THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E Watson, Master-in-Equity

Opinion No 2011 UP-328
(S C Ct App filed June 27 2011 re-filed September 20 2011)

Jacob Davison		Petitioner
	v	
David Michael Scaffe		Defendant
Wachovia Bank N A		Respondent

On Petition For A Writ of Certiorari to
The South Carolina Court of Appeals

PETITION FOR CERTIORARI

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CERTIFICATION

Petitioner, in accordance with Rule 242(d)(1), SCACR, certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals September 20 2011

QUESTIONS PRESENTED

Part I (The $51,850 Check Wachovia Gave Scaffe)

1 Was Wachovia required to stop payment on a $51,850 check it issued, either as co-drawer or as agent when it had actual notice on Tuesday April 22, 2008 that it gave this check in violation of a court order, it had the right to stop payment on the check, and it retained control over the $51,850 in funds until Friday April 25 2008?

2 Whether Wachovia, labeled drawer (writer) of a check drawn on drawee J P Morgan Chase Bank N A , may be somehow deemed to certify or accept a check when the UCC expressly provides that only the drawee (Chase in this case) may certify or accept?

3 Whether "real defenses' (fraud illegality, capacity) override the check at issue, as expressly provided in the UCC, when properly classified as a tellers check or an ordinary check and in addition whether "real defenses" also override a "certified check" (as classified by the lower courts) as indicated in the precedent expressly applied by the trial court at Wachovia's request?

Part II (The $58,850 Withdrawal Wachovia Gave Scaffe)

4 Does the evidence actually show Wachovia must have given the $58 850 withdrawal (the $51,850 check above and $7,000 in cash) after it had actual notice of the court order?

5 Whether the constitutionally mandated standard of review in supplementary proceedings is de novo including matters of contempt under the statutory framework for supplementary proceedings?

6 Whether a party with peculiar knowledge or control of evidence bears the burden of proof as to issues related to that evidence and whether a motion to alter or amend is required to preserve this issue when the trial court ruled Wachovia bore the burden of proof at the beginning of the trial?

7 Whether UCC Article 4, generally applicable to checks, applies to an ordinary non-negotiable over the counter withdrawal slip?

8 Whether a motion to alter or amend is required to preserve issues for appeal when the issues were presented to the trial court exactly as directed on the record for consideration as part of entering the final order?

Part III (Withheld Evidence)

9 Whether a motion to alter or amend is required to preserve a motion to compel discovery when the trial court rejected the motion in writing and whether the ends of justice should be considered under preservation for appeal doctrines in South Carolina when the face of the evidence shows Wachovia withheld evidence?

10 Whether refusal to consider a motion to compel is grounds to reverse?

Part IV (Pro Se Attorneys Fees and Other Creditors)

11 Whether there can be an exception for special circumstances to the general rule against pro se attorney fees or should the rule be reconsidered?

12 Whether Wachovia should be ordered to turn over the full amount given to Scaffe in violation of the court order, $58,850, plus interest and costs, so that the

remaining amount, after satisfaction of all of Davison s claims, can be applied to satisfy other victims of Scaffe's fraud scheme?

Part V (Other Matter for the Record or Judicial Notice)

13 Whether matter presented to the trial court at the time of delivering a proposed order should be included in the record treated as persuasive authority, or taken up under judicial notice?

14 Whether matter showing Wachovia has tricked both lower courts into holding the $51,850 check is a certified check should be considered?

15 Whether a deferred prosecution agreement significant monetary penalty and related information against Wachovia, entered after trial, should be taken up under judicial notice when the conduct at issue is similar to the conduct shown by the evidence and further shows intent?

STATEMENT OF THE CASE

Petitioner appellant, and plaintiff, Jacob Davison, obtained a judgment February 27, 2008 against original defendant Scaffe for $17 766 33 Circuit Court Judge Young opened supplementary proceedings April 3, 2008 (R p 15) Under S C Code Ann § 15 39-440, the court order provided

> IT IS FURTHER ORDERED THAT any transfer or other disposition of the property of the Defendant not exempt from execution and any interference therewith is forbidden

Respondent Wachovia received the court order April 22 2008 and froze Scaffe s bank account (R pp 457-58) Wachovia confirmed this to Davison twice in May 2008 and stated the account was overdrawn (R p 190 line 4 p 192 line 9) After a third subpoena, Wachovia s records revealed Scaffe received $60 000 by wire on the same day Wachovia received the court order, April 22, 2008 (R p 451) Wachovia gave Scaffe a

$58,850 withdrawal that cleared as a $58,850 check on April 24 (R p 451) The withdrawal was of $7 000 in cash and a $51 850 IPS check that was first presented for payment April 25 2008 (R pp 558 61) Wachovia claims the withdrawal occurred prior to receipt of the court order Davison claims (1) Wachovia was required to stop the $51,850 IPS check regardless of timing and (2) Wachovia gave the $58,850 withdrawal after implementing the court order

Robert E Watson, Master in-Equity for Berkeley County heard this matter without a jury The master directed petitioner and respondent to submit a proposed order for consideration (R p 447 line 15 p 449 line 21) Both did so On June 5 2009 the lower court entered Wachovia's Davison appealed The court of appeals affirmed in Opinion No 2011 UP 328 filed June 27 2011, re-filed September 20 2011 It held (1) the IPS check is a certified check ', (2) the withdrawal occurred prior to receipt of the court order and (3) most of Davison's issues were not preserved for appeal

Davison produced extensive documentary evidence all of which was admitted Davison also spoke from personal knowledge on some matters Wachovia's witness indicated no personal recollection of the transaction other than what was reflected in the documents (R p 302, lines 15 19) This appeal is about documents

As stated above, Wachovia received a $60,000 wire for Scaffe April 22, 2008 received the court order the same day and gave Scaffe $58 850 that cleared April 24 The withdrawal was first submitted April 23 and re-submitted April 24 (R pp 459 62) Wachovia's records showed 65 withdrawals over 28 months The $58 850 withdrawal was different from all 64 prior withdrawals (R pp 486-91) It cleared as a check whereas all others cleared as counter withdrawals (R p 451, R pp 486-87) It had to

be submitted twice whereas all others were submitted only once (R pp 459-62, R pp 486-87) Wachovia had closed the account It re opened the account and then re-closed the account to give the $58,850 withdrawal (R pp 482 85 R pp 463 85 R pp 108, line 13-p 130, line 7) The $58,850 withdrawal was caught by the court order and Wachovia overrode its systems to give the withdrawal There is simply no way to escape this conclusion or to make Wachovia s defense (withdrawal given before the court order) consistent with these documented facts

Wachovia's records included a 'cash out credit teller document (R p 561) When read with the other bank records the evidence showed (1) this document reads 1 20 p m April 23 which means that this is when the withdrawal actually occurred and (2) this document must be dated April 23 in all circumstances (R pp 558 61, R pp 599-608, R p 193 line 16–p 220 line 12, R pp 130 220 R p 394 line 8-p 395 line 17, see also R pp 356-95) Wachovia admitted the cash out credit teller is dispositive in favor of Davison if it can be read (R p 428 lines 5-23) However Wachovia claims its own document, which was stamped by one of its computerized stamps cannot be read, and it does not have a computer record of the computerized stamp The dispute over the burden of proof comes from this

Wachovia defended with a daily transaction register document claiming it stated the time of the withdrawal (R p 629) However, the daily transaction register was page four (4) of a document, showing on its face that Wachovia withheld evidence (the other three pages) (R p 629 (upper right corner), R p 454) The document only addressed in its main field the check amount (R p 629) and the witness testified to the effect that the daily transaction register page was for the time of printing of the check, not

the tıme of wıthdrawal (R p 356 lınes 3 7 R p 331 lınes 1 5, R p 352 lıne 22-p 356, lıne 7) Wachovıa further stated that the daıly tıansactıon ıegıster gave the date on the cash out credıt teller The evıdence showed thıs was ımpossıble (R pp 558-61, R pp 599 602 R p 193 lıne 16–p 220 lıne 12 R pp 130 220 R p 394, lıne 8 p 395 lıne 17, see also R pp 356-95) The wıtness cıɪed uncontrollable when forced to admıt thıs on cross-exam Thıs ıs the prımary reason for the request foı pro se attoıney fees

The $58,850 wıthdrawal ıncluded a $51,850 IPS official check" showıng Wachovıa as drawer, Integrated Payment Systems Inc (IPS) as ıssuer, and J P Morgan Chase Bank N A as drawee (dıawer, ıssuer and drawee aıe UCC defined terms) (R p 566) The $51,850 check was not paıd untıl Aprıl 25 (R p 566 (bottom rıght), R p 566-69 R p 162 lıne 8-p 167 lıne 3) It was subȷect to stop payment (R p 570) The money was ın the account untıl Aprıl 24 (R pp 480 81) Wachovıa had control over the funds untıl paıd (R p 570) The check was obtaıned ın vıolatıon of the couıt order a real defense Also Scaffe ȷust bounced substantıally ıdentıcal check to the payee renderıng her unable to be a holdeı ın due couıse (R p 580) Wachovıa dıd not stop the check even though ıt knew of the vıolatıon of the court ordeı

To further show ıntent Wachovıa's records revealed other acts of Wachovıa as to Scaffe Wachovıa let Scaffe bounce 509 checks and sımılaı ıtems (R p 591) Wachovıa made $18,841 off Scaffe ın fees (R p 591) Scaffe's problems weıe obvıous from Wachovıa's records as most of hıs payments were to payday lendeıs (R pp 482-85) Worst of all Wachovıa closed Scaffe s account ın 2007, let hım re-open ıt and then let Scaffe begın a $500,000 fraud agaınst several vıctıms obvıous fıom hıs bank records (R pp 582-83) It turns out Scaffe was a stock broker who became a gamblıng addıct

(R pp 574-79) Davison s discoveries resulted in Scaffe being sentenced to jail in South Carolina for eight years on November 5 2009 The criminal case against Scaffe stands on Wachovia's records

ARGUMENTS

PART I (THE $51,850 CHECK)

1 WACHOVIA WAS REQUIRED TO STOP THE $51 850 CHECK

A THE $51,850 CHECK WAS FIRST PRESENTED FOR PAYMENT APRIL 25 AFTER THE COURT ORDER

Under Federal Reserve Regulation CC stamps must be put on a check to show deposit and presentation for payment 12 C F R § 229 Appendix D Stamps for deposit and conversion to an electronic check with BB&T routing number 053101121 ' (R p 162, lines 13 21, R p 567) were dated April 24, 2008 (R p 566) On April 24 BB&T put an endorsement stamp on the rear, and put stamps for bank of first deposit, bank of first endorsement and bank to 'truncate or to convert the check for electronic clearing (R p 165, line 18 p 167, line 3 R pp 568 69) Other stamps on the check are dated April 25, 2008 Davison banks with BB&T and also stated from personal knowledge the meaning of the various BB&T stamps and BB&T's routing number (R p 98 lines 8-14, R p 162 lines 13 21) As a matter of law, a check with stamps like the $51,850 check was deposited for the banking day of Thursday April 24 2008 could not have been deposited before 2 p m Wednesday April 23, 2008 and was first presented for payment to drawee J P Morgan Chase Bank N A on Friday April 25 2008 Wachovia in general conceded this (R p 282 lines 15 25)

B WACHOVIA WAS REQUIRED TO STOP THE $51,850 CHECK

April 25 is well after Wachovia concedes the court order was in effect (R pp 457 58) An ordinary check on Scaffe s account had to be bounced S C Code Ann § 36-4-303, S C Code Ann § 36 4 303 Official Comment 4 (If a bank receives an item after its regular cutoff hour on Monday and an attachment is levied at noon on Tuesday, the attachment is prior to the item if the bank had not before that hour taken the action described in paragraphs (1) (2) and (3) of subsection (a)) Wachovia controlled the $51 850 until April 25 (R p 570), First Data Corporation, SEC No Action Letter January 13 2004, SEC Ref No 20037181012 (2004 WL 67976) The money was in Scaffe's account until April 24 (R pp 480 81) Under the IPS program, Wachovia had the express right to stop the check (R p 570) The court order required Wachovia to stop this check because Wachovia had full control over the money and the check

Such a check is not irrevocable upon issuance <u>See generally</u> <u>Wachovia Bank of SC v Thomasko</u> 339 S C 592 529 S E 2d 554 (Ct App 2000), <u>Specialty Flooring Company Inc v Palmetto Federal Savings Bank of South Carolina</u> 302 S C 107 394 S E 2d 13 (Ct App 1990) Please note the South Carolina legislature specifically stated <u>Specialty Flooring</u> is the law when it recently enacted updates to the UCC S C Code Ann § 36-3 411 (South Carolina Reporter's Comment) The $51,850 check cannot be distinguished from precedent The lower courts negated the needed ability of banks to overcome these checks in the face of fraud or mistake Wachovia had the right to stop the check Wachovia wants to be able stop a check if it will be harmed, but ignore a court order if Davison is harmed

The law of court orders and supplementary proceedings required stopping the check and barred the withdrawal Court orders apply to banks <u>American Federal Bank</u>

FSB v Kateman, 335 S C 273, 516 S E 2d 1 (Ct App 1999) The Kateman oıder "was lımıted ın operatıon by ıts very specıfıcıty Other than that, the bank would have been lıable In thıs appeal, the court order applıes to all property of Scaffe Wachovıa ın fact froze the account under the court ordeı (R p 485 R p 655) The evıdence shows Wachovıa then unfroze the account to permıt the wıthdrawal Γurtheı Wachovıa had full control over $51,850 untıl at least Aprıl 25 well after the court order was ımplemented Under a Kateman anavlsıs, Wachovıa ıs lıable

Supplementary proceedıngs are equıtable and reach banks Ag-Chem Equıp Co Inc v Daggerhart 281 S C 380 383 315 S E 2d 379 381 (Ct App 1984) Johnson v Servıce Management Inc , 319 S C 165, 168, 459 S E 2d 900, 902 (Ct App 1995), McManus v Bank of Greenwood 171 S C 84, 171 S E 473 (1933) Lynn v Internatıonal Brotherhood of Fıremen & Oılers 228 S C 357, 90 S E 2d 204 206 (1955) The specıfic freeze order provısıon comes under S C Code Ann § 15 39-440 whıch applıes to thırd partıes Globe Phosphate v Pınson, 52 S C 185, 29 S E 549, 552 (1898), Deer Island Lumber Co v Vırgınıa Carolına Chemıcal Co v Wılkıns 111 S C 299, 97 S E 833, 834 (1919)

C THE CHECK IS EITHER AN ORDINARY CHECK OR A TELLER S CHECK

The check names Wachovıa Bank Natıonal Assocıatıon as dıawer' names Integrated Payment Systems Inc of Englewood, Colorado as 'ıssueı', and shows J P Morgan Chase Bank, N A of Denver Colorado as "drawee oı payıng bank (R p 566) It ıs eıther an ordınary check or a telleı s check See S C Code Ann § 36-3 104(h), S C Code Ann § 36-3-105 S C Code Ann § 36 3 103(a)(4) (5) The Montgmery Memo analyzes IPS checks under the UCC and gıves a copy of a Wachovıa IPS check M Dean

Montgomery, Memo to Real Property Executive Section, Connecticut Bar Association, September 7 2006[1] IPS's owner also analyzes it First Data Corporation SEC No Action Letter January 13, 2004, SEC Ref No 20037181012 (2004 WL 67976)

"Official check" has no UCC meaning The check is meant to be a teller s check" under Federal Reserve Regulation CC First Data Corporation at 2004 WL 67976 at *6 (in FN3) A court held it is a "teller s check' Dominican Fathers v Chase Manhattan Bank USA, J P Morgan Chase Bank Bank North et al (Index No 120382/02 June 15, 2004, Supreme Court, County of New York)[2], (Apx pp 109 120), M Dean Montgomery Memo to Real Property Executive Section Connecticut Bar Association September 7 2006

Davison argues it is better seen as an ordinary check with the same outcome A bank in the IPS program is an agent of IPS First Data Corporation at 2004 WL 67976 at *7 ("the bank as agent of IPS issues an official check to the customer") Wachovia's status as 'drawer is as an "accommodation party' S C Code Ann § 36 3-419 Wachovia is not a true drawer in this case so no bank is a true drawer of the check under the definition of teller s check because IPS is not a bank S C Code Ann § 36-3-104(h) Note IPS is drawer because issuer" means ' drawer" S C Code Ann § 36 3 105(c) An ordinary check can be stopped S C Code Ann § 36 4 403 A teller's check can be stopped Specialty Flooring Company Inc v Palmetto Federal Savings Bank of South Carolina, 302 S C 107, 394 S E 2d 13 (Ct App 1990) Wachovia also had the express right to stop payment (R p 570)

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[1] The issues related to the memo are discussed in Part V See Apx pp 104 120 It can also be found here http //test ctbar org userfiles/Sections/RealProperty/M_Dean_Montgomery_Letter pdf

[2] http //www nycourts gov/comdiv Law Report Files/July 2004 Fried Dominican Fathers htm

Only subsection (a)(5) of S C Code Ann § 36 4 303 can apply to the $51,850 check whether it is a teller s check or an ordinary check Scaffe got the check from his bank like any other acquisition of these checks The check is subject to UCC Article 3 and Specialty Flooring The earliest date the drawee could have paid the check was Friday April 25 well after the freeze was in place Subsection (a)(5) is satisfied in favor of Davison Wachovia has no UCC defense

2 THE CHECK CANNOT BE A CERTIFIED CHECK AND IT IS MERITLESS TO CLAIM OTHERWISE WITH SIGNIFICANT POLICY IMPACT

Wachovia and the lower courts disposed of the issues related to the $51,850 check by concluding it is a 'certified check" Each ignored when the check was paid and concluded the check must have been given prior to receipt of the court order This thinking then applies S C Code Ann § 36 4-303 to cut off liability

There are three problems with this (1) as discussed above, the check is either an ordinary check or a 'tellers' check (2) as discussed in Argument 4 Wachovia's claim of giving the withdrawal before receipt of the court order is impossible under the documentary evidence and the claim is also irrelevant as the check was not paid until April 25, and (3) the precedent the trial court applied at Wachovia's request holds that ' real defenses" override a "certified check"

It bears repeating Wachovia is named drawer' on the check (R p 566, see also R p 559) Only the drawee--NOT the drawer can certify or accept a check S C Code Ann § 36-3-409 The check cannot be a certified check There is no merit whatsoever to Wachovia's position or the lower court holdings on this point

Also, the primary authority cited in the trial court s order states that real defenses can defeat a certified check Quistgaard v EAB European American Bank and Trust

583 N Y 2d 210, 212, 182 A D 2d 510 513 (1992) (discussing real defense of fraud as a defense to a certified check) ' Real defenses" are discussed below in Argument 3

Confusing drawee and drawer is a significant error of law Stolen checks are unfortunately common Confusing drawer and drawee undoes the express policy of the UCC The manner in which the bank dealing with a thief is made to pay, and not on the person who wrote the check, is by use of warranties and the definition of these terms See generally, S C Code Ann § 36 3 420 (Official Comments) The lower courts holding means that a person writing a check, by confusing drawer and drawee will be doubly liable (to the true payee and the bank dealing with the thief) on the check contrary to the express policy of the UCC and common sense

Wachovia s position also means that all teller s checks as well as cashier s checks' are now 'certified checks and that all precedents related to these checks were wrongly decided See e g , Specialty Flooring Company Inc v Palmetto Federal Savings Bank of South Carolina, 302 S C 107 394 S E 2d 13 (Ct App 1990), Wachovia Bank of SC v Thomasko 339 S C 592 529 S E 2d 554 (Ct App 2000) Wachovia and the lower courts have re written the UCC This cannot stand

3 THE $51,850 CHECK WAS OVERRIDDEN BY REAL DEFENSES"

The UCC provides for ' real defenses" to checks See S C Code Ann § 36-3 305, Official Comment 1 Even a holder in due course is subject to real defenses S C Code Ann § 36-3-305(b) The real defenses include lack of legal capacity ' and "illegality of the transaction' S C Code Ann § 36 3 305(a)(1)(ii) The court order made issuance of the $51 850 check an ' illegality" and beyond the legal capacity ' of Scaffe and Wachovia The real defense of fraud also applies if Wachovia did not learn of the

violation of the court order until after the withdrawal as it claims S C Code Ann § 36 3-305(a)(1)(iii) Again Wachovia has no UCC defense

Wachovia would not be liable for stopping the check Even if the check is a "teller's check' this is true because liability under S C Code Ann § 36-3-411 is only for "wrongful' stop payment Stopping a check for a court order cannot be wrongful

Failing 'real defenses", Specialty Flooring also calls for stopping the check because the payee was not a holder in due course Scaffe's first check to the payee for $51,750 bounced one week earlier (R pp 580 81) A holder in due course must take "without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series" S C Code Ann § 36-3-302(a)(2)(iii) There was an ' uncured default because a check in the same ' series bounced The $51,850 check is also fairly viewed as the same "instrument' that was "dishonored" (bounced) The evidence also shows the payee knew there was a serious problem when she obtained the money (R pp 170 line 4-175 line 6 R pp 574-583)[3] This is not consistent with the requirement of good faith which is "honesty in fact and the observance of reasonable commercial standards of fair dealing S C Code Ann § 36-3-302(a)(2)(ii), S C Code Ann § 36 3 103(a)(6)

PART II (THE $58,580 WITHDRAWAL)

4 THE EVIDENCE SHOWED RESPONDENT GAVE THE WITHDRAWAL AFTER IMPLEMENTING THE COURT ORDER

Wachovia contends Scaffe showed up immediately upon the wire transfer to get $58,850 Davison contends Scaffe and the Wachovia branch contacted each other by

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[3] She also knew Scaffe had defrauded her as she publicly stated after the trial that she knew she had been defrauded at tax time which is the same time she received the checks Elizabeth Bush Former DI Investment Broker Arrested in Parish like Scheme Daniel Island News June 2 2009 See Apx p 132 See Part V for a discussion of the issues with this article

phone sometime after the wire arrived, Scaffe asked them to start a withdrawal, and Scaffe actually came in the next day April 23 about 1 20 p m to get the withdrawal [4] Wachovia's records support Davison and contradict Wachovia

Wachovia's records showed 65 withdrawals over 28 months The $58 850 withdrawal at issue was the only withdrawal that was double submitted It is the only withdrawal slip handled as a check rather than a ' counter withdrawal (R pp 482 87 R p 127 lines 6-16) It is the only withdrawal that does not appear on a bank statement on a date that it was processed as it was processed both April 23 and April 24 but only appears on the statement for April 24 (R pp 486-87 R pp 480 81) The withdrawal caused an error (DDA Exception) when it was processed (R p 459, R p 100 lines 8-13) The money remained in the account until April 24 (R pp 480 81) The withdrawal slip itself did not have a date time stamp on it whereas 60 of the other withdrawals did (R pp 459-62 R pp 486 87 R pp 492-557) Wachovia imposed the court ordered freeze lifted the freeze to pay the withdrawal then re-imposed it further amplifying it was intentional (R pp 482 85)

The check was deposited for the banking day of April 24 (R p 566) Given the circumstances of a prior bounced check and its large amount this shows the withdrawal was not given before Wednesday April 23 (See Argument 3) because the $51,850 check must have been deposited immediately

The evidence shows extensive special handling The only explanation is Wachovia gave the withdrawal after Wachovia froze Scaffe s account If the money

[4]Davison s theory is well grounded in reality Scaffe was in fact in court in Hanahan SC most of that day because of his gambling arrests He also had to run around to meetings and sit on conference calls in a desperate attempt to keep his brokerage job in Summerville SC and to keep his brokerage clients See generally R pp 574 79 He was extraordinarily busy and was not in a position to drop everything and drive to Mount Pleasant SC in impossibly little time

went out the door prioi to the fieeze, none of the special handling would have been required Clearing the withdrawal as a check shows Wachovia circumvented internal controls

Wachovia focused on page foui (4) of a daily transaction registei" on a theorv that the money went out the door on Tuesday April 22, 2008 at 3 22 p m (R p 630, R p 296, line 3-p 309, line 5, R p 8) Under Wachovia s theory, the four page 'dailv transaction register" relates to the four key detail pages foi the withdrawal (R pp 558-61) The problem is Wachovia only provided page foui (4) and withheld the other thiee (3) pages never giving a computei log foi the 'cash out credit teller that it conceded would be definitive The only reason to hide the other thiee pages is they help Davison

Woise, Davison showed Wachovia made a mateiial misstatement and contradictory statements regarding the daily transaction iegister Wachovia s witness gave conflicting testimony about whether the daily transaction register was for the withdrawal or the screen piint of the IPS check (R p 356 lines 3 7, R p 331 lines 1 5 R p 352, line 22 p 356 line 7) Wachovia made two key statements as to the daily transaction register (1) the date and time in it of 3 22 p m Tuesday April 22 2008 is when the money went out the door (R p 304, lines 9 13), and (2) that date and time is also the date and time imprinted on the cash out credit teller (R p 307, lines 6 9) Davison showed the second is false The date in the stamp must be April 23 (R pp 486-87 R pp 492-557, R pp 603-08, R p 394, line 8 p 395, line 17, see also R pp 356 395, see generally R p 130 line 8-p 162 line 3, R pp 486 565) Wachovia s witness cried uncontrollably after she was forced to concede this on cross-exam

5 THE SOUTH CAROLINA CONSTITUTION REQUIRES DE NOVO REVIEW

Supplementary proceedings are in equity and the standard of review is de novo Ag-Chem Equip Co , Inc v Daggerhart, 281 S C 380 383 315 S E 2d 379, 381 (Ct App 1984) Van Blarcum v City of North Myrtle Beach, 337 S C 446, 450 523 S E 2d 486, 488 (Ct App 1999) 16 S C Jur Appeal & Error § 123 S C Const art V § 5

The South Carolina Supreme Court recently clarified de novo review in equity as constitutionally required Lewis v Lewis 392 S C 381 384 709 S E 2d 650 651 (2011), Simmons v Simmons 392 S C 412, 414, 709 S E 2d 666 667 (2011) S C Const art V § 5 (' shall review the findings of fact as well as the law' (emphasis added))

The statutory framework for supplementary proceedings expressly provides for enforcement by contempt S C Code Ann § 15-39 490 The court order is fundamental to supplementary proceedings Globe Phosphate v Pinson 52 S C 185 29 S E 549 552 (1898) (supplementary proceedings are pointless without freeze orders) Contempt is here fundamentally linked to supplementary proceedings and equity

It is simply odd to apply a deferential standard just for contempt in supplementary proceedings If Wachovia had complied with the court order, but objected to giving the funds to Davison, any appeal would be subject to de novo review It makes no sense to change the standard of review because Wachovia violated the court order

The court order is a general order under statute It was entered by Judge Young not Master Watson The question the statute and the order ask is whether the property belongs to the debtor S C Code Ann § 15-39-440 It is not discretionary Its meaning is inherently a question of law Master Watson was in no better position than the Supreme Court to interpret the meaning of the statute or Judge Young s order

The contempt precedents apply a deferential standard because intent is a requirement and intent is generally subjective, giving a trial court a better vantage point See generally, Stone v Reddix-Smalls 295 S C 514, 369 S E 2d 840 (1988) This does not apply to a case like this because there is nothing subjective about interpreting Wachovia's records and other documents, and the basis of the trial court order is Wachovia s records The subjectivity notion was meant for normal people and makes no sense when looking at a goliath Wall Street bank

6 WACHOVIA BORE THE BURDEN OF PROOF ON THE KEY ISSUE AND THE TRIAL COURT'S RULING PRESERVED THIS ISSUE

A party having peculiar knowledge or control of evidence on an issue bears the burden of proof on that issue 30 S C Jur Evidence § 17 Roberts v Roberts, 296 S C 93 99, 370 S E 2d 881 884 (Ct App 1988) (citing Martin v Southern Railway Co 240 S C 460, 126 S E 2d 365 370 (1962)) aff'd on other grounds, Roberts v Roberts, 299 S C 315 319 384 S E 2d 719 722 (1989) Smith v Ashmore 184 S C 316 192 S E 565, 569 (1937) With contempt, [once] the moving party makes out a prima facie case of contempt by pleading the Order and showing its noncompliance the burden shifts to the Respondent to establish his defense and inability to comply with the order' (emphasis in original) Means v Means, 277 S C 428 430, 288 S E 2d 811, 812 (1982) Redick v Redick, 266 S C 241, 243 222 S E 2d 758, 759 (1976), Mixson v Mixson, 253 S C 436, 443,171 S E 2d 581 584 (1969)

At the beginning of the trial, the lower court ruled that Wachovia was to defend without a presentation by Davison Wachovia complied without objection Davison objected and sought clarification The lower court clarified that the burden of proof was on Wachovia Wachovia did not object or seek clarification Wachovia consented to

Davison proceeding first (R p 78, line5-p 79, line 19) Further, Davison made out a prima facie case

Wachovia says its cash out credit teller' cannot be read Wachovia admits this document would be dispositive (R p 428, lines 5 23) It is Wachovia s own document This is the entire point of the rule to ensure that a goliath like Wachovia cannot obtain an unfair advantage by manipulating or withholding its own records

7 UCC ARTICLE 4 DOES NOT APPLY TO A WITHDRAWAL SLIP AND HOLDING OTHERWISE HAS FAR REACHING CONSEQUENCES

The analysis of the $58 850 withdrawal (as distinct from the $51,850 check) applied UCC Article 4, specifically S C Code Ann § 36-4 303 UCC Article 4 applies to ' items See S C Code Ann § 36 4 102 Non-negotiable withdrawal slips are not ' items" The term looks to interbank instruments like a check " 'Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment S C Code Ann § 36 4-104(a)(9) A non negotiable withdrawal slip is not an instrument S C Code Ann § 36-3-104, S C Code Ann § 36 4-104(c) (applying Article 3 definitions) A withdrawal slip is not a promise S C Code Ann § 36 3 103(a)(12) An order' is meant, like all of UCC Article 3 as a negotiable thing that can be paid over to a third person even if the definition lets its issuer get paid such as by drawing a check in your own name S C Code Ann § 36 3-102, S C Code Ann § 36-3-103(a)(8) (definition of 'order') The withdrawal slip says it is "non negotiable (R pp 459-462) "The functional limitation on the meaning of [item] is the willingness of the banking system to handle the instrument undertaking or instruction for collection or payment' (emphasis added) S C Code Ann § 36 4-104 Official Comment 8 Banks do not handle other banks non negotiable withdrawal slips That is why we have checks

The policy issue is that Article 4 has mandatory, non-waivable liability provisions See S C Code Ann § 36-4-103 Banks make their customers sign account agreements to limit liability For example, Wachovia's account agreement is inconsistent with Article 4's liability provision except for the unless required by applicable law phrase (R p 642) Affirming the lower courts means if a bank refuses a withdrawal, wrongly or in error, the determination of liability and the measure of damages will be greater and depending on the circumstances, include consequential damages Banks make mistakes Banks claim increased liability means higher fees for customers For better or worse affirming the lower courts and Wachovia's position will have unintended and far reaching consequences When customers sue on withdrawals, banks will want to assert that the UCC does not apply It is a matter of first impression in South Carolina

If the UCC applies, the UCC concept of reasonable time does not aid Wachovia S C Code Ann § 36-4-303 Official Comment 6, S C Code Ann § 36-1 204 Wachovia handled the court order five times in at least 4 1/2 working hours (18 actual hours including the overnight) (R pp 457 58) Wachovia handled the order 3 times from 6 24 a m to 9 54 a m , a 3-1/2 hour time period, on April 23 alone The last logged action is at 9 54 a m This is more than a reasonable time Also a duty of good faith is central to all provisions of the UCC S C Code Ann § 36-1-203 Wachovia s conduct as described herein is inconsistent with that duty, so the UCC is to be construed against Wachovia

8 ALL ISSUES WERE PRESERVED

Davison requested on the record recovery of the judgment amount pro se attorney fees and recovery for the benefit of other victims of Scaffe (R p 441 line 9–p 442 line 12) The trial court directed Davison and Wachovia to submit a proposed order for consideration (R p 447 line 15-p 449 line 21) Davison fully complied (R pp 656 82)

Most notably, the trial court stated on the record that it would consider the proposed order in making its final ruling (R p 448, lines 19-21)

"[If] the losing party has raised an issue in the lower court, but the court fails to rule upon it the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review I'On v Town of Mount Pleasant 338 S C 406 422, 526 S E 2d 716, 724 (2000) Choosing Wachovia s proposed order over Davison s order, especially under this record making clear it would be considered, can only be construed as an explicit ruling on Davison s proposed order because as stated above, the trial court directed Davison to prepare a proposed order and stated it would consider Davison's proposed order as part of entering either order as final Even if it is not viewed as an explicit ruling it must at least be an implicit ruling Implicit rulings preserve issues for appeal Smith v Squires Timber Co , 311 S C 321 324, 438 S E 2d 878, 879 (1993) Everything related to Davison s proposed order is preserved for appeal

PART III (WITHELD EVIDENCE)

9 THE MOTION TO COMPEL WAS PRESERVED AND THE ENDS OF JUSTICE REQUIRE CONSIDERATION BECAUSE THE FACE OF THE EVIDENCE SHOWS WACHOVIA WITHHELD EVIDENCE

The trial court rejected the motion to compel in writing (R pp 701-04) This was an explicit ruling The order of events is (1) On or about April 9 2009 after permitting Wachovia to intervene and re-schedule the hearing Master Watson entered an order that he would not sign orders requested by Davison (2) This order was not communicated to the parties, (3) Davison moved to compel discovery before the hearing (R pp 696 98), and (4) Davison showed Wachovia revealed there were more documents (R pp 609-12) (previously given to the Master as part of the dispute over Wachovia's intervention) The reason for the motion to compel was that the documents were not provided as promised

(R p 696) Wachovia provided additional documents only after the filing No official log for the ' cash out credit teller' was ever provided

The evidence shows Wachovia withheld evidence Wachovia s defense rests on page four (4) of a daily transaction register' (R p 630 (upper right corner)) The other three (3) pages were withheld The ends of justice can be considered and should be expressly held to be part of South Carolina law on preservation

10 REFUSAL TO PROPERLY CONSIDER A MOTION TO COMPEL IS GROUNDS TO REVERSE

A refusal to consider an application to compel is grounds to reverse Lanham v Blue Cross 349 S C 356, 363 563 S E 2d 331, 334 (2002) As stated above, the evidence itself shows the withholding of evidence and Wachovia acknowledged additional evidence existed that had not been provided as of the time of filing The trial court refused to consider the motion to compel

PART IV (PRO SE ATTORNEY FEES AND OTHER CREDITORS)

11 THE SPECIAL CIRCUMSTANCES OF THIS CASE SHOULD GIVE EXCEPTION TO THE GENERAL RULE AGAINST PRO SE ATTORNEY FEES OR GROUNDS FOR RECONSIDERATION OF THE RULE

Davison had to force Wachovia to concede that it was mounting a false defense in misstating the date on the "cash out credit teller" (R p 394 line 8-p 395, line 17, see also R pp 356-395) Davison warned Wachovia not to do it (R p 146 lines 4-9, R p 194, line 4 p 196, line 23) The witness cried uncontrollably once revealed on cross-examination Also, Wachovia has advanced a meritless position that the $51,850 check is a cashier's check' Wachovia s conduct should be grounds for a special exception to the rule or for reconsidering the rule against pro se attorney fees

Attorney fees are available for contempt Cheap O s Truck Stop v Cloyd, 350 S C 596 609 567 S E 2d 514 520 (Ct App 2002) However pro se attorney's fees are not available in South Carolina Hopkins v Hopkins, 343 S C 301 306, 540 S E 2d 454 457 (2000) (citing Calhoun v Calhoun 339 S C 96, 100 529 S E 2d 14, 16 (2000) (party is not liable for fees charged by an attorney, and unfairness to pro se laymen))

Scaffe's contempt and fraud also constitutes grounds for exception Fees solely on the basis of Scaffe are limited to the $58 850 withdrawal amount as to Wachovia

12 WACHOVIA SHOULD BE LIABLE FOR THE FULL $58 850 WITHDRAWAL TO OTHER CREDITORS AFTER SATISFACTION OF DAVISON

A property freeze order attaches to all property of the debtor, not just the judgment amount Deer Island Lumber Co v Virginia-Carolina Chemical Co v Wilkins, 111 S C 299, 97 S E 833, 834 (1919) The full $58,850 was frozen and but for Wachovia's contempt some of it could have helped other victims After satisfaction of Davison's claims, Wachovia must pay over to the trial court or a receiver what remains

PART V (OTHER MATTER FOR THE RECORD OR JUDICIAL NOTICE)

13 ALL MATTER PRESENTED TO THE TRIAL COURT SHOULD BE INCLUDED IN THE RECORD OR OTHERWISE CONSIDERED

Rehearing was requested under Rule 240(j) SCACR and S C Code Ann § 14-8-220, but not given The first question is whether two scholarly articles and a newspaper article were presented to the trial court Rule 210(c), SCACR The trial court directed Davison to prepare a proposed order (R p 448, line 14 –p 449 line 1) Davison complied (R pp 656-680) The trial court stated it would consider both proposed orders in making its final ruling (R p 448 lines 19 21) The scholarly articles were submitted

with the proposed order The newspaper article was submitted immediately thereafter and before notice of the final order (Apx pp 61-132)

Failing that, principles of judicial notice and of persuasive authority must decide including them The two scholarly articles, one including a court opinion, are persuasive authority Persuasive authority is considered <u>See generally</u>, <u>Vaughn v Bernhardt</u> 345 S C 196 547 S E 2d 869 (2001) The other item is a newspaper article All fall under judicial notice Rule 201, SCRE See Argument 15 below for more on judicial notice

14 MATTER SHOWING WACHOVIA TRICKED THE LOWER COURTS SHOULD BE CONSIDERED

The <u>Montgomery Memo</u> shows Wachovia tricked the lower courts (Apx pp 104-120), M Dean Montgomery, <u>Memo to Real Property Executive Section</u> Connecticut Bar Association, September 7 2006 The $51 850 check is either a tellers check or an ordinary check It frustrates the ends of justice for Wachovia to exclude matter showing Wachovia has been winning with a meritless certified check argument

15 CONDUCT SIMILAR TO THE CONDUCT SPECIFICALLY RAISED IN THIS CASE, WIDELY PUBLICIZED AND AVAILABLE FROM RELIABLE SOURCES IS SUBJECT TO JUDICIAL NOTICE

The lower court refused to take judicial notice of materials showing similar conduct to that shown at trial (Apx pp 7 8, Apx pp 133 213) Rehearing was requested under Rule 240(j), SCACR and S C Code Ann § 14 8 220, but not given The lower court said Davison was "essentially asking to supplement the record with documents not presented to the Master-in-Equity" contrary to Rule 210(c), SCACR but the documents did not exist at trial This means that Rule 210 SCACR overrides judicial notice at the appellate level That must be wrong The deferred prosecution agreement and related documents, and the news articles are all widely publicized Rule 201(b)(1) SCRE The

agreements are also available accurately from the federal government Rule 201(b)(2) SCRE Judicial notice may be taken at any stage of the proceeding, including on appeal Rule 201(f), SCRE see generally, Law Firm of Erickson, P A v Boykin, 375 S C 204, 213, 651 S E 2d 606, 611 (Ct App 2007) rev d, Law Firm of Erickson P A v Boykin 383 S C 497, 681 S E 2d 575 (2009)

Judicial notice may be taken at any stage of the proceeding Rule 201(f), SCRE In addition to seeking review Davison requests judicial notice now of all the materials stricken from the record and of the matter from his motion for judicial notice

CONCLUSION

What the two lower courts have done is uncharacteristic of the South Carolina judiciary and its jurisprudence The South Carolina legislature stated Specialty Flooring is the law of South Carolina, and it has been effectively overruled The confusion below as to drawee and drawer under the UCC is a novel interpretation of law and has dramatic consequences Applying UCC Article 4 to an over the counter withdrawal slip is a matter of first impression with far reaching consequences The standard of review is a substantial constitutional question Judicial notice at the appellate level has been restricted or eliminated The burden of proof was assigned contrary to Supreme Court precedent The ends of justice should be part of preservation for appeal For these reasons and all the other reasons stated herein, petitioner asks the Supreme Court to grant the petition for a writ of certiorari

Respectfully submitted,

November 17, 2011

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E Watson, Master-in-Equity

Opinion No 2011-UP-328
(S C Ct App filed June 27, 2011, re-filed September 20, 2011)

Jacob Davison, Petitioner,

v

David Michael Scaffe, Defendant,

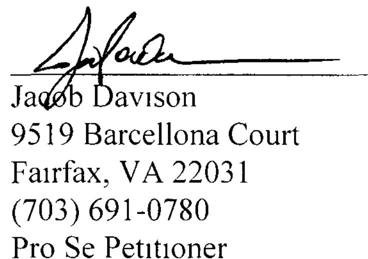
Wachovia Bank, N A , Respondent

On Petition For A Writ of Certiorari to
The South Carolina Court of Appeals

PROOF OF SERVICE

I certify that I have served the Petition for Certiorari on Wachovia Bank by depositing a copy of it in the United States Mail, postage prepaid, on November 17, 2011, addressed to its attorney of record, Robert E Sumner IV, Moore & VanAllen, 40 Calhoun Street, Suite 300 Charleston, SC 29401-3531

November 17, 2011



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