THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appellate Case No. 2013-001441

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Case No. 2010-CP-23-1621

Edward G. Wellmaker, Judge

J. P. Morgan Chase Bank NA, Plaintiff

v.

Thomas R. Irby, Roy C. Irby aka Roy C. Irby II, Bank of America, NA And Charles H. Knight LLC, Defendants

Of whom
Bank of America, NA and Roy C. Irby, aka Roy C. Irby II are the Respondents

and

Thomas R. Irby is the Appellant

INITIAL BRIEF OF APPELLANT

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OVERVIEW

This is an appeal from a case of bank negligence tried as breach of contract.

A line of credit for $69,000.00 with BOA was paid off from a consolidation loan with M&T Bank for $95,000.00. The M&T loan was later purchased by Chase Bank.

I was the primary borrower, Thomas R. (Tom) Irby. The cosigner is Roy C. (Roy) Irby II. Roy Irby is my nephew.

Bank of America failed to close the equity line of credit when instructed to do so. The bank accepted the payoff check and ignored written instructions to close the account. I was not informed that the account was not closed until over two years after sending a payoff check and instructing BOA to close the account. Roy Irby withdrew the limit of $69,000.00 and stopped paying.

At trial Roy Irby was awarded an adjusted total of $110,791.61 Bank of America was awarded an adjusted total of $73,019.07. I received a debt of $1,510.67. Those totals are the jury verdicts adjusted by the accounts and case records. In Final analysis Roy received $164,000.00.

The jury awarded a judgment for BOA against Roy for $21,508.46 and a judgment for me against Roy for $31,700.00. Roy received all the $69,000.00 so his net profit from BOA was $15,791.46. He also received the $95,000.00 from the Chase Bank loan. His total profit is $110,791.54.

Bank of America was allowed to sell a questionable first mortgage position to Chase for $50,000.00. BOA received the judgment against Roy for $21,508.46 and a judgment against me for $1,510.67. These three amounts total $73,019.07, (BOA balance on 4/5/11 was $72,214.69). Roy won't pay BOA but it's an accounting asset for the bank, (BOA,ex.#1).

I received a judgment against Roy for $31,700.00 and a judgment against me for BOA of $1,510.67. I am informed that an individual can't

collect a judgment from another individual in this state so I received a debt of $1,510.67. By adding costs of over $40,000.00 to $50,000.00 I am penalized by a loss greater than (-)$41,510.67. That does not include stress, anxiety, time lost for me, Damage to my credit, or the stress, anxiety, emergency room, and medical care for my wife.

All the costs, court time, lawyer time and fees, hundreds of pages of print, fraudulent withdrawals, fraudulent and unfounded accusations, and all else expended through now and yet to come could have been avoided. All bank of America had to do was notify me or Attorney Jones that they were not going to close the account. If there was any error in the closing procedure BOA only had to ask that it be corrected.

QUESTIONS & ISSUES

Concerning Bank of America

1. Should a Bank accept a payoff check with a letter from a borrowers attorney instructing the bank to close an account and then;

   (a) Accept the check and ignore the attorney's letter instructing the bank to close the line of credit account,

   (b) Not inform the Attorney or the primary borrower that the account was not closed for over two years,

   (c) Let a cosigner use the account for over two years and max it out at $69,000.00.

   (d) Try to collect the $69,000.00 (plus costs) from the primary borrower,

   (e) Claim first mortgage status because the bank failed to close the account?

2. Is a bank customer in breach of contract by not paying on a loan that he does not know exists because he paid it off and closed it?

3. Did the Court err by ignoring my Claim for Negligence and restricting the trial to Breach of Contract?

4. Did the Court err by not considering Duty of trust and/or Duty of Care?

5. Did the Court deliberately force the matter into appeal?

6. Should the jury decision be set aside for Inconsistency?

7. Should the Jury Verdicts be set aside because of Unjust Enrichment?

8. Did the Court err by not allowing my cost records to be presented?

9. Did the Court err by restricting the jury verdicts?

10. Did the court err by ignoring punitive damages?

11. Did BOA accept the payoff check under false pretense?

12. Was the equity court in error not to determine the First Mortgage Status?

QUESTIONS & ISSUES

(Concerning Roy C. Irby II)

13. As cosigner did Roy C. Irby II violate Federal and/or State law by taking funds from the account he knew it was supposed to be closed?

14. By taking funds from the account during and after august 22, 2007 did Roy C. Irby commit breach of trust with fraudulent intent against me?

15. Should the court have referred the claims against Roy Irby to the Criminal Court?

16. Did Roy C. Irby, upon knowing the account was not closed, have an obligation to inform me, Attorney Jones, or Bank of America?

Grounds for Questions
On Bank of America

Question No. 1

(a) A payoff check and letter of instructions were sent to Bank of America. The bank received both the letter and check. The letter from Attorney Gregg Jones instructed the bank that the check was to payoff the account and that BOA was to block and close the account. The letter also stated that the check was to pay off the account. BOA deposited the check as a regular payment and ignored the letter. The letter also told the bank that if there was any problem they were to contact him, (pln.ex#4).

(b) Bank of America chose not to inform anyone that they did not close the account. BOA never informed me, as the primary borrower, or Attorney Jones that the account was not closed, (tr.301:17-25, 302:1).

(c) The bank allowed the cosigner on the account draw $69,000.00 from the account and told no one until the cosigner defaulted. The cosigner was supposed to make all payments on the account by agreement with me, (pln.ex#5) (tr.152:1-5, 13-17).

(d) When the cosigner stopped paying on the account after withdrawing the limit of $69,000.00 Bank of America chose to send me two consecutive delinquent payment statements. From that I learned the account had not been closed, (tr.153:25, 154:1-2, 15-20).

(e) Because the bank failed to close the account they claimed first mortgage status. BOA was later allowed to sell first mortgage status to Chase Bank for $50,000.00. Chase Bank provided a consolidation loan of $95,000.00 to pay off Bank of America's second mortgage and the First Mortgage from Community First Bank, (tr.121:2-7).

Question No. 2: Is a bank customer in breach of contract by not paying on a loan that he does not know exists because he paid it off and closed it? At trial the court only allowed a cause of action on Breach of Contract. My charge of Negligence was denied. Bank of America argued that I had breached a contract that I did not know existed (because of the bank's negligence), (tr.154:9-14).

Question No. 3: Did the Court err by ignoring my Claim for Negligence and restricting the trial to Breach of Contract? Breach of Contract was prejudicial because it was most favorable to the Bank. Compensable damages were limited. Documentation on general expenses and costs were not allowed. My attorney David Alford, argued for negligence numerous times and asked the court to preserve his stand for Negligence as the moving cause. The court noted that his position was preserved for the record, (tr.277:14-17).

Question No. 4: Did the Court err by not considering Duty of trust and/or Duty of Care? The Duty that arises or Negligence thereof was not considered. Reference to Duty was argued a number of times by my Counsel. (tr.205:9-13, 206:1-10).

Question No. 5: Did the Court deliberately force the matter into appeal? Judge Welmaker stated that if he was wrong on Breach of Contract he had a good safety net in Columbia. The court was aware that I am financially vulnerable as is Bank of America. The court selected a cause of action that would add additional financial burden on me and place me in a prejudiced position. (Refer to the General Amendment to my Cross Complaint filed September 6, 2011) (tr.277:20-24) (see complaint)

Question No. 6: Should the jury decision be set aside for Inconsistency? The Jury decision is inconsistent with the testimony, records, and evidence presented. The Jury failed to rationalize the full accounts in calculating the verdicts. When those verdicts are analyzed thoroughly, Roy Irby was awarded an adjusted total of $110,791.61 Bank of America was awarded an adjusted total of $73,019.07. I received a debt of $1,510.67. Those totals are based on the jury verdicts adjusted by the account records. This defies the fact that I am the injured party and plaintiff in the action. (A judgment against Roy for me of $31,700.00 is not rational to the evidence and testimony. It is also not collectible so it is meaningless) (see verdict sheets)

Question No. 7: Should the Jury Verdicts be set aside because of Unjust Enrichment? The disparity of the verdicts (question 6 above) amounts to awards of unjust enrichment. *"Unjust enrichment" is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff."* Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988).

"In a law action, the measure of damages is determined by the parties' agreement, while in equity, 'the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly

enriched at the expense of the plaintiff." United States Rubber Prods., Inc. v. Town of Batesburg, 183 S.C. 49, 55, 190 S.E. 120, 126 (1937).

Question No. 8: Did the Court err by not allowing my cost records to be presented? I am informed that my cost records were not allowed in evidence because those costs were not compensable in Breach of Contract. The Jury obviously felt some compunction to consider my expenditures. From deliberations they asked the court to confirm:

"What is Thomas Irby asking for?" "Please explain how amount is determined." "Please break down into categories"

The jury was returned to the court room and informed by Judge Welmaker that he could not provide such information for deliberation. He said that he could have the recorder find the testimony on the recording and play it back. The jury was returned to deliberations without the answers or the recorders assistance, (tr.326:3-8, 13-18, 22-25).

Question No. 9: Did the Court err by restricting the jury verdicts? The verdict sheets provided to the jury were restrictively based on Breach of Contract. The text and composition are as follows:

" As to the claims for Breach of Contract:

_____ We, the Jury, find for Plaintiff Thomas Irby against Defendant Bank of America actual damages in the amount of $_____

Or

_____ We, the Jury, find for Defendant Bank of America against Plaintiff Thomas Irby actual damages in the amount of $ _____

Or

_____ We, the Jury, find for the Defendants (no recovery for either party)"

The verdict sheets had no provision for repairing the damage to my credit rating or to my business, or personal reputation. The fact that because of the negligence of Bank of America I have a foreclosure permanently on my record is not considered for Breach of Contract. The damage to my credit can't be repaired in my lifetime.

Question No. 10: Did the court err by ignoring punitive damages? My complaint with revisions asked for punitive damages at the discretion of the court. Judge Welmaker determined that the claims against BOA did not rise to a punitive level, (see complaint).

Bank of America is a recidivist. The bank has reprehensibly and egregiously denied any duty, error, or correction thereof. The Negligence by the Bank resulted in damages in costs, expenditures, defamation, credit loss, stress, anxiety, medical costs, time lost, and other costs. The qualification for Punitive damages is well met, (see complaint).

In BMW v. Gore Jr. the U.S. Supreme Court states: "Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance. See *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948)."

In Mitchell v. Fortis the SC Supreme Court No. 26718, referring to Gore the court stated:

"First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award. Gore, 517 U.S. at 565."

"The practice of awarding punitive damages originated in principles of common law to deter the wrongdoer and others from committing like offenses in the future." 385 S.C. at 584, 686 S.E.2d at 183.

Question No. 11: Did BOA accept the payoff check under false pretense? The letter from Jones qualified the purpose of the accompanying check, (pln.ex#4).

"Enclosed herewith please find my check in the amount of $9,998.92 to be applied to the above mortgage number." Then the purpose of the check is explained;

"If there is a balance due please contact this office immediately. If no balance is due, or if this is an equity line, you are directed and authorized to close, block, and satisfy said mortgage and forward to my office. If you have any questions, please feel free to call me. "

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Upon receiving the letter Bank of America made a decision not to abide by the instructions and not to acknowledge the letter in any way. They deposited the check under false pretenses.

Question No. 12; Was the equity court in error not to determine the First Mortgage Status? The matter of mortgage status was referred to the Equity Court at the first hearing before Judge Stilwell. The equity court failed to determine an official first mortgage status. BOA subsequently "sold" their questionable first mortgage status to Chase which effectively increased my liability to Chase by $50,000.00. When Boa was challenged on the $50,000.00 it was deducted from the amount BOA claimed as balance owed. BOA testified that transferring the $50.000.00 to Chase was a gift to me. Chase took the loss but the foreclosure is a permanent detriment to my credit, (tr.251:16-25).

Grounds for Questions
On Roy C. Irby II

Question No. 13: As cosigner did Roy C. Irby II violate Federal and/or State law by taking funds from the account that he knew was supposed to be closed? My cross complaint charged Roy C. Irby II with violation of Federal and State law by taking the funds and breach of contact with fraudulent intent.

SC ST SEC 34-3-110; Crimes against a federally chartered or insured financial institution, provides the following:

(A) A person knowingly may not execute, or attempt to execute, a scheme or artifice to:

(a) Defraud a federally chartered or insured financial institution; or

(b) Obtain monies, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises.

(c) A person who violates the provisions of subsection (A) is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned for not more than five years, or both.

Roy Irby withdrew funds from the BOA account after the payoff balance was sent to Gregg Jones' office. BOA knew the account was in

payoff process but used the untimely advances as a reason not to close the account.

Question No. 14: By taking funds from the account during and/or after august 22, 2007 did Roy Irby commit breach of trust with fraudulent intent against me? Roy Irby committed breach of trust with fraudulent intent and/or and breach of contract with fraudulent intent against me. For over two years he caused me to believe he was fulfilling his pledge to service the Chase Bank mortgage of $95,000.00. He concealed that the BOA account of $69,000.00 had not closed and that he was drawing funds from it. He testified that he paid me for the rest of the land with funds from the BOA account. Regardless of which account the funds came from he paid me with money he never intended to repay. He therefore paid me with my own money.

Question No. 15: Should the court have referred the claims against Roy Irby to the Criminal Court? The violations of Roy C. Irby against BOA and Me are criminal. I had moved on the court for bifurcation of BOA matters and Roy C. Irby matters because criminal charges against the bank are barred. Separating the issues would have allowed allegations against Roy to be filed in or referred to criminal court. The Equity Court rejected the motion for bifurcation. With the trial restricted to common breach of contract as a civil matter, criminal charges against Roy were avoided.

Question No. 16: Did Roy C. Irby, upon knowing the account was not closed, have an obligation to inform me, Attorney Jones, or Bank of America? Roy C. Irby knew the account was not closed. In numerous efforts to incriminate me he admitted that.

The letter from BOA that the account was linked as overdraft protection to Roy's personal account proves he knew it was not closed, (pln.ex#7). Roy admitted that he had continued to use access devices to draw from the account. He continued to actively use the account from the payoff date of August, 2007 until June, 2010. That is proven by the account history, (pln.ex#5).

NATURE OF DECISIONS

Jury Verdicts filed May 31, 2013: Judgments for BOA are $1,510.61 against T. R. Irby, $21,508.46 against Roy C. Irby, Judgment for T. R. Irby against Roy is $31,700.00. (not collectable)

On July 7, 2004 I signed a "Contract for Deed" agreement with Roy Irby for 1.43 acres of land at 156 Pearson Road, Belton SC, 29627. Roy started construction of a house on the property, (tr.149:5-10). Shortly thereafter I discovered that the surveyor had made an error of 0.08 acres less than the actual property. That was added to the lot to make the total acreage to be 1.51 acres. At $10,000.00 per acre the total price for the land was $15,100.00.

In April of 2007 Roy ran out of money. The house was framed with no roof. He asked me to help him get funds to continue construction. He promised that if I would help obtain financing he would repay everything, (tr.221:24-25, 222:1-2)

I procured a $55,000.00 loan with Community First Bank in Williamston, SC on April 20, 2007, (tr.149:14-20). He cosigned with me and agreed to keep up the payments and pay the costs. I retained half interest in the property by deed as security for my signature, (def.ex#1, Irby) (tr.165:1-5). The deed was filed on March 23, 2007. This loan was processed by Attorney Gregg Jones in Williamston, SC.

On May 16, 2007 I cosigned with Roy on a home equity line of credit with Bank of America in the amount of $69,000.00, (pln.ex#1) This loan was processed by Attorney Gregg Jones.

On August 22, 2007 I cosigned with Roy for a loan for $95,000.00 with M&T Bank to pay off the existing loans including Bank of America, (pln.ex#1&8) The balance was to pay me the unpaid amount he owed me for the land and for accrued construction expenses on his house. This loan was also processed by Attorney Jones.

Jones requested a payoff balance statement from Bank of America and on receipt thereof processed the M&T loan and paid off the other two

If Roy Irby had exercised his responsibility to me and BOA there would be no issues.

STATEMENT OF THE CASE HISTORY

(See Opening statements by Alford Tr.64:13-25, 65:1-25, 66:1-26, 67:1-8)

COMMENCEMENT DATES

Chase Bank filed an action for foreclosure on March 10, 2010.
Appellant Thomas R. Irby file a Cross Claim on June 16, 2010
Cross Claim was amended Oct. 12, 2010 and Sept. 6, 2011

NATURE OF ACTION

Cross Claim against Bank of America and Roy C. Irby II, for Negligence, Breach of Contract, Breach of Contract with Fraudulent intent, Breach of Trust, Violation of Duty of Care.

NATURE OF DEFENSE

BOA.....Denial, Claims no Violations by BOA, claims I breached contract. Roy C. Irby.....Denial, Claimed agreement is not a contract, claims incrimination by me.

DATES OF TRIAL

May 29-30, 2013

ACTION OF THE COURT

The Court Denied Negligence claim on BOA, Allowed only Breach of Contract as action for trial.

AMOUNTS INVOLVED

Thomas R. Irby...$40,000.00 to $50,000.00 costs and expenses. (tr.162:14-18) (tr.298:14-17) Plus credit damage, plus stress & anxiety, plus stress & anxiety for wife, plus Punitive Damages (refer to cross claim) Bank of America...Claimed delinquent balance of $71,214.69, reduced to $23,852.36 at trial (tr.299:22-25, 300:1-3). Chase loan, $95,000.00.

loans. He issued a check to Bank of America in the amount of $9,998.92 on August 22, 2007, (pln.ex#4). That amount is on the payoff statement provided by Bank of America, (pln. ex#12).

The check cleared Jones' trust account with First Citizens Bank in Williamston. Jones and I considered the account closed.

Roy moved into the house in late August of 2007. By spring of 2009 Roy had moved to Nashville. He ordered his daughter out of the house and attempted to sell it along with a complete estate auction of everything he had on the property, (def. ex#4). The Auction was completed on November 9, 2009. I informed the auctioneer and realtor's agent (Maggie Holloway) that I was cosigner on the loan for $95,000.00 and the property could not be transferred until the loan was paid off.

I received a delinquent payment notice dated November 13, 2009 for $207.91, (tr.161:7-19). I carried the notice to BOA at Simpsonville and paid it. I asked to get a printout of the account balance and was told the branch could not provide it. I tried to contact Roy without success.

On December 1, 2009 I went to the ROD office for Greenville County. On searching the property records I learned that Bank of America had not closed the account. I was the primary borrower on two cosigned loans. I also discovered that Roy had filed the reserve deed he requested to be held in case something happened to me. The deed was filed with the ROD on November 13, 2008, (def.ex#2). That deed was dated the same as the deed of record and plainly noted that "No Title Examination Performed". That deed relinquished me of my half interest. I had no collateral for the two loans I had cosigned for Roy.

I was unable to contact Roy with my concerns. I checked the document tray on my desk where the records for the property had stayed. All of the property records were gone. When I resorted to a certified letter to his last known address the letter was returned as not deliverable, (tr.156:2-6).

On December 4, 2009 I received another delinquent notice from BOA, (tr.154:15-20). I paid it at the same BOA branch in Simpsonville. I talked with the manager. He could not provide a printout of the account history.

Efforts to get BOA to reconcile the matter remained futile. Attorney Gregg Jones prepared a Lis Pendens which was filed on January 14, 2010, (def.ex#3). Harassing phone calls from BOA continued.

I received a letter from Roy dated February 1, 2010 telling me to short sell the house. I had the letter reviewed by Jones and we determined the request was valid. I signed an agreement with Knight Real Estate in Williamston to market the property. I also requested a short sale agreement from BOA, (tr229:7-15). When Roy ordered the Realtor to cease his involvement I did not pursue the short sale further.

Chase Bank filed an action for foreclosure on March 10, 2010.

On June 11, 2010 I finally received a telefax copy of the account history that was addressed to Nashville, (pln.ex#5). That is the first time I had been able to review the account record. The account showed that Roy had withdrawn the limit of $69,000.00 from the account and stopped paying on it. It also shows that BOA had kept the account open until June of 2010. They ignored my insistence that the account was supposed to be closed.

I filed my Cross Complaint on June 18, 2010.

On June 22, 2010 I received a second telefax from BOA. This was in reply to my request for verification of who received the funds from the account. The telefax informed me that the line of credit was linked to the personal checking account of Roy C. Irby, (pln.ex#7). No other verification was provided. This second telefax was also addressed to Nashville.

At the first hearing on September 1, 2010 I released Chase Bank from my cross complaint. Judge Stilwell referred the matter to the Equity court to determine the first mortgage position.

I filed an Amendment to Clarify my cross complaint on October 12, 2010.
I filed a General Amendment to my cross complaint on September 6, 2011.

My Cross Complaint with amendments alleged Breach of Contract, Negligence, Breach of Trust, and violation of Duty of care against BOA. I also asked for Punitive damages. Refer to my "General Amendment to Cross Complaint" filed 9/6/2011, page 4, paragraph 7 and page 5, paragraphs 9 and 11.

I charged Roy with breach of contract with fraudulent intent, breach of trust, and violation of SC ST SEC 34-3-110, crimes against a bank. If he knew the account had not been closed he had an obligation to inform me, Attorney Jones, and BOA.

In September of 2011 I retained attorney David Alford of Spartanburg to continue the case. I had met with and reviewed the case with numerous attorneys. I could not afford the fees and cash reserve accounts they required.

The permanent damage to my credit by the resulting Chase foreclosure and the continuing derogatory credit reports by BOA are ignored. Costs and expenses accrued are ignored. Medical records and prescriptions for stress and anxiety were not allowed. Damage and repair to my credit is ignored. The Chase foreclosure on my record would not have occurred, and that damage is ignored by the court.

All the costs, court time, lawyer time, hundreds of pages of print, fraudulent withdrawals, fraudulent and unfounded accusations, and all else expended through now and yet to come could have been avoided. All bank of America had to do was notify me or Attorney Jones that they were not going to close the account. If there was any error in the closing procedure BOA only had to ask that it be corrected. They chose to keep the check and do nothing else, (tr.301:17-25) (tr.302:1).

THE TRIAL

My cross complaint and amendments alleged Negligence, Breach of contract, Breach of Trust, Violation of Duty of Trust and asked for punitive damages against BOA. The reference cases for the charges are valid.

The only cause of action allowed by the Court was breach of contract, (tr.59:8-11).

Negligence as a cause of action against BOA was argued and discussed to the court in numerous instances. (tr.9:23-25, 11:21-25, 36:22-25, 37:1-15, 17-25, 38:24-25, 39:3-5, 40:7-16, 54:2-6, 56:2-7, 59:8-11, 205.18-22, 206:12-18, 277:14-24). The court determined to proceed in a manner most favorable to BOA and prejudicial to me.

The duty that arose when the bank received the letter from Jones with the payoff check was also noted to the court. (tr.40:20-25) (tr.205:9-13)(tr.206:1-18), (tr.207:16-25).

The court decision to try the matter as simple breach of contract barred other charges. The breach of contract charge restricted records, documents of evidence, and testimony. Once the payoff instructions were received with the check, BOA had a duty of care and trust to inform me, Gregg Jones, or Roy if there was any error in the closing process. Especially if the error prevented closing or suspending the account.

After the payoff process of August 22, 2007 Bank of America posted at least 114 negligent transactions to the account through June 2, 2010, (pln.ex#5). BOA never contacted <u>anybody</u> on any of the continued account activity yet BOA confirmed that I was the principal borrower, (tr.175:20-22). The only evidence BOA offered as an attempt to contact me was the letter addressed to myself and Roy Irby at a location in Nashville, Tennessee dated 6/11/2010, (plnt.ex#5). BOA records confirm that the Bank knew my address was the same as it has been since 1974, (tr.171:14-20). I have never had a Nashville address. (*How did BOA mail two delinquent notices to me?*)

BOA chose not to inform me for over two years that the account was not closed. BOA based their defense on a form submitted to Attorney Jones with the Payoff notice. This form had space for a signature of a borrower to close an account. BOA never informed anyone that the form

BOA testified that they considered the instructions from Jones to be "third party" and they had no obligation to respond to, or comply with his was missing or necessary, (f1) (pln.ex#12). It is not a part of the contract. instructions. (tr.119:3-8) (tr,130:5-9) and (tr.241:4-9,19-22). They chose to ignore the letter and deposit the check.

Attorney Jones did not include that form with his instructions to close the account. He testified that he provided the same instructions on the same letterhead that he had always used to close an equity line with BOA (tr.80:10-14, 81:24-25, 82:1-25, 83:8-16, 84:1-21, 87:6-9, 90:1-6). His letter (on his letterhead) specifically noted that his instructions applied to a line of credit account, (pln. ex#4). His letter stipulated that the check was to pay of the account. BOA deposited the check. They did not return the letter or check or acknowledge the letter. The specific instructions from the Jones letter is typed here for convenience:

"Enclosed herewith, please find my check in the amount $9,998.92, to be applied to the above mortgage. If there is a balance due please contact my office immediately. If no balance is due or if this is an equity line, you are directed and authorized to close, block, and satisfy said mortgage and forward to my office. If you have any questions please feel free to call me."

BOA also claimed that because I did not return credit cards, checks and access devices on the account it could not be closed. I testified that

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f1: BOA claimed that because the form was not signed and submitted they could not close the account. The form was not an issue until BOA's hearing for summary judgment of December 14, 2011 (?). Counsel for BOA stated to the court that the bank could not close the account based on the instructions of Gregg Jones' letter because he was a third party and the form was not signed. Judge Simmons responded in question; "and when did Bank of America return the payoff check for $9,998.92 to Mr. Jones?" The BOA motion for summary judgment was denied. Because the form was not signed and submitted in no way barred BOA from asking for it to be signed and submitted. The "Attorney Disbursement Instructions" from the BOA loan lists Gregg Jones as Attorney. Jones initiated the original mortgage and account. Boa corresponded with him and his staff during that process. His signature and information are on those documents.

I never received a credit card, checks, or devices for the account, (tr.153:6-9).

BOA provided no activation date for any credit or debit card issued to me an no numbers for such cards. They provided no verification that any cards or checks were delivered to me. BOA had no proof that I used any cards, checks, or devices or made any withdrawals from the BOA account. BOA never asked me to return anything. If I never had them I could not return them.

BOA testified that if they had notified Jones or me that the account was not closed they would be violating Federal Law, (tr.265:8-10).

Bank of America testified that the conditions of the contract are to protect the customer. Should they not also protect the customer from the bank?

Attorneys for BOA and Roy insisted that because the HUD statement on the Chase account showed a payout of $23,019.07 I had received the payout. Any funds from the Chase account were irrelevant to the funds drawn from the BOA account. Other than my signature on the HUD statement there was no evidence that I received any benefit from either account, (f2) (tr.158:1-14).

The BOA Maximizer Agreement says that upon " *proper written notice*" from either borrower the account will be closed to all. Nowhere does the agreement offer any definition of what is "proper written notice". When a lawyer sends a notice to BOA to close a loan, by any common concept that is "proper written notice". Especially when that same attorney initiated the original loan and is now telling BOA to close it; And especially when that same lawyer is representing both borrowers and is

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f2: The HUD statement was part of the Chase loan and was irrelevant to the BOA account. It was the only way counsels for Roy and BOA could accuse me of profiting from the accounts. The $23,019.07 would have been deposited to the construction account on 8/22/2007, the same date as the HUD statement. Roy then withdrew $10,400.00 on that date to pay the balance on the land. He withdrew $13,000.00 from the construction account on 9/10/07 and deposited it to the BOA account on 9/12/2007, (pln. ex#5). The $13,000.00 was the balance of the $23,019.07 less $19.07. The History for the BOA account shows the only funds issued from the Chase HUD statement other than to BOA, Community First, and Gregg Jones, was the $23,019.07. There were no sums issued from BOA on that date. There was $9,998.92 paid to BOA. Because of the irrelevance to the case I had no documentation in evidence to confirm the disposition of the HUD payout.

the attorney on record for all three loans and mortgages involved.

Nowhere does the agreement say that BOA retains the right to conceal any error in a closing process or that they will do so. It does not say that BOA has the right to hide such an error and profit from that error for two years. It does not say BOA can then deny any responsibility for the error in order to profit from their negligence.

The agreement does not say that the bank, as the trusted banking expert in all relative matters, can hide behind the conditions of its' own agreement in order to conceal an error from anyone who is obviously trying to close the account.

ARGUMENTS

Bank of America

My cross complaint and amendments are referenced herein as if rewritten in entirety. My cross complaint alleged Negligence, Breach of contract, Breach of Trust, Violation of Duty of Trust and asked for compensation and Punitive damages against BOA. My Negligence charge against BOA was granted by court order from Judge Charles B Simmons, Jr., August 24, 2011.

The Bank's Position

The core of the banks position is that they did not close the account:

(1) Because I violated the contract (the Maximizer agreement).

(2) Because to notify me of a payoff error would be a violation of Federal law.

(3) Because an outstanding balance was due.

(4) Because the letter and check were from an unknown third party.

(5) Because a form for individuals to close an account was not signed.

(6) Because access devices were not returned to the bank.

(7) Because they had a contract, BOA owed no other duty to me.

COMMENTS ON BOA'S POSITION

(1a) The account was closed according to the conditions of the agreement. The Maximizer Agreement states in condition number 20 on page 6 that;

> *"Suspension or Termination by you. Each of you has the right, upon proper written notice to us, to suspend the privilege of obtaining new advances. A request to suspend the privilege of obtaining advances, even if made only by one of you, will be effective against all of you. To do so you must notify us in writing." "If one of you requests termination of the account, the account will be terminated for all of you. At our option, we may release some of you from liability under this Agreement and/or under applicable law without releasing all of you." (pln.ex#1)*

The language of the letter qualifies as required "written notice", (a) to terminate the right to suspend the privilege of obtaining advances, and (b) the condition to request termination of the account. Nowhere is anything provided in the agreement that would tell me or Jones that the letter and check would not be "proper written notice".

Nowhere in the Maximizer Agreement does it say any specific form is the only acceptable means of written notification. Nowhere does it explain what constitutes "proper written notice", (tr.108:22-25, 109:1-4). Nowhere does it say BOA has a right to ignore an obvious effort to close an account. Nowhere does it say that an attorney's letter of instructions to close an account will be ignored. Nowhere does it require a "power of attorney" to suspend or close the account. Nowhere in the agreement does it say anything other than "proper written notice to us" is required to suspend or close the account.

The unsigned form is extraneous to the agreement. It is not referred to in the agreement. It is an effort by BOA to modify the terms of the agreement after the fact. The Maximizer Agreement as signed states that it is the entire agreement, (tr.109:5-14). Refer to Plaintiff's exhibit #1, page 8, cond. #29.

BOA was notified in writing to close the account. The letter from Attorney Gregg Jones is specific. His letter verifies that his instructions apply to an equity line of credit, (pln.ex#4) (tr.79:21-25) (tr.82:1-5) (tr.83:8-10, 13-24) (tr.84:3-11) (tr.84:12-21)

I trusted the bank to protect my best interest and believed the account was closed according to the agreement. The negligence of BOA violated that trust. Roy C. Irby used the negligence for his enrichment yet BOA claims I violated the contract. It was only the negligence of BOA that caused all subsequent problems since August 22, 2007. If BOA had notified me or Jones of any problem I could have corrected it. If I had known of an outstanding balance it could have been added to the M&T loan at payoff. BOA prevented the account from being paid off and concealed their negligence for over two years, (tr.206:12-25).

(2a) BOA testified to the court that if they notified anyone of an error in the closing process they would have violated a Federal Law. Directly quoting the transcript, the statement for the jury was:

(Counsel) "Does it seem weird to you that Thomas Irby's asking, why did you not violate Federal Law for me?" (BOA) "It seems very odd. You know, again, I'll say, this is exactly how I'd want my account handled." (tr.265:8-12)

BOA offered no reference to any Federal Law that prohibits them from notifying a customer that an account can't be closed because of an error. I have been unable to find such a law by reference or statute.

(3a) BOA claimed that because of an outstanding balance the account could not be closed, (tr.76:23-25). The Maximizer Agreement states on page 6, condition 21, that;

"Effect of suspension of your account. If your account is suspended or terminated for any reason, you will nonetheless remain obligated to pay the account balance in accordance to the terms of this agreement".

BOA claimed also that if they closed or suspended the account with an outstanding balance they would violate Federal Regulations (tr.77:1-8). The conditions of the Maximizer agreement must therefore be in conflict with Federal regulations or BOA provided fraudulent testimony to the jury. The obvious intent of condition 21 is that an outstanding balance will not interfere with suspension of obtaining advances, or the termination of an account.

(4a) BOA claims that the letter and payoff check were from an unknown third party. Plaintiff's exhibit number 4 is a copy of the letter from Gregg Jones to BOA.

The letter displays a complete letterhead for "Gregg F. Jones, Attorney and Counselor at Law". It also includes the account number and complete contact information. Jones testified that he had processed all three loans for the property. The first loan and mortgage was with Community First for $55,000.00. The second loan and mortgage was the $69,000.00 Bank of America Equity Line of Credit. The third loan and mortgage was the $95,000.00 M&T loan to pay off the two outstanding loans and mortgages. (tr.79:19-25) *(Note should be taken here that Bank of America was never in a legitimate first mortgage position. They were paid off, or would have been paid off, by the same instrument that paid off the first mortgage to Community First Bank)*

Any reasonable effort by BOA to confirm the validity of the Jones letter would have confirmed that he was the Attorney of Record that processed the credit line and mortgage. There was obvious Correspondence then from BOA to Gregg Jones. The BOA HUD statement was prepared by Jones and his information is Plainly displayed. His certification of title examination has his complete information. The BOA "Attorney Disbursement Instructions" was provided to Jones by BOA. Each document that required an attorney or Notary has Jones' signature.

(5a) Bank of America claims that a form submitted with the payoff statement to Jones was not signed and returned with the letter and check, (pln.ex#12). This form is secondary to the conditions of the Maximizer Agreement. It is not included as any part of the agreement signed by me or Roy Irby as processed by Jones.

Attorney Jones did not include that form with his instructions to close the account. He testified that he provided the same instructions <u>on the same letterhead</u> that he always uses to close an equity line with BOA (tr.80:10-14, 81:24-25, 82:1-25, 83:8-16, 84:1-21, 87:6-9, 90:1-6). His

letter specifically noted that his instructions applied to an equity line account, (pln.ex#4).

BOA conveniently wants this form to supersede the agreement. The agreement as signed provides only that "proper written notice to us" is required to suspend advances or to terminate the account, (pln.ex#1, p6, #20). Examination of the form indicates that it might be used by a person closing an account without an attorney, (pln.ex#12).

Bank of America confirmed that the Maximizer Agreement was the entire agreement between me, Roy C. Irby, and Bank of America., (tr.109:5-14). The referenced form is not included in nor a part of the signed agreement. There's nothing in the agreement to cause anyone to believe the letter from Jones is not acceptable "proper written notice."

(6a) BOA claims that because access devices were not returned by me they could not suspend or close the account. I never received any access devices, (tr.153:19-23) (tr.77:10-14) (tr.175:11-14) (tr.180:9-22).

BOA provided no evidence that I was ever given such devices. There is no record of any cards activated in my name. There is no evidence of any withdrawals or advances in my name. There's no confirmation of delivery or method of delivery of such devices to me. No overdraft protection, checks, cash advances or other funds were received by me from the account, (tr.151:12-17, 18-25)

(7a) BOA claims that because the Equity Line Maximizer Agreement is a contract the bank owes no duty of trust or duty of care to me. The Bank is essentially saying that they are protected by the contract from any duty or negligent claims other than the Agreement. BOA would have the court believe that the contract is a shield of immunity under which I have no reason to expect any anticipated standard of practice or expected Duty of Care, (tr.37:17-19, 22-35). My attorney presented Duty as an obligation that arose from the letter and check. Failure to act thereon is negligence. (tr.40:17-24) (tr.41:9-15, 20-25) (tr.42:1-5) (tr.43:15-18, 19-23) (tr.205:1-5, 9-13) (tr.206:1-10) (tr.207:2-12) (tr.207:16-21)

Violation of Duty by Bank of America

The jury was charged that "In every contract, written or oral, there's (an) unspoken but legally enforceable promise of good faith and fair dealing."(tr.308:21-22) Every party to a contract has a right to rely on that promise. The promise described is a reliant duty that existed when the contract was signed. That duty was activated when BOA received the letter and check from Jones. BOA violated this promise (duty) without question.

When BOA was told to close the equity line a duty arose on the bank to abide by the agreement and close the account accordingly, (tr.207:16-21). If there was any error to prevent the closing, that duty required BOA to confirm the error and have it corrected by communicating with me or Jones. When they failed to do that the account was fraudulently used by Roy Irby for his enrichment at my expense. If BOA had suspended withdrawals from the account until the error could be remedied, Roy could not have damaged the process further than his repairable but untimely withdrawals during the payoff.

A duty to act and or respond by BOA arose upon receipt of the check and letter from Jones. Each transaction on the account after that date is an act of negligence. A like duty arose when Roy Irby withdrew funds from the account during the payoff process and bank of America failed to notify Jones or me of the increased account balance, (tr.206:1-10, 16-21).

Murray v. Bank of America, SC Court of Appeals No. 3634, is a bank negligence case parallel to this case. The court of appeals determined that when Murray instructed BOA to close the account a relationship arose that imposed a duty of care on the Bank.

"The Bank failed to follow its own procedure and did not timely close the account. The account was thereafter fraudulently accessed. (Murray, 354, S.C. 337, 343. The Court of Appeals found that this was sufficient evidence to establish the existence of a duty and a breach thereof. "

Also From Murray duty is defined as:

"The obligation to conform to a particular standard of conduct toward another." *Shipes v. Piggly Wiggly St. Andrews* *269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977).* *.....An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance(s)."*

The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996)."

"We find a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of the account. The Bank failed to follow its own procedures, did not timely close the account. (in the record from which the jury could determine the Bank breached its duty to Murray after this duty arose.")

In Carson V. Adgar, 326 S.C. 212, 486 S.E. 2d 3 (1997) *"An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance."*

A duty of care arose when BOA received the letter and Check from Jones. Bank of America neglected to act on that duty. I was damaged in financial expenditures, reputation, and credit that will not be repaired in my lifetime. Damages in time expended, costs, stress, and anxiety continue to mount. My wife's stress and anxiety continues. All damages we suffered are the direct result of the negligence by BOA. If the Bank had exercised any care or expected duty concerning a payoff error, the last five years of ongoing frustration would not have occurred.

The damages are ongoing. I believe that BOA has made no effort to correct the derogatory reports they continue to provide on my credit. The $1,500.00 judgment against me is a disputed amount at best and previous negative reports are in error. Therefore BOA has deliberately damaged my reputation and credit and egregiously continues to do so.

Bank of America is exercising strategic procedure to discourage legal recourse for the Bank's wrong doings. The U.S. Court of Appeals in Mathias v. Accor, No. 03-1010 & 03-1078 (346 F.d672), states:

(a) "Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee."

(b) "In other words, the defendant is investing in developing a reputation intended to deter plaintiffs." It is difficult otherwise to explain the great stubbornness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included."

The Maximizer agreement established a relationship of trust between me and BOA. That duty also exists from "special circumstances". The special circumstances were generated by BOA's negligence when the bank failed to act on the duty imposed by the letter and check from Jones. The duty arose on receipt of the letter and did not need to be specified in contract or statute.

Negligence by Bank of America

Jernigan v. Katz & Bank of America, SC Court of Appeals Case No. 2012-210729, a bank negligence case, is also parallel to this case. It is ongoing. Jernigan and his wife, prior to their divorce, instructed BOA to remove Jernigan's name from their joint account. BOA failed to do so. BOA allowed Jernigan's bill pay agreement to remain active and funds were disbursed from Katz's account. Before trial Jernigan was joined by Katz (v. Bank of America). Common Pleas in Charleston found BOA negligent and in breach of duty. BOA appealed and the case is moved to the Supreme Court to be considered on February 4, 5, 6, 19 and 20, 2014. Jernigan and Katz rely strongly on Murray v. Bank of America.

Also in Jernigan v. Katz & BOA, the Court of Appeals noted from the Plaintiff's pleadings that BOA breached the duty "by and through it's grossly negligent, and /or reckless acts and/or omissions. *Gross negligence is defined as the failure to exercise slight care*". (Steinke v. SC Dept. of Labor, L & R, 336 S.C. 337, 395, 520, SS.E.2d, 142, 153. Also, *"It has been defined as the intentional conscious failure to do something which*

it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do". And, *"Gross negligence is a relative term , and means the absence of care that is necessary under the circumstances",* DOE v. Greenville County Sch. Dist. 375 S.C. 63, 71 (S.C. 2007).

Also In Murray v. Bank of America, Negligence as a cause of action is defined:

"In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. Thomasko v. Poole, *349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002)."*

"An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dep't of Mental Health, *331 S.C. 79, 86, 502 S.E.2d 76, 81 (1998)."*

From Stevens v. Allen, SC Court of Appeals, opinion number 3017, Negligence is similarly defined:

"To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. Reiland v. Southland Equip. Serv., Inc., *330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998)(Emphasis added.);* Rickborn v. Liberty Life Ins. Co., *321 S.C. 291, 468 S.E.2d 292"*

In Davenport v. Walker, 280 S.C. 588, 591, (S.C. Ct. App. 1984) referring to Negligence, *"Negligence and Proximate Cause are ordinarily questions of fact that are not to be disturbed."*

COMPENSATORY DAMAGES

At pre-trial hearings and during the trial, counsels for BOA were obsessed with what they considered "non compensable" damages. (tr.54:1-6, 55:1-12) (tr.298:14-17, 22-25)

In my position as pro se appellant, all the costs, expenses, and/or damages I claimed are qualified in these provisions by the U.S. Supreme Court. Certainly the damage to my credit by BOA is compensable. No damages or costs would have occurred if BOA had informed me or Jones of any error in the payoff process.

(1) The U.S. Supreme Court, in State Farm v. Campbell States: *"Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Ibid. (citing Restatement (Second) of Torts §903, pp. 453—454 (1979)*

(2) *Compensatory Damages also include: (a) Potential costs and expenses plus (b) potential damages that could have incurred through continued time lost, distress, anxiety, outrage, and humiliation.*

In United States v. Burke - 504 U.S. 229, the Supreme Court described the traditional harms associated with personal injury as *"pain and suffering, emotional distress, harm to reputation, or other consequential damages,"* (e.g. a damaged credit rating)."

Smalls v. South Carolina Dep't of Educ. on pain & suffering (i.e. stress & anxiety) . "One cannot easily or with any mathematical certainty place a value on the amount of a person's pain and suffering." (339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000).

In Murray v. Bank of America the jury was charged on actual damages as; *"Mental anguish, pain and suffering, loss of the enjoyment of life, meaning not being able to do the kinds of things you normally did or you did prior to the incident, embarrassment. Those kinds are things that can be considered as actual damages. You're not limited to medical bills, that kind of thing, in determining actual damages."*

Punitive Damages

In my cross claim and amendments I asked for punitive damages at the discretion of the court. The egregious and reprehensible actions of BOA from the discovery of the duty and negligence thereof qualifies for punitive levies by the court. The negligence by BOA not only qualifies for punitive damages but for increased damages as a recidivist.

Bank of America is a Recidivist (repeat) Violator. In BMW v. Gore Jr. the U.S. Supreme Court states: *"Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.* See Gryger v. Burke, 334 U.S. 728, 732 (1948)."

Murray v. Bank of America, SC Court of Appeals No. 3634, is a bank negligence case. Murray is parallel in principal to this case.

In Jernigan v. Katz & Bank of America, SC Court of Appeals Case No. 2012-210729, an ongoing bank negligence case, is also parallel to this case.

In Bank of America v. Narula, Johnson County Kansas District Court, case no. 04-CV-06279. Div. 17, Chapter 60, a breach of trust case: The court confirmed a punitive award to defendant Narula. In confirmation the Court commented on BOA that: *"The Court is convinced that the plaintiff intentionally defrauded the defendants and intentionally failed to act with due regard for the defendants' interests as their fiduciary or trusted financial advisor. The court does not believe that the plaintiff will now or ever recognize or accept the wrongfulness of its actions."* (see General Amendment to my Cross Complaint)

The verdicts of the jury on the Breach of Contract action in my case evaded any application of punitive charges. The verdict sheets provided to the jury did not allow for punitive damages and the jury was not charged on punitive issues. The judgment against me avoids any claim for punitive damages. The inconsistent and unjust enrichment of the verdicts negate any post trial claim of punitive damages against BOA.

ARGUMENTS (2)

Roy C. Irby II

(Breach of Trust with Fraudulent Intent)

(Breach of Duty of Trust)

My cross complaint and amendments are referenced herein as if rewritten in entirety. The case references and authorities are as valid today as when first written.

My charge of Breach of Contract with Fraudulent Act against Roy C. Irby II was preserved and granted by Court Order from Judge Charles B. Simmons, Jr. on August 14, 2011. All of the case against Roy C. Irby II should have been tried before a criminal court. My efforts to have criminal charges filed against Roy were unsuccessful.

Regardless of the banks errors in not closing the account, Roy Irby had an obligation to notify BOA, Jones, and me. He knew the account was not closed, (trl.139:15-25). He knew his obligation was to preserve the account and tell someone instead of taking the money. Instead he took all of the money.

Roy knew that every withdrawal he made from the equity line increased the amount I would be responsible for. He knew the funds from M&T were to pay off all outstanding debts, (tr.140:2-7, 24-25) (tr.141:2-5). He also knew that each withdrawal was an act of fraud. He used the accounts over two years after the house was finished He continued to manipulate the BOA account and the Chase Account for over two years and when he had used all the funds from both accounts he stopped paying.

In closing arguments counsel for Roy Irby informed the jury that there was no contract between me and Roy. He informed the jury that there was only an agreement and an agreement was not a contract, (tr.289:4-9). The jury was then charged that an oral agreement (contract) is an acceptable contract by law, (tr.308:17-22). In this case it is a contract that has been verified by Roy Irby's testimony and by his counsel, (tr.221: 23-25, 222:1-2). It is also a contract that is validated by over two years of maintenance by Roy Irby. The statements by Mr. Gaines

in closing were not challenged. The confusion generated may well have influenced the jury's inconsistent verdicts.

Roy testified that he had a sale of the house and because I filed a Lis Pendens on January 14, 2010 the sale was blocked, (tr.143:9-12) (def.ex#5). The contract for sale submitted as evidence notes a closing date of December 15, 2009 on the second page. The Lis Pendens was filed January 14, 2010, (def.ex#3). That's thirty days after the contract expired. No one notified me or Jones of a pending sale.

Except for testimony confirmed by evidentiary exhibits none of Roy's testimony has merit. His efforts to incriminate me are deliberate attempts of libel, slander, and perjury before the court. Any testimony from Roy that has merit is confirmed by my testimony and/or by the documents in evidence and/or as previously referenced. His accusations are refuted by my testimony and the factual evidence of his actions.

The court is referred to: [SC ST SEC 34-3-110] Crimes against a federally chartered or insured financial institution, which provides the following:

(A) A person knowingly may not execute, or attempt to execute, a scheme or artifice to:

(a).....Defraud a federally chartered or insured financial institution; or

(b).....Obtain monies, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises.

(c)....A person who violates the provisions of subsection (A) is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned for not more than five years, or both.

Roy's withdrawals during the payoff process were deliberate. BOA claims the outstanding balance Roy created was a reason the

account was not closed. He continued using the account and deliberately concealed that he was doing so.

Breach of Trust with Fraudulent Intent is defined on Writ by the SC Supreme Court in The State v. Marion L. Parris, Opinion No. 25965, filed April 4, 2005. " *Breach of Trust with Fraudulent Intent is nothing more than Larceny. It might well be termed as Statutory Larceny, as distinguished from larceny as common law.*" State v. Mcann, 167 S.C. 393, 397-98, 166 S,E, 2d 411,413 (1932) with reference to State v. Shirer, 20 S.C. 392, 408 (1884).

The pattern of violation by Roy C. Irby II strongly indicates that:

(a).....Roy never intended to pay the loans.

(b).....He manipulated the BOA account against the Chase Account for two years. When he had exhausted both loans he simply stopped paying. (pln.ex#5,7)

(c).....If he had succeeded in selling the property I would have been liable to Chase for a $95,000.00 loan on which Chase and I would have no collateral.

(d).....Chase could have brought charges against me for defaulting on a mortgage which had no security or I would have to pay out $95,000.00 for no return.

Roy is experienced as Defendant in six foreclosure actions in Spartanburg County. He should have known that drawing from the account during the payoff process might interrupt the procedure. (see my cross complaint re: foreclosures) (tr.178:19-25)

From the accounts and testimony a pattern of designed "Flim-Flam " emerges. That is further confirmed by the payment to me for the land. Since I was paid with funds that the bank(s) would have to collect from me, he paid me <u>with my own money</u>.

Since no money was disbursed from the BOA account at the Chase closing, I was paid with funds from Chase. Chase was to be left to collect from me. Roy could then abandon the BOA account or sell the property for additional profit.

The Jury verdicts actually rewarded Roy Irby $142,491.54

Roy received $69,000.00 and $95,000.00 that totals $164,000.00.

His judgment owed to BOA is -$21,508.46

His judgment owed to me is -$31,700.00

Roy's Net then is +$110,791.54

Roy will never pay the +$31,700.00

Then his award is....+$142,491.54

If Roy never Pays BOA the $21,508.46, his total is the entire $164,000.00

(The cost of the land was his debt that he paid from these funds)

SUMMARY AND CONCLUSION

Bank of America

The denial by the lower court to allow an action on Negligence was an error. Failure to recognize the Duty that arose from the instructions and the check to close the account was an error. The trial on breach of contract restricted the verdicts by the jury and placed me in a position of prejudice before and by the court.

For the reasons stated herein I respectfully ask the Court of Appeals to reverse the verdicts from the jury trial for a new trial absolute or to:

(A).....Set aside the verdicts by the Jury and direct a new trial on negligence against BOA, and/or

(B).....Direct the lower court to remedy the errors by retrying the case for a directed bench verdict by tribunal, and/or

(C).....Direct the lower court to correct the verdicts according to the testimony supported by evidence on record and all additional evidence available, and

(D).....Direct the lower court to correct the unjust enrichment by the verdicts, and

(E).....Direct the lower court to command BOA to correct the damage to my credit and cease their continued negative reports, and

(F).....Preserve my request for Punitive damages at the court's discretion, and/or

(G).....Provide whatever remedies this Court deems appropriate.

"*To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial.*" Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 61 S.E.2d 165 (1950).

SECTION 15-33-135, HISTORY: 1988 Act. No. 432, Section 4. Punitive damages: "*In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.*" (see the General Amendment to my cross complaint)

SUMMARY AND CONCLUSION

Roy C. Irby II

Roy C. Irby II conspired to defraud me and Chase Bank. He did so with premeditated and deliberate intent. He admitted to his deeds while trying to incriminate me in his actions. He accused me without proof, or any valid reference to evidence.

Gregg Jones testified that Roy was present at all proceedings and knew that the account was supposed to be closed. Roy knew that he had drawn funds from the accounts during the payoff process and failed to tell me or Jones.

He violated the purpose of the reserve deed. Jones confirmed that the first deed filed was the deed of record. Jones also testified that the reserve deed was Roy's Request in case something happened to me (because of my cardiac history).

The BOA failure with the payoff would have been fixed had Roy not used the error to withdraw $69,000.00. He used the account from the payoff in August 2,007 until he stopped paying in June of 2010. The house was completed in August of 2007. He knew that the Chase Loan was to pay off the BOA loan. Jones confirmed that.

Roy Irby should be retried in criminal court for Breach of Contract with Fraudulent intent according to my cross complaint. He should also be tried on Federal Charges for defrauding a Federally Chartered Bank. [SC ST SEC 34-3-110]

Roy's actions should also be referred to the appropriate authorities for criminal charges of Breach of contract with Fraudulent Intent and Crime against the Bank. I ask the Court of Appeals to direct any appropriate court or authorities to act on the criminal violations by Roy C. Irby II. I ask also that my rights to bring separate charges or actions against Roy Irby to the appropriate courts or authorities be preserved.

Signed: Thomas R. Irby, February 18th,2014

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