lender is aware of defects it may be liable under *Kennedy v. Columbia Lumber and Manufacturing Company*, 384 S.E. 2d 730, at 734 (1989), *Lane v. Trenholm Building Company*, 229 S.E. 2d 728 (1976), and *Kirkman v. Parex, Inc.*, 632 S.E. 2d 854 (2006). The argument that RBC Bank acted as more than a mere lender is preserved in the underlying record.

**II. The court failed to recognize that evidence in the record demonstrated that RBC Bank admitted to making mistakes in disbursement of the loan proceeds, which evidence should, at a minimum, have precluded summary judgment on the grounds it demonstrates RBC Bank violated its duty of good faith and fair dealing under the construction loan agreement.**

RBC Bank admitted to making mistakes in disbursing loan proceeds. (R. 226-227, 275-276 and 278-279). The evidence of RBC Bank's mistakes, and its admission that it made mistakes, should have been viewed in a light most favorable to the Appellants. At a minimum, the evidence demonstrates a breach of RBC Bank's implied covenant of good faith and fair dealing under the construction loan agreement. At the maximum, the court overlooked that even if it is presumed that RBC had no duty, once RBC undertook to act and make discretionary decisions, then such acts must be reasonable. *Madison v. Babcock Ctr., Inc.*, 638 S.E. 2d 650, at 657 and *Restatement (Second) of Torts* §§324 -325 (1965). The evidence of mistaken disbursements and RBC's admission of mistakes was overlooked by the court in considering the reasonableness of RBC Bank's acts.

**III. The court failed to recognize evidence in the record that RBC Bank negligently disbursed loan proceeds in excess of the percentage of completion of the home, which should have precluded summary judgment.**

The record demonstrates that RBC disbursed loan proceeds in excess of the percentage of completion of the home (R. 296 and 538-539). RBC Bank explained that monitoring the percentage of completion was a piece of the disbursement decision (R. 227- 233).

When RBC chose to act, the court should have considered the reasonableness of those actions. Even where one has no duty to act, if they choose to act, they must do so with due care, *Russell v. City of Columbia*, 406 S.E. 2d 338 (1991). Evidence of the improper disbursements should have been viewed most favorably for the Appellants and precluded summary judgment on the negligence claim when the court considered the reasonableness of RBC Bank's actions.

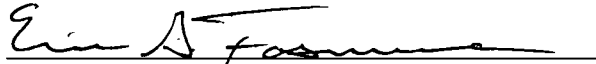
**IV. The court failed to recognize that the Appellants were damaged by RBC Bank's disbursement decisions since those decisions allowed the builder to take funds, abandon the job, and cause Appellants to find a substitute builder to repair damage and complete the project at a cost of \$583,681.93.**

The evidence in the record establishes that the Appellants incurred \$583,681.93 in additional expenses once the builder received funds from RBC Bank and then abandoned the job (R. 540). In the court's decision, it states that the Appellants "...presented no evidence to prove they suffered any injury from this conduct." While it is true that RBC Bank restored the improperly disbursed funds, the opinion overlooks that it was the fact of RBC's failure to properly disburse that allowed the builder to take the funds and leave the project.

CONCLUSION

For the foregoing reasons, the Appellants request that the court rehear this appeal and consider the evidence it overlooked in rendering its opinion. If the court does not rehear this appeal and reconsider its opinion, then this case stands for the position that a construction lender can mistakenly disburse all the funds available under the loan agreement, without the defective building being completed, and then hold the borrower liable for the entire loan amount without any borrower recourse.

Respectfully submitted,



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ATTORNEYS FOR APPELLANTS

March 5, 2014

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

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Case No. 2010-CP-32-00442

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Dr. Joseph G. Carew and Dr. Karen Carew, ..... Appellants,

v.

RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank, Clifton W. Hall, Hall Builders, LLC, Appraisal Team of Mid Carolina, LLC, and Teresa Addy-Haltiwanger, Defendants,

Of Whom, RBC Bank, is the Respondent.

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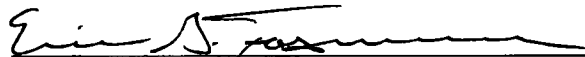
**PROOF OF SERVICE**

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I certify that I have served the Petition for Rehearing of the Appeal Pursuant to Rule 260, SCACR by hand-delivering a copy of it on the 5th day of March, 2014 addressed to Respondents attorney of record,

Thomas William McGee, III  
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March 5, 2014



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