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## CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 21, 2014.

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding the argument that RBC acted as more than a mere lender was not preserved in the record below?
2. Did the Court of Appeals err in holding RBC's admitted mistakes in disbursing loan proceeds did not preclude summary judgment on the claim for breach of covenant of good faith and fair dealing?
3. Did the Court of Appeals err by failing to acknowledge that evidence of loan disbursals well in excess of the percentage of completion of the home should have precluded summary judgment?
4. Did the Court of Appeals err by failing to recognize that the fact of the RBC disbursal decisions lead to the Carews' damages?

## STATEMENT OF THE CASE

Drs. Joseph and Karen Carew commenced this action by filing their original Complaint on January 29, 2010. (App. pp. 25-44) The suit arises from the construction of the Carews' home at 34 Edens Point Road, Irmo, South Carolina. Id. As to Respondent, RBC, the Carews allege negligence and breach of the Construction Lending Agreement. Id.

On January 6, 2012, RBC Bank moved for summary judgment. Oral argument on RBC's Motion was heard by the Honorable R. Knox McMahon on April 9, 2012. An Order granting summary judgment was signed by the Honorable R. Knox McMahon on May 15, 2012. (App. pp. 13-24) Appellants received written notice of entry of Judge McMahon's Order on May 23, 2012 and filed and served their appeal on June 21, 2012. The Court of Appeals heard oral argument and then filed Unpublished Opinion No. 2014-UP-069 on February 19, 2014. (App. pp. 594-597) Appellant timely filed a Petition for Rehearing on March 5, 2014 (App. pp. 598-602) and the Court of Appeals denied the Petition on March 21, 2014. (App. P. 604)

## ARGUMENT

**I. The Court of Appeals erred when it failed to recognize that there was evidence in the record that RBC Bank was aware of defects yet continued to disburse loan proceeds and acted as more than a mere lender.**

The primary issue in this case is damage suffered by the Carews as a result of the RBC's loan disbursement decision-making. In the record below, the Carews provided evidence that RBC Bank acted as more than a mere lender. RBC disbursed loan proceeds when it had evidence of defective construction and out of sequence construction. The evidence in the form of the inspection records (App. pp. 538-539) established that RBC Bank had knowledge that the roof of the home under construction was not yet complete; yet, at the same time, the builder was finishing interior components and seeking disbursements from RBC. Despite the evidence of defects, RBC continued to disburse construction loan proceeds. By arguing that RBC made decisions to disburse funds for the benefit of the builder at Christmas time (App. pp. 136-137, 318-320 and 334-335) despite the level of completion of the home, the Carews established evidence that RBC conducted itself as more than a mere lender, which should have precluded summary judgment. If a lender is aware of defects it may be liable under *Kennedy v. Columbia Lumber and Manufacturing Company*, 384 S.E. 2d 730, at 734 (1989), *Lane v. Trenholm Building Company*, 229 S.E. 2d 728 (1976), and *Kirkman v. Parex, Inc.*, 632 S.E. 2d 854 (2006). The argument that RBC Bank acted as more than a mere lender is preserved in the underlying record.

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

RBC Bank admitted to making mistakes in disbursing loan proceeds. (App. pp. 226-227, 275-276)

and 278-279). The evidence of RBC Bank's mistakes, and its admission that it made mistakes, should have been viewed in a light most favorable to the Carews. At a minimum, the evidence demonstrates a breach of RBC Bank's implied covenant of good faith and fair dealing under the construction loan agreement. At the maximum, the court overlooked that even if it is presumed that RBC had no duty, once RBC undertook to act and make discretionary decisions, then such acts must be reasonable.

*Madison v. Babcock Ctr., Inc.*, 638 S.E. 2d 650, at 657 and *Restatement (Second) of Torts* §§324 -325 (1965). The evidence of mistaken disbursements and RBC's admission of mistakes was overlooked by the court in considering the reasonableness of RBC Bank's disbursal decisions.

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

The record demonstrates that RBC disbursed loan proceeds in excess of the percentage of completion of the home (App. pp. 296 and 538-539). RBC Bank explained that monitoring the percentage of completion was a piece of the disbursal decision (App. pp. 227- 233). When RBC chose to act, the court should have considered the reasonableness of those actions. Even where one has no duty to act, if they choose to act, they must do so with due care, *Russell v. City of Columbia*, 406 S.E. 2d 338 (1991). Evidence of the improper disbursements should have been viewed most favorably for the Carews and precluded summary judgment on the negligence claim when the court considered the reasonableness of RBC Bank's actions.

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

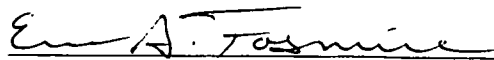
The evidence in the record establishes that the Carews incurred \$583,681.93 in additional expenses

once the builder received funds from RBC Bank and then abandoned the job (App. p. 540). In the Court of Appeal's decision, it states that the Carews "...presented no evidence to prove they suffered any injury from this conduct." (App. p. 595) While it is true that RBC Bank restored the improperly disbursed funds, the opinion overlooks that it was the fact of RBC's failure to properly disburse that allowed the builder to take the funds and leave the project. The resulting damages from the RBC decision-making process were ignored by the Court of Appeals decision.

### CONCLUSION

For the reasons stated, Petitioners ask the court to grant the Petition for a Writ of Certiorari. If the court does grant a Writ of Certiorari, then this case stands for the position that a construction lender, with knowledge of defects of the home under construction, can negligently disburse all the funds available under the loan agreement, without the defective building being completed, and then hold the borrower liable for the entire loan amount without any borrower recourse. The result is unjust in light of admittedly deficient conduct by RBC.

Respectfully submitted,



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ATTORNEYS FOR PETITIONERS

April 21, 2014

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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Unpublished Opinion No. 2014-UP-069 (S.C. Ct. App. filed Feb. 19, 2014)

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

v.

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

Of Whom, RBC is the Respondent.

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PROOF OF SERVICE

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I certify that I have served the Petition for Writ of Certiorari upon the Respondent by delivering a copy to its attorney Thomas Wm. McGee, III, at his office at Nelson Mullins Riley & Scarborough, 1320 Main Street, 17<sup>th</sup> Floor, Columbia, South Carolina 29201, on April 21<sup>st</sup>, 2014.



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April 21<sup>st</sup>, 2014

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