2012-213005

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

Op. No. 2012-UP-404 (Ct. App. filed July 11, 2012)
Appellate Case No. 2010-172106

McDonnell and Associates, PA,
f/k/a McDonnell Law Firm, PA,
f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc.,.....Petitioners,

v.

First Citizens Bank and Trust Company, Inc.,.....Respondent.

APPENDIX

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INDEX

McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc., v. First Citizens Bank and Trust Company, Inc., Op. No. 2012-UP-404
(Ct. App. filed July 11, 2012)..... 1

Order Denying Petition for Rehearing..... 3

Petition for Rehearing 5

Respondent's Return to Petition for Rehearing..... 18

Appellant's Reply to Respondent's Return to Petition for Rehearing..... 32

INDEX

McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc., v. First Citizens Bank and Trust Company, Inc., Op. No. 2012-UP-404
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Order Denying Petition for Rehearing..... 3

Petition for Rehearing 5

Respondent's Return to Petition for Rehearing..... 18

Appellant's Reply to Respondent's Return to Petition for Rehearing..... 32

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc., Appellants,

v.

First Citizens Bank and Trust Company, Inc., Respondent.

Appellate Case No. 2010-172106

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

Unpublished Opinion No. 2012-UP-404
Heard May 9, 2012 – Filed July 11, 2012

AFFIRMED

L. Henry McKellar and Amy L. Neuschafer, of Collins & Lacy, PC, of Columbia, for Appellants.

Wesley F. Few and Jake S. Barker, of Ellis Lawhorne & Sims, PA, of Columbia, for Respondent.

PER CURIAM: McDonnell and Associates, PA, and Boomerang Title, Inc., (collectively, "McDonnell") appeal from the circuit court's order granting summary judgment in favor of First Citizens Bank and Trust Company, Inc. ("First Citizens") for McDonnell's failure to produce evidence demonstrating First Citizens' lack of ordinary care. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 36-4-406(3) (2003)[1] ("The preclusion under subsection (2) does not apply if the *customer establishes lack of ordinary care* on the part of the bank in paying the item(s).") (emphasis added); *Read v. S.C. Nat'l Bank*, 286 S.C. 534, 540, 335 S.E.2d 359, 362 (1985) ("The burden of proving the bank's failure to exercise ordinary care under § 36-4-406(3) in paying the items rests squarely on the customer."); § 36-4-406 official cmt. 4 (2003) ("[E]ven if the bank succeeds in establishing that the customer has failed to exercise ordinary care, *if in turn the customer succeeds in establishing the bank failed to exercise ordinary care* in paying the item(s), the preclusion rule does not apply.") (emphasis added).

AFFIRMED.

WILLIAMS, THOMAS, and LOCKEMY, JJ., concur.

[1] The negotiated checks occurred before the effective date of the 2008 amendment to section 36-4-406. Accordingly, the pre-2008 version of section 36-4-406 is applicable and cited herein.

The South Carolina Court of Appeals

McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Bomerang Title, Inc., Appellants,

v.

First Citizens Bank and Trust Company, Inc., Respondents.

Appellate Case No. 2010-172106

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
John Thomas Lay
Wesley D. Few
L. Henry McKellar

Amy Lynn Neuschafer

FILED
23 Aug 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Case No. 09-CP-40-8786R
Appellate Case No. 2010-172106

McDonnell and Associates, PA,
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f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc.,.....Appellants,

v.

First Citizens Bank and Trust Company, Inc.,.....Respondent.

PETITION FOR REHEARING

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, Appellants McDonnell and Associates, PA and Boomerang Title, Inc. (collectively "McDonnell") seek an order granting rehearing in the instant case.

McDonnell respectfully avers this Honorable Court overlooked or misapprehended several points that would support reversal of the Circuit Court's grant of summary judgment in favor of Respondent First Citizens Bank and Trust Company, Inc. ("First Citizens").

FACTUAL/PROCEDURAL BACKGROUND

McDonnell's employee forged and negotiated ninety-four (94) checks totaling approximately $767,880.53 from McDonnell's various First Citizens accounts. McDonnell

commenced suit against First Citizens for breach of contract as a result of First Citizens' payment of these checks. (R. p. 2; pp. 33-39). It is undisputed that First Citizens honored each and every one of these forged checks.

On May 27, 2009, First Citizens filed a Motion for Summary Judgment. (R. pp. 48-49). The following week, the parties stipulated that the case be removed from the trial docket pursuant to Rule 40(j), SCRCP. (R. pp. 26-27). This stipulation explicitly provides that "when the case is restored, it shall be restored to the General Docket, where it will proceed as a newly filed action." (Id.).

The case was restored by way of a consent order filed December 16, 2009. (R. pp. 28-30). When restored, the case was assigned a new 2009 civil action number. Thereafter, on March 10, 2010, a hearing was held on First Citizens' motion for summary judgment. (R. pp. 335-70). In its motion, First Citizens enumerated the following specific grounds in support of summary judgment:

> [B]ecause Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406 [subsection 4], because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens, precludes them from asserting any claims against First Citizens under South Carolina law [subsection 1], and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code §36-4-406(d)(2) [subsection 2].[1]

(R. pp. 48-49) (footnote added). In other words, the motion for summary judgment contained no mention of § 36-4-406(3), but was based solely on the preclusion provided for in § 36-4-406(1) and (2), as well at the one-year time bar contained in (4). (Id.).

[1] First Citizens' motion appears to incorrectly cite to the post-2008 amended version of § 36-4-406. The pre-2008 version does not contain a subsection delineated as § 36-4-406(d)(2).

In opposition to the motion, McDonnell contended summary judgment was improper because First Citizens had not moved for summary judgment on the dispositive issue under § 36-4-406(3)—whether a genuine issue of material fact exists regarding First Citizens' exercise of due care in paying the checks. (R. pp. 267-68).

The Circuit Court granted First Citizens' motion for summary judgment, ruling McDonnell's failure to exercise ordinary care under §§ 36-4-406(1) and (2) absolutely barred any claims against First Citizens. (R. pp. 1-14). McDonnell filed a Rule 59(e) motion to alter or amend the order, contending the Circuit Court overlooked the importance of subsection (3). (R. pp. 311-13, pp. 316-19). Because First Citizens had not moved for summary judgment on McDonnell's failure to demonstrate First Citizens did not exercise due care in paying the checks under subsection (3), McDonnell argued the burden was not on him to present evidence in opposition to subsection (3) at the summary judgment hearing and summary judgment was not proper. (R. pp. 314-15).

The Circuit Court granted this motion in part and denied this motion in part. Of import to this appeal, the Circuit Court agreed McDonnell's failure to exercise reasonable care was not dispositive and § 36-4-406(3) can trump the preclusive effect of subsection (2). (R. p. 17). However, the Circuit Court upheld its grant of summary judgment because McDonnell had not presented any evidence that First Citizens failed to act with ordinary care under subsection (3). (R. pp. 18-19). The Circuit Court reasoned it was not error to rule on this issue because First Citizens had moved for summary judgment on "all claims." (R. p. 19).

Appellants appealed the decision of the Circuit Court. In its opinion, this Court held summary judgment was proper because McDonnell had not presented evidence demonstrating First Citizens' lack of ordinary care in paying the checks. McDonnell and Associates, PA v.

First Citizens Bank and Trust Company, Inc., Op. No. 2012-UP-404 (Ct. App. filed July 11, 2012). The Court did not address the central issue presented by this appeal—whether First Citizens sufficiently raised McDonnell's alleged failure to present evidence of First Citizens' lack of ordinary care as a ground for its summary judgment motion.

LAW/ANALYSIS

I. The Court Erred in Affirming the Grant of Summary Judgment Because First Citizens Did Not Include Appellants' Failure to Adduce Evidence of First Citizens Lack of Ordinary Care as a Ground Upon Which It Sought Summary Judgment.

Although the merits of this case ultimately are governed by § 36-4-406, the issue on appeal is governed by the South Carolina Rules of Civil Procedure. By way of background, Section 36-4-406(1) places the responsibility on the bank customer to examine his statements and checks to determine if there are any forgeries and report these forgeries to the bank. Section 36-4-406(2) provides that if the customer fails to notify the bank of the forged signature within fourteen (14) days from when the statement is made available and the same wrongdoer continues to forge checks, the customer is precluded from asserting against an unauthorized signature by the same wrongdoer on any subsequent forgeries. These two sections set out the duties of the customer and resultant consequences if the same wrongdoer continues to forge checks.

But the preclusive effect of subsection (2) is not absolute. Section 36-4-406(3) provides that the preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item. § 36-4-406(3).

The Circuit Court and now this Court held First Citizens was entitled to summary judgment because McDonnell did not present evidence demonstrating First Citizens' lack of ordinary care. However, the central issue presented by this appeal is whether First Citizens actually asserted this issue as a ground for its motion as required by the South Carolina Rules of

Civil Procedure, thereby requiring McDonnell to come forward with such evidence. A review of First Citizens' summary judgment motion patently demonstrates this is not the case. Specifically, First Citizens enumerated the following three (3) grounds in its motion for summary judgment: (1) McDonnell's failure to report the forgeries within one year under § 36-4-406(4); (2) McDonnell's failure to exercise ordinary care under § 36-4-406(1); and (3) the same wrongdoer provision of § 36-4-406(2).[2] First Citizens' motion, the document that serves to place McDonnell on notice of the grounds upon which First Citizens seeks summary judgment so that McDonnell can prepare a response, is devoid of any reference to lack of proof of First Citizens' failure to use ordinary care.

It is axiomatic that the Circuit Court must not grant summary judgment on an issue not raised, addressed, or even so much as mentioned in the motion filed by the moving party. It has long been the black letter law in South Carolina that an issue that was not raised in a notice and motion for summary judgment is not before and cannot be ruled on by the trial court. Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 351, 384 S.E.2d 738, 740 (1989) ("The trial judge could not have understood the basis of People's Life's motions to be that the conversion was unconnected to 'trade or commerce' because the motions neither raised nor encompassed such an argument."); Morgan v. Blackwell, 286 S.C. 457, 334 S.E.2d 817 (1985); Glass v. Glass,

[2] First Citizens' motion stated its grounds for summary judgment as follows:

> [B]ecause Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406 [subsection 4], because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens, precludes them from asserting any claims against First Citizens under South Carolina law [subsection 1], and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code § 36-4-406(d)(2) [subsection 2].

(R. pp. 48-49).

276 S.C. 625, 281 S.E.2d 221 (1981) (trial judge erred in determining issue of applicability of statute of frauds as an affirmative defense to contract since that issue was not raised in motion to dismiss); cf. Resolution Trust Corp. v. Eagle Lake & Golf Condos., 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993) (disapproving of the practice of orally raising unpled issues for the first time at a summary judgment motion).

One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds supporting the motion. See Rule 7(b)(1), SCRCP (stating "[a]n application to the court for an order shall be by motion which . . . shall **state with particularity the grounds** therefor") (emphasis added). Generally, the trial court may not grant relief beyond the limits or scope of such notice. Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 260 S.E.2d 708 (1979); Skinner v. Skinner, 257 S.C. 544, 186 S.E.2d 523 (1972). To do so in this case clearly violates the Rules of Civil Procedure and prejudices McDonnell by effectively requiring him to anticipate and refute any and all reasons First Citizens might believe it is entitled to summary judgment. First Citizens is not entitled to summary judgment on an issue it did not state as a ground for its motion. Accordingly, even assuming, arguendo, that First Citizens has demonstrated it is entitled to the benefit of the preclusive effect of §§ 36-4-406(1) and (2), First Citizens' failure to move for summary judgment based on the absence of evidence demonstrating it failed to exercise of ordinary care—the controlling issue in this case—precludes summary judgment in its favor.[3] Therefore, the order granting First Citizens' motion for summary judgment must be reversed, as McDonnell is entitled to present proof at trial that First Citizens did not exercise ordinary care in paying the forged checks.

[3] McDonnell pointed out in their memorandum in opposition to First Citizens' motion for summary judgment that First Citizens did not move for summary judgment on its own exercise of reasonable care, as did counsel at the hearing. (R. pp. 267-68; R. p. 353, lines 4-12).

The Circuit Court also apparently misconstrued McDonnell as contending summary judgment on this issue was improper because First Citizens did not move for summary judgment on all "claims." (R. p. 19). Whether First Citizens moved for summary judgment on all **claims** is irrelevant. The pivotal issue is whether First Citizens included McDonnell's failure to adduce evidence regarding First Citizens' lack of ordinary care in paying the forged items as a **ground** on which it was entitled to summary judgment on all claims.

A "claim" is "the aggregate of operative facts giving rise to a right enforceable by a court." Black's Law Dictionary 710 (7th ed. 1999). A request that summary judgment be entered on all claims is simply a request for relief based on the premise that an enforceable right exists. Black's Law Dictionary 710 (7th ed. 1999) (defining "claim" as "the aggregate of operative facts giving rise to a right enforceable by a court").

In this case, McDonnell alleged three (3) claims for breach of contract stemming from First Citizens' payment of items that were not properly payable under the UCC, one claim for each of McDonnell's First Citizens' accounts from which the unauthorized checks were drawn. (R. pp. 36-39). First Citizens' failure to exercise ordinary care in paying the items pursuant to § 36-4-406(3) is not a "claim."

Moreover, moving for summary judgment on each "claim" is not akin to stating the ground on which the party believes it is entitled to summary judgment. There exist numerous reasons why a party may seek summary judgment on a breach of contract claim brought pursuant to the UCC. Simply stating summary judgment is sought on all "claims" does not obviate the need to include a brief description, i.e. the grounds or legal basis, **why** the party is entitled to the relief sought. See Rule 7(b)(1), SCRCP; Black's Law Dictionary 710 (7th ed. 1999) (defining "ground" as "[t]he reason or point that something (as a legal claim or argument) relies on for

validity"). The moving party must also state the specific grounds or reasons why it is entitled to such relief so that the non-moving party is on notice of the basis for the motion and has the opportunity to prepare a response directed to these grounds. It appears this necessity was not entirely lost on First Citizens at the time it filed its motion for summary judgment. As discussed and quoted previously, First Citizens' motion enumerated three very specific reasons it believed it was entitled to summary judgment. In fact, First Citizens introduces the bases for its summary judgment motion by stating it moves "for an Order pursuant to Rule 56, SCRCP granting First Citizens summary judgment on the Plaintiffs' claims **on the grounds** . . ." and then continues on to briefly describe these grounds, which are derived from §§ 36-4-406(1), (2), and (4). (R. p. 48). (emphasis added). No where in its motion does First Citizens mention § 36-4-406(3) or state Appellants' failure to adduce evidence demonstrating First Citizens lack of ordinary care is a ground for its motion.

In addition, it is well-established law that a party may move for summary judgment on an issue on which it will not bear the burden of proof at trial. In such a case, the moving party may carry its initial burden by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case. Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). Only if the moving party carries this initial burden must the non-moving party come forward with facts demonstrating the existence of a genuine issue of material fact for trial. Id.; see also Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004) (explaining that because the defendants moved for summary judgment on the absence of evidence to support the plaintiff's case, the "burden then shifted" to the plaintiffs to prove a genuine issue of material fact existed).

The instant motion for summary judgment was based solely on the preclusion provided for in § 36-4-406(1) and (2), as well at the one-year time bar contained in (4). (R. pp. 48-49). Accordingly, because First Citizens did not set forth the absence of evidence demonstrating it failed to exercise ordinary care as a ground for its motion, First Citizens' motion did not shift the burden to McDonnell to establish a genuine issue of material fact exists with regard to this issue. See Hedgepath, 348 S.C. at 354, 559 S.E.2d at 335 (stating moving party may discharge its initial responsibility under summary judgment standard by pointing out an absence of evidence on which the non-moving party bears burden of proof; only when this initial burden is met must the opposing party come forward with evidence demonstrating an issue of fact).

First Citizens' reasoning and that adopted by the Circuit Court concerning whether moving for summary judgment on "all claims" suffices as notice of a party's grounds for summary judgment totally eviscerates and renders worthless Rules 56 and 71, SCRCP. If this logic is taken to its natural conclusion, all that is required when moving for summary judgment is a single sentence stating "no genuine issue of material fact exists as to all the plaintiff's claims." Such an interpretation places the non-moving party in the impossible position of anticipating every possible reason why the moving party might believe (whether reasonably or unreasonably) that it is entitled to summary judgment on the non-moving party's claims. This is simply not permitted or contemplated by our rules of court.

In short, the Circuit Court erroneously granted, and this Court erroneously affirmed, summary judgment in favor of First Citizens on a ground not included in its motion. Had First Citizens simply stated in its motion that it was entitled to summary judgment because of an absence evidence demonstrating its lack of ordinary care, McDonnell would have presented a scintilla or more of evidence to defeat the motion. Simply put, McDonnell did not present such

evidence because it was not and should not have been required to do so in response to First Citizens' motion. Therefore, the Circuit Court's ruling granting summary judgment in favor of First Citizens is in error and must be reversed.

II. The Court Erred in Affirming the Grant of Summary Judgment Because Summary Judgment Was Premature in Light of the Fact the Case Had Recently Been Restored to the General Docket.

The Court's opinion also overlooks the significance of the fact that this case had only been restored to the general docket three (3) months prior to the summary judgment hearing.

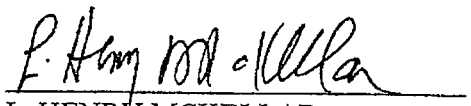
The filed stipulation striking the case from the trial roster specifically provided that the case would proceed as a "newly filed" action upon its restoration. (R. pp. 26-17). When the case was restored, it was given a 2009 civil action number. At the time the Circuit Court heard argument on First Citizens' motion for summary judgment, this case has been restored to the general docket for less than three (3) months. Because the parties agreed the case would be treated as a newly filed action after it was restored, it was error for the Circuit Court to grant summary judgment on the absence of evidence demonstrating First Citizens did not exercise ordinary care in paying the items. Rather, at this early stage in the restored action, Appellants should have been afforded the opportunity to further develop their case. Cf. Baughman, 306 S.C. at 112, 410 S.E.2d at 543 (summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery"); Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.P.A., 320 S.C. 470, 465 S.E.2d 765, 771 (Ct. App. 1995) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court issue an order granting rehearing of this case and reversing the grant of summary judgment in favor of First Citizens.

Respectfully submitted,

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PETITION FOR REHEARING

Columbia, South Carolina
July 26, 2012

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In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

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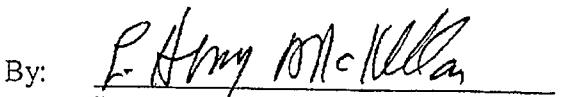
PROOF OF SERVICE

I hereby certify that I served the Petition for Rehearing, by placing a copy in the United States mail, postage prepaid, to counsel of record, John T. Lay, Esquire, Wesley D. Few, Esquire and Jake S. Barker, Esquire, Ellis Lawhorne & Sims, PA, P.O. Box 2285, Columbia, SC 29202, on July 26, 2012.

[Signature Page to Follow]

Respectfully submitted,

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PROOF OF SERVICE – PETITION FOR REHEARING

Columbia, South Carolina

July 26, 2012

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v.

First Citizens Bank and Trust Company, Inc., ... Respondent.

RETURN TO PETITION FOR REHEARING

The Respondent, First Citizens Bank and Trust Company, Inc. ("First Citizens" or "Respondent"), submits its Return in opposition to the Appellants' McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC and Boomerang Title, Inc.'s (the "Appellants") Petition for Rehearing, in which an Opinion was filed by this Court on July 11, 2012. Appellants seek a rehearing of the matters within this Court's Opinion affirming the Circuit Court's grant of summary judgment to First Citizens on all of Appellants' claims under S.C. Code § 36-4-406.

FACTUAL / PROCEDURAL BACKGROUND

This case concerns payment of ninety-four (94) forged checks drawn on Appellants' accounts with Respondent First Citizens. There is no dispute that these checks were all

forged by the Appellants' former employee and office manager, Anna Hoorman, during her tenure with Appellants (R. p. 216, p. 233, p. 238). Appellants maintained three (3) checking accounts with First Citizens:

(i) **Operating Account**, 83045789101, in the name of Edward G. McDonnell, PC ("Operating Account") opened on June 24, 2003;

(ii) **Boomerang / Title Insurance Account**, 83045792501, in the name of Boomerang Title, Inc. ("Boomerang / Title Insurance Account") opened on June 24, 2003; and

(iii) **IOLTA Account**, 891001421901 in the name of Edward G. McDonnell, PC, IOLTA ("IOLTA Account") opened on July 17, 2003 (collectively "Accounts").

Appellants alleged they are entitled to recover against First Citizens for these 94 forged checks written from between October 1, 2004 and December 23, 2005 (R. p. 120, p. 142, p. 144, p.188). The embezzlement of Anna Hoorman was first discovered, not by Appellants, but instead by First Citizens when the bank reported to Edward McDonnell on December 23, 2005 that he had an insufficient fund ("NSF") charge against his IOLTA account (R. p. 71, pp. 281-282). Other discovery showed that Mr. McDonnell was put on notice of at least one earlier NSF charge as against his IOLTA account in early 2004 when a title insurance premium check was returned and his title insurer investigated and followed up with Mr. McDonnell in writing to advise him on the need to and how to reconcile his accounts, including his IOLTA (R. p. 261). It is undisputed that Appellants did not review their periodic bank statements regarding their accounts, and did not report any of the alleged forgeries until after December 23, 2005 (R. p. 83).

Appellants wrote to Respondent in early 2006 purporting to make a claim for some of the 94 checks now put at issue in this lawsuit (R. p. 309). Over a year and a half later, Appellants filed suit on August 15, 2007 against First Citizens in case assigned Civil Action

No. 2007-CP-40-5252 (R. pp. 31-39).[1] The suit was fully discovered with considerable written discovery and depositions taken by both sides. The parties participated in a status conference before Judge James R. Barber, III, in early 2009, wherein it was discussed that the case would come up for trial in May of 2009. The case was continued one month to the term of court beginning June 8, 2009. On May 27, 2009 First Citizens filed its Motion for Summary Judgment, which is the subject of this appeal.

Notwithstanding Defendant's discovery requests served on December 19, 2007, requesting identification of Plaintiffs' experts, it was not until the week before trial, on June 2, 2009, Plaintiffs named Carl Manheim as their expert witness, presumably on the issue of "ordinary care" related to S.C. Code § 36-4-406(3). First Citizens moved to exclude this witness on grounds of prejudice for being named the week before trial, and for his lack of qualifications. Rather than taking Mr. Manheim's deposition, on Friday, June 5, 2009, the parties dismissed the case under Rule 40(j) (R. pp. 26-27).

The case was restored on December 16, 2009 as Civil Action No. 2009-CP-40-8786R (R. pp. 28-30). Respondent then noticed Mr. Carl Manheim's deposition. In response, Appellants withdrew the designation of Mr. Manheim as an expert sometime in late February of 2010, and never named another expert of any kind. After withdrawal of this expert, the circuit court heard First Citizens' Motion for Summary Judgment on March 10, 2010, and dismissed all claims, but granted Appellants' Motion to Amend its complaint to add a fourth claim for common law negligence. (R. pp. 1-14).[2] Appellants filed a Rule

[1] Appellants also filed a separate suit on October 12, 2007 and recovered a settlement with Carolina Legal Associates via 2007-CP-40-6854, under the theory that Carolina Legal Associates did not screen Anna Hoorman prior to placing her for temporary employment with the Appellants.

[2] Appellants' fourth claim for negligence was filed with their Second Amended Complaint on September 14, 2011, and was dismissed by the Circuit Court's April 14, 2011 Order granting First Citizens' Motion to

59(e) motion to alter or amend the circuit court's July 9, 2010 Order (R. pp. 310-334). On August 19, 2010, the circuit court issued another order affirming its grant of summary judgment to Respondent (R. pp. 15-25).

All of the originally filed claims in this action, specifically the three UCC claims, are now part of this appeal. A review of the Complaint and the circuit court's Order dismissing these initial causes of action shows that each is the same legal claim under S.C. Code § 36-4-406 for the three accounts at issue: (i) Operating Account, (ii) Boomerang/Title Insurance Account, and (iii) IOLTA.

Appellants appealed the August 19, 2010 decision of the circuit court, and oral arguments were held before this Court on May 9, 2012. In an unpublished opinion dated July 11, 2012, the Court upheld the circuit court's ruling as to all claims and causes of action. McDonnell and Associates, PA v. First Citizens Bank and Trust Company, Inc., Op. No. 2012-UP-404 (Ct. App. Filed July 11, 2012).

LEGAL STANDARD AND ARGUMENT

A petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." S.C. APP. CT. R. 221(a); The petitioning party has the burden of proving that the former opinion was erroneous, or that a judge in a lower court erred. *See* Green v. E.B. Gresham Co., 168 S.C. 395, 167 S.E. 659, 663 (1933). In determining whether the court has "overlooked or misapprehended" a particular point of fact or law, the South Carolina Supreme Court has suggested that rehearing is only appropriate when the court issued a decision without keeping a material

---

Dismiss. Plaintiffs did not appeal that Order. All of Appellants claims have been dismissed by the Circuit Court.

principle "fully in mind." Green v. E.B. Gresham Co., 168 S.C. 395, 395, 167 S.E. 659, 663 (1933).

Appellants' petition contends that the Court has overlooked, mischaracterized, and/or failed to address various arguments as posited by the Appellants. However, the arguments, as set forth within the petition (which appear to be a reiteration of those exhaustively set forth within the Appellants' briefs), amount to an assertion that the Court has failed to adopt the rationale advocated by Appellants. Under Rule 221, South Carolina Appellate Court Rules, this is inadequate to warrant a rehearing on the matters presented to this Court.

This Court upheld the prior rulings of the circuit Court, and rightfully rejected the Appellants' misguided interpretation in its entirety. The arguments urged within the Appellants' Petition notwithstanding, this Court has given adequate consideration to the legal arguments urged by Appellants, and therefore granting the petition would be improper.

I. **Appellants' argument that Summary Judgment must be reversed because First Citizens did not include Appellants' Failure to Adduce Evidence of First Citizens' lack of ordinary care is without merit.**

The issue before this Court on appeal involved a question of interpretation of S.C. Code Ann. §36-6-406. Appellants did not comply with the requirements of § 36-4-406(1), specifically by not reviewing their statements. Appellants were also constrained by § 36-4-406(2) because the same employee forged all ninety-four (94) checks. Therefore Appellants are precluded from asserting any claims against First Citizens for payment of the checks at issue. The issue is then whether or not First Citizens, in its Motion for Summary Judgment, was somehow also required to show that Appellants failed to produce any evidence of a lack of ordinary care under § 36-4-406(3) that could enable

Appellants to avoid the preclusive effect of §36-4-406(1) and (2). Appellants assert that "the customer can still recover if the bank failed to exercise ordinary care in paying the items." (Appellants' Brief, p. 11). However, the plain language of § 36-4-406(3) states Appellants' failure to comply with § 36-4-406(1) and (2) is only obviated only if "the customer establishes lack of ordinary care on the part of the bank in paying the items." S.C. CODE ANN. § 36-4-406(3) (1976), amended by S.C. CODE ANN. §36-4-406 (2008) (emphasis added). The burden was on Appellants, not Respondents, for this issue.

In the briefs and oral arguments, the parties offered two divergent interpretations of how subpart (3) of that statute should be treated under the circumstances presented in this appeal. Appellants' argument is that First Citizens is, in *addition* to establishing Appellants' undisputed failure under 36-4-406(1) and (2), *also* required to provide *evidence of a lack of evidence* that the "customer establishe[d] lack of ordinary care on the part of the bank [First Citizens] in paying the items." S.C. CODE ANN. § 36-4-406 (1976) amended by S.C. CODE ANN. §36-4-406 (2008). Appellants failed to adduce *any* evidence of lack of ordinary care by First Citizens, as was noted by the Circuit Court in their August 19, 2011 order, which states "the South Carolina Supreme Court stated, '[t]he burden of proving the bank's failure to exercise ordinary care under § 36-4-406(3) in paying the items rests squarely on the customer.'" (R. p. 17) (quoting Read v. South Carolina Nat'l, 286 S.C. 534, 541, 335 S.E.2d 359, 362 (1985)).

Appellants also argue "that the Circuit Court must not grant summary judgment on an issue not raised, addressed, or even so much as mentioned in the motion filed by the moving party." (Petition, p. 5). While this statement on its face may be accurate, it is certainly not representative of the situation before this Court. Appellants in their own

Petition admit they were on notice of Respondent's reliance on § 36-4-406(1) and (2) since Respondent's Motion for Summary Judgment references same. (Petition, p. 5) (R. pp. 48-49). Appellants are at that point then required to present evidence under § 36-4-406(3) to overcome the preclusive effect of § 36-4-406(2).

Even if the statute were interpreted to somehow require Respondent to, *in addition* to establishing its rights to judgment under § 36-4-406 (1) and (2), *also point to a lack of evidence* of ordinary care under subpart (3), such a determination would not alter the Circuit Court's conclusion. As recited here and in the Record, Appellants have never offered any evidence that First Citizens ever exhibited any lack of ordinary care with its treatment of the accounts at issue. Assuming that § 36-4-406(3) would act to preclude First Citizens from prevailing under § 36-4-406(1) and (2), Appellants could have, and should have, brought forth any evidence that would fall under §36-4-406(3), as the burden was on them to establish that lack of ordinary care. (See S.C. CODE ANN. §36-4-406, Official Cmt. 4). Again, Appellants offered no evidence of lack of ordinary care.

Appellants argue the Court's ruling is improper because it "effectively require[es] him to anticipate and refute any and all reasons First Citizens might believe it is entitled to summary judgment." (Petition, p. 6). However, Appellants know now and have known all along that First Citizens is entitled to summary judgment under § 36-4-406(1) and (2). If there was any evidence available to combat this pursuant to § 36-4-406(3), then Appellants have had *five years* since this case was originally filed to develop same. The present posture of this matter, specifically the attempt to argue that the circuit court denied Appellants their opportunity to present evidence of lack of ordinary care begs the question: *why did Appellants not just submit such evidence or provide an affidavit as provided under S.C. R.*

Civ. P. 56(f), or ask the court for more time to do so? Instead, Appellants are before this Court arguing they were on notice of First Citizens' Motion for summary judgment on §§ 36-4-406(1), (2) and (4), but not § 36-4-406 (3).

Further, the case law relied upon by Appellants is misplaced. In fact, most of these cases were already cited by Appellants in their Brief, and necessarily rejected. (Appellants' Brief, pp. 10-18). Respondents would refer the Court to its Final Brief for a full discussion of those cases. For example, Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 351, 384 S.E.2d 738, 740 (1989) (Petition, p. 5) is distinguished from the present case and any reliance thereon is futile. Specifically Connolly, involved the denial of a directed verdict on a claim for Unfair Trade Practices, which the Court of Appeals reversed for grounds not raised in the directed verdict motion. Id. at 351. In this case, Appellants are asking for a reversal of a summary judgment decision by the circuit court, who undisputedly heard and was aware of the argument regarding the effects of § 36-4-406(3). (R. pp. 335-370). The record is replete with references to the content and treatment of that subsection, and this case in no way can be construed as one where "the trial judge could not have understood the basis of [the] motions." Id. at 351.

Appellants also rely on Glass v. Glass, 276 S.C. 625, 281 S.E.2d 221 (1981), alleging the same principles as above. In Glass, the motion at issue sought dismissal of an action based on unconstitutionality of equitable distribution, yet the circuit court issued its order dismissing the case based on the Statute of Frauds. Id. As outlined above, that is not the case here. First Citizens moved for summary judgment under § 36-4-406. The Circuit Court ruled in favor of First Citizens based at least in part on the provisions of that statute. Appellants now contend that they have not had the opportunity to present

evidence of First Citizens' alleged lack of ordinary care. This issue is covered by the statute, was before the court on First Citizens' motion, and was addressed in the record and in the circuit court's order. The circuit court did not rule on an issue or claim not before it, and therefore Glass is inapplicable.

Appellants next cite to Resolution Trust Corp. v. Eagle Lake & Golf Condos, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993), to state that the Court disapproves "of the practice of orally raising un-pled issues for the first time at a summary judgment motion." (Petition, p. 6). First Citizens did not orally raise any un-pled issues. Appellant failed to offer any evidence to show any lack of ordinary care by First Citizens, and now wish to create an issue for appeal under S.C. R. Civ. P. 7(b). First Citizens' Motion sought summary judgment on the claims to end the case, as provided for in Rule 7(b) of the South Carolina Rules of Civil Procedure, which states, the motion "shall set forth the relief or order sought." S.C. R. Civ. P. 7(b). Appellants' position amounts to First Citizens' Motion asking for the following hypothetical relief: *an order requiring Plaintiffs to now come forward with evidence of lack of ordinary care*. Why would First Citizens file a motion seeking such relief the week before the case was set for trial in 2009?

Two other cases are cited for the first time in Appellants' Petition, Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001) and Sides v. Greenville Hosp. Sys., 362 S.C.250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). These cases are also distinguished as shown below. First, Sides involved a situation in which the moving party sought Summary Judgment based on a lack of evidence in the Plaintiffs' case. Sides, 607 S.E.2d at 364. Specifically, in Sides, the appellants contended that summary judgment

was inappropriate because "sufficient evidence was presented to survive summary judgment." Id. at 365. In this case, Appellants do not contend such evidence was ever presented, as it is undisputed that no evidence of any lack of ordinary care against First Citizens has ever been offered. As discussed above, First Citizens moved for summary judgment based on S.C. Code § 36-4-406, and Appellants failed "to come forward with specific facts to show there is a genuine issue of fact remaining for trial." Id.

Lastly, Appellants' reliance on Hedgepath is also misplaced. As discussed above, First Citizens moved for summary judgment under §36-4-406. (R. pp. 48-49). For Appellants to assert that the motion at issue "did not shift the burden to McDonnell to establish a genuine issue of material fact" is incorrect. (Petition, p. 9). Subpart (3) of § 36-4-406 is just that – a subpart of a section of the Code. First Citizens' Motion under § 36-4-406 establishes Respondent is entitled to summary judgment, and Appellants should have at that time brought forth evidence of lack of ordinary care. In Hedgepath, the motion at issue sought summary judgment on all claims based on the Statute of Limitations, and the circuit court order ruled that the Statute applied to bar Plaintiffs' claims. Id. at 350. In that case the appealing plaintiffs, despite the opportunity to do so, could not bring forth sufficient evidence to combat Defendants' Statute of Limitations arguments. Id. Still further, Appellants' seem to misstate the meaning of Hedgepath. Put simply, just because a party "*may* discharge its initial responsibility under summary judgment by pointing out an absence of evidence," that does not mean it is the only way to gain summary judgment. Id. at 354. (emphasis added) (Petition, p. 9) Rather, a moving party could, as First Citizens did here, establish that they are entitled to summary

judgment by meeting their own burden, thus notifying the non-moving party (Appellants) of the need to come forward with evidence to combat same.

Neither Hedgepath or any case can support Appellants' necessary argument that they were not on notice of the need to come forward with evidence of a lack of ordinary care under S.C. Code § 36-4-406(3) as a means of overcoming their failure to "exercise reasonable care and promptness" to examine their statements as required by S.C. Code § 36-4-406(1), or that the "same wrongdoer" under S.C. Code § 36-4-406(2) for all ninety-four (94) of those checks was Appellants' employee, Anna Hoormann.

Under § 36-4-406(1) and (2), First Citizens is entitled to summary judgment. The only way Appellants could have overcome this was to come forward with specific evidence of First Citizens' lack of ordinary care so as to invoke the protection of § 36-4-406(3). Appellants were on notice of Respondent's reliance on § 36-4-406(1) and (2) once Respondent's Motion for Summary Judgment was filed. (Petition, p. 5) (R. pp. 48-49). Appellants are at that point then required to present evidence under § 36-4-406(3) meet their burden. Appellants did not do this in their initial brief to the trial court, at the hearing on the Motion for Summary Judgment, in their Rule 59(e) Motion for Reconsideration, in their brief to this Court or at Oral Argument, or in their most recent Petition. As noted within the instant unpublished opinion of this Court, "the burden of proving the bank's failure to exercise ordinary care under §36-4-406(3) in paying the items rests squarely on the customer." McDonnell and Associates, PA v. First Citizens Bank and Trust Company, Inc., Op. No. 2012-UP-404 (Ct. Appl. Filed July 11, 2012). Yet Appellants have never come forward with any evidence to meet this burden.

II. **Appellants' argument that the Grant of Summary Judgment was premature is also without merit.**

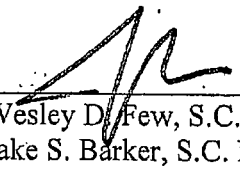
Appellants conclude that, because the case had recently been restored to the general docket, "Appellants should have been afforded the opportunity to further develop their case." (Petition, p. 10). Respondent would direct the Court's attention to the full procedural history in the record and this Return, including the lack of any affidavit under S.C. R. Civ. P. 56(f) or any other claim by Appellants that they needed more time to develop evidence of lack of ordinary care. This case concerns events taking place from October 2004 to December 2005, was first filed in 2007, and was removed from the docket after *over two years* of extensive discovery and the taking of numerous depositions. For Appellants to categorize this case as a "newly filed action" simply because they neglected to develop evidence to carry their burden, even though the case was up for trial in 2009, is misleading, and suggests that the circuit court was not familiar with the procedural history of the case.

In support of this argument, Appellants cite Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) for the proposition that summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Two years of written discovery and depositions would qualify as the "full and fair opportunity to complete discovery" that Appellants claim they were entitled.

CONCLUSION

Based upon those considerations set forth hereinabove, it is respectfully submitted that the Appellants' Petition for Rehearing should be denied.

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August 6, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

RECEIVED
AUG 06 2012
SC Court of Appeals

Case No. 2009-CP-40-8786R

McDonnell and Associates, PA,
f/k/a McDonnell Law Firm, PA,
f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc., ... Appellants,

v.

First Citizens Bank and Trust Company, Inc., ... Respondent.

PROOF OF SERVICE

I, the undersigned employee of the law offices of Ellis, Lawhorne & Sims, P.A., attorneys for the Respondent, do hereby certify that I have served all counsel Respondent's *Return to Petition for Rehearing* by hand delivering a copy of the same to the following address:

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Columbia, SC 29201

Kaitlyn Kellough
Kaitlyn Kellough

Columbia, South Carolina
August 6, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

SC Court of Appeals
AUG 16 2012
RECEIVED

Case No. 09-CP-40-8786R
Appellate Case No. 2010-172106

McDonnell and Associates, PA,
f/k/a McDonnell Law Firm, PA,
f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc.,.....Appellants,

v.

First Citizens Bank and Trust Company, Inc.,.....Respondent.

APPELLANTS' REPLY TO RESPONDENT'S RETURN TO PETITION FOR REHEARING

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, Appellants McDonnell and Associates, PA and Boomerang Title, Inc. (collectively "McDonnell") submit the following in reply to First Citizen's Return to Petition for Rehearing.

I. The Circuit Court Erroneously Granted Summary Judgment on a Ground Not Included in First Citizens' Motion.

The issue presented in this appeal is simple: The Circuit Court improperly granted summary judgment to First Citizens on a ground not asserted in its motion for summary judgment in contravention with the South Carolina Rules of Civil Procedure.

1077-100

It is undisputed that Rule 7(b), SCRCP, requires a party state the grounds for its motion with particularity. Despite this clear rule, First Citizens argues that it was not necessary to move for summary judgment on § 36-4-406(3), the dispositive issue in this case, because it moved for summary judgment on subsections (1) and (2). However, moving for summary judgment on one part of a statute does not require the non-moving party to come forward with proof on a totally separate part of the statute to defeat the motion. It is not only absurd, but contrary to Rules 7 and 56 to require the non-moving party to present evidence on issues not raised in a motion for summary judgment.

First Citizens simply omitted a material ground from its motion for summary judgment. To justify this omission, First Citizens contends the grounds on which it did seek summary judgment placed McDonnell on notice that a separate, distinct, and indisputably unstated ground was also before the Circuit Court by way of its motion. This argument turns Rule 7(b) and Rule 56 on their heads and allows for impermissible gamesmanship in motions. If First Citizens wanted summary judgment based on subsection (3), it should have simply said so in its motion.

However, because subsection (3) was inarguably not included as a ground on which First Citizens sought summary judgment, McDonnell was not required to present evidence at the summary judgment hearing establishing a genuine issue of material fact existed with respect to First Citizens' lack of ordinary care. The Court's opinion affirms the decision of the Circuit Court ruling McDonnell failed to present evidence of First Citizens' lack of ordinary care. However, before this issue can be reached, it must first be determined whether First Citizens' moved for summary judgment on this basis. The Court's decision overlooks this issue.

In short, the Circuit Court erroneously granted, and this Court erroneously affirmed, summary judgment in favor of First Citizens on a ground not included in its motion. Therefore,

McDonnell respectfully requests the Court reconsider its decision and reverse the order of the Circuit Court granting summary judgment in favor of First Citizens.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

Case No. 09-CP-40-8786R
Appellate Case No. 2010-172106

McDonnell and Associates, PA,
f/k/a McDonnell Law Firm, PA,
f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc.,.....Appellants,

v.

First Citizens Bank and Trust Company, Inc.,.....Respondent.

PROOF OF SERVICE

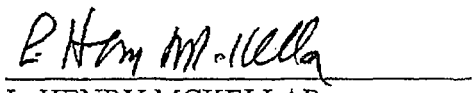
I hereby certify that I served Appellants' Reply to Respondent's Return to Petition for Rehearing, by placing a copy in the United States mail, postage prepaid, to counsel of record, John T. Lay, Esquire, Wesley D. Few, Esquire and Jake S. Barker, Esquire, Ellis Lawhorne & Sims, PA, P.O. Box 2285, Columbia, SC 29202, on August 16, 2012.

[Signature Page to Follow]

SC Court of Appeals
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Respectfully submitted,

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Columbia, South Carolina

August 16, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

Case No. 09-CP-40-8786R

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v.

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RECORD ON APPEAL

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INDEX

PAGE

Order Granting Summary Judgment filed July 9, 2010 1

Order Granting in Part, Denying in Part Rule 59(e) Motion filed August 20, 2010 ... 15

Stipulation to Remove Case from Trial Docket Pursuant to Rule 40(j), SCRCP, filed June 5, 2009 26

Consent Order Restoring Case filed December 16, 2009 28

Summons and Complaint 31

Amended Complaint 36

Answer and Counterclaim Against All Plaintiffs 40

Notice of Motion and Motion for Summary Judgment dated May 27, 2009 48

Memorandum in Support of Motion for Summary Judgment dated March 10, 2010 and any and all Exhibits thereto 51

Memorandum in Opposition to Motion for Summary Judgment dated March 10, 2010 and all Exhibits thereto 264

Appellants' Rule 59(e) Motion dated July 23, 2010 and all Exhibits thereto 310

Transcript of Record dated March 10, 2010 335

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title Inc., Plaintiffs, v. First Citizens Bank and Trust Company, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 2009-CP-40-8786R **ORDER**

RICHLAND COUNTY
FILED
2010 JUL -9 AM 9:03
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the Court for a hearing on Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment.[1] Present at the hearing were L. Henry McKellar, Esquire, and Amy L. Neuschafer, Esquire, on behalf of Plaintiffs McDonnell and Associates, PA ("McDonnell and Associates"), Edward G. McDonnell, PC, and Boomerang Title, Inc. ("Boomerang Title"); and Wesley D. Few, Esquire, and Jacob S. Barker, Esquire, on behalf of Defendant First Citizens Bank and Trust Company, Inc. ("First Citizens").

Factual and Procedural Background

The instant case concerns First Citizens' payment of forged checks drawn on Plaintiffs' First Citizens accounts. At all times relative to this action, Plaintiffs McDonnell and Associates and Boomerang Title maintained three (3) checking accounts with First Citizens: (1) account number 83045789101 opened in the name of Edward G. McDonnell, PC on or about June 24, 2003 ("Operating Account"); (2) account number 83045792501 opened in the name of

[1] On December 15, 2009, the date that Plaintiffs restored this action, they also sought to reinstate their previously filed Motion for Summary Judgment. However, at the hearing on this matter, Plaintiffs indicated to the Court that they were withdrawing this motion.

1

Boomerang Title on or about June 24, 2003 ("Boomerang Account"); and (3) account number 891001421901 opened in the name of Edward G. McDonnell, PC, IOLTA, on or about July 17, 2003 ("IOLTA Account").

Beginning on October 1, 2004, Plaintiffs' employee and authorized agent Anna Hoormann ("Hoormann"), began forging and cashing seventy-seven (77) checks drawn on the Operating Account totaling $488,760.58. Hoormann made and negotiated fifteen (15) checks on her behalf from the Boomerang Title Account totaling $205,196.00, as well as, two (2) checks drawn on Edward G. McDonnell, PC,'s IOLTA Account totaling $73,923.95. According to Plaintiffs, all in all, Hoormann forged and negotiated ninety-four (94) checks totaling $767,880.53. These activities continued undetected by Plaintiffs until December 23, 2005, when First Citizens notified Edward G. McDonnell, PC, that a check drawn off of the IOLTA Account had been returned for insufficient funds. It is undisputed that Plaintiffs did not review their periodic bank statements regarding their accounts, and did not report any of the alleged forgeries until after December 23, 2005.

Plaintiffs filed their complaint on August 15, 2007. This case was set for trial on June 8, 2009. The week prior to trial, Plaintiffs named an expert witness. First Citizens moved to exclude this witness on grounds of prejudice and for his lack of qualifications as he had not been active in banking during the relevant time period. On June 5, 2009, the parties dismissed the case under Rule 40(j). On December 16, 2009, Plaintiffs restored the case to the docket and amended their complaint alleging causes of action for breach of the agreements between Plaintiffs and First Citizens claiming that the Bank improperly forged checks to First Citizens. By letter dated February 18, 2010, Plaintiffs advised they were withdrawing their previous designation of their expert and have not yet designated a replacement expert.

2

Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Rule 56(c), SCRCP; Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The party seeking summary judgment carries the burden of clearly establishing the absence of a genuine issue of material fact. "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Penny Creek Assoc., LLC v. Fenwick Tarragon Apartments, LLC, 375 S.C. 267, 271, 634 S.E.2d 617, 620 (Ct. App. 2007) (citing Osborne ex rel. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). Summary judgment is not appropriate "where there is no dispute as to the facts but the parties dispute inferences to be drawn from those facts." Penny Creek, 375 S.C. at 271, 651 S.E.2d at 619; Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005). "However, if the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court." Ward v. Zelinski, 260 S.C. 229, 232, 195 S.E.2d 385, 387 (1973). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." Hill v. York County Sheriff's Dept., 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993); see also Hancock v. Mid-South Management Co., Inc., 381

S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (clarifying and reaffirming in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment). "The opposing party, however, may not rest upon the mere allegations or denials of the pleadings, but his response...must set forth specific facts showing there is a genuine issue for trial." Midland Mutual Life Ins. v. Harrell, 331 S.C. 394, 503 S.E.2d 189, 190-191 (Ct. App. 1998); Bravis v. Dunbar, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994).

Legal Discussion

First Citizens moves the Court for summary judgment on the following grounds: (1) Plaintiffs did not report unauthorized activity or initial forgeries on the relevant accounts within the one year limitations period proscribed by S.C. Code Ann. § 36-4-406(4) (1976)[2] nor within the fourteen (14) day time period set forth in the deposit agreement; (2) Plaintiffs did not exercise reasonable care in examining their bank statements because they failed to timely review their periodic statements and have presented no evidence that First Citizens failed to exercise ordinary care in paying the items; (3) Plaintiff's claims are barred by the same wrongdoer provisions of South Carolina code §36-4-40 (d)(2); and (4) Plaintiffs, as an issuer of the checks in question, are precluded from bringing a suit for conversion against First Citizens.

I. Summary Judgment

A. Failure to Report

Section 36-4-406(4) of the South Carolina Code, in effect at the times relevant to this litigation provided:

> Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made

[2] South Carolina's version of the Uniform Commercial Code has since been revised, and this section was renamed S.C. Code Ann. § 36-4-406(f) (2008), although the substance of the provision remains unchanged.

> available to the customer (Subsection (a)) discover and report the customer's unauthorized signature on or any alteration of the item is precluded from asserting against the bank the unauthorized signature or alteration.

S.C. Code Ann. § 36-4-406(4) (1976), *amended by* S.C. Code Ann. § 36-4-406(f) (2008).

First Citizens presented evidence that Hoormann, Plaintiffs' employee and authorized agent, began forging checks on the relevant accounts as early as October 1, 2004. Plaintiffs did not discover and report these forgeries until after December 23, 2005 when First Citizens notified Plaintiffs that a check drawn on the IOLTA Account was being returned for insufficient funds. Plaintiffs received a bank statement from First Citizens in November 2004 that would have placed Plaintiffs on notice of the alleged forgeries. First Citizens mailed periodic statements of the accounts to Plaintiffs in the normal course of their business relationship. At least thirteen (13) months passed between Plaintiffs' notice of the first alleged forgeries and the date Plaintiffs notified First Citizens. Accordingly, S.C. Code Ann. § 36-4-406(d) completely bars recovery of any claim against First Citizens which was included in a statement dated over one (1) year from the time of discovery and report to First Citizens.

The requirements under S.C. Code Ann. § 36-4-406(4) apply "without regard to care or lack of care of either the customer or the bank." Plaintiffs admittedly failed to notify First Citizens within one (1) year of the time that the first bank statement was made available to Plaintiffs. Thus, Plaintiffs are "precluded from asserting against the bank the unauthorized signature or alteration." S.C. Code Ann. § 34-4-406(4) (1976), *amended by* S.C. Code Ann. § 36-4-406(1) (2008). This limitations period completely bars recovery of any claim against First Citizens which was included in a statement dated over one (1) year from the time of discovery and report to First Citizens. Id.

In addition, Section 6, paragraph 4 of the deposit agreement between the parties required

5 JMC

Plaintiffs to report any unauthorized signatures or alterations within fourteen (14) days after receipt of the statements. This time period was also proscribed by S.C. Code Ann. § 36-4-406 (1976), which during the relevant time period, provided that a customer had a responsibility to promptly examine his statements and timely notify the bank of any problems. See S.C. Code Ann. § 36-4-406 (1976), *amended by* S.C. Code Ann. § 36-4-406 (2008). Just as Plaintiffs failed to examine his statements and notify First Citizens of any unauthorized signatures within one year of receipt of the statements as required by statute, they also failed to notify First Citizens within the fourteen (14) day period provided for in the deposit agreement. For these reasons, Plaintiffs are precluded from asserting any unauthorized signature or alteration against First Citizens which has been on bank statements for more than one year. Accordingly, the Court finds that Defendant's Motion for Summary Judgment is **GRANTED** on this ground.

B. Reasonable Care

During the time relevant to this case, both the South Carolina version of the Uniform Commercial Code and the Plaintiff's deposit agreement provided a fourteen (14) day window starting upon receipt of the bank statement to notify the bank of unauthorized signatures. The Code provided that a customer who, like Plaintiffs, failed to notify the bank of unauthorized signatures, was precluded from holding the bank liable when:

> an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

S.C. Code Ann. § 36-4-406(2)(b) (1976), *amended by* S.C. Code Ann. § 36-4-406(d)(2) (2008). In 2005, a court analyzing the Uniform Commercial Code confirmed this two (2) week time limitation, stating that "a reasonable period for such notification is defined as no more than 14

days." Haber v. Citibank. NA., 808 N.Y.S.2d 917, 2005 WL 2441453 *1 (2005). For each account, Plaintiffs received a copy of First Citizens' "Rules and Regulations: Checking Accounts, Savings Accounts, and Money Market Accounts," ("Rules and Regulations"). Plaintiffs acknowledged receipt of these Rules and Regulations when opening the accounts by executing "Signature Cards" for the accounts. The Rules and Regulations set forth duties of both the bank and the customer. Paragraph six (6) outlines the responsibilities that the bank and the customer have regarding periodic statements on the accounts. In the Rules and Regulations, Plaintiffs agreed to the following:

> Upon receipt (or *availability)* of your statement and cancelled items, you agree that you will promptly examine your statement and items and will notify us [bank] if there are any incorrect or unauthorized signatures, transactions, or alterations.

(Rules and Regulations, 4) (emphasis in original). The parties further agreed that fourteen (14) days is "a reasonable amount of time for [customer] you to examine your statement and notify us [bank] of unauthorized signatures or alteration."

In the present case, it is undisputed that Hoormann is the only forger of the ninety-four (94) checks put at issue by Plaintiffs in this lawsuit. Thus, both the Rules and Regulations applicable to the account as well as South Carolina's version of the Uniform Commercial Code in effect at the relevant time, placed upon Plaintiffs the duty "to exercise reasonable care and promptness to examine the [account] statement and items [which are provided by the bank] to discover his unauthorized signature." S.C Code Ann. § 36-4-406(1), *amended by* S.C. Code Ann. § 36-4-406(a) (2008). Furthermore, by Plaintiffs' own allegations, Hoormann's forgeries constitute an "unauthorized signature" that Plaintiffs should have discovered upon examination of their account statements. These facts establish that Plaintiffs failed to exercise the required reasonable care to timely review their account statements from First Citizens, which is the reason

they failed to discover the unauthorized signatures. Edward McDonnell stated that once he finally took time to review the statements, he discovered the scope of the alleged forgeries by Hoormann. Edward McDonnell admitted that he did not review the monthly statements from the bank on a regular basis. Not only did he fail to examine his statements, but Edward McDonnell also placed Hoormann in charge of receiving, reviewing, and filing the bank statements, including the IOLTA statements. Hoormann shared an office with Edward McDonnell and had unlimited access to the cabinets that held Plaintiffs' financial records. As the office manager for Plaintiffs, Hoormann had the responsibility of preparing checks for the law firm. The complete delegation of financial responsibility to Hoorman and Plaintiffs' failure to check the account statements demonstrates Plaintiffs' lack of reasonable care and precludes Plaintiffs from asserting claims against First Citizens under the Uniform Commercial Code. See Read v. South Carolina Nat'l Bank, 286 S.C. 534, 541, 335 S.E.2d 359, 363 (1985) ("The evidence in this case clearly presents a situation where Read's negligence as a matter of law substantially contributed to the forgeries. He was negligent in failing to maintain proper control over the signature stamp, he allowed the same person who had possession of the checkbook to reconcile the statements with no supervision or verification and he failed to examine his bank statements.").

In addition to the customer's duty to examine statements and returned items, the customer has the further duty to "notify the bank promptly after discovery" of any alleged forgeries. S.C Code Ann. § 36-4-406(1), *amended by* S.C. Code Ann. § 36-4-406(a) (2008). First Citizens' Rules and Regulations also state that a customer "will notify us [bank] if there are any incorrect or unauthorized signatures, transactions, or alterations." (Rules and Regulations, 3-4). A bank customer who fails to examine his account statements and who as a result of such failure does not detect his employee's ongoing embezzlement, cannot hold the bank liable for:

8 JMC

> an unauthorized signature . . . by the same wrongdoer on any item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days.

S.C. Code Ann. § 36-4-406(2), *amended by* S.C. Code Ann. § 36-4-406(d) (2008) (emphasis added); see also Sabatino v. Atlantic Sav. Bank, F.S.B, 314 S.C. 402, 444 S.E.2d 537 (Ct. App. 1994) (holding "Section 36-4-406 creates an affirmative duty on the part of the customer to discover and report any unauthorized signatures. The time limits imposed in subsection (4) for making a claim against the Bank start at "the time the statement and items are made available to the customer."); see also Read, 286 S.C. at 541, 335 S.E.2d at 363 (precluding same wrongdoer forgeries where first in a series of forgeries occurred in September, 1980, and was included in the statement mailed on October 1, and the forgeries were not reported to bank until January 26, 1981).

The repeated actions of Hoormann qualify as forgeries perpetrated by "the same wrongdoer" meaning Plaintiffs' failure to discover the first forgery within one year (or fourteen days) of receiving the statements prevents the customer from bringing a claim against a bank for any subsequent forgeries by the same employee. Official Comment I to section 36-4-406(2), which was in effect at all times relevant to this lawsuit, provides:

> This rule follows substantial case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank traceable to the customer's failure to exercise reasonable care in examining his statement and notify the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the requirements of subsection (I) is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items. Hence, the rule of subparagraph (b) is prescribed and to avoid dispute a specific time limit for action by the customer is designated, namely fourteen calendar days.

S.C. Code Ann. § 36-4-406 (cmt. 1) (1976), *amended by* S.C. Code Ann. § 36-4-406 (2008).

The first forged item from October 1, 2004 cited above (check no. 1354)— which First Citizens paid in October of 2004 and reported to Plaintiffs shortly thereafter in November of 2004 — was not identified and reported within the fourteen (14) day limitations period, or even within one (1) year. In fact, Plaintiffs never reported any of the unauthorized checks to First Citizens from October 1, 2004 through 2005. It was only upon notification to Plaintiffs by First Citizens on December 23, 2005 that Plaintiffs discovered the unauthorized forgeries by Hoormann. Therefore, Plaintiffs' own negligence, as a matter of law, precludes Plaintiffs' recovery. Plaintiffs also failed to maintain proper control over the check writing and reconciling operations, allowing Hoormann to receive, review and reconcile statements. Hoormann had unfettered access to Plaintiffs' records and the authority to create checks on Plaintiffs' accounts. Further, Plaintiffs failed to examine their bank statements themselves to discover any forgeries. See Read, 286 S.C. at 541, 335 S.E.2d at 363 (In ruling on a Motion for Directed Verdict the Court stated: "In viewing all of the evidence in the light most favorable to [p]laintiff, the only inference that can be drawn from undisputed facts is that [plaintiff's] negligence substantially contributed to the making of the unauthorized signatures."). As Plaintiffs failed to notify First Citizens of Hoormann's alleged forgeries on the Operating Account, S.C. Code Ann. § 36-4-406 bars subsequent action on all of the checks forged on all of Plaintiffs' accounts. See Read, 286 S.C. 534, 335 S.E.2d 359 (holding preclusion of claims against bank under same wrongdoer provision applied to numerous accounts with different account holders). This preclusion is not limited in scope, and applies to "any other item paid in good faith by the bank after the first item and statement was available to the customer." S.C. Code Ann. § 36-4-406(2)(b) (1976), *amended by* S.C. Code Ann. § 36-4-406(d)(2) (2008).

Beginning October 1, 2004, Hoormann forged at least ninety-four (94) checks on

Plaintiffs' accounts. Hoormann committed fraudulent acts against Plaintiffs for well over one (1) year before Plaintiffs became aware of the perpetration. Plaintiffs did not learn of the forgeries by their own diligence and only realized the forgeries were happening because First Citizens notified Plaintiffs of the problem on December 23, 2005. Had First Citizens not contacted Plaintiffs, Hoormann might have continued to forge checks indefinitely, which is the precise situation that the Official Comment stated the Uniform Commercial Code was designed to prevent, which is the "opportunity present to the wrongdoer to repeat the misdeeds." S.C. Code Ann. § 36-3-406 (cmt. 3) (1976), *amended by* S.C. Code Ann. § 36-4-406 (cmt. 2) (2008). Thus, the Court finds that Plaintiffs' own negligence and failure to exercise reasonable care absolutely bars any claims against First Citizens.[3] Therefore, Defendant's Motion for Summary Judgment is **GRANTED** on this ground.

3. Conversion Claim

First Citizens argues that its Motion for Summary Judgment should be granted because Plaintiffs, as issuers of the checks in question, are barred from bring an action for conversion against the Bank. Under South Carolina law, the issuer of an instrument or check cannot maintain an action in conversion. See S.C. Code Ann. § 36-3-420(a) ("an action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument"). The Code defines the "issuer" as "a maker or drawer of an instrument." S.C. Code Ann. § 36-3-105(c). Plaintiffs in this action are issuers of the instruments in question. Further, an instrument is converted when a "bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." S.C. Code Ann. § 36-3-420(a). In their Amended Complaint, Plaintiffs allege that the Bank is liable for conversion because First

[3] The Court would also note that Plaintiffs withdrew their expert designation and, to date, have yet to designate another expert.

Citizens allegedly made payment on checks that "were not properly payable in that they contained forged and unauthorized signatures." Plaintiffs are listed as the drawers of the checks they allege First Citizens converted, and thus, as issuers, are barred as a matter of law from bringing a conversion action under § 36-3-420(a). As the South Carolina Reporter's Comments to this section clarify, "the issuer or acceptor of an instrument may not maintain an action for conversion." Therefore, Defendant's Motion for Summary Judgment is **GRANTED** on this ground.

II. Plaintiff's Motion for Leave to File Second Amended Complaint

Plaintiffs request the Court to grant their Motion for Leave to File Second Amended Complaint pursuant to Rule 15(a), SCRCP, which was filed on June 1, 2009 and reinstated when the case was restored on December 15, 2009. Plaintiffs contend that during the course of discovery, they learned that a Business Online Banking feature had been opened in 2004 with respect to their accounts with First Citizens. Accordingly, Plaintiffs now seek leave to amend their complaint to allege that First Citizens was negligent in allowing the operating and IOLTA accounts of Plaintiffs to be registered for First Citizens' Business Online Banking Program without the knowledge and consent of Edward McDonnell, the owner of the accounts. Plaintiffs allege that as a result of First Citizens' negligence, a dishonest employee was able to transfer funds between the operating and IOLTA accounts to cover up the checks she forged. In response, First Citizens argues that it will be prejudiced if the Court allows the amendment. First Citizens further asserts that Plaintiff's attempt to assert a cause of negligence in these circumstances is impermissible because such cause of action has been displaced by the Uniform Commercial Code.

Rule 15(a), SCRCP, provides that "leave shall be freely given when justice so requires and does not prejudice any other party." South Carolina courts have interpreted Rule 15(a), SCRCP, to mean that leave to amend pleadings "shall be liberally and freely given." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005). Moreover, "[t]he Rule strongly favors amendments and the court is encouraged to freely grant leave to amend." Id. In addition, "[i]t is well established that a motion to amend or supplement is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice." Tanner v. Florence County Treasurer, 336 S.C. 552, 558, 521 S.E.2d 153, 156 (1999). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Parker, 362 S.C. at 286, 607 S.E.2d at 716-17.

Based on the foregoing, and in light of the fact that the action has been recently restored, the Court finds that First Citizens has not demonstrated prejudice. As far as First Citizens' argument that the Uniform Commercial Code displaces Plaintiffs' negligence claim, the only question before the Court at this time is whether or not Plaintiffs' amendment of the pleadings will prejudice First Citizens, and the Court finds that it will not. A decision on the merits of Plaintiffs' amendment is premature at this time. Therefore, because First Citizens cannot demonstrate prejudice, the Court finds that Plaintiffs' Motion to Amend is **GRANTED.**

CONCLUSION

For the foregoing reasons, **NOW THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED,** that Defendant's Motion for Summary Judgment is **GRANTED**; however, Plaintiffs' Motion for Leave to File Second Amended Complaint with regard to its cause of action for negligence is **GRANTED.**

IT IS SO ORDERED.

13

The Honorable J. Michelle Childs
Presiding Judge
Fifth Judicial Circuit

This 8th day of July, 2010.
Columbia, South Carolina.

14

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title Inc., Plaintiffs, v. First Citizens Bank and Trust Company, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 2009-CP-40-08786R **ORDER**

RICHLAND COUNTY
FILED
2010 AUG 20 AM 9:33
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court pursuant to Plaintiffs' Rule 59(e) Motion to Alter or Amend, filed on July 23, 2010. L. Henry McKellar, Esquire, and Amy L. Neuschafer, Esquire, represent Plaintiffs; and Wesley D. Few, Esquire, and Jake S. Barker, Esquire, represent Defendant.

Plaintiffs request the Court to reverse its prior order granting summary judgment to Defendant First Citizens Bank and Trust Company, Inc. ("First Citizens") on all claims of the Plaintiffs.

This Court granted Defendants' Motion for Summary Judgment by Order filed July 9, 2010 on the following grounds:

(1) Plaintiffs failed to report the forged checks to First Citizens within one year as required by S.C. Code § 36-4-406(4);

(2) Plaintiffs failed to exercise reasonable care in reviewing their statements and such failure allowed the "same wrongdoer" to "repeat [her] misdeeds" under S.C. Code § 36-4-406(2)(b); and

(3) Plaintiffs as issuers of the checks in question cannot maintain a claim for conversion under S.C. Code § 36-3-419.

1

Plaintiffs now request the Court to reconsider its Order on the following grounds:

(1) the Court ignored the impact of S.C. Code Ann. § 36-4-406(3), in that subsection (3) trumps the preclusive effect of subsection (2); summary judgment must be denied because Defendant did not move for summary judgment on Plaintiffs' failure to demonstrate Defendant exercise of ordinary care; and Plaintiffs' failure to use reasonable care is not dispositive;

(2) clarification of the Court's ruling regarding S.C. Code Ann. § 36-4-406(4) is needed; and

(3) Plaintiffs did not allege a cause of action for conversion.

A. S.C. Code Ann. § 36-4-406(1976)

In section B of the Order, entitled "Reasonable Care," the Court analyzed § 36-4-406(1) and concluded that Plaintiffs failed to exercise reasonable care and promptness in examining their bank statements and notifying Defendant of the unauthorized signatures. The Court then analyzed whether Plaintiffs were precluded from asserting the forgeries against Defendant by operation of the "same wrongdoer" provision contained in § 36-4-406(2). The Court reasoned that because all checks at issue were forged by the same wrongdoer, Anna Hoorman, and the first check was not reported within fourteen (14) days after it was made available to Plaintiffs via monthly statements, Plaintiffs are precluded from asserting the forgeries against First Citizen by operation of § 36-4-406(2).

Plaintiffs contend that the Court erred by ending its analysis with subsection (2) and overlooking the importance of subsection (3). Subsection (3) states the following: "The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s)." S.C. Code Ann. § 36-4-406(3). The South Carolina Reporter's Comments to § 36-4-406 further explain: "[s]ubsection (3) makes the preceding rules

inoperative if the bank itself was negligent in paying the item. Thus, a negligent bank cannot put the loss resulting from a forgery or the like upon the customer on the ground that the customer also has been negligent." Furthermore, the official comments state:

> The two effects on the customer of his failure to comply with subsection (1) (subparagraphs (a) and (h) of subsection (2)) are stated in terms of preclusion from asserting a claim against the bank. However, these two effects occur only if the customer has failed to exercise reasonable care and promptness in examining his statement and items and notifying the bank to establish such failure. Further, even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing the bank failed to exercise ordinary care in paving the item(s) the preclusion rule does not apply. This distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

The Court agrees with Plaintiffs that subsection (3) can trump the preclusive effect that subsection (2) may have on Plaintiffs' claims.

However, the Court disagrees with the effect that subsection (3) has on the Plaintiffs' claims in this case. Plaintiffs contend that whether Defendant has established Plaintiffs failed to exercise reasonable care and promptness in examining their bank statements and notifying Defendant of the unauthorized signatures and whether Plaintiffs are precluded from asserting the forgeries against First Citizens by operation of the "same wrongdoer" provision are not controlling, and the Court erred in finding such provision controlling. Rather, Plaintiffs argue that they are still entitled to the opportunity under § 36-4-406(3) to establish First Citizens failed to exercise ordinary care in paying the forged items.

Moreover, Plaintiffs misstated which party carries the burden of proof on this issue. In Read v. South Carolina National, 286 S.C. 534, 541, 335 S.E.2d 359, 362 (1985), the South Carolina Supreme Court stated, "[t]he burden of proving the bank's failure to exercise ordinary care under § 36-4-406(3) in paying the items rests squarely on the customer." (citing Nu-Way

Services, Inc. v. Mercantile Trust Company, 530 S.W.2d 743 (Mo. App. 1975)). The Supreme Court in Read further stated, "[a]lthough 'ordinary care' is not defined in the Code, § 36-4-103(3) provides that action or nonaction consistent with general banking usage constitutes ordinary care." No evidence has been offered by Plaintiffs that Defendant failed to act in accordance with general banking usage. Accordingly, it is undisputed that, in response to Defendant's summary judgment motion, Plaintiffs have not pointed to any evidence they would allege creates a material issue of fact as to whether or not First Citizens exercised "ordinary care" in processing the ninety-four (94) checks at issue in this case. Therefore, the Court's finding that Plaintiff failed to exercise ordinary care in this case is sufficient.

Plaintiffs cite to Indiana Nat'l Corp. v. FACO, Inc., 400 N.E.2d 202, 204-5 (Ind. Ct. App. 1980), for the proposition that the Plaintiffs were denied their "right to establish that First Citizens failed to exercise ordinary care as required by [S.C. Code] § 36-4-406(3)." However, Plaintiffs' reliance on Indiana National Corp. v. FAC, Inc., 400 N.E.2d 202 (1980) is unavailing because the Plaintiff in Indiana offered evidence of lack of ordinary care. Here, Plaintiffs have not come forward with any evidence to establish a lack of ordinary care by Defendant.

Plaintiffs have made no attempt to define "ordinary care," nor do they point to any evidence or testimony that they intend to present that would establish Defendant's lack of "ordinary care." Thus, Defendant is not required to establish that it exercised "ordinary care" because Plaintiffs have presented no evidence to support its contention that Defendant failed to exercise ordinary care. As a result, the exception contained in subsection (3) to application of the same wrongdoer provision in subsection (2) of S.C. Code § 36-4-406 does not apply in this case.

The Court notes that the events in question occurred from October 1, 2004 to December 23, 2005, Plaintiffs first wrote to First Citizens to complain of the acts of Anna Hoorman on

January 3, 2006, the original action was not filed until August 15, 2007, and discovery by all parties occurred through the date this matter was set for trial on June 8, 2009. The case has previously been set on a trial docket, dismissed under Rule 40(j), and restored to the docket. However, Plaintiffs still cannot point to any evidence that they allege creates a material issue of fact to carry their burden that First Citizens did not exercise "ordinary care."

Plaintiffs also argue that Defendant did not move for summary judgment on all claims. Defendant's summary judgment motion, originally filed on May 27, 2009 under the original civil action number 2007-CP-40-05252, sought "summary judgment on the Plaintiffs claims." Still further, Defendant's Memorandum in Support of Motion for Summary Judgment, filed March 10, 2010, requested "Summary Judgment as to all claims of the Plaintiffs in this action." Furthermore, Plaintiffs have provided no affirmative evidence that Defendant failed to exercise reasonable care. Therefore, the Court finds that it was not error to rule on all of Plaintiffs' claims in the summary judgment motion.

B. Reasonable Care

Plaintiffs next argue that their failure to use reasonable care is not dispositive. Specifically, Plaintiffs contend the Court erred in ruling "the complete delegation of financial responsibility to Hoorman and Plaintiffs' failure to check the account statements demonstrates Plaintiffs' lack of reasonable care and precludes Plaintiffs from asserting claims against First Citizens under the Uniform Commercial Code." In support of this proposition the Court cited Read v. South Carolina National Bank, 256 S.C. 534, 335 S.E.2d 359 (1985), and included the following quotation: "The evidence in this case clearly presents a situation where Read's negligence as a matter of law substantially contributed to the forgeries. He was negligent in failing to maintain proper control over the signature stamp. He allowed the same person who had

possession of the checkbook to reconcile the statements with no supervision or verification and he failed to examine his bank statements." Id. at 541, 335 S.E.2d at 363.

However, Plaintiffs argue that the Court misapprehends the cited portion of Read, as it is inapplicable to the instant case and does not stand for the proposition that Plaintiffs' failure to exercise reasonable care alone bars Plaintiffs' claims against First Citizens. In the above-quoted portion of Read, the court addressed § 36-3-406, not § 36-4-406, which is at issue in this case. Section 36-3-406 provides a separate and distinct defense for a bank where it is able to establish the customer "by his negligence substantially contributes" to the making of an unauthorized signature and the bank paid the instrument "in good faith and in accordance with reasonable commercial standards." In such a case, the customer is precluded from asserting the lack of authority for making the signature against the bank. Section 36-3-400 was not raised as a ground for First Citizens' motion for summary judgment, nor was it discussed at the hearing or even in the Court's order.

The Court agrees that the standard for application of the preclusion set forth in § 36-3-406 is different from the standard for application of the preclusion set forth in the statute at issue. Section 36-4-406 provides "the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature ... and must notify the bank promptly after discovery thereof." § 36-4-406(1). In other words, the reasonable care required of the customer by § 36-4-406 extends only to examination of his statement and discovery of his unauthorized signature. Section 36-3-406, on the other hand, broadly speaks in terms of the customer's negligence substantially contributing to the making of the unauthorized signature. In the quoted portion of Read, the court discussed the various ways in which the customer substantially contributed to the forgeries (as required by § 36-3-406), only one of

which was by failing to examine his bank statements. 286 S.C. at 541, 335 S.E.2d at 363.

Therefore, the Court finds that this evidence is not germane on the issues presented by Defendant's motion, which was premised upon § 36-4-406. The only duties imposed upon the customer by § 36-4-406 are to exercise reasonable care and promptness to examine the statement and items to discover forgeries and notify the bank promptly after discovery. It is irrelevant for purposes of § 36-4-406 how the forger was able to accomplish his misdeeds or whether the customer gave the forger too much control amid access over his account information. Such facts are relevant with respect to § 36-3-406, as there the standard is whether the customer "substantially contributed" to the forgery. Accordingly, reliance upon such evidence and testimony is misplaced and must not be considered in ruling on § 36-4-406. Therefore, Plaintiffs motion **is GRANTED** on this ground.

C. Clarification of the Court's Ruling regarding S.C. Code Ann. § 36-4-406(4)

Plaintiffs also argue that clarification is necessary regarding the Court's ruling with respect to S.C. Code Ann. § 36-4-406(4). As its second ground for summary judgment, Defendant argued that Plaintiffs were precluded from recovering on the forged checks because the first forgery was not reported within one year as required by § 36-4-406(4). This section provides as follows:

> (4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature ... is precluded from asserting against the bank such unauthorized signature...

The Court determined the forgeries were not reported to Defendant until December 23, 2005, which is thirteen months after the first forgery appeared on the November 2004 bank statement. The Court appears to have disagreed with First Citizens' interpretation of § 36-4-406(4) that

because the first forgery was not reported for over a year, it and all subsequent forgeries are not actionable. Instead, the Court ruled that § 36-4-406(4) "completely bars recovery of any claim against First Citizens which was included in a statement dated over one (1) year from the time of discovery and report to First Citizens" and "Plaintiffs are precluded from asserting any unauthorized signature or alteration against First Citizens which has been on bank statements for more than one year." (Order, 5 and 6). The Court also concluded by stating Defendant's motion for summary judgment was granted on the issue of § 36-4-406(4), and Plaintiffs contend that the Court did not qualify this ruling by stating the forged checks appearing on bank statements in the year preceding Plaintiffs' report to First Citizens are recoverable.

Here, the majority of the forged checks appeared on bank statements made available less than one year before Plaintiffs' report was made to First Citizens in December 2005. Because the one-year time limitation for reporting unauthorized signatures runs from the time the bank statement on which the item appears is made available, all forgeries appearing on bank statements made available on or after December 23, 2004 (one year before the reporting date of December 23, 2005) are actionable. See Gerber v. City Nat'l Rank of Fla., 619 So.2d 328, 329-30 (Fla. Ct. App. 1993) (recognizing "that when a series of checks, rather than a single check, are alleged to have been improperly honored by a bank, the proper application of Section 674.406(4) [Florida's codification of § 36-4-406(4)] may serve to preclude a customer's recovery on some checks, while allowing recovery on others, depending upon when bank statements are issued and when notice is given"); Indiana Nat'l Corp. v. FACO, Inc. 400 N.E.2d 202, 205-06 (Ind. Ct. App. 1980) (finding that where 167 checks were forged by bookkeeper and forgeries were reported in August 1975, customer could recover for those forgeries which cleared the bank before July 1974, but could not recover for those prior to this date).

Accordingly, the Court now clarifies its ruling to state that Defendant's motion for summary judgment is granted and applicable to those checks appearing on bank statements made available before December 23, 2004, one year before Plaintiffs reported the forgeries. In other words, when each bank statement was made available, it commenced the one-year limitation for reporting unauthorized signatures for items appearing on that statement.

In addition, Plaintiffs assert that the portion of the Order addressing § 36-4-406(4) discusses the deposit agreement's requirement that customers discover and report any unauthorized signatures to First Citizens within fourteen (14) days after receipt of the bank statement is unclear if the Court has also ruled that Plaintiffs' claims on all checks are barred because they were not reported to First Citizens within fourteen (14) days.

The deposit agreement provides only the duties and responsibilities of the customer, as follows:

> Upon receipt (or availability) of your statement and cancelled items, you agree that you will promptly examine your statement and items and will notify us if there are any incorrect or unauthorized signatures, transactions, or alterations. You also agree that 14 days (SC) / 30 days (GA) after the statement and items are first made available is a reasonable time for you to examine your statement and notify us of unauthorized signatures or alterations.

Section 36-4-406(1) provides that when the bank makes bank statements available, the customer "must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof." Accordingly, the deposit agreement merely supplies that the parties agree fourteen days is a reasonable time to examine statements and report forgeries, providing the definition of the phrase "reasonable care and promptness" as used in § 36-4-406(1).

The Court agrees with Plaintiffs that the deposit agreement does not contain a provision

9

setting forth the consequences or penalty for the customer's failure to examine his statement and report unauthorized signatures within fourteen (14) days of receipt of the statement, and it does not provide that the customer waives his right to pursue recovery from the bank if he does not report the forgeries within fourteen (14) days. To determine the effect of the failure to report within fourteen (14) days, the Court must look to § 36-4-406(2), which specifically sets forth the preclusive effect of the customer's failure to fulfill the duties imposed by § 36-4-406(1).

Therefore, to the extent that the Court's Order is read to interpret the deposit agreement to mean that recovery cannot be had for forged checks when the customer does not report them within fourteen (14) days of receipt of the bank statement for claims that the bank failed to exercise due care, the Order is modified. Rather, the fourteen day reporting period does not bar Plaintiffs' claim for negligence on behalf of the bank and that any interpretation otherwise would be contrary to the intent and meaning of § 36-4-103, which states in pertinent part:

> The effect of the provisions of this chapter may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure: but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

For the foregoing reasons, Plaintiffs' motion for reconsideration is **GRANTED** on this ground. However, the Court's ruling still stands with respect to Plaintiffs' failure to present evidence that Defendant was negligent in this case.

D. Conversion

With respect to the conversion cause of action, as Plaintiffs have stated that "the only claims alleged by Plaintiffs in this case are a breach of contract claim for each account from [which] the checks were forged," the Court now vacates the portion of its Order that granted summary judgment with respect to Plaintiffs' nonexistent claim for conversion. Therefore,

Plaintiffs' motion for reconsideration is **GRANTED** on this ground.

E. Pre-2008 UCC Code Provisions

To clarify, all citations to the S.C. Code contained herein are to the pre-2008 Code, which applies to the items at issue in this case negotiated between October 1, 2004 and December 23, 2005. These UCC provisions were amended in 2008 and some of the statutory sections were re-numbered.

Based on the foregoing, **NOW THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED** that Plaintiffs' Rule 59(e) Motion to Alter or Amend is **GRANTED in part and DENIED in part.**

IT IS SO ORDERED.

The Honorable J. Michelle Childs
Presiding Judge
Fifth Judicial Circuit

This 19th day of August, 2010.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	)	CIVIL ACTION NUMBER: 07-CP-40-5252
Plaintiffs,	)	**STIPULATION TO REMOVE CASE FROM TRIAL DOCKET PURSUANT TO RULE 40(J), SCRCP**
vs.	)	
First Citizens Bank and Trust Company, Inc.,	)	
Defendant.	)	

FILED
2009 JUN -5 PM 4:07
JANE H. McBRIDE
C.C.P. & G.S.

Pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, the parties to the above-captioned case stipulate that the case, including both Plaintiffs' claims against Defendant and Defendant's counter-claim against Plaintiffs, is hereby stricken from the Trial Docket. All parties agree that if Plaintiff files a motion to restore the case within one (1) year of the date this Order is filed, the statute of limitations will be tolled as to all parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date the case is restored. Defendant additionally stipulates it will not oppose and will consent to Plaintiff's motion to restore the case provided such motion is filed within one (1) year of the date this Order is filed. Furthermore, the parties stipulate that when the case is restored, it shall be restored to the General Docket, where it will proceed as a newly-filed action on the General Docket.

[Signature Page to Follow]

WE STIPULATE AND CONSENT:

COLLINS & LACY, P.C.

By: _____

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STIPULATION TO REMOVE CASE
FROM TRIAL DOCKET PURSUANT
TO RULE 40(J), SCRCP

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
June 5, 2009

WE STIPULATE AND CONSENT:

ELLIS LAWHORNE & SIMS, P.A.

By: _____

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STIPULATION TO REMOVE CASE
FROM TRIAL DOCKET PURSUANT
TO RULE 40(J), SCRCP

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina
June 5, 2009

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc., Plaintiffs, vs. First Citizens Bank and Trust Company, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CIVIL ACTION NUMBER: 07-CP-40-5252 **CONSENT MOTION AND ORDER TO RESTORE CASE TO THE GENERAL DOCKET AS A NEWLY FILED ACTION PURSUANT TO RULE 40(J), SCRCP**

JEANETTE W. McBRIDE
CLERK OF COURT
RICHLAND COUNTY, S.C.
2009 JUN -8 PM 1:34
FILED

On June 5, 2009, the parties to the above-captioned case filed a Stipulation to Remove the Case from the Trial Docket Pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. Defendant additionally stipulated it would not oppose and would consent to Plaintiff's motion to restore the case provided such motion is filed within one (1) year of the date of filing of the Stipulation.

The parties move the Court for an Order restoring the above-captioned case, including both Plaintiffs' claims against Defendant and Defendant's counter-claim against Plaintiffs, to the General Docket. The parties have represented to the Court that they consent to the restoration of this case to the General Docket, where it will proceed as a newly filed action on the General Docket and receive a "2009" case number.

Therefore, the Court orders the above-captioned case be restored to the General Docket pursuant to Rule 40(j), SCRCP, as set forth herein.

IT IS SO ORDERED.

The Honorable James R. Barber III
Chief Administrative Judge of the Fifth Judicial Circuit

_____, South Carolina
_____, 2009

WE CONSENT:

COLLINS & LACY, P.C.

By: _____

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CONSENT MOTION TO RESTORE CASE TO TRIAL DOCKET PURSUANT TO RULE 40(J), SCRCP

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
~~October~~ December 8, 2009

WE CONSENT:

ELLIS LAWHORNE & SIMS, P.A.

By: _____

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CONSENT MOTION TO RESTORE CASE TO TRIAL DOCKET PURSUANT TO RULE 40(J), SCRCP

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina
October 20, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Edward G. McDonnell, PC, and Boomerang Title , Inc.,	)	CIVIL ACTION NUMBER:
	)	
Plaintiff,	)	SUMMONS
	)	
vs.	)	
	)	
First Citizens Bank and Trust Company, Inc.,	)	
	)	
Defendant.	)	
	)	

FILED
2007 AUG 15 AM 11:30
BARBARA A. SCOTT
C.C.C. & G.S.

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their offices at 1330 Lady Street, Suite 601, Post Office Box 12487, Columbia, South Carolina 29211, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

[Signature page follows]

Respectfully submitted,

COLLINS & LACY, P.C.

By: L. Henry McKellar

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(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

Aug 13, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Edward G. McDonnell, PC, and Boomerang Title , Inc.,	)	CIVIL ACTION NUMBER:
	)	
Plaintiff,	)	
	)	**COMPLAINT**
vs.	)	**(Jury Trial Requested)**
	)	
First Citizens Bank and Trust Company, Inc.,	)	
	)	
Defendant.	)	

FILED
2007 AUG 15 AM 11:30
BARBARA SCOTT
C.C.C. & G.S.

The Plaintiffs complaining of the Defendant, would allege as follows:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff Edward G. McDonnell, PC, is a professional corporation organized and existing under the laws of the State of South Carolina and doing business in Richland County as a law practice.
2. Plaintiff Boomerang Title, Inc. is a corporation organized and existing under the laws of the State of South Carolina and doing business in Richland County.
3. Defendant is a corporation organized and existing under the laws of South Carolina and doing business in Richland County.
4. Sometime prior to 2005, Edward G. McDonnell opened a checking account with Defendant in the name of Edward G. McDonnell, PC, account number 83045789101.
5. Sometime prior to 2005, Edward G. McDonnell opened a checking account with Defendant in the name of Boomerang Title, Inc., account number 83045792501.
6. Beginning in January 2005 and continuing on through December 2005, checks with forged and unauthorized signatures of the person authorized to sign checks on the

account were drawn on account number 83045789101 and were presented for payment to Defendant. These checks were not properly payable in that they contained forged and unauthorized signatures. Defendant paid these checks.

7. Payment of these checks which were not properly payable is a breach of the agreement between Plaintiff, Edward G. McDonnell, PC and Defendant to pay only checks which are properly payable.

8. Plaintiff Edward G. McDonnell, PC has been damaged in the amount of the checks paid with forged or unauthorized signatures in an amount exceeding Five Hundred Thousand ($500,000.00) dollars.

9. Plaintiff Edward G. McDonnell, PC is entitled to a judgment against Defendant for the amount of checks improperly paid against the account plus prejudgment interest.

FOR A SECOND CAUSE OF ACTION

10. Each and every allegation of the previous paragraphs is re-alleged herein.

11. Beginning in January 2005 and continuing on through December 2005, checks with forged and unauthorized signatures of the person authorized to sign checks on the account were drawn on account number 83045792501 and were presented to Defendant for payment. These checks were not properly payable in that they contained forged and unauthorized signatures. Defendant paid these checks.

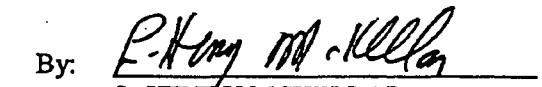
12. Payment of these checks which were not properly payable is a breach of the agreement between Plaintiff, Boomerang Title, Inc. and Defendant to pay only checks which are properly payable.

13. Plaintiff Boomerang Title, Inc. has been damaged in the amount of the checks paid with forged or unauthorized signatures in an amount exceeding Two Hundred Thousand ($200,000.00) dollars.

14. Plaintiff Boomerang Title, Inc. is entitled to a judgment against Defendant for the account of check improperly paid against the account plus prejudgment interest.

WHEREFORE, having fully set forth its Complaint herein, the Plaintiffs pray for judgment against the Defendant for the face amount of the checks at issue, consequential damages, punitive damages where applicable, prejudgment interest from the date each check was deposited, the costs of this action, and for whatever other relief the Court deems necessary and proper.

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

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ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
Aug 13, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title , Inc.,	)	CIVIL ACTION NUMBER: 07-CP-40-5252
Plaintiffs,	)	**AMENDED COMPLAINT (Jury Trial Requested)**
vs.	)	
First Citizens Bank and Trust Company, Inc.,	)	
Defendant.	)	

RICHLAND COUNTY
FILED
2007 AUG 21 AM 10:33
BARBARA A. SCOTT
C.C.C. & G.S.

The Plaintiffs complaining of the Defendant, would allege as follows:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, is a professional corporation organized and existing under the laws of the State of South Carolina and doing business in Richland County as a law practice.

2. Plaintiff Boomerang Title, Inc. is a corporation organized and existing under the laws of the State of South Carolina and doing business in Richland County.

3. Defendant is a corporation organized and existing under the laws of South Carolina and doing business in Richland County.

4. Sometime prior to 2005, Edward G. McDonnell opened a checking account with Defendant in the name of Edward G. McDonnell, PC, account number 83045789101.

5. Sometime prior to 2005, Edward G. McDonnell opened a checking account with Defendant in the name of Boomerang Title, Inc., account number 83045792501.

6. Sometime prior to 2005, Edward G. McDonnell opened a checking account with Defendant in the name of Edward G. McDonnell, PC, IOTA, account number 891001421901, which was a trust account for his law practice.

7. Beginning in January 2005 and continuing on through December 2005, checks with forged and unauthorized signatures of the person authorized to sign checks on the account were drawn on account number 83045789101 and were presented for payment to Defendant. These checks were not properly payable in that they contained forged and unauthorized signatures. Defendant paid these checks.

8. Payment of these checks which were not properly payable is a breach of the agreement between Plaintiff, Edward G. McDonnell, PC and Defendant to pay only checks which are properly payable.

9. Plaintiff Edward G. McDonnell, PC has been damaged in the amount of the checks paid with forged or unauthorized signatures in an amount exceeding Five Hundred Thousand ($500,000.00) dollars.

10. Plaintiff Edward G. McDonnell, PC is entitled to a judgment against Defendant for the amount of checks improperly paid against the account plus prejudgment interest.

FOR A SECOND CAUSE OF ACTION

11. Each and every allegation of the previous paragraphs is re-alleged herein.

12. Beginning in January 2005 and continuing on through December 2005, checks with forged and unauthorized signatures of the person authorized to sign checks on the account were drawn on account number 83045792501 and were presented to Defendant for payment. These checks were not properly payable in that they contained forged and unauthorized signatures. Defendant paid these checks.

13. Payment of these checks which were not properly payable is a breach of the agreement between Plaintiff, Boomerang Title, Inc. and Defendant to pay only checks which are properly payable.

14. Plaintiff Boomerang Title, Inc. has been damaged in the amount of the checks paid with forged or unauthorized signatures in an amount exceeding Two Hundred Thousand ($200,000.00) dollars.

15. Plaintiff Boomerang Title, Inc. is entitled to a judgment against Defendant for the account of check improperly paid against the account plus prejudgment interest.

FOR A THIRD CAUSE OF ACTION

16. Each and every allegation of the previous paragraphs is re-alleged herein.

17. During the year 2005, checks were forged and unauthorized signatures of the person authorized to sign checks on this trust account were drawn on account number 89100142901 and presented to the Defendant for payment. Defendant paid these checks.

18. Payment of these checks which were not properly payable is a breach of the agreement between Plaintiff Edward G. McDonnell, PC IOTA and Defendant to pay only checks which are properly payable.

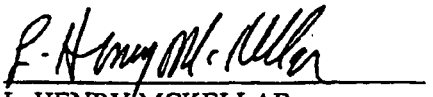
19. Plaintiff Edward g. McDonnell, PC IOTA has been damaged in the amount of the checks paid with forged or unauthorized signatures.

20. Plaintiff is entitled to a judgment against Defendant for the account of check improperly paid against the account plus prejudgment interest.

WHEREFORE, having fully set forth its Complaint herein, the Plaintiffs pray for judgment against the Defendant for the face amount of the checks at issue, consequential damages, punitive damages where applicable, prejudgment interest from the date each check was

deposited, the costs of this action, and for whatever other relief the Court deems necessary and proper.

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

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ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

August 21, 2007

STATE OF SOUTH CAROLINA)		IN THE COURT OF COMMON PLEAS
)		
COUNTY OF RICHLAND)		CASE NO. 2007-CP-40-5252
MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	
Plaintiffs,	)	
-vs-	)	ANSWER AND COUNTERCLAIM AGAINST ALL PLAINTIFFS
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	(jury trial demanded)
Defendants.	)	

Defendant, First Citizens Bank And Trust Company, Inc., ("First Citizens"), answering the Amended Summons and Amended Complaint ("Complaint") of the above-identified Plaintiffs ("Plaintiff" or "Plaintiffs") filed August 21, 2007, herein respectfully responds with its Answer and Counterclaims against all Plaintiffs and would show this Court as follows:

FOR A FIRST DEFENSE

1. Defendant First Citizens denies every allegation not hereinafter specifically admitted.

2. Answering Paragraph 1 of the Plaintiffs' Amended Complaint, First Citizens, on information and belief, would admit the allegations of this paragraph.

3. Answering Paragraph 2 of the Plaintiffs' Amended Complaint, First Citizens, on information and belief, would admit the allegations of this paragraph.

4. Answering Paragraph 3 of the Plaintiffs' Amended Complaint, First Citizens, would admit the allegations of this paragraph.

5. Answering Paragraph 4 of the Plaintiffs' Amended Complaint, First Citizens, on information and belief, would admit the allegations of this paragraph.

6. Answering Paragraph 5 of the Plaintiffs' Amended Complaint, First Citizens, on information and belief, would admit the allegations of this paragraph.

7. Answering Paragraph 6 of the Plaintiffs' Complaint, First Citizens, on information and belief, would admit the allegations of this paragraph.

8. Answering Paragraph 7 of the Plaintiffs' Complaint, First Citizens would admit so much of this paragraph as alleges that it paid checks drawn on the referenced account number in 2005. The remaining allegations of this Paragraph contain legal conclusions for which no response is required. To the extent any response is required to the allegations of these paragraphs, First Citizens denies same.

9. Answering Paragraph 8 of the Plaintiffs' Complaint, this Paragraph contains legal conclusions for which no response is required. To the extent any response is required to the allegations of these paragraphs, First Citizens denies same.

10. Answer Paragraph 9 of the Plaintiffs' Complaint, the allegations of this Paragraph are denied.

11. Answer Paragraph 10 of the Plaintiffs' Complaint, the allegations of this Paragraph are denied.

PLAINTIFFS' SECOND ALLEGED CAUSE OF ACTION

12. Answering Paragraph 11, First Citizens realleges its responses to the above Paragraphs as if fully stated herein.

13. Answering Paragraph 12, First Citizens would admit so much of this paragraph as alleges that it paid checks drawn on the referenced account number in 2005. The remaining allegations of this Paragraph contain legal conclusions for which no response is required. To the extent any response is required to the allegations of these paragraphs, First Citizens denies same.

14. Answering Paragraph 13, this Paragraph contains legal conclusions for which no response is required. To the extent any response is required to the allegations of these paragraphs, First Citizens denies same.

15. Answer Paragraph 14 of the Plaintiffs' Amended Complaint, the allegations of this Paragraph are denied.

16. Answer Paragraph 15 of the Plaintiffs' Amended Complaint, the allegations of this Paragraph are denied.

PLAINTIFFS' THIRD ALLEGED CAUSE OF ACTION

17. Answering Paragraph 16, First Citizens realleges its responses to the above Paragraphs as if fully stated herein.

18. Answering Paragraph 17, First Citizens would admit so much of this paragraph as alleges that it paid checks drawn on the referenced account number in 2005. The remaining allegations of this Paragraph contain legal conclusions for which no response is required. To the extent any response is required to the allegations of these paragraphs, First Citizens denies same.

19. Answering Paragraph 18, this Paragraph contains legal conclusions for which no response is required. To the extent any response is required to the allegations of these paragraphs, First Citizens denies same.

20. Answer Paragraph 19 of the Plaintiffs' Amended Complaint, the allegations of this Paragraph are denied.

21. Answer Paragraph 20 of the Plaintiffs' Amended Complaint, the allegations of this Paragraph are denied.

22. Answering the WHEREFORE Paragraph(s) following numbered Paragraph 20, First Citizens responds and states that the allegations of this Paragraph contain legal conclusions for which no response is required. To the extent any response could be required to the allegations of this Paragraph, First Citizens denies. First Citizens further responds and denies Plaintiffs are entitled to judgment, damages, interests, costs, attorneys' fees, or any other relief as purportedly sought in this action.

FOR A SECOND DEFENSE AND BY WAY OF THIRD-PARTY CLAIM

(Breach of Contract and Contractual Indemnity Against all Plaintiffs / Account Holders)

23. First Citizens realleges its responses to the above Paragraphs as if fully stated herein.

24. Plaintiffs opened the accounts put at issue in this action with First Citizens.

25. By opening these accounts, Plaintiffs established a relationship with First Citizens and were contractually bound to hold harmless and indemnify First Citizens for any legal expenses incurred by First Citizens related to these accounts.

26. First Citizens made all periodic accounts statements for these accounts available to all Plaintiffs.

27. Plaintiffs failed to fulfill their duties as set forth herein to review the periodic accounts statements made available to them by First Citizens.

28. As a result of these and other failures by Plaintiffs and Plaintiffs' attempts herein to hold First Citizens responsible for the actions of Plaintiffs' employee and authorized agent in spite of Plaintiffs' failure to review the subject periodic accounts statements, First Citizens has

incurred unnecessary legal expenses, including attorneys' fees and costs related the Plaintiffs' accounts for which Plaintiffs must indemnify and reimburse to First Citizens under the terms of the Rules and Regulations governing the subject accounts.

FOR A THIRD DEFENSE

29. The Plaintiffs are not entitled to recover in this action against First Citizens because the party alleged to have prepared and negotiated the improper checks was an employee and authorized agent of the Plaintiffs and the Plaintiffs did not fulfill their duties to review the periodic accounts statements made available to them by First Citizens and did not report the allegedly improper items with the time period set forth in the S.C. Code or the governing deposit account agreement Rules and Regulations, and therefore cannot maintain or prevail in this action against Defendant.

FOR A FOURTH DEFENSE

30. Defendant acted in good faith, in a reasonable commercial manner, and in accordance with reasonable commercial standards in accepting for deposit all checks that are referenced in the Complaint.

FOR A FIFTH DEFENSE

31. The Plaintiffs are not entitled to recover against First Citizens because these Plaintiffs all failed in their statutory, contractual, common law, and other applicable duties to inspect their periodic accounts statements made available to them by First Citizens.

FOR A SIXTH DEFENSE

32. The claims in Plaintiffs' complaint must fail because of Plaintiffs' grossly negligent conduct in failing to review the periodic accounts statements made available to them by First Citizens.

FOR A SEVENH DEFENSE

33. Some or all of the Plaintiffs' claims are barred by the applicable statutes of limitations, and other reporting requirements for the items attempted to be put at issue by the Plaintiffs in this action.

FOR AN EIGHTH DEFENSE

34. The person or persons accused of preparing and/or negotiating the subject items or checks was an authorized agent or employee of the Plaintiff or Plaintiffs, and Plaintiffs are bound by their actions with respect to the instruments that were entrusted to their care as a part of their employment or other agency relationship with Plaintiffs.

FOR A NINTH FOURTH DEFENSE

35. Plaintiffs by their actions consented to the conduct as complained of in their complaint.

FOR A TENTH DEFENSE

36. Plaintiffs' causes of action are barred by the doctrines of waiver, estoppel, and laches.

FOR AN ELEVENTH DEFENSE

37. Plaintiffs' claims must be dismissed because First Citizens used ordinary care in handling all items presented related to the accounts put at issue in this action.

FOR A TWELFTH DEFENSE

38. Plaintiffs' claims must be dismissed because First Citizens acted in good-faith, in a reasonable commercial manner, and in accordance with reasonable commercial standards in accepting for deposit all checks presented related to the accounts put at issue in this action.

FOR A THIRTEENTH DEFENSE

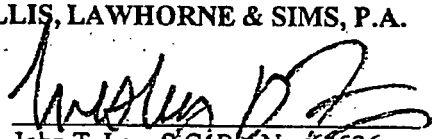
39. Some or all of the Plaintiffs' claims must fail because the Complaint fails to state a claim and must be dismissed under Rule 12.

FOR A FOURTEENTH DEFENSE

40. First Citizens reserves the right to assert any additional affirmative defenses and matters of avoidance, including specifically but not limited to claims under Rules of Civil Procedure 13, 14, and 19, as may be disclosed during additional investigation and discovery.

WHEREFORE, having fully answered Plaintiffs' Complaint, First Citizens respectfully requests that the Complaint be dismissed, with prejudice, that judgment be entered in favor of First Citizens for its legal expenses, and for such other relief as this Court may deem just and proper.

ELLIS, LAWHORNE & SIMS, P.A.



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Attorneys for Defendant and Counterclaimant First Citizens Bank and Trust Company, Inc.

Columbia, South Carolina

September 27, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO. 2007-CP-40-5252

MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	**CERTIFICATE OF SERVICE**
Plaintiffs,	)	
-vs-	)	
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	
Defendant.	)	

The undersigned does certify that on the 27th day of September, 2007, that he did mail by U.S. Postal Service, regular mail, a copy of the Answer and Counterclaim, to the following:

L. Henry McKellar, Esquire
Lisa A. Delzotti, Esquire
Collins & Lacy
Post Office Box 12487
Columbia, SC 29211

Wesley D. Few

STATE OF SOUTH CAROLINA)		IN THE COURT OF COMMON PLEAS
)		
COUNTY OF RICHLAND)		CASE NO. 2007-CP-40-5252
MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	
Plaintiffs,	)	
-vs-	)	NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	
Defendants.	)	

TO: L. HENRY MCKELLAR, ESQUIRE, AND LISA A. DELZOTTI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE that the Defendant, First Citizens Bank and Trust Company, Inc. ("First Citizens"), through its undersigned counsel on the tenth (10th) day after service hereof, at 10:00 a.m., or as soon thereafter as may be convenient to Court and counsel, at the Richland County Courthouse, Columbia, South Carolina, will move before the presiding judge of the Court of Common Pleas for an Order pursuant to Rule 56, SCRCP granting First Citizens summary judgment on the Plaintiffs' claims on the grounds that the undisputed deposition testimony and discovery show that there is no genuine issue as to any material fact in this case because Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406, because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens,

precludes them from asserting any claims against First Citizens under South Carolina law, and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code § 36-4-406(d)(2).

This Defendant specifically reserves the right to add additional grounds, as necessary, and to respond to any relevant issues raised by Plaintiffs. This Motion may also be supported by a memorandum to be filed in the future and any such matters as the court may deem just and proper. This Defendant specifically reserves the right to supplement this summary judgment in the future with affidavits, deposition excerpts, or other information.

This Defendant's Motion is based on the pleadings filed herein, applicable case and statutory law and the South Carolina Rules of Civil Procedure.

Respectfully submitted,

Wesley D. Few
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Attorneys for Defendant First Citizens Bank and Trust Company, Inc.

May 27, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO. 2007-CP-40-5252

MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	**CERTIFICATE OF SERVICE**
Plaintiffs,	)	
-vs-	)	
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	
Defendant.	)	

The undersigned does certify that on May 27, 2009, that she did cause to have served by hand delivery, a copy of Defendant's Notice of Motion and Motion for Summary Judgment, to the following:

Henry McKellar
Collins & Lacy
1330 Lady Street, 6th Floor
Columbia, South Carolina 29202

Monica Mulvey Mcgee
Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO. 2009-CP-40-8766R

MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC. Plaintiffs, -vs- FIRST CITIZENS BANK AND TRUST COMPANY, INC., Defendants.	)	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

FILED
2010 MAR 10 PM 2:16
JEANETTE W. WALKER
C.C.P. & G.S.

Defendant First Citizens Bank and Trust Company, Inc., hereby files its Memorandum in support of its Motion for Summary Judgment as to all claims of the Plaintiffs in this action.

BACKGROUND

At all times relevant to this action, Plaintiff McDonnell and Associates, PA, f/k/a McDonnell Law Firm, A, f/k/a Edward G. McDonnell, PC, ("McDonnell") and Boomerang Title, Inc. ("Boomerang") (collectively "Plaintiffs") maintained three checking accounts with Defendant First Citizens Bank and Trust Company, Inc. ("First Citizens Bank" or "Bank"): (i) account number 83045789101 in the name of Edward G. McDonnell, PC ("Operating Account") opened on or about June 24, 2003, (ii) account number 83045792501 in the name of Boomerang Title, Inc. ("Boomerang Account") opened on or about June 24, 2003, and (iii) account number 891001421901 in the name of Edward G.

McDonnell, PC, IOLTA ("IOLTA Account") opened on or about July 17, 2003 (collectively "Accounts").

Beginning on October 1, 2004, Plaintiffs' employee Anna Hoormann ("Hoormann"), began forging and cashing seventy-seven (77) checks drawn on the Operating Account totaling $488,760.58. Hoormann made and negotiated fifteen (15) checks on her behalf from the Boomerang Account totaling $205,196.00 as well as two checks drawn on Plaintiffs' IOLTA Account totaling $73,923.95. According to Plaintiffs' lawsuit, Hoormann forged and negotiated ninety-four (94) checks totaling $767,880.53. These activities continued undetected by Plaintiffs for well over a year, until December 23, 2005, when First Citizens notified Edward McDonnell that a check drawn off McDonnell's IOLTA Account had been returned for insufficient funds.

On March 17, 2008 Anna Hoormann was convicted of Breach of Trust for her role in forging the checks at issue. Hoormann paid Plaintiff over $23,000.00 and also gave him jewelry she alleges is valued at approximately $80,000 purchased from Gudmundsun and Buyck Jewelers on Devine Street in Columbia. On August 15, 2007 Plaintiffs brought suit against First Citizens, alleging the Bank improperly paid the forged checks. Plaintiffs admit they did not review their periodic statements from First Citizens. Plaintiffs admit and allege that Anna Hoormann alone forged all the checks put at issue or improperly paid in this lawsuit. Plaintiffs never reported any alleged forged checks to First Citizens until after First Citizens notified Plaintiffs of an "NSF" on their IOLTA Account on December 23, 2005.

This case was up for trial on June 8, 2009. The week before trial, Plaintiffs named Carl Manheim as their expert witness, presumably on the issue of "ordinary care." First Citizens moved to exclude thie witness on grounds of prejudice and for his lack of

qualifications as he had not been active in banking during the relevant 2004-2005 time period. Rather than taking Mr. Manheim's deposition on Friday, June 5, 2009, the parties dismissed the case under Rule 40(j). On December 16, 2009, Plaintiffs restored the case to the docket. First Citizens then requested documents and other information related to Plaintiff's expert. After receiving no response to these requests, First Citizens notice the deposition of Mr. Manheim for February 25, 2010. By letter dated February 18, 2010, Plaintiffs advised they were withdrawing their designation of Mr. Manheim as an expert witness in this case. Plaintiffs have not designated a replacement expert.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c). In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 158 (Ct. App. 2005). All ambiguities, conclusions, and inferences rising from the evidence must be construed most strongly against the moving party. Id. at 325, 608 S.E.2d at 159. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact."

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing" -that is, pointing out to the [trial] court- that there is an absence of evidence to support the nonmoving party's case.' ". Id. (alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). "The moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim.'" Id. (quoting Celotex, 477 U.S. at 323,); see also Richardson v. State-Record Co., 330 S.C. 562, 499 S.E.2d 822 (Ct.App.1998).

Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. The South Carolina Supreme Court, clarifying prior case law, has held that in certain cases a nonmoving party must present more than a mere scintilla of evidence to survive summary judgment:

> Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.

Hancock v. Mid-South Management Co., Inc., 673 S.E.2d 801, 2008 WL 5545318 at *1 (S.C. 2009). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).

ANALYSIS

Defendant's Motion for Summary Judgment should be granted as to all causes of action because (I) Plaintiffs did not report the forgeries within the one year limitation proscribed by section 36-4-406(f) of the South Carolina Code (1976), and because Plaintiffs did not report the forgeries within the fourteen (14) day time period set forth in the deposit agreement, (II) Plaintiffs did not exercise reasonable care in examining their bank statements by failing to review their periodic accounts statements from First Citizens and have no evidence that First Citizens failed to exercise ordinary care in paying the items, and because (III) Plaintiffs, as an issuer of the checks in question, are precluded from bringing a suit for conversion against the Bank.

(I) FIRST CITIZENS BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE PLAINTIFFS FAILED TO REPORT THE ALLEGED FORGERIES WITHIN ONE YEAR AS REQUIRED BY S.C. CODE § 36-4-406(4)

Section 36-4-406(4) of the South Carolina Code in effect at the times relevant to this litigation provided:

> Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (Subsection (a)) discover and report the customer's unauthorized signature on or any alteration of the item is precluded from asserting against the bank the unauthorized signature or alteration.

S.C. CODE ANN. §36-4-406(4) (1976), amended by S.C. CODE ANN. §36-4-406(f) (2008). Anna Hoormann began forging checks on the Accounts as early as October 1, 2004. In his deposition, Plaintiff Edward McDonnell identified a forged check signed by Anna Hoormann on that date. (See Deposition Transcript of Edward G. McDonnell page 212, line 20 to page 215, line 10, attached hereto as **Exhibit One**). Anna Hoormann also

admitted that she began forging checks on Plaintiffs' Accounts as early as October 1, 2004. (See Deposition of Hoormann, page 20, lines 16 to 21, and page 110, line 24 t opage 111, line 10, attached hereto as **Exhibit Two**). Further, Plaintiffs identified in their responses to Defendant's Request for Production the same check (check no. 1354) as a check forged by Anna Hoormann that serves as part of the basis for their alleged damages in this case. (See Plaintiffs' Responses to Defendant's Request for Production # 1; attached hereto as **Exhibit Three**).

Plaintiffs did not discover and report these forgeries until after December 23, 2005 – and only did so then because the Bank notified Plaintiffs that another check drawn on the McDonnell Firm IOLTA Account was being returned for insufficient funds. Plaintiffs received a bank statement from First Citizens that would have put Plaintiff McDonnell on notice of the alleged October 2004 forgeries in November 2004. See Deposition of Hoormann, pages 110-111 (**Exhibit Two**). At least 13 months passed between Plaintiffs' notice of the first alleged forgery and the date Plaintiffs notified First Citizens. Accordingly, section 36-4-406(d) of the South Carolina Code completely bars this action.

In his deposition, Edward McDonnell stated that First Citizens mailed periodic statements of the accounts to Plaintiffs in the normal course of their business relationship. See Deposition of McDonnell, page 234, line 25 to page 253, line 4, (**Exhibit One**). While Plaintiffs allege they experienced some minor delay receiving their mail at some point in August of 2004, there is no evidence that any of the bank statements in question were subject to this delay, or that Plaintiffs' notice of the first alleged forged item (check

no. 1354) on October 1, 2004 was within one year of December 23, 2005 by any such delay. See Plaintiffs0001, attached here as **Exhibit Four**).

Plaintiffs must notify the Bank within one year from that point forward in order to recover. S.C. CODE ANN. §36-4-406(4) (1976), amended by S.C. CODE ANN. §36-4-406(f) (2008). This requirement applies "without regard to care or lack of care of either the customer or the bank." Id. Plaintiffs failed to notify First Citizens within one year of the time that the bank statement was made available to Plaintiffs as required by S.C. Code Ann. § 36-4-406(4). Thus Plaintiffs are "precluded from asserting against the bank the unauthorized signature or alteration." S.C. CODE ANN. §34-4-406(4) (1976), amended by S.C. CODE ANN. §36-4-406(f) (2008). This limitations period bars Plaintiffs claim in its entirety, notwithstanding any care or alleged lack thereof by either party. Id. Therefore, the court must grant summary judgment based on Plaintiffs' failure to comply with section 34-4-406.

Still further, Section 6, paragraph 4 of the deposit agreement, or "Rules and Regulations" between Plaintiffs and First Citizens, a copy of which is attached hereto and incorporated herein as **Exhibit Five**, required Plaintiffs to report any unauthorized signatures or alterations within 14 days of receipt of the statements. This time period was also proscribed under South Carolina law in § 36-4-406, which at that time provided that a customer had a responsibility to promptly examine his statements and timely notify the bank of any problems. See S.C. Code Ann. §36-4-406 (1976), amended by S.C. CODE ANN. §36-4-406 (2008). Just as Plaintiff failed to examine his statements and notify First Citizens of any unauthorized signatures within one year of receipt of the statements as required by statute, they also failed to notify First Citizens within the 14 day period

provided for in the deposit agreement. For these reasons, Plaintiffs are precluded from asserting any unauthorized signature or alteration against First Citizens.

(II) FIRST CITIZENS BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE PLAINTIFFS FAILED TO EXERCISE REASONABLE CARE, AND FIRST CITIZENS USED ORDINARY CARE AND PAID ALL ITEMS IN GOOD FAITH

For each account, Plaintiffs received a copy of First Citizens Bank's "Rules and Regulations: Checking Accounts, Savings Accounts, and Money Market Accounts," ("Rules and Regulations") See Rules and Regulations (Exhibit Five). Plaintiffs acknowledged receipt of these Rules and Regulations when opening these three accounts as evidenced by their execution of "Signature Cards" for the accounts, a copy of which are attached hereto and incorporated herein as Exhibit Six. The Rules and Regulations set forth duties of both the bank and the customer. Paragraph six (6) outlines the responsibilities that the bank and the customer have regarding periodic statements on the accounts. In the Rules and Regulations, Plaintiffs agreed that:

> [u]pon receipt (or *availability*) of your statement and cancelled items, you agree that you will promptly examine your statement and items and will notify us [bank] if there are any incorrect or unauthorized signatures, transactions, or alterations.

See Rules and Regulations, page 4, (Exhibit Five) (emphasis in original). The parties further agreed that fourteen (14) days is "a reasonable amount of time for [customer] you to examine your statement and notify us [bank] of unauthorized signatures or alteration." When the deposit agreements were executed, this time period reflected the time period contemplated by the version of the South Carolina Code in effect at the time. The Code provided that a customer who, like Plaintiffs, failed to notify the bank of unauthorized signatures was precluded from holding the bank liable for

> an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

S.C. CODE ANN. §36-4-406(2)(b) (1976), amended by S.C. CODE ANN. §36-4-406(d)(2) (2008) (underlining emphasis added). In 2005, a court analyzing the Uniform Commercial Code, upon which the South Carolina Code is based, confirmed this two week time limitation, stating that "a reasonable period for such notification is defined as no more than 14 days." Haber v. Citibank, N.A., 808 N.Y.S.2d 917, 2005 WL 2441453. Anna Hoormann is the only forger of the ninety-four (94) checks put at issue by Plaintiffs in this lawsuit. (See Plaintiffs' Response to Defendant's Interrogatory No. 15, attached hereto as **Exhibit Seven**); (See Also Deposition of McDonnell, page 62, line 24 to page 63, line 3, (**Exhibit One**).

Thus, both the Rules and Regulations applicable to the accounts as well as the South Carolina Code of Laws in effect at the time of their opening place upon customers like Plaintiffs the duty "to exercise reasonable care and promptness to examine the [account] statement and items [which are provided by the bank] to discover his unauthorized signature." S.C CODE ANN. §36-4-406(1), amended by S.C. CODE ANN. §36-4-406(a) (2008).

By Plaintiffs' own allegations, Anna Hoormann's forgeries constitute an "unauthorized signature" that Plaintiffs should have discovered upon examination of their account statements. These facts establish that Plaintiffs failed to exercise the required reasonable care regarding statements from First Citizens, which is the reason they failed

to discover the unauthorized signatures. In an earlier deposition, Plaintiff Edward McDonnell even admits that once he finally took time to review this statements, he discovered the scope of the alleged forgeries by Anna Hoormann. See Transcript of Deposition of Edward G. McDonnell, McDonnell and Associates, et al. v. Carolina Legal Associates, Inc., 2007-CP-40-6854 ("CLA Action"), page 74, lines 20-23 attached hereto as **Exhibit Eight.**

Edward McDonnell admitted that he did not review the monthly statements from the bank on a regular basis. See McDonnell Deposition in CLA Action, page 49, line 23 to page 51, line 16, **(Exhibit Eight)**. Not only did Edward McDonnell fail to examine his statements, but he also put his employee Anna Hoormann, the person alleged to be solely responsible for the forgeries at issue, in charge of receiving, reviewing, and filing bank the statements, including the IOLTA statements. See McDonnell Deposition in CLA Action, page 51, lines 14-18 **(Exhibit Eight)**. Anna Hoormann shared an office with Edward McDonnell and had unlimited access to the cabinets that held the Plaintiffs' financial records. See McDonnell Deposition in CLA Action, page 70, lines 5 to 20 **(Exhibit Eight)**.

As the office manager for Plaintiffs, Hoormann also had the responsibility of preparing checks for the law firm. See McDonnell Deposition in CLA Action, page 49, lines 6 to 15 **(Exhibit Eight)**. This delegation to staff – in addition to not reviewing their periodic statements - on the part of the Plaintiffs constitutes the lack of reasonable care that precludes Plaintiffs from asserting claims against the Bank under the Code. See Read v. South Carolina Nat'l Bank, 286 S.C. 534, 541, 335 S.E.2d 359, 363 (1985) ("The evidence in this case clearly presents a situation where Read's negligence as a matter of

law substantially contributed to the forgeries. He was negligent in failing to maintain proper control over the signature stamp, he allowed the same person who had possession of the checkbook to reconcile the statements with no supervision or verification and he failed to examine his bank statements.")

Prior even to Anna Hoormann's employment with Plaintiff, Plaintiff was aware of potential problems with his IOLTA Account. After a check was returned on that Account December of 2003 and another again in January of 2004, Sallie Delvecchio, Quality Assurance Representative for LandAmerica Title Company performed a Quality Assurance Review on Plaintiff's Account. Documents outlining the results of that review are attached hereto and incorporated by reference herein as **Exhibit Nine**. In those documents, Ms. Delvecchio notes that, prior to the incident that prompted her review, "the trust account was not being reconciled." (**Exhibit Nine**). Thus, as far back as 2003 Plaintiffs failed to exercise reasonable care with respect to its accounts, and its claims against First Citizens are therefore barred as a matter of law.

In addition to the customer's duty to examine statements and returned items that Plaintiffs failed to meet, a second duty is imposed upon the customer - the duty to "notify the bank promptly after discovery" of any alleged forgeries. S.C CODE ANN. §36-4-406(1), amended by S.C. CODE ANN. §36-4-406(a) (2008). First Citizens Bank's Rules and Regulations also state that a customer "will notify us [bank] if there are any incorrect or unauthorized signatures, transactions, or alterations." See Rules and Regulations, pages 3-4, (**Exhibit Five**). A bank customer who fails to examine his account statements, and who as a result of such failure does not detect his employee's ongoing embezzlement, cannot hold the bank liable for

> an unauthorized signature . . . by the same wrongdoer on any item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days.

S.C. CODE ANN. § 36-4-406(2), amended by S.C. CODE ANN. §36-4-406(d) (2008) (emphasis added). See Sabatino v. Atlantic Sav. Bank, F.S.B, 314 S.C. 402, 444 S.E.2d 537 (Ct. App. 1994) (holding "Section 36-4-406 creates an affirmative duty on the part of the customer to discover and report any unauthorized signatures. The time limits imposed in subsection (4) for making a claim against the Bank start at "the time the statement and items are made available to the customer.") See also Read, 286 S.C. at 541, 335 S.E.2d at 363 (precluding same wrongdoer forgeries where first in a series of forgeries occurred in September, 1980, and was included in the statement mailed on October 1, and the forgeries were not reported to bank until January 26, 1981).

The repeated actions of Anna Hoormann qualify as forgeries perpetrated by "the same wrongdoer," meaning Plaintiffs' failure to "catch" the first forgery within one year (or fourteen days) of receiving the statements prevents the customer from bringing a claim against the bank for any subsequent forgeries by the same employee. Official Comment 1 to section 36-4-406(2), which was in effect at all times relevant to this lawsuit, provides:

> This rule follows substantial case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank traceable to the customer's failure to exercise reasonable care in examining his statement and notify the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the requirements of subsection (1) is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his

> statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items. Hence, the rule of subparagraph (b) is prescribed and to avoid dispute a specific time limit for action by the customer is designated, namely fourteen calendar days.

S.C CODE ANN. §36-4-406 (cmt. 1) (1976), amended by S.C. CODE ANN. §36-4-406 (2008) (underlining emphasis added).

The first forged item from October 1, 2004 cited above (check no. 1354, See **Exhibit Four**) – which First Citizens paid in October of 2004 and reported to Plaintiffs shortly thereafter in November of 2004 – was not identified and reported within the fourteen day limitations period, or even within one year. In fact, Plaintiffs never reported any of the unauthorized checks Anna Hoormann repeatedly wrote from October 1, 2004 through 2005 to the bank. It was only upon notification to Plaintiffs by the Bank on December 23, 2005 that the Plaintiffs discovered the check-writing practices of Hoormann. See Deposition of McDonnell, page 32, lines 2 to 16, **(Exhibit One)**. Plaintiffs' own negligence as a matter of law substantially contributed to the forgeries at issue in this lawsuit. Plaintiffs also failed to maintain proper control over the check writing and reconciling operations, allowing Anna Hoormann – who had access to checks on the accounts – to receive, review and reconcile statements. See McDonnell Deposition in CLA Action, page 51, lines 14-18 **(Exhibit Eight)**. Hoormann had unfettered access to Plaintiffs' records and the authority to create checks on Plaintiffs accounts. See McDonnell Deposition in CLA Action, pages 49 and 70, **(Exhibit Eight)**. Further, Plaintiffs failed to examine their bank statements themselves to discover any forgeries. See Read v. South Carolina Nat'l Bank, 286 S.C. 534, 541, 335 S.E.2d 359, 363 (1985) ("In viewing all of the evidence in the light most favorable to [p]laintiff, the only

inference that can be drawn from undisputed facts is that [plaintiff's] negligence substantially contributed to the making of the unauthorized signatures."). As Plaintiffs failed to notify the Bank of Hoormann's alleged forgeries on the Operating Account, section 36-4-406 bars subsequent claims for the acts of Hoormann – the same wrongdoer – on all of Plaintiffs' accounts. See Read, 286 S.C. 534, 335 S.E.2d 359 (holding preclusion of claims against bank under same wrongdoer provision applied to numerous accounts with different account holders.) This preclusion is not limited in scope, and applies to "any other item paid in good faith by the bank after the first item and statement was available to the customer." S.C. Code Ann. §36-4-406(2)(b) (1976), amended by S.C. CODE ANN. §36-4-406(d)(2) (2008).

Beginning October 1, 2004 Anna Hoormann forged at least ninety-four (94) checks on Plaintiffs' accounts. (See Deposition of Hoormann, page 13, lines 1 to 5, attached hereto as **Exhibit Two**). Hoormann committed fraudulent acts against Plaintiffs for well over a year before Plaintiffs became aware of the perpetration. Plaintiffs did not learn of the forgeries by their own diligence and only realized the forgeries were happening because the Bank notified them of a problem on December 23, 2005. See McDonnell Deposition, page 32, lines 11-16, (**Exhibit One**). Had First Citizens not contacted Plaintiffs, Anna Hoormann might have gone on forging checks indefinitely. That is the very situation that the Official Comment stated the UCC was designed to prevent: the "opportunity present to the wrongdoer to repeat the misdeeds." S.C. Code Ann. §36-3-406 (cmt. 3) (1976), amended by S.C. CODE ANN. §36-4-406 (cmt. 2) (2008). Thus, Plaintiffs' own negligence and failure to exercise reasonable care absolutely bars any claims against First Citizens. Plaintiffs failed to report the unauthorized signatures *at*

all, much less within fourteen days or even one year. Therefore, Plaintiffs claims against the Bank must be dismissed as a matter of law under S.C. Code § 36-4-406, and applicable case law as cited herein.

(III) FIRST CITIZENS BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE PLAINTIFFS, AS ISSUERS OF THE CHECKS IN QUESTION, ARE BARRED FROM BRINGING AN ACTION FOR CONVERSION AGAINST THE BANK

Under South Carolina law, the issuer of an instrument or check cannot maintain an action in conversion. S.C. Code Ann. §36-3-420(a) ("an action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument"). The Code defines the "issuer" as "a maker or drawer of an instrument." S.C. Code Ann. § 36-3-105(c). Plaintiffs in this action are thus issuers of the instruments in question. Further, an instrument is converted when a "bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. S.C. Code Ann.§36-3-420(a). In their Complaint, Plaintiffs allege that the Bank is liable for conversion because the Bank allegedly made payment on checks that "were not properly payable in that they contained forged and unauthorized signatures." Complaint, ¶¶ 7, 12, 17. Plaintiffs are the drawers on the checks they allege the Bank converted, and thus as issuers are barred as a matter of law from bringing a conversion action under § 36-3-420(a). As the South Carolina Reporter's Comments to this section clarify, "the issuer or acceptor of an instrument may not maintain an action for conversion."

CONCLUSION

Plaintiffs failed to report any alleged forged or unauthorized items to First Citizens Bank within one year as required by S.C. Code § 36-4-406, to exercise

reasonable care in examining statements from the bank and notifying the bank of any alleged forgeries or unauthorized items. Specifically, Plaintiffs did not review statements, nor did Plaintiffs identify or report any forgeries or alleged unauthorized items as required by applicable law. First Citizens acted in good faith and used ordinary care in paying all checks put at issue by Plaintiff. Therefore, Plaintiffs are precluded from claiming the Bank is responsible for any of the items alleged in the Complaint. As set forth herein, the facts supporting this analysis are undisputed. Accordingly, this Court must grant summary judgment to First Citizens Bank as to all of the Plaintiffs' claims.

Plaintiffs claims should also be barred as a matter of law because Plaintiffs are the issuers of the checks they allege the Bank converted, and are thus precluded from bringing an action against the bank under § 36-3-420(a).

WHEREFORE, First Citizens respectfully requests that this Court grant summary judgment in Defendant's favor on all of Plaintiffs claims against Defendant, under the theories set forth herein, along with such other relief as the Court deems just and proper.

Respectfully Submitted,

ELLIS, LAWHORNE & SIMS, P.A.

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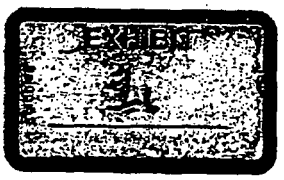
Columbia, South Carolina
March 10, 2010

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

MCDONNELL AND ASSOCIATES, PA,
F/K/A MCDONNELL LAW FIRM, PA,
F/K/A EDWARD G. MCDONNELL, PC,
AND BOOMERANG TITLE, INC.,



Plaintiffs,

vs. CASE NO. 2007-CP-40-5252

FIRST CITIZENS BANK AND TRUST
COMPANY, INC.,
Defendant.

DEPOSITION OF: EDWARD G. McDONNELL
DATE: February 3, 2009
TIME: 10:08 a.m.
LOCATION: Law Offices of
Collins & Lacy, PC
1330 Lady Street, 6th Floor
Columbia, South Carolina

TAKEN BY: Counsel for the Defendant

REPORTED BY: ANGELA D. ZUVER,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES
Fast, Accurate & Friendly

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Page 2

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ALSO PRESENT:
Kathy M. Houston

(INDEX AT REAR OF TRANSCRIPT)

Page 3

STIPULATIONS

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent does not waive reading and signing of this deposition.

* * * * * * * * * * *

EDWARD G. McDONNELL

being first duly sworn, testified as follows:

EXAMINATION

BY MR. FEW:

Q. Good morning.
A. Good morning.
Q. Ed, I saw where you graduated law school in 2000 and I thought we might recognize each other because we overlapped a little bit, but we don't know each other, do we?
A. No.
Q. You were at USC Law School from '97 to 2000; is that right?
A. Correct.
Q. And you've been deposed before, right?

Page 4

A. One other time.
Q. One other time, by Wilbur Johnson?
A. Uh-huh.
Q. In the case involving Carolina Legal Associates?
A. Yes.
Q. Is that case resolved, or is it still pending?
A. It's settled.
Q. It's settled. What were the terms of that settlement?
A. We settled for $400,000.
Q. When did that happen?
A. Two weeks ago, roughly.
Q. So other than that -- that's your only deposition, right?
A. Correct.
Q. Have you ever taken depositions, sitting where I'm sitting as counsel?
A. No.
Q. Now, you're aware of the rules regarding the deposition, the South Carolina Rules of Civil Procedure?
A. If you want to remind me, that's fine.
Q. You're under oath, obviously, right?

Page 5

A. Right.
Q. So you just have to listen to my questions and give truthful answers, right?
A. Correct.
Q. Also, if you don't understand any question that I ask you, let me know, because otherwise we'll have a possible dispute over what you intended to say. So we can only assume that unless you let me know that you don't understand my question that you understood it. Is that fair?
A. Yes.
Q. If you need a break, just let me know, okay?
A. Okay.
Q. What have you done to prepare for this deposition?
A. Nothing. I mean, I met with my attorneys yesterday.
Q. You met with your attorneys?
A. Uh-huh.
Q. Did you review any documents?
A. You sent over a document while we were there.
Q. You reviewed that document?
A. Yeah.

Page 6

MR. FEW: Can we go off the record for a second.
(Off-the-record conference.)
BY MR. FEW:
Q. Tell me about the software that you use to reconcile your accounts. It's called SoftPro; is that right?
A. That's right.
Q. When did you start using SoftPro?
A. I believe January of '04.
Q. Who made the decision to get SoftPro?
A. I did.
Q. Tell me what led up to that decision, what -- I mean, how did you become aware of it?
A. It's the industry leader.
Q. So you heard about it from other folks?
A. Yes.
Q. Did someone call on you to get you to use it, or did you contact them? How did that come about?
A. I contacted SoftPro.
Q. Where are they located?
A. I believe Raleigh.
Q. You contacted them and just purchased it off the shelf?

Page 7

A. Correct.
Q. Did anybody from SoftPro ever come down and give you any tutorials or demonstrations or anything?
A. Not directly to me. SoftPro offered reconciliation or tutorials through various title insurance companies and seminars.
Q. Did you ever attend any of those offerings by SoftPro?
A. Yes.
Q. Where?
A. I don't remember the exact name of the learning facility, but it's over behind like Galeana Chrysler Jeep.
Q. Would this have been a part of a Lawyers Title or LandAmerica CLE?
A. Yes.
Q. Where have you received your CLEs, the best you can remember, since, say -- well, just since you started practice. Have you gotten most all of your CLEs through offerings from LandAmerica or Lawyers Title or their title agents?
A. No.
Q. You were admitted to practice in 2001; is that right?

Page 8

A. Yes.
Q. What was your first job in the legal profession?
A. I worked at the South Carolina Attorney General's office.
Q. Who did you work for over there?
A. Don Zelenka.
Q. What did you do?
A. Panel briefs in the capital crimes division.
Q. And you started there when?
A. January of 2002.
Q. That was your first job as a lawyer, January of 2002?
A. Correct.
Q. So you finished law school in roughly May or June of 2000; is that right?
A. I did a joint degree with a master's in international business and there was some overlap between the two courses.
Q. What was the date of your last class in either program?
A. I finished up an internship in Germany in December of -- no. That would be December of '01.

Page 9

Q. So how many times did you take the bar exam?
A. Once.
Q. How long did you work with the AG's office?
A. About six months.
Q. Did you leave on favorable terms?
A. Yes.
Q. So you left voluntarily?
A. Yes.
Q. Did you know that you wanted to do real estate when you took that job?
A. The job with the Attorney General's office?
Q. Right.
A. No.
Q. So where did you go after you left the Attorney General's office in, I guess, mid 2002?
A. My wife and I were -- my wife and I backpacked through South America.
Q. And that was when, starting in June?
A. End of May, June.
Q. How long were you all in South America?
A. I think until the end of August, beginning of September.

A. WILLIAM ROBERTS, JR. & ASSOCIATES (800) 743-DEPO
SCHEDULEDEPO.COM

Page 10

Q. What did you do -- did you have a job when you came back?
A. I moved back to Hilton Head and I began covering closings for a man named Jack Shore.
Q. Jack --
A. Shore.
Q. How do you spell his last name?
A. S-H-O-R-E.
Q. He's a lawyer?
A. Yes.
Q. So you started your real estate practice career in roughly September of '02?
A. Correct.
Q. Did you grow up in Hilton Head?
A. No. Aiken.
Q. You said back to Hilton Head. What do you mean by that?
A. I was in South America and I came back to Hilton Head.
Q. Had you lived in Hilton Head before?
A. My family. My family had moved there while I was in...
Q. Where did you grow up?
A. Aiken.
Q. What year did you finish high school?

Page 11

A. '92.
Q. Did you go straight to undergraduate school?
A. Yes. College of Charleston.
Q. What was your degree from College of Charleston?
A. Philosophy.
Q. When did you get it?
A. '96.
Q. What did you do between 1996 and starting law school?
A. I worked as a courier for Warren and Sinkler.
Q. In Charleston?
A. Correct.
Q. So was that your only -- was that your first full-time job, at Warren and Sinkler?
A. Yes.
Q. Did you stay with Warren and Sinkler until you went to law school?
A. I don't remember.
Q. Did you work anywhere else between the time that you graduated college at the College of Charleston and the time you graduated law school?
A. Yes, I did. Eddie Bauer in Jackson

Page 12

Hole, Wyoming.
Q. How long were you with Warren and Sinkler?
A. Approximately two years.
Q. You got your degree from College of Charleston in philosophy when, in May of 1996?
A. I'm not sure. I'd have to -- at College of Charleston I also got a degree in corporate communications.
Q. When did you get that degree?
A. Simultaneously, but there wasn't...
Q. But you received those degrees in '96, as best you can recall?
A. Yeah. May. It was May.
Q. May?
A. Yeah.
Q. And then you started law school in August of '97, right?
A. Correct.
Q. When were you in Jackson Hole, Wyoming?
A. From May until July.
Q. Of '97?
A. I'd say June, actually. June to July.
Q. Of 1997?
A. Yes.

Page 13

Q. That was right before you started law school?
A. Right.
Q. When did you get married?
A. April 17, 2004.
Q. You got any children?
A. Two.
Q. What are their ages?
A. Four and three months.
Q. Congratulations. You getting any sleep?
A. Yes.
Q. Boys or girls?
A. Four year old boy named Finnley.
Q. And the three month old, the girl?
A. Lindy.
Q. Where do you live now, Mr. McDonnell?
A. 5920 Indian Mound.
Q. That sounds familiar. Tell me where it is.
A. The Woodlands, the old Woodlands behind the VA.
Q. That's where Jake lives. How long have you been there?
A. Approximately two years.

Page 14

Q. So you bought that house after all the events related to Anna Hoormann, right?
A. Correct.
Q. What did you pay for the house?
A. Approximately 410.
Q. Have you done any substantial work to it since then?
A. We've redone the floors.
Q. About how much money did you spend on the renovations and improvements?
A. Probably about 125.
Q. How much of a mortgage do you have on that property right now?
A. I think it's 385.
Q. That's all? That includes any seconds or other loans?.
A. There's a second for 162.
Q. Now, you testified in your deposition given in what I'll call the CLA case --.
A. Sure.
Q. -- if that's okay with you all, before Wilbur Johnson, that your parents deeded a house to you and you borrowed $550,000 against that house. Is that accurate?
A. Yes.

Page 15

Q. What's the address for that property?
A. 17 Fox Briar Court, Hilton Head, 29926.
Q. And that loan is with Countrywide?
A. Correct.
Q. And I believe you testified that that loan closed in January of 2006?
A. Correct.
Q. So is it fair to say that you were taking immediate action to get some money to put back in your trust account?
A. Yes.
Q. What's the status of that mortgage at this point in time?
A. It's still in existence.
Q. Is it amortized, interest only? Tell me how it's being paid off or being paid.
A. It's a ten-year interest-only with vary -- I believe you can also make a 15-year or 30-year payment.
Q. When did you apply for that loan, Mr. McDonnell?
A. I don't remember.
Q. You made the application yourself, though; is that right? Because the loan is in your name.

Page 16

A. Yes.
Q. Now, I believe the documents and the records will show that you received some sort of notification from the bank on about December 23, 2005, that you had some problems with your account. Does that sound right?
A. Yes.
Q. And I believe your testimony was that you were in line to see Santa; is that right?
A. Yes.
Q. And you then came back to your office to try to figure out what had been going on?
A. Yes.
Q. And I also believe that your testimony, and I'm going to -- was that you reviewed the statements from First Citizens Bank on a semi-regular basis. Does that sound right?
A. Yes.
Q. Explain to me what you mean by semi-regular basis.
A. We did a number of reconciliations throughout the year.
Q. Reconciliations. Okay. And I'm going to get back to the SoftPro issue. When you say reconciliations, we haven't been provided any

Page 17

reconciliations in discovery in this lawsuit. So what kind of records would the reconciliations be kept on?
A. You would do them in SoftPro.
Q. So you save a file in SoftPro that includes these reconciliations?
A. Correct.
MR. FEW: We're going to want to get those. I'm pretty sure there's a specific request for production asking for that and we don't have it.
BY MR. FEW:
Q. Do you know roughly how much is owed? Have you just been paying interest only on the mortgage at Hilton Head?
A. I could not give you a balance right now.
Q. Well, approximately. I mean, who is making the payments, you?
A. Yes. I can't give you an exact number.
Q. You don't have the -- is it more than 500?
A. Probably right around 500. I mean...
Q. Have you made all the monthly payments on that mortgage since it was taken out in January

Page 18

of 2006?
A. Yes.
Q. Are you sure about that? It's okay. I'm just asking you.
A. We make -- we make a monthly payment that the -- obviously, our business that suffered the loss has been making it, and that's how we've been paying.
Q. So it's being paid out of the business account or out of your personal account?
A. Business account.
Q. I'm sorry. The business account's paying it?
A. Yes.
Q. The reconciliations that you were referring to a minute ago, those were done through SoftPro?
A. Yes.
Q. So SoftPro is the industry standard?
A. Yes.
Q. Do you still use it today?
A. Yes.
Q. For example, if anybody wanted to determine how many checks had been written out of your IOLTA account to -- let's just say to pay

Page 19

Richland County taxes. That's something that's done frequently, right?
A. Yes.
Q. You do a closing in South -- you do a closing in Richland County and you're going to certainly have to pay some sort of taxes; is that right?
A. Yes.
Q. Could you go into SoftPro right now and produce a report showing all the checks from which Richland County was paid?
A. There's different modules for SoftPro. There's a closing. There's a report. There's several different modules. If you have that report module.
Q. Do you have the report module?
A. Currently.
Q. You do. When did you get it?
A. Probably seven months ago.
Q. So could you have done that in 2004?
A. I don't know.
Q. You don't know. Do you have records showing when you purchased any updates or improvements to SoftPro?
A. Not -- no. I could obtain them from

Page 20

SoftPro or possibly from the office manager.
Q. Who is your office manager?
A. My office manager now is Angela Jones.
Q. Do you remember the lady's name that did the audit for Lawyers Title?
A. That's Sallie DelVecchio.
Q. Did she use SoftPro as part of conducting that audit?
A. Yes.
Q. She did?
A. Yeah.
Q. So you have data on your computer that shows all the receipts and disbursements from your trust account?
A. Yes.
Q. SoftPro is also used to reconcile or control the data or allow you to access and produce reports on the data for your operating account too, right?
A. No.
Q. No?
A. No.
Q. Only the IOLTA?
A. Yes.
Q. How do you handle the operating

Page 21

account?
A. QuickBooks.
Q. When did you start using QuickBooks on that?
A. Mid January. Mid of -- mid '04.
Q. So before Anna Hoormann became an employee?
A. I don't know if it was before or concurrently.
Q. Do you recall the date of the first alleged forged check in this case?
A. No.
Q. You don't?
A. No.
Q. You still hold accounts with First Citizens Bank, right?
A. Yes.
Q. All of them at First Citizens Bank?
A. No.
Q. What business accounts do you have at any other bank other than First Citizens?
A. I have a banking account with Ameris Bank.
Q. What is the name on that account?
A. I have several accounts, so...

Page 22

Q. Well, just answer my question, please, about Ameris. You have -- you said you have a bank account at Ameris. What is the name on that account? Is it your firm?
A. Boomerang Title.
Q. When did you open that account?
A. Roughly nine months ago.
Q. Do you still have a Boomerang Title account with First Citizens Bank?
A. Our accounts with First Citizens have been dormant for a while. I don't know if it's been...
Q. So in response to my question, which is -- yes, you still have an account at First Citizens on Boomerang Title? You haven't closed it?
A. I don't know.
Q. Do you know when the last time any transaction involving Boomerang Title had a check written from it drawn off a First Citizens Bank account?
A. Can you repeat the question?
Q. Do you own Boomerang Title?
A. Yes.
Q. Does Boomerang Title have an active

Page 23

account at First Citizens Bank as of today?
A. I don't know if it's been closed out or not.
Q. So you don't know the balance?
A. No.
Q. What I'm attempting to do is get a complete picture of where you're holding your bank accounts and so on. So what companies do you own any interest in, or entities, other than Boomerang Title and the name of the -- your law practice now, what is the name of your law practice now?
A. McDonnell and Associates.
Q. That's an LLC, PA?
A. It's a PA.
Q. Is that one of the named parties in this lawsuit?
A. I believe the suit was -- I'd have to read the caption. Yes.
Q. McDonnell and Associates, PA?
A. Yes.
Q. Does McDonnell and Associates have an account at Ameris Bank?
A. No.
Q. Where all does --
A. Let me correct myself. Yes, it does.

Page 24

Q. Who would know whether or not Boomerang Title has an active account at First Citizens Bank?
A. My wife.
Q. And that's Tracy Donnelly?
A. Uh-huh.
Q. Is she a lawyer?
A. She's not.
Q. What's her role at Boomerang Title? Is she a full-time employee?
A. She handles HR and payroll for Boomerang Title and McDonnell and Associates.
Q. So she would know if you have an active account and what the balance is at Boomerang Title?
A. Yes.
Q. Who owns Boomerang Title?
A. I do.
Q. A hundred percent?
A. Yes. Currently.
Q. So as far as you know, Boomerang Title has accounts at Ameris and then maybe First Citizens Bank?
A. Yes.
Q. Anywhere else?
A. NBSC.
Q. When did you open an account at NBSC?

Page 25

A. Somewhere between February and April of '06.
Q. So is that account active?
A. No.
Q. Has it been closed?
A. It is active. You're -- I apologize. It is active in that there are -- it's open to make sure all the checks clear.
Q. You seem to be having some difficulty remembering these things. Is it fair to say that you're not substantially involved in keeping up with the accounts?
A. No. I am. The -- we've moved our banking to Carolina First.
Q. So since 2006, Boomerang Title has held accounts at First Citizens Bank, correct?
A. Correct.
Q. Ameris?
A. Correct.
Q. NBSC?
A. Correct.
Q. And Carolina First?
A. Correct. Also, Palmetto Citizens and First Savers Bank.
Q. So that makes six separate financial

Page 26

institutions, correct?
A. Correct.
Q. How do you receive a report -- well, let me just back up. Do you get a report regarding the finances for Boomerang Title?
A. Yes.
Q. How do you receive that report?
A. Spreadsheet.
Q. Prepared by who?
A. Tracy.
Q. Monthly?
A. No.
Q. No? How often?
A. We also receive a reconciliation report through SoftPro now.
Q. So you use SoftPro for Boomerang Title now?
A. For Boomerang Title and McDonnell and Associates.
Q. When did you start using SoftPro for the McDonnell and Associates?
A. The beginning of '06.
Q. Do you still have the QuickBooks records and the data for the McDonnell and Associates of your -- what we'll call your

Page 27

operating accounts, prior to switching to SoftPro?
A. SoftPro doesn't handle the operating account.
Q. That's not my question. You testified earlier that you use QuickBooks for your operating account.
A. Yes.
Q. And then I'm assuming that you were referring to the operating account that was at First Citizens Bank?
A. Yes.
Q. In the 2004/2005 time period?
A. Yes.
Q. Did you have any other accounts for the law firm practice prior to December 23, 2005, at any banks other than First Citizens Bank?
A. No.
Q. Are you still using your First Citizens Bank IOLTA account?
A. No.
Q. No?
A. No.
Q. When did you stop?
A. Around the time I indicated earlier for opening the accounts with NBSC.

Page 28

Q. Well, you're going to have to give me a date and time, as best you can.
A. Somewhere between February and April in '04, and there was some overlap due to receiving wires into that other account.
Q. Wires into the First Citizens account?
A. Correct.
Q. Now, back to my other question. You testified that you used QuickBooks on your operating account through 2005; is that right?
A. Yes.
Q. Do you still have the data in QuickBooks, or accessible in any other way, for the operating account up through 2005?
A. Yes.
MR. FEW: We're going to need to get that, Lisa.
BY MR. FEW:
Q. Did Sallie DelVecchio access the data through QuickBooks, or otherwise, for the operating account for the time period -- in order to prepare the audit report that she's given you on behalf of Lawyers Title?
A. I don't remember.
Q. Explain what you did to help her get

Page 29

that audit report prepared.
A. We provided her access -- she had access to QuickBooks. I'm not sure if she did in fact use it or not. I would assume she did, though.
Q. Do you know if you have produced in this case copies of statements that you may or may not still have related to the First Citizens Bank account that was held by McDonnell and Associates prior to the end of 2005?
A. Have we produced them in this case? Is that what you're asking me?
Q. Uh-huh.
A. I don't know that we have. I don't know if we have or haven't.
Q. Do you have those statements?
A. Do we have the bank statements?
Q. Yeah.
A. We have -- we do not have the original bank statements. We have, you know, printouts that we received from the bank mixed in with some statements.
Q. What happened to the original statements for the operating account that you received from First Citizens up through 2005?

Page 30

A. I assume that Anna Hoormann destroyed them.
Q. Did she tell you that she destroyed them?
A. No.
Q. Did they come to your office? I mean, you did receive them, right?
A. We did have a problem with the mail where we had to request them a few times.
Q. But you received them, right?
A. What would -- what our procedure was, was Anna would pick them up from the mailbox and file them.
Q. Did you review them?
A. Not on a -- not on a monthly basis, but I would periodically look at them.
Q. But you didn't look at them close enough to find out that Anna Hoormann was writing checks off the account, did you?
A. No.
Q. Because if you'd have done that you could have reported this earlier, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.

Page 31

BY MR. FEW:
Q. Excuse me?
A. I don't know.
Q. You don't know if you could have reported it earlier if you'd have reviewed the statements and seen it? I can see by --
A. Yes. Yes. Yes.
Q. You could have reported it earlier if you'd have reviewed the statements, right?
A. Can you -- I'm sorry, can you ask the question again?
Q. Let's do it another way. When you were deposed by Wilbur Johnson, I believe your testimony was that after the bank -- the bank notified you that you had an insufficient funds charge on your IOLTA account, right?
A. What happened was I was notified that there was a -- somebody was not receiving a wire. I called the office and was told by Anna that the wire had gone into the wrong account. I came back to my office and I called the bank, and they said there was a problem with the account and they were looking into it, and that's how I found out.
Q. You were told by Anna Hoormann that there was a problem with the wire?

Page 32

A. Right.
Q. But in fact, there was an NSF, insufficient funds charge, against your IOLTA account on December 23, 2005; isn't that right?
A. Correct.
Q. So whether or not it had to do with the wire, there was no dispute that there was an insufficient funds charge against your trust account on December 23, 2005?
A. Yes.
Q. And you were notified of that by the bank, correct?
A. Yes.
Q. And you didn't discover it yourself? They notified you, right?
A. Yes.
Q. Now, I believe your testimony then was that you immediately went back to the office and, with the assistance of your brother and either your wife or your sister, began to attempt to figure out why you were having this problem with your trust account; is that right?
A. Yes.
Q. And would that have been on December 23, 2005?

Page 33

A. Yes.
Q. So to make sure I understand, you get the phone call at the Richland Mall, with your son, waiting to see Santa Claus, that you have a problem, right?
A. Yes.
Q. Did you all go ahead and see Santa Claus or did you go on back to your office?
A. I don't remember if I stayed to see Santa. I know that I left.
Q. Was it just you and your son at the mall, or was someone else with you?
A. It was my father and mother. I believe Tracy and her mother.
Q. Who went back to the office with you when you did go back to the office that day?
A. Me.
Q. Just you?
A. Yes, sir.
Q. Tracy didn't go with you?
A. Not immediately, no.
Q. Did you tell your wife at that time that there was a problem with the accounts?
A. I don't -- I don't remember exactly what I told her.

Page 34

Q. So you don't remember if you told your wife at that time that you had to all of the sudden leave the Santa Claus visit to go to work?
A. I told her there was a problem, but I don't remember exactly how in depth I went into the problem.
Q. So how about anybody else that was with you? Your parents? Did you tell them what the problem was, or just that...
A. I believe I told my dad there was a problem at the office.
Q. Was that in the afternoon?
A. Yes.
Q. And I believe your testimony was that you were attempting to figure out what happened.
A. Yes.
Q. When you got back to the office were the statements there for the IOLTA account?
A. Not in whole, no.
Q. The whole statements weren't there?
A. Not in entirety.
Q. And you would know that, right, because the bottom of the statement says page one of however many pages, doesn't it?
A. Correct.

Page 35

Q. Do you remember that?
A. I don't remember that specifically.
Q. Are you familiar with the rules regarding lawyer trust accounts?
A. Yes.
Q. Were you familiar with the rules regarding lawyer trust accounts in 2004?
A. I don't remember exactly how familiar.
Q. Let me know if you need a break. In September of 2002, you testified, you went to work for Jack Shore in Hilton Head. How long did you stay there?
A. I didn't work for Jack Shore. He just hired attorneys throughout the state independently to handle execution and explanation of the documents.
Q. Was that your first experience as a real estate practitioner?
A. Yes.
Q. What sort of training did you get before you met with clients and explained to them what these documents meant?
A. I did some ride-alongs with Jack and he explained all the documents to me.
Q. When you say ride-alongs, is he leaving

Page 36

his office and conducting closings in different places?
A. Yes.
Q. Is he still practicing in Hilton Head?
A. He was based in Columbia. I don't know his current status.
Q. When is the last time you spoke to him?
A. That year. I mean, it wasn't --
Q. '02?
A. Yeah. It wasn't a long relationship.
Q. So do you employ that same practice as part of your business today?
A. Which practice?
Q. Do you hire lawyers on a part-time basis to explain documents related to a closing?
A. Occasionally.
Q. How many physical offices does your practice own?
A. We don't own any, but we have --
Q. Hold on a second. You're presently on Devine Street, right?
A. Correct.
Q. Are you going to be moving from there?
A. Yes.
Q. You need more space?

Page 37

A. No.
Q. So why are you moving?
A. Just wanted an office with more office -- actual individual offices.
Q. Where are you moving to?
A. It's either 2515 or 2517 Devine Street.
Q. So you're going to stay on Devine?
A. Correct.
Q. Are you buying the building or leasing the new building?
A. Leasing.
Q. Who are you leasing it from?
A. Chris Twitty.
Q. Is it going to be in Chris Twitty's building, the Prudential Building?
A. Correct.
Q. Do you lease any other space other than on Devine Street right now?
A. Yes.
Q. Where?
A. Aiken.
Q. Explain to me the -- do you lease it exclusively?
A. It's an executive office.
Q. It's an executive office?

Page 38

A. Suite.
Q. Who do you lease that from?
A. Aiken Pain Management Center.
Q. P-A-Y-N-E?
A. Pain like hurt, P-A-I-N.
Q. Do you have any staff there full time?
A. No.
Q. What's the purpose of that lease?
A. If we have a client in Aiken we would meet them there to execute documents.
Q. How long have you had that lease?
A. About ten months.
Q. Any others?
A. Yes.
Q. Where?
A. Bluffton.
Q. Same arrangements, roughly?
A. No. It's staffed.
Q. It's staffed?
A. Uh-huh.
Q. By who?
A. Damian Murphy.
Q. Is he a lawyer?
A. Yes.
Q. How long has he been practicing?

Page 39

A. Approximately eight years.
Q. How long has he been -- is he an employee of your firm?
A. Yes. We're in a transition down there. He's actually just starting back on down there. I had another attorney, William Griffin, down there for a number of months.
Q. Do they have any other employees, paralegals or some --
A. Jeremy McDonnell.
Q. Is that your brother?
A. Yes. He's an administrative assistant.
Q. How long have you had an office in Bluffton?
A. Three years.
Q. Other office locations other than Aiken, Bluffton or Devine Street?
A. Beaufort, and that's the same arrangement as Aiken.
Q. No staff?
A. No. The staff from Hilton Head is utilized.
Q. Damian Murphy, how long has he been doing real estate closings?
A. Approximately five years.

Page 40

Q. Other than Beaufort, Bluffton, Aiken and Devine Street, where do you have any leases or arrangements for office space right now?
A. Summerville, South Carolina. And that's a similar situation as Aiken, and we cover that with Dan Zickefoose, who is in our Mt. Pleasant office.
Q. Can you spell that?
A. Dan is D-A-N and Zickefoose is Z-I-C-K-E-F-O-O-S-E. There's two Os.
Q. Zickefoose, or is it --
A. Yes.
Q. So there's an N in there, right?
A. No. It sounds like an N, but there's not.
Q. And he's a lawyer?
A. Yes.
Q. He's in your Mt. Pleasant office?
A. Yes.
Q. So is your Mt. Pleasant office similar to your Bluffton office in that it's staffed?
A. It includes Dan, and then there's a shared receptionist.
Q. Before I go any further on these locations, did you have any locations other than

Page 41

Columbia during the time period that Anna Hoormann worked for you?
A. Yes. Greenville.
Q. So you have Greenville?
A. Uh-huh.
Q. How does Greenville work? Is it staffed?
A. It's staffed.
Q. By who?
A. Currently, Joe Hill.
Q. He's a lawyer?
A. Yes.
Q. Does he have a receptionist?
A. A paralegal, Dawn Murray. She splits time between here and Greenville.
Q. How long has she been with you?
A. On and off since the beginning.
Q. She knows Anna Hoormann?
A. Yes.
Q. Where is Anna Hoormann?
A. Jail.
Q. Jail here in Columbia or in this area?
A. I know that she was in -- is it Allen Glenwood?
Q. Alvin Glenn?

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Page 42

A. Alvin Glenn. I don't know if she's still there.
Q. Is she in jail based upon charges related to the complaint that you filed?
A. For forgery.
Q. So she's in jail for forging the checks?
A. (Nodding head.)
Q. Any other office locations?
A. Rock Hill.
Q. Is that staffed?
A. No. That's covered by an attorney -- one of our attorneys in Columbia normally. Occasionally in Greenville.
Q. Where else? Any others?
A. Myrtle Beach.
Q. Staffed?
A. Yes. Attorney Donnie Brooks.
Q. Spell that name, please.
A. Donnie, D-O-N-N-I-E, Brooks, B-R-O-O-K-S.
Q. Can you give me the names of all the lawyers that are working for you right now?
A. In addition to the ones that I named to you, let's see, William Griffin.

Page 43

Q. Where is William Griffin?
A. He was down at Hilton Head. He's been relocated to the Columbia office.
Q. Do these lawyers do all closings?
A. Primarily.
Q. Who else other than the ones you've -- I've got Damian Murphy, William Griffin, Dan Zickefoose, Joe Hill and Donnie Brooks.
A. John Pincelli.
Q. Pincelli's in Columbia?
A. Uh-huh.
Q. Who else is in Columbia?
A. Did you say John Howell? John Howell is another.
Q. Spell that last name, please.
A. H-O-W-E-L-L.
Q. Where is he?
A. Columbia.
Q. Anybody else?
A. No.
Q. What was your income for 2008?
A. Somewhere between 350 and 400.
Q. So that's what you'll report on your personal --
A. I haven't filed my taxes yet for 2008.

Page 44

Q. But from what you've ascertained, that's roughly what you'll have on there?
A. Yeah.
Q. How about 2007?
A. 500.
Q. 500. How about 2006?
A. I don't -- I don't recall.
Q. You don't remember what -- was it more than 200?
A. I don't remember exactly, because of the loss.
Q. You filed a tax return for 2006, didn't you?
A. Uh-huh.
Q. How about 2005?
A. I don't remember exactly what it was.
Q. 2004?
A. I don't remember exactly what it was.
Q. 2003?
A. I don't remember exactly what it was.
Q. Tell me, if you will, please, what did you do -- picking up again working with Jack Shore. How long did that last?
A. A few months.
Q. So through the end of 2002?

Page 45

A. No. No. I began sharing office space with Harry Heizer.
Q. Harry Heizer is a Columbia lawyer, right?
A. Correct.
Q. Does he still practice?
A. Yes.
Q. How old is Mr. Heizer?
A. I would say late 50s.
Q. But you all don't work together anymore?
A. No.
Q. When did you all break up?
A. I worked as a -- I worked on a draw basis with Harry originally and --
Q. Explain that, what you mean by a draw basis.
A. You eat what you kill. I mean, what you bring in you get a percentage of. There wasn't a paycheck.
Q. Those were all closings?
A. No. That was -- Harry had a general practice.
Q. So between the time that you got licensed to practice in '01, your legal jobs, going

Page 46

in order, have been with the Attorney General's office, doing work for Jack Shore, and then you went on a draw basis with Harry Heizer?
A. Correct.
Q. No other jobs before going to work for Harry Heizer?
A. In the legal profession?
Q. Right.
A. None.
Q. Did you have any nonlegal jobs after May of 2001, when you were admitted to practice?
A. Yes.
Q. What were they?
A. I worked for Mojo Pizza.
Q. Where was that?
A. In Hilton Head.
Q. What did you do there?
A. Delivered pizzas.
Q. What was it roughly, the time period for that?
A. I only did it one night.
Q. I'm sorry, what?
A. I only did it for one night.
Q. What year, though?
A. That would have been when I returned

Page 47

back to Hilton Head, roughly August or September, and I also worked in the same period, for just a couple weeks, at a pest control place.
Q. Is that it for nonlegal jobs?
A. Uh-huh.
Q. So those were very short stints?
A. Correct.
Q. Picking up with your work with Harry Heizer on a draw basis, beginning, say, late 2002 or early -- was it 2002?
A. I want to say that would have been the fall of 2002, because we came back from...
Q. So how long did you -- and then you went to work for Harry Heizer. How long did that last?
A. A few months.
Q. And then what did you do?
A. I took a job with Dallis Law Firm.
Q. Who would that be?
A. Alex Dallis.
Q. Is he in Columbia?
A. He's based out of Charleston. He had a Columbia location.
Q. What does he do, closings?
A. And patent work.

Page 48

Q. And what, patent work?
A. Yes.
Q. Did you do any patent work?
A. No.
Q. Is he a patent lawyer?
A. Yes.
Q. How long did you work with the Dallis firm?
A. From January of that year until about June.
Q. Of '03?
A. Yes.
Q. And then what, did you leave?
A. I left and established my law firm.
Q. And that was under the name of -- what was the name of the firm at that point in time?
A. Originally it was Edward G. McDonnell, PC.
Q. And that was about the time that you opened your accounts with First Citizens Bank?
A. Yes.
Q. Now, just to make sure, you can't even recall or give a guess within -- any guess about what your income was in 2006?
A. 2006. I want to say it was roughly

Page 49

$200,000.
Q. But you're saying that's a -- I mean, just tell me. That could be plus or minus how much?
A. $50,000, and that would be on all the incomes.
Q. That's from Boomerang? Is that what you're saying?
A. No. I mean on '08 and '07.
Q. Your plus or minus?
A. Yeah.
Q. What about 2005?
A. Oh, wait. That was 2006. I would say 2006 was about 300, and then 2005 was about 200.
Q. You've got your tax returns which would show this, right?
A. Sure.
Q. What about 2004?
A. I don't remember.
Q. You have no idea what you made in --
A. 90,000.
Q. The audit report that you received from Lawyers Title made some suggestions for follow-up to ensure that what we'll call a mess that was created be cleaned up. Did you follow through on

Page 50

all those suggestions?
A. We've gone back through -- gone back through our accounts.
Q. You've gone back through your accounts. What documentation can you provide to show that there was no -- that all client money has been replaced and that there are no claims against you?
A. That there's no claims against me?
Q. Uh-huh.
A. There are no claims against me.
Q. There are no claims against you?
A. There's no...
Q. So what was the total revenue for your office -- for your law practice in 2004, as best as you can recall?
A. I don't remember.
Q. You have no idea?
A. I don't remember.
Q. So do you not wonder how $600,000 could go missing and you wouldn't realize it?
A. Would you re-ask me the question?
Q. How does $600,000 go missing over a period of roughly a year and you not realize it, being a small business with -- how many employees, ten?

Page 51

A. At the time there were three.
Q. The three employees then were --
A. Maybe four.
Q. -- Anna Hoormann?
A. Anna Hoormann.
Q. Dawn?
A. Dawn. Dawn worked for Harry back then. She worked for Harry, but was also -- we also -- she also did work for me as part of our rental agreement.
(DEF. EXH. 1, SIGNATURE SAMPLES, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark as Exhibit 1. I'm going to represent to you that these are copies of your signature taken off of documents that have been produced in this lawsuit, and I'm going to ask you, starting at what time I have, 11:12:20, to tell me which of the three of those, if any of them, are your signature or if they're forgeries, or if you can't tell me, tell me you can't tell me.
A. I don't believe I'm qualified to judge which one is which.
Q. You can't tell? Is that your

Page 52

testimony? You can take all the time you need to look at it.
A. I don't think -- I don't think that's for me to determine.
Q. Well, my question is: Can you tell if those are your signatures or not?
A. I don't know.
Q. You don't know?
A. (Shaking head.)
Q. The one on top here, is it your testimony that you don't know for sure if that's your signature?
MS. DELZOTTI: I'll object to the form.
THE WITNESS: It looks like my signature.
BY MR. FEW:
Q. The top one. If you don't mind, I'm going to take my red pen and mark this as number one. And it's now 11:14, 11:15, according to my watch, so we've been looking at this for a couple of minutes. So your testimony, I believe, is that number one here, what I've marked number one with red pen, that that is your signature?
A. I'm sorry, can you repeat yourself?
MR. FEW: Would you read that question

Page 53

back to him, please.
(Thereupon, the Reporter read the record as requested.)
THE WITNESS: It looks like my signature.
BY MR. FEW:
Q. So you think that the top one here -- that's your testimony, that that appears to be your signature?
A. It looks like my signature.
Q. Now, how about the one that I'm going to put a two right here? Is that your signature, the best you can tell?
A. It looks like my signature.
Q. So you're saying if you were pressed to say yes or no you're saying yes for number one and yes for number two?
MS. DELZOTTI: I'm going to object to the form.
THE WITNESS: Can you clarify the question?
BY MR. FEW:
Q. My question would be, if you had to give a yes or no answer as to whether or not this first one was your signature, and I'm just trying

Page 54

to clarify your earlier testimony, you -- if I understand it, you're saying that you would say yes, this is your signature, number one?
A. It looks like my signature.
Q. Same question for number two.
A. It looks like my signature.
Q. So that would be a yes?
A. It looks like my signature.
Q. And then the third one here I'm going to mark as number three. I'm going to ask you the same question. Is number three your signature? And it is right now 11:18:09, on my watch.
MS. DELZOTTI: I'm going to object to the form.
THE WITNESS: It looks like my signature.
BY MR. FEW:
Q. The third one looks like your signature also?
A. (Nodding head.)
Q. We've been going over an hour. Do you need to take a break, or do you want to keep going?
A. I'll take a break.
MR. FEW: Can we stay on the record and put the time down. By my testimony, the time is

Page 55

now 11:19.
(A recess transpired.)
(DEF. EXH. 2, DEFENDANT'S FIRST REQUEST FOR ADMISSIONS, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark as Exhibit 2, and I'm going to represent to you that these are requests for admissions that were served on your counsel in this case on December 19, 2007, and ask you if you've ever seen that document, Mr. McDonnell.
A. I don't remember this, right off the top of my head.
Q. Do you remember requests for admissions being served in this case?
A. I would have received those from my attorney.
Q. I understand that. Do you recall receiving those from your attorney?
A. I don't -- I don't remember them in particular, no.
Q. So sitting here today, do you know whether or not you've filed responses to those requests for admissions?
A. I believe we have.

Page 56

Q. But you're not sure?
A. No.
Q. Flip, if you would, to Exhibit C-1, and if you would also look at Exhibit 1, which is to your right, right there. The signature on Exhibit C-1, does that appear to be the same signature that's marked as number one of Exhibit 1?
A. It appears to be.
Q. And then let me help you flip to Exhibit 2. Same question. Does the signature here for you under C -- on Exhibit C-2 of Exhibit 2 appear to be the same as what's marked number two of Exhibit 1?
A. It appears to be.
Q. And same question for this signature of yours on what's marked as Exhibit C-3 of Exhibit 2 to this deposition. Does that appear to be the same signature as what's marked -- what we've marked as the third signature here on Exhibit 1 to this deposition?
A. It appears to be.
Q. Is it fair to say that these three signatures are different?
A. I don't have an opinion as to that.
Q. Well, I mean, the way that the tail

Page 57

looks there on the -- what must be the L is a little different than it is on number one, where I'm pointing, as to number two, isn't it?
A. Yes.
Q. So, for example, this one there, this third one, has separations in the ink between what appears to be the first, middle and last names, doesn't it?
A. Yes.
Q. And there's almost no separation here on the second one, is there?
A. No, there's separation.
Q. The G runs into the M, it looks like there, doesn't it?
A. Yes.
Q. So is it your testimony that these signatures are the same, partially the same, or are they slightly different?
A. The same.
Q. Your testimony is that those are all the same?
A. They are similar.
Q. Flip, if you would, to Exhibit D. And if I may look at these. Each one of these -- C-1 has a statement here that says: The undersigned

Page 58

acknowledges that at least one authorized signer has received at least one copy of each of the following documents. Is that what it says?
A. Yes.
Q. And then it lists documents, correct?
A. Yes.
Q. And on one of those documents is the -- it says -- let me point you to it. It's right here, Rules and Regulations For Checking and Savings Accounts.
A. I mean, it appears to reference that. I don't know that this is the same.
Q. Well, did you read these documents when you signed them? Exhibit C-1, did you read this document when you signed it?
A. I don't remember.
Q. Do you typically read things before you sign them?
A. Yes.
Q. But you can't remember if you read that or not?
A. It's been a long time.
Q. Do you dispute that the bank provided you with rules and regulations related to the accounts that you were opening with the bank?

Page 59

A. I don't remember.
Q. You don't remember. Do you remember signing -- that's your signature, right, on C-1?
A. Yeah.
Q. And you're signing acknowledging that you received these documents, right?
A. Yeah. Yes.
Q. So did you ever review these rules and regulations regarding your account with First Citizens Bank that's a marked as Exhibit D to Exhibit 2 to this deposition?
A. I don't remember.
(DEF. EXH. 3, PLAINTIFF'S RESPONSES TO DEFENDANT'S REQUEST TO ADMIT, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark as Exhibit 3. I'll represent to you that those are your responses to the requests for admissions in this case and ask you if you've seen that document or recognize it.
A. Could you repeat the question?
Q. Have you ever seen that document that's been marked as Exhibit 3?
A. I don't remember whether I have or not,

Page 60

but I'm sure I have with my attorney.
Q. The first three requests for admissions, you admit your -- you admit the signature cards?
A. Correct.
Q. Then, for Exhibit D, you say you're unable to tell if this was the agreement in force; is that right?
A. Yes.
Q. Do you have a copy of anything else that you would assert that First Citizens provided you that would be any different than what's been marked as Exhibit D to Exhibit 2?
A. I'm not fully versed in First Citizens's policies and their changes.
Q. That's not my question. My question is: Do you have any documents anywhere that you can provide or that you have provided that would be the deposit agreement between your practice and First Citizens Bank or Boomerang Title and First Citizens Bank?
A. No.
Q. Or your trust account agreement with First Citizens Bank?
A. No.

Page 61

Q. And I believe you -- one of the issues in your lawsuit with Carolina Legal Associates was that you alleged that they were required to provide screening, meaning some type of criminal background checks; is that right?
A. Yes.
Q. Did you ever produce any documents in that case or did you have any documents in that case where they -- where Carolina Legal Associates represented that they were going to provide any type of screening or background checks before they sent somebody to you?
A. I'm sorry. I was distracted. Could you...
MS. DELZOTTI: My fault. Sorry.
BY MR. FEW:
Q. Did you have any -- were there any documents that you produced in that case where Carolina Legal Associates represented to you that they were going to do background checks?
A. Screening.
Q. You had documents?
A. The documents were...
Q. They used the word screening?
A. Screening.

Page 62

Q. Can you produce those?
A. Yes.
Q. You produced them in that case?
A. I don't remember if I produced those in that case or if we got them from them through a subpoena. I don't remember exactly.
Q. But sitting here today, can you go back through your file and produce a copy that says -- where they represented to you, and you can circle the word that shows where they represented to you, that they were going to do that?
A. Do what?
Q. That they were going to do criminal background checks for Anna Hoormann.
A. It said screening.
Q. It said screening?
A. Right.
Q. So it didn't say criminal background checks?
A. No.
Q. Did you pay any extra fee to them for criminal background checks?
A. No.
Q. Now, I believe you've admitted in these requests for admissions that Anna Hoormann is the

Page 63

only person that you allege forged any of these checks.
A. Yes.
Q. And during the time period that she did that she was an employee of McDonnell -- of your law firm?
A. Yes.
Q. Was she an employee of Boomerang Title?
A. No.
Q. Did she have access to the Boomerang Title accounts?
A. Yes.
Q. Why would she have access to the Boomerang Title accounts if she wasn't an employee of Boomerang Title?
A. It's an ancillary function of real estate attorneys to have a title agency.
Q. You never reported any forgeries to the bank until after the bank told you of these problems, correct?
A. Yes.
Q. Is that right?
A. Yes.
Q. So it would have been -- so any report that you would have made to the bank related to

Page 64

this lawsuit, or any alleged forgeries, would have been after December 23, 2005?
A. Yes.
Q. And you only became aware of this problem because the bank notified you of the insufficient charges; isn't that correct?
A. No.
Q. No?
A. I called the bank. They didn't call me. I didn't get a letter. I called the bank and asked them what was going on and they said there was a problem with the account.
Q. When was that? Because, if I recall, your testimony earlier was that --
A. December 23rd.
Q. December 23rd. But you already had an insufficient check on the IOLTA account on December 23rd, right?
A. They didn't pick up the phone and call me. That's not how I found out.
Q. But you -- okay.
A. I think -- I think --
Q. Explain it to me, then. Explain to me the coincidence that you discovered this but yet you were with your child to see Santa when you get

Page 65

a call. You got the call because First Citizens notified your office of the insufficient funds charge; isn't that right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I do not know if First Citizens called my office. I know that when I got back, returned to my office, I called First Citizens.
BY MR. FEW:
Q. You got back to your office and you didn't even have the statements for your IOLTA account to review; isn't that right?
MS. DELZOTTI: Objection to form.
THE WITNESS: For which month?
BY MR. FEW:
Q. For any month.
A. I don't -- I don't know.
Q. Isn't it true that you testified in your earlier deposition that you discovered what happened once you started reviewing the statements that First Citizens provided to you with your brother and whoever else was helping you?
A. Yes.
Q. So now, those were the same statements that had been mailed to you once already by First

Page 66

Citizens Bank, correct?
A. Yes.
Q. This is a repeat of one of my earlier questions. Had you reviewed those statements when they first came in in the same manner that you reviewed them in late 2005, after December 23, 2005, you could have discovered that Anna Hoormann was writing checks on your accounts; isn't that right?
A. Can you just rephrase that question?
MS. DELZOTTI: Objection to the form.
BY MR. FEW:
Q. You know what, we'll just go through the statements one by one here in a little bit and I'll give you a chance to see what you could have seen if you'd reviewed them.
Now, you were asked in this request for admissions to -- who were the attorneys that were assigned to review the IOLTA account statements between September of 2004 and December of 2005?
A. I would have been the attorney.
Q. You were the attorney?
A. (Nodding head.)
Q. No other attorneys had that responsibility?

Page 67

A. No.
Q. What typically did you do in order to review these statements when they came in?
A. Anna was in charge of -- Anna was in charge of, initially, reconciling or the bookkeeping for the entire office. Dawn, on one occasion -- on one or two occasions, went behind and reconciled it, and then my brother, on a few occasions, did, too.
Q. So my question was what did you do, and you just told me what Anna, Dawn and your brother did. So if I understand your answer, you delegated the responsibility; isn't that right?
A. Yes. Or no. I relied on my accountants.
Q. Did you or did you not delegate the responsibility to review the IOLTA account statements from First Citizens Bank from September of 2004 to December of 2005?
A. I relied on my accountants.
Q. Your accountants?
A. Yeah.
Q. Now, in response to the same question a minute ago, you referred to Anna, Dawn and your brother.

Page 68

A. Right.
Q. And now you're saying that you relied on your accountants.
A. Rick served in an accounting function.
Q. So you delegated it to Rick?
A. Yes.
Q. Who is Rick, your brother?
A. Yes.
Q. Is he older or younger?
A. Younger. Older.
Q. Where are the documents showing that the IOLTA account statements were reconciled by any of these three people between September of 2004 and December of 2005?
A. That would be in SoftPro.
Q. And did they prepare reports that would give you a summary for you to review on a monthly basis?
A. No. Semi-regular.
Q. Explain that, please. Semi-regular? Is that what you said?
A. Yeah. Every few months.
Q. So you didn't do a -- you didn't even look at or get a report every month?
A. No.

Page 69

Q. So did they bring you a hard copy and say, This is the report that reconciles the trust account?
A. I would confer with Rick.
Q. Explain that. How would it happen?
A. Rick, do we have any outstanding things? We have a few questions. We're getting answers from the bank. Anna's asking for answers from the bank.
Q. What would be an example of something that would be outstanding?
A. If they accidentally -- if they made a mistake. This is just a -- I'm not going to say this is an instance that happened, but sometimes banks clear checks for the wrong amount and you have to contact them to make -- get a correction made. They might transpose a number when clearing a check.
Q. So did you get a written report from anybody?
A. No.
Q. Now, I asked you earlier if you were familiar with the rules regarding lawyer trust accounts in 2004. Tell me what you knew. Did you know in 2004 that IOLTA trust accounts had special

Page 70

requirements?
A. Yes.
Q. And in South Carolina, a lawyer – you have to have a lawyer perform a closing, right?
A. Yes.
Q. And so as a condition of that, the lawyer has to follow the rules that are provided for lawyers, correct?
A. Yes.
Q. Do you know the number for the rule regarding financial recordkeeping and trust accounts?
A. No.
Q. You don't know it?
A. No.
Q. Today, as we sit here, you don't know the number of the rule?
A. No.
Q. What are you doing differently in your office to reconcile your IOLTA accounts, if anything, since December of 2005?
A. SoftPro does a monthly reconciliation, provides us a report with outstanding checks and deposits.
Q. Did you get a report of outstanding

Page 71

checks and deposits in 2004?
A. I don't remember.
Q. Well, if you don't remember, then more likely than not you didn't get one; is that fair?
MS. DELZOTTI: Objection to form.
THE WITNESS: No, it's not fair.
BY MR. FEW:
Q. That's not fair. You don't remember getting a report of outstanding checks and deposits during the 2004/2005 time period for you IOLTA account?
A. I don't remember.
Q. You remember the lady from Lawyers Title doing an audit, right?
A. Yes.
Q. Do you know if this audit was produced in this lawsuit?
A. I don't recall.
(DEF. EXH. 4, DOCUMENTS BEGINNING WITH AN E-MAIL TO WILMOT B. IRVIN, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark Exhibit 4. I'll represent to you that this is –
A. Are we finished with this for right

Page 72

now?
Q. Uh-huh.
A. Okay.
Q. I want you to look that over and tell me if – the opening document there on what's been marked as Exhibit 4 is an e-mail from your lawyer to Chuck Winfrey at landam.com; is that right? Actually, it's from Chuck Winfrey to your lawyer, right?
A. Yes.
Q. Wilmot Irvin?
A. Yes, Wilmot Irvin.
Q. Do you recognize that? Does that appear to be the audit that was performed?
A. It does appear to be.
Q. Now, there's an e-mail in there, too, from January 16, 2006, where it states that she used your Capital One credit card; is that right?
A. Yes.
Q. When did she use your Capital One credit card?
A. I don't remember.
Q. So did you discover that she used your – did she use your Capital One credit card without your permission?

Page 73

A. Yes.
Q. So did you discover that she used your Capital One credit card without your permission before or after December 23, 2005?
A. After.
Q. After?
A. After.
Q. What months did she use your Capital One credit card without your permission?
A. I don't remember.
MR. FEW: Lisa, we need the records regarding the Capital One credit card. All that's been requested in discovery and we don't have anything on that.
BY MR. FEW:
Q. Do you still have the documents related to your Capital One credit card?
A. I don't know.
Q. Are you seeking attorney's fees in this lawsuit?
A. I would have to review the complaint.
Q. We can go off the record and you can talk to your lawyer, and then respond to the question.
(Off-the-record conference.)

Page 74

BY MR. FEW:
Q. Your lawyers in this case, are they being paid by the hour or is it on a contingency basis?
A. Hourly.
Q. Hourly?
A. (Nodding head.)
Q. To the best of your recollection, when you discovered that Anna Hoormann had used your Capital One credit card without your permission, approximately how much were the charges that she put on your Capital One credit card?
A. I don't remember the exact figure, but I do know it was nominal.
Q. More than a thousand or less than a thousand?
A. I think, more or less, around $2,200.
Q. Where did the Capital One statements get delivered to, your house or your office?
A. To the P.O. box.
Q. The P.O. box for your office?
A. Yes.
Q. Did you review them?
A. No.
Q. Who paid the Capital One credit card

Page 75

bills?
A. My office manager.
Q. Anna Hoormann?
A. Yeah.
Q. She prepared the checks and gave them to you and you signed them?
A. Yes.
Q. So you didn't review your Capital One statements either, did you?
A. No.
Q. Now, you mentioned a minute ago, when I was asking you about reconciliations -- if you would bear with me for a second. Let me have the exhibit. I think I can get you there quicker. Within this pretty big document that we've marked as Exhibit 4 -- now, before I go forward on that, you agree that all of Exhibit 4 appears to be the audit that was given to you by Lawyers Title, correct?
A. Yes.
Q. If you see anything in there that doesn't appear to be part of that audit, you let us know, okay? All right. I'm pointing at a page that reads: Receipts and disbursements report, all outstanding receipts and disbursements. Do you see

Page 76

that?
A. Yes.
Q. It's for the trust account, correct?
A. Yes.
Q. So this is your IOLTA account at First Citizens Bank, right?
A. Yes.
Q. And it's as of 12/31/2005; is that right?
A. Yes.
Q. Let me ask you this. How was this -- these pages that I'm flipping through, that we're looking at, were these prepared by SoftPro?
A. Yes.
Q. And so apparently all that needed to be done to produce this report was to go to SoftPro and give it the instructions to produce the report; is that right?
A. Can you re-ask that question?
Q. These pages that are marked receipts and disbursements report, all outstanding receipts and disbursements, this was produced out of SoftPro, correct?
A. Yes.
Q. And apparently either someone from your

Page 77

office did it or Sallie DelVecchio did it. Do you know who prepared this particular --
A. Sallie DelVecchio.
Q. Sallie DelVecchio did it. So she -- within eight days of the NSF charge and the investigation that your office started to conduct into what happened she's in your office and she's prepared this report for you?
A. Yes.
Q. And she did it with SoftPro?
A. Yes.
Q. Did you buy any additional modules for SoftPro between December 23, 2005, and January -- and December 31, 2005?
A. I don't remember.
Q. But you don't recall buying any at that time?
MS. DELZOTTI: Object to the form.
THE WITNESS: I don't remember.
BY MR. FEW:
Q. You were mentioning that your brother, or whoever, was giving you these, apparently, verbal reports on the status of the IOLTA account during the September 2004 to December 2005 time period. Is that a fair statement, that you were

Page 78

receiving some type of verbal report from either your brother Rick, who is an accountant, or Dawn or Anna?
A. Yes.
Q. Now, did they report to you that you had these outstanding checks, a $5,800 check involving Remax? Do you -- can you explain that?
A. No.
Q. There's a $5,800 check that was apparently cut in September of 2003 and it never gets negotiated. As we sit here today, do you know if that check has cleared or not?
A. The Cunningham file -- as I mentioned earlier, we ordered SoftPro in the beginning of '04. There was maybe one or two, a handful of files that we performed the old way, in that it was a typewriter settlement statement and handwritten checks. Cunningham was one which was put in after the fact. We were trying to comprise a whole picture.
Q. So the answer to my question is, as of December 31, 2005, is that accurate, that you had a $5,800 check that was over two years old?
A. I don't know.
Q. Now, at this point in time Anna

Page 79

Hoermann's been making Internet banking transfers out of your IOLTA account since May of 2005 and you hadn't caught it; isn't that right?
A. I don't remember, off the top of my head, when she started making Internet transfers.
Q. Isn't it true that the bank, and I mean First Citizens Bank, had to inform you that there was a check drawn off of your accounts made out to Anna Hoermann?
A. Yes.
Q. And up until that time you actually were still thinking that she was helping you to figure out what happened to the accounts?
A. Correct.
Q. So we can go in SoftPro, when we get access to the data, like we've requested in discovery, and we can run this report again right now and see if all these checks have cleared; is that right?
A. You should, yes.
Q. Now, what I'm curious to understand is, at this point in time, we'll just say somewhere over $600,000 is missing, right?
A. Yes.
Q. But yet the checks -- and even though

Page 80

there's a long list of them here as we're flipping through, is that what this shows, is that 987,000 hadn't cleared?
A. Where are you referencing?
Q. If you look to 13 of 13 of this report.
MS. DELZOTTI: Do you have the Bates stamp?
MR. FEW: Bates stamp CLA0105.
THE WITNESS: Okay. Now, can you repeat your question, sir?
BY MR. FEW:
Q. The number there that shows 678 disbursements that haven't cleared -- is that what that shows?
A. It just shows that they're outstanding.
Q. Those are the ones that are outstanding?
A. Uh-huh.
Q. If you -- go ahead.
A. Those are the ones showing outstanding.
Q. Now, the bulk of that number comes from the larger items that are shown that are cut on December 30th, for example, 174,000 to RP Silver, right?
A. Yes.

Page 81

Q. Is it unusual that that check would have not cleared? Now, this report was run on January the 10th.
A. Right.
Q. Now, if you sign a check and it's on the system --
A. I don't know that that's a check.
Q. It's got a reference number over here for 8230. It appears to be the check number. Is that what that is?
A. Okay.
Q. Is that what that is?
A. It appears, yeah.
Q. I mean, this is your software, so you tell me. Is that what it is?
A. It appears, yes.
Q. Do you know the circumstances under which it's acceptable for a lawyer to put money into his IOLTA account?
A. I believe it's to hold money on behalf of his client, and also to mitigate any damages for his client.
Q. Have you ever read the rule?
A. I have in the past.
Q. So you don't know the circumstances

Page 82

under which it's permissible for a lawyer to put money, his money, into an IOLTA account?
A. I can't remember recall.
Q. So you're not certain. If I tell you there's only one circumstance that it's permitted, you're not aware of what that one circumstance is?
A. I don't know what the one circumstance you're referring to is.
Q. So sitting here today, is it your testimony that you did or did not violate the rules of professional conduct when you put money back into your IOLTA account for the purpose of covering missing client funds?
A. I don't believe I did.
Q. You don't think you violated any rules?
A. I don't believe I did.
Q. When was the last time you read the rule?
A. Six months ago.
Q. And even having read the rule six months ago, you still -- you didn't see that there's only one circumstance in which it's permitted to put -- for the lawyer to put his own money into an IOLTA account?
MS. DELZOTTI: Object to the form.

Page 83

THE WITNESS: Which circumstance are you referring to? Ask me again.
BY MR. FEW:
Q. Well, I've asked you if you know it, and I believe your testimony is that you don't; is that right?
A. That's correct. I do not know which circumstance you're asking me about.
Q. We'll go over the rule here in a little bit and see if it refreshes your memory. So we can run this report and see, as of December 23rd, how many checks were outstanding; is that right?
A. It would show you how many are still showing as outstanding.
Q. But we could actually access the data and get a report, as of December the 23, 2005, right?
A. Yes.
Q. Just like this is a January 10, 2006, report, but it's as of 12/31/2005, right?
A. Right.
Q. Well, what I'm trying to understand, and I'm interested in any explanation you can give, is how did $600,000 go missing without things not being paid? For example, if this Anna Hoormann is

Page 84

going to steal money from your business, she knows one way she could do it -- if you'd agree with this -- would be to not mail a payoff for a mortgage, right?
A. Right.
Q. That's been done before, right?
A. I don't know.
Q. You don't know. Do you ever read the advance sheets?
A. Yeah.
Q. You do?
A. Yeah.
Q. So were you aware that paralegals or employees had stolen from lawyers before?
A. I do read the advance sheets. I don't -- I don't know that I, you know, read them on a regular basis then.
Q. So when did you start reading the advance sheets on a regular basis?
A. Right around this time.
Q. Right around the end of 2005?
A. Uh-huh.
Q. So prior to December 23, 2005, had it ever occurred to you that an employee could steal money out of your IOLTA account?

Page 85

A. I guess it was a possibility.
Q. But yet you still -- you delegated the responsibility to Anna Hoormann, Dawn and your brother Rick; is that right?
A. Yes.
Q. And none of them -- did all three of those people have full access to the IOLTA account statements that came in the mail from First Citizens Bank?
A. They'd come in the mail, Anna would pick them up, and then we would look at the statements.
Q. No. My question was, starting as of October 1, 2004, Anna Hoormann had access to the IOLTA account statements from First Citizens Bank?
A. Yes.
Q. And Dawn did, too, if she wanted it?
A. She would have requested those from Anna.
Q. She would have requested those from Anna?
A. Yeah.
Q. Because your testimony has been that Dawn gave you reports that the accounts were reconciled also, right?

Page 86

A. Correct.
Q. What did they do? Did they get on SoftPro and look at SoftPro?
A. Yes.
Q. Did Anna Hoormann, to your knowledge, do anything to hide the fact that she was the payee on all those checks?
A. Yes.
Q. What did she do? How did she do that?
A. She manipulated the program.
Q. So what would that program show? Instead of showing her as a payee, how would it -- how would it -- what would it have shown?
A. These checks, in this audit, show to Anna Hoormann, but on the front of the check -- the software shows Olivia Ramos.
Q. Olivia Ramos?
A. Yeah.
Q. Spell that, please.
A. Your guess is as good as mine. Olivia, and then it's either R-A-M-O-S or something along those lines. There's a fictitious person.
Q. So if anybody had been reviewing the statements or the software they would have seen that Olivia Ramos was getting checks totalling over

Page 87

$600,000; is that right?
A. No.
Q. Well, explain --
A. I'm saying these two checks, in the audit -- on the audit are to Anna Hoormann. In the software it appears to Olivia Ramos.
Q. But that's the two IOLTA checks, right?
A. Yes.
Q. We've got lots of other checks to do.
A. Sure.
Q. All right?
A. Sure.
Q. And these checks were drawn off of the IOLTA account in September, right?
A. Sure.
Q. And Anna Hoormann actually put money back in the IOLTA account sometime around August, didn't she?
A. I don't remember.
Q. But no one caught that in their review of the statements, did they?
A. The last one we were able to successfully complete, I believe, was in July.
Q. The last what?
A. Reconciliation.

Page 88

Q. July of what?
A. It would have been '04. Either June or July.
Q. Explain that for me, if you will, because I've understood your testimony to be that you were receiving oral, verbal reports from either Anna, Dawn or Rick confirming for you that the IOLTA account did not have any problems with it.
A. Right
Q. Is that right?
A. Right.
Q. So what do you mean when you say that the last reconciliation was from June of 2004?
A. June or July. I'm not certain. But Rick did those, like I said earlier, on a semi-regular basis up until that point. Rick then left and went to go work at a CPA firm.
Q. That's helpful. When did Rick quit doing the reconciliations for you?
A. He didn't. He left in June or July of '04, and then was to come back in once a month to do them. Unfortunately, Ms. Hoormann would pull certain stunts -- her mom was dying, she had cancer, emergencies such as that -- on the day we were supposed to reconcile.

Page 89

Q. Now, I believe the question that I've asked is, who did reconciliations from September of '04 until December of '05, and your testimony, if I recall, was Anna, Dawn and Rick, or your brother, who was performing an accounting function; is that right?
A. Right.
Q. Is that correct? Is that your testimony?
A. Say that again.
Q. Let's just focus on Rick, okay?
A. Okay.
Q. Rick was working in the office up until June of 2004?
A. No, I'm sorry, it was 2005. The dates are cloudy.
Q. Well, you agree it's important to know the difference between 2004 and 2005, right?
A. Yes.
Q. So Rick was around through June or July of 2005?
A. Yes. Sorry.
Q. So I think what your testimony is, is that nobody did anything to reconcile or provide a report to you on the IOLTA accounts after Rick left

Page 90

in either June or July of 2005; is that right?
A. He came in on a few occasions to do it and, as I said, there would be some sort of emergency.
Q. I understand what your testimony is, is that -- I think I did. Let me make sure.
A. I don't know if he actually made headway on starting or if he didn't.
Q. So you don't know if anything was done after June of July of 2005 to reconcile the IOLTA accounts? Is that your testimony?
A. I know that Rick showed up at my office to do them and then there was always an issue. I don't know how far he got into them or not into them.
Q. Well, you do know if you got a report, correct?
A. Right.
Q. So apparently, if I understand your testimony, you didn't even get a conference or a verbal confirmation that everything was okay with the IOLTA accounts after that period of time, June or July of 2005; is that correct?
A. Correct.
Q. Now, there's a requirement in the rules

Page 91

of professional conduct for lawyers to reconcile these accounts on a monthly basis; is that right?
A. There is a -- I'd have to review the rule.
Q. Sitting here today, you're not even aware if there's a requirement to reconcile an IOLTA account on a monthly basis?
A. I would have to review the rule to agree to what it verbatim says.
Q. Well, I'm not asking you what it verbatim says. I'm asking you if you're aware that there is a provision in the rules of professional conduct, okay, put out by the bar, on the Web site, been on the Web site for years, that says a lawyer must reconcile his IOLTA account every month.
A. I believe that's along the lines that you must maintain the records with which to...
Q. But we now have some clarification that nothing was done to reconcile or do anything on your IOLTA account with First Citizens between, we'll say, July, June or July is your testimony, and December 23, 2005; is that correct?
MS. DELZOTTI: Objection to form.
THE WITNESS: Do you want to rephrase the question?

Page 92

BY MR. FEW:
Q. The statements came out on a monthly basis, right?
A. Yes.
Q. Did anybody provide you a report that the IOLTA account was okay for the statement period ending in November of 2005?
A. No.
Q. Did anybody provide you a report, written, oral, verbal, or otherwise, that the IOLTA account for the statement that would have come in October of 2005 was okay?
A. In which month?
Q. October of 2005.
A. I received that report, obviously, in January.
Q. But my question to you is: Before December 23, 2005, did anybody give you a report that there were no problems with your First Citizens Bank IOLTA account statement ending October of 2005?
A. No.
Q. Same question for the September 2005 statement. Did anybody give you a report?
A. No.

Page 93

Q. Same question for the August 2005.
A. No.
Q. What about for July 2005?
A. I don't remember.
Q. So you're not sure about that one?
A. No.
Q. So is it fair to say that nobody was reviewing the IOLTA account statements from First Citizens Bank between -- at least between July of 2005 and December 23, 2005?
MS. DELZOTTI: Objection to form.
THE WITNESS: Obviously Anna was.
BY MR. FEW:
Q. Anna was?
A. Yeah.
Q. Because she actually put money back in the IOLTA account in August of 2005, didn't she?
A. I don't know.
Q. You don't remember?
A. (Shaking head.)
Q. So do you know if she ever put money back in the IOLTA account?
A. I know that she was manipulating the accounts, yes.
Q. Why would she put money back in the

Page 94

IOLTA account?
MS. DELZOTTI: Objection to form.
THE WITNESS: Because she was a thief.
BY MR. FEW:
Q. But why would she put money back in the IOLTA account?
A. Because she was a good thief. She was -- she knew what she was doing.
Q. Do you think maybe it was because she was afraid that the bank -- that it was going to have an NSF charge?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.
BY MR. FEW:
Q. Flip, if you will, to the last two pages of what we've marked as Exhibit 4. Do you recognize those pages?
MS. DELZOTTI: What pages are you talking about?
MR. FEW: The last two pages of Exhibit 4. It's a letter from LandAmerica dated June 26, 2006, addressed to Edward G. McDonnell from Sallie P. DelVecchio.
THE WITNESS: It appears to be her follow-up letter.

Page 95

BY MR. FEW:
Q. Did you read that letter?
A. Yes.
Q. Right here, under the bold underlined heading Escrow Reconciliation Review, she states that the account's being phased out, right?
A. Yes.
Q. Now, she says: The negative client files shown on the multiple balances report should be researched and cleared. Has that been done?
A. Are you saying now?
Q. Yeah.
A. Are you asking about now?
Q. Uh-huh.
A. I know that they have been researched, yes.
Q. Did any third party ever contact you and say, Mr. McDonnell, you haven't paid off our mortgage?
A. Between that time period?
Q. Uh-huh.
A. No.
Q. No. Okay. Can you provide documents showing exactly what you did with the $550,000 that you received from that Countrywide loan?

Page 96

A. Yes.
Q. What did you do with it?
A. I put the funds into my trust account and paid off the previous loan I took to cover the loss.
Q. What previous loan?
A. I had taken a loan with First Citizens on a piece of property to -- initially to make sure that the escrow was made whole. I also paid off my --
Q. Hold on. You took out a loan with First Citizens when? The one that you were just describing, when did you take that loan out?
A. January of that year.
Q. Now, that was on a piece of property that you owned?
A. I owned it with my parents.
Q. Where?
A. On Shandon.
Q. What's the address?
A. 130 South Shandon.
Q. Describe the property, please.
A. It's a three-bedroom, two-bath bungalow, central heat and air, dishwasher.
Q. What was the loan amount?

Page 97

A. It was two -- I believe it was around 225, maybe 250.
Q. And you paid that off with the Countrywide loan?
A. Yes.
Q. Approximately when did you receive -- so the First Citizens loan on 130 South Shandon, was that property -- did it not have a mortgage on it before that?
A. No.
Q. It was free and clear?
A. Free and clear.
Q. And you owned that with your parents?
A. Yes.
Q. When did you come to own that property?
A. In law school.
Q. You lived in it in law school?
A. Uh-huh.
Q. And you had kept it and you were renting it out, or was it your house, you were still living there then?
A. I moved in and out of it and rented it in between.
Q. Where did you live in December of 2005?
A. 1404 Maple Street.

Page 98

Q. Do you know when you received the proceeds of this First Citizens loan on 130 South Shandon, the best you recall?
A. January or February.
Q. Well, you testified in your deposition with Wilbur Johnson that the Countrywide loan funded in January. So if the Countrywide loan paid off the First Citizens loan, then --
A. It was in between.
Q. Then the First Citizens loan had to have occurred before?
A. January, yeah. Of course, yes.
Q. But you don't know if it was the first of January? We could get the documents and find out?
A. Yeah.
Q. You can provide those documents, right?
A. Yeah.
Q. Is it your testimony here today that all of the money from the First Citizens loan on 130 South Shandon was put immediately into your First Citizens IOLTA account?
A. No.
Q. Where did it go?
A. I believe -- I don't -- I don't

Page 99

remember if it did or did not.
Q. Well, your lawsuit alleges that you have these damages and that you've had to put money back to make up for them; is that right?
A. Right. Right.
Q. So is it your testimony that you've put back every penny that was stolen by Anna Hoormann?
A. No.
Q. How much have you not put back?
A. I don't know.
Q. Did you ever have any third party come to you as a result of this and say, Mr. McDonnell, your firm has not satisfied this obligation on our behalf, we need our money?
A. No.
Q. Never happened?
A. No.
Q. Why do you think that is if the money was stolen over a period of, at least out of the IOLTA account, from May until December, that things weren't getting paid?
A. Everything got paid.
Q. Everything got paid?
A. Yes.
Q. Can you provide all the documents to

Page 100

show all the moneys that you obtained and put back in your accounts to cover these losses of client funds and all the documents to show that there are no claims against your practice?
A. Can you repeat that? Are you asking me if there are -- if I can produce the documents?
Q. First question. Can you produce all the documents to show all the monies that you've put back in to pay back these losses?
A. Yes.
MR. FEW: We need to get them because we don't have them. We do not have anything related to the --
BY MR. FEW:
Q. Have you produced any documents to your lawyers in this case related to the Countrywide loan for $550,000?
A. I don't remember. I could.
Q. You've got the documents still?
A. I can request them.
Q. Okay. We need it. Loan application all the way through to closing, okay, all the payment records.
MS. DELZOTTI: If he has them. He just said he doesn't know if he has them.

Page 101

MR. FEW: Well, if he doesn't have the loan application, then we'll get it by subpoena.
BY MR. FEW:
Q. The loan from First Citizens, do you have that?
A. I don't know.
Q. The final page of Exhibit 4 identifies what appears to be about 17 title policies that they needed confirmation that had been issued. Do you know if that's been addressed?
A. I know it's been addressed. I don't know if they've all been issued. Some of them might have been cancelations.
Q. Explain for me, if you can, how you think it took so long for your small business to discover that all this money was missing?
MS. DELZOTTI: Objection to form.
THE WITNESS: There's several factors.
BY MR. FEW:
Q. Start with the first one, please.
A. I relied upon an employee I trusted. I relied upon a bank.
Q. What does that have to do with not discovering that the money was gone? My question is: If the monies are being taken out, it had to

Page 102

be somebody's money, right?
A. (Nodding head.)
Q. So how could all this money be taken starting all the way back in October of 2004, according to your allegations, and it not be discovered until December of 2005, when the bank notified you of the problem?
MS. DELZOTTI: Objection to form.
THE WITNESS: She was able to kite the float between the accounts.
BY MR. FEW:
Q. She was able to kite the float?
A. (Nodding head.)
Q. Explain that.
A. She used the float off of the difference accounts to make sure that they did go in that account.
Q. Do you agree that the bulk of the money that was taken was taken out of the IOLTA account and put into the operating account?
A. I don't -- I don't remember. I'd have to review that.
Q. You don't remember how it was done?
A. (Shaking head.)
Q. Do you know how much money was taken

Page 103

out of the IOLTA account?
A. I don't remember exactly how much.
Q. You can't even guess?
A. No.
Q. So did you do any investigation yourself or did you just rely on what Lawyers Title did for you?
A. I went through the statements with my brother and my wife, as I mentioned earlier, but I relied upon the investigation of the third party, yes.
Q. When you went through the statements, how did you discover -- did you -- but you didn't even find -- if you went -- did you go through the statements and find checks made out to Anna Hoormann that you've now alleged are forgeries before or after First Citizens told you that there was a large check made out to her?
A. It was after.
MR. FEW: Can we take a break?
MS. DELZOTTI: Uh-huh.
(A recess transpired.)
BY MR. FEW:
Q. I'm going to hand you, Mr. McDonnell, a copy of what I'll represent to you is the rules of

Page 104

professional product for lawyers under South Carolina Rule 407, Rule 1.15, Safekeeping Client Property, that I printed off of the Supreme Court's Web site last night. I'll ask you if you're familiar with that rule.
A. Looks to be the rule.
Q. Read B, if you would, please. And I'm going to mark that as Exhibit 5. Read paragraph B there, please.
(DEF. EXH. 5, RULE 1.15: SAFEKEEPING PROPERTY, marked for identification.)
THE WITNESS: A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying service charges on that account, but only in an amount necessary for that purpose.
BY MR. FEW:
Q. So you agree that that rule provides that a lawyer -- that the only time, the sole purpose that it's allowed to do it, is to pay service charges?
A. I think that -- no, I do not.
Q. You don't agree with that?
A. No.
Q. So in your estimation, when you put

Page 105

your money, any money that you put back in your IOLTA account for any purpose other than to pay service charges to the account, that that was okay under the rules of professional conduct?
A. I don't know. I'd have to ask a professor or something like that.
Q. So with what you've been through, you haven't had any discussions with anybody on that yet?
A. No.
(DEF. EXH. 6, RULE 417 FINANCIAL RECORDKEEPING, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you a copy of what we'll mark as Exhibit 6, Financial Recordkeeping, Rule 417. Are you familiar with that rule?
A. I'll have to look at it. It appears to be that rule, yeah.
Q. A3 reads that you must -- that the lawyer who practices in the state shall maintain current financial records as provided in this rule and shall maintain the following records for a period of six years after termination of the representation. And then subparagraph eight says: Copies of monthly reconciliations of the lawyer's

Page 106

trust accounts with the statements received from the financial institutions. Do you see that?
A. Yes.
Q. So do you agree that that rule requires you to reconcile the trust account on a monthly basis?
A. I don't know.
Q. On subparagraph B, the rule states: With respect trust accounts required by Rule 1.15 of the rules of professional conduct, number two, withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized bank transfer. Do you see that?
A. Yes.
Q. Isn't it true that Anna Hoormann was making Internet banking transfers out of your IOLTA account starting in May of 2005?
A. I'm not sure on when it began, but she did.
Q. Generally, that doesn't ring a bell with you?
A. She apparently did Internet transfers.
Q. You agree with me, and we'll look at the statements in a minute, that if you had so much as glanced at the first several pages of the

Page 107

statements you would have seen Internet banking transfer on the statement, isn't that right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't recall.
BY MR. FEW:
Q. You don't recall because you didn't look at the statements, did you?
A. In what time period?
Q. May of 2005. Did you look at the May statement for 2005?
A. I don't know. I mean, obviously, since then I have, but I don't remember exactly what it says.
Q. Well, for purposes of this case – and you can answer the question in any way that you believe to be a truthful response under oath, but we're not concerned with what you looked at after December 23, 2005, unless we ask about it. We're concerned about, did you review the statements when they were mailed to your office by the bank, okay?
(DEF. EXH. 7, PLAINTIFFS' FIRST SUPPLEMENTAL RESPONSES TO DEFENDANT'S FIRST REQUEST TO PRODUCE, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark

Page 108

as Exhibit 7 and represent to you that this is the supplemental production response provided to my office by your lawyers in this case. That includes documents that we will go through here in detail, and you tell me if you recognize these documents, if they appear to be related to this lawsuit.
A. They appear to be the documents. I would need a moment. I mean, if you want me to go through and verify each one, I would, obviously, need some time.
Q. No, that's not my question. I'm just asking you if in general you recognize that to be discovery responses provided by your lawyers in this case. All right. Look, if you will, to Plaintiff 182. Do you recognize that?
A. Yes.
Q. This is an IOLTA account statement?
A. Yes.
Q. Down at the bottom, it says page one of two, right?
A. Yes.
Q. So apparently this was in the early stages of using the IOLTA account from First Citizens?
A. Yes.

Page 109

Q. And the address up here is P.O. Box 11496, correct?
A. Yes.
Q. Is that still your P.O. box?
A. No.
Q. What's your P.O. box? When did it change?
A. In January of -- probably January of '06.
Q. But at that time that was the P.O. box that you used?
A. Yes.
Q. And that's where you received mail?
A. Yes.
Q. So if we looked in a Lawyer's Desk Book, or on your business card, or the Internet, or anywhere, that would have been the business address that we would have seen for Edward G. McDonnell, PC?
A. Yes.
Q. Flip, if you will, two pages over to what your counsel has Bates marked Plaintiff 184. Do you see that at the bottom?
A. Yes.
Q. And down here at the bottom right it

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Page 110

also says page one of 16, doesn't it?
A. Yes.
Q. Now, if you look at this statement, you see wires in as credits, correct?
A. Yes.
Q. But there are no wires out, right? Take your time and look at it and make sure.
A. Yes.
Q. Because according to that rule -- according to the rules, all disbursements out of a trust account should be made by check. Isn't that what it says?
A. After review, yeah.
Q. You agree that any disbursement out that -- if it's in the IOLTA account it's client money, right?
A. Right.
Q. Even if it's for a closing and your fees are going to be paid out of it, until that check is cut out to you for your closing fees, title insurance or whatever, it's client money when it's in that account, right?
A. Right.
Q. And the recordkeeping requirements generally require you to be able to show where

Page 111

every penny went, right?
A. Right.
Q. Right. So if it's by check, then you know that, right, because you know the payee, you know the amount, you can see where it went, correct?
A. Yes.
Q. How would it be -- explain to me under what circumstances you think it complies with the rules of professional conduct to have a wire out of an IOLTA account.
A. What's the difference between that and a check?
Q. Well, the wire, do you have records showing where it went?
A. Yeah. You would have a reference number, a federal reference number that represents account numbers.
Q. What about an Internet banking transfer, is that ever an appropriate transaction coming out of an IOLTA account?
A. I used -- I would use a wire.
Q. You would use a wire. Okay. So at this point in time, these statements that we're looking at right now, which is page three of 16 and

Page 112

four of 16, these are for the period of February 1, 2004, to February 29, 2004, right?
A. Uh-huh.
Q. So there must have been a leak here, right? All right. Then Plaintiff 200, this is a different document, isn't it?
A. Yes.
Q. This is prepared out of SoftPro, isn't it?
A. Right.
Q. So somebody went in and prepared this reconciliation account, didn't they?
A. Yes.
Q. So that could be done -- so obviously it can be done, right?
A. Yeah.
Q. In fact, this was run on September 15, 2008.
A. Right.
Q. Explain to me what this is. Is this a picture of what's going on in the IOLTA account as of September -- you know, as of 2/29/04?
A. It's a snapshot based upon the data which was entered into SoftPro.
Q. Did anyone prepare a report like this

Page 113

and give it to you in February of 2004?
A. Yes.
Q. Do you have it in your files?
A. I don't -- I don't know.
Q. This would be the reconciliation. Is this what you're saying is the reconciliation that shows that you complied with the rule?
A. No.
Q. So the rule requires a monthly reconciliation, right?
A. I don't know.
Q. But this is something that was prepared on September 15, 2008, right?
A. Yes.
Q. Next statement, Plaintiff 201. Same P.O. box, right?
A. Yes.
Q. You've testified earlier and in your other deposition that you had trouble receiving some mail.
A. Yes.
Q. What communications did you have with the bank regarding any difficulty receiving any statements from First Citizens Bank?
A. I informed my office manager to contact

Page 114

the bank and find out what's going on with the statements, and look into it with the post office.
Q. Your office manager then would have been who?
A. Anna Hoormann.
Q. Well, we're actually in March right now, so she didn't even work for you at this point, did she? When did the problem with the mail occur?
A. Okay. After this point, around -- I would say it was an ongoing thing.
Q. Ongoing starting when?
A. Probably August of '04.
Q. So starting after Anna Hoormann comes to work for you, right?
A. Correct. We also moved, yes.
Q. When did you move?
A. Either in August or September of '04.
Q. But this is coming to a P.O. box, right?
A. Yes.
Q. I mean, you agree that -- and we can go through -- all these IOLTA account statements through the end of 2005 were sent to your P.O. box; isn't that right?
A. That's where they are addressed, yes.

Page 115

Q. So did you have difficulty with the IOLTA account statements even though they were being mailed to your P.O. box?
A. Yes.
Q. And what's the basis of your belief that you had difficulty receiving the statements? What Anna Hoormann told you?
A. Both myself and Harry were having troubles with getting our mail. We looked into it with -- we called the people we were having problems with mail with. Anna did it on my behalf. Dawn did it on Harry's behalf. There was a circle where we were at -- we had been at 712 Calhoun Street, we moved to 1924 Barnwell Street, we put in a mail forward request, and the mail got, supposedly, caught up in some circle between the P.O. box and the office, the old office.
Q. Are you saying in any way that your failure to report issues with the IOLTA account had anything to do with not receiving the mail?
A. Repeat that question.
Q. You're under an obligation under South Carolina law, with respect your accounts, to report any problems with the account if you want to have a remedy. Do you understand that?

Page 116

A. Okay. Yeah. What are you -- are you saying that I have an obligation to --
Q. I'm asking you are you aware that you have to review your statements if you want to have any remedy against the bank?
MS. DELZOTTI: Objection to form.
THE WITNESS: I am now.
BY MR. FEW:
Q. As of when? As of today, or before, or since this suit?
A. I don't know.
Q. You've suggested that maybe you didn't receive the mail, okay? Are you suggesting or testifying in any way that you did not receive any of these First Citizens Bank account statements in a timely manner?
A. Yes.
Q. You are? Okay. So is that the reason that you didn't report the monies being transferred in and out of these accounts by Anna Hoormann, is because you didn't receive the statements? Is that your testimony?
A. It would have delayed it.
Q. Your testimony has been that your brother was giving you these reports --

Page 117

A. Yeah.
Q. -- up through July of '05, correct?
A. Right.
Q. So apparently there was no issue with receiving the statements prior to July of '05, right?
A. They weren't coming timely.
Q. But you're required, under the deposit agreement, to report it within 14 days, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.
BY MR. FEW:
Q. Well, the deposit agreement is Exhibit D, right? We've been over that already. Do you want me to show you?
A. I can't -- I can't substantiate whether that is the one that was provided to me.
Q. Page three. And let's just assume for purposes that this will be. It says: Upon receipt or availability of your statement and canceled items, you may agree that you will promptly examine your statement and items and will notify us if there are any incorrect or unauthorized signatures, transactions, or alterations. You also agree that 14 days, 30 days in Georgia, after the statements

Page 118

and items are first available to you is a reasonable time for you to examine your statements and notify us of unauthorized signatures or alterations. Do you agree that's what that statement -- what that says?
A. That's what that document states.
Q. And you signed the deposit agreement saying that you received that document as a part of opening the account, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know that.
BY MR. FEW:
Q. You don't know that you signed the deposit agreements?
A. No. I know that.
Q. We've already covered that once already. So this statement here doesn't have any Internet transfers on it, does it, the one for March 31, 2004?
A. It doesn't appear, no.
Q. And then once again we've got this report that's Plaintiff 214 that was produced in September of 2008, right?
A. Sure.
Q. Did you receive a report like this in

Page 119

March of 2004?
A. I don't -- I don't know.
Q. Would it have been normal practice for someone to print this off and show it to you?
A. No.
Q. So you didn't keep a written reconciliation of the account during that time period?
A. I don't know.
Q. Let's look at the April 30, 2004, statement. Do you see that?
A. Uh-huh.
Q. It's page one of 14, correct?
A. Uh-huh.
Q. And in this set we were provided with the first four pages. Do you see that?
A. Yes.
Q. And then here's another escrow account reconciliation summary report prepared by somebody on September 15, '08, right?
A. Right.
Q. Who is Angela?
A. She's my office manager now.
Q. Eventually you received the statements, right, because through July of 2005 your brother,

Page 120

or somebody, or Anna or Dawn, was, as far as you know, reviewing them and telling you that everything was okay; is that right?
A. Yes. They were giving me a status, yes.
Q. Verbally, right?
A. Yes.
Q. They weren't producing any written reconciliation; is that right?
A. No.
Q. Flip, if you will, to the statement from May of 2005. It's marked Plaintiff 740. This appears to be a form that -- a document that was provided to you by the bank on December 27, 2005; is that right?
A. Correct.
Q. And this one says -- so is it -- if it's not in the documents that have been produced to us, then apparently you don't have the original of this statement; is that right?
A. That's correct.
Q. And as far as you know, that would be accurate? Is it your testimony that Anna Hoormann apparently destroyed or threw it away or put it somewhere where you couldn't reach it?

Page 121

A. Yes.
Q. Do you have any reason to believe that what's shown on these pages, Plaintiff 740 through 744, is not the same as what would have been shown on the statement that you received back in May of 2005?
A. I don't know.
MS. DELZOTTI: Let's take a break for one second.
(A recess transpired.)
BY MR. FEW:
Q. Let's back up to 689, please. Mr. McDonnell, if you can, flip back to what would be Plaintiff 689.
A. Okay.
Q. Do you have that?
A. Yes.
Q. Is that the first page of the statement ending April 30, 2005?
A. Yes.
Q. For your IOLTA account?
A. Yes.
Q. That was mailed to the P.O. box?
A. Yes.
Q. So apparently this was received,

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Page 122

because this appears to be the original from the bank, correct?
A. I don't know.
Q. Well, let's compare it to what's marked 740. 689 has the First Citizens logo at the top, right?
A. Right.
Q. 740 does not, right?
A. Right.
Q. 740 shows a fax header from First Citizens Bank Irmo, right?
A. Yes.
Q. Is that your fax number, 739-2077?
A. Yeah.
Q. That's where it came from. And it says page two of six, correct, at the top?
A. Yes.
Q. And then at the bottom it looks like it says page one of five. Do you see that?
A. Yes.
Q. So this appears to be something that the bank sent you after they notified you that you had problems with the IOLTA account, right?
A. Yes.
Q. And it says page one of five at the

Page 123

bottom, right?
A. Yes.
Q. Now, if you flip back to 689, this appears to be the type of statement that you would have -- the original statement that would have been mailed to you in the mail, correct?
A. Yes.
Q. And in fact, at the bottom right of page 689 it says page one of 50, doesn't it?
A. Yes.
Q. So what you were receiving was not only the initial pages that show the credits, the balance, the checks that were paid and the other debits and a summary, but also a list of -- you received image copies of all the items that were run through the account, didn't you?
MS. DELZOTTI: Objection to form.
THE WITNESS: Uh-huh.
BY MR. FEW:
Q. Is that right?
A. If I could clarify your question about the two -- the two -- the two statements.
Q. Sure.
A. Some were provided by fax by First Citizens, some of them we picked up.

Page 124

Q. Some of them you picked up?
A. Yeah.
Q. Well, I think we can get testimony from First Citizens folks, but if -- normally they -- if it has this appearance on it, it's because they had to go back and reprint it off the system, more than likely. So, you know...
A. Okay.
Q. But since you've raised that point, you don't really know if they're originals or not, do you?
A. They're obviously not originals.
Q. Well, you don't know if this was a copy of the original statement. Do you have -- you have this original copy, right?
A. I don't know.
MR. FEW: We'll want to make an appointment to review all the originals that he's provided.
BY MR. FEW:
Q. So let's look now at the May statement, which is marked Plaintiff 740.
A. Okay.
Q. Do you have that?
A. Yes.

Page 125

Q. Do you see the part here that gives the balance, average collected balance, 473,000, shows all the credits and the debits? Do you see that?
A. Yes.
Q. You've got 254 checks at 1 million -- 1.5 million, roughly, and then 40 other debits at 2.297. Do you see that?
A. Yes.
Q. And then, if you flip to the next page, you see the wires that came into the account, right?
A. Yes.
Q. And that totals, looks like, $4,273,274?
A. Yes.
Q. And then there's a list of checks that were paid, right?
A. Yes.
Q. And then page three of five, which is 742, continues with another full page of checks, correct?
A. Yes.
Q. And then, if you look at 743, there's a summary of the other debits from your account, right?

Page 126

A. Yes.
Q. And then you see that the -- most of them are listed as wire transfers with a reference number.
A. Right.
Q. But there's three there -- there's a telephone transfer --
A. Right.
Q. -- of 11,000 and then there's two Internet transfers.
A. Right.
Q. Now, if you'd have reviewed this statement and you would have seen those Internet transfers of even numbers, 10,000 and $18,000, on May the 18th and May the 25th, what you would have done?
A. I don't know.
Q. Would you have known that that was improper, to see an Internet transfer on your IOLTA account?
A. I don't know.
Q. You don't know?
A. I don't know.
Q. How do you know where it went?
A. I don't know if that was the bank -- I

Page 127

wouldn't know if that was the bank moving money or -- I don't know that that --
Q. Why would the bank move money out of your IOLTA account?
A. They put it in the --
Q. Has that ever happened before?
A. Have they ever put the money in the wrong account?
Q. Has the bank ever made -- moved money, made a debit out of your IOLTA account that was unauthorized?
A. Yes.
Q. Can you provide -- First Citizens did that?
A. I don't know. I don't know if it was First Citizens, but I know it has happened.
Q. Tell me about it, the last time it happened.
A. I know that a person can reverse a wire without your authorization after money has gone into your account.
Q. Well, in that case you would just have more money in your account, right?
A. Yes.
Q. Because the wire wouldn't go through.

Page 128

right? That wouldn't be a problem, would it?
A. Say that again.
Q. Let's just get back on track. Did First Citizens ever make a debit out of your IOLTA account that was unauthorized?
A. I don't know.
Q. You can't remember any specific instance of First Citizens doing that?
A. I don't -- I don't remember.
Q. On any of your accounts?
A. I don't remember.
Q. May the 18th. Do you see this list?
A. Yes.
Q. And we're looking at page -- at Plaintiff --
A. Yes, sir.
Q. -- 743?
A. Yes.
Q. These things, they stand out, don't they, because they have these numbers over here in this big blank space. And then, if you look, it says: Transfer Internet. Okay. So did you look at this statement and see these Internet transfers at any time in the month of June of 2005?
A. No.

Page 129

Q. How about July of 2005?
A. No.
Q. Now, Dawn and Anna and your brother, who were charged with reconciling these accounts -- correct?
A. Yes.
Q. They would have done that work pursuant to your instructions, right?
A. Yes.
Q. But as we sit here today, you don't even agree that it's improper to have an Internet transfer out of your IOLTA account?
MS. DELZOTTI: Objection to form.
THE WITNESS: I think it would depend on the circumstances.
BY MR. FEW:
Q. It is my belief that we have not been provided copies of the operating account bank statements for 2005. So when we go on break, if you want to get with your lawyer and go through what you all have produced to us. If you can show me that you have those Boomerang -- I mean those operating account statements, then that would be appreciated and we can start to use them in this deposition. If not -- I'll ask you this. Do you

Page 130

have copies of the operating account statements?
A. Yes.
Q. You do have copies of the operating account statements?
A. They might be similar to this.
Q. Well, have you given them to your lawyers?
A. I don't know.
Q. Have you had conferences with your lawyers in response to the requests for production that have been sent in this case to make sure that everything that we've asked for has been provided? Because I'm taking this deposition to ask you questions about three accounts that have been put at issue in a lawsuit brought by you against my client, and it -- we're over a year old and I still don't have all the documents related to it, and your answer is that you don't know if you've given them to your lawyer or not?
MS. DELZOTTI: He's got more than one lawyer. He's dealing with Wilmot and with us. I don't know what specific interrogatories or requests that you're referring to.
MR. FEW: That is no excuse at all. This is his lawsuit. It's his lawsuit. We don't

Page 131

have the documents.
MS. DELZOTTI: Show me where you asked for the documents and what our response was. And if you didn't have the documents before today -- I mean, he's dealt with other attorneys.
MR. FEW: The deposition -- the deposition will be continued because we don't have -- unless he testifies that he doesn't have them.
MS. DELZOTTI: Okay. Show me where you asked for the documents and I'll respond to that.
MR. FEW: It's in there. I'm not going to interrupt the deposition to do it. You can pull the request for production. We've asked for every document related to all the accounts put at issue, and I'm asking you all if you want to take a break now. Let's take a break, go through your documents and find the document that would show where this money went. Okay?
MS. DELZOTTI: If he has them.
THE WITNESS: It says on there where it went.
BY MR. FEW:
Q. It says on there where? It gives the account number, right?

Page 132

A. Right.
Q. And that would be the account number for your operating account, right?
A. Correct.
Q. So if we had the bank statement for your operating account -- which you agree you were supposed to review that one also, right?
MS. DELZOTTI: Objection to the form.
THE WITNESS: I don't know of an obligation on the operating account.
BY MR. FEW:
Q. So sitting here today, you are not aware that as an accountholder you have --
A. Oh, yes.
Q. -- an obligation to review your operating account statement?
MS. DELZOTTI: Objection to form.
THE WITNESS: I thought you were referring to the Rule 417.
BY MR. FEW:
Q. I'm talking about, under South Carolina law, if you want to have a remedy against the bank you've got to review your statements, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: It appears.

Page 133

BY MR. FEW:
Q. Under your understanding of South Carolina law, you have to review your statements if you want to have any remedy against the bank and report the unauthorized transactions; isn't that right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know. That's not my area.
BY MR. FEW:
Q. You don't know?
A. It's not my --
Q. That's the basis of your lawsuit, isn't it?
A. -- my area of law.
Q. Isn't it? Isn't that what this lawsuit is about?
A. I'd have to refer to my lawyer.
MS. DELZOTTI: Objection to form.
BY MR. FEW:
Q. You don't know what this lawsuit is about? Okay. Going back to Plaintiff 743.
A. Yeah.
Q. There's a series of wire transfers and then there are two Internet transfers and one

Page 134

telephone transfer, right? Where did the telephone transfer go? Do you know?
A. I don't.
Q. Was that made by Anna Hoormann?
A. I don't know.
Q. So you still don't know what that $11,000 transaction out of your IOLTA account was?
A. I don't know.
Q. You don't know if that's part of your damages claim in this lawsuit or not?
A. I would have to review the audit.
Q. Assuming you did not review the IOLTA account statement and you did review the operating account statement for the May 2005 time period, you would have seen these Internet transfers out of the IOLTA account into the operating account, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't believe you phrased that right.
BY MR. FEW:
Q. If we had before us the May 2005 bank statement for your operating account --
A. Okay.
Q. -- it should show these two Internet transfers, correct?

Page 135

A. I don't know how it would show up on there.
Q. Well, the money is transferred out of the IOLTA account and into the operating account.
A. I don't know if it would show up as an Internet transfer, a regular deposit. I'm not sure exactly.
Q. If money is transferred out of an IOLTA account and into your operating account, you have taken client funds; isn't that right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't -- I don't know that that would be a true statement.
BY MR. FEW:
Q. The money is transferred out of this IOLTA account into your operating account. Is that what this shows on this document that's marked 743?
A. Yes.
Q. And you never discovered this on your own?
A. After the fact.
Q. After the bank reported the whole affair to you? After December 23, 2005, right?
A. Yes.
Q. Look at 746, which is the June

Page 136

statement. Okay. This does not appear to have been faxed to your office, right?
A. Correct.
Q. And at the bottom it says page one of 88, right?
A. Yes.
Q. Now, we have right here as a part of this production that was provided -- we only go to page six of 88, right?
A. Yes.
Q. Is it fair, and do you agree, that pages seven of 88 are more than likely copies of all the checks, image copies of all the checks?
A. I don't know what -- probably most of them.
Q. Well, your testimony is that you reviewed these statements on a semi-regular basis, right?
A. Right.
Q. Do you not remember what made up the final 82 pages of the statement? Did you not review it enough to even remember why it was an 88-page statement?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't think anybody

Page 137

would remember what page seven through 88 was.
BY MR. FEW:
Q. If you get a bank statement and it's 88 pages long and you didn't -- the fact is you didn't look at it. You didn't even look at it to know what was included, did you?
MS. DELZOTTI: Objection to form.
THE WITNESS: Can you restate that? Somebody was walking in here.
BY MR. FEW:
Q. You didn't look at the bank statements ever, did you?
A. I said that I've reviewed them on a -- every once in a while.
Q. On an every-once-in-a-while semi-regular basis?
A. Semi-regular, yeah.
Q. But sitting here today, you can't even recall whether or not pages seven through 88 were the image copies of the checks or not?
MS. DELZOTTI: Objection to form.
THE WITNESS: I'm certain that part of them were checks. I don't know if page seven was more of the bank agreement.

Page 138

BY MR. FEW:
Q. Well, I'm saying generally. I mean, the image copies of the checks would have been provided, right, as part of those 82 pages?
A. Yes.
Q. Let's look at this statement from -- dated June 30, 2005. Tell you what. Why don't you start right now, at 1:54, and flip through those four pages and see how long it takes you to find either a telephone transfer or an Internet transfer.
A. Where are you asking me to start?
Q. Between 746 and 751.
A. To find a telephone transfer?
Q. Uh-huh.
A. Or an Internet transfer?
Q. Yes. No. Yeah, find either a telephone transfer or an Internet transfer out of the account.
A. There doesn't appear to be one.
Q. You don't see one?
A. You said on 746 and 747, correct?
Q. No. I said on 746 through 751.
A. Okay. I misunderstood. There appears to be one on page four and one on page five.

Page 139

Q. That didn't take long, did it?
A. No.
Q. Took less than a minute, didn't it?
A. Yes.
Q. If you had seen the telephone -- the Internet transfer that went to the account ending in 89101 -- which is your operating account, right?
A. Right.
Q. If you would have seen that sometime in July, when you would have received this statement, what would you have done?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.
BY MR. FEW:
Q. Would you have even known that it was improper to have an Internet transfer into your account without some type of fee agreement?
MS. DELZOTTI: Objection to form.
BY MR. FEW:
Q. I mean, if you had earned an $8,000 fee and you had -- and for some reason it had been handled by an Internet transfer, don't you think you would have known about it?
MS. DELZOTTI: Objection to form.
THE WITNESS: As I mentioned earlier, I

Page 140

probably wouldn't have known whether it was the bank or something else going on. I'd have to find that out.
BY MR. FEW:
Q. But you didn't even -- would you have even realized that this was something that should have been investigated?
A. I don't know.
Q. Would you have asked Anna Hoormann why there was an $8,000 transfer out of the account?
A. Probably.
Q. What type of answers would have been satisfactory?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.
BY MR. FEW:
Q. So your office received this June 30, 2005, statement and didn't report any issues regarding that Internet transfer on June 17th --
MS. DELZOTTI: Objection to form.
BY MR. FEW:
Q. -- to the bank until after December 23, 2005, right?
MS. DELZOTTI: Objection to the form.
THE WITNESS: As I mentioned before, I

Page 141

don't know if we received these in the mail or if they were hand delivered.
BY MR. FEW:
Q. Well, this would have been during the time period that your brother was reconciling the accounts, right? This is June of 2005, so you were still getting -- according to your earlier testimony, you were still getting at least a verbal report from your brother that everything was still okay with your trust account, right?
MS. DELZOTTI: Object to the form.
THE WITNESS: We would have received this in July.
BY MR. FEW:
Q. So did your brother review this statement and give you a report or not?
A. I don't know.
Q. You don't know?
A. I don't know.
Q. So it could be that the last one he reviewed was the May statement, right?
A. Yes, it could be.
Q. But again, he can only review and report to you the issues that you've trained him to report to you, right?

Page 142

MS. DELZOTTI: Objection to form.
THE WITNESS: Yes.
BY MR. FEW:
Q. If you look at 750, there's a telephone transfer for $10,924.49. Is that -- do you know where that went?
A. No.
Q. And right above it there's a wire transfer for the same amount.
A. What page was that again? I'm sorry.
Q. 750.
A. Yes, there is.
Q. And there's also a miscellaneous debit on June 22nd.
A. Yes.
Q. So should SoftPro have entries for this that would allow us to determine where this money went?
A. When you say we...
Q. Anybody. I mean anybody that reviews, I mean, your --
A. It would indicate where it's manipulatable.
Q. This is client money, right?
A. I don't know. I mean, at that -- I

Page 143

don't know at that point.
Q. Well, it's in your IOLTA account, it's in your trust account which is an account that's created specifically for client funds, right?
A. Right.
Q. So this is client money that's being transferred out. Whether it's a fee to you or whoever, it's client money at this -- when it's in this account, right?
A. I don't know.
Q. Sitting here today, you don't know if any of those debits are made by Anna Hoormann or not? And I'm referring to the $1,188.86 on June the 22nd marked miscellaneous debit on page 750. Do you know if that debit was made by Anna Hoormann or not?
A. I believe it would be in the audit.
Q. The wire transfer of 10,924.49 of June 28th?
A. I believe that would be in the audit.
Q. The telephone transfer of June 28th of the exact same amount, 10,924.49, do you know any -- do you know anything about that?
A. I believe that would be in the audit.
Q. You haven't investigated these things

Page 144

yourself, you're relying on whether or not Lawyers Title told you if these were improper transfers?
A. As I mentioned before, we went back through these things during those days after Christmas, but since then, I have not, no.
Q. Well, when you went through them in those days after Christmas, did you -- do you remember if you looked at every single transaction and reconciled it with your software to determine if it was an appropriate debit from the account?
A. To the best of our abilities, yeah.
Q. But your testimony today is that you would have to look at the audit prepared by Lawyers Title?
A. Right.
MR. FEW: So we're going to get those Quick -- those -- access to this SoftPro software so we can determine where this money went, right?
MS. DELZOTTI: You're going to have to -- what are you asking for specifically?
MR. FEW: I'm asking for complete responses to our discovery, which is all documents related to this lawsuit, okay?
MS. DELZOTTI: Okay. Well, I mean, you're going to have to take that up with the

Page 145

lawyer.
MR. FEW: With the lawyer who's not here. He's in the office, he's just not in this deposition.
BY MR. FEW:
Q. And now Angela, on 8/14/08, prepared this reconciliation summary report marked Plaintiff 834?
A. Yes.
(DEF. EXH. 8, IMAGE COPIES OF CHECKS, marked for identification.)
BY MR. FEW:
Q. And following up on our other questions, I'm going to hand you what we'll mark as Exhibit 8 and ask you if this doesn't appear to be the missing pages seven through 88 on the June statement that shows image copies of the checks on the account. And you can take your time and look through that.
MR. FEW: Why don't we go off the record while he reviews that.
(Off-the-record conference.)
BY MR. FEW:
Q. Have you had time to review what we've marked as Exhibit 8, Mr. McDonnell?

Page 146

A. Yes.
Q. Does it appear to be the pages seven through 88 of the June 2005 statement that First Citizens Bank provided to your office?
A. Yes.
Q. And does it appear to show image copies of all the checks that would have run through the account during that month?
A. Yes, minimized copies.
Q. And does that appear to be what you would -- what you recall receiving from the bank during that time period?
A. Yes.
Q. So when you made your semi-regular review of these account statements that's what you would have seen, generally?
A. Yes.
Q. Let's go back to what we've marked as Exhibit 7, I believe, and, if you would, look at the July statement. Now, when did you say your brother left? You said June or July, was your testimony.
A. Yeah, June or July.
Q. So if this statement didn't come out until July 31st, then we know from your previous

Page 147

testimony that nobody reviewed it until after December 23, 2005, right?
A. Right.
Q. So even with that -- if you would, take a look at the pages that are marked Plaintiff 835 to 840 and see if you can find any Internet banking transfers.
A. Some appear on page four.
Q. So just by flipping the pages and glancing, you can see that those transactions jump out at you, correct?
A. Yeah. You asked about Internet transfers.
Q. Because they have the -- the account number appears in the blank space right out here, right?
A. Yeah. It does.
Q. So if anybody had reviewed those they would have seen those Internet transfers, right?
A. Yeah.
Q. And if Anna or Dawn or your brother Rick were viewing the statements as you had instructed them and trained them to do, would they have raised these transfers to your attention?
MS. DELZOTTI: Objection to form.

Page 148

BY MR. FEW:
Q. The $20,000 transfer on July the 8th and the $15,000 transfer on July the 20th.
A. I'm sorry, could you repeat that? I'm sorry.
Q. Your testimony has been that you delegated responsibility to review the IOLTA statements, correct?
A. Yes.
Q. Those that you delegated it to included Anna Hoormann, Dawn -- is that correct?
A. Uh-huh.
Q. And your brother, Rick McDonnell?
A. Yes.
Q. Anybody else?
A. No.
Q. What's Dawn's last name?
A. Murray. No. Player.
Q. Player. Was that her name at the time?
A. No.
Q. What was her name at the time?
A. Murray.
Q. Dawn Murray. Okay. And they would have reviewed these statements following your instructions, right?

Page 149

A. Right.
Q. So did you ever train them to look for an Internet transfer as being an appropriate transfer from an IOLTA account?
A. I sent them to reconcile -- the SoftPro classes for reconciliation.
Q. So you don't know if they were trained to know that this was a red flag?
A. I don't know.
Q. Do you consider this to be a red flag?
A. As I stated before, I'd have to find out, you know, if it was the bank or what.
Q. You would have investigated it, then, if you saw it? If you had reviewed the statements and seen these transfers you would have -- is it your testimony that you would have taken a second step to determine why these types of debits were showing up on your client account?
A. I probably would have asked Anna to call the bank and find out what was going on.
Q. So you would have left responsibility with Anna to determine whether or not they were appropriate?
MS. DELZOTTI: Objection to form.
THE WITNESS: I would have found out

Page 150

why they appear on the statement.
BY MR. FEW:
Q. And part of that would have been determining where the money went, right?
A. Yes.
Q. And if it went into your operating account, then it would have had to have been a fee; isn't that right?
A. No, that's not correct.
Q. What else could it have been? Why else would –
A. You said in my operating account.
Q. Yeah. If this money – which we know it went into your operating account, right?
A. Right.
Q. If you see a transfer out of the client funds into your operating account, other than a fee for services rendered, why else would you be – why else would the money be transferred into your operating account?
A. If it went from IOLTA to my operating account? Yes, a fee.
Q. Other than a fee, what would be an appropriate debit from a client account to your operating account?

Page 151

A. Just a miswired – miswired – come in the wrong account.
Q. That wouldn't be appropriate, though, would it?
A. If somebody else put it into my account?
Q. Other than a fee for services rendered – what are the circumstances under which it would be proper to have a transfer out of the client funds account into your operating account other than a fee? You tell me.
A. Out of the clients' funds, never.
Q. Never?
A. Yeah.
Q. So if you'd have looked at this, and going back through the statements that we've been looking at back into May, where we have 8,000, 10,000, 15,000, 20,000, $15,000 transfers out of the client funds account into your operating account, those all would have had to have been fees? Is that your testimony?
A. Should be fees.
Q. And there also should be some documentation in your records to show what the basis of the fee was, right? Either a closing file

Page 152

or some fee agreement with the client for a contingency fee; isn't that right?
A. Yes.
Q. Do you have documentation in your file for any of these transfers, these Internet transfers that we're going over, starting with that May statement of 2005?
A. I don't know.
Q. Those transfers were all made by Anna Hoormann, weren't they?
A. Right.
Q. And neither you or anybody else discovered it until the bank notified you, right, on December 23, 2005?
A. I just – when I called the bank and asked them what was going on. You know, when Anna called me and said there was a problem with the account and then I called the bank, they said there was an issue.
Q. But my question was: Neither you or anybody that works for you realized that those transactions, those Internet transfers into your operating account out of the IOLTA account, were improper until after the bank notified you of the problem with the IOLTA account on December 23,

Page 153

2005?
A. Correct.
Q. Mr. McDonnell, let's look at the August 31, 2005, statement that starts at Plaintiff 908. If you would, flip through 908 through 915 and tell me how many Internet transfers you see on this statement.
A. Three. Four.
Q. Four, right? Would these transfers have been red flags if you would have reviewed the statement and seen them sometime in September of 2005?
A. I would have done the same thing I would have done the month before.
Q. And what was that again?
A. Try to find out what they are.
Q. So if you had seen them you would have done an investigation, correct? Is that your testimony?
A. Yes.
Q. And these transfers, this is client money, $15,000, on August the 5th; is that right?
A. I'm sorry, could you repeat that question?
Q. 15,000 on August the 25th?

Page 154

A. That's what it appears on the statement, yeah.
Q. That was the amount of the Internet transfer, right? 15,000 on August 26th?
A. Yes.
Q. 25,000 on August 29th; is that right?
A. I'll say that's 25,000. I can't tell if that's 25 or 26.
Q. And then 30,000 on August 31st?
A. Yes.
Q. Now, I've asked you earlier that -- apparently Anna Hoormann put money back into the IOLTA account at one point in time. Do you remember --
A. Yes.
Q. Do you remember that?
A. Yeah.
Q. Do you know where -- which account that money came from?
A. I'd have to look at the audit.
Q. Did it come from either the Boomerang account or the operating account, or did it come from some other account?
A. One of those two.
Q. Let's look at the September statement

Page 155

that's marked Plaintiff 1022.
A. Let me grab some water real quick.
Q. Sure. Yeah.
MR. FEW: Do you want to go off the record.
(Off-the-record conference.)
BY MR. FEW:
Q. Mr. McDonnell, we were looking at Plaintiff 1022, which is part of Exhibit 8, I believe. Is it eight or seven, Exhibit 7?
A. I think it's --
Q. Look on the front here.
A. Seven.
Q. Seven. Okay. This is -- are you on that page?
A. Yeah.
Q. This is a September 1st to September 30, 2005, statement for the IOLTA account; is that right?
A. Uh-huh.
Q. And the fax header up above indicates that First Citizens Bank faxed this to your office, apparently, on December 23, 2005, at 5:47 p.m. Do you see that?
A. Yes.

Page 156

Q. So apparently the bank -- and this handwriting down here appears to be from one of the bank employees, maybe Jim Holcombe? Does that ring a bell?
A. Jim worked at that branch. I don't know if that's his handwriting or not.
Q. You identified Jim as a witness in this case, right?
A. Right.
Q. So you initially had communications with Jim about this matter, right?
A. I don't remember if it was initially Jim or initially Lisa. It might have been both.
Q. Lisa Mosley?
A. Yes.
Q. Did you speak with one of the two of them on December 23rd, or was Anna Hoormann doing the work at that time?
A. I don't remember.
Q. So anyway, this appears to be like one of the earlier ones where the statement is -- you must not have had your original statement in your office file. Does that seem accurate?
A. Yes.
Q. And so tell me -- if you can, flip

Page 157

through this statement and see if you see any Internet transfers.
A. Looks like one.
Q. You see one?
A. Yeah.
Q. And what's the amount?
A. $30,000.
Q. Now, would that have been a red flag if you'd have seen it?
A. I probably would have investigated it further.
Q. Because you would have -- I mean, a $30,000 transfer out of client funds into your operating account, that would have been a big fee for one transaction, right?
A. Yeah.
Q. I mean, that's way out of line for the type of real estate practice that you have, is it not?
A. Right.
Q. Correct?
A. Correct.
Q. Now, while we're on this, let's go back to what we've marked as Exhibit 4. I think we probably need to put a binder on this because it's

Page 158

so -- Anna Hoormann also wrote two checks out of the IOLTA account. Do you remember that?
A. Yes.
Q. And do you remember that time period?
A. I mean -- do I remember that time period?
Q. Yeah. Let me ask you this. Let's look back at this audit, at McDonnell 72. I have it right here. I'll show it to you. Do you see that?
A. Yeah.
Q. This McDonnell 72 is fraudulent credit card charges; is that right?
A. Right.
Q. Were these by Anna Hoormann?
A. Yes.
Q. And these are the dates, right?
A. Yes.
Q. So you said before 2,200. It appears to be $2,990.72?
A. Right.
Q. And she began making these credit card charges to Mary Kay for $826.26 in November of 2004, right?
A. Yes.
Q. Is it your testimony here today that

Page 159

you never discovered any of these improper charges on your credit card account until after December 23, 2005?
A. Correct.
Q. You didn't authorize these charges?
A. No.
Q. The audit indicates, and your discovery responses show, that Anna Hoormann wrote two checks in September out of the IOLTA account, one for 38,503.95, and the other one for $35,420, 6259 and 6281. Does that sound familiar?
A. That is what the audit indicates.
Q. And in fact, the audit, which is marked McDonnell 67, shows that, right? The third page in of Exhibit 4.
A. Yes.
Q. Now, in the documents that have been provided to my office by your lawyers we only have this statement from September of 2005. There's no backup copies of the items, okay?
A. Which -- you said July of '05?
Q. No, September. Did I say July? I meant September.
A. No. I just might have misheard you.
Q. So we only have what's marked Plaintiff

Page 160

122 through Plaintiff 127, but I would represent to you that what we marked as Exhibit 8 --
MS. DELZOTTI: 1022.
THE WITNESS: Okay.
BY MR. FEW:
Q. -- what's marked as Exhibit 8, which is the remaining 88, you know, seven through 88, was provided to us after we made a follow-up request for these documents. As a part of that follow-up request for these documents, we don't have anything from September. So apparently Anna Hoormann destroyed the copies of the statements. Is that what you think happened?
A. You're going to have to restate that. That was convoluted.
Q. You've given your lawyers all that you have in regards to bank statements and copies of imaged items related to all three accounts in this lawsuit; is that right?
A. I believe so, yeah.
Q. So what I'm saying is, if you look at this September statement, it's marked 122 -- 1022, 1023, 24, 1025, 1026, 1027. The next document is 1028, which is the reconciliation prepared by Angela on August 14, '08.

Page 161

A. Right.
Q. And then the next page is the October statement that goes to 1029.
A. Okay.
Q. So apparently you must not have copies of the imaged items for September of '05 on the IOLTA statement. Does that seem correct?
A. What we received from First Citizens was a box just of front of checks.
Q. I'm talking about do you have copies of the imaged items for this September statement?
A. I don't know. I don't know.
Q. But this sequence of numbering the pages appears to indicate that you do not. Do you agree with that?
A. I have a fax copy that did not have -- you're talking about September, correct?
Q. Uh-huh.
A. The fax copy for September is one that would not have the copies.
Q. Right. And that was the month that Anna Hoormann wrote herself two checks out of the account totalling $73,923.95?
A. Right.
Q. So do you know right now if you ran --

Page 162

okay. You're saying these are the checks that were made out to somebody Ramos?
A. I'm not sure if one or both were made to Olivia Ramos.
Q. If you had looked at a reconciliation and seen a check in that amount to Olivia Ramos, would you have known that something was suspicious about it?
A. Not at all.
Q. Let's go to the October statement. This one starts with Plaintiff 1029, and it's page one of 95 or 96, it appears, right?
A. Yeah.
Q. Take a minute, flip through this statement, and see if you can find any Internet transfers.
A. I would say it looks like there's one. It looks like there's one.
Q. Just one? Looking all the way up through page 1033?
A. I'll take a second look. Internet transfers is what you're asking me about?
Q. Yes.
A. I'm sorry. There's three on page four and one on page five, so four.

Page 163

Q. Four. What are the amounts? And those are all transfers into your operating account, right?
A. Uh-huh.
Q. The amounts are getting bigger, aren't they?
A. It gets bigger, then smaller, then bigger.
Q. Well, the first one --
A. Is smaller.
Q. The one on October 11th was the biggest one that was made, as far as we know, right, $65,000?
A. Right. I don't know, off the top of my head, but on this page, yes.
Q. And then on October 18th there's another one for $45,000, right?
A. Yes.
Q. And then on October 19th there's another one for $65,000?
A. Yes.
Q. And then on October 27th there's one more for $40,000?
A. Yes.
Q. So if, as we've covered, the only

Page 164

proper way to transfer money from the client account to your account is if it was a fee, this would indicate that you received $215,000 in fees in that month; is that right?
A. If you're suggesting that they are only fees, yes.
Q. I believe your testimony has been that you didn't review this statement, and neither did anybody else in your office, right? Not before December 23, 2005.
A. Correct.
Q. If you would, look at the November statement, which is marked Plaintiff 001125 through 1130. Do you see any Internet transfers on this?
A. There appears to be one. Two.
Q. The first page shows a credit, doesn't it?
A. Uh-huh.
Q. Of $35,000?
A. Uh-huh.
Q. A $35,000 transfer would be more than is required to covered service fees on the account, wouldn't it?
A. Yes.
Q. Again, this statement was not reviewed

Page 165

by you or anybody in your office until after December 23, 2005, right?
A. Correct.
Q. And then there's a miscellaneous debit down here. What would that be? I mean, do we know what that is? Is that a counter check? How is that done? I'm looking at Plaintiff 1128, in the amount of $31,623.25.
A. I don't know.
Q. No check number, so we don't really know where that -- would you agree that as a part of the review of your client account you need to find out where that $31,623.25 went?
MS. DELZOTTI: Objection to form.
THE WITNESS: I think we called the bank to find out what it was.
BY MR. FEW:
Q. Do what?
A. Checked with the bank to see what it is.
Q. And then on 11/23 there's another Internet transfer for $20,000.
A. Yes.
Q. That would have been a red flag if you'd have seen it, right?

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Page 166

A. I would have researched it further.
Q. Let's go to Plaintiff 1221, which is the December statement. It shows at the bottom of the page one of 92. Do you see that?
A. Uh-huh.
Q. This appears to be the statement that would have been mailed to you in the normal course, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: Uh-huh.
BY MR. FEW:
Q. Do you see any Internet transfers in this month, credits or debits?
A. There's an Internet transfer on 12/23.
Q. And that's what, a credit or a debit?
A. It's a credit.
Q. That's coming from your operating account, right?
A. Yes.
Q. So would you agree that appears to show that Anna Hoormann was putting money in the account to keep the IOLTA from having an NSF charge?
A. It does.
Q. Did you ever have any discussions with her about why that was done?

Page 167

A. No.
Q. Let's look at page Plaintiff 001224. On December 2nd there's something marked a book entry for $4,200.50. Do you know what that is?
A. No.
Q. And then on December the 9th there is a telephone transfer for $12,000. Do you know what that is?
A. No.
Q. Mr. McDonnell, is it possible that these are other improper transfers from Anna Hoormann and yet you haven't discovered them yet?
MS. DELZOTTI: Objection to form.
THE WITNESS: Today?
MR. FEW: Repeat my question, please.
(Thereupon, the Reporter read the record as requested.)
THE WITNESS: I have no idea. I believe these are in the audit. I don't know.
BY MR. FEW:
Q. I'm sorry, you said you believe what?
A. They would be in the audit. I don't know.
Q. So you don't know for sure?
A. (Shaking head.)

Page 168

Q. So it is possible that these are other withdrawals out of the client funds account by Anna Hoormann that, sitting here today, you don't even -- haven't even identified yet?
A. I don't know.
Q. So the answer to the question is, yes, it's very possible that these are other transfers by Anna Hoormann out of the client funds account that you have not yet identified as being improper?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.
BY MR. FEW:
Q. And in fact, if you look at this you see on 12/23 that there's an overdraft charge of $5, right?
A. Yes.
Q. You agree that your SoftPro program, which we're going to get access to, would provide -- should provide a description of what this debit is out of the client funds? And I'm referring to the December 2, 2005, book entry in the amount of $4,200.50.
A. Yes.
MR. FEW: That finishes that. You all want to take a break? Can we, during this break --

Page 169

stay on the record -- let you all have the opportunity to provide me with any documents that would be statements for the operating account or the Boomerang pilot account?
MS. DELZOTTI: I don't have any of those, but I will talk to Ed. I don't have any.
MR. FEW: I mean, you have your file. We're in your office, so --
MS. DELZOTTI: I understand that. We don't have them. Our office does not have copies of them. If I had them I would give them to you right now. You all are the bank, so I would expect that you all have copies, but I don't have --
MR. FEW: Well, what we have --
MS. DELZOTTI: -- copies from my client. Which I've had them check while we've been in here. So I'll talk to Ed during the break.
MR. FEW: Okay. And that's fine. I'm just trying to get the record clear. So as of today, we have not been provided from the plaintiff his documents that would show that he actually has copies of statements or items for the operating account or the Boomerang Title account? Is that -- is that what I'm hearing you tell me?
MS. DELZOTTI: If you've asked for

Page 170

that. I don't know what you've asked for. I haven't looked through. I've just asked them. I don't know specifically what you've asked for and what Henry has replied.
MR. FEW: Okay. While we're still on the record, I'll make sure –
MS. DELZOTTI: But I asked. If we do have any copies of the operating account documents, then I've got them.
MR. FEW: Request for production 13 states: Produce all documents you received from First Citizens related to any account referenced in your amended complaint. Okay? That would cover all three accounts.
And then we also have 25, which states: Produce all documents related to any bank or other financial institution deposit or similar account held by Plaintiff since January 1, 2004, which would include the six accounts that he testified about earlier from Ameris, almost every bank in town, and credit union. So those are things that we don't have and we've not been provided.
BY MR. FEW:
Q. So I guess while we're on that issue I'll ask the question again just so it will be

Page 171

someplace in the transcript. Have you given your counsel all the documents that you have related to, first, the three accounts that are in your amended complaint, the Boomerang account at First Citizens, the operating account at First Citizens, and the IOLTA account at First Citizens?
A. I don't know what they have and they don't have. I mean, I believe I've given them everything I've got.
MS. DELZOTTI: And I'd have to check with Wilmot's office. He might have some of the documents and Ed might think he gave them to him. So I'll go find out.
MR. FEW: That's between you all, okay? Wilmot is not a lawyer –
MS. DELZOTTI: I understand that. I'm just telling you that.
MR. FEW: I understand, but I'm just – I mean, we're at this point when we're taking a deposition, and to have an excuse that something was given to one lawyer on a case that's over the same set of facts that this is, Anna Hoormann, and not given to us, that's not our issue. That's you all's issue.
MS. DELZOTTI: I'm not asking him if he

Page 172

gave it to his attorney. I'm trying to explain why he might not know if he gave it to us or not.
MR. FEW: Bottom line, we don't have them, right?
MS. DELZOTTI: Well, you're the bank, so I'm assuming you have them, but you don't have our copies.
MR. FEW: We can produce our images.
MS. DELZOTTI: I know.
MR. FEW: We haven't received any –
MS. DELZOTTI: I understand that.
MR. FEW: Bottom line, we have not received any copies of any statements in production for Boomerang or the operating account. That's what I'm hearing you all tell me, right?
MS. DELZOTTI: I would have to go back and look. If this is – if what you went over today is all that we've produced, then that's the IOLTA account.
MR. FEW: No. That's not what I'm saying. I'm saying you all have the time –
MS. DELZOTTI: I haven't looked at all of the production. I have to go look at it now. I don't know what we've produced.
MR. FEW: I thought you said a minute

Page 173

ago that you asked for that and that you were told that you didn't have it?
MS. DELZOTTI: She told me we didn't have it, yes.
MR. FEW: She being somebody on you all's staff, right?
MS. DELZOTTI: Correct.
MR. FEW: Okay. We'll take a break.
(A luncheon recess transpired.)
BY MR. FEW:
Q. Mr. McDonnell, you had a good lunch?
A. Yes.
Q. Good. You apparently – tell us how you came to discover only after December 23, 2005, that Anna Hoormann had also used your Capital One credit card as early as November of 2004.
A. As part of her job she paid the credit cards.
Q. Well, but there's an indication in the audit that we've already gone over that there was $2,990 and some odd cents of improper charges on the Capital One credit card; is that right?
A. Correct.
Q. Why did you discover that between December 23, 2005, and the audit report being

Page 174

concluded by Lawyers Title? What prompted you to discover improper charges on your Capital One credit card?
A. Because I found out I had a thief in my office.
Q. So you found out you had a thief in your office and you then went back and reviewed all your Capital One credit card statements and found the charges that you were attributing to Anna Hoormann?
A. It was myself and my wife.
Q. So you had those statements then. Do you still have those Capital One account statements?
A. I don't know. I would assume so.
Q. I mean, wouldn't you -- I mean, if it related to this matter wouldn't you have kept it?
A. Yes.
Q. How much money did Anna Hoormann pay back to you?
A. I don't have an exact figure. It was approximately 30,000.
Q. What was the format of how you received that $30,000?
A. I think a check and then a second

Page 175

check.
Q. One check was for about $7,000; is that right?
A. Uh-huh.
Q. Is that what you testified to?
A. Uh-huh.
MS. DELZOTTI: Say yes instead of uh-huh.
THE WITNESS: Yes.
BY MR. FEW:
Q. So whatever your damages are for the -- for adding up the checks, your alleged damages, that's got to be reduced by $30,000, right?
A. No.
Q. No?
A. No.
Q. Why not?
A. Because that was put back into the trust account. I didn't keep it.
Q. But it reduces the amount of the money that you're alleging that she stole from you, right?
A. The amount of my damages is what the amount of my damages are. The money that she gave back was put back into the account to make it

Page 176

whole.
Q. But if you're calculating your damages, as your counsel has taken the position in discovery, that the amount of your damages is the face amount of the checks that Anna Hoormann wrote, okay, then if she gave you back $30,000, don't you have to reduce that amount by $30,000 because she gave it back to you? Right?
A. It would be offset against what she took, yes.
Q. It would be offset, right?
A. Uh-huh.
Q. So would that $400,000 that you got from Carolina Legal Associates, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't think that's a decision for me.
BY MR. FEW:
Q. Well, let's explore that for a second. If you were to sue Carolina Legal Associates over the employee, Anna Hoormann, and your damages in that case were related to the checks that she wrote -- weren't they?
A. Yes.
Q. Your damages in that case were

Page 177

basically the exact same damages that you're claiming in this case; isn't that true?
A. The money which was taken, yes.
Q. Is that a yes or a no?
A. The money that was taken was the same money, yes.
Q. The damages that you claimed in the Carolina Legal Associates lawsuit are exactly the same as the damages that you're claiming in this lawsuit; isn't that true?
MS. DELZOTTI: Objection to form.
THE WITNESS: I would have to sit down and read complaint versus complaint.
BY MR. FEW:
Q. So is your answer no?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.
BY MR. FEW:
Q. That's been a popular answer here today. Okay. Let me put it to you another way.
MS. DELZOTTI: That's a valid answer.
BY MR. FEW:
Q. Explain the differences between the damages you claimed in the Carolina Legal Associates lawsuit and the damages that you're

Page 178

alleging in this lawsuit. I've got 3:30. Take all the time you need.
A. Okay.
MS. DELZOTTI: I'm going to object to the form.
THE WITNESS: I think I stated that I believe the monetary loss was the same monetary loss.
BY MR. FEW:
Q. So let me make sure I understand this. The monetary loss, what you're claiming, was the amount of the checks that Anna Hoormann -- that you allege Anna Hoormann wrote improperly out of the three accounts, right?
A. Yes.
Q. And you had the same -- and it would be, to the penny, the same in that lawsuit as it was in this lawsuit; isn't that right?
A. No.
Q. Explain the difference, then. Explain why there's a difference in the damage amount in the two cases.
A. I don't know that you have a responsibility for the credit cards.
Q. So the credit cards is a difference?

Page 179

A. Yeah.
Q. And you claimed the credit card in the suit against Carolina Legal Associates, right?
A. Yes.
Q. Did you sue Capital One?
A. No.
Q. Did you report the improper charges to Capital One and get any refund from Capital One?
A. Yes, I reported it, and no, I did not receive it.
Q. We need copies of the reports that you made to Capital One regarding Anna Hoormann. That's already covered in the discovery that we've served, so...
Okay. So other than the claim of the Capital One charges, which you're stating here today is not a part of your suit against First Citizens, what are the differences between the damages that you claimed in the Carolina Legal Associates lawsuit and this lawsuit?
MS. DELZOTTI: Object to the form.
THE WITNESS: Do you mind if I look at the audit?
BY MR. FEW:
Q. You can take all the time you need.

Page 180

It's 3:32 right now. You're looking at Exhibit 4, right?
A. Yes. It would be the checks minus the credit cards -- credit card charges plus the loan fees and interest.
Q. So the checks are the same in each lawsuit, right?
A. Yes.
Q. And the credit card damages -- the improper credit card charges on Capital One, the $2,900, is something that you claimed as a damage against Carolina Legal Associates but you don't claim as a damage against First Citizens, correct?
A. Yes.
Q. Now, you just said loan fees. What do you mean by that? Those would be the same in each case, right?
A. Yes. I was just explaining the damages in this case.
Q. Well, my question to you is: What is the difference? And that's what we're trying to ascertain, right?
A. The credit card.
Q. The credit card. Is that it?
A. Yes.

Page 181

Q. Are you asserting damages for loan fees in this case?
A. I believe that would be part of the damages.
Q. Well, I don't believe you've produced any documents to show any damages for loan fees, so we can add that to the list of things for damages that you're claiming that you haven't produced any documents for. That would include the Countrywide loan, I'm assuming?
A. Yes.
Q. And the loan from First Citizens?
A. I would hope that you guys have that.
Q. Well, I would hope that you have it, because it's your obligation, okay? You're the plaintiff.
Okay. Going back to Capital One. I want to make sure I understand that you -- was that the only credit card that you had that Anna Hoormann could have had access to?
A. I'm not sure.
Q. Was it a business account?
A. Yes.
Q. Who found the charges that are listed here on this audit? Because you -- this was not

Page 182

on -- I mean, this was information that either you or your wife or somebody had to have provided to the auditor from Lawyers Title, right?
A. Correct.
Q. So who went back and looked at the charges and found the Mary Kay, the Atlanta Braves, the Ticketmaster, the Victoria's Secret and the Lauderdale Lifestyle?
A. I believe my wife.
Q. Your wife did?
A. Uh-huh.
Q. So to make sure I'm clear, these -- this $2,990.72 shown on McDonnell 72, which was production that you all made in the other lawsuit, as a part of Exhibit 4, that's the only difference between the damages you claimed in your Carolina Legal Associates lawsuit versus this lawsuit?
MS. DELZOTTI: Objection to form.
THE WITNESS: Yes.
BY MR. FEW:
Q. So either you or your wife went back through the Capital One accounts. And did you give documents to the auditor from Lawyers Title or did you all just give her the amounts?
A. I don't remember.

Page 183

Q. What would be the source of funds going into the Boomerang Title account?
A. It would be title insurance premiums.
Q. What's the largest title insurance premium that you've ever collected in your practice as a real estate lawyer?
A. $3,000.
Q. $3,000?
A. Give or take.
Q. Now, Boomerang is a side business that operates under the same roof and with the same employees as your law practice, right?
A. Yes.
Q. So, I mean, how do you typically handle the money that goes into the Boomerang account? I mean, do you take it out on a monthly basis as profit or salary to yourself? How do you deal with that?
A. At the time, it was -- at the time, it went into a separate account and then when I would receive an invoice from Lawyers Title I would pay them.
Q. Are you on a 50 percent split or a 60/40 split? I don't know. What's the ratio?
A. 60/40 is the standard.

Page 184

Q. So if you had a $3,000 premium, then you would send how much to Lawyers Title?
A. I would put it in my account and wait for an invoice and then send it to them.
Q. So what would you expect a typical monthly balance to be in the Boomerang Title account?
A. I really didn't ever take money out of the Boomerang account because it was -- I just never took it out.
Q. Did Boomerang pay rent?
A. Not at that time.
Q. So basically all the Boomerang account did was operate as a holding account for the premiums until you got the invoice from the insurance company?
A. Correct.
Q. And then the remaining 40 percent was yours to keep?
A. Correct.
Q. Did you ever review the Boomerang account statement?
A. I don't remember.
Q. Do you recall the largest check that Anna Hoormann wrote out of the Boomerang account?

Page 185

A. Authorized or unauthorized?
Q. Unauthorized.
A. I believe she wrote one for $72,000 or somewhere along those lines.
Q. $75,000?
A. That must be it.
Q. Would you typically allow $75,000 to be in that account?
A. Yeah.
Q. Did you ever get any NSF charges on the Boomerang account?
A. I don't remember.
(DEF. EXH. 9, BUSINESS ONLINE BANKING (BOB) CUSTOMER SETUP FORM, marked for identification.)
BY MR. FEW:
Q. Let me show you what we'll mark as Exhibit 9. I'll represent to you that this is an online banking form. I'll ask you if you recognize that document.
A. I don't remember this document.
Q. I'll keep these straight. You just...
A. I don't remember that -- this document. I believe it came in yesterday. It came in yesterday when I was here.

Page 186

Q. I'll ask you this. Your signature appears right here. Is that your signature?
A. I don't know.
Q. We looked at signatures on Exhibit 1, so you take your time and look at this one and you let me know if you think this is your signature or not.
MS. DELZOTTI: Object to the form. Asked and answered.
THE WITNESS: I don't remember.
BY MR. FEW:
Q. You don't know?
A. I don't know.
Q. Do you remember signing a document to register your accounts for online banking?
A. I do not.
Q. This document is dated -- your signature there is September the 3rd; is that right?
A. The document is dated September the 3rd.
Q. And there's a fax header right there for September the 7th, right?
A. That's correct.
Q. And there's a fax header for September

Page 187

the 3rd from Heizer and McDonnell, right? On the bottom here.
A. Uh-huh.
Q. Now, when we went over Exhibit 1 we made sure you had plenty of time to determine whether or not you thought that was your signature or not, so I want you to make sure you're sure about your answer on this.
A. I don't know.
Q. What do you know about Dana Risi? Do you know Dana Risi?
A. I don't recall that name.
Q. Do you know Angelo Anderson?
A. I believe he was a mortgage broker.
Q. Have you met him before?
A. He did a closing in my office.
Q. He did one closing in your office?
A. I believe one. It might have been more. I don't know.
Q. Who supervised the closing? Did you supervise the closing?
A. Yes.
Q. You did. Would that be the one in the documents that we produced to you?
MS. DELZOTTI: Which documents are you

Page 188

referring to?
MR. FEW: The ones that I'm about to hand to him that are going to be marked as Exhibit 10.
(DEF. EXH. 10, SETTLEMENT STATEMENT, marked for identification.)
THE WITNESS: Yes.
BY MR. FEW:
Q. Did you look through these documents that were produced?
A. These?
Q. Uh-huh.
A. No, but I'm familiar with the transaction.
Q. You are?
A. Yeah.
Q. What comments, if any, do you have about this transaction?
A. This was a closing where Ameritrust Mortgage later made a claim that the -- I think the broker was involved with fraud.
Q. Made a claim against who?
A. The title insurance company.
Q. So let me ask you an earlier question in a different way. How many title insurance

Page 189

claims has Lawyers Title or any other underwriter that you've written policies for since January 1, 2004, have filed claims related to any closings that you've handled since January 1, 2004?
A. You would have to qualify that and explain. I mean, you sometimes get a claim that sometimes, Hey, this mortgage hasn't been satisfied, then you do the research and you show that it has, and then it's closed.
Q. We'll exclude those.
A. Okay.
Q. Written claims that have been submitted to the title company that have caused the title company to open a file and investigate it, including litigation over the coverage provided in the policy.
A. Can you qualify that last portion about over the coverage provided in the policy? You mean in excess?
Q. Regarding the coverage. No. Just a written claim. A written claim to the title insurance company, that you're aware of.
A. Somewhere between -- I don't know. I don't know the exact number.
Q. More than ten.

Page 190

A. I don't know. Probably. Probably around ten. I don't know.
Q. To the best of your knowledge, of those more than ten since January 1, 2004, how many of them had anything to do with work that was performed by Anna Hoormann?
A. I believe it's one.
Q. Just one?
A. I believe it's one.
Q. Just this one?
A. I believe this one.
Q. This one right here?
A. Yes.
Q. This one right here involving Sonya Hoffman and Charles Brown?
A. Yes.
Q. Now, I believe you said that you presided over this closing; is that right?
A. I was the supervising attorney. It appears Jeremy Woods handled the closing.
Q. Well, one question I have is, how many executed HUDs are there in the file?
A. There's two because one was sent up for approval and then they came back and said that it was a short sale and they stated that the buyer was

Page 191

not supposed to get any money back. And then I received a call from the lender. I received another call saying there were some invoices left out, and we sent them the invoices which appear on the second settlement statement. Those were sent up, and then we received a phone call authorizing us to disburse.
Q. Let me make sure. Is it your testimony that all the checks that were cut out of the proceeds from this loan to Charles Brown in this transaction that you closed, that your office closed on August 17th, were approved by Ameritrust Mortgage Company?
A. We received a phone call from somebody who purported to be with Ameritrust approving the settlement statement.
Q. Purported? What do you mean by that?
A. Called in and said, This is so-and-so from Ameritrust Mortgage, and the settlement statement has been approved.
Q. Did you get a name and a number?
A. I wouldn't -- that would not typically be a phone call I would take. That would be something a paralegal would take.
Q. So a paralegal is in -- a paralegal --

Page 192

what we're talking about here is 63,818.71 is at issue, correct?
A. Correct.
Q. So you're allowing a paralegal to make decisions on how to disburse $63,818.71?
A. They were receiving the phone call with a funding authorization number.
Q. But you used the word purported. Why do you use the word purported?
A. Because I think it turned out that it was somebody else calling.
Q. You said you presided over this closing, right? Is that your signature on the HUD?
A. Yes.
Q. So you signed a HUD that is different from an earlier HUD?
A. The one we sent up for approval.
Q. But you sent it up for approval with signatures on it. Because it's got signatures all over it, right?
A. Yeah. That's how we do it.
Q. Including for this seller out of this foreclosure sales saver, Sonya Hoffman, who has someone sign as her attorney-in-fact. Do you remember, did you have a power of attorney from

Page 193

her?
A. I don't remember.
Q. Truth be told, this was a scam, wasn't it? This loan right here was a scam?
A. I believe it was.
Q. Did you know that Mr. Brown never made a payment on this loan, never moved into this property, and these people ran off with the $48,000, that you signed, taking it away from the seller, and moving it to the additional disbursement exhibit on the HUD that you signed?
A. I don't know what happened with that.
Q. Is that surprising to you at all?
A. I think it would be surprising to me if they were committing a crime to stick around.
Q. Do you continue to do business with Angelo Anderson and Associates?
A. No.
Q. Property Investment Consultants?
A. No.
Q. What documentation is in your file for this loan to justify an $18,429.80 payout to Property Investment Consultants, LLC as a consultant fee?
A. It would -- they provided an invoice.

Page 194

Q. You have an invoice in your file?
A. I don't know that I have it now. I know at closing it was provided.
Q. Did you look at it, or did Anna Hoormann look at it?
A. I don't know.
Q. You signed this HUD based upon information given to you by Anna Hoormann?
A. Yes.
Q. Anna Hoormann did not receive any approval in any written documentation from Ameritrust that this additional disbursement exhibit was something that they approved?
A. No. That was sometimes done by phone call.
Q. Well, I understand it was sometimes done by phone call. And you're the one that suggested that it's possible that whoever made the phone call was not a true representative of Ameritrust, who provided $330,000 for this transaction, right?
A. Yes.
Q. Is this an unusual loan to be closed by your office or is this just something normal?
A. Unusual how?

Page 195

Q. Well, it's a short sale. How many short sales do you do usually?
A. It varies. Two or three a month.
Q. Have you ever received a kickback for handling this type of transaction?
A. No.
Q. Are you sure about that?
A. Yeah.
Q. Check number 5929. Is that your signature?
A. 5929. Yeah.
Q. For $26,611.11?
A. Yeah.
Q. Your testimony is that the lender rejected a HUD that was allowing $63,000 to go to Sonya Hoffman, $63,818.71; is that right?
A. Yes.
Q. And the reason is, is because Sonya Hoffman was in foreclosure, right?
A. Yes.
Q. And then these people, Angelo Anderson and Dana Risi, or whoever, they found her and they put up this stooge buyer named Charles Brown; isn't that right?
A. I don't know.

Page 196

Q. Did you verify this person's driver's license?
A. That would be the normal course of business.
Q. Did you ask him if he made $96,000 a year, which is what was shown on his loan application?
A. I would have asked him to review the settlement -- the loan application.
Q. But you didn't ask him if he made $96,000 a year?
A. No.
Q. Is it your testimony here today that, as far as you know, Ameritrust Mortgage Company, who funded this loan, has filed a claim against the title insurance company?
A. Yes.
Q. How do you know that?
A. Because I got notice of a claim and then I dealt with Lawyers Title to help them figure it out.
Q. What's the amount of their claim, do you know?
A. I would assume it's for the 63,000.
Q. When did you discover that this was --

Page 197

this loan had some problems?
A. When we received a notice of claim or when the --
Q. Was that before or after this document was produced by us in this lawsuit?
A. I don't remember.
Q. Check number 5925 for $18,429.80. Is that your signature?
A. Yes.
Q. And the one before it for $3,847.29. Is that your signature?
A. Yes.
Q. So why did you take over this closing from Jeremy Woods?
A. Jeremy Woods? Because the closing ran over because we were waiting on approval on the second settlement statement. Because after you get done with a purchase closing you send up something -- you send up documents, including the settlement statement, for approval.
Q. And you approved a shift in funds of roughly $63,000 without seeing any written documentation from Ameritrust, even after knowing that they had rejected the first HUD?
A. Yes.

Page 198

Q. And you don't see any problems with that?
A. I'd like to clarify that. There were invoices for the fees.
Q. The invoices for the fees?
A. Yeah.
Q. That are shown in the additional disbursements exhibit?
A. Yeah.
Q. Well, when did you get those?
A. I already spoke earlier. These were sent up, they did not approve the settlement statement because of 63,000, I was given a call to wait a second, you guys didn't include the invoices. We said okay. We called up there, and they said, Well, just send --
Q. Who called and said, Wait a minute, you didn't include the invoices?
A. I don't remember. It was either the Anderson guy or the Property Investments.
Q. The people that arranged the transaction, right?
A. Yeah.
Q. And you didn't get a power of attorney for Sonya Hoffman?

Page 199

A. I don't know.
Q. Huh?
A. I don't know.
Q. So you didn't meet Sonya Hoffman?
A. I don't know.
Q. Well, the signature on the HUDs is by somebody named Sydney something as attorney-in-fact.
A. Uh-huh.
Q. So if she was there why would she have someone else sign for her?
A. I don't know if I've ever met her.
Q. But you didn't meet her as a part of this closing, is my question.
A. I don't remember.
Q. If Sonya Hoffman had been there and thought that she stood to gain $63,818.71, don't you think she'd have been interested in getting that money?
MS. DELZOTTI: Object to the form.
THE WITNESS: Restate the question.
BY MR. FEW:
Q. Sonya Hoffman owned this property, right?
A. Yes.

Page 200

Q. She was in foreclosure?
A. Yes.
Q. Somebody went and found a buyer for her, and she owed 200 and -- well, the one time, and this is another thing that's truly amazing, your first HUD shows a payoff of 248,000, and then your next HUD shows a payoff of $266,776.80. Why is that?
A. I don't know.
Q. And if you're telling me today that you had invoices in the file that would be consistent with this additional disbursements exhibit of $48,888.20, then why were those not picked up when the first HUD was prepared? It sounds like you're telling me that those invoices came in after the -- supposedly, the lender in Charlotte, Ameritrust, rejected the loan.
A. That's exactly what I told you.
Q. And all of that came in over the telephone; right?
A. What?
Q. All of that information came over the telephone?
A. The invoices, no.
Q. The information that this was rejected.

Page 201

A. Yes.
Q. And it was relayed -- did you speak with anybody on the phone over that?
A. I believe I spoke to somebody at Ameritrust and they told me it was rejected.
Q. Be certain, now, because you're under oath.
A. Again, I spoke to somebody who purported to be with Ameritrust.
Q. So Ameritrust sent you a closing package, right?
A. Yes.
Q. And all of the sudden you've got a $60,000 dispute. Can't you pick up the phone and look on their closing package and call them and make sure you're speaking to the people that sent the $330,000 down for this transaction?
MS. DELZOTTI: Objection to form.
THE WITNESS: In the middle of a closing, often a paralegal will call and check on the status of the closing.
BY MR. FEW:
Q. That's not my question. My question is: You had a fiduciary obligation to Ameritrust, didn't you, because they entrusted you with

Page 202

$330,000 of their money, correct?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know that if -- I don't know if I had a fiduciary duty.
BY MR. FEW:
Q. You don't have any duty to a lender that puts their money in your account?
A. I have a duty to disburse according to the closing instructions.
Q. Comment one to Rule 1.15, entitled Safekeeping Property, states: A lawyer should hold property of others with the care required of a professional fiduciary. Do you agree that's what the comment to our professional rules says? And I'm reading off of Exhibit 5.
A. Yes.
Q. You have a fiduciary duty to a lender that puts money in your IOLTA account, right?
A. Yes.
Q. And all you had to do was look on their closing instructions and call them with any question, right?
A. Yes.
Q. Now, let's be honest with each other. A foreclosure sale like this, where the buyer is

Page 203

paying $63,000 over what is owed, that's a fishy transaction from the beginning, isn't it?
MS. DELZOTTI: Objection to form.
THE WITNESS: It would depend.
BY MR. FEW:
Q. Was Charles Brown your client?
A. Charles Brown was a -- yes.
Q. Right. Charles Brown was your client and you had a fiduciary obligation to Ameritrust. Okay. Did you ever have any discussions with Charles Brown about why he was paying $63,000 more for this house than what was owed on it?
A. No. What somebody owes on a house and what it's worth are two operate things.
Q. I understand that, but he was your client, right? You were under an obligation as his lawyer to advise him of all material issues related to the transaction, right?
A. That's a business decision for him. That's not a business decision for me.
Q. I understand it's a business decision for him, but you had an obligation to advise him, didn't you?
MS. DELZOTTI: Objection to form.
THE WITNESS: I do not believe I had a

Page 204

duty to advise him of whether he was getting a good deal or not.
BY MR. FEW:
Q. You didn't even get to know him, talk to him long enough -- nobody in your office even talked to him long enough to find out if he was even going to move into this property, did you?
A. He would indicate that on the loan documents.
Q. Well, obviously it's an owner-occupied loan, or he never could have gotten it, right?
A. I don't know. I'm not a lender.
Q. You didn't review the loan application to see if it -- did the mortgage that you prepared have an owner occupancy clause in it?
A. They stated whether he would get approved or not. I don't know what their approval guidelines were.
Q. Let's face it. Let's be honest with each other. You knew this was an owner-occupied loan, didn't you?
A. I don't remember.
Q. It's a conventional residential mortgage loan. Are you suggesting that this is a mortgage loan? Because we've got the entire file

Page 205

and we'll pull it out and we'll go over the mortgage that you prepared that had an owner occupancy provision in it.
A. I don't -- I don't remember. It could be a second home, could be a vacation home. I don't know.
Q. If you prepare a mortgage that has an owner occupancy provision in it and the buyer is not refinancing, are you under an obligation to explain to him that he is warranting to the mortgage company that he's going to move into that property within 60 days?
A. Yes.
Q. Did you have that discussion with Mr. Brown?
A. I don't remember.
Q. Do you normally have that discussion with --
A. Yes.
Q. You normally do, but you don't know if you had it in this case?
A. I don't remember having it.
Q. Is it a typical practice of your firm to prepare a closing with two fully executed HUDs like this?

Page 206

A. It's a practice of the industry.
Q. To have two fully executed HUDs?
A. Yes. You have to have it executed before you send it up for approval. Once it's approved -- if it's denied, then you sign up and send up another one.
Q. Have you seen the allegations or the correspondence from Ameritrust Mortgage Company regarding their claim against the title company here?
A. No.
Q. But that would be in the possession of Lawyers Title, right?
A. I would assume so.
Q. I asked you before and I believe you said that it was probably more than ten title claims that have been filed regarding closings that have been handled by your office since January 1, 2004. Is that -- now that we've had some discussion on it, does that seem right to you still?
A. I cannot give you an exact number.
Q. We can send a subpoena to Lawyers Title and find out, right?
A. Yes.

Page 207

Q. In your damages claims, what have you or anybody else done to distinguish checks that may have been written to Anna Hoormann as part of her payroll versus checks that you may now allege that she forged in the amount of her payroll?
A. Are you asking what -- are you asking about her salary?
Q. Right.
A. Her salary was one amount and the checks were other.
Q. But, I mean, when you looked at all the checks that were made out to her, have you excluded the ones that were for the salary that you were paying her?
A. Yes.
Q. You're sure that's been done?
A. Yes, because my accountant went back through it because she was double-paying herself.
Q. So she was initially -- now, you testified that she made out two checks out of the IOLTA account to -- what was the name, Reves, Ramos?
A. Olivia Ramos.
Q. Did she do that on the operating account checks?

Page 208

A. To Oliva Ramos?
Q. No. When Anna Hoormann -- let's just go over it.
A. Oh. She would make false payees.
Q. She would make false payees?
A. Yeah.
Q. Just random names?
A. Abstractors.
Q. Abstractors?
A. Uh-huh.
Q. Did you never do any type of review to see how much was being paid out to abstractors?
A. I would -- I mean, I had a general idea of what they were.
Q. And there were a lot of ways that this could have been discovered, aren't there?
A. There are ways.
Q. A lot of ways, right? Looking at statements would be the first, right?
A. I don't know.
Q. You don't know whether or not looking at the statements would have uncovered that your employee was writing checks that you hadn't authorized? Isn't that the basis of your lawsuit against my client, is that we were supposed to look

Page 209

at the signatures and determine whether or not they were appropriate signatures?
A. Yes.
Q. That's the basis of your suit but yet you took quite a bit of time to even identify your own signatures on Exhibit 1, and on Exhibit 9 you don't know for -- you can't say for sure whether or not this is your signature?
MS. DELZOTTI: Objection to form.
BY MR. FEW:
Q. Correct?
MS. DELZOTTI: Same objection
BY MR. FEW:
Q. Is that an accurate summary of your testimony here so far?
A. Correct.
Q. So you didn't have time to review the statements that the bank was sending you on any of these three accounts?
MS. DELZOTTI: Objection to form.
THE WITNESS: I didn't -- you're saying I didn't have time to?
BY MR. FEW:
Q. You didn't make time to review --
A. I did a semi-regular review.

Page 210

Q. Semi-regular review. Where, before this lawsuit, have you ever heard the term semi-regular used?
A. I don't know.
Q. Is it something you made up?
A. No.
MS. DELZOTTI: Objection to form.
BY MR. FEW:
Q. As a part of your -- by semi-regular, what we can see is, and what you know is, that you didn't review these statements, correct?
A. Semi-regularly.
Q. Well, semi-regular apparently was not good enough to find out that your employee was writing $650,000 worth of checks out of your accounts over a 15-month period; is that fair?
A. No, it is not.
Q. Excuse me?
A. It was not.
Q. It was not what?
A. It was not enough to catch her.
Q. If you had looked at the statements when they came in from the bank you could have discovered -- when the very first set of checks came in on that October 2004 statement you would

Page 211

have seen the checks and you would have known -- assuming you knew what was a proper check and what wasn't, you would have known that she was writing these checks to herself, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: October 2004?
BY MR. FEW:
Q. Correct.
A. Which check are you...
(DEF. EXH. 11, PHOTOCOPIES OF CHECKS, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark as Exhibit 11. This says Plaintiff 1 through Plaintiff 94. This is the first 94 documents that your lawyers have produced in this case, that show -- that you allege show your damages in this suit. I'll let you look through that.
MR. FEW: Lisa, do you need a copy?
MS. DELZOTTI: If you have one. Thank you.
THE WITNESS: What are you asking me about these checks?
BY MR. FEW:
Q. Have you seen these checks?

Page 212

A. At one time or another.
Q. Did you identify these checks or did Lawyers Title identify these checks? How were these 94 pages determined to be the --
A. I believe both.
Q. The very first one, Plaintiff 1. It's a check dated 10/1/2004, made out to Anna M. Hoormann, right?
A. Uh-huh.
Q. Now, is it your testimony here today that you can look at that signature and tell that that is not your signature?
A. I don't know.
Q. You don't know, but the bank should have known; is that -- isn't that the basis of your lawsuit?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know.
BY MR. FEW:
Q. Just stay there with me, if you don't mind. We'll go through page by page if we need to. Check number 1354 is the first document that you produced in this lawsuit. Again, it's dated October 1, 2004. Okay. Now, you testified a minute ago, and you've testified earlier today,

Page 213

that the operating account was run off of QuickBooks, correct?
A. Uh-huh.
Q. Now, is it your testimony today that Anna Hoormann, when she made this check out to herself in the amount of $1,154, would have written a different name in on QuickBooks?
A. I don't know about the particular check.
Q. Was that what -- I mean --
A. That was her method.
Q. That was what you understood to be one of her methods, which was to change the information on QuickBooks?
A. Yes.
Q. Is that right?
A. Yes.
Q. Now, to prepare this check, because it is typewritten, would QuickBooks prepare this check? I mean, she would enter -- first she would have to go into QuickBooks, enter her name and print the check, right?
A. Yes.
Q. Right. And then she would go back into QuickBooks and change the payee?

Page 214

A. Yes.
Q. And QuickBooks apparently allows that?
A. Yes.
Q. But if anyone was reconciling the QuickBooks records with the documents that came in from the bank they would have seen that the payees didn't match up?
A. I don't know.
Q. Let me make sure I understand this. You just testified that she would take -- okay. Let's assume that for any check -- let's assume that this is a check that she changed the payee on. All right. Do you know if she changed the payee on that?
A. I don't know.
Q. Do you still have the QuickBooks records?
A. Yes.
Q. And you're going to provide those to your counsel?
A. Yeah.
Q. So that they can provide them to us in discovery, right?
A. Yes.
Q. Let's look at it a different way.

Page 215

First Citizens provided you a statement for all these accounts, right?
A. Yes.
Q. First Citizens provided you a statement for the operating account, right?
A. Yes.
Q. And as part of that statement they would have provided you with image copies of the checks or the checks themselves?
A. The image copies, yes.
Q. The image copies. Okay. And if you would have reviewed the image copies in either October or November of 2004, when you first received it, you could have found this check and identified it, as you have now identified it, as a fraudulent check, right?
MS. DELZOTTI: Objection to form.
BY MR. FEW:
Q. I don't know why you're looking at all those additional documents. I'm asking you a question about the one that's marked Plaintiff 1, check number 1354. If you had reviewed the statement that showed this check -- right?
A. The miniature version of the check, yes.

Page 216

Q -- you could have determined that it was not an authorized transfer, right?
A Yes
Q And you could have done that as soon as you received the statement in the mail from First Citizens Bank sometime in October or November of 2004, when it would have been mailed out, right?
A When I received it, yes
Q But you didn't do it, right?
A No
Q Any of these other checks, did you -- any of these checks in one through 94, did you look at them and see that they were payments to Anna Hoormann that were not part of her salary or something that you would have approved?
A No.
(DEF EXH. 12, McDONNELL CASE SPREADSHEET ANALYZING CHECKS ALLEGEDLY FORGED BY HOORMANN, marked for identification.)
BY MR. FEW:
Q I'm going to hand you what we'll mark as Exhibit 12.
MR. FEW: You might want to make a copy of this because I printed it out wrong and I cut it off.

Page 217

BY MR. FEW:
Q. I'll represent to you that this is a listing of the page showing the transactions. I'll let you look at that and compare it to Exhibit 11, if you want to, and tell me if it appears to be an accurate representation.
A. You want me to match these all up?
Q. Well, if you -- tell you what. In the interest of time -- you can match them all up if you want to.
A. Isn't this something you're preparing?
Q. Uh-huh.
MS. DELZOTTI: Can we take a quick break while he's looking at that so I can make a quick phone call?
MR. FEW: Sure.
(Off-the-record conference.)
BY MR. FEW:
Q. So is Exhibit 12 an accurate representation, as far as you can tell, of the amounts of the checks and the accounts which they're drawn on?
A. Yes.
Q. And the total of the checks is $767,880.53?

Page 218

A. Well, I haven't done the math, but if that's what it turns out to.
Q. That's what the spreadsheet shows.
A. Okay.
Q. Two of those were out of one account and into another, right?
A. Uh-huh.
Q. A $75,000 check out of the Boomerang account?
A. Uh-huh.
Q. Do you see that one?
A. Yes.
Q. And that went into the -- look at 89, if you would, please, Plaintiff 89. That went into the IOLTA account?
A. Yes.
Q. Now, I believe we talked about it before. Is a transfer into -- that's a -- that check violates the rules of professional conduct, doesn't it?
MS. DELZOTTI: Objection to form.
THE WITNESS: That's a check that somebody else put in my account.
BY MR. FEW:
Q. Yeah, but, I mean, it's drawn, and

Page 219

it's your employee. As soon as you saw that -- it's a violation of the rules because it's not something intended to cover service fees, right?
A. That's a check that somebody else put in my account.
Q. Who?
A. Anna Hoormann.
Q. Was she your employee when she did it?
A. Yes.
Q. Were you responsible for what she did during the time that she was an employee of your law practice?
MS. DELZOTTI: Objection to form.
THE WITNESS: Within her scope of authorized employment.
BY MR. FEW:
Q. I want to make sure that I have an understanding in this deposition of your understanding of what's allowed on an IOLTA account. Your testimony is that Plaintiff 89, for 75,000 out of your title company, Boomerang, account into your IOLTA account, and Plaintiff 92 out of your Boomerang account into your IOLTA account for 28,000, that there's nothing wrong with those deposits?

Page 220

MS. DELZOTTI: Objection to form.
THE WITNESS: What I stated was that -- well, the money which should not have been written from the one account to the other, that was not an authorized duty of Anna Hoormann.
BY MR. FEW:
Q. Were these deposits that were made to cover service fees on the IOLTA account?
A. No.
Q. And we asked about this earlier when we dealt with one of the Internet banking transfers into this account. These were deposits that she made into the IOLTA account to keep it from bouncing, right?
A. Correct.
Q. But unfortunately for you, the one on December 23rd didn't get in quick enough, did it?
A. Can you repeat that question?
Q. Plaintiff 92 is dated 12/23/2005, for $28,000, right?
A. Right.
Q. It apparently didn't get deposited quick enough to keep you from getting an NSF charge on that day, right?
A. Yes.

Page 221

Q. So assuming that these numbers are correct, the total amount of checks that she wrote is 767, and two of them, the ones that we just went over that total $103,000, is that the damages that you're claiming?
A. No.
Q. What are the -- let me finish my question. Assuming these numbers are right, 664,880.53, is that the amount of damages that you're claiming with respect to the checks?
A. What I'm claiming as my damages is the money that was rightfully mine that was taken out of the operating account plus the money that was taken out of the trust account which I had to replace.
Q. And Boomerang, right?
A. And Boomerang, yeah.
Q. And if it adds up to be this number --
A. Yes.
Q. -- then you reduce that number also by the amount of money that she gave back to you, right?
A. I don't know that I can agree to that because I don't see where you're taking into account -- you're taking it out -- let me see here.

Page 222

You took it out as a -- it would be the money that was taken minus what she put back in. As far as what was taken out of the trust account, it would be what she had taken out minus what she put back.
Q. She also gave you some jewelry, right?
A. Yeah.
Q. What was the value of that? What have you done with it?
A. It was -- it turned out to be junk.
Q. You kept it, though, right?
A. I believe Wilmot has it.
Q. So you don't -- I mean, it's worth nothing? Less than $10?
A. I think a hundred dollars.
Q. And you got $400,000 from your other lawsuit, right?
A. That's what it settled for.
Q. What were the claims in that suit, tort claims?
A. I'd have to read the complaint to be able to cite them verbatim.
Q. But you didn't have any contractual right to attorney's fees or statutory right to attorney's fees in any of the claims on that case, did you?

Page 223

A. Yes, I did.
(DEF. EXH. 13, COMPLAINT, marked for identification.)
BY MR. FEW:
Q. Let's mark this as Exhibit 13. Is that -- Exhibit 13, is that a copy of the complaint against Carolina Legal Associates?
A. It appears to be.
Q. Look at page three. For a first cause of action, negligent hiring, gross negligence and deliberate indifference. You don't have any right to attorney's fees under any of those claims, do you?
A. I'm not sure. I mean, I don't think we -- I don't know.
Q. For your second claim, you do have a claim for statutory -- you have a claim for statutory damages under that act, which, I believe, is only for the surety bond, right?
A. Are you asking if that's only damages that are possible under that?
Q. Well, I'm saying that's your -- your second claim is the only claim that would give you any right to attorney's fees, assuming your pleadings are accurate; is that right?

Page 224

A. As far as I know.
Q. And then, third, you have a breach of contract claim. Did the contract at issue provide for attorney's fees?
A. I don't -- I don't remember.
Q. So if your damages are -- and then what's the -- what amount of damages, approximately, are you claiming on your loan fees plus the damages that we discussed earlier for which we've yet to be provided any documents?
A. I'm not -- I don't have those right in front of me. I don't know.
Q. Well, approximately, the best you can recall, what would be the loan fee damages that you think you're claiming here?
A. As far as origination fees or interest?
Q. It's your lawsuit. I'm asking you. The lawsuit's over a year old. You've testified that you're trying to collect loan charge fees, and you haven't produced documents, and I'm asking you to give me, the best you can recall --
A. The approximate origination fees on the two loans would probably be somewhere in the neighborhood of eight to $10,000.
Q. Anything more than?

Page 225

A. The interest on the one loan would approximately be $90,000.
Q. That's a damage you're claiming in this suit?
A. Yes.
Q. Have you given your lawyers any documents relating to that?
A. I don't know.
Q. Do you understand that when you file a lawsuit and we serve discovery that we're supposed to get all the documents related to your claim so that we don't have to take your deposition twice, which is what we're going to have to do in this case?
A. I communicated with my attorneys. I've provided what I've been asked.
Q. You communicated to your attorneys that you wanted to collect damages for loan fees and interest and you didn't give them the documents?
A. I don't recall if I've given them to them or not. I know that it's been provided in one lawsuit or the other. I'm not sure.
MR. FEW: Why don't we take a break and call Wilmot's office and see what documents he's got that are related to this, and maybe that can

Page 226

alleviate some of the confusion. So at 4:40, why don't we take a break and get an answer to that before we finish this deposition today. I mean, unless you want to stipulate to exclude those damages claims.

MS. DELZOTTI: No, we don't.

(A recess transpired.)

BY MR. FEW:

Q. Now, I've asked you questions earlier about Exhibit D to Exhibit 2, which we had sent to you as a request for admission asking that it be admitted. Now, you don't deny that the bank has a deposit agreement that governs these accounts, do you?

A. I don't know the bank's policies.

Q. Well --

A. You're showing me --

Q. That's right. But I'm asking you, do you think that the bank -- do you think that this is an authentic document from the bank regarding its deposit accounts during the time period that you opened your account?

A. I don't know.

Q. But are you alleging -- it's important that we tie this down -- that the bank does not

Page 227

have a written agreement governing the way the accounts will be handled between the bank, as the deposit institution, and you, as the depositor?

A. Are you asking if there's a deposit agreement?

Q. Is there a deposit agreement. Right.

A. I would think there would be.

Q. And the documents that you signed, which are in the exhibits that you acknowledged earlier, in fact stated that you had received a copy of those, right?

MS. DELZOTTI: Object to the form.

THE WITNESS: I'd have to review the document.

BY MR. FEW:

Q. Well, we've already reviewed the document, but we'll do it again. Exhibit 3 is your admissions, you admitted the signatures on the various pages. The documents were marked as -- and I'm looking at Exhibit 2, Exhibit A, Exhibit B, and Exhibits C-1, C-2 and C-3. Okay?

A. Uh-huh. Yes.

Q. Do you ever refer to yourself as the managing attorney?

A. Yes.

Page 228

Q. Now, here's what it says, all right? I'm going to highlight it, if you don't mind, on C-3 of Exhibit 2. The undersigned acknowledge that at least one authorized signer has received at least one copy of each of the following documents: Business deposit account fee schedule/interest disclosures brochure, then, semi colon, rules and regulations for checking, comma, savings, comma, MMDA accounts/funds availability/direct deposit, cardholder agreement and electronic fund transfer disclosure brochure. Is that what it says?

MS. DELZOTTI: Objection to form. We're already been over this.

MR. FEW: Your witness just said he'd have to see the document again.

THE WITNESS: That's what this document indicates.

BY MR. FEW:

Q. This document that you signed?

A. Yes.

Q. And then D is, in fact, the rules and regulations, checking accounts, savings accounts and money market accounts, right?

A. That's what it purports to be.

Q. So if somebody from the bank testifies

Page 229

that this is the document, Exhibit D, that governs these accounts that you opened, you don't have any reason to dispute that, do you?

A. I don't know that that was the one that was in place at the time.

Q. I understand that you don't know, okay? That's clear. My question is: If someone from the bank testifies that this is the document that's in effect, that governs the accounts that you opened with First Citizens Bank, you don't have any reason to dispute that, do you?

A. I'm not aware of the bank's policies, no.

Q. The policies were given to you when you signed this document, and your testimony is that -- which is nonresponsive to my question, but I appreciate your testimony -- you're not aware of the bank's policies, right?

MS. DELZOTTI: Objection to form.

THE WITNESS: The forms reference a policy. I do not -- I do not know if I was given one.

BY MR. FEW:

Q. You signed a document that states you had -- at least one authorized signer has received

Page 230

at least one copy of each of the following documents. The second one is rules and regulations for checking, which is what's attached as Exhibit D. Now, do you agree that this is the document?
A. The document?
Q. Yeah.
A. I don't know.
Q. You don't know?
A. I don't know.
Q. Because you didn't keep records, did you?
A. I don't know.
Q. You didn't keep the records, right?
A. I don't know if I have that document.
Q. One of two things happened, okay? The rules and regulations either weren't provided to you and you signed stating that they were -- that could have happened, right?
A. That could have happened.
Q. Or they were provided to you and you didn't keep them?
A. That could have happened.
Q. Okay. Because you didn't --
A. There's other possibilities.

Page 231

Q. Tell me what the other possibilities are.
A. There's two other signatures on there.
Q. But they're representatives of your firm, right? So for them to get it, it's just the same as you getting it, right?
A. To me, it's something totally different.
Q. How about this one, C-1, how many signatures are on that one?
A. One.
Q. Does it say the same thing?
A. I don't know.
Q. I'll tell you what. Take your time and read it, paragraph one.
A. Yes.
Q. On that one, either you received it and you didn't keep it, or you signed acknowledging that you received it and you didn't get it?
A. That's what it indicates.
Q. Well, which one do you think it is?
A. I don't know.
Q. You don't know. Okay. You signed five different deposit agreements, didn't you?
A. Is it five or three?

Page 232

Q. It's three for the IOLTA and one for each of the others. Exhibit A, that's your signature?
A. Yes.
Q. That's for the business checking or what we call the operating account, June 24, 2002; is that right?
A. Yes.
Q. June 24, 2003, you and your wife also signed for Boomerang Title?
A. Yes.
Q. And July 17, 2003, you alone signed for the IOLTA?
A. Yes. And the first one, they just opened up an incorrect account. That's why we had to return.
Q. So these first two were handled by Laura Craps with the bank?
A. Uh-huh.
Q. And the third one, C-1, by Leslie Pitts?
A. I don't remember.
Q. You don't remember. Okay. And then there's the name Angie Carter, and Angie Carter again; is that correct?

Page 233

A. Yes, that's whose name appears on the document.
Q. So did you or did you not sign five different business signature card documents with First Citizens Bank?
A. I did.
Q. And each one of them states that you received a copy of the rules and regulations, right?
A. They do state that.
Q. And we've attached the rules and regulations for the time period in question as Exhibit D. And my question to you, again, is: You've acknowledged that the bank has a deposit agreement?
A. Yes.
Q. If somebody at the bank testifies that this is the deposit agreement, how could you have any dispute over that?
MS. DELZOTTI: Objection to form.
THE WITNESS: They change.
BY MR. FEW:
Q. They might change, but if someone testifies -- you know, what reason would you have to say that that's -- that this is not the

Page 234

agreement that you were provided?
A. I wouldn't.
Q. Now, you're aware that there is a right of indemnity against the accountholder for lawsuits, correct? Have you read that as part of our counterclaim in this suit?
A. Yes.
Q. So you understand that at the close of this lawsuit if the bank prevails they're going to be asking the court to award their fees and costs for having to defend the case brought by you?
A. Yes.
Q. Did First Citizens Bank have anything do to with you hiring Anna Hoormann to come to work for you?
A. No.
Q. First Citizens provided you all the statements for the accounts that you've put at issue in this lawsuit, didn't they?
A. I don't know.
Q. Now, if you didn't receive a statement, then you would have known about it, right?
A. Are you asking me if they provided it to me after the fact, or before?
Q. No. Before. During the time -- during

Page 235

the normal course of the business relationship First Citizens mailed you statements. mailed you periodic statements, right?
A. Yes.
Q. Are you sure?
A. I guess they did. I don't know.
Q. Well, you don't really know because you didn't review them, did you?
A. At the time of the loss I was not able to look at all those statements.
Q. And if you had made it your regular practice to review them yourself you would have known on a month-by-month basis whether or not you were receiving the statements, right?
A. Right.
Q. And if it was something that you did on a monthly basis you would have notified the bank if you ever didn't receive one, right?
A. We did notify the bank when there was a problem with the statements.
Q. When was that again?
A. Around the time we moved.
Q. When was that time period?
A. September or October of '04.
Q. Did the bank eventually get -- you

Page 236

eventually get the statements from the bank for all three accounts, right?
A. I believe so.
Q. Well, if you notified the bank that you weren't getting them and then you followed up with the post office, either you just gave up or you eventually received them. Which one is it?
A. As I said to you earlier, I instructed Anna to check into it with the post office.
Q. So she was the one that was telling you that you weren't getting them in the first place?
A. Yeah.
Q. So your testimony that relates to not receiving the statements just happens to coincide with the time period that Anna Hoormann became a full-time employee with your firm?
A. I don't know. Why it happened I don't know.
Q. But it's within a month, right? You said you moved in September and she became an employee of at the end of September of '04?
A. Yes, they coincide.
Q. So the bank was mailing your IOLTA account statements to the P.O. box, right?
A. Yes.

Page 237

Q. Now, did you forward anything from the P.O. box to your now address? You kept the P.O. box, right?
A. Correct.
Q. So did you ever get any answer to why you weren't receiving mail?
A. Just it was at the post office.
Q. Well, was it --
A. It was happening with Harry's mail as well.
Q. Was it a glitch at the post office or was it just something that Anna Hoormann was telling you?
A. I don't know.
Q. You don't know, do you?
A. I don't know.
Q. So as far as you know, Anna Hoormann is in Alvin S. Glenn Detention Center?
A. Yes.
Q. Did you appear at any court proceedings related to her charges?
A. Yes.
Q. You did?
A. Yes
Q. She pled guilty?

Page 238

A. Yes.
Q. She had a public defender representing her?
A. Yes.
Q. What did she get? What was her sentence?
A. Twenty years.
Q. Twenty years?
A. I think it was actually ten years and then two ten-year – a concurrent sentences.
Q. Did you request that she get the maximum sentence?
A. I don't remember what I requested. It's in the transcripts.
Q. You took a statement from Anna Hoormann on December 28, 2005, right?
A. Yes, I did.
Q. Now, I'm confused, because in your deposition with Wilbur Johnson you testified that at that time you thought there was only the one bad check that she had written –
A. Yes.
Q. – that the bank had told you about, but the next day you filed a report with the police setting forth $538,000 in damages.

Page 239

A. Yes.
Q. So after the time that you met with her at the public library on December 28th and then you went to the police on December 29th you discovered all these other incidences?
A. Yes.
Q. Who reported those to you? How did that come about?
A. As I testified to you earlier, we were going through the statements that entire Christmas.
Q. So it was on the 28th that that was discovered, that that was the difference?
A. I'm not sure. Sometime between the statement and sometime between when the police were called we were able to identify that amount.
Q. Who identified that amount, you and your family or Lawyers Title?
A. Myself and my family.
(DEF. EXH. 14, HANDWRITTEN STATEMENT, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark as Exhibit 14 and ask you if that's a copy of the statement that Anna Hoormann gave you.
A. Yes, it is.

Page 240

Q. You also filed a lawsuit against her, right?
A. Yes, we did.
Q. That lawsuit's still pending, isn't it?
A. No, it's not.
Q. Are you sure it's dismissed?
A. I believe it was dismissed.
Q. Now, when she worked for you, as I understood your testimony in your other deposition, you all shared – I mean, she worked in the same – her office was in the same room as yours; is that right?
A. That's correct.
Q. So surely you were aware that she purchased a house in September of 2005?
A. Yes.
Q. Why did she go to Buell Reeves for a closing when she worked for you?
A. I believe she stated it was a matter of the closing package, part of the closing conditions.
Q. Part of the closing conditions that the lender required her to go to an attorney of their choosing?
A. The lender or the builder. I can't

Page 241

remember.
Q. So you knew that she was buying a house?
A. Yeah.
Q. And you later filed a lis pendens against that property, right?
A. Yes.
Q. Do you ever refer to yourself as the president of Edward G. McDonnell, PC?
A. Yes. Do I need this anymore?
Q. You can just put it in the stack of exhibits.
(DEF. EXH. 15, TYPED STATEMENT, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark as Exhibit 15 and ask you if that is a statement that you made related to this matter.
A. Okay.
Q. Now, when did you make this statement?
A. I don't know.
Q. Excuse me?
A. I don't know.
Q. Well, what was the purpose of it? I mean, who did you give it to? You didn't just type

Page 242

it up for the heck of it, did you?
A. I believe Stan Freeman asked me for it.
Q. Who is Stan Freeman?
A. He works with Punky Holler.
Q. So about what time period would you have been having the discussion with Stan Freeman?
A. Probably the end of December.
Q. Now, some things in here are not accurate, right?
A. It appears that the date of December 27th should be December 23rd.
Q. So you made the statement but you didn't bother to go back and look at your statement to see when you were actually notified by the bank; is that right?
A. I believe, as far as the statement goes, he asked me to type up a state statement, I sent it over for his review, and that's as far as I was involved.
Q. Well, were you expecting him to know the date that you were notified by the bank?
A. I had met with him, yeah.
Q. Well, if you gave him this statement before the end of December, this is within barely a week of all this happening and you got the date

Page 243

wrong by four days, right?
A. I'm not positive of when I gave him this statement.
Q. That's not my question.
A. It was one of your questions.
Q. No. My question is: You've got down here December 27th --
A. Right.
Q. -- and we know from your testimony today, including the faxes that you received from the bank on December 23rd, that you were notified of all this by the bank on December 23rd, not December 27th, right?
A. December 23rd should be the date.
Q. Is there any reason that you -- was it just carelessness that you put December 27th instead of December 23rd?
A. If somebody rips you off for that amount of money you're not exactly in the best mood and thinking too clearly, you're trying to figure out what happened to you.
Q. You put in here, in addition, that she was transferring funds via the Internet, right?
A. Right.
Q. So you knew about that? You knew about

Page 244

it at that point in time?
A. Whenever this was created, yes.
Q. Now, do you allege that the document that has been marked Exhibit 9 was executed with or without your authorization?
A. I don't remember this document.
Q. That's not my question. My question is: Did you authorize or did you intend to start an online banking relationship, business online banking, with First Citizens in September of 2004?
A. No.
Q. You didn't?
A. (Shaking head.)
Q. But if you had read the statements you would have seen that you were set up for Internet transfers at least as early as May of 2005, right?
A. That's what the statements indicate.
Q. That's right. You would have seen Internet transfers, right?
A. Yes.
Q. You never notified the bank that you weren't set up for Internet transfers?
A. I don't know.
Q. Now, we've gone over the IOLTA account statements that show the transfers into your

Page 245

operating contact, right?
A. Yes.
Q. $418,000, right? You can get the audit out and find it yourself if you need to.
A. I just wanted -- you're stating that $418,000 went out of the operating account into the trust account, or vice versa?
Q. Out of the trust account into the operating account. McDonnell 64, Internet transfers out. I'll highlight it right there.
A. Yes.
Q. That's the total transfers out, right?
A. Yes.
Q. While we're on that page, you've testified that nobody reviewed those statements after July, right?
A. Yes.
Q. So that would mean that you never looked to see if any of these transfers occurred on either account, right?
A. Yes.
Q. So if you total these numbers, 15 and 15 is 30, right?
A. Yes.
Q. Plus 25 makes 55, right?

Page 246

A. Yes.
Q. Plus 30 makes 85?
A. Yes.
Q. Plus 30 makes 115?
A. Yes.
Q. Plus 65 makes 180,000?
A. Yes.
Q. Forty-five more makes 225,000?
A. Yes.
Q. 65,000 more makes 290,000?
A. Yes.
Q. Another 40 makes 330,000?
A. Yes.
Q. And 20 more makes 350,000?
A. Yes.
Q. Now, what I want you to understand is you can't get a double recovery of your same damages. You understand that, right?
A. Yes.
Q. So if your damages are 660,000 less 30 that she paid you, plus ten more, okay, and then you've got $350,000 here that you've testified that you never even reviewed the statements to find -- right -- not to mention the ten or 12 Internet transfers above out of your IOLTA account, and

Page 247

you've already collected $400,000, what is it that you're hoping to get out of this lawsuit?
MS. DELZOTTI: Objection to form.
THE WITNESS: I'd like to be made whole.
BY MR. FEW:
Q. Made whole for damages under -- under the South Carolina law, do you understand that there's an obligation of the accountholder, whether it's an IOLTA account or an operating account or a commercial account or a personal account, you have to review your statements?
MS. DELZOTTI: Objection to form.
MR. FEW: I'm asking him what he understands. There's no basis for any objection.
MS. DELZOTTI: No. You're telling him what the law is and you're being augmentative.
MR. FEW: I'm asking if he -- I'm asking if he understands that that's the law.
MS. DELZOTTI: As you stated it.
THE WITNESS: I understand that that's the law as you stated it.
BY MR. FEW:
Q. And you didn't review the statements, correct?

Page 248

A. No.
Q. Hold on. You answered with a negative, but I think you intended to acknowledge that you didn't review the statements, right?
A. When?
Q. From October 1, 2004, to December 23, 2005. If you would just let me know any one statement that you have any document to show that you reviewed, if you annotated it, if you could put that in the record, that would be wonderful.
A. Between October 1, 2004 --
Q. Right, to December 31, 2005.
A. Whether I personally or someone in my office did?
Q. You.
A. No, I don't.
Q. You delegated it to others?
A. Yes.
Q. And that would be Dawn Murray or Dawn Player, Anna Hoormann or your brother?
A. Uh-huh.
Q. Anybody else?
A. No.
Q. And that would include all three accounts?

Page 249

A. Yes.
Q. So if they failed to do it and raise the issues to you, then that's something you've got to deal with because you delegated that responsibility, right?
A. I guess we'll see.
Q. Well, it's your practice, okay? It's your law practice. You've got a monopoly on real estate closings, right? Lawyers have a monopoly on real estate closings?
A. I don't know about that.
Q. You don't?
A. Do I have a monopoly on real estate closings?
Q. Lawyers have a monopoly on real estate closings in South Carolina?
A. When they're done correctly, yes.
Q. Who besides a lawyer can handle a real estate closing in South Carolina?
A. When they're done legally, yes.
Q. My question is: Can anybody other than a lawyer, without breaking the law, handle a real estate closing transaction in the state of South Carolina?
A. No.

Page 250

Q. And you benefit from that, don't you?
A. Yes.
Q. And are you familiar with the rules of professional conduct regarding lawyers delegating responsibility?
A. I realize that I'm the supervising attorney and responsible for those people.
(DEF. EXH. 16, COLUMBIA POLICE INCIDENT REPORT, marked for identification.)
BY MR. FEW:
Q. Let me hand you what we'll mark as Exhibit 16. Is that the police report?
A. Yes.
Q. Who was the solicitor that handled the prosecution of Anna Hoormann?
A. Bob Maldonado.
Q. Page one, about -- under the Narrative section, do you see that? It says: Totalling $538,075 for her personal use; is that right?
A. Yes.
Q. That's what you reported at that time?
A. Yes.
Q. So you apparently didn't have all the information in front of you then, right?
A. No.

Page 251

Q. Now, look back at Anna Hoormann's statement. Now, we asked you earlier -- you testified in your deposition in the Carolina Legal Associates case that at the time you took that statement from her at the -- was that at the Richland County Public Library?
A. Yes.
Q. Over on Assembly Street?
A. Yes, sir.
Q. That you thought it was only one bad check?
A. Yes.
Q. But in the statement itself she lists all three accounts and then she refers to them as transfers.
A. Yes.
Q. I mean, did you think on December 28th, when she gave you this, that it was only one bad check?
A. When I went there to meet with her, yes, but I knew that, I mean, I had a thief in my office, so I wanted to make sure that if she did something else she admitted to it.
Q. But I'm trying to figure out how you had the belief that it was only one, or why -- I

Page 252

don't know why it really makes any difference. It just doesn't make any sense that you would testify that you thought on December 28th, when you took the statement, that it was only one transaction, and yet she gives you this statement referring to transfers and referring to all three accounts.
A. At the time she wrote this statement we were still compiling the damages so I had no -- I did not know.
Q. Now, the time she gave you this statement, that was when she gave you the jewelry?
A. Yes.
Q. When is the last time you communicated with Anna Hoormann?
A. Probably -- I don't know. I don't know. It's been years.
Q. Well, when was she sentenced to jail?
A. Within the last six months.
Q. Did you go to the hearing?
A. Yes.
Q. Did you see her there?
A. Yes.
Q. Did you speak to her?
A. No.
Q. When is the last time you saw her

Page 253

between December 28th and the time you saw her at her sentencing hearing?
A. I believe it was December 28th.
Q. So you didn't have any -- you didn't communicate with her or see her at all from December 28th until the time of her sentencing?
A. I don't recall. She might have made some phone calls saying that she was getting money together or something along those lines.
Q. Now, do you have any reason to believe that Anna Hoormann's testimony is going to change when she's deposed in this case?
A. As to what?
Q. As to whether or not you knew about these transfers?
A. I have no idea what she's going to say.
Q. Back to the other subject. December 28th and what we'll call her sentencing hearing -- was it a sentencing hearing?
A. Yes.
Q. Those are the last two times that you physically laid eyes on her?
A. Yes.
Q. Is that right?
A. Yes.

Page 254

Q. Now, again, I want to ask the question. You've spoken to her or communicated -- have you ever communicated with her by e-mail since December 28th?
A. No.
Q. So the only other time that you would have communicated with her between those two times would have been by phone?
A. Yes.
Q. She ever call you? Has she ever called you?
A. Yeah, communicated -- I never called her.
Q. She called you after December 28th?
A. I don't know.
Q. Come on. You don't remember? You don't know? What is it? You testified in your earlier deposition that you did communicate with her.
MS. DELZOTTI: Objection to form.
THE WITNESS: I said she might have called in regards to replacing money.
BY MR. FEW:
Q. Did she communicate with you by voice mail, leaving a message with your office, leaving a

Page 255

message on your cell phone, or any other way, between December 28th and her sentencing hearing that you've referred to here today?
A. I don't know.
Q. We'll work on some other questions and see if your memory gets refreshed.
MS. DELZOTTI: It's 5:20. What time are you planning to go until?
MR. FEW: Just a few more minutes on this, and then the deposition is going to be left open until we get -- well, absolutely until we get access to those other records.
BY MR. FEW:
Q. On SoftPro, did you testify that either one of the three, Dawn Murray, Dawn Player, Anna Hoormann or your brother Rick -- did they ever bring you written reconciliation reports similar to what we went through?
A. Those would be in SoftPro.
Q. They're saved in SoftPro?
A. They would be in SoftPro.
Q. If the report is -- that's a report that's prepared and if it's --
A. Uh-huh.
Q. If it's saved, it is saved on your

Page 256

system?
A. Reconciliation's an ongoing thing, so you reconcile, then you go back and reconcile.
Q. We need copies of every file that's been saved for every report that's been produced out of SoftPro from January 1, 2004, through the present, and we also need copies of all the electronic data that would show any changes to the payee names or anything else. So we need to get in touch with someone that has that expertise that can do that, and they can put it on a disk and everybody can have it.
(DEF. EXH. 17, DEPOSITION TRANSCRIPT OF EDWARD G. McDONNELL, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what we'll mark as Exhibit 17 and tell you -- ask you if that looks like a copy of your deposition, apparently without exhibits, from the Carolina Legal Associates case.
A. It does.
Q. Flip, if you would, to page 21, which is 81 of 84 of the condensed version. Do you see on page 83, at lines eight and nine, you were -- it says: Did you -- well, it starts at six and seven. You're asked: Did you ever have any other

Page 257

conversation with her after that time? And you say: Well, I believe so, yes, but I couldn't tell you the substance of the conversation.
So does that refresh your memory about whether or not you've had any conversations with her after December 28, 2005?
A. It appears I did.
Q. Now, you testified that you couldn't recall the substance. I mean, what would you have talked about? I mean, you either talked about personal matters or you talked about the business matters. You spoke to her, but you -- as we sit here today, you don't know what you talked to her about?
A. I don't know the exact conversation. It would most likely be --
Q. Was it, How's the family, or was it, Where's my money?
A. Most likely the latter.
Q. Well, I mean, I'm asking you. Was it the latter or was it not?
A. I definitely did not ask about her family.
Q. Good. All right. Did she call you or did you call her?

Page 258

A. I don't know.
Q. Was it more than one time?
A. I don't know.
Q. I just find it strange to believe that this could -- something like this could happen and you don't remember the subsequent conversations with this person.
MS. DELZOTTI: Object to the form.
BY MR. FEW:
Q. So was it one conversation or multiple conversations with her after that?
A. I don't know.
Q. You weren't being blackmailed by this person, were you?
A. No.
Q. Now, we've asked questions about the rules, and I want to know if -- has there been a report of any of the violations of the rules of professional conduct made by you or anyone else related to Anna Hoormann?
A. I self-reported.
Q. When did you self-report?
A. Around the time period when it was discovered.
Q. Now, under the rules, you can waive the

Page 259

confidentiality of any information that you've given to the Commission on Lawyer Conduct. Are you willing to do that? We have a protective order in this case.
A. I'm not ready to answer that.
(DEF. EXH. 18, RULE 12, ACCESS TO DISCIPLINARY INFORMATION, marked for identification.)
BY MR. FEW:
Q. I'm going to mark as Exhibit 18 Rule 12 to Appellate Rule 413. Are you familiar with that rule?
A. No, I'm not familiar with it.
Q. Let me ask you this. Have you given the commission or anybody else related to this matter anything that is inconsistent with what you've testified to here today?
A. No.
Q. No?
A. No.
Q. You've got nothing to hide, right? You filed a lawsuit over this, correct?
A. I have filed a lawsuit over this. That's why I'm here.
Q. So are you willing to disclose

Page 260

everything that's been provided to the Commission on Lawyer Conduct?
A. I'm not ready to answer that today.
Q. Any of the title claims that were filed -- let me back up for a second. Have you written title insurance policies for any company other than Lawyers Title or LandAmerica, as it may be now known, since January 1, 2004?
A. Yes.
Q. Who?
A. Investors Title and Old Republic.
Q. Now, you gave testimony earlier about Lawyers Title, title claims to them. What about Investors?
A. I don't believe there's any.
Q. None?
A. No.
Q. What about Old Republic?
A. None.
Q. Any of these involve unsatisfied mortgages?
A. As I mentioned before, you frequently will get a claim for an unsatisfied mortgage that the lender has failed to satisfy, and then once you do some digging you find out they have or are in

Page 261

the process of.
Q. But do you know if any of them involve mortgages that remain unsatisfied?
A. No.
Q. Because we don't have any -- we don't have the documents to show how the money was put back at this point.
A. Okay.
Q. That's another thing that we need. So what -- how do you normally handle a closing in your office?
A. That's a very broad question.
Q. Well, run through the process, please. Unless you all want to break.
A. I would receive a title report.
Q. You'd receive a --
A. Title report.
Q. And who does the title, somebody that works in yours office, or do you?
A. No. An abstractor.
Q. An employee?
A. No.
Q. Who do you use for Richland County, typically?
A. Several people. Preacher Group. Jason

Page 262

Woodley. Kathy Ellison.
Q. So they'd provide you a title report, right?
A. They provided me an abstract report, yes.
Q. And then somebody prepares a title opinion?
A. We prepare a title commitment.
Q. Who does that?
A. One of the paralegals will prepare the title commitment for review and approval.
Q. What sort of review do you normally do when they bring one to you?
A. If there's an issue, we'll review it.
Q. If there's an issue as determined by what they tell you or as determined by --
A. In the abstract? If there's an unopen mortgage what do we need to about it. I mean an unsatisfied mortgage, what should we do about it.
Q. Do you look at title work before you sign a title commitment?
A. Yes, we do.
Q. Always?
A. No.
Q. If the paralegal brings you a title

Page 263

commitment and tells you everything is okay, do you sign it without looking at anything else?
A. Well, there -- sometimes, yeah.
Q. Do you let paralegals or anybody else sign title commitments on your behalf?
A. Not without indicating that it was their -- done on my behalf.
Q. Did you ever authorize Anna Hoormann to sign anything on your behalf?
A. No.
Q. Not a letter?
A. No.
Q. Not a HUD?
A. No.
Q. Not a check?
A. No.
Q. Nothing?
A. No.
Q. As I understand your claim against the bank, you are alleging that the bank should have been examining all of these checks that were coming through your account and marking and notifying you of irregular signatures, regardless of the amount of the check; is that right?
A. Yes.

Page 264

Q. Now, let's go back to this, okay? Let's look at Exhibit 8. How many checks are involved in that? And I'll remind you as a part of this question that when you looked at Exhibit 1 I believe it took you several minutes to determine whether or not three signatures were in fact yours. So I want you to count the checks in that one statement on that one account and let's figure out how much time it would take somebody to review every single check.
A. There's five.
Q. Five? Five what?
A. Five checks.
Q. No. The whole -- the rest of the thing, seven through 88.
A. 440.
Q. 440 checks?
A. Uh-huh.
Q. Roughly?
A. Uh-huh.
Q. Exactly? Okay. And let me make sure that I understand you. You expect the bank was going to examine every single one of these checks and yet you're not charged any fee for that? Is that your expectation?

Page 265

A. The bank's in the business of cashing checks.
Q. Is that your expectation, that the bank was going review every single check for a signature?
A. Review or have some system in place with which to review.
Q. Did you ask the bank what system they had in place?
A. I don't think I did.
Q. You had the opportunity to choose any bank that does business in Columbia to start your practice in 2003 and you chose First Citizens, right?
A. Yes.
Q. Do you have any document anywhere that you would allege supports your expectation that the bank was going to examine every single one of your checks regardless of its amount?
A. No.
Q. You don't. And in fact, the bank mailed this to you, right? Because you're just -- this is just one of numerous -- you received statements from the bank, right?
A. Yeah.

Page 266

Q. With the image copies of the checks, right?
A. Yeah.
Q. And you had the opportunity to go through and see if the payee was proper, right?
A. Yes.
Q. As well as the signature, right?
A. Yes.
Q. Who was in a better position to know if the payee is proper on any one of these checks, you or the bank?
A. Me.
Q. The bank has no idea what -- who the payee should be, do they?
A. Well, no. Unless it's one of their closings.
Q. The bank gives you the checks and you're responsible for them, right?
A. I'm sorry, can you restate it?
Q. The bank gives you the account?
A. Right.
Q. And you have the checks and you're responsible for making out the checks and reviewing your statements?
A. That's what -- yes.

Page 267

Q. Did you ever have any conversation with anybody at First Citizens about a review for forged checks --
A. I don't remember.
Q. -- before December 23, 2005?
A. I don't remember.
Q. I mean, was that something that you would have asked about when you were trying to determine where you wanted to open your account?
A. I would assume that's a normal course of business with a bank.
Q. You would assume?
A. Yeah.
Q. But you don't have any documents, right?
A. No.
Q. And you can't give me the name of one single person that you had a conversation with?
A. In regards to...
Q. In regards to what First Citizens may or may not do regarding forged checks.
A. No.
Q. You understand that the bank might look at checks that have gone through your account and not been complained about as a part of their review

Page 268

of your future checks, right?
MS. DELZOTTI: Objection to form.
THE WITNESS: Say that again. Clarify your question.
BY MR. FEW:
Q. If someone fills out a signature card in 2004 --
A. Right.
Q. -- and their signature changes over a period of time, the bank might look at the signature card or they might look at other checks that have come through the account?
MS. DELZOTTI: Objection to form.
THE WITNESS: I don't know what a bank does.
BY MR. FEW:
Q. You don't know. So who all is at fault for this loss that you're claiming damages for?
A. Can I go to the bathroom real quick?
MR. FEW: Sure.
(A recess transpired.)
BY MR. FEW:
Q. I believe my question to you, Mr. McDonnell, was: Who all do you believe is responsible for these checks being run through your

Page 269

account?
A. First Citizens, Carolina Legal.
Q. Anna Hoormann?
A. Anna Hoormann, yeah.
Q. And yourself?
A. I think I did what the average attorney in my position would have done.
Q. So my question is: Do you believe that you are at all responsible for what Anna Hoormann did as an employee of your firm?
A. I have a slight degree of responsibility.
Q. A slight degree of responsibility?
A. Uh-huh.
Q. You didn't review the statements; we've established that in this deposition, today right?
A. That's correct. Semi-regular.
Q. Semi-regular?
A. Yeah.
Q. You reviewed them semi-regular. And as part of your semi-regular review, you don't even have statements for two of the accounts, correct, because you haven't produced them?
MS. DELZOTTI: Objection to form.
THE WITNESS: I thought we established

Page 270

that I thought they were here. Did we not establish that?
BY MR. FEW:
Q. We haven't established anything. You and your lawyers have pointed fingers at the lawyer that brought the other case against Carolina Legal Associates that, for whatever reason, was brought separate from this case even though the only difference in damages is $2,900?
MS. DELZOTTI: No, we didn't. I said he may have given them to Wilmot. I didn't point fingers at Wilmot.
MR. FEW: I'm not suggesting that you are, but what I am making clear for the record is that we don't have the documents, and the witness' testimony here today, over one year after this case has been filed, and after tons of discovery has been sent back and forth, and e-mails and complaints about what has and has not been produced, you testified -- the witness testified here today about damages that he alleges he's due, and nobody has documents.
We're in your office. You all don't have them. You had a chance to call Wilmot's office and see what he has. I don't particularly

Page 271

care, it's just we're entitled to have them and the deposition is going to be held open so that we can question the witness about those documents, as well as all these other documents that we have haven't received, namely all this software. And I'll spare the record the e-mail correspondence about getting access to all that that's gone back and forth.
BY MR. FEW:
Q. You testified earlier, later in the day, that you didn't review these statements. So, I mean, isn't that the truth, Mr. McDonnell, you did not review the statements for -- from October of 2004 to 2005, you did not review the IOLTA statements?
MS. DELZOTTI: Objection to form.
THE WITNESS: Semi-regular basis.
BY MR. FEW:
Q. I've asked you, as a part of your semi-regular review, do you have one single document that you can produce that shows that you annotated the statements, that you marked them, that you checked off the items to show that it was consistent? One document? Can you produce one single document to show you that you personally reviewed any IOLTA account statement from

Page 272

October 1, 2004, to December 23, 2005?
MS. DELZOTTI: Objection to form.
THE WITNESS: As I stated earlier, reconciliations would be done in SoftPro.
BY MR. FEW:
Q. My question is: Do you have any documents to show for it?
A. The ones that I have you've been provided.
Q. You're sure of that?
A. I believe so.
Q. Well, we haven't been provided any reconciliations out of SoftPro that were done prior to August 14, 2008, okay, as a part of this lawsuit. So do you know if you have any documents on SoftPro, any reports that were generated by anybody, that show that they did a reconciliation?
A. I stated earlier it's a constant thing. I don't know that -- I think you're asking for something that doesn't exist.
Q. I'm asking if you know that it exists.
A. And I'm stating that it's something that's a continuos thing. Reconciliation, it's done today, I reconcile for everything that's happened in the past.

Page 273

Q. If you reconcile at the end of a month, as the professional rules of conduct require, that I'm going to go into again --
A. Okay.
Q. -- because you didn't even know about them -- okay. If you do a monthly reconciliation and you produce a report out of SoftPro, can you or can you not save that report on your system to show that you complied with the rules regarding reconciling IOLTA accounts on a monthly basis?
MS. DELZOTTI: Objection to form.
THE WITNESS: I guess you could.
BY MR. FEW:
Q. Again, did Anna Hoormann or Dawn Player or Dawn Murray or Rick bring you hard copies of reconciliations between October 1, 2004, and December 23, 2005?
MS. DELZOTTI: Objection to the form.
THE WITNESS: We would confer about them. There would be some that are stored in the software.
BY MR. FEW:
Q. So they may be saved on your computer somewhere?
A. Again, a reconciliation is a constant

Page 274

thing. They change consistently. You might have a check that doesn't clear for four months. That changes the picture.
Q. You're going to give us the records and we can find out if you saved any reports, right?
A. I don't know. I don't see why I wouldn't.
Q. What we were talking about is, do you acknowledge any fault for the fact that your employee wrote fraudulent checks right under your nose and the bank gave you statements every month for three different accounts and you never found it. You never even found it on your own. The only way that you even -- that this even came about is that finally there was a bounced check in the IOLTA account.
MS. DELZOTTI: Objection to form.
BY MR. FEW:
Q. Is your testimony still that you acknowledge a slight degree of fault?
A. Yes.
Q. Did you ever give First Citizens a written notice that they were authorized to report your NSF charges to the Commission on Lawyer Conduct?

Page 275

A. Yes.
Q. You did?
A. I believe so. I mean, they did.
Q. Well, I know they did, but did you -- read H. This is Exhibit 5, Rule 1.15.
A. Okay.
Q. Did you do it?
A. I believe I opened my account before this was a rule.
Q. Well, when the rule comes out you've got to do what the rule says, right?
A. I never -- yes.
Q. Do you have a copy of a document that you sent to First Citizens Bank that shows that you complied with H of Rule 1.15?
A. That I provided to First Citizens or to the bar?
Q. Can you produce it in this lawsuit?
A. I don't know.
Q. Written directive, okay?
A. All right.
Q. You don't have it?
A. I don't know. I mean...
Q. I'll tell you what.
A. What?

Page 276

Q. You've got a lot more discovery to gather up in this case. Okay? If you find your written directive to the bank showing you complied with that rule, then you all can produce it in your supplemental responses.
So you attribute --
MS. DELZOTTI: Did you send a discovery request asking for that, so that you and Henry can deal with it? If you haven't asked for it before.
MR. FEW: We have broad requests and we have narrow requests.
MS. DELZOTTI: And I'm sure there are objections, and I don't know what they are, sitting here today.
MR. FEW: Well, there's no valid objection for our request for a document that he would have provided to First Citizens --
MS. DELZOTTI: Which time?
MR. FEW: -- related to these accounts.
MS. DELZOTTI: If you didn't specifically ask for it, I'm asking you to ask for it.
MR. FEW: Well, I'm not going to do it --
MS. DELZOTTI: Okay.

Page 277

MR. FEW: -- because we're not obligated to know every single -- that's what discovery is for. We've provided abundant production requests. We'll go through them on the record, if you want to.
MS. DELZOTTI: I really don't, because it's ten to six.
BY MR. FEW:
Q. So I want to know if you still stand by your testimony that you only attribute slight fault to yourself for the employee that you hired?
MS. DELZOTTI: Objection to form. Asked and answered three times.
THE WITNESS: Yes.
BY MR. FEW:
Q. Slight?
A. Yes.
Q. So you attribute greater fault to Anna Hoormann or First Citizens?
A. Both.
Q. First Citizens is equally at fault with Anna Hoormann?
A. More than me, yes.
Q. No. I want to know -- you attribute equal fault to First Citizens and --

A. I don't know.
Q. You don't know?
A. No.
Q. What about First Citizens or Carolina Legal, who do you think is more – who, in your opinion, is more at fault for this?
A. Equally.
Q. Equally. Okay. Carolina Legal or Anna Hoormann?
A. I don't know.
MR. FEW: Okay. Well, I'm going to conclude subject to our right to reopen and address at least all the issues that we have not been provided documents for.
(The deposition was recessed at 5:53 p.m.)

SIGNATURE OF DEPONENT

I, the undersigned, EDWARD G. McDONNELL, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

_____
EDWARD G. McDONNELL Date

CERTIFICATE OF REPORTER

I, Angela D. Zuver, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript, pages 1 through 283, is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 19th day of February, 2009 at Lexington, Lexington County, South Carolina.

_____
Angela D. Zuver, Court Reporter
My Commission expires
July 2, 2014

INDEX

WITNESS/EXAMINATION	Page
STIPULATIONS	3
EDWARD G. McDONNELL	3
EXAMINATION BY MR. FEW	3
SIGNATURE OF DEPONENT	279
CERTIFICATE OF REPORTER	280

REQUESTED INFORMATION INDEX

Reconciliations	17
Data for the operating account up through 2005	28
Records regarding the Capital One credit card	73
All documents showing monies put back in to pay back losses	100
Documents related to the Countrywide loan for $550,000	100
Copies of reports made to Capital One regarding Anna Hoormann	179
Copies of every file that's been saved for every report that's been produced out of	256

SoftPro from January 1, 2004, through the present
Copies of all electronic data that would show any changes to the payee names 256
Documents to show how the money was put back 261

EXHIBITS

Page/Line

DEF. EXH. 1, SIGNATURE SAMPLES 51 11
DEF. EXH. 2, DEFENDANT'S FIRST REQUEST FOR ADMISSIONS 55 3
DEF. EXH. 3, PLAINTIFF'S RESPONSES TO DEFENDANT'S REQUEST TO ADMIT 59 13
DEF. EXH. 4, DOCUMENTS BEGINNING WITH AN E-MAIL TO WILMOT B. IRVIN 71 19
DEF. EXH. 5, RULE 1.15: SAFEKEEPING PROPERTY 104 10
DEF. EXH. 6, RULE 417 FINANCIAL RECORDKEEPING 105 11
DEF. EXH. 7, PLAINTIFFS' FIRST SUPPLEMENTAL RESPONSES TO DEFENDANT'S FIRST REQUEST TO PRODUCE 107 21
DEF. EXH. 8, IMAGE COPIES OF CHECKS 145 10

DEF. EXH. 9, BUSINESS ONLINE BANKING (BOB) CUSTOMER SETUP FORM 185 13
DEF. EXH. 10, SETTLEMENT STATEMENT 188 5
DEF. EXH. 11, PHOTOCOPIES OF CHECKS 211 10
DEF. EXH. 12, McDONNELL CASE SPREADSHEET ANALYZING CHECKS ALLEGEDLY FORGED BY HOORMANN 216 17
DEF. EXH. 13, COMPLAINT 223 2
DEF. EXH. 14, HANDWRITTEN STATEMENT 239 19
DEF. EXH. 15, TYPED STATEMENT 241 13
DEF. EXH. 16, COLUMBIA POLICE INCIDENT REPORT 250 8
DEF. EXH. 17, DEPOSITION TRANSCRIPT OF EDWARD G. McDONNELL 256 13
DEF. EXH. 18, RULE 12, ACCESS TO DISCIPLINARY INFORMATION 259 6

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

McDONNELL AND ASSOCIATES, PA,
F/K/A McDONNELL LAW FIRM, PA,
F/K/A EDWARD G. McDONNELL, PC,
AND BOOMERANG TITLE, INC.,



Plaintiffs,

vs. CASE NO. 2007-CP-40-5252

FIRST CITIZENS BANK AND TRUST
COMPANY, INC.,
Defendant.

VIDEOTAPED
DEPOSITION OF: ANNA HOORMANN

DATE: March 12, 2009

TIME: 11:28 a.m.

LOCATION: Leath Correctional Institution
2809 Airport Road
Greenwood, South Carolina

TAKEN BY: Counsel for the Defendant

REPORTED BY: ANGELA D. ZUVER,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES
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ALSO PRESENT:
Edward G. McDonnell
Alan Metts

(INDEX AT REAR OF TRANSCRIPT)

STIPULATIONS

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent does not waive reading and signing of this deposition.

* * * * * * * * * * *

THE VIDEOGRAPHER: We are now on the record. This is in the matter of McDonnell and Associates, PA, F/K/A McDonnell Law Firm, PA, F/K/A Edward G. McDonnell, PC, and Boomerang Title, Incorporated, Plaintiff, versus First Citizens Bank and Trust Company, Incorporated, Defendant, Case Number 2007-CP-40-5252, pending in the Court of Common Pleas, State of South Carolina, County of Richland.

On behalf of the defendant, the deponent is Anna Hoormann. The date is Thursday, March 12, 2009. The scheduled start is 11:00 a.m., and it is approximately now 11:28 a.m. The location is Leath Correctional Institution, 2809 Airport Road, Greenwood, South Carolina.

Videographer, Alan Metts, with A. William Roberts, Junior and Associates. The court reporter is Angela Zuver, with A. William Roberts, Junior, and Associates.

And if everyone present will identify themselves.

MR. FEW: Wesley Few, attorney for the defendant, First Citizens Bank, and my address is 1501 Main Street, 5th Floor, Columbia, South Carolina 29201.

MR. McKELLAR: My name is Henry McKellar. I represent the plaintiffs in this matter. I practice with the firm of Collins and Lacy, and our office location is 1330 Lady Street, Columbia, South Carolina. And sitting next to me is Mr. Ed McDonnell. He is the plaintiff in this matter.

THE VIDEOGRAPHER: Okay. And will the court reporter now swear in the witness.

ANNA HOORMANN

being first duly sworn, testified as follows:

EXAMINATION

BY MR. FEW:

Q. Good morning, Ms. Hoormann.

A. Good morning.

Q. Wesley Few. And we're just now meeting for the first time; is that right?

A. That's correct.

Q. Okay. Now, we're taking your deposition by video just in case you may not be available for trial when we go to trial in this matter. Let me go over a couple of ground rules, because it's very important that we play by -- that we -- we follow the rules and that we get an accurate understanding of your testimony here today. If you don't understand any question that I ask you, just let me know, and I'll either rephrase it or I'll -- I'll rephrase it. Okay?

A. Okay.

Q. But if you don't let me know that you had trouble understanding a question, then we're going to assume that you're -- that you did understand it and that you've answered that question.

A. Okay.

Q. Does that sound fair?

A. Uh-huh.

Q. If you would please try, and I know it's difficult to do it -- I'm famous in depositions for calling people by the wrong name

Page 6

because I'm trying to outthink myself, but try to answer yes and no when you can instead of uh-huh and huh-uh, and that helps the court reporter to get a good record.

Now, the -- the role -- your role here really is easy. All you need to do is listen to my questions and Mr. McKellar's questions and answer them truthfully according to the oath you just took. You believe you can do that, right?

A. Yes, sir.

Q. Do you have any reason that you can think of that you wouldn't be able to answer any questions truthfully today?

A. No.

Q. Okay. And, now, I understand you were born in 1968; is that correct?

A. That's correct.

Q. Okay. Where -- where were you born?

A. New Orleans, Louisiana.

Q. Okay. And how far did you go with your education? Did you go through --

A. I graduated --

Q. Graduated.

A. -- from college.

Q. Okay. What school?

Page 7

A. University of South Carolina Aiken.

Q. Okay. What year was that approximately?

A. 2000.

Q. Okay. Now, when did you have your first job in the legal community doing real estate closings or anything related to the practice of law?

A. I worked for Parham Law Firm in 2003.

Q. Where was that?

A. In Irmo.

Q. Who was the lawyer?

A. Jim Parham.

Q. What kind of work did he do?

A. He was a litigation attorney, as well as real estate. Real estate was not his primary practice. It was medical malpractice.

Q. But you were exposed to real estate closings at that point in time?

A. I was.

Q. Okay. Now, you have -- in addition to being incarcerated on charges for which we'll talk about later, you have a criminal record; is that right?

A. That's correct.

Page 8

Q. Okay. When was the first time you were ever convicted of -- of a crime that would show up on your criminal record, best you can recall?

A. I believe it was fraudulent check, when I was 18 or 20. I don't recall exactly. It's been a long time.

Q. Where -- what -- what state would that have been in?

A. South Carolina.

Q. Okay. When did you move to South Carolina?

A. 1982 or '83.

Q. Okay. You -- you are currently incarcerated under a charge of breach of trust; is that correct?

A. That's correct.

Q. Okay. And who would have been the victim that would have reported that crime to the state to have them prosecute you?

A. Ed McDonnell.

Q. Okay. When did you first understand that you were going to be charged with breach of trust?

A. In December of 2006 -- or 2005. I apologize.

Page 9

Q. Okay. All right. Now, I understand -- and Mr. McDonnell is here today, right?

A. Yes, he is.

Q. And when's the last time you communicated with him in any way?

A. We've had no communication. He was present at sentencing.

Q. And did he speak at the sentencing?

A. He did.

Q. Tell us, best you can recall, a summary of what he had to say at that sentencing hearing.

A. I was very upset at the time. A lot of it I don't really recall, but he was very nice. He could have said a lot harsher things and he did not, and I really appreciate that. He did tell the judge that he wasn't interested in me being taken from my children and asked for counseling, and that was pretty much the end of the conversation. I mean, I didn't address him directly.

Q. Now, when were you sentenced?

A. I believe that was September.

Q. Of which year?

A. This past year.

Q. Two thousand and --

A. Eight.

Page 10

Q. Eight. Okay. When did you get -- when -- did you serve any time prior to that, or were you out on bond?
A. I was out on bond from the original arrest.
Q. What was the date of that original arrest?
A. It was January 2006. I don't remember the date.
Q. Now, you had some meetings with Mr. McDonald (sic) at the -- McDonnell at the Richland County Public Library; is that -- is that right?
A. I don't recall where we met, but we did have conversations.
Q. Would that have been toward the very -- the end of 2005?
A. It was around that time. All of this really took place right before Christmas so it's within those past couple of weeks between Christmas and the first of the year.
Q. Now, when you say, All of this, you're referring to the fact that there was an NSF charge on the IOLTA account?
A. I believe that's what happened.

Page 11

Q. Okay. And did you understand that First Citizens Bank called and advised Mr. McDonnell or somebody at his law firm that there had been an NSF charge on that account?
A. We were -- we were sent a fax. Whenever there is a wire sent to the office it comes across the fax machine, and we got that, and then there was some communication for a couple of days back and forth with the bank and I wasn't privileged to that.
Q. Okay. Did you ever spend any time after that -- did -- so -- so tell me about your communications or your involvement with Mr. McDonnell in investigating the matter after that fax came in from First Citizens Bank. And starting right from the moment that you can remember that that fax came in, try to give me a full account of what happened over the next day or two.
A. The best I can remember, we were going through the account, and we had the bank statements and things like that, and going through them line by line. Other people were present and were helping in that situation. And then Christmas came and then we broke for Christmas break.

Page 12

Q. Who else was present at that time?
A. Tracey Donnelly, Mr. McDonnell. I believe his brother, Rick McDonnell, was there as well.
Q. Were you ever assigned as a part of your work responsibilities to review the monthly bank statements from First Citizens Bank?
A. Not really. Not really, because Ed had hired someone that did that.
Q. Who was that?
A. His brother.
Q. That would be Rick McDonnell?
A. That's correct.
Q. So you never received any training from Ed or any other attorney at the firm on how to reconcile the monthly bank statements?
A. No. I did QuickBooks. I didn't really fool with the actual paper.
Q. Now, on QuickBooks, if you wrote yourself a check and someone went and looked at the QuickBooks data, wouldn't they see your name as the payee?
A. I assume so, yes.
Q. Did you ever go back -- because you wrote approximately, and we'll get into them a

Page 13

little bit later -- let me ask you this: Do you now acknowledge that you forged approximately 90 to a hundred checks?
A. Yes, sir. That's what I was convicted of.
Q. Okay. And you pled guilty to that?
A. I did.
Q. Did you give a -- at your guilty plea, did the prosecutor give what's called an allocution or an explanation of everything that you did in a pretty detailed fashion?
A. It wasn't very detailed. I had several court appearances leading up to that, and he was specific as best he could.
Q. Who was the prosecutor? Do you remember?
A. Robert Maldonado.
Q. Okay. And was there a monetary amount assigned to the -- the breach of trust that you were convicted of?
A. Yes and no. They said it was a -- an amount, but he couldn't allude to the fact of all of it because it was still pending, from my understanding.
Q. So even as of September of 2008 the

Page 14

amount was not stated in your guilty plea?
A. When I was first served with papers there was an amount. I don't recall that amount because it's been some time and I have been hospitalized and have lost memory because of certain treatments. My attorney of record had gone over a dollar amount with me, and then Mr. Maldonado went through another dollar amount, but it wasn't actually given to me on paper, the exact amount.
Q. What -- what dollar amount do you remember discussing with your attorneys?
A. About 600,000.
Q. Okay. Does that seem like the amount of money that --
A. I really have no idea.
Q. What happened to the money?
A. I spent it on various things.
Q. Tell me the biggest thing that you used the money for in terms of dollar amount.
A. A down payment on my house, car, furnishings.
Q. This would be the house that -- that Mr. McDonnell put a lis pendens on?
A. That's correct.

Page 15

Q. And that was eventually foreclosed by the lenders?
A. It was, uh-huh.
Q. So you bought that house with a down payment?
A. Yes, sir.
Q. But did you later take out a loan so there wasn't really any equity in it?
A. Correct. I did have a mortgage.
Q. Did you take a mortgage out after you purchased it? Did you refinance that mortgage?
A. No, I did not.
Q. Okay. What was the house -- what -- what do you think the house was worth when they filed the foreclosures?
A. It's hard to say, with the market. I know the house was purchased around 160,000. I -- I don't really remember.
Q. That was the approximate appraised value when you purchased it?
A. When I purchased it. But there was upgrades, so I'm sure it appraised for more.
Q. Did you use -- how did you finance the upgrades?
A. I just wrote a check for them.

Page 16

Q. With money that you took from --
A. That's correct.
Q. Okay. And you said you purchased the car. What kind of -- would that be with -- at Yonce Ford?
A. That was in the beginning.
Q. Okay.
A. That was the first car.
Q. You started writing checks off of the accounts in October of 2004; is that right?
A. I don't recall the date.
Q. Do you recall that you were hired as a temporary employee?
A. I don't recall that.
Q. Did you not get placed with Mr. McDonnell's firm through Carolina Legal --
A. Oh. That's correct. I was. You're right. I was with Carolina Legal Associates. I did forget about that.
Q. Did you know that Mr. McDonnell has filed a lawsuit against Carolina Legal Associates?
A. No, sir. I'm not aware of that.
Q. Okay.
A. I was not even aware of this pending action until two days ago, when I was served

Page 17

notice.
Q. Okay. So you're not aware that he's received a settlement from -- from Carolina Legal Associates?
A. No, I'm not aware of that.
Q. Okay. So you didn't know that this action was pending until a couple of days ago?
A. When I received your notice.
Q. Okay. Now, a minute ago you said you had children; is that right?
A. That's correct.
Q. How many?
A. Two.
Q. How old are they?
A. I have a 17-year-old son and a two-year-old daughter.
Q. Okay. So the two year old has been born even since all these events transpired, right?
A. Right. This action was prior to conception.
Q. Who's the father of the two year old?
A. David Bell.
Q. Does he have custody of child -- of the child?
A. It's a temporary matter at this time.

Page 18

We have a court case pending for permanent placement.
Q. You mean -- are you opposed to David Bell keeping the child?
A. Not in a sense. David does not have actual physical custody of her, his mother does, and he has filed action asking for custody, but he doesn't have custody of her.
Q. What county is that pending in?
A. Richland.
Q. Okay. What does David do?
A. He's a captain in the United States Air Force.
Q. Okay. Now, what about -- now, QuickBooks was used to manage which accounts at Mr. McDonnell's law firm?
A. The operating account, and QuickBooks was run through Soft Pro, which is our real estate software, and that's how the checks were issued for real estate closings.
Q. Okay. Help me understand the difference QuickBooks and Soft Pro. Are they the same?
A. No. Soft Pro is a real estate software that does the HUD one statements, and then to

Page 19

disburse those loans, it's through -- I believe it's Soft Pro. I think it has a different name for the actual disbursement of funds, but it's still the same software.
Q. Is -- is it -- is it fair to say that Soft Pro is used on -- only on the IOLTA account?
A. That's correct.
Q. Okay. And QuickBooks is used on the operating account?
A. That's correct.
Q. And the Boomerang Title account?
A. I don't really recall Boomerang. I know Boomerang, we had a separate checkbook. It wasn't printed checks. They were typed.
Q. They were typed?
A. Uh-huh.
Q. Did you ever meet Sallie DelVecchio with Lawyers Title that did an audit of Mr. McDonnell's firm after all this transpired?
A. No, I have not.
Q. She never interviewed you?
A. No.
Q. Okay. So you wrote, as I understand it, two checks out of the IOLTA account. Does that seem right?

Page 20

A. Uh-huh.
Q. And that was in the latter part of 2005, around maybe September time period?
A. I don't recall the exact date.
Q. But those were pretty good size checks. 20, $25,000? Does that seem...
A. Uh-huh, that seems correct.
Q. And why did you wait so long to start writing checks out of the IOLTA account?
A. I really don't have an explanation for that.
Q. When did you realize that you would be able to write checks without permission and get away with it?
A. I don't understand the question.
Q. Well, we'll go through the checks that have been put at issue, and I'll represent to you that October the 1st, approximately, of 2004 is the time that -- that Mr. McDonnell alleges that you first started forging checks. Does that seem fair?
A. That seems fair.
Q. Okay. So it -- so you wrote checks on the three accounts for over a year, correct, before it -- it was discovered by anybody?
A. I believe it was 11 months.

Page 21

Q. From --
A. From what my attorney had stated with the criminal case, it was 11 months.
Q. Well, if you started in October of '04 and then it wasn't discovered until December 23rd of 2005, then really that's almost 15 months, isn't it?
A. I'm just going by what I was told with my criminal attorney; it was 11 months.
Q. I -- I understand that, but -- but from October of '04 to December 23rd of -- of '05 is almost 15 months, correct?
A. Correct.
Q. Okay. And did Ed McDonnell ever come to you and -- and ask you what any of these checks were for?
A. No, he did not.
Q. Is it true that anyone that worked in that firm that had access to QuickBooks could have opened the software, looked at the payee names and seen the checks to you?
A. I assume so.
Q. Okay. Are you surprised that that never happened?
A. I really didn't give it much thought.

Page 22

Q. How did you manage to take, let's just say if it's over $600,000, without someone discovering it in -- in a small firm like this?
A. I can't speak for the other people that I worked with.
Q. Do you think that Mr. McDonnell, who owned -- Mr. McDonnell owned the firm, correct?
A. That's correct.
Q. Okay. Did you think that that would have been income to him that he just never realized because you took it?
MR. McKELLAR: Object to the form of the question.
BY MR. FEW:
Q. You can answer the question. He just doesn't like the way I asked it. But if you want me to restate it, I will.
A. If you would, please.
Q. Okay. What was the source of the money? Was it client money or was it profits to Mr. McDonnell?
A. I never gave that much thought, but I assume it was real estate closings.
Q. Uh-huh.
A. That was our business.

Page 23

Q. Isn't it true that you would take a borrower's cash for a loan closing that should have gone into the IOLTA account and you put it into the operating account?
A. I don't recall that.
Q. You don't recall that?
A. No, sir. I mean, just for the record, you know, after completion of this, being out on bond, having my daughter, being pregnant, I was hospitalized and had ECT treatments so a lot of short-term memory is not there anymore.
Q. Okay. I'm sorry about that. Well -- but you -- you -- you -- you'll tell us if you -- if you need to take a break today?
A. Yes, sir. I'll -- I'm -- I'm fine.
Q. Okay.
A. It's just a lot of the memory I don't have because it's very vague at this point.
Q. Okay. All right. Well, let me ask you when -- did you ever have any discussions with Mr. McDonnell about using a Capital One card?
A. It was the business card. It was Mr. McDonnell's personal card for the business.
Q. Did you use it?
A. I have in the past.

Page 24

Q. Approximately how much money did you charge on it?
A. I don't recall.
Q. Was it around $3,000? Does that sound about right?
A. I don't recall. I don't have a dollar amount.
Q. Was it -- but was it more than ten?
A. I don't believe so.
Q. Probably less than five?
A. I believe so. I don't really have a dollar amount.
Q. Okay. So you -- you never told him that you did that?
A. I don't believe I did.
Q. Did he ever ask you about that when you all had your meetings after First Citizens gave notice of the insufficient charge on the IOLTA?
A. No.
Q. So he's never said anything to you about the Capital One card?
A. No, he has not.
Q. When's the last time you had any communication with anybody that was affiliated with Mr. McDonnell's law firm?

Page 25

A. December of 2005.
Q. So you didn't have any meetings with him?
A. I had meetings with him. I don't recall the date. It was within that time --
Q. Around that time?
A. -- before I was actually arrested.
Q. When were you arrested? Do you remember the date of that?
A. I don't. It was in January.
Q. And did -- did First Citizens Bank have anything to do with you becoming an employee of Mr. McDonnell?
A. No, they did not.
Q. Now, I asked you earlier about the bank statements that came in from First Citizens Bank. Did you have any responsibility as a part of your job with the McDonnell Law Firm to review those statements?
A. The operating, but not IOLTA. Mr. McDonnell's brother had done that. He was hired for that purpose.
Q. When was he hired?
A. I don't remember the exact date. He had been there a while.

Page 26

Q. He was there when you got there?
A. No, he wasn't, because when we first started it was just Ed and I.
Q. Okay.
A. And then Rick came in once we moved to another location and the work was becoming a lot and we needed somebody to reconcile, and that's what he did.
Q. That was his sole job, was to reconcile the accounts?
A. He had some other duties, but I don't really know what all they were. Mr. McDonnell had communicated with his own brother as to what he was doing.
Q. Would he have been working at the law firm in May of 2005?
A. I don't recall. He could have been. I don't recall the exact dates.
Q. Okay.
A. Because Rick has been there on and off for a while while he's been in school.
Q. Okay. So you made Internet transfers out of the IOLTA account into the operating account, right?
A. I believe I did.

Page 27

Q. Approximately, would it be fair to say it was a little over 418 -- about $418,000 worth?
A. I don't have a dollar amount.
Q. But -- but do you recall making some significant --
A. There were some -- there were some transactions. I don't remember the dollar amount.
Q. Okay. Do you remember when you -- do you need to finish?
A. No.
Q. Okay. Do you remember when you started making those transfers?
A. No. I do not have a date.
Q. When are you going to be eligible for parole?
A. 2010.
Q. On what, March the 14th?
A. I don't recall the date. I know it's the first part of the year.
Q. Do you understand that Mr. McDonnell may have a role in whether or not your -- you -- you -- you get parole?
A. Yes, sir, I do.
Q. Okay. And do you expect that he'll be there at the parole hearing to testify?

Page 28

A. I'm -- I'm not sure.
Q. Okay. But you -- but you're aware that -- that -- that he has the right --
A. He will be notified, yes.
Q. -- to be there and to testify, correct?
A. At any court cases, yes.
Q. Okay. Do you think he's going to be in favor of you receiving parole?
MR. McKELLAR: Objection.
THE WITNESS: I can't speculate on that, sir. I've had no contact with Mr. McDonnell. I don't know what he's thinking.
BY MR. FEW:
Q. So, to try to tie a few things up, you were never asked by Mr. McDonnell to review the IOLTA bank statements from First Citizens Bank?
A. I don't recall if that was one of the accounts. I know operating was one. I just don't recall specifically IOLTA.
Q. Do you -- was it your understanding, when you worked for Mr. McDonnell, that there were special rules that applied to an IOLTA account?
A. Yes.
Q. And that's because it's client money, right?

Page 29

A. It's a trust account.
Q. It's a trust account that's -- has client money in it, right?
A. Correct.
Q. And in the case of Mr. McDonnell's firm, the source of that money would be lenders that are funding loans, right?
A. Yes.
Q. And borrowers that are bringing cash to closing?
A. Correct.
Q. What other sources would you understand there would be for money to go in the IOLTA account?
A. There are no other sources.
Q. Did Mr. McDonnell ever give you any training about whether or not you could ever take money out of the IOLTA account?
A. It was just common knowledge. I -- I don't know if there was specific training per se, because I came with training to the law firm.
Q. What was common knowledge? That you -- that you were not supposed to take money out of the IOLTA account?
A. Because it's a -- because it's a trust

Page 30

account.
Q. So you knew that -- that -- that you weren't supposed to take money out of the IOLTA account unless it was specifically related to something on a HUD statement, for the most part, right?
A. That's correct.
Q. Okay. Dawn Player, Dawn Murray. Do you know this person?
A. Dawn Murray. I do.
Q. Okay. What was her role at the law firm? Did you work at the law firm at the same time she did?
A. I did. She worked for the other attorney.
Q. Who? Harry Heizer?
A. That's correct.
Q. What was Mr. Heizer's practice at the time you worked there? Did he do loan closings?
A. Not really, because if he had any closings they were filed through our office.
Q. What kind --
A. And there were very few because Mr. Heizer, his primary representation was the adult entertainment business in South Carolina, and

Page 31

they were his primary client. He did some criminal cases, but I wasn't aware of their cases.
Q. And by that you mean like strip clubs, right?
A. That's correct.
Q. Okay. Do you recall who some of his clients were?
A. Just Kenwood Enterprises.
Q. Say it again, please.
A. Kenwood Enterprises.
Q. Did he have establishments in the Columbia area?
A. He did.
Q. Was there any sharing of clients? Did -- did -- did those entertainment -- adult entertainment people do loan closings with Mr. McDonnell's firm?
A. There was just one that I recall.
Q. What was that person's name?
A. That was Ken Gaines.
Q. Ken Gaines?
A. Uh-huh.
Q. So what -- had you ever -- did you write any bad checks on Mr. Parham's account when you were an employee there?

Page 32

A. I did not.
Q. Did you -- when did you come up with the idea to -- to write checks to yourself?
A. I don't remember when that exactly happened. I don't have the exact date.
Q. What was the -- tell me how your employment with Mr. Parham terminated.
A. He was downsizing. He was doing away with the real estate practice and just specifically handling med mal cases.
Q. What year was that?
A. It was before Mr. McDonnell, and I would say 2004, 2005. I -- I don't remember the exact date that I was hired with Mr. McDonnell.
Q. Did you go straight from -- did you have any jobs in between working for Mr. Parham and Mr. McDonnell?
A. I did. I waited tables.
Q. Approximately how long was that, that you were --
A. A few months. I don't recall exactly.
Q. So, best of your recollection, you -- you -- your job ended with Mr. Parham, you waited tables for a couple of months, and then Carolina Legal Associates placed you with Mr. McDonnell; is

Page 33

that right?
A. That's correct.
Q. Okay. And when you were initially placed with Mr. McDonnell it was not a permanent position; is that right?
A. Not at first.
Q. Okay. But eventually it did become a permanent position?
A. That's correct.
Q. Okay. Do you recall when it became a permanent position?
A. No, I don't. I don't have that date.
Q. Okay. Did you write any -- do you recall if you wrote any checks on Mr. McDonnell's accounts that would now be considered to be unauthorized while you were a temporary employee?
A. No, I did not.
Q. So you only wrote those checks after you became a permanent employee?
A. I believe so, yes.
Q. Is it fair to say that you had seen the way the office operated and you knew that no one was reviewing the bank statements?
A. Mr. McDonnell was aware -- Mr. McDonnell was privileged to that information

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Page 34

and I believe he did review them.
Q. You believe that he did review the bank statements?
A. I would assume he did. It's his practice.
Q. So if you started writing what he alleges are fraudulent checks in October of 2004, don't you think he would have discovered it in November of 2004 when he would review the statements?
MR. McKELLAR: Objection. Objection to the form of the question.
THE WITNESS: You're asking me to speculate on what his beliefs were. You're asking me what I believed he was doing, and I can't do that.
BY MR. FEW:
Q. Do you have a checking -- did you have a checking account during that time period?
A. I did.
Q. With what bank?
A. First Community Bank.
Q. Okay. Did you review your statements?
A. Not really.
Q. Did you review your activity online at

Page 35

that time?
A. Sometimes, but not often.
Q. But you understand that's one of the purposes of a bank statement, right, is that the -- the owner of the account can review the statement and make sure that only authorized charges are on there?
A. That's correct.
Q. Okay. So your testimony, as I understand it right now, is that you thought Mr. McDonnell was reviewing the accounts?
A. I'm sure he did. I mean, I can't say that for sure, but, you know, I would assume so.
Q. Okay. You assumed he was reviewing the accounts but yet you still wrote checks on the accounts that you -- that -- that he says you were not authorized to write?
A. I'm not sure what you're asking me.
Q. I'm asking you -- I'm trying to understand what you understood was going to happen when you wrote a bad check, a check that he says is unauthorized, in October of 2004. Okay?
A. Okay.
Q. Okay. So as of October of 2004, if I understand your testimony right now, today, you

Page 36

understood that Mr. McDonnell would review all three account statements from First Citizens Bank?
A. It was his option.
Q. It was his option. I understand that. First Citizens mailed them to his office, correct?
A. Correct.
Q. And you all received them, correct?
A. Correct.
Q. Are you aware of any time that bank statements were not received?
A. Not that I'm aware of.
Q. If they weren't received, do you think he would have asked you to call the bank and get them for him?
A. If that situation had come up, I assume he would.
Q. But as far as you know, it never did?
A. Not that I recall.
Q. Okay. So your testimony a minute ago is that you said that Mr. McDonnell -- you assumed that he was reviewing the statements and you thought he was reviewing the statements; is that right?
A. Yes, sir. It's his practice.
Q. Well --

Page 37

A. But I can't say with a hundred percent certainty that he did because Ed and I were not always together.
Q. Okay.
A. We were in separate offices. I don't know what he did when he was in his office.
Q. Well, I'm trying to -- all I can ask you to do, Ms. Hoormann, is to tell me what you know. Okay? Now, you've testified, and I'm a little confused by this, that it was his option because the statements were received, right?
A. Correct.
Q. But you've also testified that it was his practice to review them.
A. It was his practice meaning the firm was his practice.
Q. Okay. The firm was his practice?
A. Yes, sir. That's what I meant by practice.
Q. Okay. So you didn't mean that it was his practice as in he actually reviewed the statements?
A. I can't -- I can't speculate on that because I'm not sure.
Q. During the time that you worked for

Page 38

Mr. McDonnell did you ever see him pull the statement out and go through it?
A. Perhaps. I can't say with a hundred percent certainty.
Q. You can't say with a hundred percent certainty that you did see him do it?
A. Correct.
Q. Okay. So you -- so you don't know -- you can't testify today that you -- that you did see him do it?
A. No, I cannot.
Q. Okay. So -- and you were there from approximately June of '04?
A. I'm assuming so. I don't remember the date, as I previously testified.
Q. You -- you worked for him for approximately 18 months; is that right?
A. I believe so. If that's what you're saying. I don't remember the date of hire.
Q. Okay. All right. So during the 18-month time period that you were there, you can't testify for sure that you ever saw him review any bank account statement? Is that your testimony?
A. With a hundred percent certainty I cannot say that because, as I said before, were we

Page 39

were not always in the same office together. We were not always around each other.
Q. I understand that.
A. I don't know what he did when he was in there.
Q. But you all did share -- at one point in time you all actually worked in the same room, correct?
A. That's correct.
Q. Okay. So it's not as if you had an office down the hall at that time. You all were in the same room much like we're all in the same room here today?
A. Towards the end of my employment there we did share an office because we had hired some other people. It was a space issue.
Q. Okay. So just to make sure I understand, during this approximate 18-month time period there were three accounts with First Citizens Bank, correct?
A. That's correct.
Q. The Boomerang Title account.
A. Correct.
Q. The law firm operating account.
A. Correct.

Page 40

Q. And then the IOLTA account.
A. Correct.
Q. Okay. And during that time period you never once for sure saw him review any of those account statements from First Citizens?
A. He's had papers on his desk. He has had bank statements. You know, he did assist his brother, but I was not in the room at all times when he was doing that.
Q. Okay. Well, you --
A. I mean, I cannot tell you with a hundred percent certainty that he sat down one day and went over those statements.
Q. Well, that's my question, is: Can you tell me if you ever saw him just one time -- just one single time, did you ever see him -- with certainty, just one time, did you ever see him reviewing a First Citizens Bank account statement when you were there?
A. Yes.
Q. You did?
A. I did see him.
Q. Okay.
A. I just don't -- I can't give you the date and when that was in comparison to my crime

Page 41

that I committed.
Q. Okay. Did you see him review a First Citizens Bank account statement more than once?
A. I'm not sure. I'm not -- I'll be honest --
Q. So you can't say for sure that you saw him reviewing bank -- First Citizens Bank account statements twice?
A. I can't give you a number. I mean, I'm assuming. If you're asking me to assume that he did, then that's the answer I'm going to give you. I mean, I mean no harm. It's just I don't know what Mr. McDonnell always did.
Q. I understand that, and I wouldn't ask you to testify about what he did when he's in a room. I'm asking you what you saw with your own two eyes that you can remember here today.
A. He has reviewed statements. I just cannot tell you how many times.
Q. Okay.
A. I mean, I did work for him, as you said, for 18 months, and he did review statements. I just can't tell you the number.
Q. All right. So your testimony right now is he reviewed statements. Did you see him review

Page 42

First Citizens Bank statements?
A. Those are the only statements we had.
Q. At that time period?
A. Yes. That's the only bank that we did business with.
Q. Okay. Now -- and I'm just trying to get an understanding of what you remember. Okay?
A. Okay.
Q. That's all I'm trying to do. I understand your testimony that you saw him on at least one occasion review a First Citizens Bank account statement when you were an employee there; is that correct?
A. That's correct.
Q. Okay. Did you see him do it regularly?
A. I can't speculate on that.
Q. I'm not asking to you speculate. I'm asking you --
A. I don't recall, sir. I mean, as I told before you, a lot of short-term memory is not there from the ECT treatments.
Q. Okay. Let me -- let's go at it another way, okay --
A. Okay.
Q. -- because I'm just trying to get the

Page 43

record straight. Okay?
A. Certainly. I understand.
Q. I'm not a party to this action --
MR. McKELLAR: I want to pose an objection to the fact that you've asked and that question's been answered about six times.
MR. FEW: Okay. That'll be on the record.
BY MR. FEW:
Q. I'm just trying to get an understanding of what you remember as best you can remember it, and that's all anybody's asking you to do. Okay? Was it a -- was it a monthly practice, the best you can recall, for Mr. McDonnell to review the First Citizens Bank account statements?
A. I believe you're asking me the same question in a roundabout way. I mean --
Q. No, I'm not. I asked you before -- we were trying to figure out if you ever saw him review a First Citizens Bank statement, and your testimony is that you can remember at, on least, one occasion.
A. Uh-huh.
Q. Okay. And then I've tried to ask you if you can remember seeing him do it on more than

Page 44

one occasion. So would that be a yes or would that be a no?
A. Yes, sir. I -- I do believe he has looked at those statements more than once. I just cannot give you an amount.
Q. I -- see, now, you're speculating. I didn't ask you if you believed he looked at them. I asked you how many times you saw him look at them.
A. I -- I know I've seen him at least one time. I do not remember. A lot of this I've put out of my mind. That's very upsetting. I'm very ashamed as to why I'm here and what I did to this man. I'm very ashamed and I've tried to get past it. And I'm trying my best to have memory for this, but I also tried -- after all of this and my daughter was born, and the postpartum depression, tried to commit suicide because I could not deal with this, the shame and the hurt that I put him through, and you're asking me to relive all of this. I'm doing my best here.
Q. I'm not trying to upset you. If you need to take a break, we can take a break. I'm not asking you to speculate. And like I told you at the beginning of this deposition, Ms. Hoormann, the

Page 45

only thing that -- that any of us here today can ask you to do is to listen to our questions and answer them to the best of your ability. Okay?
A. And I believe I'm doing that, but I -- I feel, in a sense, you're badgering me about the same question. You know, you can form it in any way, but --
Q. Well, we -- we are -- we are entitled to know what happened, the best as you can recall. Okay?
A. And I've given you my answer.
Q. Okay. Very well. And I appreciate that. Now, did Mr. McDonnell ever come to you with a question about an IOLTA bank account statement before December 23rd of 2005?
A. He's asked me where the statements are because Rick was reconciling.
Q. Okay. Did he ever come to you -- then my question is: Did he ever come to you with an IOLTA statement in his hand and say, Anna, I need you to -- ask you a question about this entry on this statement? Did he ever do that?
A. I don't recall that.
Q. So your testimony is that you don't recall that he ever did that?

Page 46

A. I don't have a memory of that. I don't. I mean, Mr. McDonnell asked me questions every day about the -- the practices of the real estate closings and things like that. We have a disbursement sheet for Soft Pro. There's been questions asked for that, but I can't recall with a hundred percent certainty if it was about IOLTA, even though IOLTA is linked to Soft Pro.

Q. Well, my question is not -- I -- I -- I'm -- I'm certain you all had communications because you -- you worked in the same room and you assisted him in doing loan closings, right?

A. Correct.

Q. Okay. But my question is: Did he ever come to you with an IOLTA statement account -- account statement in his hand from First Citizens Bank when you worked there and say, Anna, I have a question about this particular entry on this statement? Did that ever happen?

A. I don't recall that happening.

Q. Okay. So would that be a no, you -- you -- as far as you know, it didn't happen?

A. I just -- I have no memory of that. So, no.

Q. Okay. Thank you. Okay. The same

Page 47

question with respect to the operating account. Did he ever come to you with an operating account statement from First Citizens Bank while you were an employee, and say, Anna, I have a question for you about any particular item on an operating account statement?

A. Yes, I believe he did.

Q. Okay. Do you remember -- do you recall, did that happen as a regular -- as a part of the regular course of business?

A. It wasn't a daily thing, but Mr. McDonnell always liked to know what was going on in the account. He liked to know how much money was in the account.

Q. He wanted to know how much money was in the operating account?

A. That's correct.

Q. Okay.

A. Because we could pull that up on QuickBooks.

Q. And so how -- he would ask you how much money was in the account?

A. That's correct.

Q. And you would pull it up on QuickBooks?

A. Yes, I did.

Page 48

Q. And you would give him an answer?

A. Yes, sir.

Q. Okay. Did he not -- but did he ever look at the operating account statements?

A. He has in the past. I just -- I can't give you an exact date as to when he did that.

Q. So -- and I'm just trying to understand your overall recollection of how things transpired, because you were there and he was there, but I wasn't there. Okay?

A. Correct.

Q. You understood that he reviewed the bank account statements?

A. Yes.

Q. Okay. So explain to me, if you can, how he reviewed the statements but didn't see the checks that he now alleges you were writing without permission.

A. I can't answer that. I can't answer what he believed to be fraudulent at that time. I -- that's a question you need to direct to Mr. McDonnell, because I can't speak for him.

Q. Uh-huh. But, now, earlier today you testified, and I think his lawsuit will show, that there's 94 checks that they've put at issue. Does

Page 49

that sound about right?

A. I have no number. I was not given discovery when I was in the county jail pending this action.

Q. I understand that, but I think you testified earlier today, when I asked you, that it was approximately 90 to a hundred checks that you wrote.

A. I agreed with you. I would assume so. There was a number of checks. I just can't give you an exact amount.

Q. And it's true that Mr. McDonnell never -- he didn't catch those checks, did he? Not until after First Citizens reported to him the -- the insufficient charge on the IOLTA account, right?

A. I believe so.

Q. And that was on December 23rd of 2005?

A. It was close to Christmas. I don't remember the exact date.

Q. Now, you testified earlier that it was close to Christmas in 2005, right?

A. Yes.

Q. And that's before Christmas, correct?

A. Correct.

Page 50

Q. Okay. And tell me what happened then. What happened immediately after that?
A. With the fax that we got?
Q. Yeah. Tell me, did you get the fax?
A. It was on our fax machine.
Q. Who -- who picked it up off the fax machine?
A. I don't know if I did or an assistant picked it up and brought it to me. I don't remember.
Q. Were you -- but you were at work when it happened?
A. It was -- I believe they were waiting on us. Which was common practice, that we would have wires sitting on the fax machine when we came in in the morning.
Q. Okay. So -- so you think that it was picked up in the morning?
A. It was picked up in the morning.
Q. Okay.
A. I just -- I can't give you a time.
Q. Now, you had transferred money into the IOLTA account in the latter part of 2005, right?
A. I don't remember that.
Q. You don't remember. So --

Page 51

A. No.
Q. Did you ever put money into the IOLTA account to keep it from having an insufficient funds charge?
A. I don't recall that.
Q. So sitting here today, you -- you can't remember if you ever put money into the IOLTA account?
A. I don't recall that.
Q. Okay. If -- you -- you were -- you knew you didn't want to get caught in the latter part of 2005, correct?
A. Correct.
Q. So if you knew -- if you thought there was going to be an insufficient funds charge on the IOLTA account and you had access to other money, you would have put that money into the IOLTA account so that it wouldn't bounce, right?
A. I don't remember exactly what my mindset was on that date. I was very upset.
Q. I'm not talking about that particular day. I'm just talking in general in the latter part of 2005.
A. I'm not sure.
Q. Okay. Is it fair to say that you did

Page 52

not want the IOLTA account to have an insufficient funds charge?
A. That's correct.
Q. Okay. And that if you suspected there was going to be an insufficient funds charge on the IOLTA account you would have put money in to keep that from happening?
A. I -- I'm not sure. I -- I really have no memory of that. You know, it sounds very elementary, but I can't give you a definitive answer.
Q. So you signed all of these checks that -- that Mr. McDonnell alleges were forgeries, right?
A. Correct.
Q. Okay. Did you -- did you sign -- did you ever sign for Mr. McDonnell in any other way?
A. No, I did not.
Q. You've never once signed his name to a HUD settlement statement?
A. No, I have not.
Q. You're certain of that?
A. I am certain of that.
Q. Okay.
A. It's illegal.

Page 53

Q. So how much -- what was the down payment on the house?
A. It was 30,000-something. I'm not sure exactly.
Q. So there's another -- how much do you think you -- you had access to after you wrote the checks?
A. What do you mean?
Q. How much other money did you get?
A. I don't have a dollar amount.
Q. Was it more than $600,000 all together?
A. I have no concept of the money that was taken. I was not given a dollar amount until I received notice about a common pleas case. And then some time had passed, I was out on -- out on bond, was subsequently arrested after my daughter was born -- well, about a year after that, and my attorney came to the county jail and said, Do you realize this -- how much it is.
Q. Who -- who was your attorney?
A. Mark Sawyer.
Q. Sawyer. He was a public defender, right?
A. He was.
Q. Okay. Didn't you give some money back

Page 54

to Mr. McDonnell at some point in time?
A. I did.
Q. How much?
A. I don't remember the exact amount.
Q. Was it more than $10,000?
A. I believe so.
Q. More than 20?
A. It was around that dollar amount. Because we had gone to my bank.
Q. What was your bank?
A. First Community Bank.
Q. Okay. Did you also -- did you give him anything else of value?
A. I did.
Q. What?
A. Jewelry.
Q. What was the approximate value of that jewelry?
A. About 80,000.
Q. $80,000?
A. I believe so.
Q. Do you have any -- what -- what's the -- explain to me how you acquired that jewelry. Did you acquire that jewelry with the money that you --

Page 55

A. I did.
Q. Okay. Where did you purchase that jewelry?
A. Gudmundson and Buyck.
Q. On Devine Street?
A. That's correct.
Q. Who'd you deal with in there?
A. I believe his name was Tom.
Q. Tom Birchmore?
A. Uh-huh.
Q. He grew up right here in Greenwood County. Let's go through. If you would, start with the most valuable piece of jewelry that you gave to Mr. McDonnell.
A. A dollar amount?
Q. Well, just describe the -- the item itself and then tell us approximately, the best you can remember, what you paid for it, where you bought it.
A. Everything was bought at Gudmundson and Buyck.
Q. Okay. So they would have a record, then. Did you buy it under your own name?
A. I did.
Q. And this would have all been purchased

Page 56

between the time that you became a permanent employee and the time that -- that First Citizens reported the insufficient funds charge?
A. Correct.
Q. Okay. What you believe to be the most expensive piece that you gave Mr. McDonnell. Explain -- describe it for me.
A. I don't recall the most expensive piece. It was diamond jewelry.
Q. Okay.
A. There was a ring. There was a necklace. There was earrings.
Q. Okay. How many -- how many rings?
A. I believe there was one ring.
Q. And best you can recall, what was that ring valued at?
A. Twenties.
Q. Twenty thousand?
A. I believe so.
Q. That was what you paid for it retail?
A. I don't remember the exact dollar amount, but it was around that.
Q. I understand. I just want to get you -- you know, the best -- the best you can recall, and if you recall later on during the

Page 57

deposition exactly what something is, if you'd please let us know.
A. Certainly.
Q. Because sometimes people -- okay. One ring valued at $20,000. What -- what else can you --
A. There was a necklace.
Q. A diamond necklace?
A. It was.
Q. How many necklaces?
A. It was one necklace.
Q. Approximately what did you pay for that?
A. It was expensive. I don't remember.
Q. More than ten?
A. I believe so, yes.
Q. When you gave this jewelry to Mr. McDonnell, did you tell him what you thought it was worth?
A. I think the appraisals were with it.
Q. You gave him copies of -- of the appraisals?
A. Whatever I got from the jewelry store. It was involved -- it was included in the package.
Q. Let me make sure I understand this.

Page 58

When you gave him the jewelry, was that when you met with him and gave him the statement?
A. Which statement is that?
Q. Let me go ahead and get that. You gave him a handwritten statement at some point in time after First Citizens reported the NSF charge; is that right?
A. Yes. I did speak with him verbally as well.
Q. Did you all have telephone conversations after that?
A. There may have been one or two, setting up a meeting.
Q. Was that -- would that have been on your cell phone?
A. Probably, because I --
Q. What was your cell phone number back then, Ms. Hoormann, if you can remember?
A. I don't remember it. I'm sorry.
Q. Who was --
A. I mean, it was with Sprint.
Q. It was with Sprint?
A. Uh-huh.
Q. I'm going to show you -- now, we've already taken a portion of Mr. McDonnell's

Page 59

deposition, and so for our convenience I'm going to use the same document. So this is marked Exhibit 14, and I'm going to ask you if you recognize this.
MR. FEW: Here's a copy for you all, Henry.
BY MR. FEW:
Q. Do you recognize that statement?
A. Uh-huh.
Q. Is the -- is that your handwriting?
A. It is.
Q. And did you -- and again, I'm just trying to get the facts as best I can. Did you write this out before you met with Mr. McDonnell?
A. I would assume so.
Q. Okay. So you didn't write it out with him sitting there with you?
A. I don't remember --
Q. You don't remember?
A. -- exactly when I wrote it.
Q. But do -- do -- it's dated December 28th of 2005.
A. Uh-huh.
Q. Does that -- does that seem like that's the date that you met with him and gave him this

Page 60

statement?
A. I would assume so, yes.
Q. Had you been arrested at this point in time?
A. I was not arrested until January.
Q. Okay. Did you know you were going to be arrested when you wrote this?
A. Yes, sir.
Q. You did?
A. Yes, sir.
Q. Well, you -- you said you were going to repay him, right?
A. Yes.
Q. Okay. Now, you don't say anything in this letter about giving him jewelry at this time, do you?
A. No, I do not.
Q. Okay. What are those numbers down there below your signature on the right-hand --
A. Social Security number.
Q. Okay. And this says -- it's got a -- a notary's signature. Who was that?
A. I don't remember.
Q. Was anyone else with you when you gave him this statement?

Page 61

A. I don't remember.
Q. Okay. Do you remember if you had that person mark the notary on there?
A. I don't remember.
Q. Okay. Well, is it fair to -- is it accurate or truthful to say that the day that you gave him this statement is the same day that you gave him the jewelry?
A. I'm assuming so, yes.
Q. Okay. And if I understand your testimony, when you gave him jewelry you gave him documentation about the purchase of the jewelry from Gudmundson and Buyck?
A. Correct.
Q. And were those receipts or --
A. I don't know if they were receipts, but I -- I believe it was whatever documents come with a diamond. It may have been the appraisal. I don't recall exactly. I don't think I ever looked at it when I got it.
Q. Okay. Okay. Well, back to the jewelry. You said that you think it was valued at $80,000. Did -- did you -- are you basing that on what you paid for it?
A. I believe so.

Page 62

Q. Okay. So it's your testimony, then, best you can call, that you purchased approximately $80,000 in jewelry from Gudmundson and Buyck?
A. I believe so.
Q. And you gave all of it to Mr. McDonnell?
A. I did.
Q. Okay. Did you hold back any piece of jewelry that you purchased from Gudmundson and Buyck?
A. I kept a ring.
Q. What ring did you keep?
A. It was a celebration ring. It was three small rings.
Q. And you purchased that from Gudmundson and Buyck?
A. I did.
Q. Approximately what did you pay for that one?
A. I don't remember. It was not very much. They were stackable rings. They were small rings.
Q. Less than a thousand?
A. I don't remember.
Q. You can't remember if it was less than

Page 63

or more than a thousand dollars?
A. I believe it was a little more than a thousand, but I can't give you a dollar amount because I don't recall.
Q. Okay. And I'm -- I'm going to keep asking. I'm not trying to pester you, okay --
A. That's fine.
Q. -- I'm just trying to get an understanding and -- and perhaps even refresh your memory. Okay?
A. Okay.
Q. Was it more than five, the celebration ring?
A. I don't recall. I -- I don't really recall how much those rings were because I did make several purchases with Tom.
Q. With Tom. So assuming that Gudmundson and Buyck still has the records of your purchase --
A. They should.
Q. -- they should -- then we would be able to go and -- and get those documents from them, correct?
A. I believe so.
Q. And it's your testimony that you gave all of those documents that you had to

Page 64

Mr. McDonnell?
A. Whatever came with the jewelry I gave him. I don't know if it was receipts or not. I can't testify to that.
Q. That's fine. So if you've given him all this jewelry and you gave him the cash, I mean, don't you think that whatever amount you take ought to be reduced by the value of what you gave him back?
MR. McKELLAR: Object to the form. Object to the form.
THE WITNESS: If you could rephrase that.
BY MR. FEW:
Q. Well, let me -- let me -- let me see if I can do it another way. They allege that you took approximately $660,000 by way of taking money out of the three -- three accounts.
A. Okay.
Q. Okay. You've testified that you gave him over 20,000 -- you think 20,000 or more. Was that in the form of a check or was that cash?
A. It was. It was certified funds.
Q. Okay. Off of First Community Bank?
A. That's correct.

Page 65

MR. FEW: Okay. Henry, I don't think I've received a copy of any certified checks in the discovery, but that would be --
MR. McKELLAR: I don't think I have them.
MR. FEW: -- consistent with all the other things that we have not received.
BY MR. FEW:
Q. The -- if you gave him 20,000 and -- and the jewelry was worth 80,000, don't you agree that you've given him back a hundred thousand dollars?
A. Yes, sir.
Q. Okay. So is it your testimony -- and I'm not -- I'm going to ask you to fill in the number. Of the money that you've taken, how much do you consider yourself to have paid back to Mr. McDonnell?
A. For sure, with the certified funds, 20,000.
Q. Or whatever that check says --
A. Right.
Q. -- because you said you couldn't remember the amount?
A. I couldn't remember the exact dollar

Page 66

amount.
Q. Okay. But First Community Bank records –
A. That's right.
Q. – would show –
A. It would show.
Q. Okay. All right. So whatever the First Community Bank, and then what – what – what – and you said earlier – you gave a value for the jewelry, but I'm going to let you tell us again what you think the jewelry was worth that you gave Mr. McDonnell.
A. I believe it was 80,000.
Q. Okay. And you gave him documents on that?
A. Yes.
Q. Okay. Okay. Thank you very much. So that would be more than a $100,000, right?
A. Give or take.
Q. Okay. Now, you had this money, but yet you ended up with a public defender. You could have used that money to hire a – hire a defense lawyer, couldn't you?
A. That's unethical practice.
Q. It would have been – explain that to

Page 67

me.
A. No attorney would represent me with stolen money. I mean, I knew that without someone telling me that. I did have representation prior to my public defender, but I could no longer afford his service.
Q. Who was your – who was your attorney before the public defender?
A. I'm trying to remember his name. I know he was in a wheelchair. I mean, it's of record. I just don't recall his name.
Q. Did you pay him any money?
A. I did.
Q. How much?
A. I don't recall. He did not represent me long. He represented me at the bond hearing and maybe a month or so after that.
Q. More than $10,000?
A. No.
Q. More than $5,000?
A. I believe it was 5,000 or under.
Q. Now, I'm trying to understand your last statement, that no attorney would take money that was improperly obtained. How -- how would they know that?

Page 68

A. Because I was very forthcoming when I was arrested. Prior to my arrest, I believe, I retained his services.
Q. I'm going to show you – and I've only got one copy of this, and I'm going to represent to you – let me ask you this: Mr. McDonnell filed a lawsuit against you, didn't he?
A. In the court of common pleas.
Q. Uh-huh. And that was in January of 2006?
A. I believe so.
Q. Did you ever receive a copy of that lawsuit?
A. Yes, sir, I did.
Q. And you – you wrote an answer out to it, right?
A. I don't remember if I had an answer with my attorney or not.
Q. Did you answer it on your own?
A. I don't remember.
Q. Did you live at 204 Bridgedale Drive?
A. I did.
Q. Okay. I'm going to hand you what's been marked – what I'll –
MR. FEW: Do you have exhibit stickers?

Page 69

Can we go to 19? Thank you.
(DEF. EXH. 19, JURY TRIAL DEMAND, marked for identification.)
BY MR. FEW:
Q. And you can ignore my yellow highlighting on there. This is marked Plaintiff 0119 and Plaintiff 0120, and I'll represent to you those were documents that were produced to my office by Mr. McDonnell's attorneys in this lawsuit and ask you if you recognize that document. Do you recognize that document, Ms. Hoormann?
A. I don't remember getting a copy for it, but I assume I did. I just don't recall it right now.
Q. Is this your signature?
A. It is.
Q. Okay. And this is dated January the 18th of 2006?
A. Yes, sir.
Q. Okay. Did you deliver this to Mr. McDonnell?
A. No. I don't believe I did.
Q. How -- how would he have received a copy of this?
A. I'm not sure, sir. I – I have no

Page 70

memory of that document.
Q. But you --
A. It is my signature and I've answered it, but I don't know if I answered that with an attorney present or not. I have no memory.
Q. But now you -- you acknowledge one, two and three, correct?
A. I would have to see the complaint to see what I was acknowledging.
Q. Well, here. We'll give you the complaint and we'll mark -- we'll just make this all a part of Exhibit 19, unless you all have any objection. I'm sorry. And this is Plaintiff 110 through 118, so these were documents that were provided to us by Mr. McDonnell and his lawyers.
A. I remember seeing this document.
Q. Okay. What's -- if you will -- on that page that you're looking at there, what's the final paragraph number at the top of that page?
A. Sixteen.
Q. And your answer here has 16 responses, right?
A. Yes.
Q. If you'll put that back together, we'll make all of this Exhibit 19.

Page 71

A. (Complying.)
(DEF. EXH. 20, INCARCERATED INMATE SEARCH, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you something that I understand we pulled off some public records and ask you if that appears to be a record related to you being in this facility.
A. It is.
Q. And is that your picture?
A. It is.
Q. Okay. And that sets forth a parole date of what?
A. March 14, 2010.
Q. March 14, 2010. So about one year and two days from today, right?
A. That's correct.
Q. Ms. Hoormann, you let me know if you want to take a break. Okay?
A. Okay.
Q. Did you know Jeremy Woods?
A. He was an attorney in our firm.
Q. Okay. To your knowledge, did any attorney at the McDonnell Law Firm ever preside over any fraudulent loan closings?

Page 72

A. No.
Q. You don't think so?
A. I don't think so.
Q. Do you know a gentleman named Dana Risi?
A. No.
Q. How about Angelo Anderson?
A. No.
Q. You don't know these people?
A. No. The names are not familiar to me.
Q. If a person was selling a piece of property, based upon what you understand about real estate, would you do that loan closing without a power of attorney from that person if someone else was signing for them?
A. I'm sorry, could you rephrase that?
Q. If a person sells property, they usually come to the closing, sign the documents and get their proceeds, right?
A. Correct.
Q. If there are any, right?
A. Correct.
Q. Okay. Now, what if a person named Jane was selling a house and your -- Mr. McDonnell's office would run a title report, right?

Page 73

A. Uh-huh.
Q. And if the title report showed that Jane owned the property, then Jane would need to come and sign the documents, right?
A. Unless she had a specific power of attorney.
Q. A specific power of attorney, right?
A. Specific to that property and that closing.
Q. Which would be -- did you ever prepare a power of attorney for anybody or -- or administer having a power of attorney prepared for somebody for the sale of property?
A. Yes, sir, I do believe I did.
Q. Okay. Would that have been the routine practice in Mr. McDonnell's law firm?
A. On some occasions.
Q. Did he ever allow a -- are you aware of any occasions when anybody in Mr. McDonnell's law firm presided over a closing where the seller was not present to sign and you did not have a fully executed and notarized power of attorney?
A. There's been occasions where the seller and the buyer were not there at the same time.
Q. Well, that's not my question.

Page 74

A. Okay.
Q. My question is: Did a seller -- did you all ever handle a closing, that you're aware of, where the seller did not sign and whoever signed for him was not the person -- did not have a power of attorney from the seller?
A. That was not our practice. We -- we had to have a power of attorney.
Q. So that was your practice?
A. Yes.
Q. So you would have had a power of attorney?
A. We had to have a power of attorney. And I don't know if we ever did a sale closing with a power of attorney. I can't speculate on that. We have had closings with power of attorneys, but I can't say if it was a refinance or a purchase.
Q. Shortly after First Citizens Bank reported the insufficient funds charge to Mr. McDonnell on or about December 23rd of 2005, did you receive any statements from First Citizens Bank that were being faxed to Mr. McDonnell's office?
A. No.
Q. You didn't?

Page 75

A. I don't think so, no. I mean, we did get some statements, but I don't remember if they came through the mail or if they were faxed, because we were going through several months of statements.
Q. So if someone testified that you were taking the statements that First Citizens was sending and diverting them, according to what your testimony is today, that would be untrue?
MR. McKELLAR: Objection to the form.
BY MR. FEW:
Q. You can answer the question or I can restate it.
A. Restate, please.
Q. Okay. Your testimony is that you never received any statements or were involved in receiving any statements that were faxed to Mr. McDonnell's law firm from First Citizens after First Citizens reported the insufficient funds charge in -- in December of 2005?
A. I don't remember if we got faxed statements or not. I don't remember. I mean, there were several of us in the office and we were trying to get to the bottom of it. I did not admit my wrongdoing at that time.

Page 76

Q. Did you do anything to conceal your wrongdoing at that point in time?
A. No, because I knew it was a matter of time.
Q. So just so I understand, just -- you didn't -- I understand your testimony to be that you did not take anything that was sent from First Citizens --
A. I can't --
Q. -- after that time period and destroy it or and throw it away?
A. I don't recall that, no.
Q. You don't recall doing that?
A. I don't recall doing that.
Q. What -- if Mr. -- if the McDonnell Law Firm had all the statements, then First Citizens wouldn't need to fax any to them, right?
A. Correct.
Q. Did you ever throw away any of the bank account statements related to any of these three statements that we've talked about here today: The IOLTA, the Boomerang or the operating accounts?
A. I don't believe I threw them away.
Q. Did you dispose of them in any way, shape or form such that they wouldn't be in

Page 77

Mr. McDonnell's law offices?
A. I'm trying to remember. I mean, I may have, but I don't believe I destroyed them. I'm not sure.
Q. Okay. Well, I'm trying to get an understanding of -- of what would have happened to these statements. Okay?
A. Okay.
Q. So you -- you just testified that you may have done something to the statements.
A. Yes, sir, but I can't say with a hundred percent certainty exactly what I did.
Q. Okay. Well, if you remember that you may have done something to them so that they wouldn't have been at this gentleman's office, what is it that you remember that you did with them?
A. They were in my desk drawer.
Q. Okay. And when -- when you say they were in your desk drawer, when are you speaking of?
A. The exact date?
Q. Yes.
A. I don't have an exact date to give you.
Q. Okay. As a routine practice, you kept them in your desk drawer?
A. Yes.

Page 78

Q. Okay. This would have been only the operating account, though, right?
A. I believe so. I -- I can't say with a hundred percent certainty which statements I kept.
Q. Well, I believe you testified earlier that you did not take responsibility at all for the IOLTA account reconciliations.
A. As I stated before, Mr. McDonnell's brother came in at various times and was balancing them.
Q. Okay. I'm going to show you what was marked as -- and we need to mark these for this deposition also. This was marked Exhibit 16 in Mr. McDonnell's deposition. I'll ask you if you recognize that one.
MR. FEW: Here's a copy for you all.
(DEF. EXH. 16, COLUMBIA POLICE INCIDENT REPORT, marked for identification.)
BY MR. FEW:
Q. Do you recognize that document?
A. I don't think I've seen the incident report. I believe this is my first time seeing it.
Q. Okay. Were -- did you -- were you interviewed about this?
A. Yes, I did speak with an investigator.

Page 79

Q. So you -- but your testimony is you've never seen this?
A. I don't believe I was privileged to that document.
Q. And it says you turned yourself in.
A. I did.
Q. And do you remember what date that would have been?
A. No, I don't. It was in January.
Q. What's your birthday?
A. 12/23/68.
Q. I'm going to mark this as 16 also. So if the First Citizens records show that the NSF was reported on 12/23/05, then -- then -- then all this happened on your birthday; is that right?
A. I believe so. If that's the date.
Q. Okay. But do you remember it as happening on your birth date?
A. I remember it being right before Christmas. I don't remember the exact date.
Q. Okay. To try to, hopefully, refresh your memory, I'm going to show you a report that was prepared by Lawyers Title.
A. Okay.
Q. Now, Mr. McDonnell wrote insurance for

Page 80

Lawyers Title --
A. That's correct.
Q. -- when you were working for him, right?
A. Uh-huh.
Q. And was that who most all the policies were written for?
A. Yes, it is.
(DEF. EXH. 4, DOCUMENTS BEGINNING WITH MAY 27, 2008, E-MAIL, marked for identification.)
BY MR. FEW:
Q. This is -- to keep this consistent with the exhibits from his deposition, I'm handing you all of this, but I don't necessarily expect you to -- but I'm going to ask you if her report seems consistent with what you can remember about what happened so that we can try to get an understanding of what happened with the various three accounts. Okay? And before I go there, did you -- so if I understand your testimony today, you used Mr. McDonnell's Capital One card, right, for the business?
A. Yes, that's correct.
Q. And you also made withdrawals from his Boomerang Title account?

Page 81

A. That's correct.
Q. And you made withdrawals from his operating -- law firm operating account?
A. That's correct.
Q. And you made withdrawals from his IOLTA account?
A. That's correct.
Q. Including transferring from the IOLTA into the operating account, correct?
A. I believe so, yes.
Q. Okay. Is there any other accounts, credit card, bank account, cash fund, cash box in the office -- is there any other way that you took anything from Mr. McDonnell?
A. No.
Q. Okay. So those were the -- the four accounts, that's it?
A. That's correct.
Q. Okay. Okay. If you would, Ms. Hoormann -- and again, remind me if you want to take a break. I'm going to ask you -- thank you. I'm going to ask you to flip in one -- until you see where it says: Checks from Boomerang Title. You're too far into that exhibit. Let me -- if you hand it to me, I'll put it on the page for you.

Page 82

Then we'll --
A. (Handing.)
Q. And I believe you testified that you were never interviewed by this person. I'm going to ask you -- I'm going to show you what's marked McDonnell 72 of this exhibit, and that says: Fraudulent credit card charges.
A. Uh-huh.
Q. Do you see that?
A. I do.
Q. Okay. What's the number that's shown right there?
A. The date or --
Q. The total number of --
A. 2,990.72.
Q. Okay. And does that appear to be -- do those appear to be the charges that you made on Mr. McDonnell's -- was it a Capital One account; is that right?
A. It was Capital One.
Q. Okay. Are those all the charges that you made on the Capital One account?
A. I believe so. I just don't have a memory of Lauderdale Lifestyle. I don't know what that is.

Page 83

Q. Okay. Would the first one --
MR. McKELLAR: Let me interpose an objection just for the record. You've handed her what is Exhibit Number 4 from Ed McDonnell's and you've characterized that as a Lawyers Title report. I don't know whether she's ever seen it, and you're just asking her to reiterate what Lawyers Title has found, and if you're going to do that, then I have an objection.
MR. FEW: Okay.
MR. McKELLAR: Because she didn't prepare the document and I don't think she's ever seen the document.
MR. FEW: That's fine.
MR. McKELLAR: And the document's already entered.
MR. FEW: Okay. And it's a discovery deposition as well, and I'm -- I'm -- I'm getting --
MR. McKELLAR: I just want to --
MR. FEW: She testified --
MR. McKELLAR: I just want to make my objection on the record.
MR. FEW: Okay. Thank you.

Page 84

BY MR. FEW:
Q. Okay. Ms. Hoormann, the first date there says Mary Kay Southern.
A. Uh-huh.
Q. What's the date of that?
A. November 19, 2004.
Q. Okay. Now, the statements for this particular credit card account, where -- where did they get mailed to?
A. Our office.
Q. Okay.
A. Our post office box.
Q. To the post office box?
A. Uh-huh.
Q. But they came to Mr. McDonnell's office, not his home?
A. Correct.
Q. Okay. Was this the office account?
A. It was his business account.
Q. Business credit card?
A. It was.
Q. Okay. Okay. I asked you questions earlier about him reviewing his monthly account statements from First Citizens Bank.
A. Uh-huh.

Page 85

Q. Did you ever see him review the monthly account statements for this business credit card?
A. Yes, I did.
Q. Okay. So do you think he saw -- I mean, did he ever ask you about these charges?
A. No, he did not.
Q. Okay. So in the month of November of 2004 you've got a charge of $826.26, correct?
A. Correct.
Q. And then another one for $706.83?
A. Correct.
Q. Okay. And basically that was never discovered by him, by Mr. McDonnell?
A. I'm assuming so, yes.
Q. You're -- if he had seen it and -- do you think he would have asked you about it?
MR. McKELLAR: Objection to the form.
THE WITNESS: I -- I can't answer that, if he saw the statement or not. I don't have any memory from 2004 of this particular statement.
BY MR. FEW:
Q. But does this document appear to accurately represent the charges that you made on Mr. McDonnell's business Capital One account?
A. Yes.

Page 86

Q. Okay. Any charges that you can remember that you made that are not shown on this page, which is marked McDonnell 72 of Exhibit 4?
A. No, sir, I can't remember.
Q. Okay. I think we're down to about a minute left, so why don't we go ahead and take a break.
THE VIDEOGRAPHER: This concludes videotape number one in the videotaped deposition of Anna Hoormann. The time is approximately 12:48 p.m. We're now off the record.
(Off-the-record conference.)
(DEF. EXH. 14, HANDWRITTEN STATEMENT, marked for identification.)
THE VIDEOGRAPHER: We're now back on the record. Today's date is March 12, 2009. The time is approximately 12:52 p.m. This is tape number two in the videotaped deposition of Anna Hoormann.
BY MR. FEW:
Q. Okay. Ms. Hoormann, if you would take that exhibit that you have in front of you, which is -- should be marked as Exhibit 4, and we were on the page, just a minute ago, going over the Capital One charges.

Page 87

A. Uh-huh.
Q. If you would flip -- go ahead two pages. Well, go ahead one page and you see the next page is a check from the operating account --
A. Uh-huh.
Q. -- in the amount of $26,447.57 --
A. Uh-huh.
Q. -- dated 12/12/2005. Do you know if that's a check that you signed? It's made out to you.
A. I believe it is.
Q. Okay. Now, when you -- so you would have signed the signature there on that check?
A. Uh-huh.
Q. And when you did that you intended for it to look like Mr. McDonnell's signature?
A. Correct.
Q. Okay. And I want to make sure I understand your testimony today, that you never signed anything for him other than the checks that are at issue in this case.
A. That's correct.
Q. Okay. If you'd flip to the next page. At the top it says: Checks from Boomerang Title. And again, this is just a document that's a report

Page 88

that was prepared by Lawyers Title that I'm using to run through their report to see if it's consistent with what you remember about what happened. Okay?
A. Okay.
Q. If you look at check number 1104, it's the fourth one up from the bottom --
A. I see it.
Q. -- dated November 9th of 2005.
A. Uh-huh.
Q. And that's $75,000, right?
A. It is.
Q. And it says: Paid to IOLTA.
A. Uh-huh.
Q. Okay. Now, I asked you earlier if you had ever put money into the IOLTA account, and I believe you said you weren't sure. Does this -- does this seem to be an accurate report of -- of money that you would have put into the IOLTA account?
A. I believe so. If this came from Lawyers Title. They did the investigation.
Q. Okay. And we could look at check number 1104 and see where it went, right?
A. Yes, uh-huh.

Page 89

Q. Okay. Now, the statements came out for all accounts at the end of each month; is that right?
A. I believe so. I don't remember the exact date.
Q. Okay. So between November 9th December 23rd, do you think Mr. McDonnell's firm would have received a statement from First Citizens for both the Boomerang account and the IOLTA account?
A. They should have.
Q. And if you -- and if the statements were accurate and -- and someone looked at them, they would see a debit to the IOLTA account -- I mean to the Boomerang account for $75,000, right?
A. I don't know how it's listed on the statement. Usually it's just the dollar amount and the check number unless a copy of the check is included.
Q. Yeah. I used the word debit. I'm -- I'm sorry.
A. Okay.
Q. But it -- it would show check number 1104 out of the Boomerang account in the amount of $75,000, right?

Page 90

A. I'm not sure how it would list.
Q. Okay. But -- but if this is accurate and check number 1104 is for $75,000, then that's what -- and the statement was accurate, that's what it would show, right?
A. It would.
Q. And then the IOLTA account would show a deposit at some point in time, probably after November the 9th, in the amount of $75,000, right?
A. That's correct.
Q. Now, that's a big check, right?
A. Uh-huh.
Q. $75,000. And you -- you made -- you made that deposit, right?
A. Probably so. It was --
Q. It was a deposit of a check, so you had to go down to an actual bank building to do that, right?
A. Either I did it or one of the assistants did it.
Q. So you would have given an assistant a check and had them go deposit it?
A. It wasn't just a check. It was several checks from closings. I'm not saying that I always deposited the checks.

Page 91

Q. Okay. So do you think -- do you recall how this particular check was deposited?
A. I don't recall.
Q. Okay. Now, down below that, the final entry there is actually dated 12/23/05, right?
A. It is.
Q. And that's in the amount of $28,000?
A. That's correct.
Q. And if this is correct, then that was more money that was being put in -- back into the IOLTA?
A. Yes, sir. It appears to be.
Q. Okay. All right. If you would -- Richard J. Wasserman, was he a doctor that ever provided you with any medical services?
A. He was.
Q. What did he do for you?
A. I'd rather not specify that.
Q. Okay. But he -- he -- so that 4,900 -- $4,790 was --
A. Medical care.
Q. Okay. Thank you. And -- and I'm -- I apologize for hitting a soft spot there. We won't go there. Now, Critical Health Systems of South Carolina for $600, was that also a check that you

Page 92

wrote?
A. Yes, sir, I believe it is.
Q. And the two checks to Yonce Ford totalling $14,000.
A. Yes.
Q. You bought a -- what, a truck?
A. I did.
Q. Okay. Now, the rest of them are all made out to you, right?
A. Correct.
Q. Now, is the Boomerang account -- and I know we covered this earlier, but I wanted to make sure you were clear. Is the Boomerang account handled by QuickBooks?
A. No, it is not. I don't think it is.
Q. Okay. So it's -- it's handled just the old fashioned way?
A. I think -- it may be in -- in QuickBooks. I just don't recall.
Q. Okay. So you're not sure if it was in QuickBooks or not?
A. I don't remember.
Q. I believe you testified earlier -- and I'm just trying to remember myself, okay --
A. All right.

Page 93

Q. -- that you had to actually type up the checks in --
A. Yes. They weren't printed.
Q. Was there a carbon that went with those?
A. No.
Q. Okay. So were the checks on like a roll and you would put them in a typewriter and type -- type -- type them?
A. No. It was a checkbook and you would tear out a single check at a time.
Q. Okay. And you --
A. It was black book about this big once you opened it.
Q. Okay. And that black book should still be in the possession of Mr. McDonnell's firm, wouldn't you think?
A. I assume so, unless he's changed banks.
Q. But even if he's changed banks he -- he's -- needs to maintain all those records. Isn't that your understanding?
A. I believe so.
Q. Now, this report from Lawyers Title shows a total out of Boomerang of $101,415. Do you see that?

Page 94

A. I see that amount.
Q. Does that seem -- does that seem to be right to you?
A. If that's their accounting.
Q. Okay. You don't have any reason to believe it was significantly more or less than that --
A. No, I do not.
Q. -- out of the Boomerang account? Let's look at -- go two pages ahead, where it says: Checks from IOLTA trust account.
A. Okay.
Q. Do you see those?
A. I do.
Q. It's number 6259 and number 6281.
A. Okay.
Q. And it shows that there were -- this report shows that these checks were made out to Anna Hoormann, right?
A. That's correct.
Q. Now, to produce these checks you went into Soft Pro, right?
A. I must have. I don't recall.
Q. Would there be any way to produce a check off of the IOLTA account without doing it

Page 95

through Soft Pro?
A. I'm sure there's a way, but I -- I don't recall.
Q. But you recall writing these two checks to yourself?
A. I believe so, yes.
Q. Did -- and -- and do you recall using Soft Pro to do it?
A. I don't remember how I did it.
Q. Okay. Do you remember --
A. I mean, the date on those checks was from September. I don't remember.
Q. September of 2005?
A. That's correct.
Q. And so these checks -- if anyone had looked at the account and performed a reconciliation, do you think that they -- they would have caught it, totalling $73,000?
A. I assume so.
Q. Okay. Do you know if anybody was reconciling the account at that point in time?
A. I don't remember the dates that Mr. McDonnell's brother was employed. He was there a good bit, but I don't remember when he was actually doing them.

Page 96

Q. So if I understand what you're saying, once Mr. McDonnell's brother left the firm, then no one was there to do the reconciliations of the IOLTA account statements?
A. He didn't actually leave the firm. He had another job and was a school -- in school at USC. So he was there on and off.
Q. Okay. But -- so explain -- you said he left the firm. I mean, explain what you meant by that, then, please.
A. That he wasn't there, is what I meant. I mean, he would leave and he would be gone a week or two and then he would be back. He didn't work a five-day workweek with us.
Q. Okay. But to clarify your testimony earlier, Rick McDonnell was supposed to reconcile the IOLTA accounts, right?
A. Yes. That's what he was doing at some point.
Q. Okay. Would it have been at some point in 2005, you think?
A. I believe so. I don't remember the date.
Q. Do you know what type of training, if any, that Rick received from his brother Ed on how

Page 97

to -- how to reconcile the IOLTA account?
A. No. Rick is a CPA student and I'd assume that he's gotten a lot of it -- that from his education.
Q. Were you aware that there are specific rules for lawyers regarding IOLTA accounts?
A. Yes, sir. You've asked me that already.
Q. Okay. I'm sorry.
A. That's okay.
Q. All right. What did you understand those rules to require of lawyers?
A. That it was a trust account and it always had to be to the penny.
Q. And then were you ever allowed to take money out? I think you testified that you're not supposed to take money out, right?
A. No.
Q. Okay. I'm going to ask you to go -- let me just find it for you. It might be a little quicker. It's marked McDonnell 64 at the bottom. And I'll also, just so you know, represent to you that these documents were obtained by way of a subpoena, I believe, through Lawyers Title from the lawyer in the Carolina Legal Associates lawsuit.

Page 98

Do you see where at the top where it says: Questionable IOLTA transfers?
A. I do.
Q. And then it says: Internet transfers out?
A. I see that.
Q. Okay. Who would have made those Internet transfers out of the IOLTA account?
A. That would have been me.
Q. Okay. So the first one is dated May the 18th of 2005?
A. It is.
Q. And what's the amount?
A. 10,000.
Q. Okay.
MR. McKELLAR: Wait. Wait. Wait one second. Let me get this straight. You said that – the thing is Internet transfers out, but you said out of the IOLTA, I believe. But I believe this refers to it being transferred to. There's a – 9101 is the IOLTA account.
MR. FEW: Well, I appreciate your testimony, and you can ask the witness any questions you want, but –
MR. McKELLAR: Well, pardon me.

Page 99

MR. FEW: Okay.
MR. McKELLAR: Pardon me.
MR. FEW: I'm just saying that – that – that the other documents will back up what's what, and Mr. McDonnell's testified, when – when you weren't there, that these were transfers out of the account, and we can go through the statement if we need to.
BY MR. FEW:
Q. Ms. Hoormann, does this refresh your memory that – that you – would it – would you believe it's true that you made – the first Internet transfer that you made out of Mr. McDonnell's IOLTA account occurred on May the 18th of 2005?
A. I don't know the date, but I'm assuming. If this is the record that they have come up with, then that's an accurate date.
Q. Okay. Does that seem correct? I know you said you've had difficulty remembering a lot of this, but does that seem like about the right time that it would have happened?
A. As I said before, I'm not really good with the time. But, I mean, the date they did the investigation, and that's the Internet transfer, so

Page 100

I assume that stands.
Q. Did you – and I'm not asking you to vouch for this report, I'm just using –
A. Okay.
Q. – it because I thought it would be a useful way to – for to you refresh your memory. Now, the question there a moment ago by Mr. McKellar – below that it says: Transfers in. Do you see that?
A. I do.
Q. Okay. And one of them is dated November the 9th, isn't it?
A. It is.
Q. So let me hold the exhibit, and I'm going to ask to you flip back.
MR. McKELLAR: Just let me clear one thing up. I was confused about the number, because the number of the operating and the IOLTA are about the same. They're the same numbers, just rearranged in a different way.
MR. FEW: That's all right.
BY MR. FEW:
Q. Now, when we were looking at these checks from Boomerang Title –
A. Uh-huh.

Page 101

Q. – I asked you about this one into the IOLTA, right –
A. Yes.
Q. – for $75,000?
A. Yes, on November 9th.
Q. On November 9th.
A. Uh-huh.
Q. And that's the same date that there was also – on November 9th, down here. So apparently you put $110,000 into the IOLTA account on November the 9th, right?
MR. McKELLAR: Which page are we looking at now?
MR. FEW: Well, we're looking at 64. She's already testified that – about the – the first one, the $35,000 check out of the Boomerang – no – the $75,000 check out of the Boomerang, number 1104.
BY MR. FEW:
Q. Do you see that, Ms. Hoormann?
A. I do.
Q. Okay. And then on the same date, looking at the page that's marked McDonnell 64 at the bottom –
A. Uh-huh.

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Page 102

Q. -- on this Exhibit 4 to your deposition, there's a $35,000 transfer into the IOLTA. Does that seem right?
A. Yes, that's how it states.
Q. Okay. So for some reason, you know, you -- you transferred $110,000 into the IOLTA account on November the 9th; is that right?
A. According to this document, yes.
Q. Now, I'd asked you earlier if you would have made transfers into the IOLTA account to keep it from having an NSF charge. Does this refresh your memory that on November 9th of 2005, for whatever reason, you -- you felt like there may have been an NSF charge on the account and so you transferred money in?
A. I can't testify to an NSF charge. I have no memory of that. The only NSF charge I'm aware of is the one that was issued on 12/23.
Q. But I think you said it would be elementary for someone to put money in to keep the IOLTA from --
A. Correct, but I can't tell you for sure that there was an NSF issue at that time.
Q. Very well. Now, if this report is correct -- and we can walk through each one of

Page 103

them, if you want, but I'm referring to this McDonnell 64.
A. Uh-huh.
Q. The total -- it says total transfers out of IOLTA to operating is $418,000; is that right.
A. It says: Transfers out of IOLTA. It doesn't say where it's going.
Q. It's --
A. Right here: Transfers out of IOLTA, 418,000.
Q. I think we're -- I'm actually referring to this part --
A. Okay.
Q. -- right in the middle of the page?
A. Okay.
Q. Doesn't it? That says: Total transfers out of IOLTA to operating, right?
A. Okay. That's correct.
Q. And it's $418,000?
A. That's correct.
Q. Okay. Now, let's talk about Rick McDonnell, who you've testified had the responsibility to reconcile these IOLTA account statements.

Page 104

A. Uh-huh.
Q. Right? Was he working for the company in May of 2005?
A. I don't have the dates of his employment. He was there throughout the time that I was there at various times, but I can't gave you the exact dates.
Q. Did you -- did you prepare his payroll checks?
A. Yes, sir.
Q. Okay. So whatever checks were made out to him for payroll would indicate when he was working there, right?
A. That's correct.
Q. Okay. Do you know if he was working there in June of 2005?
A. I don't have the dates.
Q. Same question. July of 2005?
A. Right. As stated before, I don't have the exact dates of his employment.
Q. Uh-huh. And so you wouldn't know any particular months in 2005?
A. No. I just know he was there.
Q. Okay. So he -- he would know when he worked, and then the records would show, right?

Page 105

A. The records would show. I don't know if Mr. McDonnell can testify to that.
Q. Okay. Who set up the Internet banking?
A. I'm not sure if it was him or I. I don't remember.
Q. Did Mr. McDonnell allow you to do that or did you do it without his permission?
A. Setting up the account?
Q. Setting up the Internet banking.
A. I don't recall if he did it or I did it. I don't recall.
Q. Was he aware that Internet banking was set up on the accounts?
A. I can't testify to that. I don't remember.
Q. Well, do you remember having any discussions with him about the capability to make Internet banking transfers out of or into the IOLTA account at any time?
A. I don't believe I've had a conversation with him, no.
Q. So he never came to you and asked you about Internet transfers --
A. I can't recall.
Q. -- in or out of the IOLTA account?

Page 106

A. Not that I recall, no.
Q. Okay. Now, if that Lawyers Title report that we just reviewed is correct --
A. Uh-huh.
Q. -- the Internet banking transfers would have showed up on the account statements from First Citizens in, at the latest, June of 2005, right?
A. They should have.
Q. Okay. And so your testimony is that Mr. McDonnell never came to you and asked you any questions about Internet banking transfers into or out of the IOLTA?
A. No.
Q. Okay. Not in June of 2005?
A. (Shaking head.)
Q. Not in July of 2005?
A. Not that I remember, no.
Q. Not in August of 2005?
A. Not that I remember, no.
Q. September 2005?
A. Huh-uh.
Q. October 2005?
A. The answers are all going to be the same: Not that I remember.
Q. Okay. Ms. Hoormann, you obviously --

Page 107

this will be my dumbest question of the day.
A. Okay.
Q. You want to get out of prison as soon as possible, don't you?
A. Yes, sir.
(DEF. EXH. 11, COPIES OF CHECKS, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you what was marked as Defendant's 11 in Mr. McDonnell's deposition and represent to you that these are the 94 checks, numbered 1 through 94 by Mr. McDonnell and his lawyers, and just ask you to flip through those and see if you --
MR. FEW: Do you all need another copy?
BY MR. FEW:
Q. These are the checks that Mr. McDonnell and his lawyers allege that you signed without his permission. Do you believe, throughout what you've been through, that you're pretty familiar with Mr. McDonnell's signature?
A. I did work with him, yes.
Q. I mean, you -- you testified earlier that you knew his signature enough to know how to do it yourself, correct?

Page 108

A. Correct.
Q. Tell you what. I think you're going to get mailed a copy of this, and then when you do, you can take all the time you need to go through it, and if you see any of those checks that you don't think were signed by you, then -- then you can make a note of it on what'll be your -- a form where you can mark anything that we transcribe wrong on the deposition. Okay?
A. Okay.
Q. Now, the first check on the first page of this, what's been marked as 11, has number 1354; is that right?
A. That's correct.
Q. What's the date on that check?
A. October -- October 1, 2004.
Q. Okay. And what's the amount?
A. $1,154 and no cents.
Q. Okay. Was that the amount of your payroll?
A. I don't recall the exact amount of my payroll.
Q. Did you at any point in time when you -- when you first started writing checks to yourself without permission, did you write them in

Page 109

an amount that would look like they were your paycheck?
A. I assume I did. I don't recall the -- the checks without looking at them and going through each one.
Q. Okay. Well, I'm just asking you --
A. I know towards the end of my payroll --
Q. Do you recall if that was something you did? I mean, did you -- because that -- those would have been harder to find, don't you agree?
A. I'm not sure. If they're duplicate checks, then they would stand out.
Q. Well, let me ask you this: If -- if someone's going to write checks without permission and they're afraid that the owner of the account may be reviewing the statements --
A. Uh-huh.
Q. -- if they wrote them in the amount of their paycheck, then if the person saw them, the owner of the account, then they might think, Oh, well, that's just a paycheck, right?
MR. McKELLAR: Object to the form.
THE WITNESS: I -- I can't speculate on what Mr. McDonnell would have done when he reviewed the statement and thinking if that was a payroll

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Page 110

check or whatnot.
BY MR. FEW:
Q. Let me ask you this way, then. You testified earlier that you wrote out the checks to Rick McDonnell for his payroll, right?
A. As well as the other employees, yes.
Q. Okay. And so if you -- if you reviewed -- and -- and -- and -- did you have responsibility to review any of these statements?
A. Operating.
Q. Operating. And that's where the payroll checks were written from, correct?
A. That's correct.
Q. So if during the course of your review of an operating account statement you saw a check in the amount that was exactly the same as what Rick McDonnell's salary was, you might -- you might not think of it as being an unauthorized check; would you agree with that?
MR. McKELLAR: Object to the form.
THE WITNESS: I really wasn't thinking at that time about that.
BY MR. FEW:
Q. Okay. When, to the best of your recollection, would First Citizens have mailed to

Page 111

Mr. McDonnell and his firm a statement for the operating account that would have reported this check that was apparently processed -- this very first check marked Plaintiff's 0001 of Exhibit 11 looks like it was processed on October 4 of '04.
A. I would say at the end of October.
Q. So Mr. McDonnell should have received and had a chance to review that statement in the month of November of 2004, right?
A. That's correct.
Q. Okay. And same thing for the next check dated October 4th?
A. Correct.
Q. And that's in the same amount as the first one, right?
A. It is.
Q. Okay. And same thing for the third check in the amount of 983.58?
A. I believe at that time that was my salary.
Q. Okay. So how do you know if this is a proper or an authorized or unauthorized check if it's the same as your salary?
A. I can't speculate on that.
Q. You don't know, then?

Page 112

A. I don't know
Q. Can you look at the signature and tell if it's yours or Mr. McDonnell's?
A. I can't discern that.
Q. And the number four -- and I'm -- when I say number four I'm going to be referring to that number at the very bottom down there --
A. Okay.
Q. -- where it says Plaintiff zeroes and -- and number four.
A. Uh-huh.
Q. Number 1439 is also dated October 29th of 2004?
A. Uh-huh.
Q. And then this next set that's written in November, which runs from number five through number eight, is it your understanding that these would be shown on a statement provided to Mr. McDonnell --
A. That's correct.
Q. -- in the month of December of 2004?
A. These checks through number eight is at the end of November so it could be at the end of November or the beginning of December.
Q. And these are all --

Page 113

A. I'm not sure when the statement drops.
Q. And these are all made out to you, right?
A. They are.
Q. And -- and I'm not trying to badger you with this, but I'm -- I just want to clarify. Your testimony was that you never did anything to -- to change the payee name in QuickBooks?
A. I can't recall that.
Q. Okay. So if we were to get Mr. McDonnell's QuickBooks data right now for this time period, it would show -- and you can pull that up right on the computer screen, right?
A. I'm assuming you can.
Q. Well, when you worked there and you sat down at a computer terminal that had access to that data you could run a search for payee names, right?
A. Sure.
Q. And you could run a search for amounts, right?
A. I believe you can.
Q. And you could produce a report for all the checks that were written in any given month, right?
A. Yes.

Page 114

Q. Okay. And you had the capability of doing that, right?
A. Yes.
Q. Well, Ms. Hoormann, let me ask you this, because I'm just curious. Why didn't you do anything to conceal the fact that you were writing these checks to yourself in QuickBooks knowing that all anybody had to do was pull QuickBooks up and see all these checks made out to you?
A. Why did I not conceal it?
Q. Right.
A. I can't answer that because I can't go to state of mind then.
Q. But you didn't want to get caught, did you?
A. Certainly not.
Q. Okay. Okay. Let's keep going. The one marked Plaintiff 0009 through -- 9 through 13 is a total of five checks, all written in the month of December of 2004, right?
A. They are.
Q. And again, is it your understanding that Mr. McDonnell would have received a statement from First Citizens Bank in the month of January showing all of these checks?

Page 115

A. I can't testify if it would have been January or December.
Q. But with --
A. I'm not sure when the statement date ends.
Q. Right. But within 30 days, basically, he --
A. Correct.
Q. -- they would have received it, right? Now -- and it's your -- been your testimony that you weren't responsible for reviewing -- oh. I'm sorry. We're on the operating account. So you were responsible for reviewing this account, right?
A. Correct.
Q. Did Mr. McDonnell ask you on a monthly basis to report to him that -- that all the transactions in the account were authorized?
A. I don't believe we've had that conversation.
Q. So he didn't ask you that?
A. There was no reason for him to ask me that question because he did not know what was going on.
Q. Okay. Now, this is -- this is money that's coming out of the operating account, right?

Page 116

Everything that we've looked at up through number 13, these are all operating account checks, right?
A. They are.
Q. So this is money where -- were you transferring money from the IOLTA account into the operating account at this point in time?
A. I would have to go back at the dates on the other exhibit and match them up.
Q. Okay. All right. So looking at number 14 and 15, those are both written in January of '05, right?
A. They are.
Q. And Mr. McDonnell's firm would have received a statement from First Citizens Bank that would have shown these checks on this statement, right?
A. Correct.
Q. All right. And now looking at 16, 17, 18, 19 -- I think that's it. Those were all written in February of 2005, right?
A. Yes, sir.
Q. Now, as of the end of February of 2005, Mr. McDonnell's never come to you and said, Why are you writing all these checks to yourself, right?
A. No.

Page 117

Q. How -- what -- how often were you paid? Were you paid weekly or --
A. Biweekly.
Q. Does that mean -- so every second Friday you received a paycheck?
A. It was either Thursday or Friday. It wasn't --
Q. Okay. But it wasn't -- it wasn't on the 1st and the 15th of each month?
A. It was not.
Q. So you were paid biweekly. So every once in a while you'd get three paychecks in one month?
A. And also a bonus.
Q. Okay. What kind of bonus? Did Mr. McDonnell authorize a bonus to you in 2004?
A. He did. As well as the other employees.
Q. What -- what was the amount of the bonus that you received in 2004?
A. It was a monthly bonus based on the closings.
Q. Okay. Explain that to me.
A. After a certain number of closings I received $25 for each closing. The other employees

Page 118

received a lesser amount.
Q. What was the biggest bonus that you remember receiving that was authorized?
A. I don't remember the dollar amount.
Q. So you were incentivized (sic) to do more closings?
A. Yes, sir. We were very busy.
Q. Okay. Did that cause you to rush through any of the details?
A. What do you mean?
Q. I mean, if you're -- if you're paid more to do more closings, then it's possible that you might be in a hurry to get one done and might not give it the review that it deserves; isn't that true?
A. No, sir. They were reviewed by me, the lender as well, and the real estate agents. If there was a discrepancy it was fixed before closing.
(DEF. EXH. 10, HUD SETTLEMENT STATEMENT, marked for identification.)
BY MR. FEW:
Q. I'm going to hand you -- you were employed in August of 2005, right?
A. Uh-huh.

Page 119

Q. I'm going to hand you what was marked Exhibit 10 to Ed McDonnell's deposition, and I'm going to mark it 10 here, and ask you if you recognize that document.
A. It's a HUD one statement.
Q. Okay. In general, how many HUD statements would you prepare for a closing?
A. How many copies would I --
Q. How -- no. How many HUDs should there be for any one particular traction?
A. There's one statement.
Q. Okay. Do you see the signature of the seller on this HUD?
A. I do.
Q. And how is it signed?
A. Sonya, I believe, Hoffman, attorney-in-fact for -- I can't make out the signature.
Q. Okay. Now, Sonya Hoffman is the seller up in block E at the top of that HUD, isn't she?
A. She is.
Q. Okay. And Charles Brown has signed this as the borrower, right?
A. That's correct.
Q. Now, who signed on the second page?

Page 120

A. Jeremy Woods.
Q. Okay. Now, this shows cash to seller of $63,818.71, doesn't it?
A. It does.
Q. Would it surprise you if I told you that Mrs. Hoffman was in foreclosure and that --
MR. McKELLAR: Objection to the form of the question.
BY MR. FEW:
Q. Would it surprise you if I told you that Mrs. Hoffman's house that's the subject of this HUD was in foreclosure before this happened?
A. Would it surprise me?
Q. Uh-huh.
A. Yes, it would.
Q. Wouldn't it be strange to you, based on your experience, to have somebody that was in foreclosure be in a position to get $63,000 profit off of their house?
MR. McKELLAR: Object to the form.
THE WITNESS: I'm not sure of the borrower's situation, or the seller. I'm not sure who's in foreclosure or who's not unless that's disclosed to me.

Page 121

BY MR. FEW:
Q. I understand that, but I'm just saying are you aware of these foreclosure sales savers schemes that people do?
A. No, I'm not.
Q. Okay. So Sonya Hoffman is the seller in block E, right?
A. Correct.
Q. And so her -- her signature is signed by someone else down here at the bottom, right?
A. Yes.
Q. If you were presiding or assisting in a closing, do -- don't you generally photocopy a driver's license of both the buyer and the seller?
A. We do. This -- I can't speculate for sure on this one, but if Jeremy signed this one this was a closing that was done outside of our office. Mr. McDonnell handled the majority of the closings handled in the office.
Q. Okay. Well, flip over, if you will -- well, hold -- before you -- stay on that first page. You testified earlier that if anybody other than the seller of the property was going to sign the documents, then you should have -- it was the office practice to have a power of attorney, right?

Page 122

A. That's correct.
Q. Okay. This does not indicate that there was a power of attorney, does it?
A. It says attorney-in-fact.
Q. Okay. If it said power of attorney, they would have probably put in POA on there, right?
A. The verbiage that we do use, I believe, is attorney-in-fact.
Q. Okay. Do you -- so you would assume that there's a power of attorney in this file for this particular matter?
A. I would assume so.
Q. Okay. All right. Did you -- were you ever involved in making any phone calls to Ameritrust Mortgage Company about this particular transaction?
A. To get a payoff.
Q. And I know it's been --
A. If I did it or an assistant did it.
Q. Uh-huh.
A. Ameritrust really wouldn't speak to me except for wanting a copy of the settlement statement; and that would be the loan officer.
Q. And so what if they made an exception

Page 123

to a HUD settlement statement? Would they -- would they allow that -- would that conversation take place with you or through a closing attorney?
A. What do you mean by an exception?
Q. Well, supposing this HUD right here was rejected by the lender. Who -- who would be involved in those communications? You? And I'm referring to the first page of Defendant's Exhibit 10.
A. Before the attorney goes out, these HUDs are approved.
Q. Okay. So why would an attorney sign a HUD, and the borrower and the seller sign a HUD, if it was not approved?
A. It should be approved.
Q. Okay.
A. You know, there's been things that have gone on after the fact that we had to go back and have a settlement statement re-signed for various reasons --
Q. Uh-huh.
A. -- where the dollar amounts were not correct.
Q. Did you ever make a phone call to Ameritrust Mortgage about this loan?

Page 124

A. I don't recall this personally.
Q. You don't?
A. We had a lot of closings. I don't recall this specific individual.
Q. Do you know of a company called Property Invest -- Properly Investment Professionals?
A. Not that I recall, no.
Q. Flip back, if you would, to the second HUD in this file.
A. Okay.
Q. Do you see it?
A. I do.
Q. Look at line 603, cash -- cash to seller. What's the amount shown there?
A. Zero dollars.
Q. Okay. And in fact, the payoff is completely different on line 504 than it is on the first page, isn't it?
A. It is.
Q. The first page shows $248,000 and no cents, right?
A. It does.
Q. And it's -- also references Wells Fargo Bank, right?

Page 125

A. It is.
Q. And then the next one represents 266,777.08 to Saxon Mortgage Service, doesn't it?
A. That's correct.
Q. Why would someone make that kind of mistake? You've got the wrong payee and you missed -- and the amount is missed by over $18,000. Is that unusual?
A. I can't speak on this particular incident.
Q. But you can speak --
A. I can't give you an answer back from August 17th about it. We've obtained a payoff to Wells Fargo Bank, is the way it appears here, and it's --
Q. It was part of your job to -- to prepare HUDs and coordinate closings, right?
A. It is.
Q. And part of that would have involved making sure that the -- obviously, the first mortgage payoff has to be correct, right?
A. That's correct.
Q. Or else you're going to have a big mess you're going to have to clean up, right?
A. Right. I would have to see the entire

Page 126

file and not just the copies and settlement statement.
Q. I understand that, but my question to you is: You've got a difference here of 18,000 -- it appears to be $18,777.80.
A. Correct.
Q. Would that be -- is that unusual to have a mistake like that in an approved HUD?
A. It is.
Q. Okay. All right.
A. But I'm -- I mean, you just stated a few minutes ago that this could have been a foreclosure situation, and foreclosures are different than any other settlement statement because, as you said, they don't get money back.
Q. Who doesn't get money back?
A. The seller.
Q. Why not?
A. You just stated -- you just stated that.
Q. Well, I'm not testifying here. I'm just --
A. No. I'm just saying what you said, that they don't get money back. I've been in a foreclosure situation, but I did not sell my home

Page 127

and I can't -- I can't give an answer as to why one HUD is different than another.
Q. Did a lender ever tell you that a seller of a property that was in foreclosure could not make a profit on a subsequent sale if they approved the payoff?
A. It depends on the circumstances, if it's a short sale or not.
Q. Well, it's not a short sale, is it?
A. I can't speculate on that without seeing the file.
Q. Well, explain to me what a -- what you mean by short sale, please.
A. It's when there's more money owed than what they're selling the house for and the bank will take whatever the proceeds are.
Q. Okay. Look over, if you will, on each one of these HUDs and tell me the amount shown on line 202. And I'll just ask you. Is it or is it not three hundred and --
A. Three hundred and thirty --
Q. $330,000?
A. 330,000. It is.
Q. On both of them, right?
A. It is.

Page 128

Q. All right. And the payoff of the first mortgage is either 266,777.80, if you look at the second HUD, or $248,000 on the first HUD?
A. Correct.
Q. Okay. So the amount of the loan is more than -- than what's owed, right?
A. Correct.
Q. Okay. So would -- does this appear to be a short sale to you?
A. No, it doesn't.
Q. Okay. All right. Look -- who signed the second HUD on behalf of the law firm?
A. Ed McDonnell.
Q. Now, is that his signature or your signature?
A. That's his signature.
Q. How do you know?
A. Because it looks like his signature.
Q. Well, you testified a minute ago that you weren't sure if a signature was yours or his, didn't you?
A. I stated that earlier when you asked me to go through checks. I'd have to go through each one of the checks.
Q. Now, this HUD signed by Ms. -- would

Page 129

Mr. McDonnell sign a HUD if he hadn't reviewed it?
A. What do you mean?
Q. I mean did he -- because you're busy and you're trying to do a lot of closings, right?
A. (Nodding head.)
Q. And you're getting paid more for doing more, right? That's been your testimony?
A. That's correct.
Q. Okay.
A. We did receive a bonus.
Q. Okay. So did you ever just take a document to him and ask him to sign it, that, We've already done this, and -- and did he -- would he sign it?
A. No, he would not.
Q. So -- so then, it's your testimony that he -- before signing this he would have reviewed it and reviewed the entire file?
A. He should have. I'm not saying he reviewed the entire file, but he went through all the specifics. He would be up for disbarment if he just signed his name to a document.
Q. Okay. Well, my question is what did he regularly do, and you responded that he should have. I want to know what you recall what

Page 130

Mr. McDonnell's regular practice was about handling a situation like this. For whatever reason, his law firm's closing a loan that has two HUDs in it and it's in foreclosure and there's $63,000 --

MR. McKELLAR: Objection to counsel testifying.

MR. FEW: I'm -- I'm reading numbers right off of the -- off of the HUDs and right off of this exhibit, and she --

MR. McKELLAR: You're allowed to ask her a question, but not to testify.

MR. FEW: And I'm allowed -- that -- that -- I'm just -- I'm allowed the recite the facts that she's already testified to, and that does not make for a valid objection by you.

BY MR. FEW:

Q. Okay. Back to my question.

A. Uh-huh.

Q. If you brought this HUD to Mr. McDonnell -- well, let me this ask you this in another way. Why do you think there's two HUDs in this loan file?

A. I can't answer that without seeing the file, sir.

Q. Okay.

Page 131

A. They're signed on -- it says the same date, August 17th, but Mr. Brown's signature is different on the first one and the second one, and the same signature for this Sonya Hoffman buyer/attorney-in-fact is the same signature. Jeremy Woods signed the first HUD, Mr. McDonnell signed the second HUD, and I cannot testify as to what was going on with this case that Mr. McDonnell stepped into a closing that Mr. Woods had already performed.

Q. Well, how do you know Mr. Woods had already performed it? How do you know Mr. McDonnell didn't -- Mr. McDonnell didn't perform it and then Mr. Woods went back and -- I mean, how do you know which HUD is valid?

A. I can't say that. I'm just going by which one is in front.

Q. Okay. You -- do you think that Mr. McDonnell signed after Mr. -- Mr. Woods?

A. Mr. McDonnell would not have signed a HUD without having the borrowers present.

Q. Okay. But you've -- you've noted that the signature for Mr. Brown appears to be different on these documents, doesn't it?

A. It is different.

Page 132

Q. Does that refresh your memory about anything about this transaction, that Mr. --

A. No, it does not.

Q. Are you sure?

A. I'm positive.

Q. And I'm going to ask you again. Do you remember the names Angelo Anderson?

A. No, I do not.

Q. Look at the very last page of this exhibit and tell me what it is.

A. It's a copy of a check to Angelo Anderson and Associates.

Q. For what amount?

A. $26,611.11.

Q. Tell -- tell me and help me understand why some third party who's not shown on the HUD would be receiving a check from Mr. McDonnell's law firm for $26,611.11.

A. I cannot testify to that without seeing the entire case file.

Q. Can you think of the any situation?

A. No, sir. This is an unusual situation.

Q. You agree this is an unusual loan file?

A. Yes, it is.

Q. Okay. Do you remember being -- again,

Page 133

do you remember -- does this refresh your memory about this file at all?

A. It does not.

Q. Okay. Let me ask you another question. From what you've seen of this file, assuming these documents are -- are accurate, the cash from borrower is zero on both HUDs, right?

A. It is.

Q. So all money is coming in from Ameritrust Mortgage Company, right?

A. As it would appear.

Q. Okay. Is it your understanding that Ameritrust and federal law require an accurate HUD?

A. Yes, that's correct.

Q. Okay. Do you know whether or not Ameritrust received this page right here that's the fourth page from the end that -- that details the $48,888.20?

A. They should have, because that's part of the HUD statement.

Q. So you're saying they should have seen that?

A. Yes, because that's the third page of the HUD statement.

Q. Is it the third page of the HUD

Page 134

statement?
A. I believe so. It's either that or it's their pro forma or pro trust out of Soft Pro.
Q. But let me ask you something. There's -- there's plenty of blank lines on the HUD where this money could be shown, isn't there?
A. Yes, sir.
Q. In fact, line 1303, 1304 and 1305 were all -- could have all been used to show the three entries that made up that $48,000, right -- $48,888.20, right?
A. 1305 says: See additional exhibit for the $48,888.20.
Q. I understand that, and -- and -- but -- and my question to you is -- show me what you understand to be the additional disbursements exhibit.
A. This one.
Q. This one here?
A. Yes, because --
Q. And there's three entries, right?
A. Yes.
Q. So why not just put those three entries on lines 1303, 1304, and 1305.
A. Because it's based on the software

Page 135

itself. I'd dont' know if we can put that in. Unless the software puts it on an additional disbursement sheet. I'd don't recall. I'd have to go through Soft Pro again. I haven't been on Soft Pro in some time.
Q. If this additional disbursements exhibit is not given to the lender, do you agree that the HUD is not accurate?
A. It's not accurate.
Q. And you agree this is an unusual situation?
A. Yes, sir.
Q. Look, if you will, at the next to the last check, number 5925, drawn off the IOLTA account. What's the amount of that check?
A. $18,429.80.
Q. So these two checks alone, the 26,611.11 made out to Angelo Anderson and Associates and the 18,429.80 made out to Property Investment Consultants, that totals -- I'm slow on my math nowadays -- over $45,000, doesn't it?
A. I would assume so, without having a calculator.
Q. And -- and those -- this is a disbursement of money that was provided to

Page 136

Mr. McDonnell's firm by Ameritrust Mortgage Company, right?
A. Yes.
Q. And Mr. McDonnell's firm has a fiduciary obligation to make sure that that money is handled in a way that's approved by Ameritrust Mortgage Company, doesn't it?
MR. McKELLAR: Object to the form of the question.
THE WITNESS: Yes.
BY MR. FEW:
Q. So is it your testimony that a file like this is -- is unusual?
MR. McKELLAR: Object to the form. Been asked and answered four times.
BY MR. FEW:
Q. It probably has, and I'm sorry.
A. That's okay.
Q. It's an unusual loan file?
A. Yes.
MR. McKELLAR: Same objection.
BY MR. FEW:
Q. Okay. Just let me move on, please. And what about this makes it unusual, Ms. Hoormann? If you would explain to me that.

Page 137

A. Because you told me that it was a foreclosure situation. The first HUD reflects the seller getting a dollar amount. The second HUD reflects them getting no amount and having two additional payee disbursements to these two individuals, the Property Investment and Angelo Anderson.
Q. So it's unusual that third parties would receive $45,000 from a loan closing without having some type of --
A. There has to be a reason. I -- I cannot speculate and I -- I object to this question, again, without seeing the case file. I'm looking at a document that is two and a half years old, almost three years old.
Q. I understand, now. It's -- yep, that's right. Okay. So you say there has to be a reason, and by that you mean there should be some document in the file showing --
A. Who these people are.
Q. Who they are and why they're getting this money, right?
A. Yes.
Q. Okay. So what if there is no document in the file showing who these people are and why

Page 138

they get this money?
A. I can't speculate that. Then it's a fraudulent closing. If these people –
Q. And who –
A. If there's nothing in the –
Q. Who – who is involved in it if it's a fraudulent closing?
MR. McKELLAR: Object to the form.
THE WITNESS: Could you rephrase that?
BY MR. FEW:
Q. You just testified that if these disbursements are not documented in the file that you think it's a fraudulent closing.
A. It would have to be, because Ameritrust would have to be aware of what's going on. They get the settlement statement. It's their money that they're lending to this individual, this particular borrower, and he wants to know where the money's is going. I'm saying he referring to the company itself.
Q. How long did you live in Columbia?
A. 2004 to the present incarceration.
Q. So 2004 through September of 2008. About four years?
A. Correct.

Page 139

Q. Are you familiar with the Wildewood neighborhood?
A. No.
Q. Did you ever look at credit applications or anything that were in the loan closing files?
A. We don't get credit applications.
Q. You don't get any – you – you didn't have loan – loan applications?
A. We do not get their credit applications. I mean, we get the credit applications. Not the credit reports.
Q. Not correct reports. Yeah. I mean, the loan – it – it is standard practice –
A. I –
Q. – for a lender to ask a closing attorney to have the borrower execute a new loan application at closing; isn't that right?
A. I don't recall. But I'm sure there's an application in there, because it has to be signed.
Q. My question is: Isn't it standard for a – a lender to put as part of their closing instructions that the borrower is to execute a new loan application at closing?

Page 140

A. I can't remember exact instructions. I'd have to look at the file.
Q. Well –
A. But I'm – I'm assuming so.
Q. Did – did you ever preside over a closing or were you involved in a closing where there was a loan application that the borrower was supposed to sign on the day of the closing?
A. If it was part of the documents then it was signed on the date of closing.
Q. If the lender required it, then – then you did it, right?
A. Yes, sir.
Q. Okay. Would it surprise you to know that this Charles Brown fellow never made a payment on this house and it was foreclosed on within two months of – of this transaction?
A. It would surprise me.
Q. That would surprise you?
A. Uh-huh.
Q. Would that further lead you to believe that it was a fraudulent closing?
A. I can't speculate to that. I mean, we get the documents from the lender to proceed with the closing. That's what we get. We proceed. We

Page 141

don't know their specific situation. I don't know the sellers. I don't know the borrowers. We get the documents, we do the HUD statements, and then we forward them to the lender for approval, and the real estate agents that are involved. If there's a discrepancy the real estate agents are the first ones to note it and then the lender contacts us and says, Wait a minute, this dollar amount is wrong.
Q. If you were involved in this HUD, in this closing, and there was nothing in the file to corroborate these last two checks that total over $45,000, would you have notified the lender?
A. Before or after the fact?
Q. Before. Before you gave their money away.
A. I can't testify on a specific incident. I mean, I don't recall having a conversation about this file. I don't remember these people.
Q. Okay. I'll try to wrap this up.
A. Okay.
Q. This is unusual because it has these two large checks to the back and we don't know if there's anything to corroborate it. Is that one of the things that makes it unusual?
A. Yes, sir, but I don't have the file.

Page 142

Q. And the other thing -- and the other thing is that there's two -- two executed HUDs --
A. That's correct.
Q. -- with a different signature for Mr. Brown?
A. That's correct. You know, we've had to go back and have HUD statements re-signed before.
Q. Well, if you did that, would you not mark which one -- which one was correct and --
A. You would destroy the old one.
Q. Okay. But you didn't -- this -- this was not destroyed here, was it?
A. Apparently not.
Q. Is this the first time you've ever had your deposition taken?
A. Yes, sir.
Q. Have you ever been convicted of anything other than forged checks?
A. I had a breach of trust conviction in 2001.
Q. Where was that?
A. Richland County.
Q. Explain the circumstances of that, please.
A. I don't believe it's relevant.

Page 143

Q. Well, I'm asking you to do it, so I think you either --
A. I just -- I don't feel like I should answer something that's happened in my past. I have served my time on that charge.
Q. You -- it's -- it's a public record event, Ms. Hoormann. You've been publicly convicted of that event. So can you at least tell me who it involved? Who was the victim of that breach of trust in 2001?
A. Bank of America.
Q. How did you manage to defraud Bank of America for breach of trust?
A. I'd rather not get into that.
Q. What was the amount of money?
A. I don't recall.
Q. More or less than $10,000?
A. More.
Q. More or less than $50,000?
A. More.
Q. More or less than $100,000?
A. Less.
Q. So between 50 and $100,000?
A. Correct.
Q. Did Dawn -- explain -- tell me her

Page 144

name. Dawn --
A. Murray.
Q. Okay. Did she -- as far as you know, did she have responsibility to reconcile the IOLTA account?
A. Before I worked there she worked for both attorneys.
Q. Okay. But do you know if she had responsibility for reconciling the IOLTA account at that time?
A. After what day? Prior to my working there?
Q. After October 1, 2004.
A. I don't remember, because we shared office space and Dawn did work for both attorneys.
Q. Do you recall her ever having any involvement in the reviewing and -- and reconciling any of the bank account statements between October 1 of 2004 and December 23rd of 2005?
A. I don't believe so.
Q. So I guess your -- your testimony, then, is that, as best you can recall, no, that was not her responsibility?
A. No, because she worked primarily for Harry Heizer. She worked for Mr. McDonnell on a

Page 145

temporary basis prior to my coming to work for him.
Q. Did you provide -- you testified that you were responsible for the operating accounts. Did you ever provide any written reports to Mr. McDonnell about any reconciliations or reviews you did of the operating accounts?
A. I believe it was orally. I don't remember handing him any papers.
Q. So what sort of report would you gave him? You'd just tell him everything's okay?
A. I believe so. I can't testify to what my conversation was then.
Q. So just to clarify, you don't recall ever giving him a written report of the reconciliations?
A. I don't think so.
Q. When you -- did you actually reconcile the accounts?
A. Yes, I did.
Q. So did you make marks on the statements to check off certain --
A. I assume I did. I don't remember exactly what I did at that time. Quick -- QuickBooks has a reconciliation program.
Q. Okay. Did you use it?

Page 146

A. I believe I did.
Q. If you used the QuickBooks reconciliation programs, did you -- wouldn't that result in a report of your reconciliation?
A. I'm sure it would if one was printed.
Q. Well, wouldn't it be saved if you ran the query to produce it?
A. I'm not sure. I don't know how long QuickBooks keeps things.
Q. Well, if you save it on the system it's saved -- well, no. Let me back up. The QuickBooks that Mr. McDonnell uses, was it Internet based or was it -- was it --
A. No. It was software based.
Q. Okay. So you didn't log onto the Internet to use QuickBooks?
A. No, I did not.
Q. Okay. During the time that you worked for Mr. McDonnell all the -- all the accounts related to his business were at First Citizens; is that right?
A. That's correct.
Q. And I believe you testified that you -- you may have done some things with some statements, but you can't recall exactly what that was?

Page 147

A. Exactly what I did. That's correct.
Q. So as of December 23, 2005, when Mr. McDonnell and his brother and whoever else went to investigate what happened and why there was an NSF on the IOLTA, could they go and get, as far as you know, all of the IOLTA account statements?
A. They could get statements. I can't testify to which statements they got. I'm not sure if they --
Q. But you don't know --
A. -- had all of them or not.
Q. But my question is: Were all of the IOLTA statements in the office, as far as you know?
A. I can't remember. I would assume so.
Q. But if they weren't it would be because you had thrown some out, or --
A. I can't testify to what I did with them because I have no memory of that.
Q. What about the operating account statements? Were all the operating account statements available?
A. Should have been, yes.
Q. Okay. Is there anybody other than you, that you can think of, that would have done anything that would have taken them out of the

Page 148

office?
A. I'm not sure what you're asking.
Q. Well, I believe --
A. If the -- are you saying if the operating statements are not there -- you're asking me if someone else could have taken them?
Q. Yeah. Can you think of anybody else --
A. No.
Q. -- that would have taken them? What about the Boomerang account?
A. No.
Q. Now, did you -- what does semi-regular mean? Do you know what that means?
A. Huh-uh.
Q. You ever heard anybody use the term semi-regular?
A. No.
Q. I asked you earlier if you ever took any checks that would have been, for example, borrower's funds provided at closing. Those -- those should have gone into the IOLTA account, right?
A. Should have.
Q. Now, if those checks were -- if that amount is shown on a HUD statement, then it's

Page 149

entered in Soft Pro, right?
A. Should be, yes.
Q. And when someone would run a Soft Pro reconciliation, if that deposit is not made into Soft Pro, then -- then it -- they ought to be able to figure that out, right?
A. Yes.
Q. Did you ever deposit any monies that -- for example, borrower funds at a closing that should have gone into the IOLTA account, into the operating act?
A. I can't recall that, but flipping through this exhibit, it does appear that it has been.
Q. Excuse me?
A. I flipped through your exhibit, and it does show that one that should have gotten into IOLTA went into operating.
Q. Show me where you're talking about.
A. McDonnell 64.
Q. Uh-huh.
A. Fraudulent deposit -- fraudulently deposited into operation instead of IOLTA, $19,734.03.
Q. Now, that's just the conclusion on that

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Page 150

page, right? So do you remember depositing monies that should have gone into the IOLTA into the operating account?
A. I don't recall that specific date.
Q. Well, if you didn't do it who else would have done it?
A. It would have been me, sir, but you're asking me do I remember doing that and I'm telling you, no, I do not.
Q. Do you believe it's a fair -- that if anybody had just looked at -- well, let me -- let me ask you this another way. You -- you would get a paycheck every two weeks, right?
A. Uh-huh.
Q. And -- and a bonus -- maybe one bonus a month?
A. There was a bonus once a month.
Q. Now, how many closings did you have to do before you started getting $25 per closing?
A. I don't remember the exact number. Mr. McDonnell probably can answer that.
Q. Okay. So you should have been receiving, at most, three checks a month out of the operating -- well, at most, four checks a month out of the operating account?

Page 151

A. Correct.
Q. But typically three checks a month out of the operating account?
A. Correct.
Q. So if we go back and look at Exhibit 11, and these are the checks that have been identified as the -- the unauthorized checks, and you're saying that this is -- the -- this is reconciled by QuickBooks, right?
A. I'm assuming so.
Q. So anybody that had access to QuickBooks, if they'd looked in there and looked at the payees, they would see that in October you -- you probably got -- if you got a bonus that month -- of '04 -- that you would received -- that you would have had seven checks made out to you, right?
A. Uh-huh.
Q. And then in November you would have probably -- you would have had four extra checks made out to you also, right? Is that right?
A. I'm assuming so.
Q. Does your last name have two Ns on the end, or just one?
A. It does.

Page 152

Q. Okay. So do you agree that anybody that looked into -- that just got on QuickBooks could have seen that -- that you were having more checks written out to your name than what would have been your payroll and your monthly bonus?
MR. McKELLAR: Object to the form.
THE WITNESS: As it would appear.
BY MR. FEW:
Q. Did Mr. McDonnell have access to QuickBooks?
A. He did.
Q. He owned the firm, right?
A. He did.
Q. Did he have access to Soft Pro?
A. He did.
Q. Did he have access to the IOLTA account statements provided by First Citizens Bank?
A. He did.
Q. Did he have access to the operating account statements provided by First Citizens Bank?
A. He did.
Q. Did he have access to the Boomerang Title account statements provided by First Citizens Bank?
A. He did.

Page 153

Q. At any time, from October of 2004 to December of 2005, did Mr. McDonnell not have access to those accounts and those software programs?
A. He's always had access.
Q. What was your relationship like with Tracey Donnelly?
A. It was his wife.
Q. But what was your relationship like with her prior to December 23rd of 2005?
A. We were cordial.
Q. Did she trust you?
A. I can't speculate on that.
Q. Did you all ever have any verbal arguments?
A. No, we did not.
Q. Did she work in the office?
A. Not really, no. She came in when all of this happened.
Q. Uh-huh. Did -- what did she have to say to you?
A. At that date?
Q. Uh-huh.
A. She was upset with me, but I don't recall the exact conversation. I believe she called me a bitch. That's the only thing that

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
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sticks out at this time.
Q. How did she get money out of the accounts? What did -- was Mr. McDonnell paid a salary?
A. He was.
Q. How much money do you think Mr. McDonnell made in 2005?
A. I have no idea.
Q. You have no idea?
A. Huh-uh.
Q. You don't know if it was a hundred thousand?
A. I have no idea.
Q. How many closings were you doing a month?
A. It depends. I mean, he can best answer that. I don't have really a good memory of that. There was many because we were very busy. We did closings all over the state.
Q. The law firm had to pay rent, right?
A. Yes, they did.
Q. Did you make out the check for the rent?
A. I'm not sure. There was an arrangement with Mr. Heizer who paid the rent and who paid the

offset of the utilities. There was an arrangement between him and Mr. Heizer where they split.
MR. FEW: Okay. That's all the questions I have. I thank you so much for your patience with me.
EXAMINATION
BY MR. McKELLAR:
Q. I just -- I just have one, Ms. Hoormann. Twice Mr. Few mentioned that you would like to get out of prison and you would like to get out of prison as soon as possible, and I believe he also mentioned to you that Mr. McDonnell could appear at your parole hearing on your behalf. Was any of the testimony that you gave today untrue or in an effort to influence Mr. McDonnell to assist you in a future parole hearing?
A. Absolutely not.
MR. McKELLAR: Okay. Thank you.
MR. FEW: Thank you.
THE VIDEOGRAPHER: This concludes the videotaped deposition of Anna Hoormann. The time is approximately 2:03 p.m. We're now off the record.
(The deposition was concluded at 2:03 p.m.)

SIGNATURE OF DEPONENT

I, the undersigned, ANNA HOORMANN, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

_____
ANNA HOORMANN Date

CERTIFICATE OF REPORTER

I, Angela D. Zuver, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript, pages 1 through 159, is a true, accurate, and complete record.
I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.
Witness my hand, I have hereunto affixed my official seal this 8th day of April, 2009 at Lexington, Lexington County, South Carolina.

_____
Angela D. Zuver, Court Reporter
My Commission expires
July 2, 2014

INDEX

WITNESS/EXAMINATION	Page
STIPULATIONS	3
ANNA HOORMANN	4
EXAMINATION BY MR. FEW	4
EXAMINATION BY MR. McKELLAR	155
SIGNATURE OF DEPONENT	156
CERTIFICATE OF REPORTER	157

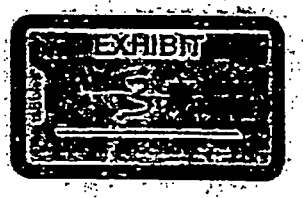
REQUESTED INFORMATION INDEX

(No Information Requested)

EXHIBITS

	Page/Line
DEF. EXH. 19, JURY TRIAL DEMAND	69 2
DEF. EXH. 20, INCARCERATED INMATE SEARCH	71 2
DEF. EXH. 16, COLUMBIA POLICE INCIDENT REPORT	78 17
DEF. EXH. 4, DOCUMENTS BEGINNING WITH MAY 27, 2008, E-MAIL	80 9
DEF. EXH. 14, HANDWRITTEN STATEMENT	86 13
DEF. EXH. 11, COPIES OF CHECKS	107 6
DEF. EXH. 10, HUD SETTLEMENT STATEMENT	118 20

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,)	CIVIL ACTION NUMBER: 07-CP-40-5252
)	
Plaintiffs,)	**PLAINTIFFS' RESPONSES TO DEFENDANT'S FIRST REQUEST TO PRODUCE**
)	
vs.)	
)	
First Citizens Bank and Trust Company, Inc.,)	
)	
Defendant.)	



TO: WESLEY D. FEW AND JOHN T. LAY, ESQUIRE, COUNSEL TO DEFENDANT:

Pursuant to Rule 34 of the South Carolina Rule of Civil Procedure, Plaintiffs respond to the First Request to Produce propounded by the Defendant as follows:

PRELIMINARY RESPONSE

Plaintiffs have not fully completed its investigation of the facts relating to this case, have not completed discovery, and have not completed its preparation for trial. All of the responses contained herein are based only upon such information and documents as are presently available to and specifically known to Plaintiffs.

It is anticipated that further discovery, independent investigation, and legal research and analyses will supply additional facts and add new meaning to known facts, as well as establish new factual conclusions and legal contentions, all of which may lead to additions to, changes in and variations from the responses herein set forth.

The following responses are given without prejudice to Plaintiffs' right to produce evidence and subsequently discovered documents. Plaintiffs accordingly reserve the right to revise any and all responses herein as additional facts are ascertained and other factual and legal analyses are completed. The responses contained herein are made in a good faith effort to supply as much information and as much specification as is presently known, but should in no way be to the prejudice of Plaintiffs in relation to further discovery research or analyses.

In the interest of cooperation in the discovery process, Plaintiffs will voluntarily provide information as reasonably appropriate and will specifically or by reference to responses given by Plaintiffs object where appropriate to discovery requests that are outside the scope of reasonable and permissible discovery under the applicable rules.

1. Any document to which reference was made in responding to any Interrogatories served to Plaintiffs in this case.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, Plaintiffs are in possession of the following:

a) **Forged checks from Edward G. McDonnell, PC Operating Account; Check Numbers: 1354, 1369, 1411, 1439, 1443, 1453, 1460, 1481, 1506, 1517, 1531, 1548, 1572, 1610, 1654, 1684, 1687, 1702, 1712, 1727, 1729, 1739, 1740, 1741, 1742, 1826, 1850, 1870, 1874, 1881, 1893, 1902, 1909, 1910, 1915, 1919, 1941, 1958, 1959, 1969, 1977, 1985, 1986, 1993, 2004, 2008, 2025, 2040, 2042, 2062, 2063, 2065, 2073, 2086, 2088, 2092, 2120, 2130, 2133, 2148, 2151, 2156, 2157, 2189, 2203, 2214, 2216, 2244, 2261, 2271, 2272, 2233, 2343, 2360, 2384, 2423, and 2424;**
(Bates Numbers: Plaintiff0001 – Plaintiff0077)

b) **Forged checks from Boomerang Title, Inc., Check Numbers: 1091, 1092, 1093, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1104, 1105, 1106, and 1108;**
(Bates Numbers: Plaintiff0078 – Plaintiff0092)

c) **Forged checks from IOLTA Account, Check Numbers: 6259 and 6281;**
(Bates Numbers: Plaintiff0093 – Plaintiff0094)

d) **First Citizens Business Signature Card;**
(Bates Number: Plaintiff0095)

e) Filed Summons and Complaint and Lis Pendens re: McDonnell v. Hoorman, Case No. 06-CP-40-522;
(Bates Numbers: Plaintiff110 – Plaintiff0118)

f) Answer of Defendant Anna Hoorman re: McDonnell v. Hoorman, Case No. 06-CP-40-522;
(Bates Numbers: Plaintiff0119 – Plaintiff0120)

g) Police Report dated December 24, 2005;
(Bates Numbers: Plaintiff0121 – Plaintiff0123)

h) Written statement of Edward McDonnell;
(Bates Number: Plaintiff0124)

i) Anna Hoorman Personnel File;
(Bates Numbers: Plaintiff0125 – Plaintiff0129)

j) Correspondence from J. Ed Holler to First Citizens Bank dated January 3, 2006;
(Bates Numbers: Plaintiff0130 – Plaintiff0131)

k) Signature Cards provided by Defendant on January 3, 2007; and
(Bates Numbers: Defendant0001 – Defendant0002)

l) Signature Card provided by Defendant on January 4, 2007.
(Bates Number: Defendant0003)

Plaintiffs reserve the right to supplement this response.

2. Any documents identified in any of the Plaintiffs responses to Interrogatories in this case.

RESPONSE: See Response to Request to Produce No. 1.

3. Any and all documents that relate to any relationship between the Plaintiffs and the alleged forger, including but not limited to, personnel file, employment contract, contractor's agreement, sub-contractor's agreement, pay-stubs, pay ledgers, checks, pleadings, correspondence, agreements, commissions, reports, etc.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, Plaintiffs are in possession of the following:

a) Anna Hoorman Personnel File.
(Bates Numbers: Plaintiff0125 – Plaintiff0129)

4. Any and all documents that relate to any relationship between the Plaintiffs and Anna M. Hoorman, including but not limited to, personnel file, employment contract, contractor's

agreement, sub-contractor's agreement, pay-stubs, pay ledgers, checks, commissions, reports, etc.

RESPONSE: See Response to Request to Produce No. 1 and No. 3.

5. To the extent not produced in response to the preceding requests, all documents that Plaintiff has faxed, emailed or otherwise provided to or received from any person or entity related to the Plaintiffs' Amended Complaint.

RESPONSE: See Response to Request to Produce No. 1.

6. Any and all corporate documents, including but not limited to, members, organizers of the Plaintiffs, McDonnell and Associates, P.A., f/k/a McDonnell Law Firm, P.A., f/k/a Edward G. McDonnell, P.C. and Boomerang Title, Inc., board directors, articles of incorporation, organizational documents, etc.

RESPONSE: Plaintiffs are not in possession of documents responsive to this Request, but reserve the right to supplement.

7. Produce all documents related to any instructions by you as to how you were to receive the checks identified in your Amended Complaint.

RESPONSE: Plaintiffs are not in possession of documents responsive to this Request, but reserve the right to supplement.

8. Produce all documents, including correspondence or notes or otherwise, related to any demands made by you or any person or entity related to the matters as alleged in your Amended Complaint, including but not limited to any agreements reached related to the matters as alleged in your Amended Complaint.

RESPONSE: Plaintiffs are in possession of the following:

a) **Correspondence from J. Ed Holler to First Citizens Bank dated January 3, 2006.**
(Bates Numbers: Plaintiff0130 – Plaintiff0131)

9. Produce all documents, including correspondence received by you or your counsel or sent from you or your counsel related to the matters as alleged in your Amended Complaint.

RESPONSE: See Response to Request to Produce No. 1.

10. Produce all documents setting forth the employment policies and procedures for McDonnell and Associates, P.A., f/k/a McDonnell Law Firm, P.A., f/k/a Edward G. McDonnell, P.C. and Boomerang Title, Inc.

RESPONSE: Upon information and belief, no such documents exist.

11. Produce all copies of all affidavits or written statements given by you or your agents to any law enforcement agency or other person attesting to any matter related to your Amended Complaint.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, Plaintiffs are in possession of the following:

a) Police Report dated December 24, 2005; and
(Bates Numbers: Plaintiff0121 – Plaintiff0123)
b) Written statement of Edward McDonnell.
(Bates Number: Plaintiff0124)

12. Produce all documents related to any review or reconciliation by an attorney of any account referenced in your Amended Complaint.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, see Response to Request to Produce No. 1.

13. Produce all documents you received from First Citizens related to any account referenced in your Amended Complaint.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine,

the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, see Response to Request to Produce No. 1.

14. Produce all documents related to Civil Action No. 2006-CP-40-00522, in which one or more Plaintiffs of this action was a party.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, Plaintiffs are in possession of the following:

a) **Filed Summons and Complaint and Lis Pendens re: McDonnell v. Hoorman, Case No. 06-CP-40-522; and (Bates Numbers: Plaintiff0110 – Plaintiff0118)**

b) **Answer of Defendant Anna Hoorman re: McDonnell v. Hoorman, Case No. 06-CP-40-522. (Bates Numbers: Plaintiff0119 – Plaintiff0120)**

15. With respect to your contention that any check put at issue was "not properly payable" as alleged in Paragraphs 8, 13 or 18 of your Amended Complaint, produce all documents and information in support of this allegation.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, see Response to Request to Produce No. 1.

16. Produce all documents and tangible things, compilations of data and any other materials that have been submitted to, prepared by, used by or relied upon by any expert witness regarding the subject of this lawsuit.

RESPONSE: Plaintiffs have not retained an expert at this time but reserve the right to do so and will supplement when an expert is retained.

17. Produce all documents that show when you first discovered the alleged forged checks identified in your Amended Complaint.

RESPONSE: Plaintiffs are not in possession of documents responsive to this Request, but reserve the right to supplement.

18. Produce all documents you allege set forth any duty owed to you by First Citizens.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, Plaintiffs are in possession of the following:

a) **First Citizens Business Signature Card.**
(Bates Number: Plaintiff0095)

19. Produce all documents that constitute the "agreement" you allege was breached as set forth in Paragraphs 8, 13 and 18 of your Amended Complaint.

RESPONSE: See Response to Request to Produce No. 18.

20. Produce all documents related to any report you have made to any law enforcement or licensing entity related to the allegations in your Amended Complaint.

RESPONSE: See Response to Request to Produce No. 11.

21. Produce all reports, including drafts, of any report prepared by any expert related to this lawsuit.

RESPONSE: See Response to Request to Produce No. 16.

22. Produce all documents you intend to use at any trial of this matter.

RESPONSE: Plaintiffs have yet to make determination as to what documents and/or exhibits it intends to introduce into evidence at trial. All documents produced in response to Defendant's Requests for Production throughout the course of this action should be considered as potential exhibits to be utilized at trial.

23. Produce all documents related to any employment relationship that existed between Plaintiff and Anna Hoorman.

RESPONSE: See Response to Request to Produce No. 3.

24. Produce all documents showing any reports you made to First Citizens of any alleged forged or unauthorized checks as alleged in your Amended Complaint.

RESPONSE: Plaintiffs are in possession of the following:

a) Correspondence from J. Ed Holler to First Citizens Bank dated January 3, 2006.
(Bates Numbers: Plaintiff0130 – Plaintiff0131)

25. Produce all documents related to any bank or other financial institution deposit or similar account held by any Plaintiff since January 1, 2004.

RESPONSE: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, Plaintiffs are not in possession of documents responsive to this Request, but reserve the right to supplement.

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
March 19, 2008

EDWARD G. McDONNELL, PC
OPERATING ACCOUNT
P.O. BOX 11495
COLUMBIA, SC 29211

FIRST CITIZENS BANK
67-604/539

1354

10/1/2004

PAY TO THE ORDER OF Anna M. Hoormann

10/04/04 E3536 T3544 P19 $1,154.00

One Thousand One Hundred Fifty-Four and 00/100********** DOLLARS

Anna M. Hoormann

MEMO:

⑈001354⑈ ⑆053905041⑆08304 5789101⑈ ⑈000001154.00⑈

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EXHIBIT 4

Transaction Information

BANK/RT	8	ACCOUNT	83045789101
POST DATE	10/04/2004	SEQUENCE	00000000007200234743
SERIAL NUMBER	1354	AMOUNT	$ 1,154.00

Archive Delivery Request Id : ANB04 20060105093035CAPPP2 0015803

Plaintiff0001

RULES AND REGULATIONS

CHECKING ACCOUNTS SAVINGS ACCOUNTS AND MONEY MARKET ACCOUNTS



FCB-00054
ELS #252-57754

RULES AND REGULATIONS FOR CHECKING ACCOUNTS, SAVINGS ACCOUNTS AND MONEY MARKET ACCOUNTS

Throughout this agreement, the terms "we," "us," "our," and "Bank" refer to First Citizens Bank and Trust Company, Inc. The terms "you" and "your" refer to the depositor, and if the context requires, anyone the depositor has authorized.

1. GENERAL PROVISIONS

You agree that:

These Rules and Regulations apply to your depository accounts. A depository account is any account from which funds may be withdrawn by order of you and includes checking, savings, accounts with credit features, and Money Market Accounts (MMAs). By signing the signature card or using the account, you agree that your account is subject to applicable state and federal laws and regulations, these Rules and Regulations, the conditions of your signature card, the Fee Schedule and Interest Disclosures, and any other agreement between you and us.

If your account causes the Bank to incur any legal expenses, you agree to indemnify and reimburse the Bank for these expenses. This includes legal action to collect amounts owed on your account.

2. OWNERSHIP

This account is NON-TRANSFERABLE except by operation of law or with our prior written consent.

3. DEPOSITS

All items accepted for deposit are credited subject to final payment to us, in cash or solvent credits, at our own office and we are not obligated to permit withdrawal of balances until final payment, except as noted on the "Ability to Withdraw Funds" section of this pamphlet. Any item not finally collected may be charged back to your account, whether the item was cashed or deposited and even if the chargeback creates an overdraft, for which we may deduct an overdraft charge from your account.

All items or deposits received and all business transacted after 2:00 p.m. on a business day, at any time on a non-business day, or after we close before 2:00 p.m. on a business day, may be treated as being received or transacted at the beginning of the next business day. Cash deposited will affect the current available balance.

If you sign, stamp or affix an endorsement to a check for deposit which is outside of the area extending 1 1/2 inches from the trailing edge of a check or otherwise cause the bank endorsement to be obscured, and the return of the check is delayed because of the obscured bank endorsement, you agree to reimburse and hold us harmless against any loss, expense and cost we may incur because of your endorsement. The trailing edge is defined as the left side of the check looking at it from the front.

4. WITHDRAWALS

You may make withdrawals by written authorization, by use of electronic terminals or other electronic means approved by us or by such other means as we may agree. We may pay items drawn on your account in any order we determine, even if paying a particular item results in an insufficient balance in your account to pay one or more other items that otherwise could have been paid out of your account.

On a checking account or MMA, if there is not enough money in your account to cover a withdrawal from your account, you agree to pay an insufficient funds charge and we will not be required to honor the withdrawal. If we pay the withdrawal, we may deduct an overdraft charge from your account. The fact that we elect to pay an overdraft in one or more instances does not obligate us to cover any future overdraft. You and any authorized signer, if the account is not a corporate account, agree to pay, promptly and without demand, any overdraft (loan) in connection with said account. Furthermore, you and any authorized signer agree to pay any cost of collection, including but not limited to attorneys' fees and cost of collection incurred to collect the amount of overdraft. If this is a multiple party account, all parties are jointly and severally liable for the amount of any outstanding overdraft.

Unless otherwise required by law, we shall not be responsible to you for any damages caused by payment of postdated items.

We shall not be bound by memoranda (e.g. wording such as "void after 90 days"; "payment in full"; etc.) placed upon or attached to a check or other withdrawal instrument by you.

We incur no liability to you on an account purporting to require two or more signatures on any items drawn on the account that have only one signature. The intent of having multiple signatures is for your internal audit and control purposes.

When permitted by law, to protect you and us in time of public excitement and danger, and otherwise required by Federal Regulation, we reserve the right to require 7 days prior written notice of intention to withdraw or transfer funds from any interest-bearing account.

If your account is a SAVINGS ACCOUNT or MONEY MARKET ACCOUNT (MMA), the following federally set transaction limit applies.

Savings Account. You may make unlimited withdrawals in person or from an automated teller machine (ATM). However, you may make no more than 6 transfers and withdrawals, or a combination of such transfers and withdrawals, per monthly period from the account to another account at First Citizens or to a third party by means of a preauthorized or automatic transfer, or telephonic (including data transmission) agreement, order or instruction. No more than 3 of the six such transfers/withdrawals may be made by draft or similar device made by you and payable to third parties. Repeated violation of the federally set limit may result in closure of the account.

MMA. You may make unlimited withdrawals in person. However, you may make no more than 6 transfers and withdrawals, or a combination of such transfers and withdrawals, per monthly period from the account to another account at First Citizens or to a third party by means of a preauthorized or automatic transfer, or telephonic (including data transmission) agreement, order or instruction. No more than 3 of the six such transfers/withdrawals may be made by check, draft, or similar device made by you and payable to third parties. Repeated violation of the federally set limit will result in either closure of the account or conversion of the account to a checking account.

Savings and MMA products are described in the Fee Schedule/Interest Disclosures brochure.

5. ACCOUNT TERMINATION

We may at any time send notice of termination to your address of record on any account. Ten calendar days after the date of the notice, we will mail you a check (at your risk) for the balance of the account, if any. Any items presented to us after such termination may be returned unpaid. Accounts maintaining a zero balance are subject to closing.

6. PERIODIC STATEMENTS AND NOTICES

We will mail to you (at your address shown on our records), or otherwise make available to you, periodic statements reflecting all transactions on your account. Each statement shall, for all purposes, be deemed received by you or made available to you five (5) business days after its date, absent any proof of an earlier or later delivery date. Checking statements and MMA statements will normally be mailed on a monthly basis while savings statements will normally be mailed semi-annually. Some savings statements may have a monthly statement cycle. (Statements on dormant accounts will be mailed annually.) You agree to notify us promptly when you have a change of address. We reserve the right to accept either written or verbal notice of your address change. We also reserve the right to change the address if we are notified by the United States Postal Service that you, or a joint owner on a joint account, have submitted a "change of address" form to the U. S. Postal Service.

If your correct mailing address is not known to us, we will hold your statement at one of our offices/departments and you agree that we have made your statement and cancelled items, if applicable, *available* to you when the statement is issued.

If you elect to have Check Safekeeping (meaning your cancelled checks/items are held by us instead of returned in your statement), you agree that we have made your cancelled items *available* to you when your statement is made available. We will provide copies of cancelled items upon your request. We may charge a fee for providing such copies.

Upon receipt (or *availability*) of your statement and cancelled items, you agree that you will promptly examine your statement and items and will notify us if there are any incorrect or unauthorized signatures, transactions,

or alterations. You also agree that 14 days (SC) / 30 days (GA) after the statement and items are first available to you is a reasonable time for you to examine your statement and notify us of unauthorized signatures or alterations. If the item in question is an electronic fund transfer, refer to the ELECTRONIC FUND TRANSFER DISCLOSURES section in this brochure.

Any notice we send you will be considered effective when it is deposited in the U.S. Mail to your last address that we have in our records. Notice from you will be considered effective when we receive it at our designated address. If your account is a joint account, we can notify any one of you and the notice will be effective for all of the account holders. Similarly, any one of you can notify us and we will consider it to be notice from all of you.

7. MULTIPLE PARTY ACCOUNTS

All parties whose names appear on a joint account and who have signed the signature card are considered co-owners of this account, regardless of whose money is deposited or who makes the deposits. As long as all co-owners are living, each co-owner is permitted to make deposits and withdraw any or all funds from the account without the consent of the other(s). Each co-owner also hereby authorizes each other co-owner to (1) endorse for deposit to the joint account any items payable to any co-owner, (2) instruct us to stop payment on any items drawn on the account by any co-owner, (3) draw upon any overdraft or other line of credit which may be established in connection with the account, (4) pledge the account as security for any debts whether individual, joint or otherwise, and (5) close the account at any time.

In the event of the death of one of the parties on a joint account, unless we have previously agreed in writing with you, the balance in the account will belong to the survivor(s). If two or more of you survive, you will own the account as joint tenants with survivorship.

If two or more of you create a revocable trust or pay on death type of account, you own the account jointly with survivorship. Beneficiaries cannot withdraw unless: (1) all persons creating the account die, and (2) the beneficiary is still living. The person(s) creating either a revocable trust or pay on death account may (1) change beneficiaries (2) change account types, and (3) withdraw all or part of the account balance at any time.

8. RIGHT OF OFFSET

You acknowledge and consent to our right to withdraw and use funds in any deposit account of yours so as to pay any loans or debts owed by you to us.

9. RIGHT TO STOP PAYMENT - CHECKING & MMA

You may ask us to stop payment of a check or draft drawn on your account. You must give us reasonable notice (at least 24 hours), and you must tell us the exact amount of the check or draft, check number, date of the check, payee and the full account number on which it is drawn for us to be able to enter a stop payment. If the information you give us is not correct or if you do not give us other reasonable information requested about

the check or draft, we will not be responsible if we are not able to effect the stop payment. You may verbally notify us to stop payment of a check or draft drawn on the account; however, the verbal order may not be effective after 14 days from the date the verbal stop order was received unless you confirm it in writing within that time period. A written order is effective for 6 months only unless renewed in writing. There is a charge for stop payments.

10. DORMANCY

An account is considered dormant when no external item has been paid from or credited to the account for a period of one year. If you have not used your account or communicated with the bank in writing or otherwise indicated an interest in the account for a period of 5 years, your account and deposits are presumed to be abandoned. Dormant or abandoned accounts will be subject to service charges defined in the Fee Schedule/ Interest Disclosures brochure. Accounts which are presumed to be abandoned will be subject to escheat (deposits remitted to the State in which your account is maintained) in accordance with applicable law.

11. SERVICE CHARGES

Your account shall be subject to service charges and other fees in effect or as adopted or changed by us in the future. These charges and/or fees, which may be deducted from the account, include but are not limited to the fees described in our Fee Schedule/Interest Disclosures brochure and charges assessed for handling legal process in connection with your account.

12. DEPOSIT ADJUSTMENTS

If any amount is deposited in this account in error, you authorize us to deduct the amount from this account or from any other deposit account you have with us, without prior notice. We may also use any other legal remedy to recover the amount of our liability even if that adjustment results in insufficient funds to cover checks you have written or other debits.

13. FIDUCIARY CAPACITY

If your account is set up as a trust account or custodial account, it is your sole responsibility to determine the legal effects of opening and maintaining an account of this nature.

If you wish to name another person to act as your attorney in fact or agent in connection with your account, we must approve the form of appointment, and we will not be liable for withdrawals signed by your agent or attorney in fact after the death of the depository(s) principal(s) unless we have received actual notice of such death.

The authorized signer(s) holding an account under a fiduciary capacity, agree(s) to indemnify and hold us harmless from any loss or damage arising from such authority or lack thereof. We have no responsibility or duty to assure or verify that authorized individual(s) have

or are acting within the authority given them by the authorizing documentation or that such authorizing document is genuine or valid, even if we have seen or retained a copy of such document.

14. ADDING/DELETING SIGNER

PERSONAL ACCOUNTS. If you request to have an authorized signer added to your account, all parties involved, i.e. current signer(s) and new signer, must sign a new signature card. IT IS OUR POLICY NOT TO ALLOW DELETION OF AN AUTHORIZED SIGNER. With the exception of death of one of the signers, if a signer is to be deleted, you must close your account and open a new one.

NON-PERSONAL ACCOUNTS. (i.e. estate accounts, organization/association accounts, business accounts). The addition/deletion of an authorized signer is permissible provided you supply specific supporting documentation acceptable to (and by) us. A new signature card must be signed by all authorized signers.

15. CREDIT INQUIRIES

We are authorized to make credit inquiries on you with credit bureaus or any other person or entity. Also, any activity concerning your depository account (including overdrafts) may be reported to credit bureaus or any other person or entity, at our sole discretion.

16. AMENDMENT

We reserve the right to amend these Rules at anytime. We will provide you with any notice required by law of any amendments we make to these Rules. Your continued use of your account after the effective date of any amendment as stated in the notice, or after a reasonable time if no such date is stated, will constitute your acceptance of the terms of the amendment.

CONSUMER ACCOUNTS. We agree to give you at least thirty (30) calendar days advanced notice of any changes we make to fees required to be disclosed (Regulation DD) in our Fee Schedule/Interest Disclosures that will adversely affect your account.

17. REGULATORY REPORTING ON CHECKING ACCOUNTS

Your checking account is comprised of two sub-accounts: a checking sub-account and a sub-account that is not classified as a transaction account. We will maintain separate information on each sub-account; however, all information reported to you will be consolidated. The use of sub-accounts is for regulatory reporting purposes only. It is totally transparent to you, that is, your monthly statement, as well as any balance information provided to you, will show your account as a single account, not as two sub-accounts.

The sub-accounts function as follows: At the beginning of each month, we will allocate the balance in your checking account between the two sub-accounts based on an allocation formula which we may change from time to time. All checks, withdrawals, debits, or other charges against your account will be presented against funds in

the checking sub-account. If additional funds are needed to cover your transactions, we will automatically transfer funds from the other sub-account to the checking sub-account. Upon the sixth transfer from the other sub-account during a monthly statement period, the entire balance in the other sub-account will be transferred to the checking sub-account for the remainder of the statement period. At the beginning of the next statement period, the funds in your account will again be allocated between the two sub-accounts.

ABILITY TO WITHDRAW FUNDS

1. GENERAL POLICY

Our policy is to make funds from your deposits available to you on the first business day after the day we receive your deposit. Electronic direct deposits will be available on the day we receive the deposit. Once they are available, you can withdraw the funds in cash and we will use the funds to pay checks that you have written.

For determining the availability of your deposits, every day is a business day, except Saturdays, Sundays, and federal holidays. If you make a deposit before 2:00 p.m. on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after 2:00 p.m. or on a day we are not open, we will consider that the deposit was made on the next business day that we are open. (Please note that because we balance ATMs anytime between the hours of 12:00 noon and 2:00 p.m., a deposit made through an ATM may be dated and credited one business day later than if you had made the same deposit at the same time in the lobby or at a drive-in window.)

2. LONGER DELAYS MAY APPLY

In some cases, we will not make all the funds that you deposit by check available to you on the first business day after the day of your deposit. Depending on the type of check that you deposit, funds may not be available until the fifth business day after the day of your deposit. However, the first $100 of your deposit may be available on the first business day after the day of your deposit.

If we are not going to make all of the funds from your deposit available on the first business day after the day of your deposit, we will notify you at the time you make your deposit. We will tell you when the funds will be available. If your deposit is not made directly to one of our employees, or if we decide to take this action after you have left the premises, we will mail you the notice by the business day after we receive your deposit. If you will need the funds from a deposit right away, you should ask us when the funds will be available.

In addition, funds you deposit by check may be delayed for a longer period under the following circumstances:

- We have reason to believe a check you deposit will not be paid.

- You re-deposit a check that has been returned unpaid.
- You deposit checks totaling more than $5,000 on any one day.
- You have overdrawn your account repeatedly in the last six months.
- There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the eleventh business day after the day of your deposit.

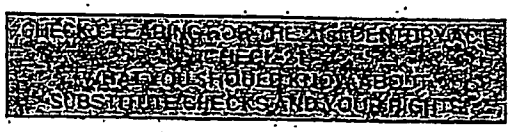
3. SPECIAL RULES FOR NEW ACCOUNTS

If you are a new customer, the following special rules may apply during the first 30 days your account is open. Funds from electronic direct deposits to your account will be available on the day we receive the deposit. Funds from deposits of cash, wire transfers, and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and federal, state, and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you. The excess over $5,000 will be available on the ninth business day after the day of your deposit.

Funds from all other check deposits will generally be available no later than the eleventh business day after the day of your deposit.

4. HOLDS ON OTHER FUNDS

- If we cash a check for you that is drawn on another bank, we may withhold the availability of a corresponding amount of funds that are already in your account. Those funds will be available at the time funds from the check we cashed would have been available if you had deposited it.
- Funds may be held in your account if we receive notice that a check you deposited or cashed is being returned unpaid. You will receive a notice indicating the amount of the hold and that the hold will be released when we receive the check and debit the funds from your account.



(This section applies to consumers only and is effective October 28, 2004.)

1. What is a Substitute Check?

To make check processing faster, federal law permits banks to replace original checks with "substitute checks." These checks are similar in size to original checks with a slightly reduced image of the front and back of the original check. The front of a substitute check states: "This is a legal copy of your check. You can use it the same way you would use the original check." You may use a

substitute check as proof of payment just like the original check.

Some or all of the checks that you receive back from us may be substitute checks. This notice describes rights you have when you receive substitute checks from us. The rights in this notice do not apply to original checks or to electronic debits to your account. However, you have rights under other law with respect to those transactions.

2. What are my rights regarding Substitute Checks?

In certain cases, federal law provides a special procedure that allows you to request a refund for losses you suffer if a substitute check is posted to your account (for example, if you think that we withdrew the wrong amount from your account or that we withdrew money from your account more than once for the same check). The losses you may attempt to recover under this procedure may include the amount that was withdrawn from your account and fees that were charged as a result of the withdrawal (for example, bounced check fees).

The amount of your refund under this procedure is limited to the amount of your loss or the amount of the substitute check, whichever is less. You also are entitled to interest on the amount of your refund if your account is an interest-bearing account. If your loss exceeds the amount of the substitute check, you may be able to recover additional amounts under other law.

If you use this procedure, you may receive up to $2,500 of your refund (plus interest if your account earns interest) within 10 business days after we received your written claim and the remainder of your refund (plus interest if your account earns interest) not later than 45 calendar days after we received your written claim.

We may reverse the refund (including any interest on the refund) if we later are able to demonstrate that the substitute check was correctly posted to your account.

3. How do I make a claim for a refund?

If you believe that you have suffered a loss relating to a substitute check that you received and that was posted to your account, please submit your claim in writing to:

First Citizens
Customer Contact Center
Mail Code 994017
P.O. Box 29
Columbia, SC 29202

You must contact us within 40 calendar days of the date that we mailed (or otherwise delivered by a means to which you agreed) the substitute check in question or the account statement showing that the substitute check was posted to your account, whichever is later. We will extend this time period if you were not able to make a timely claim because of extraordinary circumstances. If you contact us orally with a claim during the 40-calendar day period, you must supply a written claim within 10 business days of the date of the oral claim.

YOUR CLAIM MUST INCLUDE:

- A description of why you have suffered a loss (for

example, you think the amount withdrawn was incorrect);
- An estimate of the amount of your loss;
- An explanation of why the substitute check you received is insufficient to confirm that you suffered a loss; and
- A copy of the substitute check *or* the following information to help us identify the substitute check: your account number, the check number, the check amount, the name of the person to whom you wrote the check; or, in the case of a returned check, the name of the person who wrote you the check.

WIRE TRANSFERS

1. COVERAGE

A Wire Transfer is any interbank transfer of funds initiated or completed by any means other than check or similar paper instrument. Wire Transfers include "funds transfers" over Fedwire, ACH, and similar networks, including but not limited to "payment orders" as those terms are defined in Article 4A (Uniform Commercial Code - Funds Transfer, SC Code 36-4A-101 et seq., GA Code 11-4A-101 et seq.) Wire Transfer does not include any consumer electronic funds transfer governed by Regulation E, 12 C.F.R.205.

However, transactions initiated by consumers through a telephone response system or home banking system requiring an entry password are covered by Regulation E because issuance of a password does constitute the kind of prearranged agreement covered by Regulation E. Refer to section on ELECTRONIC FUNDS TRANSFER DISCLOSURES for details.

2. BANK AGREES

The Bank will use its best efforts to complete any Wire Transfer initiated by you or persons purporting to be your agent(s), and who possess or can access your established security devices. We, at our sole discretion, may refuse to complete any Wire Transfers for any reason or no reason, including a good faith belief that security has been compromised, the Wire Transfer does not comply with state or federal law, or network or other malfunctions or deficiencies may impede our ability to complete the Wire Transfer. We, at our discretion, may record any telephone conversation with you.

3. BANK'S LIABILITY IS LIMITED

The Bank is not liable for any losses resulting from its unintentional failure to complete a Wire Transfer or honor your request to stop payment, unless our action or failure to act was negligent. We have no liability for any loss resulting from the failure of any communication media, or the action or inactions of anyone else. We are not liable to you, any transferee, or other third party for any consequential, special, indirect or other damages beyond the amount of the Wire Transfer.

4. YOU (DEPOSITOR) AGREE(S)

You will promptly pay any fees associated with the Wire Transfer, whether imposed by us or any third party, and authorize us to deduct those fees from the funds transferred or from the account. You also agree to protect any security devices. You will provide us with accurate and complete information necessary to complete a Wire Transfer. You will notify us as soon as possible of any discrepancy in any statement or confirmation sent by us.

5. YOUR (DEPOSITOR) LIABILITY

You understand and agree that the Bank is not liable for any losses or damages that result from your failure to provide complete and accurate information, or any action, inaction, or circumstance beyond our control. You also agree to hold us harmless and indemnify us for any costs and expenses including attorneys fees incurred to prosecute or defend any claim related to a requested or completed Wire Transfer unless such claim is the result of our negligence or willful misconduct.

6. SECURITY DEVICES

"Security devices" refers to any keypad, card, secret code, password, encryption, or similar effort to keep unauthorized persons purporting to represent you from initiating a Wire Transfer. If you and the Bank agree on a security device, you expressly agree that any person possessing the security device may order us to initiate, cancel, redirect, modify or stop a Wire Transfer, whether or not we have been notified of that person's authority, and you accept sole responsibility for that order.

ELECTRONIC FUND TRANSFER DISCLOSURES

This section applies to Electronic Fund Transfers involving consumer accounts.

1. INTRODUCTION AND DEFINITIONS

Different parts in this section may apply depending on which service(s) you may be requesting or using. An electronic fund transfer is a transfer of funds initiated through an electronic terminal, telephonic voice response unit, computer, or magnetic tape for the purpose of authorizing the Bank to debit or credit an account. Electronic fund transfers include, but are not limited to, debit card and ATM transactions; pre-authorized deposits and payments; telephone transfers; transfers initiated through a personal computer; and, transfers initiated by using information obtained from a check (electronic check conversions). Electronic fund transfers do not include checks; paper drafts; pre-authorized transfers between your accounts within the Bank, such as an automatic transfer from savings to checking; or, transfers initiated by a telephone conversation between a customer and an officer or employee of the Bank, not pursuant to a prearranged plan.

With regard to Bank Cardholder Transactions, throughout this pamphlet, the term "ATM Card" means a card issued by the Bank which may be used at any participating automated teller machine (ATM) or Merchant POS Device to access an account. The term "Check Card" means a Card issued by the Bank which may be used as an "ATM Card" or as a "POS Card" at any merchant or company honoring the Visa Check Card. Where provisions in this pamphlet apply to both cards, the terms "ATM Card" and "Check Card" are collectively referred to as the "Card" and apply to all "Cardholder" transactions.

If you have a non-bank card or other access device issued to you by a service-provider (such as a bill paying service or major oil company) which you may use to pay for goods or services (such as gasoline) by accessing your checking or other Bank asset account, the use of such card or access device is governed by the agreement(s) sent to you by the service provider with the card or access device.

You should contact the service provider, not the Bank, for any questions about transactions that you make using your non-bank card or access device. The service provider is also responsible for resolving any errors in transactions made with your non-bank card which appear on your bank statement.

2. DISCLOSURES OF TYPES OF AVAILABLE TRANSFERS

A. Preauthorized Transfers

The types of available transfers include preauthorized electronic deposits and payments to and from your checking or savings accounts.

B. Cardholder Transactions

1. For eligible accounts you may use your Card and PIN at First Citizens automated teller machines to:
   a. Obtain balance information from your depository accounts.
   b. Make a transfer from Credit Card account to your depository accounts.
   c. Make a deposit to your depository accounts.
   d. Make a payment from either your depository accounts or by envelope to Overdraft Protection Account or Credit Card Account or Pay-Any-Day Loans or Installment Loan or Mortgage Loan through First Citizens Mortgage Corporation.
   e. Withdraw cash from Credit Card Account or depository account.
2. You may use your Card and PIN at automated teller machines owned by other financial institutions within the participating ATM network.
   a. Obtain balance information from your eligible depository accounts.

b. Make a transfer between your eligible depository accounts.
c. Withdraw cash from your eligible depository accounts.

3. A fee per transaction may apply to 2a, 2b and 2c above performed at NON-First Citizens automated teller machines. Also, you may be charged a fee by the ATM operator or any network used to complete the transaction (and you may be charged a fee for a balance inquiry).
4. You may use your Card and PIN or Visa Check Card for purchases at participating merchant locations.
5. There are limitations on dollar amounts or transfers. You may make withdrawals and purchases up to your daily limit provided there are sufficient funds in your account. Daily limits are described in detail in section LIMITATION ON DOLLAR AMOUNTS OF TRANSACTION. For security reasons, there are other limits on withdrawals when you use our automated teller machines.

C. Electronic Telephone Transfers

For eligible accounts you may use your touch tone telephone and PIN to perform the following activities:

1) Obtain balance and transaction detail information.
2) Place stop payments on items.
3) Make a transfer between depository accounts.
4) Make payment to consumer loan, credit card or line of credit from a depository account.

3. BANK'S LIABILITY FOR FAILURE TO MAKE TRANSFER ON TIME OR IN THE CORRECT AMOUNT

If we do not properly complete a transfer to or from your account on time or in the correct amount according to our agreement with you, we will be liable for your losses or damages. However, there are some exceptions. We will not be liable, for instance:

(1) If, through no fault of ours, your account does not have enough available money to make the transfer.
(2) If the transfer would go over the credit limit of your Overdraft Protection account.
(3) If the ATM or terminal where you are making a withdrawal does not have enough cash.
(4) If the ATM or terminal was not working properly and you knew about the breakdown when you started the transfer.
(5) If circumstances beyond our control (such as fire, flood) prevent the transfer.
(6) If the funds are subject to legal process or other encumbrances restricting such transfer.
(7) If the transfer would exceed a limitation described in section LIMITATION ON DOLLAR AMOUNTS OF TRANSACTION.

There may be other exceptions stated in our agreement with you.

4. YOUR RIGHT TO RECEIVE DOCUMENTATION OF TRANSFER

A. Preauthorized Transfer (Credits) - If you have arranged to have direct deposits made to your account at least once every 60 days from the same person or company, either the person or company making the deposit will tell you every time they send us the money or you can call us at your branch office telephone number shown on the front of your periodic statement to find out whether or not the deposit has been made.

B. Cardholder Transactions - For transactions through an automated teller machine, you will have the option to receive a receipt at the time you make any transfer to or from your account.

For Visa Check Card purchases made in person through a participating merchant, you will have the option to receive a sales receipt at the time of purchase or a credit voucher to represent a refund.

C. Periodic Statements - You will receive a monthly statement of transaction activity in your checking and savings account(s). If there is no activity in your account(s), you will get a statement at least quarterly. If your account(s) has been inactive for an extended period of time, you may receive statements less frequently.

5. BUSINESS DAYS OF FIRST CITIZENS BANK AND TRUST COMPANY, INC.
Our business days are Monday through Friday. Saturdays, Sundays and holidays are not included.

6. IN CASE OF ERRORS OR QUESTIONS ABOUT YOUR ELECTRONIC TRANSFERS
Telephone us at 1-888-612-4444 or write us at:

First Citizens
Customer Contact Center
Mail Code 994017
P. O. Box 29
Columbia, SC 29202

as soon as you can, if you think your statement or receipt is wrong or you need more information about a transfer listed on a statement or receipt. We must hear from you no later than 60 days after we sent the FIRST statement on which the error appeared.
(A) Tell us your name and account number.
(B) Describe the error or transfer you are unsure about and explain as clearly as you can why you believe it is an error or why you need more information.
(C) Tell us the dollar amount of the suspected error.
If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine if an error occurred within ten (10) business days after we hear from you and we will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within ten (10) business days for the amount you think is in error so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within ten (10) business days, we might not credit your account.

We will tell you the results within three (3) business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

If a notice of error involves an electronic fund transfer that occurred within thirty (30) days after the first deposit to the account was made, the applicable time periods for action shall be twenty (20) business days in place of ten (10) business days and up to ninety (90) days for final resolution.

If you tell us that a notice of error involves unauthorized use of your check card with the Visa logo when it is used as a Visa point of sale check card, we will provide provisional credit within five (5) business days after you notify us instead of within ten (10) or twenty (20) business days. We may withhold providing this accelerated provisional credit, to the extent allowed under applicable law, if the circumstances or account history warrants the delay.

If you tell us that the alleged error involves an electronic fund transfer resulting from a point of sale transaction, or a transaction initiated outside a state, territory or possession of the United States, the applicable time periods for action by us are ten (10) business days and ninety (90) calender days (instead of 45).

7. SPECIAL RULES FOR PREAUTHORIZED TRANSFERS

If you have told us in advance to make regular payments out of your account, you may stop any of these payments. Here's how: You may call your local First Citizens office - the phone number is on the front of your periodic statement. You may also call us at 1-888-612-4444 or write us at:

First Citizens
Customer Contact Center
Mail Code 994017
P.O. Box 29
Columbia, SC 29202

Please call or write us in time for us to receive your request 3 business days or more before the payment is scheduled to be made. If you call, we may also require

you to put your request in writing and get it to us within 14 days after you call.

If these regular payments may vary in amount, the person you are going to pay will tell you 10 days before each payment, when it will be made and how much it will be. You may choose instead to get this notice only when the payment would differ by more than a certain amount from the previous payment, or the amount would fall outside certain limits that you set.

If you order us to stop one of these payments 3 business days before the transfer is scheduled, and we do not do so, we will be liable for your losses or damages. There is a charge for each stop payment order you give.

8. ACCOUNT INFORMATION TO THIRD PARTIES
We disclose information to third parties about your account or the transfers you make:

1) Where it is necessary for completing transfers, or

2) In order to verify the existence and condition of your account for a third party, such as a credit bureau or merchant, or

3) In order to comply with government agency or court orders, or

4) If you give us your written permission.

9. VALIDATION DISCLOSURE FOR CARDHOLDERS - YOU CANNOT USE THE CARD TO TRANSFER MONEY INTO OR OUT OF YOUR ACCOUNT UNTIL WE HAVE VALIDATED IT BY ASSIGNING YOU A PERSONAL IDENTIFICATION NUMBER (PIN). IF YOU DO NOT WANT TO USE THE CARD, PLEASE DESTROY IT BY CUTTING IT IN HALF AS SOON AS YOU RECEIVE IT.

10. YOUR LIABILITY FOR UNAUTHORIZED VISA POINT OF SALE CHECK CARD TRANSACTIONS
Tell us AT ONCE if you believe your First Citizens Visa check card has been lost or stolen. Telephoning is the best way of keeping your losses down. This will help prevent unauthorized access to your account and minimize any inconvenience.

Your liability for unauthorized use of your check card with the Visa logo when it is used as a Visa point of sale check card will not exceed (A) Zero dollars ($0.00) liability if you report the loss or theft of the card within two (2) business days of discovery that your check card was lost or stolen, or (B) Fifty dollars ($50.00) liability if you report the loss or theft of your Visa point of sale check card after two (2) business days of discovery that your card was lost or stolen. For other assertions of unauthorized Visa point of sale transactions, there is a maximum of fifty dollars ($50.00) liability if you provide proper notification of

unauthorized Visa point of sale check card transactions. We may require you to provide a written statement regarding claims of unauthorized Visa point of sale check card transactions.

In addition to the limitations set forth above, the following limitations may be applicable to your account(s).

YOUR LIABILITY FOR UNAUTHORIZED TRANSFERS AND DISCLOSURE OF ADVISABILITY OF PROMPT REPORTING

Tell us AT ONCE if you believe your Card or PIN has been lost or stolen. Telephoning us is the best way of keeping your losses down. You could lose all the money in your account (plus your maximum line of credit in your Overdraft Protection account, if applicable). If you tell us within two (2) business days after you learn of the loss or theft, you can lose no more than $50.00 if someone used your Card or PIN without your permission. If you do not tell us within two (2) business days after you learn of the loss or theft of your Card or PIN, and we can prove that we could have stopped someone from using your Card or PIN without your permission if you had told us, you could lose as much as $500.00.

Also, if your statement shows transfers that you did not make, tell us AT ONCE. If you do not tell us within sixty (60) days after the statement was mailed to you, you may not get back any money you lost after the sixty (60) days if we can prove that we could have stopped someone from taking the money if you had told us in time. If a good reason (such as a long trip or a hospital stay) keeps you from telling us, we will extend the time periods.

11. **TELEPHONE NUMBER AND ADDRESS TO BE NOTIFIED IN CASE OF UNAUTHORIZED TRANSFERS**

If you believe your First Citizens Issued Card or PIN has been lost or stolen or that someone has transferred or may transfer money from your account without your permission, call us at 1-888-612-4444 or write us at:

First Citizens
Customer Contact Center
Mail Code 994017
P. O. Box 29
Columbia, SC 29202

12. **CHARGES FOR TRANSFERS OR RIGHT TO MAKE TRANSFERS**

Charges for Electronic Fund Transfers and related services are itemized in the Fee Schedule/Interest Disclosures brochure given/sent to you previously, with this agreement or as amended from time to time. We reserve the right to change our schedule of service

charges from time to time, but prior notice of any increase will be given to you.

13. CHANGE IN TERMS
Bank may amend, modify or terminate this Agreement and Disclosure at any time after notifying you in writing as required by law prior to the effective date of any modifications at the last address you furnished in writing.

14. LIMITATIONS ON DOLLAR AMOUNTS OF TRANSFERS
A) ATM withdrawals may be made up to a total of $400.00 per calendar day. Some deposit account plans may have a $500.00 limit.
B) Purchases may be made up to $1,000 or the amount available in your account, per calendar day, when you use your PIN to complete purchase.
C) Purchases not requiring a PIN, may be made up to your daily limit, which is $2,500 or your available balance, whichever is less.

First Citizens Bank

BUSINESSSIGNATURECARD

083045789101 Acct Type Business Checking I 06/24/2003

Branch 101 Opened by LAURA CRAPS ✓ New ____ Amended ____ Temp

EDWARD G MCDONNELL, PC TIN: 200043908

Amended By: _____

EXHIBIT C

Account Ownership Designation:

Corporation

DOCUMENTATION OBTAINED: ___Corp. Resolution ___Unincorp. Resolution ___Partnership Agreement ___Other _____

FIRST-CITIZENS BANK AND TRUST COMPANY OF SOUTH CAROLINA

[The relationship between the Bank and account holder(s) remain(s) the same regardless of (possible) conversions of this account.]

The undersigned:

(1) acknowledge that at least one authorized signer has received at least one copy of each of the following documents: Business Deposit Accounts Fee Schedule/Interest Disclosures brochure; Rules and Regulations for Checking, Savings, MMDA Accounts/Funds Availability/Direct Deposit, Cardholder Agreement and Electronic Fund Transfer Disclosures brochure.

(2) agree to the provisions set forth in the above documents.

(3) certify that the "Account Ownership Designation" indicated above is correct.

(4) certify that the purpose of this account is for business use and is not for consumer purposes.

(5) CERTIFY, UNDER PENALTIES OF PERJURY, THAT: (A) THE TAXPAYER IDENTIFICATION NUMBER SHOWN ABOVE IS CORRECT; AND (B) THE ACCOUNT IS NOT SUBJECT TO BACKUP WITHHOLDING BECAUSE (1) THE ENTITY IS EXEMPT FROM BACKUP WITHHOLDING, OR (2) THE ENTITY HAS NOT BEEN NOTIFIED BY THE INTERNAL REVENUE SERVICE (IRS) THAT IT IS SUBJECT TO BACKUP WITHHOLDING AS A RESULT OF FAILURE TO REPORT ALL INTEREST OR DIVIDENDS, OR (3) THE IRS HAS NOTIFIED THE ENTITY THAT IT IS NO LONGER SUBJECT TO BACKUP WITHHOLDING. (NOTE: ITEM (B) MUST BE CROSSED OUT IF THE ENTITY HAS BEEN NOTIFIED BY THE IRS THAT IT IS CURRENTLY SUBJECT TO BACKUP WITHHOLDING BECAUSE OF UNDER-REPORTING INTEREST OR DIVIDENDS ON ITS TAX RETURN.); AND (C) THE ENTITY IS A U.S. ENTITY.

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE YOUR CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING AS CONTAINED IN ITEM (5).

Authorized Signatures:

EDWARD G MCDONNELL Edward G McDonnell

Title _____

TRACY L DONNELLY Tracy L. Donnelly

Title _____

Title _____

Title _____

MISC-011 (Rev. 2/01)

First Citizens Bank

BUSINESSSIGNATURECARD

891001421901 Acct Type IOLTA Business Interest Ckg 07/17/2003

Branch 101 Opened by LESLIE PITTS ✓ New ____ Amended ____ Temp

EDWARD G MCDONNELL, PC IOLTA TIN: 999999999

Amended By: _____

Account Ownership Designation:

IOLTA

DOCUMENTATION OBTAINED: ___Corp. Resolution ___Unincorp. Resolution ___Partnership Agreement ___Other _____

FIRST-CITIZENS BANK AND TRUST COMPANY OF SOUTH CAROLINA

[The relationship between the Bank and account holder(s) remain(s) the same regardless of (possible) conversions of this account.]

The undersigned:

(1) acknowledge that at least one authorized signer has received at least one copy of each of the following documents: Business Deposit Accounts Fee Schedule/Interest Disclosures brochure; Rules and Regulations for Checking, Savings, MMDA Accounts/Funds Availability/Direct Deposit, Cardholder Agreement and Electronic Fund Transfer Disclosures brochure.

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THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE YOUR CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING AS CONTAINED IN ITEM (5).

Authorized Signatures:

EDWARD G MCDONNELL, PC _____

Title owner

_____

Title _____

_____

Title _____

_____

Title _____

MISC-011 (Rev. 2/01)

First Citizens Bank

BUSINESS SIGNATURE CARD

083045792501 Acct Type Business Checking I 06/24/2003

Branch 101 Opened by LAURA CRAPS _____New _____Amended _____Temp

BOOMERANG TITLE, INC TIN: 200033630

Amended By: _____

Account Ownership Designation:

Corporation

DOCUMENTATION OBTAINED: ___Corp. Resolution ___Unincorp. Resolution ___Partnership Agreement ___Other _____

FIRST-CITIZENS BANK AND TRUST COMPANY OF SOUTH CAROLINA

[The relationship between the Bank and account holder(s) remain(s) the same regardless of (possible) conversions of this account.]

The undersigned:

(1) acknowledge that at least one authorized signer has received at least one copy of each of the following documents: Business Deposit Accounts Fee Schedule/Interest Disclosures brochure; Rules and Regulations for Checking, Savings, MMDA Accounts/Funds Availability/Direct Deposit, Cardholder Agreement and Electronic Fund Transfer Disclosures brochure.

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(5) CERTIFY, UNDER PENALTIES OF PERJURY, THAT: (A) THE TAXPAYER IDENTIFICATION NUMBER SHOWN ABOVE IS CORRECT; AND (B) THE ACCOUNT IS NOT SUBJECT TO BACKUP WITHHOLDING BECAUSE (1) THE ENTITY IS EXEMPT FROM BACKUP WITHHOLDING, OR (2) THE ENTITY HAS NOT BEEN NOTIFIED BY THE INTERNAL REVENUE SERVICE (IRS) THAT IT IS SUBJECT TO BACKUP WITHHOLDING AS A RESULT OF FAILURE TO REPORT ALL INTEREST OR DIVIDENDS, OR (3) THE IRS HAS NOTIFIED THE ENTITY THAT IT IS NO LONGER SUBJECT TO BACKUP WITHHOLDING. (NOTE: ITEM (B) MUST BE CROSSED OUT IF THE ENTITY HAS BEEN NOTIFIED BY THE IRS THAT IT IS CURRENTLY SUBJECT TO BACKUP WITHHOLDING BECAUSE OF UNDER-REPORTING INTEREST OR DIVIDENDS ON ITS TAX RETURN.); AND (C) THE ENTITY IS A U.S. ENTITY.

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE YOUR CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING AS CONTAINED IN ITEM (5).

Authorized Signatures:

TRACY L DONNELLY Tracy L Donnelly Title _____

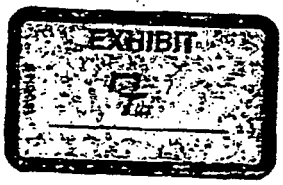
EDWARD G MCDONNELL Edward G McDonnell Title _____

Title _____

Title _____

MISC-011 (Rev. 2/01)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	)	CIVIL ACTION NUMBER: 07-CP-40-5252
Plaintiffs,	)	**PLAINTIFFS' ANSWERS TO DEFENDANT'S FIRST INTERROGATORIES**
vs.	)	
First Citizens Bank and Trust Company, Inc.,	)	
Defendant.	)	



TO: WESLEY D. FEW AND JOHN T. LAY, ESQUIRE, COUNSEL TO DEFENDANT:

Pursuant to Rule 33 of the South Carolina Rule of Civil Procedure, Plaintiffs answer the Interrogatories propounded by Defendant as follows:

PRELIMINARY RESPONSE

Plaintiffs have not fully completed its investigation of the facts relating to this case, have not completed discovery, and have not completed its preparation for trial. All of the responses contained herein are based only upon such information and documents as are presently available to and specifically known to Plaintiffs.

It is anticipated that further discovery, independent investigation, and legal research and analyses will supply additional facts and add new meaning to known facts, as well as establish new factual conclusions and legal contentions, all of which may lead to additions to, changes in and variations from the responses herein set forth.

The following responses are given without prejudice to Plaintiffs' right to produce evidence and subsequently discovered documents. Plaintiffs accordingly reserve the right to revise any and all responses herein as additional facts are ascertained and other factual and legal analyses are completed. The responses contained herein are made in a good faith effort to supply as much information and as much specification as is presently known, but should in no way be to the prejudice of Plaintiffs in relation to further discovery research or analyses.

In the interest of cooperation in the discovery process, Plaintiffs will voluntarily provide information as reasonably appropriate and will specifically or by reference to responses given by Plaintiffs object where appropriate to discovery requests that are outside the scope of reasonable and permissible discovery under the applicable rules.

1. Give the names and addresses of persons known to Plaintiffs or counsel to be witnesses concerning the facts of this case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

a) **Edward G. McDonnell**
McDonnell and Associates, P.A.
P.O. Box 12245
Columbia, SC 29211

Mr. McDonnell is expected to testify regarding the facts and circumstances regarding the allegations stated in the Complaint. Plaintiff is in possession of his written statement.

b) **Tracy McDonnell**

Ms. McDonnell is expected to testify regarding the facts and circumstances regarding the allegations stated in the Complaint. No known written or recorded statement of the witness at this time.

c) **Harry Heizer**
P.O. Box 3928
Irmo, SC 29063

Mr. Heizer is expected to testify regarding the facts and circumstances regarding the allegations stated in the Complaint. No known written or recorded statement of the witness at this time.

d) Jeremy Woods
McDonnell and Associates, P.A.
P.O. Box 12245
Columbia, SC 29211

Mr. Woods is expected to testify regarding the facts and circumstances regarding the allegations stated in the Complaint. No known written or recorded statement of the witness at this time.

e) Witnesses Identified by Defendant in its Discovery Responses.

Plaintiffs expressly reserve the right to supplement this response.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of Plaintiffs that relate to the claims or defenses in the case.

ANSWER: Plaintiffs object to this request to the extent that it seeks documents specifically protected by the attorney/client privilege, attorney work-product doctrine, the self-critical analysis privilege; or documents prepared in anticipation of litigation. Notwithstanding these objections, Plaintiffs are in possession of the following:

a) Forged checks from Edward G. McDonnell, PC Operating Account, Check Numbers: 1354, 1369, 1411, 1439, 1443, 1453, 1460, 1481, 1506, 1517, 1531, 1548, 1572, 1610, 1654, 1684, 1687, 1702, 1712, 1727, 1729, 1739, 1740, 1741, 1742, 1826, 1850, 1870, 1874, 1881, 1893, 1902, 1909, 1910, 1915, 1919, 1941, 1958, 1959, 1969, 1977, 1985, 1986, 1993, 2004, 2008, 2025, 2040, 2042, 2062, 2063, 2065, 2073, 2086, 2088, 2092, 2120, 2130, 2133, 2148, 2151, 2156, 2157, 2189, 2203, 2214, 2216, 2244, 2261, 2271, 2272, 2233, 2343, 2360, 2384, 2423, and 2424;
(Bates Numbers: Plaintiff0001 – Plaintiff0077)

b) Forged checks from Boomerang Title, Inc., Check Numbers: 1091, 1092, 1093, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1104, 1105, 1106, and 1108;
(Bates Numbers: Plaintiff0078 – Plaintiff0092)

c) Forged checks from IOLTA Account, Check Numbers: 6259 and 6281;
(Bates Numbers: Plaintiff0093 – Plaintiff0094)

d) First Citizens Business Signature Card;
(Bates Number: Plaintiff0095)

e) Filed Summons and Complaint and Lis Pendens re: McDonnell v. Hoorman, Case No. 06-CP-40-522;
(Bates Numbers: Plaintiff0110 – Plaintiff0118)

f) Answer of Defendant Anna Hoorman re: McDonnell v. Hoorman, Case No. 06-CP-40-522;
(Bates Numbers: Plaintiff0119 – Plaintiff0120)

g) Police Report dated December 24, 2005;
(Bates Numbers: Plaintiff0121 – Plaintiff0123)

h) Written statement of Edward McDonnell;
(Bates Number: Plaintiff0124)

i) Anna Hoorman Personnel File;
(Bates Numbers: Plaintiff0125 – Plaintiff0129)

j) Correspondence from J. Ed Holler to First Citizens Bank dated January 3, 2006;
(Bates Numbers: Plaintiff0130 – Plaintiff0131)

k) Signature Cards provided by Defendant on January 3, 2007; and
(Bates Numbers: Defendant0001 – Defendant0002)

l) Signature Card provided by Defendant on January 4, 2007.
(Bates Number: Defendant0003)

Plaintiffs reserve the right to supplement this response.

3. Set forth the terms of any resolution or agreement between any Plaintiff and the alleged forger of the checks put at issue in this action.

ANSWER: There has been no resolution or agreement between the Plaintiffs and the person who forged the signatures on the checks set forth in the complaint. This case is still pending.

4. Set forth an itemized statement of all damages, including but not limited to those damages referenced in Paragraphs 9, 10, 14, 15, 19 and 20 of your Amended Complaint, exclusive of pain and suffering, claimed to have been sustained by the Plaintiffs.

ANSWER: The damages are the face amount of the checks plus prejudgment interest from the day each check was paid against the account.

5. List the names and addresses of any expert witnesses whom the Plaintiffs propose to use as a witness at the trial of this.

ANSWER: Plaintiffs have not retained an expert at this time but reserve the right to do so and will supplement when an expert is retained.

6. For each person known to Plaintiffs or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Defendant of the important facts

known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory No. 1.

7. Identify and list all documents (hereinafter, to include tangible writings of any type, including those contained on electronic media, such as email) which you contend support your claims as set forth in your Amended Complaint.

ANSWER: See Answer to Interrogatory No. 2.

8. To the extent you deny in any respect First Citizens' Request for Admission No. 7, identify every document you contend shows a report made to First Citizens related to any account or check put at issue in your Amended Complaint.

ANSWER: Plaintiffs through their attorney, J. Ed Holler, notified the Defendant by letter dated January 3, 2006 of checks improperly paid against the accounts.

9. To the extent you deny in any respect First Citizens' Request for Admission No. 8, identify the licensed attorney that reviewed or reconciled any such statement before December 1, 2005.

ANSWER: Ed McDonnell reviewed and reconciled bank statements before December 1, 2005.

10. Identify the person responsible for supervising Anna Hoorman while she was an employee of any Plaintiff.

ANSWER: Ed McDonnell.

11. Identify all persons that were authorized to sign any check you allege was forged or unauthorized in your Amended Complaint.

ANSWER: Only the persons whose names are on the signature cards for each account were authorized to sign checks:

a. Edward G. McDonnell;

b. Harry Heizer; and
c. Jeremy C. Woods.

12. Identify the job responsibilities of Anna Hoorman as an employee of any Plaintiff.

ANSWER: Office Manager/Closing Paralegal.

13. Set forth in detail the accounting system used by Plaintiffs to reconcile the accounts identified in your Amended Complaint from January 2005 through December 2005.

ANSWER: Soft Pro.

14. Set forth in detail the accounting system used by Plaintiffs to reconcile the accounts identified in your Amended Complaint from January 2006 through December 2006.

ANSWER: Soft Pro.

15. **Identify all persons you alleged forged any checks put at issue by you in your Amended Complaint.**

ANSWER: Anna Hoorman.

16. Set forth and identify the relationship between Plaintiffs and Anna M. Hoorman, including but not limited to identifying all documents related to any relationship between Plaintiffs and Anna M. Hoorman.

ANSWER: Employer / Employee. She was also a temp to hire through October 2004.

17. Explain how the alleged forger came into possession of the checks that are the subject matter of this lawsuit.

ANSWER: Ms. Hoorman came into possession of the checks as part of her duties as a n office manager/closing paralegal.

18. Other than the alleged forger, identify the person at Plaintiffs' office most knowledgeable of the alleged forgery of checks.

ANSWER: Edward G. McDonnell.

19. State when the practice of allowing your employees or agents to handle and transmit disbursement checks was first employed by you.

ANSWER: **It has always been the practice to allow the office manager or closing paralegals to handle checks relative to their duties. However, they have never had signature authority.**

20. State when and how you first became aware that any of the checks identified in your Amended Complaint were not negotiated according to your instructions, and if this information was first provided to you by someone not employed by a Plaintiff, identify who provided this in formation and the representative(s) of the Plaintiffs that first received it.

ANSWER: **We were notified by Jim Holcombe of First Citizens.**

21. List every check or instrument that you alleged contains a forgery. In responding to this Interrogatory, identify the date of the instrument, the institution on which the instrument was drawn, the payee, and the amount of the check.

ANSWER: **See documents attached in response to Defendant's Request to Produce No. 1.**

22. Set forth in detail any facts which you allege demonstrate that the Defendant failed to exercise reasonable care when posting and cashing checks.

ANSWER: **The Plaintiffs are unable to respond to this Interrogatory until Defendant responds to discovery requests sent to Defendant.**

23. With respect to your contention that the Defendant breached any agreement with you as set forth in Paragraphs 8, 13 and 18 of your Amended Complaint, provide all facts in support of this contention, including identifying all documents or other in formation in support of such contention.

ANSWER: **Under South Carolina law, a bank which maintains an account in the name of its customer into which funds have been deposited is charged with the responsibility to pay only checks which are properly payable. Checks which contain forged or unauthorized signatures of the maker are not properly payable.**

24. Set forth in detail your method of maintaining the following records for each of the accounts put at issue in your Amended Complaint, including identifying the place that the physical records are kept, as well as identifying any electronic software utilized in preparing or storing these records: receipt and disbursement journals, ledger records for all trust accounts, copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf, copies of records showing disbursements on behalf of clients, checkbook registers or check stubs, bank statements, records of deposit, pre-numbered canceled checks or their equivalent and copies of monthly reconciliations of the lawyer's trust accounts with the statements received from the financial institutions.

ANSWER: Soft Pro.

25. Identify all documents or information in support of your contention that any check put at issue in this action was "not properly payable" as alleged in Paragraphs 8, 13 and 18 of your Amended Complaint.

ANSWER: **The checks set forth in the Complaint and in response to these interrogatories are not properly payable because they contain forged or unauthorized signatures.**

26. Identify all documents that you allege set forth any duty owed to you by First Citizens.

ANSWER: **The duties owed by Defendant to Plaintiffs are set out in South Carolina law, more particularly, Title 36, more commonly known as the Uniform Commercial Code.**

27. Identify all documents that constitute the "agreement" you allege was breached, as set forth in Paragraphs 8, 13 and 18 of your Amended Complaint.

ANSWER: See Answer to Interrogatory No. 26.

28. Identify the person responsible for reviewing and reconciling the account statements for the accounts put at issue in your Amended Complaint in 2005.

ANSWER: **Ed McDonnell.**

29. Identify and explain any procedures, written or otherwise, including in emails or other instructions to employees, owners, representatives of Plaintiff, in place since January 1, 2004 to secure the checks put at issue in your Amended Complaint.

ANSWER: **Only attorneys are able to sign checks. Checks over $100,000 require a second signature. All wires require two independent verifications, an initial set up and then a second verification. Wires are only able to be completed through the wire system. All checks are kept behind locked doors. Each ledger is verified by an attorney and matched against the ledger sheet.**

30. State whether or not Anna Hoorman was supposed to have access to the checks put at issue in your Amended Complaint, alleged to have been forged or unauthorized.

ANSWER: **Ms Hoorman, as part of her duties as an office manager and closing paralegal had access to the checks but did not have signature authority.**

31. Identify any check drawn from or related to any Plaintiff, including specifically but not limited to the accounts put at issue in your Amended Complaint, that Anna Hoorman was ever authorized to sign in any capacity.

ANSWER: **Anna Hoorman was never authorized to sign any check set forth in the Complaint.**

32. Identify all bank or other financial institution deposit or similar accounts held by any Plaintiff since January 1, 2004.

ANSWER:

a. **Regions Bank: Trust Account, Operating Account, Boom Lawyers Title Account;**
b. **Ameris Bank: Boom Premium Account, Money Market Account;**
c. **NBSC: Trust Account, Operating Account, Boom Trust Account;**
d. **First Citizens: Trust Account, Operating Account;**
e. **Carolina First: Trust Account, Operating Account; and**

f. Congaree Bank: Money Market Account

Respectfully submitted,
COLLINS & LACY, P.C.

By: _____

L. HENRY MCKELLAR
hmckellar@collinsandlacy.com
LISA A. DELZOTTI
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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
March 19, 2008

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND) CA NO.: 2007-CP-40-6854

McDonnell and Associates, P.A., f/k/a McDonnell Law Firm, P.A., f/k/a Edward G. McDonnell, P.C., Edward G. McDonnell, and Boomerang Title, Inc.,

Plaintiffs,

vs.

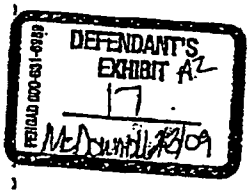
Carolina Legal Associates, Inc., and Liberty Mutual Insurance Company,

Defendants.

DEPOSITION OF

EDWARD G. MCDONNELL

MAY 5, 2008



Deposition on oral examination of Edward G. McDonnell, reported by Patricia G. Bachand, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure; said deposition taken at the law offices of Wilmot B. Irvin, 1533 Richland Street, Columbia, South Carolina, on Monday, the 5th day of May, 2008, scheduled for ten o'clock a.m. and commencing at the hour of ten o'clock a.m.

APPEARANCES:

Representing the Plaintiffs:

WILMOT B. IRVIN, ESQUIRE
Law Offices of Wilmot B. Irvin
1533 Richland Street
Columbia, South Carolina 29201

Representing the Defendants:

WILBUR E. JOHNSON, ESQUIRE
Young, Clement, Rivers, LLP
28 Broad Street
Post Office box 993
Charleston, South Carolina 29402

Also Present:

Rebecca Fulmer



CONTENTS

[Deposition of Edward G. McDonnell]

	PAGE
Exhibit Index	3
Stipulations	5
Direct Examination by Mr. Johnson	5
Certificate of Reporter	105
Verification	106
Errata Sheet	107

* * * * *

EXHIBIT INDEX

EXHIBITS:	IDENTIFIED AT PAGE:
(Copies of exhibits attached to transcript.)	
Defendant's Exhibit No. 1 (6 pages) - Carolina Legal Associates Website Information	19
Defendant's Exhibit No. 2 (2 pages) - CV of Joyce Bunburr	32
Defendant's Exhibit No. 3 (1 page) - CV of Anna Marie Hoormann	33
Defendant's Exhibit No. 4 (1 page) - Carolina Legal Associates Work Order	40
Defendant's Exhibit No. 5 (11 pages) - Carolina Legal Associates Timesheets for Anna Marie Hoormann	53
Defendant's Exhibit No. 6 (22 pages) - Copies of checks, invoices	54
Defendant's Exhibit No. 7 (1 page) - Copy of Invoice dated 9/8/04	56

Defendant's Exhibit No. 8 (1 page) - Copy of Cancelled check for $200 dated 9/28/2004	57
Defendant's Exhibit No. 9 (4 pages) - South Carolina Department of Health and Human Services form for Anna Marie Hoormann	59
Defendant's Exhibit No. 10 (1 page) - Handwritten Affidavit by Anna Marie Hoormann dated December 28, 2005	80
Defendant's Exhibit No. 11 (1 page) - Edward G. McDonnell, P.C. Final Report	83
Defendant's Exhibit No. 12 (11 pages) - Copies of cancelled checks	85
Defendant's Exhibit No. 13 (1 page) - Operating Account Total - Total Checks Written for Month	86

* * * * *

Court Reporter's note:

-- indicates interruption; incomplete phrases, unfinished sentences; indicates trailing off

This deposition is taken in accordance with the South Carolina Rules of Civil Procedure.

It is agreed and stipulated by the deponent and respective counsel that the reading and signing of the deposition by the deponent is expressly not waived.

WHEREUPON:

EDWARD G. MCDONNELL, being duly sworn and cautioned to speak the truth, the whole truth and nothing but the truth, testifies as follows:

DIRECT EXAMINATION:

BY MR. JOHNSON:

Q. Good morning, Mr. McDonnell.

A. Good morning.

Q. As you know, my name is Wilbur Johnson. I'm with Young, Clement, Rivers in Charleston. And you're an attorney, so I can dispense, I presume, with the normal introductions or remarks that one might make to a witness --

A. Okay.

Q. -- with respect to a deposition. I suspect you've been through depositions previously in terms of either having taken them yourself or having sat with a client who was being deposed, so I don't think I need to tell you about why I'm here or what this is all about and why I need to ask you some questions about the lawsuit that

you're involved in.

MR. IRVIN: We're fine with that.

MR. JOHNSON: Okay.

MR. IRVIN: But I should say, and maybe the witness can tell you -- or you can ask him -- he's a real estate lawyer. He's not -- he's not all that experienced in terms of depositions.

MR. JOHNSON: Okay.

MR. IRVIN: But I'm fine with your dispensing with --

MR. JOHNSON: Well, that's helpful.

MR. IRVIN: -- the rules and stuff.

MR. JOHNSON: That's helpful.

BY MR. JOHNSON:

Q. I didn't know whether you did litigation or not. But just very briefly: In any civil action, one side gets to ask questions of the witnesses and the parties from the other side, and that process is called a deposition.

And so this is my opportunity on behalf of the Defendants, in the lawsuit you have brought, to ask you some questions about the facts of your claim, so that -- so that my clients can be fully aware of it, and so it might help us to be able to move this matter along toward some sort of resolution.

A. Okay.

Q. So I will -- I will try to ask you some questions, and I'll try to ask them in a way that they're clear to you. You know, the deposition is a process of just trying to find out information.

It is not a process where, you know, I need to try to trick you or mislead you or confuse you. My job and my role is to simply try to find out what facts make up the basis of your claim. So I will try to ask you questions, and if for some reason I ask you a question that's not particularly clear to you, let me know.

A. Okay.

Q. And I'll be glad to rephrase it. I don't know how long we'll be -- I don't typically tend to take long depositions, but if for any reason during my questioning you have a need for a break, or the men's room or to call your office, or whatever it is you need to do, don't hesitate to let me know.

A. Okay.

Q. And I'll be glad to -- I'll be glad to try to take a break so that we can -- so we can accommodate you. Are there any questions you need to ask of me before we begin?

A. Not at this time, no.

Q. Okay. Well, let me just ask you to state your -- state your full name just for the court reporter's

-- for her benefit.

A. My name is Edward Gerard McDonnell.

Q. And you are a lawyer, right?

A. I am, yes.

Q. And what is the nature of your practice, presently?

A. I'm primarily residential real estate.

Q. And let me just go back as far as your undergraduate education. Where did you get your -- do your undergraduate work?

A. I went to undergraduate at the College of Charleston. I graduated with a joint degree in philosophy and corporate communications, with a minor in business administration.

Q. How old are you now?

A. I'm 33.

Q. What year did you graduate from the College of Charleston?

A. I graduated from the College of Charleston in 1996.

Q. And did you go to law school directly after college?

A. During that time, I took one year off and worked as a assistant at Warren Sinkler, and also attended some graduate school at the Medical University of South

Carolina. No, let me correct that. At that time I took some graduate work -- course work at the College of Charleston in their masters program.

Q. Did you obtain any other degree after college and but before law school?

A. No. It was just some graduate work, trying to better my chances of getting into law school.

Q. Okay. And what discipline was that graduate work in?

A. What was it? Behavior -- Organization of Behavior.

Q. Okay. And then you began law school in what year?

A. 1997. The fall of 1997.

Q. At USC?

A. At the University of South Carolina, yes.

Q. Are you present -- are you married now?

A. I am.

Q. And what's your spouse's name?

A. Tracy Donnelly.

Q. Is she also a lawsuit?

A. She's not. She has her degree in -- she has a IMBA from the MIBS program over at USC.

Q. Is she presently employed?

A. She is.

Q. Where does --

A. She works in the firm, handling HR and payroll.

Q. In your law firm?

A. Correct.

Q. Okay. All right. And how long has she worked with you?

A. Since December -- well, no. January of 2006.

Q. Okay. Do you have children?

A. We do. We have a 3 1/2 year old named Finley.

Q. And so you began USC law in 1997?

A. Yes.

Q. And finished within the three years?

A. I did a joint degree program with the MIBS program.

Q. What is the MIBS program? I'm not --

A. Masters in International Business. It's the IMBA program they have over at USC.

Q. Okay.

A. And I did it in a -- in a, I guess you could say, non-traditional way, in that I didn't do it four years. I did it in what, four and a half. Just because I got it -- I found out about the program late, but got into it. So I graduated -- I did graduate from law school with my class but hadn't finished up the business program.

Q. Okay. And of course you got your JD degree.

A. Uh-huh.

Q. What year was that?

A. The JD degree?

Q. Yeah.

A. It was 2000.

Q. Now, once you -- once you got your JD, did you go to work for a firm, or in some other setting?

A. I went -- I was still finishing up the MIBS degree, so I went and -- I had one semester of MIBS, then I took the BAR and had a couple electives. I went overseas, worked for Ingersoll Rand in the mergers and acquisitions department. Came back from there and I immediately took a job under Charlie Condon at the Attorney General's office, working in capital crimes.

Q. Okay. When did you pass the BAR?

A. In 2001.

Q. So your first legal job, or full-time legal job, was in the AG's office?

A. I guess so. Yes, sir.

Q. And, again, what section were you in?

A. Capital crimes under Tom Zelenka.

Q. And what generally did you do in the capital crimes unit?

A. I was there in the appellate division, writing briefs.

Q. Okay. Criminal appeals? Or PCRs? Or a combination?

A. Criminal appeals.

Q. And Tom was your supervisor?

A. That's correct.

Q. How long did you work in the division?

A. I was only there for, I believe it was six months. I was originally interviewed for a job in regular prosecution. I accepted the job informally during the second interview, and then the final interview they indicated that it would now be in capital crimes.

That's -- after being there a few months, I knew that, that wasn't my life. It was apparent to me, by looking around at the people that really enjoyed doing it, that was their career job, and I knew it wasn't mine.

You know, after that, I went and began doing real estate.

Q. So you saw Ed Salter and Rapoport and those guys --

(Talking over one another.)

A. Yes.

Q. -- after you --

Page 13

A. I know. His office was right across from mine.

Q. Yeah. Now, when you interviewed -- I guess you'd call it a regular prosecution -- who did you interview with?

A. John McIntosh.

Q. John McIntosh.

A. Uh-huh.

Q. Okay. But you were ultimately hired in the criminal appeals section.

A. Correct.

Q. Now, when you -- I assume at that point when you decided it wasn't for you, that you left the AG's office altogether?

A. Uh-huh. That's correct.

Q. Okay. All right. Now, where did you go after that?

A. My wife graduated business school shortly after that time, and she was going to travel. And I realized that, you know, I thought we might get married.

So I left that job there. I had a job promised to me working in the real estate field when I got back. And we backpacked through South America for about three, four months.

Q. What year was this, again?

Page 14

A. That would have been 2002.

Q. So, 2002 you and your wife backpacked --

A. Yeah.

Q. -- through South America?

A. Uh-huh.

Q. And you -- did you return after you got back --

A. We came back -- yeah, we came back and I began working in Hilton Head just for a brief time for a real estate attorney named Jack Short, just handling closings on his behalf.

And I moved back here and took a job -- actually, I took a job with an attorney named Barry Heizer, kind of like his overflow in the general practice; but also handling some real estate.

Q. Okay. Let me ask you one thing. Can I call you Ed --

A. Yeah.

Q. -- if that's okay? She's trying to, you know, take down our testimony --

A. And I talk fast.

Q. -- your testimony. And sometimes lawyers tend to anticipate questions -- even witnesses do. So it would be easier for her, and a little bit for me as well, if you'd let me get my questions out fully before you start

Page 15

to answer. It just makes the record a whole lot clearer from time to time.

A. I understand.

Q. So if you can wait until I get my question out, then you can begin to answer. It makes it a little bit easier on everyone.

So you went to work for Barry Heizer for a period of time?

A. Correct.

Q. Now, what did you do when you went to work with Barry Heizer's office? Generally speaking.

A. He had a general practice. I was kind of the newbie associate, where pretty much anything he asked. I worked on a draw basis, and trying to bring clients in. And did a little bit of everything.

Q. And how long did you stay with Barry Heizer?

A. That was about a six-month period. And then I left there for a job opportunity.

Q. And what was that job opportunity?

A. I was -- I took a job working with the Dallis Law Firm as their managing attorney in the Columbia office.

Q. Now, what year was this?

A. That was in November of 2002. November, maybe October, of 2002. I'm not sure.

Page 16

Q. Okay. And what sort of practice did the Dallis Law Firm engage in?

A. A hundred percent residential real estate.

Q. Okay. Are they a Columbia-based law firm?

A. They're actually based out of Charleston on -- I think it's Sam Rittenberg -- not Sam Rittenberg. Ashley River Road. One of those two, right down there.

And they have their office in Charleston and Columbia. And they have a -- since that time, I think they opened an office in Summerville.

Q. Okay. And what was the nature of your work with the Dallis Law Firm?

A. Handling closings in the office everyday.

Q. And how long did you remain with that law firm?

A. Through June of that year. I went on vacation and came back, and Mr. Dallis had decided to hire someone else.

Q. Did he give you a reason why he made that decision?

A. He felt -- I think he said he felt like I was progressing very fast. I don't remember the reason exactly, except that I -- I don't know that -- I don't remember.

Q. But is it fair to characterize your

separation from the Dallis Law Firm as involuntary?
A. Yes.
Q. Okay. Now, when you left the Dallis Law Firm, what was your next legal position?
A. I went ahead and set myself up as my own law firm. I moved back in the same space which I previously shared with Harry, except I was no longer collecting a draw or anything from him; I was just working on my own.
Q. So your first association with Harry Heizer, you were a employee of that firm; is that -- or Harry's firm, is that correct?
A. Yes.
Q. And now the second association, you-all just were space-sharing.
A. Yes.
Q. And you had your own law firm.
A. Yes.
Q. Okay. And what sort of work did you do --
A. Residential real estate.
Q. Okay. Closings, and that sort of thing?
A. Closings, yes.
Q. And how long did you remain in that practice?
A. I'm still -- I'm still continuing today. I've moved -- moved my office, but I'm -- Harry and I

continued to share office space till March of 2005.
Q. Okay. So you continued that practice from that time to the present?
A. Correct.
Q. Just in a different location.
A. Correct.
Q. Is it my understanding that at one point you had occasion to seek the services of Carolina Legal Associates on your own behalf?
A. That's correct.
Q. Now, when did that occur?
A. I'm not positive. I can't remember the dated. I just -- when I found out my wife was pregnant. I think we-all go through that, you know, worries about finances. So I went ahead and I sent -- submitted a resume.
Q. Did you -- was it before you went to work for Harry Heizer, or after? Can you put any sort of a time frame on it?
A. I believe it was the second time when I was on my own, looking for additional work to fill that time.
Q. So it was a -- it was a time when you were sharing space with Harry?
A. Yeah.
Q. Now, how did you come to know about Carolina

Legal Associates at that time?
A. Advertising, I believe. I know that we had -- I know at Harry's office we had several promotional items and stuff like that.
Q. Okay. Okay. And so is it your testimony, that you saw some promotional piece or document that involved Carolina Legal Associates?
A. I don't -- I don't remember exactly.
Q. Okay. All right. Have you ever gone on Carolina Legal Associates' web site to take a look at it --
A. Yes.
Q. -- the site?
A. Yes.
Q. Did you ever print anything off of the web site?
A. I don't remember.
Q. Okay. Let me just should show you a document -- I'm going to have the court reporter mark it -- just to see if you recognize it, or have ever seen it before.
(Defendant's Exhibit No. 1 was marked for identification purposes (6 pages) - Carolina Legal Associates Website Information)
BY MR. JOHNSON:
Q. Ed, I'm showing you a document which I would

represent to you comes off of Carolina Legal Associates' web site. I just want to ask you: Have you ever seen this document before?
A. It looks familiar.
Q. Is that something you think you might have seen on the web site?
A. More than likely, yeah.
Q. All right. So once you -- once you visited the web site, or saw the promotional document, however it was that you -- that you came -- became aware of the agency, how did you go about contacting the agency? And I'm speaking of Carolina Legal Associates.
A. I don't remember. I probably faxed them or e-mailed them a resume, or contacted them.
Q. So the thought is that you may have faxed a resume, or --
A. Yeah.
Q. -- or sent it by e-mail attachment, or something like that?
A. Uh-huh.
Q. Do you remember speaking with anyone by phone?
A. When I went to go interview with them, I believe I spoke with Marsha Silver; I'm not sure.
Q. So you recall having an interview?

Page 21

A. Uh-huh.
Q. And you think it was probably with Marsha?
A. I believe so.
Q. Okay. Did she call you to set up the interview, or did someone else?
A. Somebody else. An assistant.
Q. Okay. All right. And I gather the interview occurred at the offices of Carolina Legal Associates?
A. Right.
Q. And I assume from your testimony, that you met with Marsha Silver when you went in for the interview?
A. I'm sorry. Can you repeat the question?
Q. I'm sorry. Did you meet with Marsha Silver when you went in for the interview?
A. I believe so.
Q. Was anyone else present during that interview?
A. I don't think so.
Q. How long did the interview last, to the best of your recollection?
A. I don't remember the actual duration. I don't think it was a terribly short or long interview. I remember it went well, and there was some follow-up from that.

Page 22

Q. Well, what did you-all talk about? What did you and Marsha talk about?
A. Job availability for -- it was, at the time, I think, a document review program with -- I think it's Nexcra Litigation.
Q. Now, if you recall, how did Marsha describe the agency services? What did she say she or the agency could do for you?
A. Help me find, you know, part-time, fill-in work.
Q. And, obviously, you were looking for work in the legal field.
A. Correct.
Q. Were you told what responsibilities that you might have, or what you needed to do, to take advantage of their services?
A. I don't remember.
Q. Did you have to fill out any kind of a form or anything of that nature?
A. I don't -- I really don't remember.
Q. Okay. Did it -- Marsha make any promises or representations to you, that you can recall, about her ability or the agency's ability to find a position for you?
A. I do remember leaving there with her being pretty confident that she could place me somewhere. But

Page 23

upon follow-up -- her follow-up, decided not to go any further; the money wasn't right.
Q. So am I to understand that you were, at some point, actually offered a position through Carolina Legal Associates?
A. I don't believe we actually got to a position. I think we got into, like, what kind of pay rate were you looking for? And the cost benefit of -- you know, what I was giving up with my wife, who was home and pregnant.
Q. Okay. And do you recall what pay rate was told to you at the time, that you didn't think was appropriate?
A. I don't remember exactly.
Q. Did you -- at the time you were interviewing with Carolina Legal Associates, or seeking their services, did you contact or consult with any other staffing firm?
A. No.
Q. Have you ever used any other staffing firm other than -- for your own personal benefit -- other than Carolina Legal Associates?
A. No.
Q. To the best of your recollection, did Marsha provide you with any documents during that interview, or associated with that interview, that you still have in your

Page 24

possession?
A. No.
Q. And so I gather, again, that you never actually obtained a position through Carolina Legal Associates.
A. That's correct.
Q. And so presently, you have a -- you're engaged in a real estate law practice?
A. Correct.
Q. Do you have any other lawyers in the practice with you?
A. Yes.
Q. Who else practices with you?
A. I have Dawn Landenslager, out of Aiken. I have Jonathan Howell, out of Columbia; Jeremy Woods, out of Columbia; Bill Griffin, out of Columbia; Joe Hill, out of Greenville; Donny Brooks, out of Myrtle Beach; Dan Zickafoose, out of Mt. Pleasant; and Damian Murphy, out of Bluffton.
Q. Now, are all of these lawyers employees of your law firm?
A. Correct.
Q. And you have -- simply have various locations around the state?
A. Correct.

Q. So you have -- you have -- your practice has locations in Columbia, Charleston; is that correct?
A. Correct.
Q. Where else?
A. Bluffton.
Q. Bluffton.
A. Greenville. Rock Hill. Myrtle Beach. And Aiken.
Q. Aiken. And is it solely a real estate --
A. Yes.
Q. -- practice?
A. Yes. If I can clarify that. In all these offices, the only thing that is conducted is real estate. I have, on occasion, handled a divorce or something along those lines and -- you know, a very minuscule amount.
Q. But your primary focus is on real estate.
A. Correct.
Q. Is it principally residential real estate transactions?
A. Yes.
Q. Do you handle commercial transactions from time to time?
A. I've handled smaller commercial -- for friends and family kind of thing.
Q. What other lawyers are with you in the

Columbia office location?
A. Jeremy Woods, Bill Griffin, and Jonathan Howell.
Q. Now, I gather -- I'm reading from your complaint, your lawsuit papers, that sometime in or around June 2004, you consulted Carolina Legal Associates to try to find an employee for your law office; is that correct?
A. That's correct.
Q. And you were looking for someone for your Columbia location?
A. That's correct.
Q. Now, in June of 2004, what lawyers, besides yourself, was in the Columbia location -- or were in the Columbia location?
A. At that time it was just myself, and Jeremy was -- at that time, was working with me on a contract basis. And then I had -- there's another gentleman named Ian Deysach that worked -- his last name is D-e-y-s-a-c-h -- worked kind of on a contract basis.
Q. Did they have physical offices within your building?
A. No.
Q. So you were the only one who was physically located within your building.
A. Correct. As part of the rental agreement

with Harry, I got -- I had shared a receptionist and a shared paralegal.
Q. So where was the office -- what was the address of the office at the time?
A. 712 Calhoun Street. I don't remember if it was Suite B or C, one of the two.
Q. I understand. And you were in a space-sharing arrangement with Harry Heizer?
A. That's correct.
MR. IRVIN: Can we take just a --
MR. JOHNSON: Absolutely.
(Off the record.)
EXAMINATION RESUMED:
BY MR. JOHNSON:
Q. I think you -- I think you responded to my last question by indicating that you were in a space-sharing arrangement with Harry Heizer?
A. Uh-huh.
Q. Okay. And I think you testified a moment ago, that you and Harry shared employee -- shared support staff employees; is that correct?
A. That's correct.
Q. So I assume you contributed to --
A. That's correct.
Q. -- their pay and that sort of thing?

A. Yes, that's correct.
Q. Okay. How many of the support staff people -- or how many support people were there?
A. There was two at the time: Dawn --
Q. I'm sorry. Go ahead.
A. Dawn Murray and Shannon Nelson.
Q. Now, what position did Dawn hold?
A. Dawn was a -- the main paralegal/office manager for Harry. And then Shannon answered the phones.
Q. Now, did you hire Dawn -- when I say "hired," did you interview her and made a decision to hire her?
A. Dawn?
Q. Yes.
A. I had worked with her previously when I had shared space -- when I worked with Harry before, she was there previously. So I was -- had dealt with her -- met with her before -- I worked with her before. And I knew her working abilities.
Shannon did interview while we were there, and I did meet with her and sat in on that interview.
Q. Did you contribute to the decision to hire Shannon?
A. Yes.
Q. I gather from your testimony, that Dawn was

Page 29

already employed with Harry --
A. Yes.
Q. -- Heizer by the time you went to work with him.
A. Yes.
Q. But Shannon, you had some -- you made some contribution to the decision to hire her; is that right?
A. Yes.
Q. Okay. Do you recall whether or not you or Harry, or both of you, did any sort of background check on Shannon?
A. I don't believe so.
Q. Is Shannon still employed with you, by the way?
A. No, she's not.
Q. Now, at some point during your practice, you had occasion or reason to contact Carolina Legal Associates again to seek an employee for your practice; is that correct?
A. That's correct.
Q. That essentially is what this lawsuit's about.
A. That's correct.
Q. The aftermath of that.
A. That's correct.

Page 30

Q. Do you recall when you contacted Carolina Legal Associates?
A. As I mentioned, Dawn was the main paralegal, which with I had a working relationship with. She -- her time became -- it became a conflict of interest, because my real estate practice was getting busier. And Harry needed her for -- obviously for his practice.
We called -- as a result, we needed to replace Dawn in her capacity as a real estate legal assistant. And --
Q. Let me stop you for a moment. Did you -- did you need to replace her, or just hire somebody else to work along with her?
A. It was -- it was actually to -- the idea was to get somebody to replace her.
Q. Okay. So you were letting her go?
A. It wasn't a matter of me letting her go. She was just going to work for Harry full-time.
Q. I see. In other words, you wanted someone to work with you full-time, and Dawn was going to continue to work for Harry.
A. Right.
Q. Okay. All right. So what happened when you made a decision to contact Carolina Legal Associates?
A. We contacted Carolina Legal. They sent over a few people to interview.

Page 31

Q. Did you yourself contact Carolina Legal, or someone else on your behalf?
A. Dawn did.
Q. Dawn did.
A. Uh-huh.
Q. Okay. All right. Do you know who Dawn actually spoke with?
A. I don't know.
Q. Okay. So Dawn made the contact. What happened next?
A. They sent over some paperwork; we filled out the paperwork; I sent it back to Carolina Legal; and I conducted, I think, two interviews.
Q. When you say paperwork was sent over, do you recall precisely what kind of paperwork it was?
A. Just what kind of position you were looking to fill.
Q. I see. Did you have to fill something out?
A. I believe so.
Q. So in other words, is it fair to say that you let Carolina Legal Associates know what type of person you were looking for?
A. Yes.
Q. And on that basis you were sent resumes to review?
A. Yes.
Q. Is that correct?
A. Yes.
Q. And did you review the resumes yourself, or did Dawn do it?
A. We both did.
Q. I'm going to show you another document, if I might.

(Defendant's Exhibit No. 2 was marked for identification purposes (2 pages) - CV of Joyce Bushorr)

BY MR. JOHNSON:
Q. You have in your hand, Ed, I think what's probably Defendant's 2, which is a resume of a Joyce Bushorr -- if I'm pronouncing that correctly. Do you recall whether or not that's one of the resumes that you reviewed --
A. It is.
Q. -- at the time? And did you make the decision to not hire Ms. Bushorr?
A. That's correct.
Q. Did you make it alone, or did Dawn contribute to that decision?
A. I did speak it over with -- I mean, Harry

Page 33

and Dawn, because they would be in the same office with her and, obviously, I wanted to see how everybody felt they'd get along with her.

Q. Did anyone else other than Harry and Dawn help you make this decision?

A. No.

Q. Do you remember the reason why you didn't hire Ms. Bushorr?

A. It was -- it was a matter of salary requirements. I believe -- I think that her salary requirements were a little too much.

(Defendant's Exhibit No. 3 was marked for identification purposes (1 page) - CV of Anna Marie Roormann)

BY MR. JOHNSON:

Q. Mr. you now have Defendant's No. 3 on behalf of the defendants, which I will represent to you is the resume of Anna Marie Roormann. Do you recall seeing this document previously?

A. Yes.

Q. And is Ms. Roormann's resume one of the ones that you -- that was sent to you by Carolina Legal Associates?

A. Yes.

Q. Did you interview Ms. Roormann?

Page 34

A. Yeah. Yeah.

Q. Okay. And did you contribute to the decision to hire Ms. Roormann?

A. Yes.

Q. Did anyone else contribute to that decision?

A. I did ask around the office if everybody felt like they got along with her.

Q. Okay.

A. I did want to mention that the resumes, they didn't have names or anything like that on them. Names and address, I think, as their standard procedure, was just blocked out.

Q. Okay. All right. So when you reviewed the resume, there was no name on it?

A. I believe -- I believe it said Resume One, Resume Two, at the beginning, or -- Interview Candidate One, Interview Candidate Two -- and you just opened which ones you wanted to interview.

Q. Okay. So when you first got the resume sent to you, there was -- you don't recall that there was a name on it?

A. I don't -- correct.

Q. When the person came in for the interview -- for example when Ms. Roormann came in -- did you have a name at that point?

Page 35

A. Yes.

Q. Did you have a resume with a name on it at that point?

A. I don't believe so.

Q. So is it accurate that you reviewed the resumes, contacted Carolina Legal Associates, and said, "I want to interview the person who's Resume Number One," for example?

A. Correct.

Q. And then that person showed up at your office; is that correct?

A. That's correct.

Q. And at that point is when you learned the person's name?

A. I believe Carolina Legal called that morning and said so-and-so will by coming by at such-and-such a time.

Q. Okay. All right. Was anyone other than yourself present for the interview of Ms. Roormann?

A. Yes.

Q. Who else was present for the --

A. Dawn Murray.

Q. Okay. Do you recall whether or not you took notes of your interview of Ms. Roormann?

A. I don't remember. I believe I probably

Page 36

wrote some stuff on the resume.

Q. You still have that document?

A. No.

Q. Do you think you discarded it?

A. I don't know what happened to it.

Q. Did you keep a personnel file on Ms. Roormann?

A. We did.

Q. Have you provided that file to your counsel?

A. What we have, yes.

Q. Do you recall what sort of questions you and Dawn discussed with Ms. Roormann during your interview?

A. Real estate experience -- her experience with real estate. Experience at her prior employers.

Q. Let me be clear: What sort of duties were you anticipating having this person do for your law firm?

A. Preparing settlement statements. Preparing title opinions to be reviewed and certified by me. Printing checks. Communicating with mortgage brokers, real estate agents.

Q. So the person, whoever took the job, was going to be preparing checks on behalf of your law firm?

A. Correct.

Q. At that time, prior to the hiring of Ms. Roormann, who was preparing the checks for your firm?

Page 37

A. Dawn Murray.
Q. When you interviewed Ms. Hoormann, did you ask her about any criminal background?
A. No.
Q. Did you or Dawn perform any sort of records check on Ms. Hoormann at that time?
A. No.
Q. Did you or Dawn contact any references that she may have provided?
A. No.
Q. And is the -- is it accurate to say, that you made the decision to hire Ms. Hoormann?
A. Yes.
Q. Did Dawn contribute that to decision?
A. Yes.
Q. Did anyone else other than Dawn contribute to the decision?
A. I think I asked Harry who he thought he'd get along with better.
Q. I may have mentioned it, and I'm sorry if I did: Did Harry sit in on you-all's interview?
A. No. But he was in the -- in the office. It was a small office.
Q. Okay.
A. You couldn't help but meet somebody in the

Page 38

office.
Q. I understand. Was it anticipated that Dawn would be doing any work at all for Harry?
A. No.
Q. I'm sorry. The new person, Anna --
A. No.
Q. Okay. All right. So she was to work solely with you, for your law firm.
A. Correct.
Q. So when you made the decision to have Ms. Hoormann come to work for your law firm, how did you communicate to that Carolina Legal Associates?
A. I called over and spoke with somebody over there -- I either called over there or they called over to me, to follow-up to see what I thought. I gave them my feedback. I think they told me that they were believing they were going to be getting an offer of employment from Ms. Hoormann.
So, you know, I think at that point we then talked about the different types of employment relationships you can have through them.
Q. Do you recall who it was that you spoke with -- was this a telephone conference?
A. Yes.
Q. Do you recall who it was that you spoke

Page 39

with?
A. I believe most of my conversations were with Terry Bolstrup. It was either Terry -- I believe it was Terry Bolstrup. I know the last name is definitely Bolstrup.
Q. And I think you testified, that you spoke with Terry probably about the different types of employment relationships?
A. Uh-huh.
Q. What do you mean? What options did you have?
A. The direct hire-to-perm; the different benefits and -- of each situation.
Q. By the way, did you ask Terry to do any sort of a background check on Ms. Hoormann during the telephone conference?
A. I did not ask her to do one. But that's why I went through Carolina Legal.
Q. I understand. Now, what sort of -- what sort of arrangement did you and Terry settle on during that telephone conference?
A. Temp-to-perm.
Q. Now, I think I know what it means, but just for the record, tell me what you understood "temp-to-perm" to mean.

Page 40

A. It means that you are able to take an employee from them. That employee goes on Carolina Legal's payroll, and you are simply submitted invoices from Carolina Legal with which you pay. They handle payroll taxes, HR issues, things like that.
Q. What was your understanding of the length of time that the person would be in a temporary status, if you will?
A. I don't remember.
Q. Okay. Is it -- is it correct to say, that you understood that there was some finite period of time that the person had to be in a temporary status?
A. I mean, just from the name, probably. But I don't remember that I was specifically told a time period.
Q. Is it fair to say that you understood that you could not hire that person as your employee right away.
A. No, that was an option.
Q. Okay. And option which you did not choose?
A. Correct.
Q. Let me show you another document.
(Defendant's Exhibit No. 4 was marked for identification purposes (1 page) - Carolina Legal Associates Work Order)
BY MR. JOHNSON:
Q. Ed, I'm showing you what's Defendant's No.

Page 41

4, a document which you may not have seen before. But let me ask you: Have you seen this document before?

A. It does look familiar.

Q. Take a look at it and see if the information on it reflects -- seems to reflect your original arrangement with Carolina Legal Associates.

(The witness pauses to review the document.)

A. It does look familiar, yeah.

Q. For example, it as a telephone number on here, 931-0808. Was that your telephone number?

A. That's correct.

Q. And it has "Contact Person: Dawn Murray, slash, Ed McDonnell." That seems to be correct?

A. That's correct.

Q. It has a position, "R.E. Assistant." What does "RE" stand for?

A. Real estate.

Q. Okay. And then there's a check mark, you'll notice, by "Temporary, slash, Perm." You see that?

A. Uh-huh.

Q. Is that the arrangement you chose?

A. Uh-huh.

Q. Okay.

MR. IRVIN: Ed, for purposes of the court reporter's record, if you could try to avoid "uh-huh" and

Page 42

"uh-uh," just --

THE WITNESS: I'm sorry. Yes.

MR. JOHNSON: Okay. That's good. Thank you.

BY MR. JOHNSON:

Q. Underneath it has a category called "Special Instructions." Do you see that?

A. Yes.

Q. And it appears to show what's called "quoted rates." Do you remember anything of that?

A. Yes.

Q. What's that all about?

A. That's the quotes that Carolina Legal gives you on a hourly basis, I believe for their employees.

Q. Okay. So, for example, the first quoted rate is -- appears to be 21,000.

A. That's right.

Q. Which I guess equates to 10.10 an hour; is that correct?

A. Yes.

Q. Then on the next line, it has "pay rate 20,000 -- 9.62 an hour." Is that the rate you-all finally agreed upon?

A. That's the rate which the employee was paid. The rate I paid I believe is the bill rate.

Page 43

Q. Okay.

A. Carolina Legal receives the spread for their services.

Q. I see. Okay. Now, Ed, let me ask you: There's a asterisk on the right side of this page. It has a date 6/17. It says, "Made offer to Joyce for twenty-eight five," and "is giving her time to make a decision."

A. Uh-huh.

Q. Do you recall anything about that?

A. That's correct, yeah.

Q. So is that indicating that you made an offer to Joyce?

A. Yeah. As I said before, I -- an offer was made and then I decided that I couldn't -- the -- her requirements were too much.

Q. So in other words, you originally made an offer for twenty-eight five, and then you decided that you couldn't -- you didn't want to pay that much?

A. Right.

Q. And then beneath that, "June 18, asterisk, it says, "Ed feels he spoke too quickly and may not be able to afford Joyce"; is that accurate?

A. That's right.

Q. At the bottom of this page of this exhibit, there's a circle, and inside the circle it appears to say,

Page 44

"Buy out $330 effective 9/6/04."

Do you recall a discussion about how much you would have to pay to buy out the employee and when you could do it?

A. Yes.

Q. Is that information appear to be accurate, according to your recollection?

A. No. I believe it was $700.

Q. Okay. So ultimately, you-all settled on $700?

A. Yeah.

Q. Okay.

A. Yes.

Q. Okay. All right. So after this telephone conference, when you-all -- when you settled on arrangements with Carolina Legal Associates, I assume that Ms. Hoermann came to work at the law firm -- at your law firm?

A. Correct.

Q. And she was performing the duties that you described earlier?

A. Correct.

Q. And am I to understand that Dawn was Ms. Hoermann's supervisor? Or were you the supervisor?

A. When we interviewed both candidates, we had

Page 45

then go through a mock closing, preparing documents, etc., just to make sure that they could perform the function.

And then Anna was hired. For a brief time, obviously, there was some transition; she and Dawn worked together for just a brief time. And it was apparent that she had performed these tasks before. And then she started reporting to me. ...

Q. So in other words, understanding that Dawn sort of broke her in, if you will.

A. Yeah.

Q. And then at that point, Ms. Moormann reported directly to you.

A. Yes.

Q. Okay. Can you describe for me how your offices were set up at the time when Ms. Moormann came to work for you? For example, I assume you had an office -- sort of an enclosed office yourself; is that correct?

A. At that time when we were over on Calhoun Street, I actually had an office with my desk at the back. And up in that same office there was a small desk where Ms. Moormann sat. Directly out that door was the receptionist's desk, where Shannon sat. One door down was where Harry sat, and across from him was where Dawn sat. There was a conference room up front with a little waiting area.

Page 46

Q. Where did Dawn sit?

A. Dawn sat -- (the witness indicates) my office was here, Harry's was here, and Dawn sat here.

Q. So if I'm understanding your description correctly, you and Ms. Moormann sat in the same space, more or less, correct?

A. Right.

Q. And she was away from you by how many feet, for example?

A. Twelve feet.

Q. Okay. But she had her own desk, telephone, and so forth?

A. Uh-huh.

Q. Give me a brief description, if you would, at that point of how you operated your business. For example, when a check needed to be cut, did you -- did you have to tell Ms. Moormann, "I need a check for A, B, or C"? Or was she authorized on her own to decide when a check needed to be cut, and that sort of thing?

A. You'd get funding authorization from a lender. At that time you would prepare the checks. So I signed the checks, review them to the ledger, and they would be mailed out.

Q. So when you got funding authorization, as you put it, did you yourself receive that through a telephone call or through a document of some sort?

Page 47

A. Through a fax.

Q. Through a fax?

A. Yeah.

Q. And then what would you do once you got a fax?

A. We would put it in the software -- put the wire information into SoftPro; make sure it was balanced.

Q. And who would actually do that?

A. Dawn. And then Anna would actually put the wire information. And I would review the ledger, sign the checks, and then they would send the checks out.

Q. So you had to sign all checks?

A. Yes.

Q. So Dawn, I guess, first, then Anna, later, would actually prepare the check, somehow present it to you, and you would sign on all checks; is that correct?

A. Correct.

Q. Is it fair to say that Dawn did not have authority to sign checks on your behalf?

A. No, she didn't.

Q. Or on behalf of your firm?

A. No, she did not.

Q. And is it also fair to say that Anna did not have the authority to sign checks on behalf of your firm?

Page 48

A. No, she did not.

Q. So you would sign the check, or whatever check that had to be produced, you would sign it and then you would at that point return it back to Anna to send out -- to actually send out?

A. Yes.

Q. Now, what bank were you doing business with at that time when Anna was first hired?

A. First Citizens.

Q. And I assume they would send you -- First Citizens would send you statements regarding your account?

A. Yes.

Q. Was this a trust account or a general operating account? Or did you have both accounts there?

A. We had both accounts there.

Q. Typically, the checks that you described earlier would be written out of the trust account?

A. Correct.

Q. Who would receive the statements that First Citizens sent to your law firm regarding your trust account?

A. Anna.

Q. And was Anna responsible for reviewing these statements to determine their accuracy and so forth?

A. Yes. She took on the role -- obviously, a

Page 49

small firm -- as office manager kind of role.
Q. Is it accurate to describe her duties at the time as sort of administrator for the firm? To use a broad term.
A. I don't know.
Q. Let me just ask you another way. Did she -- did she also have the responsibility of paying your bills, generally speaking, your rent, for example --
A. Yes.
Q. -- electric, whatever it is that you had to pay?
A. Yes.
Q. And did she prepare those checks as well for those other kinds of expenses?
A. Yes.
Q. And it would be prepared, I assume, out of the general operating account.
A. Yes.
Q. And did you review those checks as well?
A. Yes.
Q. Did you sign those checks?
A. Yes.
Q. So when your bank statements from First Citizens came in, Anna would receive them?
A. Yes.

Page 50

Q. And Anna would review them?
A. Yes.
Q. Did you review them?
A. On a -- on a -- on a -- on a regular -- semi-regular basis.
Q. When you say 'semi-regular,' Ed, precisely what does that mean?
A. I guess --
Q. Let me ask you: Did the statements come in once a month?
A. Initially they did, yes.
Q. Did that change after a period?
A. Yes. In August of that year, we moved to Barnwell Street, over here at 1524 Barnwell Street. And then we began having an issue with our mail.
Q. Okay.
A. Or so I believe.
Q. Okay. And so did the statements come in at that point more than once a month, or less than once a month?
A. Less than once a month. Then we would contact the bank and get the address corrected. And we moved from Calhoun Street to Barnwell Street, and had that address corrected to the PO box.
But for some reason the mail was getting

Page 51

forwarded to the PO box, and then immediately right back to the old office.
Q. Okay. So you testified a moment ago that you reviewed the statements -- I think your term was 'semi-regularly.'
A. Uh-huh.
Q. I'm assuming from that, that you didn't review them all the time.
A. No.
Q. What happened to the statements once Anna reviewed them and you did? Did she put them in a file somewhere, or --
A. They were filed.
Q. And was Anna responsible for maintaining that file; that is, making sure the statements were --
A. Yes.
Q. -- in there, and that sort of thing?
A. Yes.
Q. Let me go back for a moment to your arrangement with Carolina Legal Associates. I know you had a telephone conference, and we looked at an exhibit, where you testified that these were the arrangements you made with Carolina Legal Associates. Did you have to sign anything at that point? Did you-all have a contract of any kind?

Page 52

A. I believe so.
Q. Did you keep a copy of that document?
A. Excuse me.
Q. That's okay.
A. I don't have that in my possession right now.
Q You think you did sign something?
A. Uh-huh.
MR. IRVIN: And that's a 'yes'?
THE WITNESS: Yes.
BY MR. JOHNSON:
Q. But you don't think you have it?
A. No.
Q. You think you discarded it?
A. I don't remember discarding it. I don't know the location of it at this time.
Q. So the arrangement you had with Carolina Legal Associates at the time Anna first began working with you, and we talked about what she was doing and that sort of thing, is that you would -- you would send a statement of Anna's work hours to Carolina Legal Associates?
A. Uh-huh.
Q. Is that correct?
A. Uh-huh.
Q. And who would have prepared that document?

Page 53

A. Anna would prepare that.
Q. Did you have to sign that document --
A. That's correct.
Q. -- when you filed it?
(Defendant's Exhibit No. 5 was marked for identification purposes (21 pages) - Carolina Legal Associates Timesheets for Anna Marie Hoormann)
BY MR. JOHNSON:
Q. Ed, you have before you, I think, what the court reporter's marked as Defendant's 5. And it's a series of what I would characterize as your time sheets, if you will --
A. Okay.
Q. -- regarding Anna Hoorman. Is that -- is that accurately --
A. That is.
Q. -- described?
A. Yes.
Q. And is -- I see -- I see what appears to be Anna's signature on the first one.
A. Uh-huh.
Q. And I see your name.
A. Uh-huh.
Q. And I see a little block called "Client

Page 54

Verification." Is that your signature --
A. That is.
Q. -- in that block?
A. Uh-huh.
Q. Okay. And the first one is -- appears to date from June 20 through June 25; is that right?
A. Yeah, that's right.
Q. So once you sent this time sheet in, what would happen then in terms of Anna being paid?
A. A check was sent to Carolina Legal.
Q. Were they sent -- would Carolina Legal have sent you an invoice of some kind?
A. I don't remember if the check accompanied the invoice, or -- or the check followed afterwards.
Q. But your office would generate a check to Carolina Legal Associates.
A. That's right.
Q. Okay. And out of that check, Carolina Legal Associates would then pay Ms. Hoormann?
A. Correct.
Q. And I gather from your earlier testimony, that there was some profit for Carolina Legal Associates.
A. Correct.
(Defendant's Exhibit No. 6 was marked for identification purposes (22 pages) - Copies of

Page 55

checks, invoices)
BY MR. JOHNSON:
Q. Before you now is defendant's No. 6, I believe. And I'll represent to you, that this is a series of checks, all of which are I think if you page through, are written out of your operating account. Are these the checks that -- you know, take your time and look at them -- are these the checks that your firm generated to Carolina Legal Associates for Ms. Hoormann's services?
(The witness pauses to review the documents.)
A. Yes.
Q. Is that right?
A. Yes.
Q. Is that your signature on all these checks?
A. Yes.
Q. Now, the last final check I see in this series is -- at the bottom of the page, says "CLA0057" -- a check -- this is not a really good copy, but the check that appears to be dated September 13, 2004.
A. Yes.
Q. To your knowledge, is that the last check you wrote to Carolina Legal Associates on this temp-to-perm basis?
A. I think there would be one more for the buy-out.

Page 56

Q. Okay. So at that point, in or around September 13, 2004, you had made a decision to, quote, buy-out Ms. Hoormann from Carolina Legal Associates.
A. Yes.
Q. And is my understanding of the phrase "buy-out" to mean that Ms. Hoormann would then become your employee?
A. Yes.
Q. And you would be responsible at that point for paying her salary?
A. Yes.
Q. Whatever benefits that you might have had available for her?
A. Yes.
Q. And she no longer was a employee of Carolina Legal Associates; is that correct?
A. Yes.
(Defendant's Exhibit No. 7 was marked for identification purposes (1 page) - Copy of invoice dated 9/8/04)
BY MR. JOHNSON:
Q. The court reporter has put before you, Ed, Defendant's 7. And I don't know whether you've seen this document before, but it appears to represent the $200 buy-out that you spoke about earlier. Does the information on

this document appear to be accurate?
A. Yes.
Q. It says "Buy-out fee for: Anna Hoormann. Start date 9/6/04. Position: Real Estate Assistant. Amount: $300." which is crossed out. And then it says "$200 per Terry Bolstrup"?
A. Uh-huh.
Q. Do you recall having a conversation with Terry Bolstrup about the buy-out amount?
A. Yes.
Q. And did you-all negotiate a balance of $200?
A. Yes.
(Defendant's Exhibit No. 8 was marked for identification purposes (1 page) - Copy of Cancelled check for $200 dated 9/28/2004)
BY MR. JOHNSON:
Q. You have before you now, Ed, Defendant's No. 8, I believe, which is a check written on your law firm's operating account at First Citizens. And it appears to be for $200; it's dated 9/28/04. Does that document appear accurate to you?
A. Yes.
Q. And you testified a moment ago that there was one more check. Is this the check you were talking about?

A. It appears to be, yes.
Q. And is that your signature on this check?
A. Yes.
Q. So it was at this point, in or around September 28, 2004, that Ms. Hoormann became your full-time employee.
A. Yes.
Q. Or your law firm's full-time employee.
A. Yes.
Q. Did you do any further -- or any kind of a check on Ms. Hoormann after the buy-out was completed?
A. No, I didn't. Because I assumed it was just as accurate as when she came to work for me through Carolina Legal.
Q. So is the answer to that question "no"?
A. The answer is no.
Q. Okay. And did Ms. -- I'm sorry. Let me start that question again. Once the buy-out was completed, did Ms. Hoormann's duties change at all?
A. No.
Q. She continued to do the same kind of work for you that she'd been doing --
A. Correct.
Q. -- prior to the buy-out --
A. Correct.

Q. -- is that right? Okay. Did she continue to create and prepare checks for you?
A. Yes.
Q. Did she continue to receive your bank statements from First Citizens?
A. Yes.
THE WITNESS: Can I take a break and go to the bathroom?
MR. JOHNSON: Absolutely.
(Off the record.)
EXAMINATION RESUMED:
BY MR. JOHNSON:
Q. Ed, we're back on the record. And so I'm going to ask you a few more questions and try to get finished up here.
I think when we broke off, your -- you were telling me that Ms. Hoormann, once she became your employee, continued to perform the same basic duties that she'd been performing for you prior to her becoming an employee.
A. Correct.
(Defendant's Exhibit No. 9 was marked for identification purposes (4 pages) - South Carolina Department of Health and Human Services form for Anna Marie Hoormann)

BY MR. JOHNSON:
Q. I'm going to show you a form that your office produced. And let me just ask you, 'cause I'm not certain what this is. Can you tell me what this is?
(The witness pauses to review the document.)
A. I think it's -- it looks to be something from the Department of Health, asking if she is -- if she had prior coverage.
Q. Okay. Are all of these forms, the forms attached -- you can look at them. Are they all from what might be called Ms. Hoormann's personnel file --
A. Yes.
Q. -- from your office?
A. Yes.
Q. Are these all of the documents that make up Ms. Hoormann's personnel file, that you still have in your possession?
A. Yes.
Q. On the top form, the DHEC form, it says, Completed by -- at the bottom, "Completed by Tracy Donnelly." Do you know who that is?
A. That's my wife.
Q. I see. Okay. And your wife was working in the firm at that time?
A. Yes.

Page 61

Q. This form is dated July 27, 2006.
A. Correct.
Q. Was Ms. Moormann still working for you at that time?
A. No.
Q. So you think you might have got a copy from them around this time?
A. I believe this was an inquiry from them. I'm not positive.
Q. Okay. All right. But in any case, July 27, 2006 is after Ms. Moormann is separated from employment with you; is that correct?
A. That's correct.
Q. On the second page of this group of documents, it looks like what's called an Employment Eligibility Verification.
A. Uh-huh.
Q. And the date on this form appears to be October 14, '04. Do you see that?
A. Yes.
Q. And it appears to have your name. Is it Edward A. McDonnell --
A. 'G.'
Q. -- G. McDonnell.
A. Gerard.

Page 62

Q. And the title "President", is that right?
A. Yes.
Q. Did you fill this form out?
A. I reviewed it and signed it and filled in my information.
Q. Okay. It looks like Anna may have filled out the top part --
A. Yes.
Q. -- is that right?
A. Yes.
Q. Okay. The Section 2 on here, the "Employer Review and Verification."
A. Uh-huh.
Q. Did Anna fill that out too? It looks like her handwriting.
A. Yes.
Q. And did you, in fact, review the documents that are specified on -- in Section 2: driver's license, Social Security card?
A. Yes.
Q. The third page of this is W-4 form. Do you see that?
A. Yes.
Q. The fourth page, McDonnell-25, what's that document?

Page 63

A. That looks to be a form to be sent to our benefits provider.
Q. Okay. And that's G. Russell Garner?
A. Yes.
Q. There's a second name on this form; Susan -- is that Medeiros?
A. Yes.
Q. Did Ms. Medeiros work for you?
A. Yes.
Q. What position did she hold?
A. She would prepare title commitments. She came to work in -- for us after we left -- moved to Barnwell Street.
Q. And was Ms. Moormann still working for you at the time?
A. Yes.
Q. So you had both of them in the office.
A. Yes.
Q. Did Ms. Moormann -- I'm sorry. Did Ms. Medeiros prepare checks for you?
A. No.
Q. So that was Anna's job.
A. Yes.
Q. And my recollection of your previous testimony is, that Anna answered only to you. In other

Page 64

words, no one else in the office supervised her but you.
A. Yes.
Q. So Susan didn't supervise her.
A. No.
Q. And Harry Heiser didn't have the responsibility to supervise her.
A. No.
Q. I guess once you-all moved to Barnwell Street, you-all were out of Harry's location.
A. Well, Harry and I share -- shared space there too.
Q. Still on Barnwell Street.
A. Yeah.
Q. Okay.
A. He had the top -- bottom floor. I had the top floor.
Q. Okay. All right. So she came to work for you full-time as your employee in September '04, still doing the same things that she did for you previously. And this arrangement continued for at least another year until -- or more -- until, at some point, you discovered that things weren't right --
A. Right.
Q. -- to put it mildly.
A. Right.

Page 65

Q. Okay. Now, during this year or more, you were still reviewing checks or reviewing bank statements, I'm -- I should say semi-regularly?

A. At that time Dawn came in one time -- maybe one or two times, to do a reconciliation. My accountant was handling our payroll, so they were being reviewed.

Q. Is it fair to say, that you weren't reviewing them all the time?

A. Yes.

Q. Okay. When did you discover, to the best of your recollection, that there was some improprieties?

A. I was standing in line for Santa Claus, with my son, and I got a phone call from a seller, saying they hadn't received their wire yet.

Q. And do you remember who it was?

A. No.

Q. Okay. Do you remember what date, or approximately you got this phone call?

A. Probably, based upon this, 12/00 -- something along these lines.

Q. January -- I'm sorry -- December 20, 2000 --

A. -- five.

Q. Five. Okay.

A. I called back to the office. Anna said that they put a wire in the wrong account, or something like

Page 67

was an issue with a check going into the wrong -- a wire going into the wrong account. So I went back there and --

Q. Did you -- did you leave Richland Mall right after you spoke with Anna?

A. Immediately.

Q. And you went back to your law office?

A. Yes.

Q. And what did you do when you got there?

A. Began trying to figure out what was going on. Called over to First Citizens, left a message over there. And then my brother and my wife came over and tried to figure out what's going on.

Q. Did you -- did you call on your brother?

A. Most likely.

Q What's his name, by the way?

A. Richard McDonnell.

Q. Did you say -- is he a CPA?

A. He is not a CPA. He was in school getting his MPA.

Q. Is that a Masters of Public Administration?

A. No. MACC, yeah.

Q. What --

A. Masters in Accounting.

Q. Masters in Accounting?

A. Uh-huh.

Page 66

that.

I went back there. My brother and wife and I -- my brother and my wife were both in accounting school and were getting their masters in accounting. And I, along with Anna, went through everything.

And as I was communicating with the bank, you know, Anna was destroying things.

Q. Let me -- let me make sure that sequence is correct: that you were in line with your son --

A. Uh-huh.

Q. -- I guess at a Christmas --

A. Richland Mall.

Q. Richland Mall.

A. Uh-huh.

Q. You get a call from a seller who hasn't gotten -- or didn't get his or her wire.

A. Right.

Q. Did you -- I think you said you called the office at that --

A. Called the office.

Q -- point? Who did you speak with?

A. Anna.

Q. Okay. And what did you -- what did you say to her?

A. She said that First Citizens called; there

Page 68

Q. Okay. All right. Does he have that degree now?

A. No.

Q. Where was he in school at the time?

A. USC.

Q. So you phoned your brother, you think. And you were still at the law office when you phoned your brother.

A. Uh-huh.

Q. Anna was there with you.

A. Uh-huh.

Q. Anyone else?

A. I think Susan was there. I don't -- I don't remember.

Q. About what time of day was it?

A. Probably between 4:30 and five. Because I remember, like the opportunity to get in touch with First Citizens was limited.

Q. Okay. And so your brother comes over to your law office with his wife?

A. No, just he.

Q. Just him by himself.

A. His wife was in the hospital.

Q. I see. Okay. And what happens when your brother gets to the law office?

Page 69

A. We, my wife and I continuously were going back through the records to try to figure out where the wire went.

Q. Okay. So you and he basically were reviewing documents?

A. And my wife.

Q. And your wife. Okay. What was Anna doing around this time?

A. Acting like she was helping us.

Q. Now, how long did you-all go through this process of reviewing the document?

A. Three days.

Q. You-all reviewed them the rest of that day?

A. Uh-huh.

Q. Came back another day, I guess?

A. Came back -- I think we -- it might have been five days. I think we might have spent the weekend there, doing it. And without being able to get in touch with the bank, did the best of our ability. And then asked them to send replacement statements, 'cause the statements ended up disappearing.

Q. The bank statements that were supposedly on file in your office?

A. Yes.

Q. Disappeared?

Page 70

A. Yes.

Q. Right after this matter of the missing wire came up?

A. Yes.

Q. And these are the statements that Anna was responsible for --

A. Yes.

Q. -- maintaining?

A. Yes.

Q. All right. Were they kept -- were the statements kept in a file cabinet of some sort?

A. Yes.

Q. Was it a locked file cabinet?

A. It was in a locked room.

Q. But the cabinet itself wasn't locked?

A. No.

Q. And I gather Anna had a key to the room?

A. Again, when we moved here, we were limited on space. My office was -- my desk was way back; her desk was at the front.

Q. Okay. Did you ever determine how the statements wound up missing?

A. Yeah. When we talked to First Citizens -- no, not the original statements, no.

Q. Okay. So you never found out what happened

Page 71

to them?

A. No.

Q. So you-all spent three days or so reviewing the documents, go forth and so on. Then what happened?

A. We were requesting copies of the statements from First Citizens. They were sending them over. And they kept not coming over complete; certain pages were missing.

Q. They were sending them by fax?

A. By fax. Which Anna was retrieving.

Q. Anna was receiving the faxes?

A. She was just walking to the fax machine and bringing them in.

Q. Okay.

A. And after speaking with the branch manager there, he said, "Is Anna still there?"

And I said, "Yes."

"Because we found a check written to her."

And I said, "Well, how much was it?"

And he said a number, and it was way out of whack.

Q. A check written on your trust account?

A. I believe it was the operating account.

Q. Okay. And so this fellow tells you he finds a check written on your operating account, written to Anna?

Page 72

A. Yeah.

Q. Okay. Do you remember the amount of that check?

A. I think it was $32,000.

Q. All right. What happens when he tells you that?

A. I sit down Anna, and ask her if it's true. And she said, "Yes."

And I said, "Were there any other occurrences of this ever happening?"

And she said, "No."

Q. So Anna -- you asked Anna if she wrote the check?

A. Yes.

Q. Who signed the check, by the way?

A. She did.

Q. Did she sign your name to it?

A. Yes.

Q. Okay. All right. Did the fellow at the bank tell you the date of the check?

A. I don't remember.

Q. Did you ever see a copy of that check?

A. Yes.

Q. Did you get separate -- and I assume you did -- bank statements for your operating account and the trust

Page 73

account?
A. Yes.
Q. Did you ever see that check before in the operating account statements?
A. No. It would -- it has happened a few days before.
Q. So that check was recently written.
A. Yeah.
Q. I see. Okay. And so you sat Anna down.
A. Uh-huh.
Q. And she, from what I'm hearing, admitted that she wrote the check?
A. Yes.
Q. Signed her name to it?
A. Yes.
Q. And I think you said you asked her were there any other checks; is that right?
A. Yes.
Q. And she said no?
A. Yes. She said no.
Q. Okay. And so what happened after that?
A. I said, "Do you still have the money?" And she said, "Most of it."
Q. She said what, now?
A. "Most of it."

Page 74

Q. Most of it. Okay.
A. And she went to go get a check, and she showed up with like $7,000, or something. And then she said --
Q. This was cash?
A. No. A check.
Q. A check for $7,000.
A. Yeah.
Q. Okay.
A. Yeah. And then she said that she would be able to repay the rest by selling items, and stuff like that.
Q. Okay. Did you, at some point, determine that she had written more checks than that one?
A. I don't remember when we did, but we did, obviously.
Q. Not at -- not at that time, though, I gather.
A. No.
Q. Do you recall how you found out that more checks had been written?
A. As we directly received statements from the bank without Anna's interference.
Q. These copies of statements the bank --
A. Yes.

Page 75

Q. -- were sending to you?
A. Yes.
Q. Statements that had previously been sent to you and filed somewhere.
A. Yes.
Q. And the bank was sending you copies of these statements.
A. Yes. It was difficult because they were sending us stuff they printed off their computer; they just had a check number and a amount. So we were having to match it up.
Q. So these weren't regular bank statements --
A. No.
Q. They were sort of, I guess, entries, perhaps, on a --
A. Correct.
Q. -- on a sheet?
A. Right. They didn't have the fronts of the checks.
Q. And so when you -- who was reviewing these entries as they came in? You and your --
A. My brother and I.
Q. Your brother? Okay. And so I gather that you see an entry and you see and amount, and that would sort of raise a red flag with you?

Page 76

A. We'd match it up to the closing software, the settlement software.
Q. Okay. And through that process you discovered other checks that Anna had written?
A. I believe so. I believe that's how we determined it.
Q. And were these checks also written to Anna?
A. Various.
Q. What do you mean "various"?
A. Various people.
Q. So some were written to people other that Anna?
A. Yes.
Q. Like who?
A. Ford Motor Company. A plastic surgeon.
Q. So did it appear that Anna may have been paying bills with --
A. Yes.
Q. -- these checks?
A. Yes.
Q. Did you ever see the -- a copy of the checks themselves?
A. Yeah. Months later, yeah. Or maybe a month later.
Q. And Anna signed her name to those -- or your

Page 77

name to those checks?
A. Yes. I want to clarify something to you for the signature.
Q. Okay.
A. The only people who ever had signature authority was myself, and then Jeremy Foose who was an attorney. And Harry Heizer, he had the ability to sign a check in case of an emergency.
Q. So I assume what you're telling me is that Anna had no authority to sign checks --
A. That's correct.
Q. -- on behalf of your law firm.
A. That's correct.
Q. Okay. Now, when you first -- when you discovered through, I guess, a telephone conference with the bank guy -- by the way, do you remember his name?
A. Jim Holcombe.
Q. Jim Holcome?
A. Uh-huh.
Q. Okay. So it was Mr. Holcombe who told you they discovered the check, and you questioned Anna about it, and she confessed, if you will. Did you terminate her at that point?
A. Yes.
Q. And you told her she was fired.

Page 78

A. Yes.
Q. Okay. Did you call the police at that time?
A. I waited to meet her to see this jewelry she brought, she said was going to reimburse us.
Q. You waited how long did you waited before --
A. I -- I -- I --
Q. -- calling the police?
A. I don't remember.
Q. Was it a matter of days?
A. It was the next day. I'm not sure.
Q. So you confronted her on one day, and she told you -- and correct me if I'm wrong -- but she told you that she confessed to having written one check.
A. Yeah.
Q. She said that she had some money, and so she brings you a check for $7,000.
A. Right.
Q. That's all on the same date, right?
A. Right.
Q. Does she also tell you that she has jewelry that would help make up the difference on --
A. Yes.
Q. -- on the one check?
A. Yes.
Q. And at that point, you hadn't discovered

Page 79

these other checks.
A. No.
Q. And so the day -- that day ends without your having called the police; is that correct?
A. Right.
Q. You terminate her, but you don't call the police.
A. Right.
Q. She also tells you on that day, that she's got jewelry that she says can help make up the difference.
A. Correct.
Q. Does she come back the next day with the jewelry?
A. She wanted to meet me. I forget where she said. I didn't feel comfortable meeting her in a -- I forget where she wanted to meet. But we met at the Richland County Library. And --
Q. Just you and her?
A. Yes. And she showed up with jewelry. And I said, you know -- she wrote a statement saying that she had taken the money, which we had across -- walked across to Wachovia and had notarized.
Q. So you take this sort of statement from Anna?
A. Yeah.

Page 80

(Defendant's Exhibit No. 10 was marked for identification purposes (1 page) - Handwritten Affidavit by Anna Marie Hoormann dated December 28, 2005)

BY MR. JOHNSON:
Q. Ed, you have a document before you which I believe is Defendant's 8.
COURT REPORTER: Yes.
MR. JOHNSON: Yes. Okay.
BY MR. JOHNSON:
Q. And it's McDonnell-46, the Bates number. It appears to be dated December 28, 2005.
A. Right.
Q. Is that the statement you were testifying about a moment ago?
A. Correct.
Q. And Anna wrote this statement?
A. Yes.
Q. While you-all were at the library.
A. Yes.
Q. And she references several accounts in that first paragraph.
A. Right.
Q. It looks like -- is that -- one of those your operating account, to the best of your recollection?

A. Yes.
Q. And another one your trust account?
A. Yes.
Q. What's the third one?
A. Title insurance premiums.
Q. Did you ask her to write this statement? Or she volunteered to do it?
A. I think she volunteered. I don't -- I don't remember.
Q. At this point, prior to your meeting with Anna at the library, had you sought the advice of counsel regarding this matter?
A. [The witness pauses.]
Q. I'm not asking you what conversations you had, but had you talked with a lawyer?
A. I believe I spoke with -- just I spoke with Harry. We were sharing an office.
Q. So you had made Harry aware of what had happened?
A. I believe so. I know he was one of the first few people I told.
Q. At this point, December 28, 2003, were you still under the impression on that day, that there was only one instance?
A. Yes.

Q. And as of this date, she was no longer your employee; you terminated her.
A. That's correct.
Q. Now, what happens after she writes this statement for you, you have it notarized? Does she give you the jewelry?
A. Yes.
Q. You take possession of the jewelry?
A. Yes.
Q. Do you remember what it was, what jewelry it was given to you?
A. I think, a ring and a bracelet.
Q. And what did you do with the jewelry at that point?
A. It's in a safety deposit box.
Q. Did you ever have it valued?
A. Unfortunately, the jeweler who sold the jewelry refused to appraise it.
Q. Did you go visit that jeweler yourself?
A. I did not. My wife did.
Q. And so you simply still maintain possession of it?
A. Yes.
Q. So did your conversation with Anna on this date end once she handed the jewelry to you?

A. It ended when we left the bank.
Q. After the notary.
A. Yeah.
Q. You-all separated ways at that point?
A. Yes.
Q. Did you ever have any other conversation with her after that time?
A. Well, I believe so, yes. But I don't -- I couldn't tell you the substance of the conversation.
Q. Did you telephone the police after she gave you the jewelry and after you-all parted ways?
A. It was in -- I believe it was that day after I left.
Q. Did you go back to your law office?
A. Yes.
Q. Do you recall any investigator or a detective or anyone coming out to your law office on that day?
A. Officer McCracken.
Q. McCracken?
A. Uh-huh.
Q. With the Columbia Police Department?
A. I believe he's City of Columbia. I'm not sure if he's City of Columbia or Richland County.
Q. Okay. And did you give a statement of some

kind? Was there a incident report generated?
A. Yes.
Q. Let me ask you, Ed: In your law office when Anna was still working with you, I assume at some point -- or at some point, I assume you had a checkbook, or checkbooks for your various accounts?
A. We had electronic checks.
Q. So Anna, or whoever, but Anna specifically, simply had to print out a check.
A. Correct.
Q. And she could do that on her own.
A. Correct.
Q. Without asking you, "Ed, can I print out the checks"?
A. Yes.
Q. So under the system you had in place at that time, if Anna didn't bring a check to you that she had printed up, you would have no way of knowing she'd printed it up, unless you checked the bank statements.
A. Yes.
Q. And then later on, you testified you found out that there were more checks?
A. Yes.
Q. Ed, just let me show you a couple of documents that you produced, so I can understand exactly

what they are.

(Defendant's Exhibit No. 11 was marked for identification purposes (1 page) - Edward G. McDonnell, S.C. Find Report)

BY MR. JOHNSON:

Q. The court reporter is handing you what's Bates-stamped McDonnell-2. Can you tell me what that document is?

A. It's a ledger showing payments to Carolina Legal for Anna.

(Defendant's Exhibit No. 12 was marked for identification purposes (11 pages) - Copies of cancelled checks)

BY MR. JOHNSON:

Q. Okay. This is No. 12, which may be duplicated documents we've seen previously. But I wanted to be certain. Do you recognize No. 12, a series of checks?

(The witness pauses to review the document.)

A. Yes.

Q. And are these checks that your office paid Carolina Legal Associates for Anna's services?

A. Yes.

Q. And, once again, the final document is that $200 buy-our check.

A. It appears so, yeah.

(Defendant's Exhibit No. 13 was marked for identification purposes (1 page) - Operating Account Total - Total Checks Written for Month)

BY MR. JOHNSON:

Q. And this is Exhibit No. 13.

A. Yeah.

Q. Can you tell me what this document is, Bates-stamped McDonnell-14?

A. I don't know. I'm not sure.

Q. Is that your handwriting?

A. No.

Q. So you have no idea what this document is?

A. It looks like we're trying to figure out how much -- it looks like it's trying to figure out how much she took.

Q. 'She,' being Anna?

A. Yes.

Q. Is this something your wife might have done?

A. Yeah, I think that might be my wife's handwriting.

Q. Is it fair to say, that this document probably was generated after you-all discovered that Anna had written checks --

A. Yes.

Q. -- she wasn't supposed to write?

A. Yes.

Q. Was Anna eventually charged with a crime? To the best of your recollection.

A. She was arrested.

Q. Do you know what the charge was lodged against her?

A. Breach of trust.

Q. Has that charge been disposed of, to your recollection?

A. I believe it's still in progress.

Q. Did you have to sign a warrant?

A. I believe I signed one with Officer McCracken.

Q. Okay.

A. It might have been a affidavit.

Q. Okay. Have you brought any civil claim against Anna, or a civil lawsuit against her?

A. Initially one was filed. I believe so.

Q. Is it no longer in existence?

A. No.

Q. Did you drop it?

A. I sought counsel through Keller and Corbett and Freeman. And I think they filed a lis pendens, and it expired.

Q. And you've not pursued any additional civil action against Anna?

A. She was missing. Skipped town.

Q. So the answer is no, you haven't?

A. No.

Q. Now, you've filed a claim against First Citizens; is that correct?

A. Yes.

Q. Who represents you in connection with the claim?

A. Collins and Lacy.

Q. Generally speaking, what's the basis of your claim against the bank?

A. A check -- they cashed forged checks.

Q. Is that suit filed in Richland County?

A. Yes.

Q. And who represents you on that?

A. The actual attorney, or the firm?

Q. The lawyer.

A. Henry McKellar.

Q. Where does that case stand? Have you -- have you had depositions in that case yet?

A. No.

Q. Do you recall who represents the bank in that case?

Page 89

A. Ellis Lawhorne.
Q. Excuse me?
A. Ellis Lawhorne.
Q. Okay.
A. And that's -- I'm not --
Q. You're not sure which lawyer?
A. John Lay and Wesley Few.
Q. Now, you obviously have sued Carolina Legal Associates, and that's why we're here today. What's the basis of your claim against Carolina Legal Associates? What do you think Carolina Legal Associates did or didn't do that caused this problem for you?
A. I feel that when you use a firm, such as Carolina Legal Associates, you basically rely on them to perform certain duties, which would qualify a candidate to be placed in a law firm where there's personal, private, confidential information, or financial data; and I feel like they failed to provide that screening.
Q. Okay. Now, my recollection of your lawsuit is that -- well, maybe you can -- let me ask you it this way: Did anyone at Carolina Legal Associates make any kind of promise to you that it would do a background check or something on Ms. Hoormann?
A. I believe it was in their material.
Q. What material are you referring to?

Page 90

A. The temp-to-perm, the description of what they do.
Q. Were you given copies of this material?
A. I was -- as I mentioned before, I was going on the phone through information with Terry Bolstrup, about the difference. In addition, they -- you know, they visit the BAR conventions and things and hand out pamphlets, and as a result, we did have some promotional items of theirs around our office.
Q. So is it your testimony, that this representation, or promise, was in a promotional item? Is that your testimony?
A. I believe it was in the temp-to-perm -- and the explanation of the services they provide, yes.
Q. And let me make sure I understand: Did someone at Carolina Legal Associates give you this written document with this explanation of temp-to-perm?
A. I believe it was faxed over with the initial sign-up, whatever you get.
Q. But you don't have that document.
A. I do not have that document, no, sir.
Q. Do you have any other document that you may have gotten from Carolina Legal Associates that you haven't yet turned over to your lawyer?
A. No.

Page 91

Q. So every document that you have you turned -- to what you were given by Carolina Legal Associates, that may support your claim, you turned over to your lawyer?
A. Can you restate the question?
Q. I guess my question essentially is, whether or not you have any other documents that you got from Carolina Legal Associates, in your possession, that you haven't given to Mr. Irvin.
A. No.
Q. I'm sorry. I thought you were saying something. Do you need to take a break?
A. I just need to get some water.
Q. Okay. Go right ahead.
(Off the record.)
EXAMINATION RESUMED:
BY MR. JOHNSON:
Q. Ed, I'm just looking at your -- at your complaint. And I know you don't have it before you. Perhaps your lawyer can provide you with a copy. I just want to ask you a couple questions about it.
A. Sure.
Q. If you'll look at Paragraph No. 7 of that document -- it's on page 2. It says in that paragraph, that CLA -- obviously meaning Carolina Legal Associates -- published advertising and represented that it extensively

Page 92

screens all its employees, etc.
Do you have promotional material, or something that supports that claim?
A. No.
Q. Ed, I want to ask you: Since Ms. Hoormann became your employee, do you think you had a responsibility to check out her credentials?
A. No.
Q. So you don't think you had any other responsibility at that point, once you hired her full-time?
A. No, I did not.
Q. Okay. Also in Paragraph No. 7, you say CLA told you that it had done a professional screening of the paralegal. Did someone from CLA tell you that?
A. I believe that was part of the discussion; we were going through the different services which they provided.
Q. And this was a conversation --
A. Yeah.
Q. -- on the telephone?
A. With Terry Bolstrup.
Q. Okay. All right. Let me point your attention -- or call your attention to page 5. You have a second cause of action for violation of the private Personnel Placement Services Act; do you see that?

Page 93

A. Yes.
Q. And you say in your Paragraph 30 there, that CLA knowingly published false or misleading information. What was the false or misleading information?
A. That they didn't -- they didn't provide a -- they didn't do a background check; they didn't check the references; and they didn't -- and they sent somebody to my office before checking their references.
Q. All right. Now, did anyone at CLA tell you that the agency was performing a background check on Ms. Roormann?
A. I think screening -- when you hear "screening," you assume background check.
Q. So your recollection is that someone said to you that CLA was doing a screening?
A. That they screened the candidates. They do the testing so you don't have to.
Q. Testing?
A. Uh-huh.
Q. You mentioned in Paragraph 30, that the -- CLA has false or misleading advertisements. Is that the promotional material you were talking about earlier? Is that what that refers to?
A. I believe so.
Q. And that's the document, or documents, that

Page 94

you don't have anymore?
A. I believe so.
Q. You mention in your next cause of action, No. 3, beginning of Paragraph 33, that CLA breached a contract with you. What's the basis for that claim -- for a breach of contract claim?
A. I hired a person on a temp-to-perm basis, based upon the fact that they had handled the duties that you would expect of a legal staffing.
Q. Anything else?
A. No.
Q. Okay. I may have missed this earlier, I may have forgotten it: Did you tell me that you signed a written contract document with CLA? Did you testify to that?
A. I sent something over to -- indicating that -- the choice of employment.
Q. So the document that you are referring to is the document on which you indicated that you were choosing Ms. Roormann?
A. Yes.
Q. Did you have to sign this document?
A. I had to sign it and fax it over.
Q. Do you remember what else was on the document other than the fact that you were choosing Ms.

Page 95

Roormann?
A. I think it was the one with stuff explaining all the different services.
Q. It's not one of the documents I've shown to you today?
A. No.
Q. It's a different document.
A. Right.
Q. And you had a copy of that document in your possession at one point?
A. Yes.
Q. You no longer have it?
A. No.
Q. Now, you mentioned earlier that someone at CLA, perhaps Ms. Bolstrup, mentioned to you that CLA screened or tested employees.
A. Right.
Q. Did you ever talk with her about what exactly was done during this process of screening or testing?
A. No.
Q. Did you ever determine, Ed, with any degree of precision, how much money you lost as a result of Ms. -- or your law firm lost as a result of Ms. Roormann's activities?

Page 96

A. Lawyer's Title.
Q. I'm sorry?
A. Lawyer's Title, our title agency -- who our title agency is with, came in and did an audit. And their numbers would be what I rely on.
Q. Would be what, now?
A. What I would rely on.
Q. Okay.
A. They're a third party.
Q. Did Lawyer's Title provide you with some sort of report?
A. Yes.
Q. In written form?
A. I believe so. If not, they have it.
Q. Do you have a report in your possession now?
A. No.
Q. Is that report what you're basing your damages on, that you're asking CLA to pay you?
A. Yes.
Q. I assume you intend to obtain a copy of that report.
A. Yes.
Q. Who is it at Lawyer's Title that you've been working with on this issue?
A. The audit was performed by Sally Salvachio.

Page 97

Q. She's an employee of Lawyer's Title?
A. She was. She was a state auditor for them.
Q. And she's no longer with them?
A. No.
Q. Okay. Is there anyone now at Lawyer's Title that's working with you after Sally's departure?
A. On this issues?
Q. Yes.
A. No, not on this issue. Their state counsel, or state president, is Oliver Crawford.
Q. What is that name, again?
A. Oliver Crawford.
Q. Okay. Do you recall what the number was in the Lawyer's Title report, in terms of your losses?
A. I think it was, plus or minus, close to 700,000.
Q. Beyond that 700,000, which I assume you -- you're asking CLA to reimburse you for, or pay to you -- are there any other damages that you think you're entitled to as a result of anything you think CLA did?
A. I know certain expenses have occurred as a result of that breach.
Q. Have you itemized those expenses?
A. No.
Q. Do you intend to?

Page 98

A. Yes.
Q. Can you tell me at this moment what those expenses are, generally?
A. Legal fees. Interest I've had to pay on a mortgage in order not to -- in order to replace the money that was stolen, to mitigate damages.
Q. This is a mortgage involving a client of your law firm? Or your own personal mortgage?
A. Actually, my parents had to take out a mortgage on their house, and I had to take a mortgage on the house.
Q. So your parents gave you some money, which they generated by taking a mortgage on their property?
A. They actually placed me on the -- I became -- I took the mortgage against their home. I'm responsible for paying it back.
Q. Let me make sure I understand. Who's the borrower?
A. Me. They added me to the title to their home --
Q. I see.
A. -- so I could --
Q. I understand. All right.
A. But their home was -- did not have that mortgage against it prior to this action.

Page 99

Q. All right. So, in effect, they deeded you a portion of the house, or put your name on the deed, and then you borrowed against it.
A. Yes.
Q. And what was that amount?
A. $550,000.
Q. Who holds that mortgage?
A. Countrywide Home Loans.
Q. Besides that, what other expenses did you incur that you think you will itemize at some point?
A. Nothing I can recall at this time.
Q. I just want to be clear: Does the 500,000 represented by that mortgage, in your view, is that included in the 700,000 that Lawyer's Title has come up with? Or is that in addition to?
A. Included.
Q. Included within that amount?
A. But as you know, in a mortgage, you pay interest, which I've been paying interest this whole time.
Q. Okay. When did you take out that mortgage?
A. January of that year. January of '06.
Q. Okay. And, of course, you have the documents related to that mortgage in your possession?
A. Yes.
Q. Would you mind providing those documents to

Page 100

your lawyer?
A. No.
Q. In other words, we need to see anything that you are claiming --
A. I understand.
Q. -- that supports your prayer for relief.
A. I understand.
Q. Including that Countrywide report -- I'm sorry -- the Lawyer's Title report, if you could get a copy of that.
A. I understand.
MR. IRVIN: When we get done, you and I can talk about it.
MR. JOHNSON: Okay. All right. And we're almost done, actually. At least as far as I'm concerned. You may have some questions.
BY MR. JOHNSON:
Q. So you told me about all your damages; is that right? Or the amounts you believe are your monetary damages as a result of this claim.
A. Yes.
Q. Let me ask you a little bit about some of the people that you have listed as potential witnesses on your behalf. You've listed John Moormann, which I -- or who I assume -- when you say in your responses that he's

Anna Heermann's father. Do you -- do you know what John Heermann might be able to testify to?

A. If there -- he was contacted for reference purposes.

Q. Okay. I may have misled you. That was not your listing. That was our listing.

A. Why did you list him?

Q. I don't know.

(Off-the-record discussion.)

Q. Okay. You list a Lisa Mosley, or Jim Holcombe. Are those folks you dealt with at First Citizens?

A. Yes.

Q. Okay. And I assume those folks can testify about your accounts at First Citizens?

A. Yes.

Q. To your knowledge are both of those people still employed at First Citizens?

A. Yes.

Q. Have you spoken with either one of them in recent weeks?

A. No.

Q. Have you spoken with either one of them since you filed a lawsuit against CIA?

A. (The witness pauses.)

Q. To the best of your recollection.

A. No.

Q. Now, you list an Officer McCracken, who was the fellow with Columbia Police Department, who investigated this matter.

A. Yes.

Q. Do you have a first name for Mr. McCracken? If you don't --

A. I can get one. I don't have it off the top of my head.

Q. Okay.

MR. JOHNSON: Can we go off the record for a moment?

MR. IRVIN: Yeah. Yeah.

(Off the record.)

EXAMINATION RESUMED:

BY MR. JOHNSON:

Q. I just have one other question, Ed. I read through your responses to our request for production. And I'm asking this question so I can be certain of what we have. If you'll look at page 9 of that document, No. 19.

MR. IRVIN: Page 9 of the Responses for --

MR. JOHNSON: Yeah, I think I have the right document out. Am I looking at the right document?

MR. IRVIN: I'm looking at the response to

your request for production. and I've got one, two, three pages.

MR. JOHNSON: Okay. Let us make sure I'm looking at the right one.

MR. IRVIN: Oh, well, maybe I -- were you looking at the documents themselves. I got the Bates numbers --

MR. JOHNSON: Well, maybe it's the interrogatories. Find the interrogatories.

MR. IRVIN: Our answers?

MR. JOHNSON: Your answers. How many pages of that?

MR. IRVIN: Yeah, there's page 9 on that.

MR. JOHNSON: All right. No. 19 on page 9?

MR. IRVIN: Yeah.

BY MR. JOHNSON:

Q. Okay. There's a response on No. 19. that wherein you mention a confession signed by Anna Heermann, which I think we saw earlier.

A. Correct.

Q. And then you mentioned a spreadsheet of illegal financial transactions by her. Is that, by any chance, No. 13 there? Or is that a different document?

A. I don't believe so. I think this is -- I don't think this is in as much detail.

Q. So is there some other document referred -- that you referred to as a spreadsheet?

MR. JOHNSON: Can we go off the record for a second?

MR. IRVIN: Sure. I don't mind putting it on the record.

(Off the record.)

EXAMINATION RESUMED:

BY MR. JOHNSON:

Q. My understanding of our conversation off the record, Ed, is that Exhibit 13 is what's referred to as the spreadsheet, at least by your lawyer.

A. Yes.

Q. Okay. You're not aware of any other document constituting a spreadsheet.

A. I know that we had a beginning spreadsheet, where we started to go through things. And then for third-party purposes, we let Lawyer's Title do their audit.

Q. Okay. All right. That's all I have at the moment.

MR. IRVIN: We don't have any questions.

Further deponent sayeth not.

(There being no further questions, the deposition concluded at 12:37 o'clock p.m.)

CERTIFICATE OF REPORTER

I, PATRICIA G. BACHAND, COURT REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA AT LARGE, HEREBY CERTIFY THAT I REPORTED THE DEPOSITION OF EDWARD G. MCDONNELL, ON MONDAY, THE 5TH DAY OF MAY, 2008, THAT THE WITNESS WAS FIRST DULY SWORN BY ME AND THAT THE FOREGOING 106 PAGES CONSTITUTE A TRUE AND CORRECT TRANSCRIPTION OF MY STENOMASK REPORT OF THE SAID DEPOSITION.

I FURTHER CERTIFY THAT I AM NEITHER ATTORNEY NOR COUNSEL FOR, NOR RELATED TO OR EMPLOYED BY ANY OF THE PARTIES CONNECTED WITH THIS ACTION, NOR AM I FINANCIALLY INTERESTED IN SAID CAUSE.

I FURTHER CERTIFY THAT THE ORIGINAL OF SAID TRANSCRIPT WAS THEREAFTER SEALED BY ME AND DELIVERED TO WILBUR E. JOHNSON, ESQUIRE, YOUNG, CLEMENT, RIVERS, LLP, 28 BROAD STREET, CHARLESTON, SOUTH CAROLINA, WHO WILL RETAIN THIS SEALED ORIGINAL TRANSCRIPT AND SHALL BE RESPONSIBLE FOR FILING SAME WITH THE COURT PRIOR TO TRIAL OR ANY HEARING WHICH MIGHT RESULT IN A FINAL ORDER ON ANY ISSUE.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND SEAL THIS 17TH DAY OF MAY, 2008.

_____

PATRICIA G. BACHAND, COURT REPORTER

MY COMMISSION EXPIRES APRIL 9, 2017

VERIFICATION OF DEPONENT

I, EDWARD G. MCDONNELL, HAVE READ THE FOREGOING DEPOSITION CONSISTING OF 106 PAGES, WHICH WAS REPORTED BY PATRICIA G. BACHAND, COURT REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, ON MAY 5TH, 2008.

I FIND THE TRANSCRIPT OF THIS DEPOSITION TO BE A TRUE AND ACCURATE TRANSCRIPT ACCORDING TO MY TESTIMONY ON THAT DATE, WITH THE EXCEPTION OF _____ CHANGES AND/OR CORRECTIONS LISTED ON THE ATTACHED ERRATA SHEET WHICH WAS FILLED IN BY ME.

_____

EDWARD G. MCDONNELL

_____, 2008

ERRATA PAGE

Page #	Line #	Change/Correction (& Explanation)
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The above changes were noted by me on this errata page before signing the attached Verification of Deponent. I have retained a copy of this errata page for my records, and the court reporter is to attach this page and my verification to the original transcript.

Dated:_____ _____

Edward G. McDonnell

A
abilities 28:19
ability 22:23,23 69:19 77:7
able 6:23 40:1 43:21 69:18 74:11 101:2
about 5:24,24,25 6:21 10:25 13:23 15:17 18:14,25 20:11 22:1,2,22 29:22 37:3 38:20 39:7 42:12 43:9 44:2 52:19 56:25 57:9,25 68:15 77:21 80:15 90:5 91:20 93:22 95:18 100:13,18,22 101:15
above 107:18
Absolutely 27:11 59:9
accepted 12:12
accommodate 7:20
accompanied 54:13
accordance 5:1
according 44:7 106:8
account 4:20 48:11 48:13,14,17,21 49:17 55:6 57:19 65:25 67:2 71:22 71:23,25 72:25 73:1,4 80:25 81:2 86:4
accountant 65:5
accounting 66:3,4 67:23,24
accounts 48:14,15 80:21 84:6 101:15
accuracy 48:24
accurate 35:5 37:11 43:22 44:6 49:2 57:1,21 58:13 106:8
accurately 53:16
acquisitions 11:14
across 13:1 45:23 79:21,21
Act 92:25
Acting 69:9
action 6:16 88:2 92:24 94:3 98:25 105:11
activities 95:25
actual 21:22 88:18
actually 14:12 16:5 23:4,6 24:4 30:14 31:8 45:19 47:9 47:10,16 48:5 98:9,14 100:15
added 98:19
addition 90:6 99:15
additional 18:21 88:1
address 27:4 34:11 50:22,24
administration 8:14 67:20
administrator 49:3
admitted 73:11
advantage 22:15
advertisements 93:21
advertising 19:2 91:25
advice 81:11
affidavit 4:10 80:3 87:16
afford 43:22
after 8:21 9:4 12:15 12:19,25 13:17,19 14:6 18:18 44:14 50:12 58:11 61:11 63:12 67:4 70:2 71:15 73:21 82:4 83:2,7,10,11,12 86:23 97:6
aftermath 29:24
afterwards 54:14
again 11:23 13:25 24:3 29:18 58:18 70:18 85:24 97:11
against 87:7,18,18 88:2,6,13 89:10 98:15,25 99:3 101:24
agency 20:11,11 22:7,7 93:10 96:3 96:4
agency's 22:23
agents 36:20
ago 27:20 51:3 57:23 80:15
agreed 5:3 42:23
agreement 26:25
AG's 11:21 13:13
ahead 17:5 18:15 28:5 91:13
Aiken 24:14 25:8,9
almost 100:15
alone 32:23
along 6:23 25:14 30:13 33:3 34:7 37:19 65:20 66:4
already 29:1
altogether 13:14
America 13:23 14:4
amount 25:15 57:5 57:9 72:2 75:10 75:24 99:5,17
amounts 100:19
AND/OR 106:9
Anna 3:35,42 4:7 4:10 33:13,18 38:5 45:3 47:10 47:15,24 48:4,8 48:22,23 49:24 50:1 51:10,14 52:18 53:1,7,15 54:9 57:3 59:25 62:6,14 63:25 65:24 66:5,7,22 67:4 68:10 69:7 70:5,17 71:10,11 71:16,25 72:7,12 72:12 73:9 76:4,7 76:12,16,25 77:10 77:21 79:24 80:3 80:17 81:11 82:24 84:4,8,8,17 85:10 86:17,23 87:3,18 88:2 101:1 103:18
Anna's 52:21 53:21 63:22 74:23 85:22
another 12:23 26:17 32:8 40:20 49:6 64:20 69:15 81:2
answer 15:1,5 58:15,16 88:4
answered 28:9 63:25
answers 103:10,11
anticipate 14:23
anticipated 38:2
anticipating 36:16
anymore 94:1
anyone 20:21 21:17 33:4 34:5 35:18 37:16 68:12 83:17 89:21 93:9 97:5
anything 15:13 17:8 19:14 22:19 34:10 42:10 43:9 51:24 94:10 97:20 100:3
apparent 12:16
appeal 45:5
appeals 12:4,6 13:10
appear 44:6 57:1 57:20 76:16
APPEARANCES 2:1
appears 42:9,16 43:25 53:20 54:5 55:19 56:24 57:19 58:1 61:18,21 80:12 86:1
appellate 12:2
appraise 82:18
appropriate 23:13
approximately 65:18
APRIL 105:24
area 45:25
around 12:17 24:24 26:5 34:6 56:1 58:4 61:7 69:8 90:9
arrangement 27:8 27:17 39:20 41:6 41:21 51:20 52:17 64:20
arrangements 44:16 51:22
arrested 87:5
Ashley 16:7
asked 15:13 37:18 69:19 72:12 73:16
asking 60:7 81:14 84:13 96:18 97:18 102:20
assistant 8:24 21:6 30:9 41:15 57:4
associate 15:13
associated 23:25
Associates 1:6,17 3:28,38,41 18:9 19:1,7,10,23 20:1 20:12 21:9 23:5 23:16,21 24:5 26:6 29:17 30:2 30:24 31:22 33:23 35:6 38:12 40:23 41:6 44:16 51:20 51:23 52:18,21 53:7 54:16,19,22 55:9,22 56:3,16 85:22 89:9,10,11 89:14,21 90:16,23 91:2,7,24
association 17:9,13
assume 13:12 21:11 27:23 44:16 45:16 48:10 49:16 72:24 77:9 84:4,5 93:13 96:20 97:17 100:25 101:14
assumed 58:12
assuming 51:7
asterisk 43:5,20
attach 107:21
attached 3:25 60:10 106:10 107:19
attachment 20:18
attended 8:24
attention 92:23,23
attorney 5:16 11:16 14:10,13 15:21 77:7 88:18 105:9
audit 96:4,25 104:18
auditor 97:2
August 50:13
authority 47:20,25 77:6,10
authorization 46:20 46:24
authorized 46:18
availability 22:3
available 56:13
avoid 41:25
aware 6:22 20:10 81:18 104:14
away 40:16 46:8
a.m 1:32,32

B
B 1:29 2:5,6 27:6 46:17
Bachand 1:26 105:2,23 106:5
back 8:8 11:15 13:22 14:6,8,8,12 16:17 17:6 31:13 45:19 48:4 51:1 51:19 59:13 65:24 66:2 67:2,6 69:2 69:15,16 70:19 79:12 83:14 98:16
background 29:10 37:3 39:15 89:22 93:6,10,13
backpacked 13:23 14:2
balance 57:11
balanced 47:8
bank 48:7 49:23

50:22 59:4 65:2 66:6 69:19,22 72:20,25 74:23,24 75:6,12 77:16 83:1 84:19 88:13 88:24
BAR 11:13,18 90:7
Barnwell 50:14,14 50:23 63:13 64:8 64:12
based 16:5 65:19 94:8
basic 59:18
basically 69:4 89:14
basing 96:17
basis 7:8 15:14 26:17,19 31:25 42:14 50:5 55:23 88:12 89:10 94:5 94:7
Bates 80:11 103:6
Bates-stamped 85:7 86:9
bathroom 59:8
Beach 24:17 25:7
became 20:10 30:5 30:5 58:5 59:17 92:6 98:14
become 56:6
becoming 59:19
before 7:21 9:5 14:25 18:17 19:20 20:3 28:16,18,18 41:1,2 43:13 45:6 53:10 55:3 56:22 56:24 57:17 73:3 73:6 78:5 80:6 90:4 91:18 93:8 107:19
began 9:12 10:13 12:19 14:9 50:15 52:18 67:9
begin 7:22 15:5
beginning 34:16 94:4 104:16
behalf 6:19 14:11 18:9 31:3 33:16 36:22 47:20,22,25 77:12 100:24
Behavior 9:10,11
being 5:7,23 12:15 22:24 54:9 65:6 69:18 86:17 104:23
believe 12:10 18:20 19:2 20:24 21:3 21:16 23:6 29:12 31:20 33:10 34:15 34:15 35:4,15,25 39:2,3 42:14,25 44:8 50:17 52:1 55:4 57:18 61:8 71:23 76:5,5 80:7 81:16,20 83:8,12 83:23 87:11,13,19 89:24 90:13,18 92:15 93:24 94:2 96:14 100:19 103:24
believing 38:16
beneath 43:20
benefit 8:1 23:8,20
benefits 39:13 56:12 63:2
besides 26:12 99:9
best 21:20 23:23 65:10 69:19 80:25 87:4 102:1
better 9:7 37:19
between 68:16
Beyond 97:17
bill 24:16 26:2 42:25
bills 49:7 76:17
bit 14:24 15:6,15 100:22
block 53:25 54:3
blocked 34:12
Bluffton 24:19 25:5 25:6
Bolstrup 39:3,4,5 57:9 90:5 92:21 95:15
Boomerang 1:10
borrowed 99:3
borrower 98:18
Bostrup 57:6
both 29:10 32:7 44:25 48:14,15 63:17 66:3 101:17
bottom 43:24 55:17 60:20 64:15
box 2:16 50:24 51:1 82:15
bracelet 82:12
branch 71:15
breach 87:8 94:6 97:22
breached 94:4
break 7:15,20 59:7 91:11
brief 14:9 45:3,5 46:14
briefly 6:16
briefs 12:3
bring 15:14 84:17
bringing 71:13
brings 78:16
broad 2:15 49:3 105:15
broke 45:9 59:16
brokers 36:19
Brooks 24:17
brother 66:2,3 67:11,13 68:6,8 68:19,25 75:22,23
brought 6:20 78:4 87:17
building 26:21,24
Bushorr 3:32 32:12 32:16,21 33:8
busier 30:6
business 8:13 10:19 11:2 13:18 46:15 48:7
buy 44:1,3 55:24 56:2,5,24
buy-out 57:3,9 58:11,18,24 85:25

C

C 27:6 46:17
CA 1:3
cabinet 70:11,13,15
Calhoun 27:5 45:18 50:23
call 7:16 13:4 14:16 21:4 47:1 65:13 65:18 66:15 67:13 78:2 79:6 92:23
called 6:18 30:8 35:15 38:13,14,14 42:6,9 53:25 60:11 61:15 65:24 66:18,20,25 67:10 79:4
calling 78:7
came 11:15 14:8,8 16:17 20:10 34:23 34:24 44:17 45:15 49:24 58:13 63:12 64:17 65:4 67:11 69:15,16 70:3 75:21 96:4
cancelled 4:2,17 57:15 85:13
candidate 34:16,17 89:15
candidates 44:25 93:16
capacity 30:9
capital 11:17,24,25 12:14
card 62:19
career 12:18
Carolina 1:1,17,27 1:28,30 2:8,17 3:28,38,41 4:6 5:2 9:1,16 18:8,25 19:7,10,22 20:1 20:12 21:8 23:4 23:16,21 24:4 26:6 29:17 30:1 30:24,25 31:2,13 31:22 33:22 35:6 35:15 38:12 39:18 40:2,4,22 41:6 42:13 43:2 44:16 51:20,23 52:17,21 53:6 54:10,11,16 54:18,22 55:8,22 56:3,15 58:14 59:24 85:9,22 89:8,10,11,14,21 90:16,23 91:2,7 91:24 105:3,16 106:6
case 61:10 77:8 88:21,22,25
cash 74:5
cashed 88:14
category 42:6
cause 60:3 69:20 92:24 94:3 105:12
caused 89:12
cautioned 5:8
certain 60:4 71:7 85:17 89:15 97:21 102:20
Certificate 3:13 105:1
certified 36:18
CERTIFY 105:4,9 105:13
chance 103:23
chances 9:7
change 50:12 58:19
changes 106:9 107:18
Change/Correction 107:4
characterize 16:25 53:12
charge 87:6,9
charged 87:3
Charleston 2:17 5:15 8:12,18,19 9:3 16:5,8 25:2 105:16
Charlie 11:16
check 4:2 29:10 37:6 39:15 41:18 46:16,17,18 47:16 48:2,3 54:10,13 54:14,15,18 55:16 55:18,18,21 57:15 57:18,24,24 58:2 58:11 67:1 71:18 71:22,25 72:3,13 72:15,20,22 73:3 73:7,12 74:2,6,7 75:10 77:8,21 78:13,16,23 84:9 84:17 85:25 88:14 89:22 92:7 93:6,6 93:10,13
checkbook 84:5
checkbooks 84:6
checked 84:19
checking 93:8
checks 3:45 4:17,20 36:19,22,25 46:21 46:22 47:12,12,13 47:17,20,25 48:16 49:13,19,21 55:1 55:5,7,8,14 59:2 63:20 65:2 73:17 74:14,21 75:19 76:4,7,19,21 77:1 77:10 79:1 84:7 84:14,22 85:13,18 85:21 86:4,24 88:14
children 10:10
choice 94:17
choose 40:18
choosing 94:19,25
chose 41:21
Christmas 66:11
circle 43:25,25
CIRCUIT 1:2
Citizens 48:9,11,20 49:24 57:19 59:5 66:25 67:10 68:18 70:23 71:6 88:7 101:12,15,18
City 83:23,24
civil 1:28 5:2 6:16 87:17,18 88:1
CLA 91:24 92:12

92:14 93:3,9,15 93:21 94:4,14 95:15,15 96:18 97:18,20 101:24
claim 6:21 7:8 87:17 88:6,10,13 89:10 91:3 92:3 94:5,6 100:20
claiming 100:4
clarify 25:12 77:2
class 11:2
Clause 65:12
CLA0057 55:17
clear 7:3,10 36:15 99:12
clearer 15:1
Clement 2:14 5:15 105:15
client 5:23 53:25 98:7
clients 6:22 15:14
close 97:15
closing 45:1 76:1
closings 14:11 16:13 17:20,21
collecting 17:7
college 8:11,17,19 8:22 9:2,5
Collins 88:11
Columbia 1:30 2:8 15:21 16:9 24:15 24:16,16 25:2 26:1,10,13,14 83:22,23,24 102:4
Columbia-based 16:4
combination 12:5
come 18:25 38:11 50:9,18 79:12 99:14
comes 20:1 68:19
comfortable 79:15
coming 35:16 71:7 83:17
commencing 1:32
commercial 25:21 25:23
COMMISSION 105:24
commitments 63:11
COMMON 1:1
communicate 38:12
communicating 36:19 66:6
communications 8:13
Company 1:19 76:15
complaint 26:5 91:18
complete 71:7
completed 58:11,18 60:20,20
computer 75:9
concerned 100:15
concluded 104:24
Condon 11:16
conducted 25:13 31:14
conference 38:23 39:16,21 44:15 45:24 51:21 77:15
confessed 77:22 78:13
confession 103:18
confident 22:25
confidential 89:17
conflict 30:5
confronted 78:11
confuse 7:6
CONNECTED 105:11
connection 88:9
CONSISTING 106:4
CONSTITUTE 105:7
constituting 104:15
consult 23:17
consulted 26:6
contact 23:17 29:17 30:24 31:2,10 37:8 41:12 50:22
contacted 20:14 30:1,25 35:6 101:3
contacting 20:11
CONTENTS 3:1
continue 30:20 59:1 59:4
continued 18:1,2 58:21 59:18 64:20
continuing 17:24
continuously 69:1
contract 26:16,19 51:24 94:5,6,14
contribute 28:22 32:24 34:5 37:14 37:16
contributed 27:23 34:2
contribution 29:7
conventions 90:7
conversation 57:8 82:24 83:6,9 92:18 104:10
conversations 39:2 81:14
copies 3:25,45 4:17 54:25 71:5 74:24 75:6 85:12 90:3
copy 3:48 4:2 52:2 55:18 56:19 57:14 61:6 72:22 76:21 91:19 95:9 96:20 100:9 107:20
Corbett 87:23
corporate 8:13
correct 9:1 10:5 12:8 13:11,15 15:9 17:11 18:4,6 18:10 22:13 24:6 24:9,22,25 25:2,3 25:17 26:7,8,11 26:25 27:9,21,22 27:24 28:1 29:19 29:20,23,25 32:3 32:22 34:22 35:9 35:11,12 36:23 38:9 40:10,19 41:11,13,14 42:19 43:10 44:19,22 45:17 46:6 47:17 47:18 48:18 52:23 53:3 54:20,23 56:16 58:23,25 59:21 61:2,12,13 66:9 75:16 77:11 77:13 78:12 79:4 79:11 80:16 82:3 84:10,12 88:7 103:20 105:7
corrected 50:22,24
CORRECTIONS 106:10
correctly 32:16 46:5
cost 23:8
counsel 5:4 36:9 81:11 87:23 97:9 105:9
Countrywide 99:8 100:8
County 1:3 79:17 83:24 88:13
couple 11:13 84:24 91:20
course 9:2 11:3 99:22
court 1:1,26 4:27 7:25 19:18 41:24 53:11 56:22 80:8 85:6 105:2,18,23 106:5 107:21
coverage 60:8
CPA 67:17,18
Crawford 97:10,12
create 59:2
credentials 92:7
crime 87:3
crimes 11:17,24 12:1,14
criminal 12:4,6 13:10 37:3
crossed 57:5
cut 46:16,19
CV 3:32,35 32:11 33:13

D

Dallis 15:21 16:2,12 16:17 17:1,3
damages 96:18 97:19 98:6 100:18 100:20
Damian 24:18
Dan 24:17
data 89:17
date 43:6 54:6 57:4 61:18 65:17 72:20 78:18 82:1,25 106:9
dated 3:48 4:3,11 18:13 55:19 56:20 57:15,20 61:1 80:3,12 107:24
Dawn 24:14 28:4,6 28:7,8,10,13,25 30:3,9,20 31:4,5,7 31:10 32:6,23 33:1,4 35:22 36:12 37:1,5,8,14 37:16 38:2 41:12 44:23 45:4,8,23 46:1,2,3 47:10,15 47:19 65:4
day 1:31 68:15 69:13,15 78:10,11 79:3,3,9,12 81:23 83:12,18 105:5,21
days 69:12,17 71:3 73:5 78:9
dealt 28:17 101:11
December 4:11 10:8 65:21 80:3 80:12 81:22
decide 46:18
decided 13:13 16:17 23:1 43:14 43:17
decision 16:20 28:11,22 29:7 30:24 32:21,24 33:5 34:3,5 37:12 37:14,17 38:10 43:7 56:2
deed 99:2
deeded 99:1
defendants 1:21 2:11 6:20 33:17
defendant's 3:27,31 3:34,37,40,44,47 4:1,5,9,13,16,19 19:21 32:10,15 33:12,16 40:21,25 53:5,11 54:24 55:3 56:18,23 57:13,17 59:22 80:1,7 85:2,11 86:2
definitely 39:4
degree 8:12 9:4,22 10:16 11:3,6,12 68:1 95:22
DELIVERED 105:14
Delvechio 96:25
department 4:6 11:15 59:24 60:7 83:22 102:4
departure 97:6
deponent 5:3,5 104:22 106:1 107:19
deposed 5:23
deposit 82:15
deposition 1:7,25 1:29 3:3 5:1,5,20 6:18 7:3 104:23 105:4,8 106:4,7
depositions 5:21 6:7 7:14 88:22
describe 22:6 45:14 49:2
described 44:21 48:16 53:18
description 46:4,14 90:1
desk 45:19,20,22 46:11 70:19,19

destroying 66:7
detail 103:25
detective 83:17
determine 48:24 70:21 74:13 95:22
determined 76:6
Deysach 26:18
DHEC 60:19 61:7
difference 78:21 79:10 90:6
different 18:5 38:20 39:7,12 92:16 95:3,7 103:23
difficult 75:8
direct 3:11 5:10 39:12
directly 8:21 45:12 45:21 74:22
Disappeared 69:25
disappearing 69:21
discarded 36:4 52:14
discarding 52:15
discipline 9:8
discover 65:10
discovered 64:21 76:4 77:15,21 78:25 86:23
discussed 36:12
discussion 44:2 92:15 101:9
dispense 5:16
dispensing 6:10
disposed 87:9
division 12:2,9
divorce 25:14
document 19:6,18 19:25 20:3,9 22:4 32:8 33:19 36:2 40:20 41:1,2,7 47:1 52:2,25 53:2 56:24 57:1,20 60:5 62:25 69:11 80:6 85:8,19,24 86:8,13,22 90:17 90:20,21,22 91:1 91:23 93:25 94:14 94:18,19,22,25 95:7,9 102:21,24 102:24 103:23 104:1,15
documents 23:24 45:1 55:10 60:15 61:15 62:17 69:5 71:4 84:25 85:16 91:6 93:25 95:4 99:23,25 103:6
doing 12:17,19 38:3 48:7 52:19 58:22 64:19 69:7,18 93:15
Don 11:24 12:7
done 86:19 92:13 95:19 100:12,15
Donnelly 9:20 60:21
Donny 24:17
door 45:21,22
down 14:20 16:7 45:22 72:7 73:9
draw 15:14 17:7
driver's 62:18
drop 87:22
duly 5:7 105:6
duplicated 85:16
duration 21:22
during 7:14 8:23 12:12 21:17 23:24 29:16 36:12 39:15 39:20 65:1 95:19
duties 36:15 44:20 49:2 58:19 59:18 89:15 94:8
D-e-y-s-a-c-h 26:18

E

E 2:13 105:14
each 39:13
earlier 44:21 48:17 54:21 56:25 93:22 94:12 95:14 103:19
easier 14:24 15:6
Ed 12:21 14:17 19:25 32:14 33:16 40:25 41:13,24 43:4,21 50:6 53:10 56:22 57:17 59:13 80:6 84:3 84:13,24 91:17 92:5 95:22 102:18 104:11
education 8:9
Edward 1:8,9,9,25 3:3 4:14 5:7 8:2 61:22 85:3 105:4 106:3,14 107:25
effect 99:1
effective 44:1
eight 43:7
either 5:22 38:14 39:3 101:20,23
electives 11:13
electric 49:10
electronic 84:7
Eligibility 61:16
Ellis 89:1,3
emergency 77:8
employed 9:24 29:1 29:13 101:18 105:10
employee 17:10 26:7 27:20 29:18 40:2,2,16 42:24 44:3 56:7,15 58:6 58:8 59:18,20 64:18 82:2 92:6 97:1
employees 24:20 27:21 42:14 92:1 95:16
Employer 62:11
employers 36:14
employment 38:17 38:20 39:7 61:11 61:15 94:17
enclosed 45:17
end 82:25
ended 69:21 83:1
ends 79:3
engage 16:2
engaged 24:8
enjoyed 12:17
entitled 97:19
entries 75:14,21
entry 75:24
equates 42:18
errata 3:17 106:10 107:1,18,20
ESQUIRE 2:5,13 105:15
essentially 29:21 91:5
estate 6:6 8:7 12:20 13:22 14:10,15 16:3 17:19 24:8 25:9,13,16,18 30:6,9 36:13,14 36:20 41:17 57:4
etc 45:1 92:1
even 14:23
eventually 87:3
ever 19:9,14,19 20:2 23:19 70:21 72:10,22 73:3 76:21 77:5 82:16 83:6 95:18,22
every 91:1
everybody 33:2 34:6
everyday 16:13
everyone 15:6
everything 15:15 66:5
exactly 16:23 19:8 23:14 84:25 95:19
examination 1:25 3:11 5:10 27:13 59:11 91:15 102:16 104:8
example 34:24 35:8 41:9 42:15 45:16 46:9,16 49:8
except 16:23 17:7
EXCEPTION 106:9
Excuse 52:3 89:2
exhibit 3:7,21,27,31 3:34,37,40,44,47 4:1,5,9,13,16,19 19:21 32:10 33:12 40:21 43:24 51:21 53:5 54:24 56:18 57:13 59:22 80:1 85:2,11 86:2,6 104:11
exhibits 3:23,25
existence 87:20
expect 94:9
expenses 49:14 97:21,23 98:3 99:9
experience 36:13 36:13,14
experienced 6:6
expired 87:25
EXPIRES 105:24
explaining 95:2
explanation 90:14 90:17 107:4
expressly 5:5
extensively 91:25
e-mail 20:18
e-mailed 20:14

F

fact 62:17 94:8,25
facts 6:21 7:7
failed 89:18
fair 16:25 31:21 40:15 47:19,24 65:7 86:22
fall 9:14
false 93:3,4,21
familiar 20:4 41:3,8
family 25:24
far 8:8 100:15
fast 14:21 16:22
father 101:1
fax 47:2,3,6 71:9,10 71:12 94:23
faxed 20:13,15 90:18
faxes 71:11
fee 57:3
feedback 38:16
feel 79:15 89:13,17
feels 43:21
fees 98:4
feet 46:8,10
fellow 71:24 72:19 102:4
felt 16:21,21 33:2 34:7
few 12:15 31:1 59:14 73:5 81:21 89:7
field 13:22 22:12
FIFTH 1:2
figure 67:9,12 69:2 86:14,15
file 36:6,9 51:11,15 60:11,16 69:23 70:11,13
filed 51:13 53:4 75:4 87:19,24 88:6,15 101:24
FILING 105:18
fill 18:21 22:18 31:18,19 62:3,14
filled 31:12 62:4,6 106:11
fill-in 22:9
final 12:13 55:16 85:24 105:19
finally 42:22
finances 18:15
financial 89:17 103:22
FINANCIALLY 105:11
find 4:14 7:4,7 22:9 22:23 26:7 85:4 103:9 106:7
finds 71:24
fine 6:2,9
finished 10:15 11:2 59:15
finishing 11:11
finite 40:11

Finley 10:12
fired 77:25
firm 1:8 10:2,4 11:10 15:21 16:2 16:4,12,15 17:1,4 17:6,10,11,16 23:17,19 24:21 36:16,22,25 38:8 38:11 44:17,18 47:22,25 48:20 49:1,3 55:8 60:24 77:12 88:18 89:13 89:16 95:24 98:8
firm's 57:18 58:8
first 11:20 17:9 34:19 42:15 47:15 48:8,9,10,19 49:23 52:18 53:21 54:5 57:19 59:5 66:25 67:10 68:17 70:23 71:6 77:14 80:22 81:21 88:6 101:11,15,18 102:7 105:6
five 43:7,17 65:22 65:23 68:16 69:17
flag 75:25
floor 64:15,16
focus 25:16
folks 101:11,14
followed 54:14
follows 5:9
follow-up 21:24 23:1,1 38:15
Ford 76:15
FOREGOING 105:6 106:3
forged 88:14
forget 79:14,16
forgotten 94:13
form 4:7 22:18 59:25 60:2,19,19 61:1,18 62:3,21 63:1,5 96:13
forms 60:9,9
forth 46:12 48:24 71:4
forwarded 51:1
found 10:25 18:13 70:25 71:18 74:20 84:21
four 10:23,24 13:24
fourth 62:24
frame 18:19
Freeman 87:24
friends 25:24
from 6:17 8:17,19 9:23 11:1,15 13:1 15:2 17:1,8 18:2 21:11,24 25:21 26:4 28:25 38:17 40:2,3,13 45:23 46:8,20 50:23 51:7 54:6,21 56:3 59:5 60:7,10,13 61:6,8,11 65:13 66:15 71:6 73:11 74:22 79:23 90:23 91:6 92:14
front 45:24 70:20
fronts 75:18
full 7:25
fully 6:22 14:25
full-time 11:20 30:18,20 58:5,8 64:18 92:10
Fulmer 2:22
function 45:2
funding 46:20,24
further 23:2 58:10 104:22,23 105:9 105:13
f/k/a 1:7,8

G

G 1:8,9,9,25,26 3:3 4:14 5:7 61:23,24 63:3 85:3 105:2,4 105:23 106:3,5,14 107:25
Garner 63:3
gather 21:7 24:3 26:4 28:25 54:21 70:17 74:18 75:23
gave 38:15 83:10 98:12
general 14:14 15:12 48:13 49:17
generally 11:25 15:11 49:8 88:12 98:3
General's 11:16
generate 54:15
generated 55:8 84:1 86:23 98:13
gentleman 26:17
Gerard 8:2 61:25
gets 6:17 68:25
getting 9:7 30:6 38:17 50:25 66:4 67:18
give 16:19 46:14 82:5 83:25 90:16
given 82:11 90:3 91:2,8
gives 42:13
giving 23:9 43:7
glad 7:12,19,19
go 8:8,21 11:10 13:16 18:14 20:11 20:23 23:1 28:5 30:16,17 45:1 51:19 59:7 69:10 74:2 82:19 83:14 91:13 102:12 104:3,17
goes 40:2
going 13:19 19:18 30:18,20 32:8 36:22 38:17 59:14 60:2 67:1,2,9,12 69:1 78:4 90:4 92:16
gone 19:9
good 5:12,13 42:3 55:18
gotten 66:16 90:23
graduate 8:17,25 9:2,6,8 11:1
graduated 8:12,19 11:1 13:18
Greenville 24:17 25:7
Griffin 24:16 26:2
group 61:14
guess 10:22 11:22 13:3 42:18 47:15 50:8 64:8 66:11 69:15 75:14 77:15 91:5
guy 77:16
guys 12:22

H

half 10:24
hand 32:14 90:7 105:20
handed 82:25
handing 85:6
handle 25:21 40:4
handled 25:14,23 94:8
handling 10:2 14:10,15 16:13 65:6
handwriting 62:15 86:11,21
Handwritten 4:10 80:2
happen 54:9
happened 30:23 31:11 36:5 51:10 70:25 71:4 73:5 73:21 81:19
happening 72:10
happens 68:24 72:5 82:4
Harry 14:13 15:7 15:11,16 17:7,9 17:25 18:18,23 27:1,8,17,20 28:9 28:16 29:1,10 30:6,18,21 32:25 33:4 37:18,21 38:3 45:23 64:5 64:10 77:7 81:17 81:18
Harry's 17:10 19:3 46:3 64:9
having 5:22,22 20:25 36:16 50:15 57:8 75:10 78:13 79:4
head 14:9 102:10
Health 4:6 59:24 60:7
hear 93:12
hearing 73:11 105:18
Heizer 14:13 15:7 15:16 17:9 18:18 27:8,17 29:3 64:5 77:7
Heizer's 15:11
help 6:23 22:9 33:5 37:25 78:21 79:10
helpful 6:11,13
helping 69:9
Henry 88:20
her 8:1 9:22 14:24 22:22,24 23:1 28:11,12,15,17,18 28:18,19,21 29:7 30:4,7,9,12,13,15 30:16,17 33:1,3 33:10 34:7 36:13 36:14 37:3 39:17 43:7,14 45:9 46:11,18 49:2 56:10,13 59:19 62:15 64:1,3,6 66:16,24 70:19 71:18 72:7 73:14 73:16 76:25 77:22 77:25 78:3,11 79:6,15,18 81:6 82:2 83:7 84:11 87:7,18 92:7,10 95:18 103:22
hesitate 7:17
Hill 24:16 25:7
Hilton 14:9
him 6:5 17:8 29:4 45:23 68:22 101:7
himself 68:22
hire 16:17 28:10,11 28:22 29:7 30:12 32:21 33:8 34:3 37:12 40:16
hired 13:9 28:11 45:3 48:8 92:10 94:7
hire-to-perm 39:12
hiring 36:24
Holcombe 77:17,18 77:20 101:11
hold 28:7 63:10
holds 99:7
Holler 87:23
home 23:9 98:15,20 98:24 99:8
Hoorman 53:15
Hoormann 3:35,42 4:7,10 33:14,18 33:25 34:3,24 35:19,24 36:7,12 36:25 37:2,6,12 38:11,18 39:15 44:17 45:11,15,21 46:5,17 53:8 54:19 56:3,6 57:3 58:5,11 59:17,25 61:3,11 63:14,19 80:3 89:23 92:5 93:11 94:20 95:1 100:24 101:2 103:18
Hoormann's 33:21 44:24 55:9 58:19 60:11,16 95:24 101:1
hospital 68:23
hour 1:32 42:18,22
hourly 42:14
hours 52:21
house 98:10,11 99:2
Howell 24:15 26:3
HR 10:2 40:5
Human 4:7 59:24
hundred 16:3

I
Ian 26:18
idea 30:14 86:13
identification 19:22 32:11 33:13 40:22 53:6 54:25 56:19 57:14 59:23 80:2 85:3,12 86:3
IDENTIFIED 3:23
illegal 103:22
IMBA 9:23 10:20
immediately 11:15 51:1 67:5
impression 81:23
improprieties 65:11
Inc 1:11,18
incident 84:1
included 99:14,16 99:17
Including 100:8
incomplete 4:29
incur 99:10
Index 3:7,21
indicated 12:14 94:19
indicates 4:29,30 46:2
indicating 27:16 43:11 94:16
informally 12:12
information 3:29 7:4 19:23 41:4 44:6 47:8,11 56:25 62:5 89:17 90:5 93:3,4
Ingersoll 11:14
initial 90:18
Initially 50:11 87:19
inquiry 61:8
inside 43:25
instance 81:24
Instructions 42:7
insurance 1:19 81:5
intend 96:20 97:25
interest 30:5 98:4 99:19,19
INTERESTED 105:11
interference 74:23
International 10:19
interrogatories 103:9,9
interruption 4:29
interview 12:13,13 13:5 20:23,25 21:5,8,12,15,18 21:20,23 23:24,25 28:11,20,21 31:1 33:25 34:16,17,18 34:23 35:7,19,24 36:12 37:21
interviewed 12:11 13:3 37:2 44:25
interviewing 23:15
interviews 31:14
introductions 5:17
investigated 102:5
investigator 83:16
invoice 3:48 54:12 54:14 56:20
invoices 3:45 40:3 55:1
involuntary 17:1
involved 6:1 19:7
involving 98:7
Irvin 1:30 2:5,6 6:2 6:4,9,12 27:10 41:24 52:9 91:8 100:12 102:14,22 102:25 103:5,10 103:13,15 104:5 104:21
issue 50:15 67:1 96:24 97:9 105:19
issues 40:5 97:7
item 90:11
itemize 99:10
itemized 97:23
items 19:4 74:11 90:8

J
Jack 14:10
January 10:8 65:21 99:21,21
JD 11:3,6,9
Jeremy 24:15 26:2 26:15 77:6
jeweler 82:17,19
jewelry 78:3,20 79:10,13,19 82:6 82:8,10,13,18,25 83:11
Jim 77:17,18 101:10
job 7:6 11:16,20,21 12:11,12,18 13:21 13:21 14:12,13 15:18,19,20 22:3 36:21 63:22
Joe 24:16
John 13:6,7 89:7 100:24 101:1
Johnson 2:13 3:11 5:11,14 6:3,8,11 6:13,14 19:24 27:11,14 32:13 33:15 40:24 42:3 42:5 52:11 53:9 55:2 56:21 57:16 59:9,12 60:1 80:5 80:9,10 85:5,14 86:5 91:16 100:14 100:17 102:12,17 102:23 103:3,8,11 103:14,16 104:3,9 105:15
joint 8:12 10:16
Jonathan 24:15 26:2
Joyce 3:32 32:11,15 43:6,12,22
JUDICIAL 1:2
July 61:1,10
June 16:16 26:6,12 43:20 54:6,6
just 6:16 7:4,24,25 8:8 9:6 10:24 14:9,10 15:1 17:8 17:13 18:5,13 19:17,19 20:2 26:15 27:10 30:12 30:18 31:17 34:11 34:17 39:23 40:13 42:1 45:2,5 49:6 58:12 60:3 68:21 68:22 71:12 75:9 79:18 81:16 84:24 91:12,17,19 99:12 102:18

K
keep 36:6 52:2
kept 70:10,11 71:7
key 70:17
kind 14:13 15:12 22:18 23:7 25:24 26:19 31:16,17 49:1 51:25 54:12 58:10,21 84:1 89:21
kinds 49:14
knew 12:15,18 28:18
know 5:14 6:15 7:3 7:5,10,13,17 12:19 13:1,20 14:20 16:23 18:14 18:25 19:2,3 22:9 23:8 25:15 31:7,9 31:22 36:5 38:19 39:4,23 49:5 51:20 52:16 55:7 56:23 60:21 66:7 79:20 81:20 86:10 87:6 90:6 91:18 97:21 99:18 101:1 101:8 104:16
knowing 84:18
knowingly 93:3
knowledge 55:21 101:17

L
Lacy 88:11
LARGE 105:3
last 21:20 26:18 27:16 39:4 55:16 55:21
late 10:25
later 47:15 76:23 76:24 84:21
Laudenslager 24:14
law 1:7,29 2:6 8:21 9:5,7,12 10:4,13 11:1 15:21 16:2,4 16:12,14 17:1,3,5 17:16 24:8,21 26:7 36:16,22 38:8,11 44:17,17 48:20 57:18 58:8 67:6 68:7,20,25 77:12 83:14,17 84:3 89:16 95:24 98:8
Lawhorne 89:1,3
lawsuit 5:25 6:20 9:21 26:5 87:18 89:19 101:24
lawsuit's 29:21
lawyer 6:6 8:3 81:15 88:19 89:6 90:24 91:3,19 100:1 104:12
lawyers 14:22 24:10,20 25:25 26:12
Lawyer's 96:1,3,10 96:23 97:1,5,14 99:14 100:9 104:18
Lay 89:7
learned 35:13
least 64:20 100:15 104:12
leave 67:3
leaving 22:24
ledger 46:22 47:11 85:9
left 13:13,21 15:18 17:3 63:12 67:10 83:1,13
legal 1:17 3:28,38 3:41 11:20,20 17:4 18:8 19:1,7 19:10,23 20:1,12 21:8 22:12 23:4 23:16,21 24:4 26:6 29:17 30:2,9 30:24,25 31:2,13 31:22 33:22 35:6 35:15 38:12 39:18 40:4,22 41:6 42:13 43:2 44:16 51:20,23 52:18,21 53:7 54:10,11,16 54:18,22 55:9,22 56:3,16 58:14 85:10,22 89:8,10 89:11,14,21 90:16 90:23 91:2,7,24 94:9 98:4
Legal's 40:2
lender 46:21
length 40:6
less 46:6 50:19,21
let 7:10,17,24 8:8 9:1 14:16,25 19:17 30:11 31:22 36:15 40:20 41:1 43:4 49:6 50:9 51:19 58:17 60:3 66:8,8 84:3,24 89:20 90:15 92:22 98:17 100:22 103:3 104:18
letting 30:16,17
Liberty 1:18
library 79:17 80:19 81:11
license 62:18
life 12:16
like 14:14 16:21 19:4 20:19 23:7 34:7,10 40:5 61:15 62:6,14 65:25 68:17 69:9 74:3,11 76:14

80:24 86:14,15 89:18
likely 20:7 67:14
limited 68:18 70:18
line 42:21 65:12 66:9 107:4
lines 25:15 65:20
lis 87:24
Lisa 101:10
list 101:7,10 102:3
listed 100:23,24 106:10
listing 101:6,6
litigation 6:15 22:5
little 14:24 15:5,15 33:11 45:24 53:25 100:22
LLP 2:14 105:15
Loans 99:8
located 26:24
location 18:5 26:1 26:10,13,14 52:16 64:9
locations 24:24 25:2
locked 70:13,14,15
lodged 87:6
long 7:13,14 10:6 12:9 15:16 16:14 17:22 21:20,23 69:10 78:5
longer 17:7 56:15 82:1 87:20 95:12 97:3
look 19:10 41:3,4,8 55:7 60:10 91:22 102:21
looked 51:21
looking 12:17 18:21 22:11 23:8 26:9 31:17,23 91:17 102:24,25 103:4,6
looks 20:4 60:6 61:15 62:6,14 63:1 80:24 86:14 86:15
losses 97:14
lost 95:23,24
lot 15:1

M

MACC 67:21
machine 71:12
made 16:19 28:11 29:6 30:24 31:10 37:12 38:10 43:6 43:11,14,16 51:22 56:2 81:18
mail 50:15,25
mailed 46:23
main 28:8 30:3
maintain 82:21
maintaining 51:14 70:8
make 5:17 7:7 22:21 32:20,23 33:5 43:7 45:2 47:8 60:15 66:8 78:21 79:10 89:21 90:15 98:17 103:3
makes 15:1,5
making 51:15
Mall 66:12,13 67:3
manager 28:9 49:1 71:15
managing 15:21
many 28:2,3 46:8 103:11
March 18:1
Marie 3:35,42 4:7 4:10 33:14,18 53:7 59:25 80:3
mark 19:18 41:18
marked 19:21 32:10 33:12 40:21 53:5,11 54:24 56:18 57:13 59:22 80:1 85:2,11 86:2
married 9:17 13:20
Marsha 20:24 21:2 21:12,14 22:2,6 22:21 23:23
masters 9:3 10:19 66:4 67:20,23,24
match 75:11 76:1
material 89:24,25 90:3 92:2 93:22
matter 6:23 30:17 33:9 70:2 78:9 81:12 102:5
may 1:11,31 20:15 37:9,20 41:1 43:21 62:6 76:16 85:15 90:22 91:3 94:12,12 100:16 101:5 105:5,21 106:6
maybe 6:4 15:25 65:4 76:23 89:20 103:5,8
McCracken 83:19 83:20 87:14 102:3 102:7
McDonnell 1:6,7,9 1:9,10,25 3:3 4:14 5:7,12 8:2 41:13 61:22,24 67:16 85:4 105:5 106:3 106:14 107:25
McDonnell-14 86:9
McDonnell-2 85:7
McDonnell-25 62:24
McDonnell-46 80:11
McIntosh 13:6,7
McKellar 88:20
mean 32:25 39:10 39:25 40:13 50:7 56:6 76:9
meaning 91:24
means 39:23 40:1
Medeiros 63:6,8,20
Medical 8:25
meet 21:14 28:21 37:25 78:3 79:14 79:16
meeting 79:15 81:10
mention 34:9 94:3 103:18
mentioned 30:3 37:20 90:4 93:20 95:14,15 103:21
men's 7:15
mergers 11:14
message 67:10
met 21:12 28:17 79:16
MIBS 9:23 10:16 10:18 11:11,12
might 5:17 6:22 13:20 20:5 22:15 32:9 56:12 60:11 61:6 69:16,17 86:19,20 87:16 101:2 105:19
mildly 64:24
mind 99:25 104:5
mine 12:18 13:2
minor 8:13
minus 97:15
minuscule 25:15
mislead 7:6 101:5
misleading 93:3,4 93:21
missed 94:12
missing 70:2,22 71:8 88:3
mitigate 98:6
mock 45:1
moment 27:19 30:11 51:3,19 57:23 80:15 98:2 102:13 104:20
Monday 1:31 105:5
monetary 100:19
money 23:2 73:22 78:15 79:21 95:23 98:5,12
month 4:21 50:10 50:19,20,21 76:23 86:4
months 12:11,15 13:24 76:23
more 20:7 46:5 50:19 55:24 57:24 59:14 64:21 65:1 74:14,20 84:22
morning 5:12,13 35:15
mortgage 36:19 98:5,7,8,10,10,13 98:15,25 99:7,13 99:18,20,23
Mosley 101:10
most 39:2 67:14 73:23,25 74:1
Motor 76:15
move 6:23
moved 14:12 17:6 17:25,25 50:13,23 63:12 64:8 70:18
MPA 67:19
Mt 24:18
much 15:13 33:11 43:15,18 44:2 71:19 86:15,15 95:23 103:25
Murphy 24:18
Murray 28:6 35:22 37:1 41:12
Mutual 1:18
Myrtle 24:17 25:7
myself 17:5 26:15 77:6

N

name 5:14 7:25 8:2 9:19 26:18 34:14 34:20,25 35:2,14 39:4 40:13 53:23 61:21 63:5 67:15 72:17 73:14 76:25 77:1,16 97:11 99:2 102:7
named 10:11 14:10 14:13 26:17
names 34:10,10
nature 8:5 16:11 22:19
need 5:23,25 7:5,15 7:16,21 30:12 46:17 91:11,12 100:3
needed 22:15 30:6,8 46:16,19
negotiate 57:11
NEITHER 105:9
Nelson 28:6
never 24:3 70:25
new 38:5
newbie 15:13
next 17:4 31:11 42:21 78:10 79:12 94:3
Nextra 22:5
non-traditional 10:23
normal 5:16
notarized 79:22 82:5
notary 1:26 83:2 105:2 106:5
note 4:27
noted 107:18
notes 35:24
nothing 5:8 99:11
notice 41:19
November 15:24,24
number 35:7 41:9 41:10 71:20 75:10 80:11 97:13
numbers 96:5 103:7

O

obtain 9:4 96:20
obtained 24:4
obviously 22:11 30:7 33:2 45:4 48:25 74:16 89:8 91:24
occasion 18:8 25:14 29:17
occur 18:11
occurred 21:8 97:21
occurrences 72:9
October 15:25 61:19

off 4:30 8:23 19:14 20:1 27:12 59:10 59:16 75:9 91:14 102:9,12,15 104:3 104:7,10
offer 38:17 43:6,11 43:13,17
offered 23:4
office 2:16 7:16 11:16,21 13:1,14 15:11,22 16:8,10 16:13 17:25 18:1 19:3 26:1,7 27:3,4 33:1 34:6 35:11 37:22,23 38:1 45:16,17,19,20 46:3 49:1 51:2 54:15 60:3,13 63:17 64:1 65:24 66:19,20 67:6 68:7,20,25 69:23 70:19 81:17 83:14 83:17 84:3 85:21 90:9 93:8
Officer 83:19 87:13 102:3
offices 1:29 2:6 21:8 25:13 26:20 45:15
Off-the-record 101:9
Oh 103:5
okay 5:19 6:3,8,25 7:11,18,24 9:8,12 10:6,10,21 11:3 11:18 12:4 13:9 13:16 14:16,19 16:1,4,11 17:3,18 17:20 18:2 19:5,5 19:9,17 21:4,7 22:21 23:11 27:19 28:2 29:9 30:16 30:23 31:7,10 34:2,8,13,19 35:18,23 37:24 38:7 40:10,18 41:18,23 42:3,15 43:1,4 44:9,12,14 45:14 46:11 50:16 50:18 51:3 52:4 53:14 54:5,18 56:1 58:17 59:1 60:9,23 61:10 62:6,11 63:3 64:14,17 65:1,10 65:17,23 66:23 68:1,19,24 69:4,7 70:21,25 71:14,24 72:2,19 73:9,21 74:1,9,13 75:23 76:3 77:4,14,20 78:2 80:9 83:25 85:15 87:15,17 89:4,19 91:13 92:12,22 94:12 96:8 97:5,13 99:20,22 100:14 101:5,10,14 102:11 103:3,17 104:14,19
old 8:15 10:11 51:2
Oliver 97:10,12
once 11:9,9 20:8,8 47:5 50:10,19,19 50:21 51:10 54:8 58:18 59:17 64:8 82:25 85:24 92:5 92:10
one 5:17 6:16 8:23 11:12 12:23 14:16 16:7 18:7 26:23 27:6 32:17 33:21 34:15,17 35:7 39:17 45:22 53:21 54:5 55:24 57:24 64:1 65:4,5 74:14 78:11,13,23 80:24 81:2,4,20,24 87:13,19 95:2,4 95:10 101:20,23 102:9,18 103:1,4
ones 33:21 34:18
only 12:10 25:13 26:23 63:25 77:5 81:23
opened 16:10 34:17
operated 46:15
operating 4:20 48:14 49:17 55:6 57:19 71:23,25 72:25 73:4 80:25 86:3
opinions 36:18
opportunity 6:19 15:18,19 68:17
option 40:17,18
options 39:10
oral 1:25
order 3:38 40:23 98:5,5 105:19
Organization 9:10
original 41:5 70:24 105:13,17 107:22
originally 12:11 43:16
other 6:18 9:4 11:10 23:17,19,20 23:20 24:10 25:25 30:19 31:21 33:4 35:18 37:16 43:16 45:8 49:14 63:25 72:9 73:17 76:4 76:11 79:1 83:6 90:22 91:6 92:9 94:25 97:19 99:9 100:3 102:18 104:1,14
out 7:4,7 10:25 14:25 15:5 16:5 18:13 22:18 24:14 24:15,15,16,16,17 24:18,18 31:12,19 34:12 44:1,3 45:21 46:23 47:12 48:4,5,17 49:16 54:18 55:6,25 56:3,6,25 57:5 62:3,7,14 64:9 67:9,12 69:2 70:25 71:20 74:20 83:17 84:9,13,22 86:14,15 90:7 92:7 98:9 99:20 102:24
over 9:23 10:20 12:23 30:25 31:12 31:15 32:25 38:13 38:13,14,14 45:18 50:14 67:10,10,11 68:19 71:6,7 90:18,24 91:3 94:16,23
overflow 14:14
overseas 11:13
own 17:5,8,16 18:9 18:21 23:20 46:11 46:18 84:11 98:8
o'clock 1:31,32 104:24

P

page 3:5,23,34,37 3:47 4:1,9,13,19 33:13 40:22 43:5 43:24 55:5,17 56:19 57:14 61:14 62:21,24 80:2 85:3 86:3 91:23 92:23 102:21,22 103:13,14 107:1,4 107:18,20,21
pages 3:27,31,40,44 4:5,16 19:22 32:11 53:6 54:25 59:23 71:7 85:12 103:2,11 105:7 106:4
paid 42:24,25 54:9 85:21
pamphlets 90:7
papers 26:5
paperwork 31:12 31:13,15,16
paragraph 80:22 91:22,23 92:12 93:2,20 94:4
paralegal 27:2 30:3 92:14
paralegal/office 28:8
parents 98:9,12
part 26:25 62:7 92:15
parted 83:11
particularly 7:10
parties 6:17 105:10
party 96:9 104:18
part-time 22:9
pass 11:18
Patricia 1:26 105:2 105:23 106:5
pauses 41:7 55:10 60:5 81:13 85:19 101:25
pay 23:7,11 27:25 40:4 42:21 43:18 44:3 49:11 54:19 96:18 97:18 98:4 99:18
paying 49:7 56:10 76:17 98:16 99:19
payments 85:9
payroll 10:3 40:3,4 65:6
PCRs 12:4
pendens 87:24
people 12:17 28:2,3 31:1 76:10,11 77:5 81:21 100:23 101:17
per 57:6
percent 16:3
perform 37:5 45:2 59:18 89:15
performed 45:6 96:25
performing 44:20 59:19 93:10
perhaps 75:15 91:19 95:15
period 15:7,17 40:11,14 50:12
Perm 41:19
person 31:22 34:23 35:7,10 36:16,21 38:5 40:7,12,16 41:12 94:7
personal 23:20 89:16 98:8
personnel 36:6 60:11,16 92:25
person's 35:14
philosophy 8:12
phone 20:22 65:13 65:18 90:5
phoned 68:6,7
phones 28:9
phrase 56:5
phrases 4:29
physical 26:20
physically 26:23
piece 19:6
place 22:25 84:16
placed 89:16 98:14
Placement 92:25
Plaintiffs 1:13 2:3
plastic 76:15
PLEAS 1:1
Pleasant 24:18
plus 97:15
PO 50:24 51:1
point 13:12 18:7 23:4 29:16 34:25 35:3,13 38:19 45:11 46:15 48:4 50:19 51:24 56:1 56:9 58:4 64:21 66:21 74:13 77:23 78:25 81:10,22 82:14 83:4 84:4,5 92:10,22 95:10 99:10
police 78:2,7 79:4,7 83:10,22 102:4
portion 99:2
position 17:4 22:23 23:4,7 24:4 28:7 31:17 41:15 57:4 63:10
positive 18:12 61:9

possession 24:1 52:5 60:17 82:8 82:21 91:7 95:10 96:15 99:23
Post 2:16
potential 100:23
practice 8:5 14:14 15:12 16:1 17:23 18:2 24:8,11 25:1 25:11 29:16,18 30:6,7
practices 24:13
prayer 100:6
precisely 31:16 50:6
precision 95:23
pregnant 18:13 23:10
premiums 81:5
prepare 46:21 47:16 49:13 53:1 59:2 63:11,20
prepared 49:16 52:25
preparing 36:17,17 36:22,25 45:1
present 2:20 9:17 18:3 21:17 35:19 35:21 47:16
presently 8:6 9:24 24:7
president 62:1 97:10
presume 5:16
pretty 15:13 22:25
previous 63:24
previously 5:21 17:6 28:15,17 33:19 64:19 75:3 85:16
primarily 8:7
primary 25:16
principally 25:18
print 19:14 84:9,13
printed 75:9 84:18 84:18
Printing 36:19
prior 36:14,24 58:24 59:19 60:8 81:10 98:25 105:18
private 89:16 92:24
probably 20:13 21:2 32:15 35:25 39:7 40:13 65:19 68:16 86:23
problem 89:12
procedure 1:28 5:2 34:11
process 6:18 7:3,5 69:11 76:3 95:19
produced 48:3 60:3 84:25
production 102:19 103:1
professional 92:13
profit 54:22
program 9:3,23 10:16,17,18,20,25 11:2 22:4
progress 87:11
progressing 16:22
promise 89:22 90:11
promised 13:21
promises 22:21
promotional 19:3,6 20:9 90:8,11 92:2 93:22
pronouncing 32:16
property 98:13
prosecution 12:12 13:4
provide 23:24 89:18 90:14 91:19 93:5 96:10
provided 36:9 37:9 92:17
provider 63:2
providing 99:25
Public 1:27 67:20 105:2 106:5
published 91:25 93:3
purposes 19:22 32:11 33:13 40:22 41:24 53:6 54:25 56:19 57:14 59:23 80:2 85:3,12 86:3 101:4 104:18
pursuant 1:27
pursued 88:1
put 18:18 46:25 47:7,7,10 51:11 56:22 64:24 65:25 99:2
putting 104:5
P.A 1:7,8
P.C 1:9 4:14 85:4
p.m 104:24

Q

qualify 89:15
question 7:9 15:4 21:13 27:16 58:15 58:18 91:4,5 102:18,20
questioned 77:21
questioning 7:15
questions 5:25 6:17 6:21 7:2,8,21 14:23,25 36:11 59:14 91:20 100:16 104:21,23
quickly 43:21
quote 56:2
quoted 42:9,15
quotes 42:13

R

raise 75:25
Rand 11:14
Rapoport 12:21
rate 23:7,11 42:16 42:21,22,24,25,25
rates 42:10
RE 41:16
read 102:18 106:3
reading 5:4 26:4
real 6:5 8:7 12:19 13:22 14:10,15 16:3 17:19 24:8 25:9,13,16,18 30:6,9 36:13,14 36:19 41:17 57:4
realized 13:20
really 12:17 22:20 55:18
reason 7:9,14 16:19 16:22 29:17 33:7 50:25
Rebecca 2:22
recall 20:25 22:6,22 23:11 29:9 30:1 31:16 32:17 33:18 34:20 35:23 36:11 38:22,25 43:9 44:2 57:8 74:20 83:16 88:24 97:13 99:11
receive 46:25 48:19 49:24 59:4
received 65:14 74:22
receives 43:2
receiving 71:11
recent 101:21
recently 73:7
receptionist 27:1
receptionist's 45:22
recognize 19:19 85:17
recollection 21:21 23:23 44:7 63:24 65:11 80:25 87:4 87:10 89:19 93:14 102:1
reconciliation 65:5
record 15:1 27:12 39:24 41:25 59:10 59:13 91:14 102:12,15 104:3,6 104:7,11
records 37:5 69:2 107:20
red 75:25
reference 101:3
references 37:8 80:21 93:7,8
referred 104:1,2,11
referring 89:25 94:18
refers 93:23
reflect 41:5
reflects 41:5
refused 82:18
regarding 48:11,20 53:15 81:12
regular 12:11 13:4 50:4 75:12
regularly 51:5
reimburse 78:4 97:18
related 99:23 105:10
relationship 30:4
relationships 38:21 39:8
relief 100:6
rely 89:14 96:5,7
remain 16:14 17:22
remarks 5:17
remember 16:22,24 18:12 19:8,16 20:13,21 21:22,24 22:17,20,24 23:14 27:5 33:7 35:25 40:9,14 42:10 52:15 54:13 65:15 65:17 68:14,17 72:2,21 74:15 77:16 78:8 81:9 82:10 94:24
rent 49:8
rental 26:25
repay 74:11
repeat 21:13
rephrase 7:12
replace 30:8,12,15 98:5
replacement 69:20
report 4:14 84:1 85:4 96:11,15,17 96:21 97:14 100:8 100:9 105:8
reported 1:26 45:12 105:4 106:4
reporter 1:26 3:13 19:18 56:22 80:8 85:6 105:1,2,23 106:5 107:21
reporter's 4:27 7:25 41:25 53:11
reporting 45:7
represent 20:1 33:17 55:4 56:24
representation 90:11
representations 22:22
represented 91:25 99:13
Representing 2:3 2:11
represents 88:9,17 88:24
request 102:19 103:1
requesting 71:5
requirements 33:10 33:11 43:15
residential 8:7 16:3 17:19 25:18
resolution 6:24
respect 5:20
respective 5:4
responded 27:15
response 102:25 103:17
responses 100:25 102:19,22
responsibilities 22:14
responsibility 49:7 64:6 92:6,10
responsible 48:23 51:14 56:9 70:6 98:15 105:17
rest 69:13 74:11
restate 91:4

result 30:8 90:8 95:23,24 97:20,22 100:20 105:19
resume 18:16 20:14 20:16 32:15 33:18 33:21 34:14,15,16 34:19 35:2,7 36:1
resumed 27:13 32:5 59:11 91:15 102:16 104:8
resumes 31:25 32:17 34:9 35:6
RETAIN 105:16
retained 107:20
retrieving 71:10
return 14:6 48:4
review 22:4 32:1,5 41:7 46:22 47:11 49:19 50:1,3 51:8 55:10 60:5 62:12 62:17 85:19
reviewed 32:18 34:13 35:5 36:18 51:4,11 62:4 65:6 69:13
reviewing 48:23 65:2,2,8 69:5,11 71:3 75:20
Richard 67:16
Richland 1:3,30 2:7 66:12,13 67:3 79:17 83:24 88:15
right 8:3 10:6 13:1 13:16 16:7 19:9 20:8 21:7,10 23:2 29:7 30:22,23 31:7 34:13 35:18 38:7 40:16 42:17 43:5,19,23 44:14 46:7 51:1 52:5 54:6,7,17 55:12 59:1 61:10 62:1,9 64:17,22,23,25 66:17 67:3 68:1 70:2,10 72:5,19 73:17 75:18 78:17 78:18,19 79:5,8 80:13,23 91:13 92:22 93:9 95:8 95:17 98:23 99:1 100:14,19 102:23 102:24 103:4,14 104:19
ring 82:12
Rittenberg 16:6,6
River 16:7
Rivers 2:14 5:15 105:15
Road 16:7
Rock 25:7
role 7:7 48:25 49:1
room 7:15 45:24 70:14,17
Rule 1:28
rules 1:28 5:2 6:12
Russell 63:3
R.E 41:15

S

safety 82:15
salary 33:9,10 56:10
Sally 96:25
Sally's 97:6
Salter 12:21
Sam 16:6,6
same 17:6 33:1 45:20 46:5 58:21 59:18 64:19 78:18 105:18
Santa 65:12
sat 5:22 28:21 45:21,22,23,23 46:2,3,5 73:9
saw 12:21 19:6 20:9 103:19
sayeth 104:22
saying 65:13 79:20 91:10
says 43:6,21 55:17 57:3,5 60:19 79:10 91:23
scheduled 1:31
school 8:21,25 9:5,7 9:12 11:1 13:18 66:3 67:18 68:4
screened 93:16 95:16
screening 89:18 92:13 93:12,13,15 95:19
screens 92:1
SEAL 105:20
SEALED 105:14,17
second 12:13 17:13 18:20 61:14 63:5 92:24 104:4
section 11:23 13:10 62:11,18
Security 62:19
see 19:19 30:19 31:19 33:2 38:15 41:4,19 42:7 43:4 53:20,20,23,25 55:16 60:23 61:19 62:22 68:24 72:22 73:3,9 75:24,24 76:21 78:3 92:25 98:21 100:3
seeing 33:18
seek 18:8 29:18
seeking 23:16
seems 41:5,13
seen 19:19 20:2,6 41:1,2 56:23 85:16
seller 65:13 66:15
selling 74:11
semester 11:12
semi 51:4
semi-regular 50:5,6
semi-regularly 65:3
send 47:12 48:4,5 48:10,11 52:20 69:20
sending 71:6,9 75:1 75:6,9
sent 18:15 20:18 30:25 31:12,13,15 31:25 33:22 34:19 48:20 54:8,10,11 54:12 63:1 75:3 93:7 94:16
sentences 4:30
separate 72:24
separated 61:11 83:4
separation 17:1
September 55:19 56:2 58:5 64:18
sequence 66:8
series 53:12 55:4,17 85:17
services 4:7 18:8 22:7,16 23:16 43:3 55:9 59:24 85:22 90:14 92:16 92:25 95:3
set 17:5 21:4 45:15 105:20
setting 11:10
settle 39:20
settled 44:9,15
settlement 36:17 76:2
several 19:3 80:21
Shannon 28:6,9,20 28:23 29:6,11,13 45:22
share 18:1 64:10
shared 17:7 27:1,2 27:20,20 28:16 64:10
sharing 18:23 27:8 27:17 81:17
sheet 3:17 54:8 75:17 106:10
sheets 53:12
she'd 58:22 59:19 84:18
short 14:10 21:23
shortly 13:18
show 19:17 32:8 40:20 42:9 60:2 84:24
showed 35:10 74:3 79:19
showing 19:25 40:25 85:9
shown 95:4
side 6:16,18 43:5
sign 47:11,13,17,20 47:25 48:2,3 49:21 51:23 52:7 53:2 72:17 77:7 77:10 87:12 94:22 94:23
signature 53:21 54:1 55:14 58:2 77:3,5
signed 46:22 62:4 72:15 73:14 76:25 87:13 94:13 103:18
signing 5:4 107:19
sign-up 90:19
Silver 20:24 21:12 21:14
simply 7:7 24:23 40:3 82:21 84:9
since 10:8 16:9 101:24
Sinkler 8:24
sir 11:22 90:21
sit 37:21 46:1 72:7
site 19:10,12,15 20:2,6,9
situation 39:13
six 12:10
six-month 15:17
Skipped 88:3
slash 41:13,19
small 37:23 45:20 49:1
smaller 25:23
Social 62:19
SoftPro 47:8
software 47:7 76:1 76:2
sold 82:17
solely 25:9 38:7
some 5:25 6:21,23 7:1,9 8:25 9:2,6 11:10 14:15 19:6 21:24 23:3 29:6,6 29:16 31:12 36:1 40:11 45:4 47:1 50:25 54:12,22 64:21 65:11 70:11 74:13 76:11 78:15 83:25 84:4,5 90:8 91:12 96:10 98:12 99:10 100:16,22 104:1
somebody 21:6 30:12,15 37:25 38:13 93:7
somehow 47:16
someone 16:18 21:5 26:9 30:19 31:3 90:16 92:14 93:14 95:14
something 20:5,19 25:14 31:19 52:7 60:6 65:20,25 74:3 77:2 86:19 89:23 91:11 92:2 94:16
sometime 26:5
sometimes 14:22
somewhere 22:25 51:12 75:4
son 65:13 66:9
sorry 21:13,14 28:5 37:20 38:5 42:2 58:17 63:19 65:21 91:10 96:2 100:9
sort 6:24 16:1 17:18 17:20 18:18 27:25 29:10 36:11,15 37:5 39:14,19,20 45:9,17 46:19 47:1 49:3 51:17 52:19 70:11 75:14 75:25 79:23 96:11
sought 81:11 87:23
South 1:1,27,28,30 2:8,17 4:6 5:2 8:25 9:16 13:23 14:4 59:23 105:3

105:16 106:6
so-and-so 35:16
space 17:6 18:1,23 27:7,16 28:16 46:5 64:10 70:19
space-sharing 17:14
speak 5:8 32:25 66:21
speaking 15:11 20:12,21 49:8 71:15 88:12
Special 42:6
specifically 40:14 84:8
specified 62:18
spent 69:17 71:3
spoke 20:24 31:8 38:13,22,25 39:6 43:21 56:25 67:4 81:16,16
spoken 101:20,23
spouse's 9:19
spread 43:2
spreadsheet 103:21 104:2,12,15,16
staff 27:21 28:2,3
staffing 23:17,19 94:9
stand 41:16 88:21
standard 34:11
standing 65:12
start 14:25 57:4 58:18
started 45:6 104:17
state 1:1,27 7:24,25 24:24 97:2,9,10 105:3 106:6
statement 52:20 79:20,23 80:14,17 81:6 82:5 83:25
statements 36:17 48:11,19,24 49:23 50:9,18 51:4,10 51:15 59:5 65:2 69:20,20,22 70:5 70:11,22,24 71:5 72:25 73:4 74:22 74:24 75:3,7,12 84:19
status 40:7,12
stay 15:16
STENOMASK 105:8
still 11:11 17:24,24 23:25 29:13 36:2 60:16 61:3 63:14 64:12,18 65:2 68:7 71:16 73:22 81:23 82:21 84:4 87:11 101:18
stipulated 5:3
Stipulations 3:9
stolen 98:6
stop 30:11
Street 1:30 2:7,15 27:5 45:19 50:14 50:14,23,23 63:13 64:9,12 105:16
stuff 6:12 19:4 36:1 74:11 75:9 95:2
submitted 18:15 40:3
substance 83:9
such-and-such 35:16
sued 89:8
suit 88:15
Suite 27:6
Summerville 16:10
supervise 64:3,6
supervised 64:1
supervisor 12:7 44:24,24
support 27:20 28:2 28:3 91:3
supports 92:3 100:6
supposed 87:1
supposedly 69:22
sure 15:25 20:24 45:2 47:8 51:15 66:8 78:10 83:24 86:10 89:6 90:15 91:21 98:17 103:3 104:5
surgeon 76:15
Susan 63:5 64:3 68:13
suspect 5:20
sworn 5:7 105:6
system 84:16

T

take 7:13,20 14:20 19:10 22:15 27:10 40:1 41:4 55:7 59:7 79:23 82:8 91:11 98:9,10 99:20
taken 1:29 5:1,22 79:21
taking 98:13
talk 14:21 22:1,2 95:18 100:13
talked 38:20 52:19 70:23 81:15
talking 12:23 57:24 93:22
tasks 45:6
taxes 40:5
telephone 38:23 39:15,21 41:9,10 44:14 46:11 47:1 51:21 77:15 83:10 92:20
tell 5:24 6:5 39:24 46:17 60:4 72:20 78:20 83:9 85:7 86:8 92:14 93:9 94:13 98:2
telling 59:17 77:9
tells 71:24 72:5 79:9
temporary 40:7,12 41:19
temp-to-perm 39:22,24 55:22 90:1,13,17 94:7
ten 1:31,32 80:8,9
tend 7:13 14:23
term 49:4 51:4
terminate 77:22 79:6
terminated 82:2
terms 5:21 6:7 54:9 97:14
terribly 21:23
Terry 39:3,3,4,7,14 39:20 57:6,9 90:5 92:21
tested 95:16
testified 27:19 39:6 51:3,22 57:23 84:21
testifies 5:9
testify 94:14 101:2 101:14
testifying 80:14
testimony 14:20,22 19:5 21:11 28:25 54:21 63:25 90:10 90:12 106:8
testing 93:17,18 95:20
Thank 42:3
their 9:3 12:18 15:21 16:8 22:16 23:16 27:25 34:11 42:14 43:2 48:24 65:14 66:4 75:9 89:24 93:8 96:4 97:9 98:10,13,15 98:19,24 104:18
theirs 90:8
themselves 76:22 103:6
they'd 33:2
they-all 60:10
thing 14:16 17:20 25:13,24 27:25 46:19 51:17 52:20
things 40:5 64:19 64:22 66:7 90:7 104:17
think 5:23 16:6,9 16:21 18:14 20:5 21:2,19,23 22:4,4 23:7,12 27:15,15 27:19 31:14 32:14 33:10 34:11 36:4 37:18 38:16,19 39:6,23 51:4 52:7 52:12,14 53:10 55:5,24 59:16 60:6 61:6 66:18 68:6,13 69:16,17 72:4 73:16 81:8 82:12 86:20 87:24 89:11 92:6,9 93:12 95:2 97:15 97:19,20 99:10 102:23 103:19,24 103:25
third 62:21 81:4 96:9 104:17
though 74:17
thought 13:20 20:15 37:18 38:15 91:10
three 10:15 13:23 69:12 71:3 103:1
through 5:21 13:23 14:4 16:16 18:14 23:4 24:4 38:21 39:18 45:1 46:25 47:1,2,3 54:6 55:5 58:13 66:5 69:2 69:10 76:3 77:15 87:23 90:5 92:16 102:19 104:17
till 18:1
time 7:23 8:23 9:1 13:19 14:9 15:2,2 15:8 16:9 18:3,18 18:20,21,22 19:1 22:3 23:12,15 25:22,22 26:15,16 27:4 28:4 29:3 30:5 32:20 35:17 36:24 37:6 40:7 40:11,14 43:7 45:3,5,15,18 46:21 48:8 49:3 51:8 52:16,18 53:12 54:8 55:7 60:24 61:4,7 63:15 65:4,4,8 68:4,15 69:8 74:17 78:2 83:7 84:17 99:11,19
times 65:5
Timesheets 3:4 53:7
title 1:11 36:18 62:1 63:11 81:5 96:1,3 96:3,4,10,23 97:1 97:5,14 98:19 99:14 100:9 104:18
today 17:24 89:9 95:5
together 45:5
told 22:14 23:12 38:16 40:14 77:20 77:25 78:12,12 81:21 92:13 100:18
top 60:19 62:7 64:15,16 102:9
Total 4:20,20 86:4 86:4
touch 68:17 69:18
toward 6:23
town 88:3
Tracy 9:20 60:20
trailing 4:30
transactions 25:19 25:21 103:22
transcript 3:25 105:13,17 106:7,8 107:22
TRANSCRIPTL.. 105:7
transition 45:4
travel 13:19
TRIAL 105:18
trick 7:6
tried 67:11
true 72:7 105:7 106:7

trust 48:13,17,20 71:22 72:25 81:2 87:8
truth 5:8,8,9
try 7:1,2,6,7,8,19 26:6 41:25 59:14 69:2
trying 7:4 9:6 14:19 15:14 67:9 86:14 86:15
turned 90:24 91:1,3
Twelve 46:10
twenty 43:6
twenty-eight 43:17
two 16:7 27:6 28:4 31:14 34:16,17 65:5 103:1
type 31:22
types 38:20 39:7
typically 7:13 48:16

U

uh-huh 11:4 13:8 13:15 14:5 20:20 21:1 27:18 31:6 39:9 41:20,22,25 43:8 46:13 51:6 52:8,22,24 53:22 53:24 54:4 57:7 61:17 62:13 66:10 66:14 67:25 68:9 68:11 69:14 73:10 77:19 83:21 93:19
uh-uh 42:1
ultimately 13:9 44:9
under 11:16,24 81:23 84:16
undergraduate 8:9 8:10,11
Underneath 42:6
understand 15:3 23:3 27:7 38:2 39:19 44:23 84:25 90:15 98:17,23 100:5,7,11
understanding 18:7 40:6,45:8 46:4 56:5 104:10
understood 39:24 40:11,15
unfinished 4:29
Unfortunately 82:17
unit 12:1
University 8:25
9:16
unless 84:19
until 15:4 64:20,21
USC 9:15,23 10:13 10:20 68:5
use 49:3 89:13
used 23:19

V

vacation 16:17
valued 82:16
various 24:23 76:8 76:9,10 84:6
verification 3:15 54:1 61:16 62:12 106:1 107:19,22
very 6:16 16:22 25:15
view 99:13
violation 92:24
visit 82:19 90:6
visited 20:8
volunteered 81:7,8
vs 1:15

W

Wachovia 79:22
wait 15:4
waited 78:3,5,5
waiting 45:24
waived 5:5
walked 79:21
walking 71:12
want 20:2 34:9 35:7 43:18 77:2 91:20 92:5 99:12
wanted 30:19 33:2 34:18 79:14,16 85:16
warrant 87:12
Warren 8:24
wasn't 12:16,18 13:13 23:2 30:17 70:15 87:1
water 91:12
way 7:2 10:23 29:14 39:14 49:6 67:15 70:19 71:20 72:15 77:16 84:18 89:21
ways 83:4,11
web 19:10,14 20:2,6 20:9
Website 3:28 19:23
weekend 69:17
weeks 101:21
well 6:11 7:24 10:8 14:24 21:24 22:1 49:13,19 64:10 71:19 83:8 89:20 103:5,8
went 8:11 11:11,12 11:13 12:19 15:7 15:10 16:16 17:5 18:15,17 20:23 21:12,15,24 29:3 39:18 66:2,5 67:2 67:6 69:3 74:2
were 11:23 13:9 17:10,14 18:22 22:11,14 23:3,8 23:15 26:9,13,23 27:7,16 28:3,20 30:16 31:17,23,25 33:11 36:15 38:16 38:17 39:2 43:15 44:24 45:15,18 48:7 51:13,15,22 54:11 57:24 59:16 64:9 65:2,6 66:3,4 66:9 68:7 69:1,4 69:22 70:10,10,18 71:5,6,7,9 72:9 73:16 75:1,8,10 75:14 76:7,11 80:14,19 81:17,22 84:22 90:3 91:2 91:10 92:16 93:22 94:19,25 103:5 107:18
weren't 64:22 65:7 75:12
Wesley 89:7
we'll 7:13
we're 6:2 59:13 86:14 89:9 100:14
we've 85:16
we-all 18:14
whack 71:21
WHEREOF 105:20
while 28:20 80:19
whole 5:8 15:1 99:19
wife 13:18 14:2 18:13 23:9 60:22 60:23 66:2,3 67:11 68:20,23 69:1,6,7 82:20 86:19
wife's 86:20
Wilbur 2:13 5:14 105:14
Wilmot 1:29 2:5,6
wire 47:8,11 65:14 65:25 66:16 67:1 69:3 70:2
witness 5:17 6:5 41:7 42:2 46:2 52:10 55:10 59:7 60:5 81:13 85:19 101:25 105:6,20
witnesses 6:17 14:23 100:23
Woods 24:15 26:2 77:6
words 30:19 31:21 43:16 45:8 64:1 100:3
work 3:38 8:10 9:2 9:2,6,9 11:10 12:9 15:7,10 16:11 17:18 18:17,21 22:10,11 29:3 30:13,18,20,21 38:3,7,11 40:23 44:17 45:16 52:21 58:13,21 63:8,12 64:17
worked 8:24 10:7 11:14 15:14 26:18 26:19 28:15,16,18 45:4
working 11:17 13:22 14:9 15:20 17:8 26:16 28:19 30:4 52:18 60:23 61:3 63:14 84:4 96:24 97:6
works 10:2
worries 18:14
wound 70:22
write 81:6 87:1
writes 82:4
writing 12:3
written 4:21 48:17 55:6 57:18 71:18 71:22,25,25 73:7 74:14,21 76:4,7 76:11 78:13 86:4 86:24 90:16 94:14 96:13
wrong 65:25 67:1,2 78:12
wrote 36:1 55:22 72:12 73:12 79:20 80:17
W-4 62:21

Y

yeah 11:7 13:3 14:3 14:8,18 18:24 20:7,17 34:1,1 41:8 43:10,13 44:11 45:10 47:4 54:7 64:13 67:21 70:23 72:1 73:8 74:8,10 76:23,23 78:14 79:25 83:3 86:1,7,20 92:19 102:14,14,23 103:13,15
year 8:17,23 9:13 10:11 11:5 13:25 15:23 16:16 50:13 64:20 65:1 99:21
years 10:15,24
Young 2:14 5:15 105:15
you-all 17:13 22:1 42:22 44:9,15 51:24 57:11 64:8 64:9 69:10,13 71:3 80:19 83:4 83:11 86:23
you-all's 37:21

Z

Zelenka 11:24
Zickefoose 24:18

$

$200 4:2 44:8,10 56:24 57:6,11,15 57:20 85:25
$30,000 72:4
$300 44:1 57:5
$550,000 99:6
$7,000 74:3,7 78:16

0

04 61:19 64:18
06 99:21

1

1 3:27,34,37,47 4:1 4:9,13,19 19:21 33:13 40:22 56:19 57:14 80:2 85:3 86:3
1/2 10:11
10 4:9 80:1
104 105:7 106:4
105 3:13
106 3:15

107 3:17
11 3:40 4:13,16 53:6 85:2,12
12 4:16 85:11,15,17
12/20 65:19
12:37 104:24
13 4:19 55:19 56:2 86:2,6 103:23 104:11
14 61:19
1533 1:30 2:7
16.16 42:18
17TH 105:21
18 43:20
19 3:27 102:21 103:14,17
1924 50:14
1996 8:20
1997 9:14,14 10:13

2

2 3:31,31 32:10,11 32:15 62:11,18 91:23
20 54:6 65:21
20,000 42:22
2000 11:8 65:21
2001 11:19
2002 14:1,2 15:24 15:25
2004 26:6,12 55:19 56:2 58:5
2005 4:11 80:4,12 81:22
2006 10:9 18:1 61:1 61:11
2007-CP-40-6854 1:3
2008 1:11,31 105:5 105:21 106:6,17
2017 105:24
21,000 42:16
22 3:44 54:25
26 54:6
27 61:1,10
28 2:15 4:11 80:4 80:12 81:22 105:15
29 58:5
29201 2:8
29402 2:17

3

3 3:7,34 10:11 33:12,16 94:4
30 1:28 93:2,20
32 3:31 94:4
33 3:34 8:16

4

4 3:37 4:5 40:21 41:1 59:23
4:30 68:16
40 3:37

5

5 1:11 3:9,11,40 53:5,11 92:23
5th 1:31 105:5 106:6
500,000 99:12
53 3:40
54 3:44
56 3:47
57 4:1
59 4:5

6

6 3:27,44 19:22 54:24 55:3
6/17 43:6

7

7 3:47 56:18,23 91:22 92:12
700,000 97:16,17 99:14
712 27:5

8

8 4:1 57:13,18 80:7 80 4:9
85 4:13,16
86 4:19

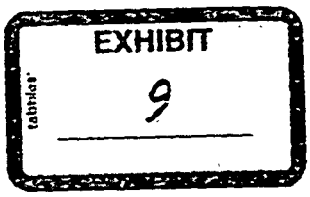
9

9 4:5 59:22 102:21 102:22 103:13,14 105:24
9.62 42:22
9/28/04 57:20
9/28/2004 4:3 57:15
9/6/04 44:1 57:4
9/8/04 3:48 56:20
931-0808 41:10
993 2:16

DelVecchio, Sallie

From:	DelVecchio, Sallie
Sent:	Monday, February 02, 2004 9:42 AM
To:	Crawford, Oliver; Wilson, Sarah (Columbia SC); Brien, Yvonne; Johnson, John R. (Atlanta, GA); Godowns, Lana
Cc:	Thacker, Al; Winfree, Chuck
Subject:	Edward G. McDonnell - 43102L

Quality Assurance Review for Edward G. McDonnell - 43102L



- QAR performed: 1/19/04
- Risk Ranking for Agent based on this QAR: 4 - Priority follow-up
- Last Recert Date: N/A - Agent's contract date is 12/12/03
- Percent of Business given to LandAmerica: 100%
- Policy Backlog: 1 policy issued, to be transmitted; one outstanding commitment, waiting for recorded documents.
- Average Lag: 8 days per ASC (4 policies issued)
- Significant drop or increase in remittance: N/A
- Accounts Receivable: None
- Claims: None

Comments: This agent will appear on the priority follow-up report. My review was performed at the request of Sarah Wilson. A premium check drawn on McDonnell's trust account payable to Lawyers Title was returned for insufficient funds and Sarah was notified of this on 1/16/04. We immediately scheduled a review for the following Monday, 1/19/04. The attorney had acted quickly to find the problem (an error on a HUD in a closing that occurred in November) and had deposited personal funds to cover the shortage when notified on the 16th. He has hired a bookkeeper to reconcile the trust account and will provide those documents to me within 30 days. (The trust account was not being reconciled prior to this.)

Mr. McDonnell is a policy-issuing agent: our Columbia Service Office issues his commitments and he issues the policies.

The above mentioned priority finding) has been reported in the Quality Assurance Review System and can be viewed and responded to on the QA website at <http:Intranet.landam.com.qa/>. We request your reply, documenting acts implemented, or reasonable implementation dates, for each finding be entered in the Quality Assurance Review System by 2/28/04.

Sallie P. DelVecchio
Quality Assurance Representative
Audit & Advisory Resources
803-419-8658

43102res.
doc

LandAmerica

February 2, 2007

Edward G. McDonnell, Esquire
712-A Calhoun Street
Columbia, SC 29201

Re: Quality Assurance Results for Lawyers Title Agent #43102

Dear Ed:

On behalf of LandAmerica and Lawyers Title Insurance Corperation, I would like to thank you for your cooperation and hospitality during my recent visit to your office.

The purpose of LandAmerica's Quality Assurance Review Program is to provide an insightful and thoughtful evaluation of an agency's practices and procedures, with particular emphasis on these areas that, in our experience, carry the greatest potential for loss. The QA Review also gives us the opportunity to observe how effective we have been in communicating LandAmerica policies and recommended agency procedures.

The Quality Assurance Review focused on three primary areas – an escrow reconciliation review, an underwriting review and a policy audit.

Based on the files I reviewed, the following issues gave me particular concern. We would appreciate your giving priority to the following:

Escrow reconciliation review

At the time of the review, you were in the process of reconciling the trust account. The escrow review is a priority issue for LandAmerica and Lawyers Title, assuring the company that its agents are performing a 3-way reconciliation of trust accounts. This is an area where the company has experienced significant losses in the past.

To complete a 3-way reconciliation, ALTA standards specify, and we at LandAmerica endorse, preparation of the following each month upon receipt of the bank statement for the trust account:

(i) an outstanding check list;
(ii) a deposit-in-transit list (those deposits made at the end of the month but not showing on the bank statement);
(iii) a trial balance (listing of all files with balances);
(iv) and the full reconciliation of the bank statement to the checkbook (register) balance, both of which should equal the trial balance.

You have hired someone to reconcile the account for you; she is working to enter data from your checkbook into Quicken. You agreed to provide a copy of the completed reconciliation to me within 30 days. You may either mail this to me at the below address or fax it to me.

Sallie P. DelVecchio
Quality Assurance Representative ♦ Audit and Advisory Resources
5 Spyglass Court ♦ Columbia, SC 29229
Phone: (803) 419-8658 ♦ E-mail: sdelvecchio@landam.com

Problems arose with this account when a $2,000 earnest money deposit was inadvertently credited on the HUD to both the seller and the purchaser in client file Rhodes. This closing occurred in November and it was not until December that you were notified a check had been returned. You immediately deposited $1,000 of your money on 12/22/03. Over the holidays, you hired a part-time bookkeeper to reconcile the account; she reviewed the HUD's in the six files closed by you and eventually found the error.

You were notified again in January that a check had been returned for insufficient funds and you deposited another $1,000 on 1/16/04. At that time the bank realized that while the account was labeled IOLTA, it was not in the system as such. The $90 NSF fees were credited back to your account by the bank. If an overdraft occurs in an IOLTA account, the bank indicated it would notify you before returning the check. You did not receive notification of the above returned checks until after the checks were returned.

At the time of our review, you planned to contact the seller in the Rhodes file and ask that the $2,000 be reimbursed to you. You also planned to leave your $2,000 in the account as a cushion.

Based on the files I reviewed, there were no issues regarding the underwriting review and the policy audit warranting your attention.

I hope that you found the Quality Assurance Review to be informative and beneficial. LandAmerica values its relationship with your firm and greatly appreciates your efforts in helping us maintain our reputation as one of the nation's leading title insurers.

Your quality assurance review, and this letter, relate to your compliance with the minimum standards set by Lawyers Title for agents, and nothing herein should be considered as an opinion concerning your compliance with the law of your jurisdiction related to the title insurance agency.

Please do not hesitate to call whenever you have any questions concerning closing and policy issuance procedures. Thank you again for taking time to assist me with the review. I look forward to hearing from you.

Sincerely yours,

Sallie P. DelVecchio
Quality Assurance Representative
Audit & Advisory Resources

cc: Oliver I. Crawford (via Email)
Sarah Wilson (via Email)
bcc: Yvonne Brien (via Email)
John R. Johnson (via Email)
Lana Godowns (via Email)
Al Thacker (via Email)
Chuck Winfree (via Email)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) FIFTH JUDICIAL CIRCUIT
McDonnell and Associates, PA, f/k/a)
McDonnell Law Firm, PA, f/k/a Edward G.) CIVIL ACTION NUMBER: 07-CP-40-5252
McDonnell, PC, and Boomerang Title, Inc.,)
)
Plaintiffs,)
)
vs.)
)
First Citizens Bank and Trust Company,)
Inc.,)
)
Defendant.)

2010 MAR 19 PM 2:04
JEANNE C. ADAMSON
C.C.P. & G.S.
RICHLAND

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

The instant case concerns payment by First Citizens of forged checks drawn on the First Citizens' accounts of Plaintiffs McDonnell and Associates, PA and Boomerang Title, Inc. The three (3) accounts at issue are owned by attorney Edward G. McDonnell. The unauthorized activity was discovered on December 23, 2005, when First Citizens advised McDonnell a check had been returned for insufficient funds. Later that week, First Citizens advised Mr. McDonnell a large check had been written to his paralegal, Anna Hoorman. Subsequent investigation revealed Hoorman forged McDonnell's signature on numerous checks written out of these accounts from October 2004 to December 2005. Hoorman's scheme was facilitated by use of a Business Online Banking feature, which allowed her to transfer funds between the accounts to cover her fraud.

Plaintiffs brought suit against First Citizens for improper payment of forged items, in breach of the account agreement and duties imposed by the South Carolina enactment of the Uniform Commercial Code. First Citizens has moved for summary judgment on the following

grounds: (1) Plaintiffs' claims are barred as a result of McDonnell's failure to exercise ordinary care; (2) Plaintiff's claims are barred by the "same wrongdoer" provision of S.C. Code Ann. §36-4-406; and (3) Plaintiff's claims are barred by the failure to report the unauthorized activity within one year. (Ex. A, Defendant's Motion for Summary Judgment).

Because a genuine issue of material fact exists with regard to each of the grounds for summary judgment cited by First Citizens, this Court must deny the instant motion.

STANDARD OF REVIEW

Summary judgment is a drastic remedy that should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Toomer v. Norfolk So. Ry. Co., 344 S.C. 486, 490, 544 S.E.2d 634, 635 (Ct. App. 2000). Summary judgment is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing and Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (1999).

In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App.1999). If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 718, 511

S.E.2d 413, 415 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Vermeer, 336 S.C. at 59; Young, 333 S.C. at 718. The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. First Citizens' Ignores the Impact of S.C. Code Ann. § 36-4-406(3)

The preclusion on which First Citizens bases its motion for summary judgment is found in S.C. Code Ann. § 36-4-406 (1976), which governs a bank customer's duty to discover and report unauthorized signatures. This section provides in pertinent part as follows:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries . . . or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discovery his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
>
> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
>
> (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure;
>
> (b) an authorized signature of the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was made available to the customer for a reasonable time period not exceeding fourteen calendar days and before the bank received notification from the customer of any such unauthorized signature or alteration.

S.C. Code Ann. § 36-4-406(1) & (2) (1976) (Ex. B).

However, the inquiry does not end with subsection (2). Rather, subsection (3) clearly states the preclusive effect of the customer's failure to exercise reasonable care under § 36-4-

406(1) and failure to report forgeries by the same wrongdoer under § 36-4-406(2) is inapplicable if the customer shows the bank failed to exercise ordinary care in paying the items:

> (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

S.C. Code Ann. § 36-4-406(3) (1976) (emphasis added).

The comments to § 36-4-406 further explain the impact of subsection (3): "[s]ubsection (3) makes the preceding rules inoperative if the bank itself was negligent in paying the item. Thus, a negligent bank cannot put the loss resulting from a forgery or the like upon the customer on the ground that the customer also has been negligent." § 36-4-406, South Carolina Reporter's Comments. Similarly, the official comments state "even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing the bank failed to exercise ordinary care in paying the item(s) the preclusion rule does not apply." § 36-4-406, Official Cmt. 4.

Here, First Citizens has not moved for summary judgment on the ultimate dispositive issue in this case—whether it exercised ordinary care in paying the items. The instant motion for summary judgment is based solely on the preclusion provided for in § 36-4-406(1) & (2). Therefore, First Citizens has not shifted the burden to Plaintiffs to establish a genuine issue of material fact exists with regarding to First Citizens exercise of ordinary care. Plaintiffs are entitled to present proof at trial that First Citizens did not exercise ordinary care in paying the forged checks.[1] Accordingly, even assuming arguendo that First Citizens has demonstrated it is

[1] Furthermore, discovery in this case is not complete. When the case was dismissed pursuant to Rule 40(j), SCRCP, in June 2009, the agreement between the parties provided that it would proceed as a newly-filed action when restored to the docket. The case was restored by order dated December 16, 2009. Discovery on the issue of Defendant's exercise of ordinary care is ongoing and Plaintiff is in the process of retaining an expert on this issue as well. Therefore,

entitled to the preclusive effect of § 36-4-406(1) & (2), First Citizens' failure to move for summary judgment based on its own exercise of ordinary care—the controlling issue in this case—precludes summary judgment in its favor at this time.

II. A Genuine Issue of Material Fact Exists Regarding Whether the Forgeries Were Reported Within One Year

As its second ground for summary judgment, First Citizens contends the forgeries were not reported within one year as required by S.C. Code Ann. § 36-4-406(4). This section provides as follows:

> (4) Without regard to care of lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature . . . is precluded from asserting against the bank such unauthorized signature . . .

S.C. Code Ann. § 36-4-406(4) (1976).

The UCC does not prescribe a specific form for the "report" required under § 36-4-406(4), nor does it state the nature of the information necessary to constitute a "report." First Citizens is not entitled to summary judgment on the basis of the one year statute of limitations contained in § 36-4-406(4), as a genuine issue of fact (at the very least) exists as to when First Citizens was informed of the forgeries. On December 23, 2005, Edward McDonnell spoke with a representative of First Citizens, who informed him a transaction from his firm's IOLTA account could not be completed due to insufficient funds. (Ex. C, Affidavit of Edward G. McDonnell, ¶1; Ex. D, McDonnell Depo. p. 16, lines 2-7). The following week, Mr. McDonnell and his wife, Tracy Donnelly, were in repeated contact with Lisa Moseley and Jim Holcomb of First Citizens in an attempt to identify and resolve these unauthorized transactions from Mr.

---

summary judgment is premature at this time. See Baughman, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery.")

McDonnell's three (3) First Citizens' accounts. (**Ex. C**, ¶¶4-5; **Ex. E**, Affidavit of Tracy Donnelly, ¶¶5-6; **Ex. F**, Donnelly Depo. p. 63, line 21-p. 64, line 3).

During a telephone conference with Lisa Moseley and Jim Holcomb the week after Christmas 2005, Ms. Moseley asked Mr. McDonnell whether the firm had written Anna Hoorman a $30,000.00 check as a Christmas bonus. When Mr. McDonnell stated the firm had not, Ms. Moseley indicated the problem with the unauthorized activity was now evident in that Anna Hoorman had been forging checks from the accounts. (**Ex. C**, ¶6; see also **Ex. F**, p. 48, line 16-p. 49, line 1; **Ex. D**, p. 79, lines 6-10). The same week, on December 28, 2005, Ms. Donnelly prepared a list of duplicate and missing checks from the records of McDonnell and Associates, PA and Boomerang Title, Inc. and faxed this list to Lisa Moseley at First Citizens. The majority of the checks identified on this list were determined to have been forged by Anna Hoorman. (**Ex. E**, ¶¶7-8 and exhibit thereto).

Ms. Moseley's knowledge of Anna Hoorman's forgeries is further evidenced by a fax she sent to Mr. McDonnell on December 27, 2005. In this fax Ms. Moseley forwarded copies of selected checks made payable to Anna Hoorman and stated "[t] '_v' beside her name appears to be a common thing on the questionable checks. It appears as though she paid herself twice on some pay dates." (**Ex. G**, Fax dated December 27, 2005). In addition, Plaintiffs' former counsel notified First Citizens via letter dated January 3, 2006 that the bank had honored numerous checks bearing forged signatures. (**Ex. H**, Letter dated January 3, 2006).

In short, when viewed in a light most favorable to Plaintiff, the above described evidence supports an inference that by the week after Christmas 2005, First Citizens was aware Anna Hoorman was forging checks from the accounts owned by Mr. McDonnell. Accordingly, a

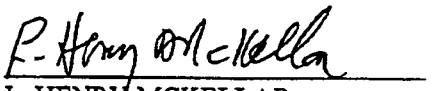
genuine issue of material fact exists regarding whether Plaintiffs timely reported the forgeries to First Citizens and such issue must be submitted to the jury.

CONCLUSION

Based on the foregoing, a genuine issue of material fact exists with regard to each of the grounds for Defendant's motion for summary judgment. Therefore, Plaintiff requests the Court deny this motion.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
March 10, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	)	CIVIL ACTION NUMBER: 07-CP-40-5252
Plaintiffs,	)	**CERTIFICATE OF SERVICE**
vs.	)	
First Citizens Bank and Trust Company, Inc.,	)	
Defendant.	)	

FILED
2010 MAR 10 PM 2:04
JEANETTE W. McBRIDE
C.C.P. & G.S.

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Sixth Floor, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below by hand delivery:

COUNSEL SERVED:
Wesley D. Few, Esquire
John T. Lay, Esquire
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, SC 29202
Attorney for Defendant

PLEADINGS:

- **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Andrea Stobbe

Columbia, South Carolina

March 10, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO. 2007-CP-40-5252

MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	
Plaintiffs,	)	
-vs-	)	NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	
Defendants.	)	

TO: L. HENRY MCKELLAR, ESQUIRE, AND LISA A. DELZOTTI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE that the Defendant, First Citizens Bank and Trust Company, Inc. ("First Citizens"), through its undersigned counsel on the tenth (10th) day after service hereof, at 10:00 a.m., or as soon thereafter as may be convenient to Court and counsel, at the Richland County Courthouse, Columbia, South Carolina, will move before the presiding judge of the Court of Common Pleas for an Order pursuant to Rule 56, SCRCP granting First Citizens summary judgment on the Plaintiffs' claims on the grounds that the undisputed deposition testimony and discovery show that there is no genuine issue as to any material fact in this case because Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406, because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens,

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272

precludes them from asserting any claims against First Citizens under South Carolina law, and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code § 36-4-406(d)(2).

This Defendant specifically reserves the right to add additional grounds, as necessary, and to respond to any relevant issues raised by Plaintiffs. This Motion may also be supported by a memorandum to be filed in the future and any such matters as the court may deem just and proper. This Defendant specifically reserves the right to supplement this summary judgment in the future with affidavits, deposition excerpts, or other information.

This Defendant's Motion is based on the pleadings filed herein, applicable case and statutory law and the South Carolina Rules of Civil Procedure.

Respectfully submitted,

Wesley D. Few
Jake S. Barker
ELLIS, LAWHORNE & SIMS, P.A.

Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190 main
(803) 779-4749 facsimile

Attorneys for Defendant First Citizens Bank and Trust Company, Inc.

May 27, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO. 2007-CP-40-5252

MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	CERTIFICATE OF SERVICE
Plaintiffs,	)	
-vs-	)	
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	
Defendant.	)	

The undersigned does certify that on May 27, 2009, that she did cause to have served by hand delivery, a copy of Defendant's Notice of Motion and Motion for Summary Judgment, to the following:

Henry McKellar
Collins & Lacy
1330 Lady Street, 6th Floor
Columbia, South Carolina 29202

Monica Mulvey Mcgee
Paralegal

"Check". Section 3-104.

"Customer". Section 4-104.

"Depositary bank". Section 4-105.

"Item". Section 4-104.

"Payor bank". Section 4-105.

SOUTH CAROLINA REPORTER'S COMMENTS

Subsection (1) of this Section 4-405 follows the generally accepted rule that a payor bank is not liable for the payment of a check before it has notice of the death or incompetence of the drawer. It would be entirely unrealistic to require banks to verify the continued life and competency of drawers before honoring their orders to pay. The subsection would broaden this rule so as to make it apply to all banks in the collection chain and this would appear to be fair and reasonable.

Subsection (2) provides a ten-day period within which a bank may pay checks (but not other instruments) even when it has notice of the drawer's death. The official comment states: "the justification is that such checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the holder, the executor, the court and the bank."

The subsection provides, however, that any person who claims an interest in a decedent's account may order the payor to stop payment. The effect of such an order would be the same as any stop-payment order.

South Carolina now has a statute, SC Code Section 8-171, which provides that any bank deposit in the names of two persons, payable to either or the survivor, may be drawn against by either of such persons, whether the other be living or not. It is not believed that this Code section would be affected by the adoption of Code Section 4-405.

Research and Practice References—

10 Am Jur 2d, Banks §§ 559, 648.

9 CJS, Banks and Banking §§ 342, 344, 353.

6 Am Jur Pl & Pr Forms (Rev ed), Bank Deposits and Collections, Forms 4:271–4:277 (relationship between payor bank and customer; death or incompetency of customer).

18 Am Jur Legal Forms 2d, Uniform Commercial Code: Article 4—Bank Deposits and Collections, §§ 253:2341 et seq. (payment of item on death or incompetence of customer).

Bank-Depositor Relations Under Article 4 of the Uniform Commercial Code. 24 SC L Rev 839.

ALR and L Ed Annotations—

Duty and liability of bank in respect of depositor's check drawn upon and payable to bank. 138 ALR 853.

§ 36-4-406. Customer's duty to discover and report unauthorized signature or alteration.

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature

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or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

HISTORY: 1962 Code § 10.4-406; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section is new to Uniform Laws. It is to replace statutes in forty jurisdictions dealing with the general subject of a depositor's duty to discover and report forgeries and alterations. In these statutes there is substantial variation in rules prescribed as to the following matters: Application of the statute to unauthorized signatures, raised checks or altered checks; inclusion of special provisions with respect to fictitious payees; periods of time prescribed for termination of right of customer to assert claims against bank; time when limitation period begins to run; restriction of rights of customer stated in terms of liability for loss, preclusion of rights or limitations on time in which suits may be brought.

2. Subsection (1) states the general duty of a customer to exercise reasonable care and promptness to examine his bank statements and items to discover his unauthorized signature or any alteration and to promptly notify the bank if he discovers an unauthorized signature or alteration. This duty becomes operative when the bank does any one of three things with respect to the statement of account and supporting items paid in good faith. The first action is the sending of the statement and items to the customer. The sending may be either by mailing or any other action within the definition of "send" (Section 1-201). The second action is the holding of such statement and items available for the customer pursuant to a request for instructions of the customer. The third action is stated as "or otherwise in a reasonable manner makes the statement and items available to the customer." Such wider residual language is desirable to cover unusual situations. An example might be where the bank knows a customer has left a former address but does not know any new address to which to send the statement or item or to obtain instructions form the customer. The third residual type of action, however, must be "reasonable" and any court has the power to determine that a particular action or practice of a bank, other than sending statements and items or holding them pursuant to instructions, is not reasonable.

3. Subsection (2) states the effect of a failure of a customer to comply with subsection (1). The first effect stated in subparagraph (a) is that he is precluded from asserting against the bank his unauthorized signature and alteration if the bank establishes that it suffered a loss by reason of the customer's failure. The bank has the burden of establishing that it suffered some loss.

Under subparagraph (b) if, after the first item and statement becomes available plus a reasonable period not exceeding fourteen calendar days, the bank pays in good faith any other item on which there is an unauthorized signature or alteration by the same wrongdoer, which payment is prior to receipt by the bank of notification of such unauthorized signature or alteration on the first item, the customer is precluded from asserting the additional unauthorized signature or alteration. This rule follows substantial case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank traceable to the customer's failure to exercise reasonable care in examining his statement and notify the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the requirements of subsection (1) is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items. Hence, the rule of subparagraph (b) is prescribed and to avoid dispute a specific time limit for action by the customer is designated, namely fourteen calendar days.

4. The two effects on the customer of his failure to comply with subsection (1) (subparagraphs (a) and (b) of subsection (2)) are stated in terms of preclusion from asserting a claim against the bank. However, these two effects occur only if the customer has failed to exercise reasonable care and promptness in examining his statement and items and notifying the bank and as to this question of fact the burden is upon the bank to establish such failure. Further, even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing that the bank failed to exercise ordinary care in paying the item(s) the preclusion rule does not apply. This distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

5. Whether the preclusion rule of subsection (2) operates or does not operate depends upon determinations as to ordinary care of the customer and possibly of

the bank. However, subsection (4) places an absolute time limit on the right of a customer to make claim for payment of altered or forged paper without regard to care or lack of care of either the customer or the bank. In the case of alteration or the unauthorized signature of the customer himself the absolute time limit is one year. In the case of unauthorized indorsements it is three years. This recognizes that there is little excuse for a customer not detecting an alteration of his own check or a forgery of his own signature. However, he does not know the signatures of indorsers and may be delayed in learning that indorsements are forged. The three year absolute time limit on the discovery of forged indorsements should be ample, because in the great preponderance of cases the customer will learn of the forged indorsements within this time and if in any exceptional case he does not, the balance in favor of a mechanical termination of the liability of the bank outweighs what few residuary risks the customer may still have. In thirteen of the existing statutes there are limitations on the liability of a bank for payment of items bearing forged indorsements which limitation periods range from thirty days to two years. In the remaining twenty-seven no provision is made for forged indorsements.

6. Nothing in this section is intended to affect any decision holding that a customer who has notice of something wrong with an indorsement must exercise reasonable care to investigate and to notify the bank. It should be noted that under the rules relating to impostors and signatures in the name of the payee (Section 3-405) certain forged indorsements on which the bank has paid the items in good faith may be treated as effective notwithstanding such discovery and notice. If the alteration or forgery results from the drawer's negligence the drawee who pays in good faith is also protected. Section 3-406.

7. The forty existing statutes on the subject as well as Section 4-406 evidence a public policy in favor of imposing on customers the duty of prompt examination of their bank statements and the notification of banks of forgeries and alterations and in favor of reasonable time limitations on the responsibility of banks for payment of forged or altered items. In two New York cases, however, it has been held that a payor bank may waive defenses of the kind prescribed by the section and ignore the public policy indicated by these defenses and recover the full amount of a forged or altered item from a collecting bank. Fallick v Amalgamated Bank of New York, 232 App Div 127, 249 NYS 238 (1st Dep't 1931); National Surety Corp. v Federal Reserve Bank of New York, 188 Misc 207, 70 NYS2d 636 (1946), affirmed without opinion 188 Misc 213, 70 NYS2d 642 (1946). Subsection (5) is intended to reject the holding of these and like cases. Although the principle of subsection (5) might well be applied to other types of claims of customers against banks and defenses to theses claims, the rule of the subsection is limited to defenses of a payor bank under this section. No present need is known to give the rule wider effect.

Cross references:

Sections 3-404, 3-405, 3-406, 3-407, 3-417 and 4-207.

Definitional cross references:

"Alteration". Section 3-407.

"Bank". Section 1-201.

"Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Good faith". Section 1-201.

"Indorsement". Section 3-204.

"Item". Section 4-104.

"Payor bank". Section 4-105.

"Send". Section 1-201.

"Unauthorized signature". Section 1-201.

SOUTH CAROLINA REPORTER'S COMMENTS

Under present South Carolina law, a payor bank is not liable to a depositor for paying a forged item if the depositor was "guilty of negligence either in discovering the forgery or in failing within a reasonable time after he discovered it to notify the bank." Hair v Winnsboro Bank, 103 SC 345, 88 SE 26 (1915).

Section 4-406 clarifies the application of this principle. Subsection (1) states the general duty of a customer to exercise reasonable care and promptness in examining his bank statements and paid checks to discover his unauthorized signature or any alteration and to notify the bank promptly if he discovers such a thing. This duty is imposed upon the depositor when the bank sends a statement with supporting items to the customer, or reasonably makes them available to him. If a customer fails to comply with the duty imposed by subsection (1), subsection (2) states that he is precluded from asserting irregularities which he should have discovered, if the bank establishes that it suffered a loss by his failure to do so. Furthermore, subsection (2)(b) extends the preclusive effect of the customer's failure to report a forgery of an item to other items subsequently forged by the same wrongdoer if the customer has had an opportunity to examine the first forged item and has not reported it to the bank within fourteen days. This is, of course, upon the sound theory that the customer's failure to report the first forgery makes subsequent forgeries easier.

Subsection (3) makes the preceding rules inoperative if the bank itself was negligent in paying the item. Thus, a negligent bank cannot put the loss resulting from a forgery or the like upon the customer on the ground that the customer also has been negligent.

Subsection (4) places an absolute time limit on the right of a customer to make claim against a bank for its payment of altered or forged paper without regard to the care or lack of care of either the customer or the bank. In the case of alteration or a forgery of the customer's own name, the absolute time limit is one year. In the case of unauthorized indorsements, it is three years.

Subsection (5) removes any temptation which a bank might have to waive its defenses under subsection (4) in favor of a good customer and to seek to recoup its loss from a forwarding bank. If a payor chooses to recredit a customer's account for an irregular item reported to it by the customer after the time limitations of subsection (4), it must absorb the loss and not pass it on to prior parties.

Cross references—

As to negligence contributing to alteration or to unauthorized signature, see § 36-3-406.

As to indorsement in name of named payee, when effective, see § 36-3-405.

As to warranties of customer or collecting bank, see § 36-4-207.

As to warranties on presentment or transfer, see § 36-3-417.

As to unauthorized signatures generally, see § 36-3-404.

Research and Practice References—

10 Am Jur 2d, Banks §§ 511 et seq., 622 et seq.

9 CJS, Banks and Banking §§ 332, 335-358.

6 Am Jur Pl & Pr Forms (Rev ed), Bank Deposits and Collections, Forms 4:281-4:293 (relationship between payor bank and customer; unauthorized signature or alteration; customer's duty).

18 Am Jur Legal Forms 2d, Uniform Commercial Code: Article 4—Bank Deposits and Collections, §§ 253:2351 et seq. (duty of customer to discover and report unauthorized signature or alteration).

ALR and L Ed Annotations—

Examination of account, passbook, or cancelled checks by bank depositor, 15 ALR 159, 67 ALR 1121, 103 ALR 1147.

Right of previous holder of check paid by bank to take advantage of depositor's failure to examine vouchers in order to discover forgeries. 17 ALR 956.

Duty of depositor to turn over to bank forged checks, or checks with forged indorsements which have been paid by bank. 60 ALR 527.

Negligence in drawing check which facilitates alteration as to payee as affecting bank's liability in cashing check. 64 ALR 1108.

Duty and liability of bank in respect of depositor's check drawn upon and payable to bank. 138 ALR 853.

Construction and effect of statutes relieving bank from liability to depositor for payment of forged or raised check unless within specified time after the return of voucher representing payment he notifies bank as to forgery or raising. 50 ALR2d 1115.

Effect on bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted. 60 ALR2d 708.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified paid check which was altered. 75 ALR2d 611.

§ 36-4-407. Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

HISTORY: 1962 Code § 10.4-407; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Section 4-403 states that a stop payment order is binding on a bank. If a bank pays an item over such a stop order it is prima facie liable, but under subsection (3) of 4-403 the burden of establishing the fact and amount of loss from such payment is on the customer. A defense frequently interposed by a bank in an action against it for wrongful payment over a stop-order is that the drawer or maker suffered no loss because he would have been liable to a holder in due course in any event. On this argument some cases have held that payment cannot be stopped against a holder in due course. Payment can be stopped, but if it is, the drawer or maker is liable and the sound rule is that the bank is subrogated to the rights of the holder in due course. The preamble and subsection (a) of this section state this rule.

2. Subsection (b) also subrogates the bank to the rights of the payee or other holder against the drawer or maker either on the item or under the transaction

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	)	CIVIL ACTION NUMBER: 07-CP-40-5252
Plaintiffs,	)	AFFIDAVIT OF EDWARD G. McDONNELL
vs.	)	
First Citizens Bank and Trust Company, Inc.,	)	
Defendant.	)	

RICHLAND COUNTY
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JEANETTE W. McBRIDE
C.C.P. & G.S.

Personally appeared before me Edward G. McDonnell, who upon being duly sworn, deposes and states as follows:

1. I am a citizen and resident of Richland County, South Carolina. I am of the age of majority.

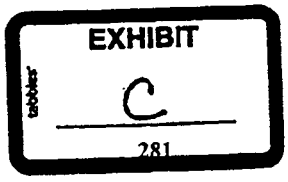
2. On December 23, 2005, I spoke with a representative of First Citizens Bank, who advised me a transaction from the IOLTA account for McDonnell and Associates, PA could not be completed as a result of insufficient funds.

3. As a result of this notification, I reviewed the transactions for all three (3) of my First Citizens' accounts. Tracy Donnelly, my wife, and Rick McDonnell, by brother and an employee of McDonnell and Associates, PA, also participated in this review.

4. In the following week, Tracy and I spoke with Lisa Mosely and Jim Holcombe of First Citizens Bank on numerous occasions in an effort to identify and resolve unauthorized transactions in these accounts.

5. During this time period, Lisa Mosely and Jim Holcombe were assisting in this investigation by supplying us with copies of checks, statements, and other information.

6. During a telephone conference with Lisa Mosely and Jim Holcombe the week after Christmas 2005, Ms. Mosely asked whether the firm had written Anna Hoorman a $30,000.00 check as a Christmas bonus. When I stated it had not, Ms. Mosely indicated the problem with the unauthorized activity was now clear in that Anna Hoorman had been forging checks from the accounts.



FURTHER, YOUR AFFIANT SAYETH NOT.

EDWARD G. McDONNELL

March 8, 2010
Columbia, South Carolina

SWORN to and SUBSCRIBED before me
this 8th day of March, 2010
E Henry McKellar (L.S.)
NOTARY PUBLIC for South Carolina
My Commission Expires: August 16, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	)	CIVIL ACTION NUMBER: 09-CP-40-8786R
	)	
Plaintiffs,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
First Citizens Bank and Trust Company, Inc.,	)	
	)	
Defendant.	)	
	)	

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Sixth Floor, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below by electronic mail and by mailing a copy of same to said person(s) in the United States Postal Service, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:
Wesley D. Few, Esquire
Ellis Lawhorne & Sims, PA
PO Box 2285
Columbia, SC 29202
wfew@ellislawhorne.com

PLEADINGS:

- **AFFIDAVIT OF EDWARD G. McDONNELL**
- **AFFIDAVIT OF TRACY DONNELLY**

Kristie C. Clamp

Columbia, South Carolina

March 8, 2010

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND

MCDONNELL AND ASSOCIATES, PA,
F/K/A MCDONNELL LAW FIRM, PA,
F/K/A EDWARD G. MCDONNELL, PC,
AND BOOMERANG TITLE, INC.,

Plaintiffs,

vs. CASE NO. 2007-CP-40-5252

FIRST CITIZENS BANK AND TRUST
COMPANY, INC.,

Defendant.

DEPOSITION OF: EDWARD G. McDONNELL

DATE: February 3, 2009

TIME: 10:08 a.m.

LOCATION: Law Offices of
Collins & Lacy, PC
1330 Lady Street, 6th Floor
Columbia, South Carolina

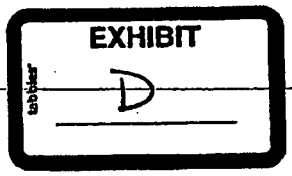
TAKEN BY: Counsel for the Defendant

REPORTED BY: ANGELA D. ZUVER,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC (843) 722-8414	Hilton Head, SC (843) 785-3263	Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224	Greenville, SC (864) 234-7030	Charlotte, NC (704) 573-3919



A. Yes.

Q. Now, I believe the documents and the records will show that you received some sort of notification from the bank on about December 23, 2005, that you had some problems with your account. Does that sound right?

A. Yes.

Q. And I believe your testimony was that you were in line to see Santa; is that right?

A. Yes.

Q. And you then came back to your office to try to figure out what had been going on?

A. Yes.

Q. And I also believe that your testimony, and I'm going to -- was that you reviewed the statements from First Citizens Bank on a semi-regular basis. Does that sound right?

A. Yes.

Q. Explain to me what you mean by semi-regular basis.

A. We did a number of reconciliations throughout the year.

Q. Reconciliations. Okay. And I'm going to get back to the SoftPro issue. When you say reconciliations, we haven't been provided any

Hoormann's been making Internet banking transfers out of your IOLTA account since May of 2005 and you hadn't caught it; isn't that right?

A. I don't remember, off the top of my head, when she started making Internet transfers.

Q. Isn't it true that the bank, and I mean First Citizens Bank, had to inform you that there was a check drawn off of your accounts made out to Anna Hoormann?

A. Yes.

Q. And up until that time you actually were still thinking that she was helping you to figure out what happened to the accounts?

A. Correct.

Q. So we can go in SoftPro, when we get access to the data, like we've requested in discovery, and we can run this report again right now and see if all these checks have cleared; is that right?

A. You should, yes.

Q. Now, what I'm curious to understand is, at this point in time, we'll just say somewhere over $600,000 is missing, right?

A. Yes.

Q. But yet the checks -- and even though

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	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
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McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	)	CIVIL ACTION NUMBER: 07-CP-40-5252
	)	
Plaintiffs,	)	AFFIDAVIT OF TRACY DONNELLY
	)	
vs.	)	
	)	
First Citizens Bank and Trust Company, Inc.,	)	
	)	
Defendant.	)	

RICHLAND COUNTY
FILED
2010 MAR -8 PM 4:44
JEANETTE W. McBRIDE
C.C.P. & G.S.

Personally appeared before me Tracy Donnelly, who upon being duly sworn, deposes and states as follows:

1. I am a citizen and resident of Richland County, South Carolina. I am of the age of majority.

2. I am married to Edward G. McDonnell.

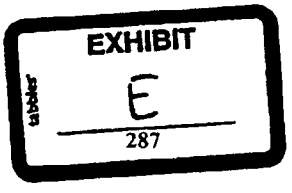
3. On December 23, 2005, my husband spoke with a representative of First Citizens Bank, who advised him a transaction from the IOLTA account for McDonnell and Associates, PA could not be completed as a result of insufficient funds.

4. As a result of this notification, I assisted in reviewing the transactions for all three (3) of my husband's First Citizens' accounts. Edward McDonnell and Rick McDonnell, by brother-in-law and an employee of McDonnell and Associates, PA, also participated in this review.

5. In the following week, Ed and I spoke via telephone with Lisa Mosely and Jim Holcombe of First Citizens Bank on numerous occasions in an effort to identify and resolve unauthorized transactions in these accounts.

6. During this time period, Lisa Mosely and Jim Holcombe were assisting in this investigation by supplying us with copies of checks, statements, and other information.

7. On December 28, 2005, I prepared a list of duplicate and missing checks from the records of McDonnell and Associates, PA and Boomerang Title, Inc. I faxed this list to Lisa Mosely at First Citizens. (Ex. A).



8. The majority of the checks identified on the list of duplicate and missing checks I faxed to Lisa Mosely were forged by Anna Hoorman.

FURTHER, YOUR AFFIANT SAYETH NOT.

Tracy L. Donnelly
TRACY DONNELLY

March 8, 2010
Columbia, South Carolina

SWORN to and SUBSCRIBED before me
this 8th day of March, 2010
L. Henry McClam (L.S.)
NOTARY PUBLIC for South Carolina

My Commission Expires: Aug 16, 2012

EXHIBIT tabbies A

MCDONNELL LAW FIRM, PA
ATTORNEYS AT LAW
1924 BARNWELL STREET
POST OFFICE BOX 11496
COLUMBIA, SOUTH CAROLINA 29211

TELEPHONE (803) 931-8793
FAX (803) 931-0810

FACSIMILE COVER SHEET

DATE: 12/28/05

TO: Lisa Moseley / Circ

FAX NUMBER: 733-2076

FROM: Ed McDonnell

THIS FAX WILL CONSIST OF 8 SHEETS, INCLUDING THIS COVER SHEET. IF TRANSMISSION IS NOT COMPLETE, PLEASE LET US KNOW BY CALLING US AT (803) 931-8793

ADDITIONAL NOTES:

Missing and Duplicate Checks from Operating

Missing Checks from Boomerang

THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL. IT IS INTENDED SOLELY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, OR THE PERSON RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY ADVISED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE MESSAGE IN ERROR, PLEASE NOTIFY THE SENDER BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO THE SENDER BY UNITED STATES MAIL.

February 04 to Current

YAHOO! MAIL

Print - Close Window

MISSING CHECKS

1068
1079
1101
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2443

MISSING BOOMERANG TITLE CHECKS

1103

1104

1105

1106

1107

1108

DUPLICATE CHECKS

1504

1667

1700

2216

2217

2218

2219

2220

2221

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND

MCDONNELL AND ASSOCIATES, P.A., F/K/A
MCDONNELL LAW FIRM, PA, F/K/A
EDWARD G. MCDONNELL, PC, AND
BOOMERANG TITLE, INC.,

Plaintiffs,

vs. CASE NO.: 2007-CP-40-5252

FIRST CITIZENS BANK AND TRUST
COMPANY, INC.,

Defendant.

DEPOSITION OF: TRACY DONNELLY

DATE: March 25, 2009

TIME: 11:19 a.m.

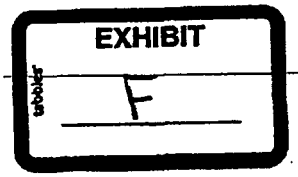
LOCATION: Collins & Lacy
1330 Lady Street
Columbia, SC 29201

TAKEN BY: Counsel for the Defendant

REPORTED BY: SHARON G. HARDOON,
Court Reporter, Notary Public

A. WILLIAM ROBERTS, JR. & ASSOCIATES
Fast, Accurate & Friendly

Charleston, SC (843) 722-8414
Hilton Head, SC (843) 785-3263
Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224
Greenville, SC (864) 234-7030
Charlotte, NC (704) 573-3919



A. Yes.

Q. Okay. What -- did you have any discussions with her?

A. I don't recall if I had direct discussions with her about it.

Q. Okay. What do you recall your involvement being once you went down to the office to try to help out, figure -- what -- what did you do, and what do you remember going on, and who was there? If you could, just, the best you can, fill in the gaps about what happened and then that would be good.

A. We just spent the Christmas weekend trying to figure out what the problem was and what was going on.

Q. Didn't someone from First Citizens, at some point in time, tell you that they had found a check made out to Anna Hoormann?

A. They did not tell me.

Q. Do you know if they told anyone at the firm that they had found a check made out to Anna Hoormann?

A. I believe they told Ed.

Q. Okay. Do you remember when that was?

A. I believe that was after the Christmas

Holiday.

Q. Because, at some point in time, you and your husband, and whoever else -- who else was assisting in that investigation at that point in time?

A. Ed's brother, Rick McDonnell and Anna.

Q. And you?

A. Uh-huh. Yes, sir.

Q. So just the four of you?

A. As I recall.

Q. Okay. Sally Delvechio wasn't involved at that point in time?

A. No, sir.

Q. Okay. So just to clarify, was anyone else involved after you got initial notice to the time period that you all eventually discovered that Anna had been writing checks to herself, other than you, your husband, his brother, Rick McDonnell, and Anna Hoormann?

A. Not that I recall.

Q. Okay. So at some point in time, you all figured out that Anna Hoormann had done this, right?

A. Yes, sir.

Q. Was there -- what happened at that

I'm sorry.

When is the last time that Anna Hoormann contacted your husband, as far as you know?

A. I don't know. I don't recall.

Q. Do you know when the last time he had a conversation with her would have been?

A. No. A long time ago, I would think.

Q. You don't know if he had a conversation with her when the deposition was taken in the prison facility in Greenwood about a week and-a-half ago?

A. I wasn't there.

Q. When the firm hires employees now, do you -- do they check references on them?

A. Normally -- it seems like the last people we've hired, we've hired from people that we know. So they were -- you know, references from people that we know.

Q. When -- going back to the investigative period right after December 23rd of 2005, did you ever speak with anyone at First Citizens Bank?

A. Yes.

Q. Who did you speak to?

A. I can't remember last names, but I know that Lisa was a contact there, and I believe

Angie was a contact there.

Q. Lisa and Angie?

A. Uh-huh.

Q. So your discussions with the bank would have been after December 23rd of 2005, right?

A. Yes, sir.

Q. Did the bank cooperate?

A. I believe so.

Q. Did the bank loan your husband some money after this happened?

A. What kind of loan?

Q. I'm just asking.

A. They didn't -- they didn't just loan him money. I'm -- I'm confused as to the question.

Q. Are you aware of whether or not First Citizens made a loan to your husband, or any of his businesses, shortly after December 23rd, 2005?

A. I don't recall.

Q. Okay. How -- do you know the approximate amount of money that's alleged to have been taken by Anna Hoormann?

A. Approximately.

Q. What do you understand that number to be?

First Citizens

TO: Ed McDonnell
COMPANY:
PHONE:
FAX: 931-0810

FROM: Lisa Moseley
lisa.moseley@firstcitizensonline.com

COMPANY: FIRST CITIZENS BANK
P O BOX 1106
949 LAKE MURRAY BLVD
IRMO SC 29063

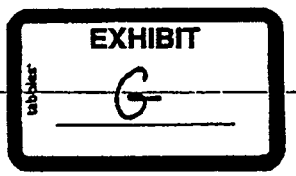
PHONE: 803-407-0527
FAX: 803-733-2077

DATE: 12-27-05

#PAGES: 4
(INCLUDING COVER)

Copies of activity on general account during May and June with certain checks payable to Anna. Again, I have not looked at every check....I just pick these out by chance. The "_v" beside her name seems to be a common thing on the questionable checks. It appears as those she paid her self twice on some pay dates.

Please look for your bank statements because images are with those. If we have to look these up individually, we are talking about many many hours of work. Please let me know what you find.



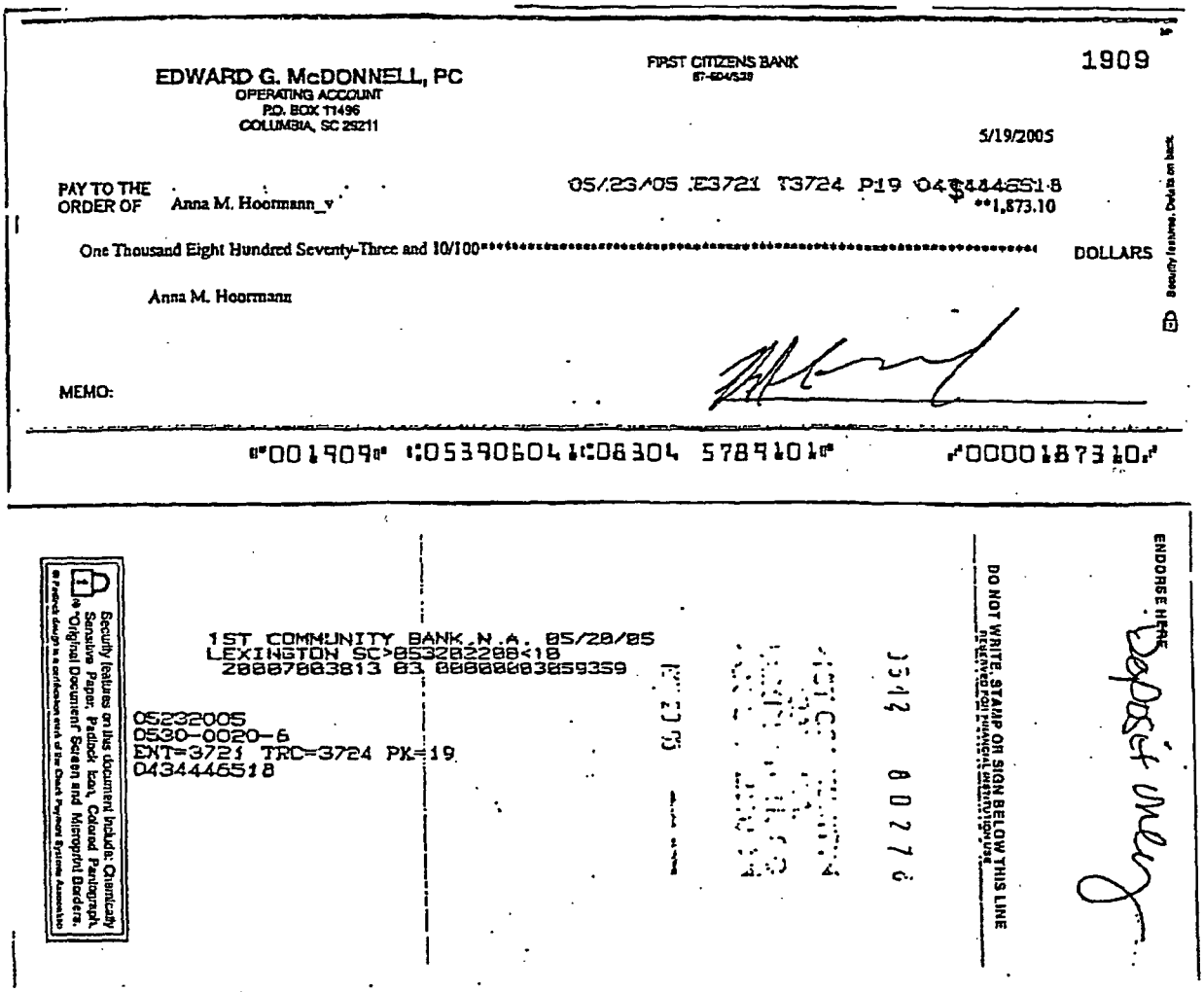
FCB-000377
ELS #252-57754

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13	☐	05/04/2005	$39.90	1852	000000000072002283897	Acct: 000000907994990	Check	Debit	Post	Check	3	05/04/2005	05/04/2005	1505
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Result List

02:51:16 PM

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EDWARD G. McDONNELL, PC
OPERATING ACCOUNT
P.O. BOX 11496
COLUMBIA, SC 29211

FIRST CITIZENS BANK
1909

5/19/2005

PAY TO THE ORDER OF Anna M. Hoormann_v

05/23/05 :E3721 T3724 P19 0434446518
$ **1,873.10

One Thousand Eight Hundred Seventy-Three and 10/100********** DOLLARS

Anna M. Hoormann

MEMO:

⑈001909⑈ ⑆053906041⑆08304 5789101⑈ ⑈0000187310⑈

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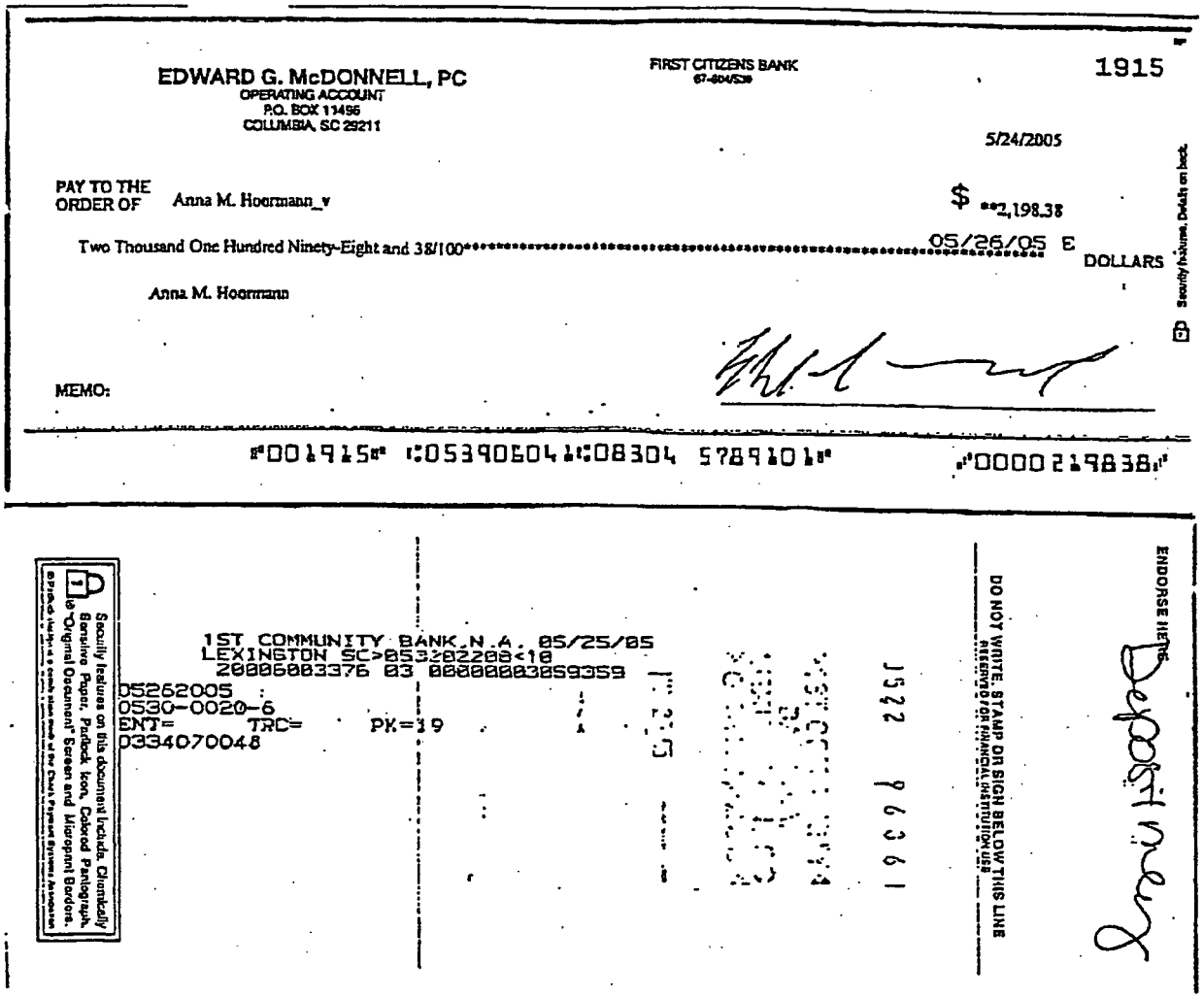
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EDWARD G. McDONNELL, PC
OPERATING ACCOUNT
P.O. BOX 11456
COLUMBIA, SC 29211

FIRST CITIZENS BANK
67-604/539

1915

5/24/2005

PAY TO THE ORDER OF Anna M. Hoermann_v

$ **2,198.38

Two Thousand One Hundred Ninety-Eight and 38/100********** 05/26/05 E DOLLARS

Anna M. Hoermann

MEMO:

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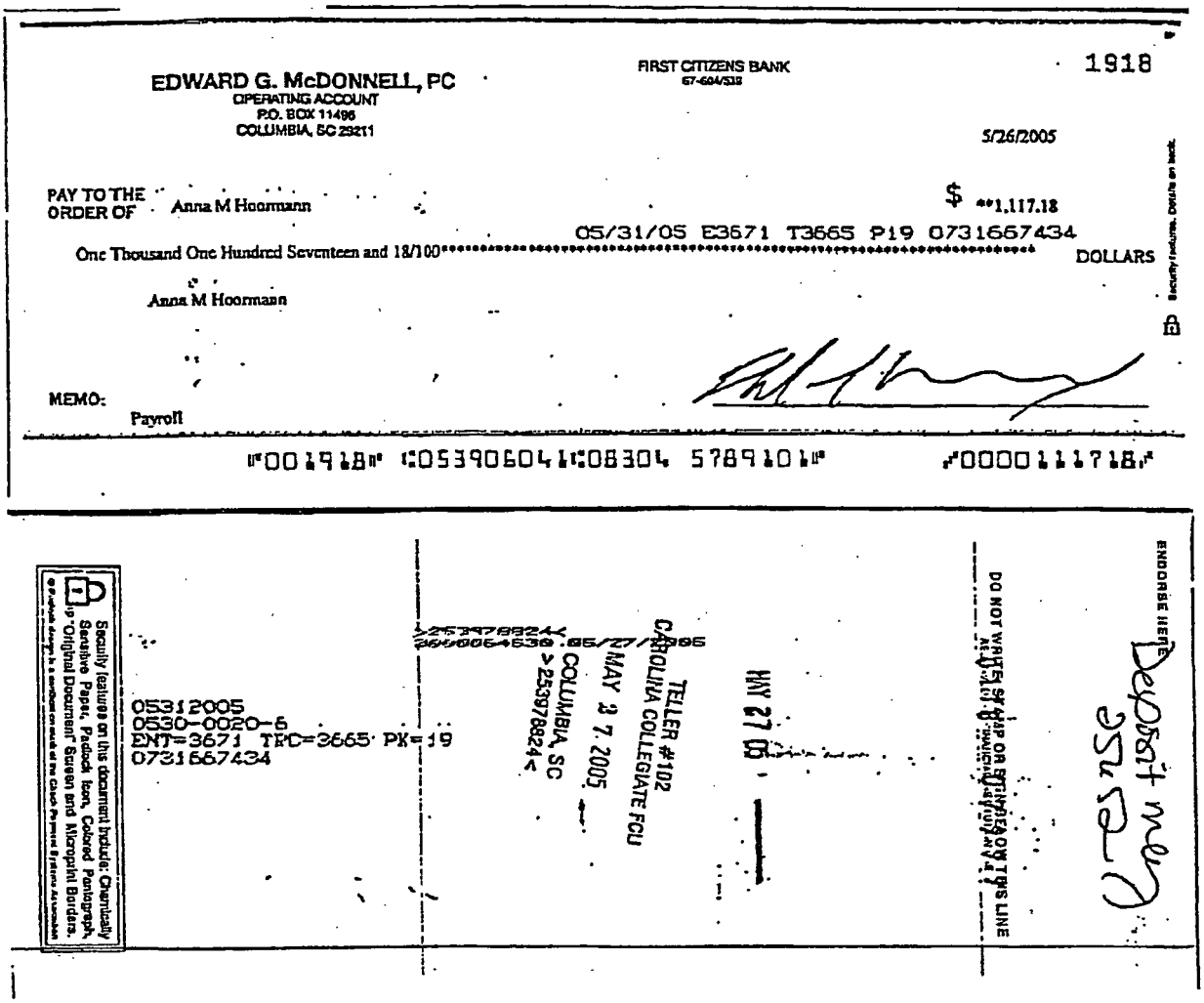
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J522 P6361

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EDWARD G. McDONNELL, PC
OPERATING ACCOUNT
P.O. BOX 11496
COLUMBIA, SC 29211

FIRST CITIZENS BANK
67-604/531

1918

5/26/2005

PAY TO THE ORDER OF Anna M Hoormann

$ **1,117.18

05/31/05 E3671 T3665 P19 0731667434

One Thousand One Hundred Seventeen and 18/100********** DOLLARS

Anna M Hoormann

MEMO: Payroll

"001918" :053906041:08304 5789101" "0000111718"

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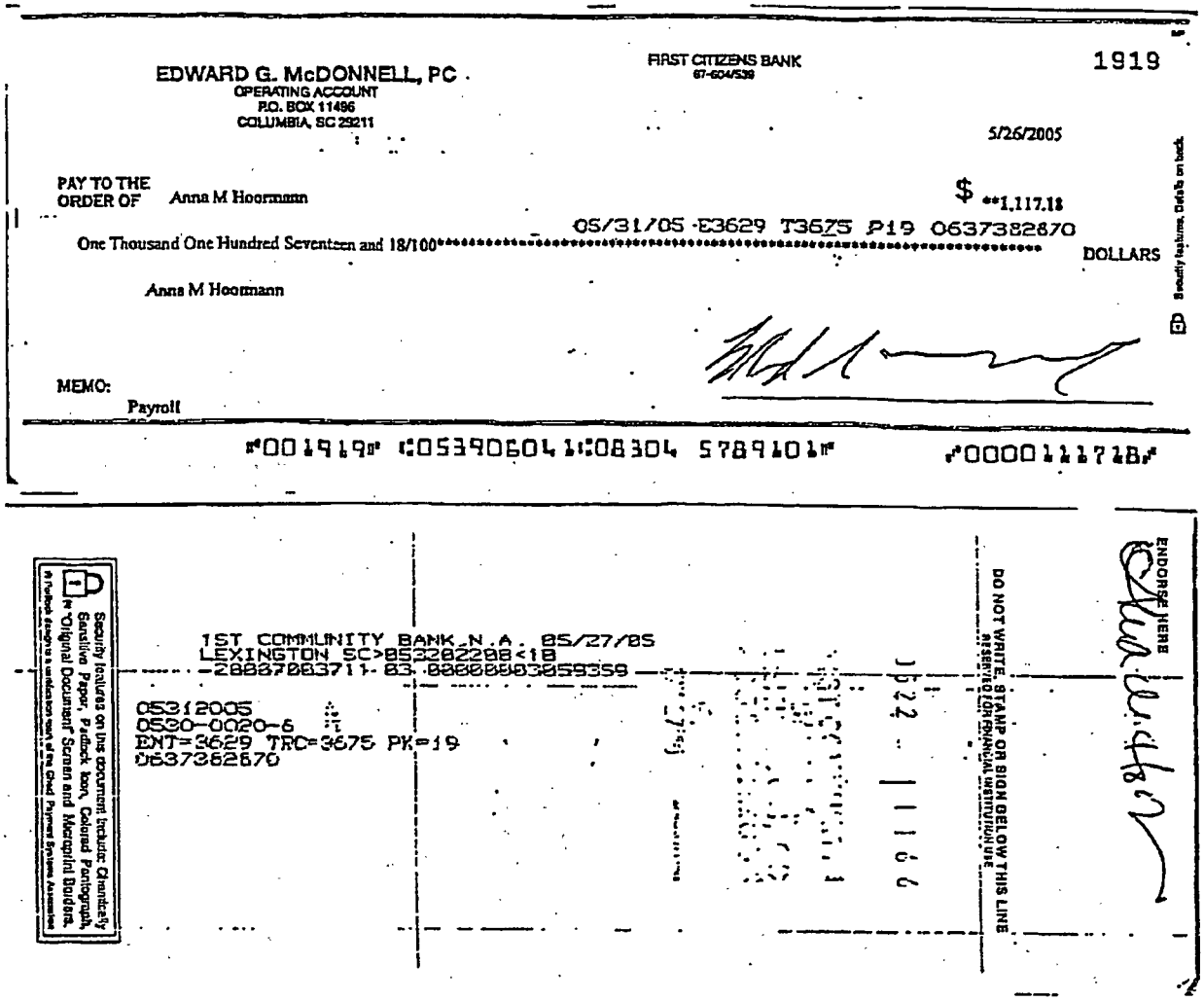
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COLUMBIA, SC
MAY 27 2005
TELLER #102
CAROLINA COLLEGIATE FCU

MAY 27 05

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EDWARD G. McDONNELL, PC
OPERATING ACCOUNT
P.O. BOX 11496
COLUMBIA, SC 29211

FIRST CITIZENS BANK
67-604/539

1919

5/26/2005

PAY TO THE ORDER OF Anna M Hoormann

$ **1,117.18

05/31/05 E3629 T3675 P19 0637382870

One Thousand One Hundred Seventeen and 18/100********** DOLLARS

Anna M Hoormann

MEMO: Payroll

⑈001919⑈ ⑆053904041⑆08304 5789101⑈ ⑈0000111718⑈

Security features on this document include Chemically Sensitive Paper, Padlock Icon, Colored Pantograph, the "Original Document" Screen and Microprint Borders. Details on back.

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05312005
0530-0020-6
ENT=3629 TRC=3675 PK=19
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RESERVED FOR FINANCIAL INSTITUTION USE

ENDORSE HERE

	View Selection	Posting Date	Amount	Serial No.	Sequence No.	Source	Type	Status	Description
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LAW OFFICES
HOLLER, DENNIS, CORBETT, ORMOND, PLANTE & GARNER
1777 Bull Street at Laurel
Columbia, South Carolina 29201
(803) 765-2968 / Fax (803) 252-8290

J. Ed Holler
• Steven D. Dennis
• Everett Hope Garner
James J. Corbett
• J. Charles Ormond, Jr.
Anthony R. Plante
• Certified Mediator S.C.

Of Counsel
Stanley G. Freeman

Reply To
Post Office Box 11006
Columbia, S.C. 29211

January 3, 2006

First Citizens Bank Main Offices
1225 Lady Street
Columbia, SC 29201

HAND DELIVERY

RE: Account Name: Boomerang Title, Inc.
Account Number: 083045792501
Account Name: McDonnell Law Firm, P.A.
Account Number: 083045789101

Dear Sir or Madam:

This is to advise that I have been retained to represent Ed McDonnell, the account owner of the above named two accounts. Enclosed please find copies of checks which were honored by your bank bearing forged signatures. We are requesting that these accounts be debited to rectify this discrepancy.

The check numbers on the McDonnell Law Firm, P.A. accounts are: 2343, 2360, 2423, 2424, 2384, 1909, 1915, 1985, 1958, 1986, 1941, 1959, 1969, 1977 and 1993.

The check numbers on the Boomerang Title, Inc. are: 1091, 1092, 1093, 1095, 1096, 1097, 1099, 1100, 1101, 1102, 1105 and 1106.

My client has requested copies of other suspicious transactions and we will provide specifics on any other discrepancies as they are received. Please have a representative of your bank contact me as soon as possible.

Thanking you, I am

J. Ed Holler

EXHIBIT
tabbies
H

Plaintiff0131

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FIFTH JUDICIAL CIRCUIT
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	CIVIL ACTION NUMBER: 07-CP-40-5252
Plaintiffs,	**RULE 59(e) MOTION TO ALTER OR AMEND**
vs.	
First Citizens Bank and Trust Company, Inc.,	
Defendant.	

RICHLAND COUNTY
FILED
2010 JUL 23 PM 3:51
JEANETTE W. McBRIDE
C.C.P. & G.S.

Pursuant to Rule 59(e), SCRCP, for the following reasons, Plaintiffs respectfully request the Court alter or amend its order entered July 9, 2010 granting summary judgment in favor of Defendant and enter an order denying Defendant's motion.

INTRODUCTION

This case is governed by S.C. Code Ann. § 36-4-406 (1976). (Ex. A). Section 36-4-406 (1) places the responsibility or duty on the bank customer to examine his statements and checks to determine if there are any forgeries and report these forgeries to the bank. This subsection provides no consequences from recovering from the bank for failure to do so. § 36-4-406(1).

However, § 36-4-406(2) provides that if the customer fails to notify the bank of the forged signature within fourteen (14) days from when the statement is made available and the same wrongdoer continues to forge checks, the customer is precluded from asserting against an unauthorized signature by the same wrongdoer on any subsequent forgeries. § 36-4-406(2).

These two sections set up the duties of the customer and resultant consequences if the same wrongdoer continues to forge checks.

But the preclusive effect of subsection (2) is not absolute. Section 36-4-406 (3) provides that the preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item. § 36-4-406(3).

In other words, even if the customer fails to discover the first forgery and notify the bank and the same wrongdoer continues to forge checks, the customer can still recover if the bank failed to exercise ordinary care in paying the items.

Section 36-4-406 provides an absolute one year time limit for reporting forgeries and a customer cannot recover for forgeries which are not reported within this time period. This limitation applies without regard to care of lack of care of the customer or the bank. § 36-4-406(4).

I. The Court Ignores the Impact of S.C. Code Ann. § 36-4-406(3)

a. Subsection (3) Trumps the Preclusive Effect Subsection (2).

In section B of the Order, entitled "Reasonable Care," the Court first analyzes § 36-4-406(1) and concludes Plaintiffs failed to exercise reasonable care and promptness in examining their bank statements and notifying First Citizens of the unauthorized signatures. The Court moves on to analyze whether Plaintiffs are precluded from asserting the forgeries against First Citizens by operation of the "same wrongdoer" provision contained in § 36-4-406(2). The Court reasoned that because all checks at issue were forged by the same wrongdoer, Anna Hoorman, and the first check was not reported within fourteen (14) days after it was made available to Plaintiffs via monthly statement, Plaintiffs are precluded from asserting the forgeries against First Citizen by operation of § 36-4-406(2).

However, the Court erred by ending its analysis with subsection (2) and overlooking the importance of subsection (3). Rather, subsection (3) clearly states:

> (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

§ 36-4-406(3) (1976) (emphasis added).

The comments to § 36-4-406 further explain the impact of subsection (3): "[s]ubsection (3) makes the preceding rules inoperative if the bank itself was negligent in paying the item. Thus, a negligent bank cannot put the loss resulting from a forgery or the like upon the customer on the ground that the customer also has been negligent." § 36-4-406, South Carolina Reporter's Comments. Similarly, the official comments make clear that the bank does not prevail simply because it proves the customer failed to exercise reasonable care; rather, the analysis must proceed to subsection (3):

> The two effects on the customer of his failure to comply with subsection (1) (subparagraphs (a) and (b) of subsection (2)) are stated in terms of preclusion from asserting a claim against the bank. However, these two effects occur only if the customer has failed to exercise reasonable care and promptness in examining his statement and items and notifying the bank to establish such failure. Further, even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing the bank failed to exercise ordinary care in paying the item(s) the preclusion rule does not apply. This distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

§ 36-4-406, Official Cmt. 4 (emphasis added).

In short, subsection (3) trumps the preclusive effect subsection (2) can have on Plaintiffs' claims. Whether First Citizens has established Plaintiffs failed to exercise reasonable care and promptness in examining their bank statements and notifying First Citizens of the unauthorized signatures and whether Plaintiffs are precluded from asserting the forgeries against First Citizens by operation of the "same wrongdoer" provision are not controlling. Even assuming First

Citizens has established these issues, Plaintiffs are still entitled to the opportunity under § 36-4-406(3) to establish First Citizens failed to exercise ordinary care in paying the forged items. See Indiana Nat'l Corp. v. FACO, Inc., 400 N.E.2d 202, 204-05 (Ind. Ct. App. 1980) (finding the evidence showed customer failed to exercise degree of care required by 4-406(1) and would be barred from asserting unauthorized signatures under 406(2), but continuing on to analyze 4-406(3) and holding that because customer presented evidence at trial that bank failed to exercise ordinary care in paying the items, the verdict in customer's favor should be affirmed). If Plaintiffs do so, then § 36-4-406(3) provides the preclusion of § 36-4-406(2) does not apply to bar Plaintiffs' claims. Therefore, the Court overlooked the importance of Plaintiff's right to establish First Citizens failed to exercise ordinary care as required by § 36-4-406(3).

b. Summary Judgment Must Be Denied Because First Citizens Did Not Move For Summary Judgment on Plaintiffs' Failure to Show First Citizens Exercised Ordinary Care.

In its recitation of First Citizens' grounds for summary judgment, the Court states the motion is premised, inter alia, on that fact Plaintiffs have "presented no evidence that First Citizens failed to exercise ordinary care in paying the items." (Order, p. 4). First Citizens did not state as a ground for its motion for summary judgment that Plaintiffs have failed to create a genuine issue of material fact regarding whether First Citizens exercised ordinary care in paying the items. (Ex. B). First Citizens first mentioned this issues in its memorandum in support of its motion, filed on the date of the hearing, in the heading of section II, which states "First Citizens Bank's Motion For Summary Judgment Should Be Granted Because Plaintiffs Failed to Exercise Ordinary Care and First Citizens Used Ordinary Care in Paying the Items." (Defendant's Memo., p. 8). However, no where in its memorandum does First Citizens present any argument in support of the assertion that First Citizens used ordinary care in paying the items.

Furthermore, First Citizens did not raise this ground in its motion for summary judgment. The instant motion for summary judgment was based solely on the preclusion provided for in § 36-4-406(1) and (2), as well at the one-year time bar contained in (4). (Ex. B).[1] Therefore, First Citizens' motion did not shift the burden to Plaintiffs to establish a genuine issue of material fact exists with regard to First Citizens' exercise of ordinary care under § 36-4-406(3). See Rule 7(b)(1), SCRCP (stating "[a]n application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor"). Because First Citizens did not move for summary judgment on this issue, its motion for summary judgment must be denied and Plaintiffs are entitled to present proof at trial that First Citizens did not exercise ordinary care in paying the forged checks.

Furthermore, it would be patently improper and reversible error for the Court to grant summary judgment on an issue not raised, addressed, or even so much as mentioned in the moving papers filed by First Citizens. It has long been the black letter law in South Carolina that an issue that was not raised in a notice and motion for summary judgment is not before and cannot be ruled on by the trial court. Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 351, 384 S.E.2d 738, 740 (1989) ("The trial judge could not have understood the basis of People's Life's motions to be that the conversion was unconnected to 'trade or commerce'

[1] Specifically, Defendant enumerated the following grounds for its motion for summary judgment:

> because Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406, because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens, precludes them from asserting any claims against First Citizens under South Carolina law, and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code § 36-4-406(d)(2).

(Ex. B, pp. 1-2).

because the motions neither raised nor encompassed such an argument."); Morgan v. Blackwell, 286 S.C. 457, 334 S.E.2d 817 (1985); Glass v. Glass, 276 S.C. 625, 281 S.E.2d 221 (1981) (trial judge erred in determining issue of applicability of statute of frauds as an affirmative defense to contract since that issue was not raised in motion to dismiss). One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds supporting the motion. Generally, the trial court may not grant relief beyond the limits or scope of such notice. Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 260 S.E.2d 708 (1979); Skinner v. Skinner, 257 S.C. 544, 186 S.E.2d 523 (1972). To do so in this case would clearly prejudice Plaintiffs. Accordingly, even assuming, arguendo, that First Citizens has demonstrated it is entitled to the benefit of the preclusive effect of §§ 36-4-406(1) & (2), First Citizens' failure to move for summary judgment based on its own exercise of ordinary care—the controlling issue in this case—precludes summary judgment in its favor at this time.[2]

In addition, the order granting summary judgment twice references that Plaintiffs withdrew their initial expert designation and have not yet designated another expert. (Order, p. 2, p. 11, n.3). It is unclear from the Court's order what bearing Plaintiffs' lack of an expert had on the Court's decision. Presumably, Plaintiff's lack of an expert is mentioned as a result of the Court's misapprehension that First Citizens moved for summary judgment on Plaintiff's failure to adduce evidence concerning First Citizens exercise of ordinary care in paying the checks under § 36-4-406(3). However, as discussed in detail above, this was not cited as a ground for First Citizens' motion for summary judgment and, therefore, Plaintiffs were under no obligation to present such evidence in opposition to First Citizens' motion.

[2] Plaintiffs pointed out in their memorandum in opposition to First Citizens' motion for summary judgment that First Citizens did not move for summary judgment on its own exercise of reasonable care, as did counsel at the hearing. (Plaintiff's Memo., pp. 4-5).

Because Plaintiffs' expert retention and designation is not germane to First Citizens' grounds for summary judgment, the Court erred to the extent its ruling is based upon or influenced by Plaintiffs' lack of an expert designation. At the time of the hearing on March 10, 2010, the instant lawsuit was only three (3) months old, as it was restored to the docket on December 16, 2009.[3] Furthermore, this case is not governed by a scheduling order that requires designation of an expert by any particular date. The grant of summary judgment based on lack of an expert when a case has been pending for only three (3) months is premature. Cf. Baughman, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery"). Accordingly, the Court should not have taken Plaintiff's lack of an expert into account when ruling on First Citizens' motion, as it was not relevant to the grounds for summary judgment.

c. Plaintiff's Failure to Use Reasonable Care is Not Dispositive.

The Court erred in ruling "the complete delegation of financial responsibility to Hoorman and Plaintiffs' failure to check the account statements demonstrates Plaintiffs' lack of reasonable care and precludes Plaintiffs from asserting claims against First Citizens under the Uniform Commercial Code." (Order, p. 8; see also p. 10 ("Therefore, Plaintiffs own negligence, as a matter of law, precludes Plaintiffs' recovery."); p. 11 ("the Court finds Plaintiffs' own negligence and failure to exercise reasonable care absolutely bars any claims against First Citizens")). In support of this proposition the Court cites to Read v. South Carolina National Bank, 286 S.C. 534, 335 S.E.2d 359 (1985), and includes the following quotation: "The evidence in this case clearly presents a situation where Read's negligence as a matter of law substantially contributed

[3] When the case was dismissed pursuant to Rule 40(j), SCRCP, in June 2009, the agreement between the parties provided the case would proceed as a newly-filed action when restored to the docket.

to the forgeries. He was negligent in failing to maintain proper control over the signature stamp, he allowed the same person who had possession of the checkbook to reconcile the statements with no supervision or verification and he failed to examine his bank statements." Id. at 541, 335 S.E.2d at 363.

However, the Court misapprehends the cited portion of Read, as it is inapplicable to the instant case and does not stand for the proposition that Plaintiffs' failure to exercise reasonable care alone bars Plaintiffs' claims against First Citizens. In the above-quoted portion of Read, the Court was addressing § 36-3-406, not § 36-4-406, which is at issue in this case. Section 36-3-406 provides a separate and distinct defense for a bank where it is able to establish the customer "by his negligence substantially contributes" to the making of an unauthorized signature and the bank paid the instrument "in good faith and in accordance with reasonable commercial standards." In such a case, the customer is precluded from asserting the lack of authority for making the signature against the bank. Section 36-3-406 was not raised as a ground for First Citizens' motion for summary judgment, nor was it discussed at the hearing or even in the Court's order.[4] Therefore, the Court must not base its decision on § 36-3-406. Connolly, 299 S.C. at 351, 384 S.E.2d at 740.

Notwithstanding that First Citizens has not raised § 36-3-406 as an issue for summary judgment, in Read, the bank prevailed as a matter of law on § 36-3-406 because the bank had proven not only that the customer substantially contributed to the forgeries, but also that it paid the checks in good faith and in accordance with reasonable commercial standards of its business. Section § 36-3-406 places the burden of proving both these elements upon the bank. Read, 286 S.C. at 541-42, 335 S.E.2d at 363. First Citizens presented no evidence that it paid the checks in

[4] The Order mistakenly refers to § 36-3-406 (cmt. 3) on page 11. It is clear from the context that the Court meant to refer to § 36-4-406 (cmt. 3), as it is the source of the quoted language.

good faith and in accordance with reasonable commercial standards. Therefore, even if § 36-3-406 had been raised in this case, First Citizens has not meet its burden under that statute merely by demonstrating Plaintiffs were negligent.

Moreover, the standard for application of the preclusion set forth in § 36-3-406 is totally different from the standard for application of the preclusion set forth in the statute at issue, § 36-4-406. Section 36-4-406 provides "the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature . . . and must notify the bank promptly after discovery thereof." § 36-4-406(1). In other words, the reasonable care required of the customer by § 36-4-406 extends only to examination of his statement and discovery of his unauthorized signature. Section 36-3-406, on the other hand, broadly speaks in terms of the customer's negligence substantially contributing to the making of the unauthorized signature. In the quoted portion of Read, the Court was discussing the various ways in which the customer substantially contributed to the forgeries (as required by § 36-3-406), only one of which was by failing to examine his bank statements. 286 S.C. at 541, 335 S.E.2d at 363. The other examples given in Read simply are inapplicable to the instant case, as they are not germane to § 36-4-406.

As a related issue, to the extent the Court's decision is based on evidence and testimony presented by First Citizens concerning Hoorman's control over Plaintiffs' financial records, the court misconstrues and overemphasizes the importance of such evidence and testimony. For example, the Court discusses that Hoorman shared and office with McDonnell and had access to the financial records stored therein, as well as that Plaintiffs permitted Hoorman to receive and

reconcile the statements. The Court further noted Hoorman had unfettered access to Plaintiffs' records and the authority to create checks on the accounts.[5] (Order, p. 8, p. 10).

However, this evidence is not germane on the issues presented by First Citizens' motion, which was premised upon § 36-4-406. The only duties imposed upon the customer by § 36-4-406 are to exercise reasonable care and promptness to examine the statement and items to discover forgeries and notify the bank promptly after discovery. It is irrelevant for purposes of § 36-4-406 how the forger was able to accomplish his misdeeds or whether the customer gave the forger too much control and access over his account information. Such facts may be relevant with respect to § 36-3-406, as there the standard is whether the customer "substantially contributed" to the forgery. Accordingly, reliance upon such evidence and testimony is misplaced and must not be considered in ruling on § 36-4-406.

Additionally, as described in Section I.a., supra, § 36-4-406 prescribes that the customer's failure to exercise reasonable care in examining his statement and notifying the bank of forgeries is not the final step in analyzing whether the customer's claims are precluded. Instead, the Court must proceed to analyze § 36-4-406(3). The language of § 36-4-406(3) makes clear that the preclusive effect of (2) is inoperative if the customer established the bank failed to exercise ordinary care in paying the items. The comments further explain that "**even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing the bank failed to exercise ordinary care in paying the item(s) the preclusion rule does not apply**." § 36-4-406(3), Official Cmt. 4 (emphasis added). Accordingly, Plaintiffs' failure to use reasonable care, in and of itself, does not preclude Plaintiff's claims.

[5] It should be noted Hoorman was not authorized to sign checks and was not a signatory on the accounts.

II. Clarification Of the Court's Ruling Regarding S.C. Code Ann. § 36-4-406(4) is Needed

As its second ground for summary judgment, First Citizens contended Plaintiffs were precluded from recovering on **all** the forged checks because the first forgery was not reported within one year as required by § 36-4-406(4). This section provides as follows:

> (4) Without regard to care of lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature . . . is precluded from asserting against the bank such unauthorized signature . . .

§ 36-4-406(4).

The Court determined the forgeries were not reported to First Citizens until December 23, 2005, thirteen months after the first forgery appeared on the November 2004 bank statement. The Court appears to have disagreed with First Citizens' interpretation of § 36-4-406(4) that because the first forgery was not reported for over a year, it and all subsequent forgeries are not actionable. Instead, the Court ruled § 36-4-406(4) "completely bars recovery of any claim against First Citizens which was **included in a statement dated over one (1) year from the time of discovery and report** to First Citizens" and "Plaintiffs are precluded from asserting any unauthorized signature or alteration against First Citizens **which has been on bank statements for more than one year**." (Order p. 5, p. 6) (emphasis added). However, the Court also concluded by stating First Citizens' motion for summary judgment was granted on the issue of § 36-4-406(4) and did not qualify this ruling by stating the forged checks appearing on bank statements in the year preceding Plaintiffs' report to First Citizens are recoverable (as it did previously in outlining its reasoning).

Here, the majority of the forged checks appeared on bank statements made available less than one year before Plaintiffs' report was made to First Citizens in December 2005. Because

the one-year time limitation for reporting unauthorized signatures runs from the time the bank statement on which the item appears is made available, all forgeries appearing on bank statements made available on or after December 23, 2004 (one year before the reporting date of December 23, 2005) are actionable.[6] See Gerber v. City Nat'l Bank of Fla., 619 So.2d 328, 329-30 (Fla. Ct. App. 1993) (recognizing "that when a series of checks, rather than a single check, are alleged to have been improperly honored by a bank, the proper application of Section 674.406(4) [Florida's codification of § 36-4-406(4)] may serve to preclude a customer's recovery on some checks, while allowing recovery on others, depending upon when bank statements are issued and when notice is given"); Indiana Nat'l Corp. v. FACO, Inc., 400 N.E.2d 202, 205-06 (Ind. Ct. App. 1980) (finding that where 167 checks were forged by bookkeeper and forgeries were reported in August 1975, customer could recover for those forgeries which cleared the bank before July 1974, but could not recover for those prior to this date). Accordingly, Plaintiffs' request the Court clarify it's ruling to state that First Citizens' motion for summary judgment is granted on this ground **only as to those checks appearing on bank statements made available before December 23, 2004, one year before Plaintiffs' reported the forgeries**.[7]

In addition, the portion of the Order addressing § 36-4-406(4) discusses the deposit agreement's requirement that customers discover and report any unauthorized signatures to First Citizens within fourteen (14) days after receipt of the bank statement. It is unclear if the Court

[6] In essence, when each bank statement is made available, it commences the one-year limitation for reporting unauthorized signatures for items appearing on that statement.

[7] Plaintiffs understand the Court's present ruling in Section B of the Order bars all claims on all checks. However, in the event this Court or the appellate court agrees with Plaintiffs' arguments concerning § 36-4-406(3), clarification of the Court's ruling on whether Plaintiffs' may recover for the checks appearing on bank statement within the one year preceding report of the forgeries is extremely important.

has also ruled that Plaintiffs' claims on all checks are barred because they were not reported to First Citizens within fourteen (14) days.[8]

The deposit agreement provides only the duties and responsibilities of the customer, as follows:

> Upon receipt (or availability) of your statement and cancelled items, you agree that you will promptly examine your statement and items and will notify us if there are any incorrect or unauthorized signatures, transactions, or alterations. You also agree that 14 days (SC) / 30 days (GA) after the statement and items are first made available is a reasonable time for you to examine your statement and notify us of unauthorized signatures or alterations.

(Defendant's Memo, Ex. 5, pp. 3-4).

Similarly, § 36-4-406(1) provides that when the bank makes bank statements available, the customer "must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof." Accordingly, the deposit agreement merely supplies that parties agree fourteen days is a reasonable time to examine statements and report forgeries, i.e. it provides the definition of the phrase "reasonable care and promptness" as used in § 36-4-406(1). The deposit agreement does not contain a provision setting forth the consequences or penalty for the customer's failure to examine his statement and report unauthorized signatures within fourteen (14) days of receipt of the statement. It does not provide that the customer waives his right to pursue recovery from the bank if he does not report the forgeries within fourteen (14) days. To determine the effect of the failure to report within fourteen (14) days, the Court must look to § 36-4-406(2), which specifically sets forth the preclusive effect of the customer's failure to fulfill the duties imposed by § 36-4-406(1).

[8] This issue was not raised as a ground on which summary judgment was sought in First Citizens' motion for summary judgment.

In addition, interpreting the deposit agreement to mean that recovery can not be had for forged checks when the customer does not report them within fourteen (14) days of receipt of the bank statements is contrary to § 36-4-103. This section provides, in pertinent part:

> The effect of the provisions of this chapter may be varied by agreement except that **no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care** or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

S.C. Code Ann. § 36-4-103(1) (1976) (emphasis added).

If the deposit agreement is interpreted to mean a customer has only an absolute time limitation of 14 days to discover and report forgeries and is barred from pursuing recovery thereafter, the right of the customer to establish the bank failed to exercise ordinary care in paying the items under § 36-4-406(3) would be completely eradicated. Such an interpretation, therefore, would eliminate First Citizens' responsibility to exercise ordinary care in paying the items, in direct contravention with § 36-4-103(1). See Cumis Ins. Society v. Girard Bank, 522 F. Supp 414, 422-23 (E.D Pa. 1981) (finding resolution of bank void under 4-103 where it would have the effect of barring customer from asserting bank's lack of ordinary care to counteract the impact of customer's own negligence) (citing J. White & R. Summers, Uniform Commercial Code, 654 n.16 (1972)).

III. Plaintiffs Did Not Allege a Cause of Action For Conversion

The Court erroneously granted summary judgment on Plaintiffs' conversion claim, as Plaintiffs alleged no such claim. The only claims alleged by Plaintiffs in this case are a breach of contract claim for each account from checks were forged. Therefore, Plaintiffs request the Court remove the discussion of conversion from the Order.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court alter or amend its Order granting summary judgment to First Citizens as described above.

Respectfully submitted,

COLLINS & LACY, P.C.

By: Amy L Neuschafer

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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
July 23, 2010

"Check". Section 3-104.
"Customer". Section 4-104
"Depositary bank". Section 4-105.
"Item". Section 4-104.
"Payor bank". Section 4-105.

SOUTH CAROLINA REPORTER'S COMMENTS

Subsection (1) of this Section 4-405 follows the generally accepted rule that a payor bank is not liable for the payment of a check before it has notice of the death or incompetence of the drawer. It would be entirely unrealistic to require banks to verify the continued life and competency of drawers before honoring their orders to pay. The subsection would broaden this rule so as to make it apply to all banks in the collection chain and this would appear to be fair and reasonable.

Subsection (2) provides a ten-day period within which a bank may pay checks (but not other instruments) even when it has notice of the drawer's death. The official comment states: "the justification is that such checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the holder, the executor, the court and the bank."

The subsection provides, however, that any person who claims an interest in a decedent's account may order the payor to stop payment. The effect of such an order would be the same as any stop-payment order.

South Carolina now has a statute, SC Code Section 8-171, which provides that any bank deposit in the names of two persons, payable to either or the survivor, may be drawn against by either of such persons, whether the other be living or not. It is not believed that this Code section would be affected by the adoption of Code Section 4-405.

Research and Practice References—
10 Am Jur 2d, Banks §§ 559, 648.
9 CJS, Banks and Banking §§ 342, 344, 353.
6 Am Jur Pl & Pr Forms (Rev ed), Bank Deposits and Collections, Forms 4:271-4:277 (relationship between payor bank and customer; death or incompetency of customer).
18 Am Jur Legal Forms 2d, Uniform Commercial Code: Article 4—Bank Deposits and Collections, §§ 253:2341 et seq. (payment of item on death or incompetence of customer).
Bank-Depositor Relations Under Article 4 of the Uniform Commercial Code. 24 SC L Rev 839.

ALR and L Ed Annotations—
Duty and liability of bank in respect of depositor's check drawn upon and payable to bank. 138 ALR 853.

§ 36-4-406. Customer's duty to discover and report unauthorized signature or alteration.

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature

EXHIBIT
A

or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

HISTORY: 1962 Code § 10.4-406; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. This section is new to Uniform Laws. It is to replace statutes in forty jurisdictions dealing with the general subject of a depositor's duty to discover and report forgeries and alterations. In these statutes there is substantial variation in rules prescribed as to the following matters: Application of the statute to unauthorized signatures, raised checks or altered checks; inclusion of special provisions with respect to fictitious payees; periods of time prescribed for termination of right of customer to assert claims against bank; time when limitation period begins to run; restriction of rights of customer stated in terms of liability for loss, preclusion of rights or limitations on time in which suits may be brought.

2. Subsection (1) states the general duty of a customer to exercise reasonable care and promptness to examine his bank statements and items to discover his unauthorized signature or any alteration and to promptly notify the bank if he discovers an unauthorized signature or alteration. This duty becomes operative when the bank does any one of three things with respect to the statement of account and supporting items paid in good faith. The first action is the sending of the statement and items to the customer. The sending may be either by mailing or any other action within the definition of "send" (Section 1-201). The second action is the holding of such statement and items available for the customer pursuant to a request for instructions of the customer. The third action is stated as "or otherwise in a reasonable manner makes the statement and items available to the customer." Such wider residual language is desirable to cover unusual situations. An example might be where the bank knows a customer has left a former address but does not know any new address to which to send the statement or item or to obtain instructions form the customer. The third residual type of action, however, must be "reasonable" and any court has the power to determine that a particular action or practice of a bank, other than sending statements and items or holding them pursuant to instructions, is not reasonable.

3. Subsection (2) states the effect of a failure of a customer to comply with subsection (1). The first effect stated in subparagraph (a) is that he is precluded from asserting against the bank his unauthorized signature and alteration if the bank establishes that it suffered a loss by reason of the customer's failure. The bank has the burden of establishing that it suffered some loss.

Under subparagraph (b) if, after the first item and statement becomes available plus a reasonable period not exceeding fourteen calendar days, the bank pays in good faith any other item on which there is an unauthorized signature or alteration by the same wrongdoer, which payment is prior to receipt by the bank of notification of such unauthorized signature or alteration on the first item, the customer is precluded from asserting the additional unauthorized signature or alteration. This rule follows substantial case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank traceable to the customer's failure to exercise reasonable care in examining his statement and notify the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the requirements of subsection (1) is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items. Hence, the rule of subparagraph (b) is prescribed and to avoid dispute a specific time limit for action by the customer is designated, namely fourteen calendar days.

4. The two effects on the customer of his failure to comply with subsection (1) (subparagraphs (a) and (b) of subsection (2)) are stated in terms of preclusion from asserting a claim against the bank. However, these two effects occur only if the customer has failed to exercise reasonable care and promptness in examining his statement and items and notifying the bank and as to this question of fact the burden is upon the bank to establish such failure. Further, even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing that the bank failed to exercise ordinary care in paying the item(s) the preclusion rule does not apply. This distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

5. Whether the preclusion rule of subsection (2) operates or does not operate depends upon determinations as to ordinary care of the customer and possibly of

the bank. However, subsection (4) places an absolute time limit on the right of a customer to make claim for payment of altered or forged paper without regard to care or lack of care of either the customer or the bank. In the case of alteration or the unauthorized signature of the customer himself the absolute time limit is one year. In the case of unauthorized indorsements it is three years. This recognizes that there is little excuse for a customer not detecting an alteration of his own check or a forgery of his own signature. However, he does not know the signatures of indorsers and may be delayed in learning that indorsements are forged. The three year absolute time limit on the discovery of forged indorsements should be ample, because in the great preponderance of cases the customer will learn of the forged indorsements within this time and if in any exceptional case he does not, the balance in favor of a mechanical termination of the liability of the bank outweighs what few residuary risks the customer may still have. In thirteen of the existing statutes there are limitations on the liability of a bank for payment of items bearing forged indorsements which limitation periods range from thirty days to two years. In the remaining twenty-seven no provision is made for forged indorsements.

6. Nothing in this section is intended to affect any decision holding that a customer who has notice of something wrong with an indorsement must exercise reasonable care to investigate and to notify the bank. It should be noted that under the rules relating to impostors and signatures in the name of the payee (Section 3-405) certain forged indorsements on which the bank has paid the items in good faith may be treated as effective notwithstanding such discovery and notice. If the alteration or forgery results from the drawer's negligence the drawee who pays in good faith is also protected. Section 3-406.

7. The forty existing statutes on the subject as well as Section 4-406 evidence a public policy in favor of imposing on customers the duty of prompt examination of their bank statements and the notification of banks of forgeries and alterations and in favor of reasonable time limitations on the responsibility of banks for payment of forged or altered items. In two New York cases, however, it has been held that a payor bank may waive defenses of the kind prescribed by the section and ignore the public policy indicated by these defenses and recover the full amount of a forged or altered item from a collecting bank. Fallick v Amalgamated Bank of New York, 232 App Div 127, 249 NYS 238 (1st Dep't 1931); National Surety Corp. v Federal Reserve Bank of New York, 188 Misc 207, 70 NYS2d 636 (1946), affirmed without opinion 188 Misc 213, 70 NYS2d 642 (1946). Subsection (5) is intended to reject the holding of these and like cases. Although the principle of subsection (5) might well be applied to other types of claims of customers against banks and defenses to theses claims, the rule of the subsection is limited to defenses of a payor bank under this section. No present need is known to give the rule wider effect.

Cross references:

Sections 3-404, 3-405, 3-406, 3-407, 3-417 and 4-207.

Definitional cross references:

"Alteration". Section 3-407.

"Bank". Section 1-201.

"Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Good faith". Section 1-201.

"Indorsement". Section 3-204.

"Item". Section 4-104.

"Payor bank". Section 4-105.

"Send". Section 1-201.

"Unauthorized signature". Section 1-201.

SOUTH CAROLINA REPORTER'S COMMENTS

Under present South Carolina law, a payor bank is not liable to a depositor for paying a forged item if the depositor was "guilty of negligence either in discovering the forgery or in failing within a reasonable time after he discovered it to notify the bank." Hair v Winnsboro Bank, 103 SC 343, 88 SE 26 (1915).

Section 4-406 clarifies the application of this principle. Subsection (1) states the general duty of a customer to exercise reasonable care and promptness in examining his bank statements and paid checks to discover his unauthorized signature or any alteration and to notify the bank promptly if he discovers such a thing. This duty is imposed upon the depositor when the bank sends a statement with supporting items to the customer, or reasonably makes them available to him. If a customer fails to comply with the duty imposed by subsection (1), subsection (2) states that he is precluded from asserting irregularities which he should have discovered, if the bank establishes that it suffered a loss by his failure to do so. Furthermore, subsection (2)(b) extends the preclusive effect of the customer's failure to report a forgery of an item to other items subsequently forged by the same wrongdoer if the customer has had an opportunity to examine the first forged item and has not reported it to the bank within fourteen days. This is, of course, upon the sound theory that the customer's failure to report the first forgery makes subsequent forgeries easier.

Subsection (3) makes the preceding rules inoperative if the bank itself was negligent in paying the item. Thus, a negligent bank cannot put the loss resulting from a forgery or the like upon the customer on the ground that the customer also has been negligent.

Subsection (4) places an absolute time limit on the right of a customer to make claim against a bank for its payment of altered or forged paper without regard to the care or lack of care of either the customer or the bank. In the case of alteration or a forgery of the customer's own name, the absolute time limit is one year. In the case of unauthorized indorsements, it is three years.

Subsection (5) removes any temptation which a bank might have to waive its defenses under subsection (4) in favor of a good customer and to seek to recoup its loss from a forwarding bank. If a payor chooses to recredit a customer's account for an irregular item reported to it by the customer after the time limitations of subsection (4), it must absorb the loss and not pass it on to prior parties.

Cross references—

As to negligence contributing to alteration or to unauthorized signature, see § 36-3-406.

As to indorsement in name of named payee, when effective, see § 36-3-405.

As to warranties of customer or collecting bank, see § 36-4-207.

As to warranties on presentment or transfer, see § 36-3-417.

As to unauthorized signatures generally, see § 36-3-404.

Research and Practice References—

10 Am Jur 2d, Banks §§ 511 et seq., 622 et seq.

9 CJS, Banks and Banking §§ 332, 335-358.

6 Am Jur Pl & Pr Forms (Rev ed), Bank Deposits and Collections, Forms 4:281-4:293 (relationship between payor bank and customer; unauthorized signature or alteration; customer's duty).

18 Am Jur Legal Forms 2d, Uniform Commercial Code: Article 4—Bank Deposits and Collections, §§ 253:2351 et seq. (duty of customer to discover and report unauthorized signature or alteration).

ALR and L Ed Annotations—

Examination of account, passbook, or cancelled checks by bank depositor. 15 ALR 159, 67 ALR 1121, 103 ALR 1147.

Right of previous holder of check paid by bank to take advantage of depositor's failure to examine vouchers in order to discover forgeries. 17 ALR 956.

Duty of depositor to turn over to bank forged checks, or checks with forged indorsements which have been paid by bank. 60 ALR 527.

Negligence in drawing check which facilitates alteration as to payee as affecting bank's liability in cashing check. 64 ALR 1108.

Duty and liability of bank in respect of depositor's check drawn upon and payable to bank. 138 ALR 853.

Construction and effect of statutes relieving bank from liability to depositor for payment of forged or raised check unless within specified time after the return of voucher representing payment he notifies bank as to forgery or raising. 50 ALR2d 1115.

Effect on bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted. 60 ALR2d 708.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified paid check which was altered. 75 ALR2d 611.

§ 36-4-407. Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

HISTORY: 1962 Code § 10.4-407; 1966 (54) 2716.

OFFICIAL COMMENT

Prior uniform statutory provision: None.

Purposes:

1. Section 4-403 states that a stop payment order is binding on a bank. If a bank pays an item over such a stop order it is prima facie liable, but under subsection (3) of 4-403 the burden of establishing the fact and amount of loss from such payment is on the customer. A defense frequently interposed by a bank in an action against it for wrongful payment over a stop-order is that the drawer or maker suffered no loss because he would have been liable to a holder in due course in any event. On this argument some cases have held that payment cannot be stopped against a holder in due course. Payment can be stopped, but if it is, the drawer or maker is liable and the sound rule is that the bank is subrogated to the rights of the holder in due course. The preamble and subsection (a) of this section state this rule.

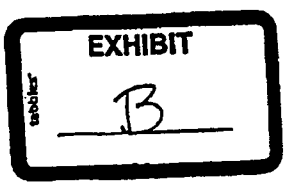
2. Subsection (b) also subrogates the bank to the rights of the payee or other holder against the drawer or maker either on the item or under the transaction

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO. 2007-CP-40-5252

MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	
Plaintiffs,	)	
-vs-	)	NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	
Defendants.	)	

TO: L. HENRY MCKELLAR, ESQUIRE, AND LISA A. DELZOTTI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE that the Defendant, First Citizens Bank and Trust Company, Inc. ("First Citizens"), through its undersigned counsel on the tenth (10th) day after service hereof, at 10:00 a.m., or as soon thereafter as may be convenient to Court and counsel, at the Richland County Courthouse, Columbia, South Carolina, will move before the presiding judge of the Court of Common Pleas for an Order pursuant to Rule 56, SCRCP granting First Citizens summary judgment on the Plaintiffs' claims on the grounds that the undisputed deposition testimony and discovery show that there is no genuine issue as to any material fact in this case because Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406, because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens,



precludes them from asserting any claims against First Citizens under South Carolina law, and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code § 36-4-406(d)(2).

This Defendant specifically reserves the right to add additional grounds, as necessary, and to respond to any relevant issues raised by Plaintiffs. This Motion may also be supported by a memorandum to be filed in the future and any such matters as the court may deem just and proper. This Defendant specifically reserves the right to supplement this summary judgment in the future with affidavits, deposition excerpts, or other information.

This Defendant's Motion is based on the pleadings filed herein, applicable case and statutory law and the South Carolina Rules of Civil Procedure.

Respectfully submitted,

Wesley D. Few
Jake S. Barker
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Attorneys for Defendant First Citizens Bank and Trust Company, Inc.

May 27, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO. 2007-CP-40-5252

MCDONNEL AND ASSOCIATES, PA, F/K/A MCDONNELL LAW FIRM, PA, F/K/A EDWARD G. MCDONNELL, PC, AND BOOMERANG TITLE, INC.	)	CERTIFICATE OF SERVICE
Plaintiffs,	)	
-vs-	)	
FIRST CITIZENS BANK AND TRUST COMPANY, INC.,	)	
Defendant.	)	

The undersigned does certify that on May 27, 2009, that she did cause to have served by hand delivery, a copy of Defendant's Notice of Motion and Motion for Summary Judgment, to the following:

Henry McKellar
Collins & Lacy
1330 Lady Street, 6th Floor
Columbia, South Carolina 29202

Monica Mulvey Mcgee
Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
McDonnell and Associates, PA, f/k/a McDonnell Law Firm, PA, f/k/a Edward G. McDonnell, PC, and Boomerang Title, Inc.,	)	CIVIL ACTION NUMBER: 07-CP-40-5252
	)	
Plaintiffs,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
First Citizens Bank and Trust Company, Inc.,	)	
	)	
Defendant.	)	

FILED
2010 JUL 23 PM 3:51
JEANNIE W. ANDERSON
C.C.P. & G.S.

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Sixth Floor, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below by hand delivery:

COUNSEL SERVED:
The Honorable J. Michelle Childs
P.O. Box 192
1701 Main Street, Rm 215
Columbia, SC 29202

Wesley D. Few, Esquire
John T. Lay, Esquire
Ellis Lawhorne & Sims, P.A.
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Columbia, SC 29201
Attorneys for Defendant

PLEADINGS:

- **RULE 59(e) MOTION TO ALTER OR AMEND**

Leslie C Clamp
Columbia, South Carolina

July 23, 2010

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS NONJURY
COUNTY OF RICHLAND)

McDONNELL AND ASSOCIATES, ET AL	TRANSCRIPT
PLAINTIFF,	OF
VS.	RECORD
FIRST CITIZENS BANK AND TRUST,	09-CP-40-8786R
DEFENDANT.	

March 10th, 2010
Columbia, South Carolina

B E F O R E:

THE HONORABLE J. MICHELLE CHILDS, Judge.

A P P E A R A N C E S:

HENRY McKELLAR and AMY NEUSCHAFER
ESQ.
Attorneys for the Plaintiff

WESLEY D. FEW
ESQ.
Attorney for the Defendant

PRISCILLA NAY
Circuit Court Reporter

Transcribed by Pamela E. Green, Circuit Court Reporter

INDEX OF WITNESSES

(There were no exhibits marked or testimony taken during this hearing.)

PROCEEDINGS

THE COURT: The Court is ready to proceed with the matter of McDonnell and Associates versus First Citizens Bank and Trust Company.

The Court did get the memorandum in opposition that was filed and I understand the defense may also have a memorandum?

MR. FEW: Yes, Your Honor. If I may approach, I'll hand up the final copy and I have an extra if you need one.

THE COURT: That's okay. For purposes of the proceeding, just indicate on the record who is representing the plaintiff.

MR. MCKELLAR: Your Honor, my name is Henry McKellar and I, along with Amy Neuschafer, represent the Plaintiff.

THE COURT: Spell that last name.

MS. NEUSCHAFER: N-E-U-S-C-H-A-F-E-R.

MR. FEW: Your Honor, Wes Few on behalf of Defendant First Citizens Bank and Trust Company, and I also have with me Jake Barker, B-A-R-K-E-R.

According to the schedule, I believe we're up first on our motion for summary judgment, and we've handed up a copy of our memorandum that we just filed today. If I may, Your Honor, I'll sort of lay out the background and

procedural history of this case so the Court can know sort of how we got where we are.

On June 8 of last year this case was first up for trial with two judges set to hear the cases, and the week before that the plaintiff asked for a status conference with Judge Barber, which we had a status conference, and as you may have noticed from the file of these motions, our motion for summary judgment, which I have a copy of that too if you need a copy---

THE COURT: Let me check the file. Yes, it is a very thin file because I guess it has been restored.

MR. FEW: That's right, and that was part of what -- so, you will see the motion we filed, Your Honor, in June of 2009 is under the old case number of 07-CP-40-5252, and the restored docket number is 09-CP-40-8766R.

THE COURT: Okay.

MR. FEW: What happened, Your Honor, the week before trial, plaintiff's named an expert witness, a gentleman named Karl Manheim, and before the Court today, which I believe is moot, but it is relevant to this discussion, Your Honor, defendants filed a motion to exclude the testimony of Karl Manheim the week before trial in 2009. We did that on grounds of prejudice by him being named late and also, from what we could tell from his qualifications, he hadn't even been in the banking

business during the relevant 2004/2005 time period when the 94 checks that have been put at issue as forgeries by the plaintiff's employee were written between October 1, 2004, and on the, the day of December 23, 2005, is when my client, First Citizens Bank, notified Mr. McDonnell, who is a fellow lawyer, that he had an N.S.F. charge on his IOLTA account.

So, it is important to remember that too, for the Court, that this case, that all of this came about because the bank notified the plaintiff that their employee -- notified the plaintiff that they had N.S.F. charges on their IOLTA account and the subsequent investigation that followed with the bank's assistants discovered that this employee, Anna Horman, had been writing checks to herself for approximately a 15-month time period, Your Honor. So, what happened -- and I'll also represent that in the status conference, Your Honor, it was discussed and agreed upon amongst counsel that the plaintiffs, in order to prevail on this matter, had to prove that my client, First Citizens Bank, agented -- they did not exercise what's called ordinary care under the code, Your Honor.

I don't know how many of these U.C.C. cases you've had recently, Your Honor. We've tried to lay everything out in our brief, in our memorandum, but the, the preclusions that -- there's two ways that plaintiff can

prevail basically under the U.C.C., and it is also important both to the later motions that the U.C.C. governs all aspects of these negotiable instruments or checks, and one way that they can recover is under 36-3-419, which is conversion, which, as we've set forth in our memorandum, they cannot do, do here because they were the issuer of the checks.

Your Honor, secondly, under 36-4-406, their provisions -- and it always helps me to look at the statute that, that specifies what is required for recovery against the depository institution, and there -- so, when we had the status conference, there was no dispute that all of these checks were written by the same person, and that they were not reported to the bank within the one year period provided for under the code, and, additionally, Your Honor, as we have set forth in our memorandum, First Citizens Bank has a deposit agreement that everyone that signs a signature card, which is attached to our memorandum, the signature cards, when these three accounts were first opened, acknowledges that they will abide by the rules and regulations of the accounts. That is sometimes, Your Honor, referred to as a deposit agreement.

So, the First Citizens deposit agreement are rules and regulations, which is Exhibit 5 to our memorandum,

additionally sets forth a 14 day time period. In fact, it says the customer agrees that 14 days from the receipt or availability of the statements is a reasonable time to report unauthorized signatures or forged endorsements.

It is also important, Your Honor, in this case, that this case involves forged signatures. It does not involve forged endorsements. Under the code, a forged endorsement has approximately a three year time period for reporting, but because forged signatures on checks should be easier to detect, if the account holders are reviewing statements, there's only a one year period under the code, and, of course, there is cases that we've sited that also provide application for the 14 day time period.

So, we were faced with a situation, in June of 2009, of do we take Mr. Manheim's deposition on the Thursday or Friday before we were going to go to trial the following Monday. It was represented he was going to be at the beach and logistical problems. So, the parties decided to dismiss the case under Rule 40(j), and then the plaintiffs restored the case to the docket in December of 2009, and this chronology is set forth in our memorandum, Your Honor.

And, so, we then corresponded again, and we asked for copies of the documents, if any, that have been provided to Mr. Manheim as well as a copy of his expert report so

we could prepare to take his deposition and go on about addressing any ordinary care issues that were going to be a part of this lawsuit. We didn't get any response in the way of documents, any additional response.

So, we noticed the deposition of Mr. Manheim for February the 25th of this year. And as we were preparing to do that and corresponding some back and forth with plaintiff's counsel, sometime within a week or ten days or two weeks before that deposition was to occur, Your Honor, we received a letter from Mr. McKellar advising that they had withdrawn the designation of Mr. Manheim as their expert in this case. And as far as defense counsel is aware, as of this hearing, Your Honor, plaintiffs do not have an expert to provide any testimony regarding whether or not First Citizens Bank acted with ordinary care in regards to these items.

So, then, Your Honor, the -- if the code -- I'll just get straight into the arguments in our memorandum, Your Honor. The code at -- and it's also important because this is always confusing to us when we're handling these cases. The code changed July 1 of 2008. So, if you go to do any research, some of these statutory provisions have changed. But it is our belief that 36-4-406, as it existed during the 2004/2005 time period when these checks were written, is what applies to this case, and also, Your

Honor, we're not aware of any substantial revisions to the code that, even if the new code were to apply, that would affect the issues in this case, and that's largely because, as I said before, this is a case of 94 checks and we have a spread sheet, Your Honor, that we can offer up to the Court that was added to the plaintiff's deposition, and, unfortunately, I don't think I had it in my memorandum.

But if you look at these checks, Your Honor -- and let me go into what I also think are obviously undisputed facts. Anna Horman, who wrote all these checks, and that's undisputed by plaintiff's own allegations, is in jail. We took her deposition in Greenwood.

THE COURT: And I actually sentenced her I believe?

MR. FEW: Oh, you did?

THE COURT: Okay.

MR. FEW: She is in jail in my hometown in Greenwood and Mr. McKellar and I went and took her deposition by video there, and she's up for parole coming up some time soon. But there's no dispute she wrote all these checks. It's in the plaintiff's interrogatory responses, their complaint, and they brought a separate action against the Carolina Legal Associates, which is referenced in our memorandum, which is the employment placement agency that provided Ms. Horman to the McDonnell Law Firm or Heiser,

whichever firm it was at the time she came from. She became a temporary employee some time I believe, Your Honor, around June of '04. And, so, she was placed as a temp.

Well, some time in September of '04 Mr. McDonnell decided he was going to, as I think the word is, buy out her contract, and, so, he would no longer be paying her through the temporary agency, and she would become an employee of his firm, and that occurred right around September 28th of 2004. Well, if that was the -- it was some time around that time period, on October 1 of 2004, and you'll see that, Your Honor, as our Exhibit No. 4. We have included just a single copy of the check, which is the first check which is undisputed, according to the deposition testimony, to be the first forged endorsement in this, first forged signature in the, this lawsuit by Anna Horman.

So, Your Honor, under 36-4-406 there is a duty of the customer to review their statements and it is undisputed in this case, and we provided full copies of the depositions of Ed McDonnell in this case as Exhibit 1 and also his deposition in the Carolina Legal Associates case, which was attached as Exhibit 17 to his deposition in this case, which is Exhibit A to our memorandum, and we have also included, Your Honor, as Exhibit 9, a letter, an

email from a lady named Sally Delvekeo who, at the time, worked for Land America or, which I believe is the company that's, now owns the title company, Lawyer's Title, and the reason that is important I believe, Your Honor, is because Mr. McDonnell's law firm bounced a premium check off his IOLTA account to Lawyer's Title in 2004, and that's all set forth in Exhibit 9.

So, Lawyer's Title came in to perform an audit, which she describes in the email as that, this is a premium for follow-up and it states -- and we've provided highlighting on all these exhibits, Your Honor, on the relevant portions. The first page of Exhibit 9 says she was hired as a bookkeeper to reconcile the trust account, and will provide those documents to me, and then she says, in paren, the trust account was not being reconciled prior to this.

So, that's in January of 2004 before Anna Horman has become an employee of the Plaintiff. He has already been put on notice by his title company that he's not reconciling his trust account, and this is the IOLTA account, Your Honor. Pages 2 and 3 of Exhibit 9 are a letter to Mr. McDonnell from Sally Delvekeo, and in that she sets forth the, all that standard for how to reconcile a trust account.

The undisputed testimony in this case from Ed

McDonnell and from Anna Horman is that Ed McDonnell did not reconcile the trust accounts nor did he review the bank statements. In, in fact, as you'll see in our references to the deposition transcripts which we have provided by page and line number, it was just simply delegated to Anna Horman. She was the one that was supposed to be reviewing and reconciling, and instead, she was writing checks and transferring money from the different accounts, and, Your Honor, the amount of the checks, just to give the Court an idea, the total amount of checks, according to our spread sheet that we asked about and there was no dispute in the depositions, was 767,880.53. Then, however, two of those checks were from one account into the other, and if I recall correctly, one was for $75,000 and I think another one was for $28,000.

So, even though the total amount is $767,000, there's $103,000 that was just transferred from one account to the other. I believe from the Boomerang Title account, which was the title company account -- right, Your Honor, and those are, those are laid out in the spread sheet. Seventy-five went to the law firm back from the Boomerang Title account. So, $664,888.53 is what's at issue.

We allege, and although it's not an issue before the Court today, plaintiffs have obtained a pretty substantial recovery in their separate lawsuit against Carolina Legal

Associates, which we say is -- we're entitled to a setoff because, according to Mr. McDonnell's testimony in the lawsuit, the only difference, according to his deposition testimony which is attached as an exhibit, is that Anna Horman was also stealing money from Capital One using his Capital One credit card, which he did not discover. So, according to his deposition testimony, the only difference in the damage he was claiming between that lawsuit and this lawsuit was that they were claiming approximately $200 in Capital One damages from charges that Anna Horman put on the Capital One account, which apparently also went undiscovered.

So, what's very important, Your Honor, is none of this was reported within one year, which makes it is a bar, and an, additionally, it was the same wrongdoer and this is all part of 36-4-406. So, Subsection 3 of 36-4-406 states the preclusion under Subsection 2 does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the items.

Your Honor, the only way, again, for the plaintiffs to establish that is to have an expert and they don't have one. They named one right before trial back in June of '09. The case ended up being dismissed. We had a pending motion to exclude that witness. Now the case has been restored, and they still don't have it. In fact, to, to

simplify matters, I, I mean plaintiff's counsel can even state whether or not it was their statement to the Court in a status conference, not on the record, but in a status conference that they had to have an expert in order to move forward with this case.

So, Your Honor, the rest of -- I mean there's -- we have gone way beyond I believe what is necessary for a defendant under the burden of proof for a motion for summary judgment to point out undisputed facts. We have, in fact, proven the undisputed facts by reference to Mr. McDonnell's testimony as well as the former employee, Anna Horman's testimony. So, plaintiff has acknowledged there's no dispute, that they didn't report within one year, didn't report within 14 days, and all of these checks were forgeries by the same wrongdoer, and they have no expert, and then, finally, Your Honor, to circle around -- and I apologize for being so all over the board on this, but our memo lays it out in three distinct sections, and the third section is being that, to the extent that they have a conversion claim, the code does not allow a conversion claim by the issuer of the maker of the instrument, which is what they would be in this case because all these checks were written by the plaintiffs very own accounts.

So, Your Honor, that's the plaintiff's position. We

believe -- and I won't -- I guess we'll deal with the motion to amend later, but this has been a very serious matter involving a lawyer, involving eye IOLTA account, involving failure to reconcile the owe IOLTA account after having been given notice by the title company that it needed to do so, still didn't do it. There is plenty of evidence that we have pointed to by reference to the deposition testimony, and we have even highlighted it for the Court's convenience in reviewing the, our memorandum.

Your Honor, we do not believe that the plaintiff should be entitled to name an expert the week before trial. We then entered into a 40(j) arrangement, which was our own willing agreement, and then when the case was restored to the docket, the plaintiff has already represented to the Court they know they have to have an expert in order to prevail in this case, and then we go to take the deposition of that expert, Your Honor, that expert designation is withdrawn, and we're here today, over four years after the events in question took place and well over two years after this case was filed in the latter part of 2007, and plaintiffs don't have an expert to prove their case.

It is very much similar to somebody bringing a med mal or some other case where they know they have to have an expert, and, in fact, the code actually requires that

now, as you well know, and, so, we're prejudiced if we have to continue to defend the case and handle the discovery and prepare for trial and prepare to, to take an expert's deposition, try to take an expert's deposition, have the expert withdrawn.

We don't even know what the plans are, Your Honor, but so -- but as it stands today, there is no dispute one person wrote all these checks. They weren't reported one, in the one year time period. They can't prevail on conversion because they're the makers of the check and they have nobody as designated despite our discovery request to provide expert testimony on the issue of ordinary care. And for those reasons, Your Honor, First Citizens Bank is entitled to summary judgment on all the claims that are pending in the case.

Thank you, Your Honor.

THE COURT: All right. You may proceed.

MR. MCKELLAR: May it please the Court, Your Honor.

Let me start off by saying the fact that Ed McDonnell didn't properly reconcile his IOLTA account has absolutely nothing to do with this case, and the fact that he brought a lawsuit against somebody else who recovered for another theory has nothing to do with this case. This whole case is governed by 36-4-406, which is with the 72 amendments, and I have set forth -- I have put a copy of the, that

section of the code at Tab B. The thing I handed up -- and I will explain to the Court in very simple terms how this action works.

Section 1 says when a bank sends a customer bank statements and checks, the bank has a duty to look over those statements and checks and discover any authorized signature or alteration. Subsection 2 says and, and notify the bank properly of any -- promptly.

Okay. That puts a duty on the customer to examine and catch forgeries and notify the bank of those forgeries. Subsection 2 says if the bank establishes that the customer failed with respect to comply with number one, which is examine, discover, and report, then the customer is precluded from asserting against the bank his signature, his unauthorized signature by the same -- Subsection A of 2 really has no significance to anything. I never found a case in my 14 years that, that made a difference, but 2(b) says if you don't report them, then if the same wrongdoer is the one who forges the checks, then you would be precluded from asserting those subsequent forgeries against the bank.

So, if a customer has a duty to examine, discover, and report, and they don't, then the same person keeps doing it, you can't recover against the bank. The important statute is Subsection 3, which says the

preclusion under Subsection 2 that is you can't recover if you didn't report, and the same wrongdoer kept doing it, the preclusion is Subsection 2 does not apply if the customer establishes a lack of ordinary care on the part of the bank in paying the items. What that means, in all reality, is you, you would never have a case of any significance where they caught the forgery in the first month because if they did it wouldn't be a case.

Anyway, obviously my client did not examine the statements, and he did not discover the forgeries, but about a year, but the code says that doesn't matter if you could show that the bank failed to exercise ordinary care in paying the items. That is also discussed in the comments to the code, both the official comments and the South Carolina Reporter's Comments.

What that does is that shifts the burden of proof, the burden of proof to the customer that the bank failed to exercise ordinary care in paying the items. What that means is originally, in the banking system, you're required to verify signatures. As times go on, more checks are written, things become more complicated, Uniform Commercial Code has passed, and you no longer have an absolute duty to check the signatures, but you have to have some system in place to catch these unauthorized signatures or there's going to be a lot of transactions.

And, so, that is my burden of proof to prove, I mean an expert and I'm getting an expert, that their system is not sufficient to meet the standard of this, of this requirement under Subsection 3. The reason I didn't present anything today by way of proving my burden under Subsection 3 is he didn't raise that as an issue in his summary judgment motion.

In his summary judgment motion he said you can't collect because you didn't discover, report, and it's all about, barred by the one-year statute. That's what he said. That's, that's at Tab A in my book that I gave you. That's his ground. So, he is not entitled to care, care in paying the items, and I think he has raised 440-64, which says, 4404, which says---

THE COURT: Sixty-four---

MR. MCKELLAR: 440-64 Subsection 4.

THE COURT: Okay.

MR. MCKELLAR: It says without regard to care or lack of care either on the customer or the bank, a customer who does not, within one year from the time the statement and items were made available to the customer, discover and report, you are precluded from filing a claim. Now, the significance of that section is this. It says without regard to Subsection 1, 2, and 3. Without regard to the negligence or lack of care of anybody. You've got one

year from the time you should have discovered to report to the bank. So, the time runs from the time you should have discovered, and then you've got one year to report, and there may be some checks written back -- not to be able to recover, but that's how you interpret that section because it says forget about one, two, and three, and you've got one year from the time you got the statements so that we've got to prove which one is reported, and then start there and run backwards on the year and see where we are.

We discovered this thing in December of '05, and the bank was helping us investigate and telling us as far as -- Ed Holland had this case before me and wrote a letter and sent out a bunch of checks that were forged, and it went on from there, and we are still in discovery to find out when all these checks were reported because we still have some discovery to do, and I don't know how this motion's popped up on this roster in December with a brand new number at Mr. Few's insistence it be put on the bottom of the docket. But I thought we'd go ahead and hear this thing because I don't think anybody is entitled to summary judgment on -- but I know I have my burden of proof and I will meet that.

THE COURT: That would be -- you certainly want to respond to, to -- I know your earlier comments were indicating how old the case was, no expert named, and they

restored it, but if you take it from the date when it is actually on the docket and start fresh, so to speak, then how do we get past some of these issues now?

MR. FEW: If I may, while it is always interesting to hear opposing counsel's viewpoint on their interpretation of the code, the memorandum they've submitted cites no cases in favor of the interpretation that's just been put before the Court. In contrast, our memorandum lays out all the cases that have applied this body of law, Your Honor.

And, so, with regard to the statement that our motion for summary judgment does not specifically point out all burdens, including motion for summary judgment, in care -- our motion clearly points out -- it seeks a dismissal of all claims, Your Honor. So, plaintiff knew and has, as he has said today, they have known all along this was an, an ordinary care case. They have had this expert designated while the case was active for about four or five days in June of '09, and then when we went to take that expert's deposition he was withdrawn.

So, our position, again, is simply the plaintiffs do not have an expert today and they shouldn't be entitled to hold the Court and the parties hostage until the last minute when they, if and when the Plaintiffs may choose to designate an expert.

THE COURT: You mentioned a status conference with Judge Barber.

Was -- that was prior to the dismissal?

MR. FEW: The first week in January of 2009.

THE COURT: Given the nature of the case, have you considered a scheduling order so that would be a deadline by which these things occurred?

MR. FEW: I have raised that with opposing counsel. In fact, I believe my correspondents to that was very recent, and it was before we were told -- maybe it was after we were told they withdrew their expert.

So, first off, Your Honor, I want to be clear, our position is we are entitled to summary judgment today.

Okay. If, for whatever reason, we don't get that---

THE COURT: You're saying you're entitled to summary judgment on the basis of -- some other reasons too about the year reporting and---

MR. FEW: Your Honor, I probably didn't do as good a job as I should have or could have about explaining 36-4-406.

THE COURT: You said these items were not reported within a year, and also did it on the basis of a conversion claim suggesting there is not one and---

MR. FEW: The conversion claims, Your Honor, are 334, which is now I think changed to 36-3-420.

THE COURT: Okay.

MR. MCKELLAR: I didn't bring conversion claims, but simply brought breach of contract claims. That's all I brought.

THE COURT: Okay.

MR. FEW: It is unclear from the complaint what -- in fact, I don't believe any code sections are listed in the complaint, Your Honor.

THE COURT: Okay. The other issue with the---

MR. FEW: The other issue is the expert, and as opposing counsel has even represented to the Court again today consistent with what we discussed in the status conference back in June of 2009, because it is the same wrongdoer and because it was not reported within one year, the only way they can prevail is to prove First Citizens Bank did not exercise ordinary care and not withstanding whether we prove that, Your Honor, we didn't have a scheduling order before because we sent in discovery wanting to know if they were going to name an expert and this case has been already discovered.

I think four, five, or six depositions have been taken and at least one by video because we didn't know if Ms. Horman would be available for trial if she wasn't released, and, and we have already, at one point in time, Your Honor, were seeking a transport order for her when we

thought we were going to trial.

So, the prejudice to First Citizens Bank is not imagined. It is very, very real. We have defended this case and the claims are -- the plaintiff simply can not prove their case without an expert, and they don't have one. So, our position is that the plaintiff is entitled to summary judgment on all the claims in the case, claims of the plaintiff.

We actually have an indemnity claim of our own, Your Honor, under the deposit agreement as a counterclaim, but, you know, if we do not get that relief, we absolutely said we would have to get a status conference with Judge Barber, and not sure -- I even sent Judge McKellar a scheduling order and he said he would have to look at that for the trial in April. So, we have tried every effort to make this case work within the Court's parameters.

No duty from today's hearing. They include an expert and they had one at one point in time and couldn't do it. So, I believe the Court is more than informed on the status of everything in this motion, Your Honor, and, again, I think it is very important, the plaintiff's memorandum does not set out any cases interpreting 46-4-064.

MR. MCKELLAR: I would represent to the Court, doing this kind of work or cases for all these years, I could

cite all the cases, but the comment says the same thing. So, I don't need to hand the Court up some brief with 50 cases. You asked about a -- I'm not required to get an expert when the case is a couple of months old. I'm going to have -- I'm going to have an expert witness. I can promise you that.

THE COURT: That is an admission that you need one?

MR. MCKELLAR: No, it is not an admission.

THE COURT: Okay.

MR. MCKELLAR: I'm going to have one. Mr. Few sent me a proposed scheduling order and called for everything to be done by like March 15 or April 1 or whatever. I have a legal malpractice case going to trial now May 3 in Federal Court that has 35 thousand documents in it, and, to me, this case is two months old and this thing is getting ready to go to trial, and I can't get -- that thing is staring me down in the face. Judge Kinard keeps your feet to the fire, and there's always something you have to file.

I don't like scheduling orders and didn't like them when, you know, I was on the bench, but I told Mr. Few we'll consider one and talk about it, but I can't do it now because of the deadlines in this federal case. So, we could probably agree to one after that.

MR. FEW: Your Honor, I point out, for the Court's

edification, Exhibit 3, we have included the plaintiff's discovery responses. Their initial responses to our discovery were provided in March of 2008. So, it's been two years from today at least because we served this in I believe December of 2007 shortly after the case was filed. We have been trying to get to the, get to the heart of the case.

I am dumbfounded. Plaintiff's counsel has told this Court on the record they are going to get an expert because they have to get an expert, but will not admit they have to have an expert to prevail in this case.

THE COURT: So, we talked about that issue and I have ruled and anything else before the Court?

MR. FEW: We have a motion to exclude, which I believe is moot because Mr. Manheim, the plaintiff's counsel will confirm, has been withdrawn and not been redesignated as an expert. We will certainly withdraw that motion the---

MR. MCKELLAR: I sent him an email and said I'm not going to use him. He used to work with me. He's a executive vice-president, but he has been out of banking a number of years, and in the end he doesn't really want to do this, and it is not time for his deposition to be taken, and that's why we agreed. So, I'm not calling him.

THE COURT: So, that motion is moot?

MR. FEW: Would be mooted.

THE COURT: I'll do a form order on that.

MR. FEW: Then the plaintiffs had a motion for summary judgment, which they've withdrawn, and now they have a motion to amend their complaint, which was filed in June of '09, the week before trial.

THE COURT: Is this even relevant since you state it was restored in December?

I'm just asking because, when it got restored, what was filed?

Was it the original complaint that was filed?

This date provides the restoring.

MR. FEW: There is discussion when, you know, we went to restore the case, how we would do it.

THE COURT: Okay.

MR. FEW: We simply said restore according to the rule, which says you go to the bottom of the docket. Judge Barber had offered to allow us to 40(j) it and come back and try it and put it back in order in a different manner and we didn't go with that option. So, so, the plaintiffs have filed their motion and I will let them argue it on adding a negligence claim.

MR. MCKELLAR: We filed a motion to amend the complaint back June 1 of '09 and the motion, of course, was never heard and the case was 40(j)'d and we filed this

motion to add a negligence claim dealing with online banking, and based this on documents we received very recently back then in discovery, and didn't know this until right before we filed this motion. So, it is simply a motion to amend the complaint, add an additional cause of action alleging negligence in regard to the opening of an online banking account, and I don't see, under Rule 15, where he would be prejudiced at all because we got a year before this thing gets to trial.

MR. FEW: May it please the Court, Your Honor.

With respect to this issue, and I would like to offer up a copy of the business online banking form to the, to the Court. This was included in part of Mr. McDonnell's deposition in early February of 2009. So, this was not any sort of surprise to anybody regarding any type of documents, and the reason -- and, Your Honor, I have also included with this full page printouts including Page 185 of Mr. McDonnell's deposition where we went through and discussed this form. And as I understand, the plaintiff's contention, they want to add a negligence claim to this lawsuit and attempted to do so the week before trial of 2009.

As I will go through in a minute, Your Honor, I will go ahead and discover the displacement aspect, and, again, we have case law to support she has positions, and this is

why we are opposed to, to the motion to amend because we are prejudiced by the fact the plaintiff is attempting to amend to add a claim that does not exist.

36-1-103 of the U.C.C. provides that certain provisions of the common law are displaced. It is titled supplementary general principals of law applicable, and, Your Honor, that case -- let me go ahead and hand up to the Court and I, I do not have a memorandum on this, and the South Carolina case I have a copy of this from 1992. It is called Flavor-Inn and N.C.N.B., and it is known as the Okey case, Your Honor. Each of these cases support the U.C.C. and I disagree with opposing counsel. The U.C.C. is extremely complicated in the various ways. It goes in different directions. So, case law is absolutely needed to determine. So, the Flavor-Inn case and the Okey case, both of which apply South Carolina law, held a conversion claim related to a negotiable instrument is displaced by the common law.

Now, the only difference I'll admit between that and what we have in this case, Your Honor, is those cases apply to conversion claims under what would have been, I believe, 36-3-419. As we have resolved here today, this case centers upon 36-4-406. Either way, Your Honor, and this is extremely important, and I invite plaintiff's counsel to explain to the Court the difference the --

whatever damages they're going to claim, if they could be allowed to conduct further discovery on this new found negligence claim, are the exact same damages that he would be claiming under the claims under 36-4-406, and, in fact, Your Honor, those cases go through the explanation for why the, the common law claims has, had to be displaced by the U.C.C. because one of the cases was, the Okey case was tried before Judge Perry and the jury came up with inconsistent verdicts, Your Honor.

The jury found that the Plaintiff, Okey, one of the parties was -- lost a negligence claim, but prevailed under the U.C.C. claim and the Court discusses this, Your Honor, how -- that's why the claims are displaced and why we are opposed to this motion, and simply put, plaintiffs have offered no case law or authority anywhere in the country that provides for a negligence claim from opening or allowing business online banking new features on their account. What is supremely important, Your Honor, is, as I understand it, the gist of their allegations in First Citizens' negligence in allowing this to be added to the account is Mr. McDonnell didn't consent to having these futures added to allow them to move funds from his IOLTA account to his operating account or to move funds from the Boomerang Title account to the operating account.

I asked him about his form in the deposition, Your

Honor. He -- the testimony is right here. He says I don't remember this document and I say -- I asked him --

THE COURT: Asked who?

MR. FEW: Mr. McDonnell, the lawyer, who is the principal of the plaintiff of, groups, Your Honor, on Page 186 of his deposition. In the materials I handed up to you, and also included as exhibits to our earlier memorandum, I say I'll ask you this.

Your signature appears right here.

Is that your signature?

I don't know.

He does not deny he signed the form.

Further, Your Honor, consistent with everything that's applicable in the U.C.C., with the burdens that's placed by the statute on an account holder to review their accounts, what happened is this Anna Horman, the lady, transferred $418,000 out of the IOLTA account into the operating account. Just as if he reviewed the statements as he's required to do under the code and the deposit agreement, he would have seen the unauthorized checks. The bank sent the statements that showed whatever transfers were made under the business online banking feature. So, there, again, he was put on notice.

They didn't find out about this in June of 2009. He knew about it when he got the first, in my memory, and it

could have been earlier than this, but at least as early as March of 2005 this woman, Anna Horman, started transferring money out of the IOLTA account into the operating account.

So, had he reviewed the statements, he would have seen it and I'm not so sure there is not business online banking transfers that showed up in the statements for that time. I just know that was the time period and it is all in the discovery that $418,000 in big round numbers was transferred out of the IOLTA account into the operating account, and that gets back to what I'm saying.

Your Honor, these are the same damages that any damages that they would claim still arise out of the fact that these were alleged to be forged checks. So, just because the money was moved from one account to the other doesn't change the fact we're still here before the Court talking about forged checks, and, Your Honor, this doesn't exist because I don't think it's necessary because the Flavor-Inn case clearly demonstrates that aspect of the law interpreting the U.C.C. and the Fourth Circuit case on Okey is actually -- one is sited -- whichever is earlier, Okey came first. So, Flavor-Inn cites Okey.

So, Your Honor, we are opposed to the motion to amend which was brought at the last possible minute, and not only besides all that, there is no claim, even if the bank

fails to follow its internal procedures, that doesn't create a negligence claim, and in this case all the damages flow from the alleged forged checks, which is absolutely an exclusion of the province of the U.C.C.

Thank you, Your Honor.

THE COURT: Okay.

MR. McKELLAR: Your Honor, it is my motion to amend my complaint, and I did so under Rule 15. Whether I can prevail on this cause of action or whether there is a cause of action or whether I should be required to elect my remedies in the future, that is not the issue at this stage of the game.

The issue is I think I have a right, with your permission, to amend my complaint, set forth a cause of action, and see if I can prove it. If I can't prove it, it's going to be a fact of summary judgment or directed verdict, and I'll lose it. But I still have a right to discover that, and, you know, Mr. Few says that we had this form way back when, when Mr. McDonnell's deposition was taken. We couldn't amend the complaint earlier because we didn't have the policies and procedures from the defendant, which we asked for a long time before we did this.

We received them on May 28, 2009. That's when we got the policies and procedures for handling online banking.

So, we couldn't do it before then. If I was arguing this motion, who's going to trial on Monday, I wouldn't argue the motion. This is a brand new case and we've got a long time to go, and I think I'm entitled as well as my theories on this cause of action.

Furthermore, on the Okey case, Mandy Greer and Beasley Carpenter and I tried that case. It was in front of Judge Perry. It lasted about ten days.

What happened was, is we convinced the judge and the other side to have a special interrogatory to the jury, and that case dealt with forged endorsements got in Charles Okey setting up phony trust accounts and pension plans for doctors and lawyers and taking forged checks and putting them in his account. So, it was a forged endorsement case.

So, the plaintiff brought an action under the conversion portion of the U.C.C. and they also brought a cause of action for negligence. Our arguments, at trial level -- Judge Perry -- code gives you a remedy so you can't sue the same -- he denied those motions and the Fourth Circuit said, listen, when the code provides a remedy, and it does, you are limited to that remedy. So, you've got to sue under -- therefore, you can't sue in negligence and that's what the Okey case was all about, and the Flavor-Inn case just simply mentioned Okey for the

same reason.

There is no U.C.C. provision that provides a cause of action for this type of negligent behavior. It is not covered by the U.C.C. If it wasn't, I wouldn't have brought the action. I'm not bringing a conversion action, and the reason I say breach of contract is because when the bank brings a check with a forged signature, it is paying a check which is not properly payable, and the agreement between the customer and the bank is to pay checks properly failed, and that's why it is, is a breach of contract action, but that is our position is we're entitled to develop this cause of action.

THE COURT: The Court will take it under consideration.

Any last words?

MR. FEW: No, thank you.

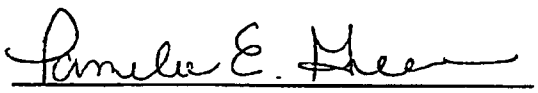
* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Richland County, South Carolina, on the 10th day of March, 2010, to the best of my ability as reported by Priscilla Nay and transcribed by myself.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 1st, 2010



PAMELA E. GREEN, Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

Case No. 09-CP-40-8786R

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SC Court of Appeals

McDonnell and Associates, PA,
f/k/a McDonnell Law Firm, PA,
f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc.,.....Appellants,

v.

First Citizens Bank and Trust Company, Inc.,.....Respondent.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210 (g), SCACR, the undersigned certifies the Record on Appeal in the above-captioned matter contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

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Columbia, South Carolina
August 10, 2011

THE STATE OF SOUTH CAROLINA
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v.

First Citizens Bank and Trust Company, Inc.,.....Respondent.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 8

LAW/ANALYSIS 10

I. The Circuit Court Erred in Granting Summary Judgment to First Citizens Based on Appellants' Failure to Adduce Evidence Demonstrating First Citizens' Lack of Ordinary Care 10

a. The Grant of Summary Judgment Must Be Reversed Because First Citizens Did Not Include Appellants' Failure to Adduce Evidence of First Citizens Lack of Ordinary Care as a Ground Upon Which it Sought Summary Judgment 12

b. The Grant of Summary Judgment Was Premature In Light of the Fact the Case Had Recently Been Restored to the General Docket 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) 10, 18
Carolina Alliance for Fair Employ't v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (1999) 10
Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 384 S.E.2d 738 (1989) 16
Glass v. Glass, 276 S.C. 625, 281 S.E.2d 221 (1981) 16
Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009) 11
Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) 10, 16
Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.P.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) 18
Morgan v. Blackwell, 286 S.C. 457, 334 S.E.2d 817 (1985) 16
Resolution Trust Corp. v. Eagle Lake & Golf Condos., 310 S.C. 473, 427 S.E.2d 646 (1993) ... 16
Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991) 10
Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 260 S.E.2d 708 (1979) 17
Skinner v. Skinner, 257 S.C. 544, 186 S.E.2d 523 (1972) 17
Strother v. Lexington Cnty. Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998) 10
Toomer v. Norfolk S. Ry. Co., 344 S.C. 486, 544 S.E.2d 634 (Ct. App. 2000) 10
Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App.1999) 10, 11
Watters v. Terminix Serv., Inc., 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008) 10
Young v. S.C. Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999) 10, 11

Statutes

S.C. Code Ann. § 36-4-406 ..... 5, 7, 8, 9, 12, 13, 14, 15, 17

Rules

Rule 7, SCRCP 15, 16
Rule 40, SCRCP 4, 6, 17
Rule 56, SCRCP 10

Treatises

Black's Law Dictionary 710 (7th ed. 1999) 15

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court Err in Granting Summary Judgment to Respondent First Citizens Based on Appellants' Failure to Adduce Evidence Demonstrating First Citizens' Lack of Ordinary Care?

STATEMENT OF THE CASE

At all times relevant to this action, McDonnell maintained three accounts at First Citizens Bank: (1) the operating account for McDonnell and Associates, PA; (2) the IOLTA account for McDonnell and Associates, PA; and (3) the account for Boomerang Title, Inc.

On August 15, 2007, Appellants commenced suit against First Citizens alleging it paid items from two (2) of McDonnell's accounts that were not properly payable because these items contained forged and unauthorized signatures. (R. pp. 33-35). On August 21, 2007, Appellants amended the Complaint to include the same allegations with respect to a third account owned by McDonnell. (R. pp. 36-39).

On May 27, 2009, First Citizens filed a motion for summary judgment. (R. pp. 48-49). The following week, on June 5, 2009, the parties entered into a stipulation to remove the case from the trial docket pursuant to Rule 40(j), SCRCP. (R. pp. 26-27).

The case was restored to the General Docket by way of consent order filed December 16, 2009. On March 10, 2010, a hearing was held on First Citizens' motion for summary judgment, as well as Appellants' motion for leave to amend the complaint. (R. pp. 335-70).

By order filed July 9, 2010, the Honorable J. Michelle Childs granted First Citizens' motion for summary judgment. (R. pp. 1-14). Appellants filed a motion to alter or amend the court's ruling, which was granted in part and denied in part. (R pp. 310-25). However, the ground on which Judge Childs denied Appellants' Rule 59(e) motion was dispositive of the case and affirmed the entry of summary judgment in favor of First Citizens.

This appeal follows.

STATEMENT OF THE FACTS

The instant case is an appeal from the Circuit Court's grant of summary judgment in favor of Respondent First Citizens Bank & Trust Company, Inc. This case is governed by S.C. Code Ann. § 36-4-406, which provides in pertinent part:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries . . . or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discovery his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
>
> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
>
> > (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure;
> >
> > (b) an authorized signature of the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was made available to the customer for a reasonable time period not exceeding fourteen calendar days and before the bank received notification from the customer of any such unauthorized signature or alteration.
>
> (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).
>
> (4) Without regarding to the care of lack of care of either the customer of the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item . . . is precluded asserting against the bank any unauthorized signature . . .

S.C. Code Ann. § 36-4-406 (1976).[1]

[1] South Carolina's enactment of the UCC was amended in 2008. The checks at issue were negotiated prior to the effective date of these amendments. Accordingly, the pre-2008 version is applicable and cited herein.

On December 23, 2005, a representative of First Citizens informed Ed McDonnell a transaction from his firm's IOLTA account could not be completed due to insufficient funds. (R. p. 281, ¶2; p. 285, lines 2-7). The following week, it was discovered that a paralegal in McDonnell's office, Anna Hoorman, had been forging checks from McDonnell's accounts. (R. p. 281, ¶6; p. 298, line 16-p. 299, line 1;R. p.285, lines 6-10). Hoorman's forgeries dated back to October 1, 2004. (R. p. 188). In total, Hoorman forged and negotiated ninety-four (94) checks from the three (3) First Citizens' accounts, amounting to approximately $767,880.53. (R. p. 2). It is undisputed that First Citizens honored each and every one of these forged checks.

In August 2007, Appellants commenced suit against First Citizens for breach of contract as a result of First Citizens' payment of checks which contained forged signatures and, therefore, were not properly payable. (R. pp. 33-39). This action was assigned civil action number 2007-CP-40-5252.

On May 27, 2009, First Citizens filed a Motion for Summary Judgment. (R. pp. 48-49). The following week, the parties stipulated that the case be removed from the trial docket pursuant to Rule 40(j), SCRCP. (R. pp. 26-27). This stipulation explicitly provides that "when the case is restored, it shall be restored to the General Docket, where it will proceed as a newly filed action." (Id.).

The case was restored by way of a consent order filed December 16, 2009. (R. pp. 28-30). When restored, the case was assigned a new civil action number, 2009-CP-40-08786R. Thereafter, on March 10, 2010, a hearing was held on First Citizens' previously filed motion for summary judgment, with the Honorable J. Michelle Childs presiding. (R. pp. 335-70). In its motion, First Citizens enumerated the following specific grounds in support of summary judgment:

> [B]ecause Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406 [subsection 4], because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens, precludes them from asserting any claims against First Citizens under South Carolina law [subsection 1], and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code §36-4-406(d)(2) [subsection 2].[2]

(R. pp. 48-49) (footnote added). In other words, the motion for summary judgment was based solely on the preclusion provided for in § 36-4-406(1) and (2), as well at the one-year time bar contained in (4). (Id.).

In their memorandum in opposition to First Citizens' motion for summary judgment, Appellants contended the plain language of the statute and comments thereto demonstrate the preclusive effect of subsections (1) and (2) is inapplicable if the customer shows the bank failed to exercise ordinary care in paying the items under subsection (3). Therefore, Appellants contended that summary judgment was improper because First Citizens had not moved for summary judgment on the ultimate issue in the case—whether a genuine issue of material fact exists regarding First Citizens' exercise of due care in paying the checks pursuant to § 36-4-406(3). (R. pp. 267-68). Appellants also contended a genuine issue of fact existed with respect to whether they reported the unauthorized signatures within one year, as required by § 36-4-406(4). (R. pp. 268-70).

The Circuit Court granted First Citizens' motion for summary judgment. (R. pp. 1-14). With regard to § 36-4-406(1) and (2), the Circuit Court held Appellants' failure to exercise ordinary care absolutely barred any claims against First Citizens. (R. p. 11). Furthermore, in its recitation of the grounds upon which First Citizens' motion for summary was premised, the

[2] First Citizens' motion appears to incorrectly cite to the post-2008 amended version of § 36-4-406. The pre-2008 version does not contain a subsection delineated as § 36-4-406(d)(2) .

Circuit Court stated the motion was premised, inter alia, on that fact Plaintiffs have "presented no evidence that First Citizens failed to exercise ordinary care in paying the items." (R. p. 4). However, the Circuit Court's order contains no further discussion or explanation of this purported ground for summary judgment. The Circuit Court's analysis ended with subsections (1) and (2) and failed to address the impact of § 36-4-406(3).[3]

Therefore, Appellants filed a Rule 59(e) motion to alter or amend the order granting summary judgment in favor of First Citizens. (R. pp. 310-15). In their Rule 59 motion, Appellants argued, inter alia, that their failure to exercise ordinary care under §§ 36-4-406(1) and (2) was not dispositive and the Circuit Court overlooked the importance of subsection (3). (R. pp. 311-13, pp. 316-19). In further support of this position, Appellants again contended summary judgment was inappropriate because First Citizens had not moved for summary judgment on Appellants' failure to demonstrate First Citizens did not exercise due care in paying the checks under subsection (3). (R. pp. 314-15).

The Circuit Court granted this motion in part and denied this motion in part. Of import to this appeal, the Circuit Court held Appellants' failure to exercise reasonable care was not

[3] The Circuit Court also held § 36-4-406(4) "completely bars recovery of any claim against First Citizens which was **included in a statement dated over one (1) year from the time of discovery and report** to First Citizens" and "Plaintiffs are precluded from asserting any unauthorized signature or alteration against First Citizens **which has been on bank statements for more than one year**." (R. pp. 5-6) (emphasis added). However, the Circuit Court also concluded by stating First Citizens' motion for summary judgment was granted on the issue of § 36-4-406(4) and did not qualify this ruling by stating the forged checks appearing on bank statements in the year preceding Appellants' report to First Citizens are recoverable (as it did previously in outlining its reasoning). Therefore, Appellants sought clarification on this ruling in its Rule 59 motion. In its second order, the Circuit Court clarified First Citizens motion for summary judgment was granted on this ground only as to those checks appearing on bank statements made available before December 23, 2004, one year before Appellants reported the forgeries. (R. p. 23).

dispositive and § 36-4-406(3) can trump the preclusive effect of subsection (2). (R. p. 17).[4] However, the Circuit Court next held reversal of its order entering summary judgment for First Citizens was not warranted because Appellants had not presented any evidence that First Citizens failed to act with ordinary care under subsection (3). (R. pp. 18-19). The Court further held it was not error to rule on this issue because First Citizens had moved for summary judgment on "all claims." (R. p. 19).

Appellants timely filed and served its notice of appeal to this Court.

[4] The Circuit Court also ruled in Appellants' favor on the other issues raised in their Rule 59 motion concerning interpretation and application of § 36-4-406. (R. pp. 15-25). However, the ruling that Appellants failed to present evidence of lack of ordinary care by First Citizens is dispositive. Therefore, only the propriety of this ruling is the basis for the instant appeal.

STANDARD OF REVIEW

Summary judgment is a drastic remedy that should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). With respect to an issue on which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party's case. Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). Summary judgment is appropriate only when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Toomer v. Norfolk S. Ry. Co., 344 S.C. 486, 490, 544 S.E.2d 634, 635 (Ct. App. 2000). Summary judgment is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employ't v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (1999). Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Serv., Inc., 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct. App. 2008).

In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington Cnty. Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App.1999). If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991); Young v. S.C. Dep't of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the

conclusions or inferences to be drawn from them, summary judgment should be denied. Vermeer, 336 S.C. at 59; Young, 333 S.C. at 718. The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. The Circuit Court Erred in Granting Summary Judgment to First Citizens Based on Appellants' Failure to Adduce Evidence Demonstrating First Citizens' Lack of Ordinary Care.

South Carolina Code Ann. § 36-4-406 provides in pertinent part:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries . . . or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discovery his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
>
> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
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> > (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure;
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> > (b) an authorized signature of the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was made available to the customer for a reasonable time period not exceeding fourteen calendar days and before the bank received notification from the customer of any such unauthorized signature or alteration.
>
> (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

In other words, § 36-4-406(1) places the responsibility or duty on the bank customer to examine his statements and checks to determine if there are any forgeries and report these forgeries to the bank. Section 36-4-406(2) provides that if the customer fails to notify the bank of the forged signature within fourteen (14) days from when the statement is made available and the same wrongdoer continues to forge checks, the customer is precluded from asserting against an unauthorized signature by the same wrongdoer on any subsequent forgeries. These two sections set out the duties of the customer and resultant consequences if the same wrongdoer continues to forge checks.

But the preclusive effect of subsection (2) is not absolute. Section 36-4-406(3) provides that the preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item. § 36-4-406(3).

In short, even if the customer fails to discover the first forgery and notify the bank and the same wrongdoer continues to forge checks, the customer can still recover if the bank failed to exercise ordinary care in paying the items.

The comments to § 36-4-406 further explain the impact of subsection (3): "[s]ubsection (3) makes the preceding rules inoperative if the bank itself was negligent in paying the item. Thus, a negligent bank cannot put the loss resulting from a forgery or the like upon the customer on the ground that the customer also has been negligent." § 36-4-406, South Carolina Reporter's Comments. Similarly, the official comments make clear that the bank does not prevail simply because it proves the customer failed to exercise reasonable care; rather, the analysis must proceed to subsection (3):

> The two effects on the customer of his failure to comply with subsection (1) (subparagraphs (a) and (b) of subsection (2)) are stated in terms of preclusion from asserting a claim against the bank. However, these two effects occur only if the customer has failed to exercise reasonable care and promptness in examining his statement and items and notifying the bank to establish such failure. **Further, even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing the bank failed to exercise ordinary care in paying the item(s) the preclusion rule does not apply.** This distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

§ 36-4-406, Official Cmt. 4 (emphasis added). In short, subsection (3) trumps the preclusive effect subsection (2) can have on Appellants' claims.

In its second order, ruling on Appellant's Rule 59 motion, the Circuit Court recognized subsection (3) can trump the preclusion set forth in subsection (2), but held summary judgment was still appropriate because Appellants had not presented any evidence to support the contention that First Citizens failed to exercise ordinary care in paying the forged checks. This ruling is in error for two reasons: (a) First Citizens did not move for summary judgment on Appellants' failure to establish it did not exercise ordinary care; and (b) granting summary judgment based on the absence of such evidence was premature when the case had been recently restored to the general docket.

a. The Grant of Summary Judgment Must Be Reversed Because First Citizens Did Not Include Appellants' Failure to Adduce Evidence of First Citizens Lack of Ordinary Care as a Ground Upon Which It Sought Summary Judgment.

First Citizens did not state as a ground for its motion for summary judgment that Appellants have failed to create a genuine issue of material fact regarding whether First Citizens exercised ordinary care in paying the items. Accordingly, the Circuit Court erred in granting summary judgment on this issue.

When the Circuit Court summarized First Citizens' grounds for summary judgment in the first order granting summary judgment, the Circuit Court stated the motion was premised, inter alia, on that fact Plaintiffs have "presented no evidence that First Citizens failed to exercise ordinary care in paying the items." (R. p. 4). Because the Circuit Court did not include any analysis of this alleged ground for summary judgment in its original order, nor did it consider the impact of subsection (3), Appellants sought reconsideration to the extent the Circuit Court's ruling was based upon the mistaken belief that First Citizens had raised such a ground for summary judgment in its motion. (R. pp. 310-15). In the order ruling on Appellant's Rule 59 motion, the Circuit Court incorporated an affirmative ruling on this issue. The Circuit Court also

apparently misconstrued Appellants as contending summary judgment on this issue was improper because First Citizens did not move for summary judgment on all "claims." (R. p. 19).

Whether First Citizens moved for summary judgment on all **claims** is irrelevant. The pivotal issue and the issue raised by Appellants in their Rule 59(e) motion is whether First Citizens included Appellants failure to adduce evidence regarding First Citizens' lack of ordinary care in paying the forged items as a **ground** on which it was entitled to summary judgment. A request that summary judgment be entered on all claims is simply a request for relief based on the premise an enforceable right exists. Black's Law Dictionary 710 (7th ed. 1999) (defining "claim" as "the aggregate of operative facts giving rise to a right enforceable by a court"). The moving party must also state the specific grounds or reasons why it is entitled to such relief. See Rule 7(b)(1), SCRCP (stating "[a]n application to the court for an order shall be by motion which . . . shall state with particularity the **grounds** therefor") (emphasis added); Black's Law Dictionary 710 (7th ed. 1999) (defining "ground" as "[t]he reason or point that something (as a legal claim or argument) relies on for validity").

The instant motion for summary judgment was based solely on the preclusion provided for in § 36-4-406(1) and (2), as well at the one-year time bar contained in (4). (R. pp. 48-49).[5]

---

[5] Specifically, First Citizens enumerated the following grounds in its motion for summary judgment:

> [B]ecause Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406 [subsection 4], because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens, precludes them from asserting any claims against First Citizens under South Carolina law [subsection 1], and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code § 36-4-406(d)(2) [subsection 2].

(R. pp. 48-49).

Accordingly, because First Citizens did not set forth the absence of evidence demonstrating it failed to exercise ordinary care as a ground for its motion, First Citizens' motion did not shift the burden to Plaintiffs to establish a genuine issue of material fact exists with regard to this issue. See Rule 7(b)(1), SCRCP (stating "[a]n application to the court for an order shall be by motion which . . . . shall state with particularity the grounds therefor"); Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) (stating moving party may discharge its initial responsibility under summary judgment standard by pointing out an absence of evidence on which the non-moving party bears burden of proof; only when this initial burden is met must the opposing party come forward with evidence demonstrating an issue of fact).

Furthermore, it was reversible error for the Circuit Court to grant summary judgment on an issue not raised, addressed, or even so much as mentioned in the moving papers filed by First Citizens. It has long been the black letter law in South Carolina that an issue that was not raised in a notice and motion for summary judgment is not before and cannot be ruled on by the trial court. Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 351, 384 S.E.2d 738, 740 (1989) ("The trial judge could not have understood the basis of People's Life's motions to be that the conversion was unconnected to 'trade or commerce' because the motions neither raised nor encompassed such an argument."); Morgan v. Blackwell, 286 S.C. 457, 334 S.E.2d 817 (1985); Glass v. Glass, 276 S.C. 625, 281 S.E.2d 221 (1981) (trial judge erred in determining issue of applicability of statute of frauds as an affirmative defense to contract since that issue was not raised in motion to dismiss); cf. Resolution Trust Corp. v. Eagle Lake & Golf Condos., 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993) (disapproving of the practice of orally raising unpled issues for the first time at a summary judgment motion).

One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds supporting the motion. Generally, the trial court may not grant relief beyond the limits or scope of such notice. Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 260 S.E.2d 708 (1979); Skinner v. Skinner, 257 S.C. 544, 186 S.E.2d 523 (1972). To do so in this case would clearly prejudice Appellants by effectively requiring them to anticipate and refute any and all reasons First Citizens might believe it is entitled to summary judgment. First Citizens is not entitled to summary judgment on an issue it did not state as a ground for its motion. Accordingly, even assuming, arguendo, that First Citizens has demonstrated it is entitled to the benefit of the preclusive effect of §§ 36-4-406(1) and (2), First Citizens' failure to move for summary judgment based on the absence of evidence demonstrating it failed to exercise of ordinary care—the controlling issue in this case—precludes summary judgment in its favor.[6] Therefore, the order granting First Citizens' motion for summary judgment must be reversed, as Appellants are entitled to present proof at trial that First Citizens did not exercise ordinary care in paying the forged checks.

b. The Grant of Summary Judgment Was Premature in Light of the Fact the Case Had Recently Been Restored to the General Docket.

In support of its ruling granting summary judgment, the Circuit Court also relied on the length of time since the filing of the original complaint. The Circuit Court noted the action was filed in August 2007 and had been dismissed pursuant to Rule 40(j) after appearing on the trial docket in June 2009, but Appellants had not pointed to any evidence demonstrating the existence of a genuine issue of fact regarding First Citizens' failure to exercise ordinary care. (R. pp. 18-19).

[6] Appellants pointed out in their memorandum in opposition to First Citizens' motion for summary judgment that First Citizens did not move for summary judgment on its own exercise of reasonable care, as did counsel at the hearing. (R. pp. 267-68; R. p. 353, lines 4-12).

When the case was stricken from the trial docket, the filed stipulation specifically provided that the case would proceed as a "newly filed" action upon its restoration. (R. pp. 26-17). After the case was restored, it was given a 2009 civil action number. At the time the Circuit Court heard argument on First Citizens' motion for summary judgment, this case has been restored to the general docket for less than three (3) months. Because the parties agreed the case would be treated as a newly filed action after it was restored, it was error for the Circuit Court to grant summary judgment on the absence of evidence demonstrating First Citizens did not exercise ordinary care in paying the items. Rather, at this early stage in the restored action, Appellants should have been afforded the opportunity to further develop their case. Cf. Baughman, 306 S.C. at 112, 410 S.E.2d at 543 (summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery"); Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.P.A., 320 S.C. 470, 465 S.E.2d 765, 771 (Ct. App. 1995) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

CONCLUSION

For the foregoing reasons, Appellants request the Court reverse the decision of the Circuit Court entering summary judgment in favor of First Citizens.

[Signature Page to Follow]

Respectfully submitted,

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APPELLANTS' FINAL BRIEF

Columbia, South Carolina
September 1, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

Case No. 09-CP-40-8786R

McDonnell and Associates, PA,
f/k/a McDonnell Law Firm, PA,
f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc.,.....Appellants,

v.

First Citizens Bank and Trust Company, Inc.,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellants' Final Brief complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

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PROOF OF SERVICE

I hereby certify that I served Appellants' Final Brief upon Respondent First Citizens Bank and Trust Company, Inc., by placing a copy in the United States mail, postage prepaid, to counsel of record, John T. Lay, Esquire, Wesley D. Few, Esquire and Jake S. Barker, Esquire, Ellis Lawhorne & Sims, PA, P.O. Box 2285, Columbia, SC 29202, on September 1, 2011.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 7

LAW ANALYSIS 9

1. The Circuit Court did not err in granting Summary Judgment to First Citizens based on Appellants' failure to adduce evidence demonstrating a lack of ordinary care. 9

   A. Appellants' argument that the Grant of Summary Judgment must be reversed because First Citizens did not include Appellants' Failure to Adduce Evidence of First Citizens' lack of ordinary care as Ground upon which is sought Summary Judgment is without merit. 12

   B. Appellants' argument that the Grant of Summary Judgment was premature in light of the fact that the Case had recently been restored to the general docket is also without merit. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537, (1991) 7, 8, 10, 16

Bennett v. Investors Title Ins. Co., 370 S.C. 561, 635 S.E.2d 660, (Ct. App. 2006) 7

BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155, (Ct. App. 2005) 7

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 7, 8

Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 384 S.E.2d 738 (1989) 14

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 8

Glass v. Glass, 276 S.C. 625, 281 S.E.2d 221 (1981) 14, 15

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) .. 8

Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.P.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) 17

Read v. South Carolina Nat'l, 286 S.C. 534, 335 S.E.2d 359 (1985) 10

Resolution Trust Corp. v. Eagle Lake & Golf Condos, 310 S.C. 473, 427 S.E.2d 646 (1993) 15

Richardson v. State-Record Co., 330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998) 8

Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 260 S.E.2d 708 (1979) 15

Skinner v. Skinner, 257 S.C. 544, 186 S.E.2d 523 (1972) 15

Statutes

S. C. CODE ANN. § 36-4-406 (1976) 9, 10, 11, 12, 13, 14, 15, 16, 17

Rules

S.C.R. CIV. P. 56 ..... 7, 11

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court Err in Granting Summary Judgment to Respondent First Citizens Bank and Trust Company, Inc. on all of Appellants' Claims?

STATEMENT OF THE CASE

On August 15, 2007 Appellants commenced suit against First Citizens alleging that certain checks or items were improperly paid from Plaintiffs' accounts because they contained forged or unauthorized signatures (R. pp. 31-39, p. 213, pp. 281-282, pp. 302-309). On May 27, 2009, First Citizens filed a motion for summary judgment (R. pp. 48-50, pp. 51-263). On June 5, 2009, the parties entered into a stipulation to remove the case from the trial docket pursuant to Rule 40(j), SCRCP (R. pp. 26-27).

By consent order filed December 16, 2009, the case was restored to the General Docket (R. pp. 28-30). On March 10, 2010, First Citizens' motion for summary judgment was heard by the Circuit Court (R. pp. 335-370). The court also heard arguments on Appellants' motion for leave to amend the complaint.

On July 9, 2010, the Honorable J. Michelle Childs issued an order granting First Citizens' motion for summary judgment as to all of Appellants claims and granting Appellants leave to amend their Complaint (R. pp. 1-14). Appellants filed a Rule 59(e) motion to alter or amend the court's ruling (R. pp. 310-334). On August 19, 2010, Judge Childs issued a second order reaffirming her ruling and entry of summary judgment in favor of First Citizens. Appellants have appealed that ruling (R. pp. 15-25).

On September 14, 2010 Appellants filed their Second Amended Complaint asserting a new claim in common law negligence. First Citizens filed a Motion to Dismiss Appellants' remaining Cause of Action in the Second Amended Complaint. The Circuit Court heard arguments on this motion on March 8, 2011, and on April 14, 2011, entered an Order granting First Citizens' Motion and dismissing Appellants' Second

Amended Complaint. As of the date of this brief all of Appellants' claims have been dismissed by the Circuit Court.

STATEMENT OF FACTS

The instant case concerns payment of ninety-four (94) forged checks drawn on Appellants' accounts with Respondent First Citizens. The checks were forged by the Appellants' former employee and office manager, Anna Hoorman, during her tenure with Appellants (R. p. 216, p. 233, p. 238). At all times relevant to this action, Appellants maintained three (3) checking accounts with First Citizens:

(i) **Operating Account**, account number 83045789101 in the name of Edward G. McDonnell, PC ("Operating Account") opened on or about June 24, 2003;

(ii) **Boomerang / Title Insurance Account**, account number 83045792501 in the name of Boomerang Title, Inc. ("Boomerang / Title Insurance Account") opened on or about June 24, 2003; and

(iii) **IOLTA Account**, account number 891001421901 in the name of Edward G. McDonnell, PC, IOLTA ("IOLTA Account") opened on or about July 17, 2003 (collectively "Accounts").

Appellants alleged they are entitled to recover against First Citizens for these 94 forged checks written from between October 1, 2004 and December 23, 2005 (R. p. 120, p. 142, p. 144, p.188). The embezzlement actions of Anna Hoorman were first discovered, not by the Appellants, but instead by First Citizens when the bank reported to Edward McDonnell on December 23, 2005 that he had an insufficient fund ("NSF") charge against his IOLTA account (R. p. 71, pp. 281-282). Other discovery showed that Mr. McDonnell was put on notice of at least one earlier NSF charge as against his IOLTA account in early 2004 when a title insurance premium check was returned NSF and his title insurer investigated that incident and followed up with Mr. McDonnell in writing to advise him on the need to reconcile and how to reconcile his accounts, including his IOLTA Account (R. p. 261). It is undisputed that Appellants, other than through the alleged forger and former

employee, did not review their periodic bank statements regarding their accounts, and did not report any of the alleged forgeries until after December 23, 2005 (R. p. 83).

Appellants wrote a letter to Respondent in early 2006 purporting to make a claim for some of the 94 checks now put at issue in this lawsuit (R. p. 309). Over a year and a half later, Appellants filed suit on August 15, 2007 against First Citizens Bank in an action captioned 2007-CP-40-5252 (R. pp. 31-39).[1] The originally filed suit was fully discovered with considerable written discovery and depositions taken by both sides. The parties participated in a status conference before Judge James R. Barber, III, in early 2009, wherein it was discussed that the case would come up for trial in May of 2009. The case was continued one month to the term of court beginning June 8, 2009. Notwithstanding Defendant's discovery requests served on December 19, 2007, requesting identification of Plaintiffs' experts, it was not until the week before trial, on June 2, 2009, Plaintiffs named Carl Manheim as their expert witness, presumably on the issue of "ordinary care." First Citizens moved to exclude this witness on grounds of prejudice and for his lack of qualifications as he had not been active in banking during the relevant 2004-2005 time period. Rather than taking Mr. Manheim's deposition, on Friday, June 5, 2009, the parties dismissed the case under Rule 40(j) (R. pp. 26-27).

Appellants then restored the case to the docket on December 16, 2009 as Civil Action No. 2009-CP-40-8786R (R. pp. 28-30). Once the case was restored, First Citizens took steps to obtain necessary discovery on Mr. Carl Manheim and also noticed his expert deposition. In response to this, Appellants withdrew the designation of Mr. Manheim as an expert witness sometime in late February or early March of 2010. After withdrawal of this

[1] Appellants also filed a separate suit on October 12, 2007 and recovered a settlement with Carolina Legal Associates via 2007-CP-40-6854, under the theory that Carolina Legal Associates did not screen Anna Hoorman prior to placing her for temporary employment with the Appellants.

expert witness, this Court heard Respondent's Motion for Summary Judgment on all claims on March 10, 2010, and dismissed all pending claims, but granted Appellants' Motion to Amend without addressing the merits of the proposed amendment. (R. pp. 1-14) (stating "a decision on the merits of Plaintiffs' amendment is premature at this time"). Appellants filed a Rule 59(e) motion to alter or amend the Circuit Court's July 9, 2010 Order (R. pp. 310-334). On August 19, 2010, the Circuit Court issued another order affirming its July 9, 2010 grant of Summary Judgment to Respondent First Citizens Bank (R. pp. 15-25).

All of the originally filed claims in this action, the UCC claims, which were Appellants First, Second and Third Causes of Action, are now part of this appeal.[2] A review of the Complaint and this Court's Order dismissing these initial three Causes of Action shows that each is the same legal claim against First Citizens for the three accounts at issue: (i) Operating Account, (ii) Boomerang/Title Insurance Account, and (iii) IOLTA Account.

The remaining claim that was filed with Appellants' Second Amended Complaint on September 14, 2011, has now been dismissed by the Circuit Court's April 14, 2011 Order granting First Citizens' Motion to Dismiss Plaintiffs' Second Amended Complaint. As of the date of the filing of this Motion, all of Appellants claims – whether originally filed and dismissed at the summary judgment stage or filed later in a Second Amended Complaint and dismissed on Motion by First Citizens – have been dismissed by the Circuit Court.

[2] Plaintiffs did not appeal the Circuit Court's April 14, 2011 Order dismissing their common law negligence claim.

STANDARD OF REVIEW

This is an appeal of the Circuit Court's ruling granting Respondent's motion for Summary Judgment as to all of Appellants' claims (R. pp. 1-14). Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C.R. CIV. P. 56(c). "In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party." BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 158 (Ct. App. 2005). "All ambiguities, conclusions, and inferences rising from the evidence must be construed most strongly against the moving party." Id. at 325, 608 S.E.2d at 159. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing" -that is, pointing out to the [trial] court- that there is an absence of evidence to support the nonmoving party's case.' " Id. (alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). "The moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim." Baughman, 306 S.C. at 115, 410 S.E.2d at 545. (quoting

Celotex, 477 U.S. at 323,); see also Richardson v. State-Record Co., 330 S.C. 562, 499 S.E.2d 822 (Ct.App.1998).

Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. The South Carolina Supreme Court, clarifying prior case law, has held that in certain cases a nonmoving party must present more than a mere scintilla of evidence to survive summary judgment:

> Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).

LAW / ANALYSIS

1. The Circuit Court did not err in granting Summary Judgment to First Citizens based on Appellants' failure to adduce evidence demonstrating a lack of ordinary care.

As noted by Appellants in their initial brief, this case centers on the court's application of South Carolina Code § 36-4-406, which provides:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries . . . or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
>
> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
>
> > (a) his unauthorized signature or any alteration on the item if the bank also establishes that is suffered a loss by reason of such failure;
> >
> > (b) an unauthorized signature of the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was made available to the customer for a reasonable time period not exceeding fourteen calendar days and before the bank received notification from the customer of any such unauthorized signature or alteration.
>
> (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

S.C. CODE ANN. § 36-4-406 (1976) (emphasis added), amended by S.C. CODE ANN. §36-4-406 (2008).[3] It is undisputed that this statute, in effect at all times relevant to this action, places the responsibility or duty on the bank customer to examine his statements and checks to determine if there are any forgeries and report these forgeries to the bank.

[3] This Section of the Code was amended in 2008 by the State Legislature. This brief cites the code sections in effect at all relevant times in this Action.

Id., (Appellants' Brief, p. 10). Further, if the customer fails to notify the bank of the forged signature within fourteen (14) days from when the statement is made available and the same wrongdoer continues to forge checks, the customer is precluded from asserting against an unauthorized signature by the same wrongdoer on any subsequent forgeries. Id., (Appellants' Brief, p. 10). As the Circuit Court states in its August 19, 2010 order, the facts of this case are clear that "Plaintiffs are precluded from asserting the forgeries against First Citizens by operation of § 36-4-406(2)." (R. p. 16).

Appellants argue, however, that their failure to comply with §§ 36-4-406(1) and (2) – their admitted and undisputed failure to monitor their own checks and statements for more than a year, including those of an IOLTA account, – does not end their case against First Citizens because of § 36-4-406(3). Appellants assert that "the customer can still recover if the bank failed to exercise ordinary care in paying the items." (Appellants' Brief, p. 11). However, the plain language of § 36-4-406(3) clearly states Appellants' failure to comply with § 36-4-406(1) and (2) is only obviated if "the customer establishes lack of ordinary care on the part of the bank in paying the items." S.C. CODE ANN. § 36-4-406(3) (1976), amended by S.C. CODE ANN. §36-4-406 (2008) (emphasis added).

The burden is placed on Appellants to establish a lack of ordinary care on the part of First Citizens. However, Appellants failed to adduce *any* such evidence, as was noted by the Circuit Court in their August 19, 2011 order, which states "the South Carolina Supreme Court stated, '[t]he burden of proving the bank's failure to exercise ordinary care under § 36-4-406(3) in paying the items rests squarely on the customer.'" (R. p. 17) (quoting Read v. South Carolina Nat'l, 286 S.C. 534, 541, 335 S.E.2d 359, 362 (1985)).

First Citizens established that Appellants failed to comply with §§ 36-4-406(1) and (2) – and that failure is undisputed by Appellants.

When the issue of First Citizens' level of care was raised by Appellants in their Rule 59(e) motion, the Circuit Court properly stated

> [n]o evidence has been offered by Plaintiffs that Defendant failed to act in accordance with general banking usage. It is undisputed that, in response to Defendant's summary judgment motion, Plaintiffs have not pointed to any evidence they would allege creates a material issue of fact as to whether or not First Citizens exercised 'ordinary care' in processing the ninety-four (94) checks at issue in this case. Therefore, the Court's finding that Plaintiff failed to exercise ordinary care in this case is sufficient.

(R. p. 18) (emphasis added). As noted above, Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. CIV. P. 56(c). Further, once the moving party carries its initial burden, the opposing party must come forward with specific facts to show there is a genuine issue of fact remaining for trial. See Baughman, 306 S.C. at 1115, 410 S.E.2d at 545. When arguments on the summary judgment motion were heard by the Circuit Court, the case was over two years old, extensive discovery had been conducted, and Appellants still could offer nothing to create a genuine issue with regards to First Citizens' level of care. "Here, Plaintiffs have not come forward with any evidence to establish a lack of ordinary care by Defendant." (R. p. 18). Still further, even as of the date of this brief, Plaintiffs / Appellants have proffered no evidence they allege could show lack of ordinary care by First Citizens.

The statute is clear that the customer must establish that a bank failed to exercise ordinary care to trump the preclusions of §§ 36-4-406(1) and (2). The official comments to the code provide:

> this distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

S.C. CODE ANN. § 36-4-406 (1976), Official Cmt. 4, amended by S.C. CODE ANN. §36-4-406 (2008) (emphasis added). When a customer, such as Appellants, presents absolutely no evidence to support a contention that First Citizens failed to exercise ordinary care, Respondent is not required to establish that it exercised ordinary care. (R. p. 18).

A. Appellants' argument that the Grant of Summary Judgment must be reversed because First Citizens did not include Appellants' Failure to Adduce Evidence of First Citizens' lack of ordinary care as Ground upon which is sought Summary Judgment is without merit.

Appellants argue that "because First Citizens did not set forth the absence of evidence demonstrating it failed to exercise ordinary care as a ground for its motion, First Citizens' motion did not shift the burden to Plaintiffs to establish a genuine issue of material fact exists with regard to this issue." (Appellants' Brief, p. 14). This argument is also without merit. As outlined above, the burden to establish lack of ordinary care lies with Appellants. It is not the responsibility of First Citizens to "shift" this burden back to Appellants – it already resides there. Again, this issue was first raised by Appellants in their Rule 59(e) motion, and the Circuit Court correctly responded by stating "Plaintiffs have provided no affirmative evidence that Defendant failed to exercise reasonable care. Therefore, the Court finds that it was not error to rule on all of Plaintiffs' claims in the summary judgment motion." (R. p. 19).

First Citizens based its motion for summary judgment, in part, on the pre-2008 version § 36-4-406, which is recited above. It is undisputed that Appellants failed to comply with that statute's requirement to monitor its statements and accounts. Further, Appellants can offer no evidence that First Citizens failed to act in good faith and exercise ordinary. Respondent first pointed this out in its Memorandum in Support of its Motion for Summary Judgment as follows:

> Plaintiffs did not review statements, nor did Plaintiffs identify or report any forgeries or alleged unauthorized items as required by applicable law. First Citizens acted in good faith and used ordinary care in paying all checks put at issue by Plaintiff. Therefore, Plaintiffs are precluded from claiming the Bank is responsible for any of the items alleged in the Complaint.

(R. p. 66) (emphasis added). Appellants could not then – and cannot now – produce any evidence that First Citizens failed to act "in good faith and … ordinary care in paying all checks put at issue." (R. p. 66). Giving Appellants yet another chance to produce this evidence would only serve to undermine the existing rules of civil procedure and the discovery process. First, no such evidence exists since First Citizens - as shown in their memorandum and by Appellants' complete failure to adduce any evidence to the contrary despite numerous opportunities and extensive discovery - exercised good faith and ordinary care at all times. Further, Appellants failed to meet their burden to establish lack of ordinary care, and allowing them a second chance to do so would erroneously shift that burden from customers to payor banks. The comments to § 36-4-406 are clear that this burden rests with customers, stating:

> this distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

S.C. CODE ANN. § 36-4-406 (1976), Official Cmt. 4, amended by S.C. CODE ANN. §36-4-406 (2008) (emphasis added).

To support their argument, Appellants cite several cases from South Carolina courts regarding a Court ruling on an issue not raised before it. First, as outlined above, that is not the case here as the Circuit Court properly ruled to grant summary judgment on all of Appellants claims. Second, Appellants' reliance on these cases is misplaced, as discussed herein.

Appellants rely on Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 351, 384 S.E.2d 738, 740 (1989) to argue that "an issue that was not raised in a notice and motion for summary judgment is not before and cannot be ruled on by the Circuit Court." (Appellants' Brief, p. 14). However, Connolly is distinguishable from the present case and any reliance thereon is futile. Connolly involves a situation wherein the Court of Appeals "based its reversal of the trial judge on a ground that was never raised or argued before him." Connolly, 299 S.C. at 351, 384 S.E.2d at 740. In this case, Appellants are asking for reversal of a Summary Judgment decision by the Circuit Court, who undisputedly heard and was aware of the argument regarding the effects of § 36-4-406(3) (R. pp. 335-370). The record is replete with references to the content and treatment of that subsection, and this case in no way can be construed as one where "the trial judge could not have understood the basis of [the] motions." Id. at 351.

Appellants next rely on Glass v. Glass, 276 S.C. 625, 281 S.E.2d 221 (1981), supposedly for the same principles as above. However, like Connolly, Glass is distinguishable from the present case, and Appellants mistakenly rely on its ruling. In Glass, the Court stated that the Circuit Court should not have dismissed a complaint

based on the Statute of Frauds since that issue was raised by an affirmative defense in the pleadings and not the actual motion to dismiss before the Court at the time of the ruling. Glass, 276 S.C. at 625, 281 S.E.2d at 221. Glass involved a situation where a Circuit Court ruled on an issue that was not "before him." Id. As outlined above, that is not the case here. First Citizens moved for Summary Judgment under § 36-4-406. The Circuit Court ruled in favor of First Citizens based at least in part on the provisions of that statute. Appellants now contend that they have not had the opportunity to present evidence of First Citizens' alleged lack of ordinary care. This issue is covered by the statute, was before the court on First Citizens' motion, and was addressed in both the memorandum of law in support thereof and the court's ruling. Appellants' attempt to equate the facts in Glass with the situation at hand is without merit. The Circuit Court here did not rule on an issue not before it, and therefore Glass is inapplicable to the case at bar.

Appellants next cite to Resolution Trust Corp. v. Eagle Lake & Golf Condos, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993), to state that the Court disapproves "of the practice of orally raising unpled issues for the first time at a summary judgment motion." (Appellants Brief, p. 14). While the Court may very well disapprove of such practices, the issue here is irrelevant as the basis for the granting of summary judgment was raised properly and well before the hearing on summary judgment. (R. p. 58, p. 66). The record is clear, and Appellants cannot and do not dispute, that Appellants failed to offer any evidence to show any lack of ordinary care by First Citizens.

Appellants' reliance on Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 260 S.E.2d 708 (1979) and Skinner v. Skinner, 257 S.C. 544, 186 S.E.2d 523 (1972) is

also misplaced for at least the reason that the Circuit Court did not "grant relief beyond the limits or scope of such notice." (Appellants' Brief, p. 15). First Citizens' Notice of Motion and Motion for Summary Judgment, filed May 27, 2009, and its memorandum in support of its motion, filed March 10, 2010, clearly state the grounds for summary judgment on all claims of Plaintiffs, including Appellants' failure to comply with S.C. Code Ann. § 36-4-406 (R. pp. 48-49, p. 66). Assuming that § 36-4-406(3) would act to preclude First Citizens from prevailing under § 36-4-406(1) and (2), Appellants could have, and should have, brought forth any evidence that would fall under §36-4-406(3), as the burden is clearly on them to establish that lack of ordinary care. (See S.C. CODE ANN. §36-4-406, Official Cmt. 4). However, they have not done so, and cannot do so.

The Circuit Court has now twice recognized this in its orders, and that is why it properly determined First Citizens was entitled to summary judgment on Appellants' claims.

B. Appellants' argument that the Grant of Summary Judgment was premature in light of the fact that the Case had recently been restored to the general docket is also without merit.

Appellants make the argument that, because this case was dismissed pursuant to Rule 40(j) in June, 2009 and restored as a newly filed action in December 2009, that they "should have been afforded the opportunity to further develop their case." (Appellants Brief, p. 16) However, the simple fact is that this case was first filed in August of 2007 involving checks written in 2004-2005, and despite being dismissed for six months in 2009, Appellants had ample opportunity to develop their case. As the Circuit Court noted:

> The events in question occurred from October 1, 2004 to December 23, 2005, Plaintiffs first wrote to First Citizens to complain of the acts of

> Anna Hoorman on January 3, 2006, the original action was not filed until August 15, 2007, and discovery by all parties occurred through the date this matter was set for trial on June 8, 2009. The case has previously been set on a trial docket, dismissed under Rule 40(j), and restored to the docket. However, Plaintiffs still cannot point to any evidence that they allege creates a material issue of fact to carry their burden that First Citizens did not exercise 'ordinary care.'

(R. p. 19) (emphasis added).[4]

Therefore, despite their assertions, the record shows Appellants have had ample time to develop their case. Appellants reliance on Baughman v. Am. Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), and Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.P.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) is misplaced, as Appellants have indeed had more than "a full and fair opportunity to complete discovery" and this case does not need "further inquiry into the facts ... to clarify the application of the law." The record is clear, the facts are not in dispute; Appellants claims fail under §§ 36-4-406 (1) and (2) because they failed to monitor their statements as the code requires, and they did not provide any evidence under § 36-4-406(3) that First Citizens acted without ordinary care at any time.

[4] Respondent would also direct the Court's attention to the fact that several rounds of discovery have been served and responded to by either side, that the depositions of Kathy Houston, Vice President of First Citizens, Anna Hoorman, and Edward G. McDonnell have been completed and were completed at the time of the Summary Judgment Motion, yet Appellants still offered no proof of lack of ordinary care.

CONCLUSION

For the reasons stated above, the Circuit Court's Order granting summary judgment in favor of First Citizens should be affirmed.

Respectfully Submitted,

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Columbia, South Carolina
September 1, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Michelle Childs, Circuit Court Judge

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Case No. 2009-CP-40-8786R

McDonnell and Associates, PA,
f/k/a McDonnell Law Firm, PA,
f/k/a Edward G. McDonnell, PC, and
Boomerang Title, Inc., ... Appellants,

v.

First Citizens Bank and Trust Company, Inc., ... Respondent.

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned employee of the law offices of Ellis Lawhorne & Sims, P.A., attorneys for Respondent do hereby certify that I have served all counsel in this action with a copy of Respondent's Final Brief via hand-delivery to the following address as indicated below on the 1st day of September, 2011:

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September 1, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

LAW/ANALYSIS 1

I. First Citizens' Arguments Misapply the Summary Judgment Standard 1

II. First Citizens Stipulated This Case Would be Treated as a Newly Filed Action Once Restored and it Should Have Been Treated as Such 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) 5
Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) 1
Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.P.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) 5
Sides v. Greenville Hosp. Sys., 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004) 1

Statutes

S.C. Code Ann. § 36-4-406 ..... 1, 2, 3

Rules

Rule 7, SCRCP 3
Rule 40, SCRCP 4, 5
Rule 56, SCRCP 3, 4
Rule 71, SCRCP 3

Treatises

Black's Law Dictionary 710 (7th ed. 1999) 2, 3

LAW/ANALYSIS

I. First Citizens' Arguments Misapply the Summary Judgment Standard

First Citizens devotes a significant portion of its brief to discussing the divided burden of proof applicable to S.C. Code Ann. § 36-4-406.[1] However, the pivotal issue in this appeal is not whether the customer bears the burden of proving the bank's failure to exercise ordinary care under § 36-4-406 (3). Appellants acknowledge (an always have acknowledged) the burden rests on the customer to establish the bank did not exercise ordinary care in paying the items. (R. p. 350, lines 16-18; p. 353, lines 1-7). Rather, the dispositive issue is whether Appellants were required to come forward with evidence to meet this burden in response to First Citizens' motion for summary judgment.

It is well-established law that a party may move for summary judgment on an issue on which it will not bear the burden of proof at trial. In such a case, the moving party may carry its initial burden by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case. Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). Only if the moving party carries this initial burden must the non-moving party come forward with facts demonstrating the existence of a genuine issue of material fact for trial. Id.; see also Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004) (explaining that because the defendants moved for summary judgment on the absence of evidence to support the plaintiff's case, the "burden then shifted" to the plaintiffs to prove a genuine issue of material fact existed).

Accordingly, First Citizens, as the moving party, bears the initial burden of demonstrating to the trial court that there is an absence of evidence concerning whether the bank

[1] The pre-2008 version of the UCC is applicable to this case and references are to that version of the UCC. (See R. pp. 275-80).

failed to exercise ordinary care. First Citizens did not include the absence of such evidence as a ground upon which it sought summary judgment. Instead, the motion for summary judgment was based solely on §§ 36-4-406(1), (2), and (4), on which First Citizens bears the burden of proof:

> [t]here is no genuine issue of material fact in this case because Plaintiffs failed to report unauthorized activity on the accounts within one year as required by South Carolina Code § 36-4-406 [subsection 4], because the Plaintiffs' failure to exercise ordinary care, specifically including but not limited to the failing to review the periodic statements provided by First Citizens, precludes them from asserting any claims against First Citizens under South Carolina law [subsection 1], and further because Plaintiffs' claims are indisputably barred by the same wrongdoer provisions of South Carolina Code § 36-4-406(d)(2) [subsection 2].

(R. pp. 48-49).

Interestingly, no where in its brief does First Citizens attempt to demonstrate it included the absence of evidence to prove § 36-4-406(3) as a basis for its motion for summary judgment. In fact, First Citizens states in its brief that it "**first** pointed [] out" in its **Memorandum in Support of its Motion for Summary Judgment**, filed the day of the hearing, that First Citizens acted in good faith and used ordinary care in paying the items. (Resp. Br. p.12) (quoting Memo. In Support of Motion for Summary Judgment, p.16) (emphasis added).

First Citizens now attempts to justify the grant of summary judgment in its favor by arguing it moved for summary judgment on "Plaintiffs' claims." (R. pp. 48-49). Again, this tortured construction misses the mark. A "claim" is "the aggregate of operative facts giving rise to a right enforceable by a court." Black's Law Dictionary 710 (7th ed. 1999). Appellants alleged three (3) claims for breach of contract stemming from First Citizens payment of items that were not properly payable under the UCC, one claim for each of Appellants' First Citizens' accounts from which the unauthorized checks were drawn. (R. pp. 36-39). First Citizens' failure to exercise ordinary care in paying the items pursuant to § 36-4-406(3) is not a "claim."

Accordingly, First Citizens' motion clearly sought summary judgment on all three of the breach of contract claims alleged in the Amended Complaint, not just one or two of the claims.

However, moving for summary judgment on each "claim" is not akin to stating the ground on which the party believes it is entitled to summary judgment. There exist numerous reasons why a party may seek summary judgment on a breach of contract claim brought pursuant to the UCC. Simply stating summary judgment is sought on all "claims" does not obviate the need to include a brief description, i.e. the grounds or legal basis, **why** the party is entitled to the relief sought. See Rule 7(b)(1), SCRCP (stating "[a]n application to the court for an order shall be by motion which . . . shall **state with particularity the grounds** therefor") (emphasis added); Black's Law Dictionary 710 (7th ed. 1999) (defining "ground" as "[t]he reason or point that something (as a legal claim or argument) relies on for validity").

It appears this necessity was not entirely lost on First Citizens at the time it filed its motion for summary judgment. As discussed and quoted previously, First Citizens' motion enumerated three very specific reasons it believed entitled it to summary judgment. In fact, First Citizens introduces the bases for its summary judgment motion by stating it moves "for an Order pursuant to Rule 56, SCRCP granting First Citizens summary judgment on the Plaintiffs' claims **on the grounds** . . ." and then continues on to briefly describe these grounds, which are derived from §§ 36-4-406(1), (2), and (4). (R. p. 48). (emphasis added). No where in its motion does First Citizens mention § 36-4-406(3) or state Appellants' failure to adduce evidence demonstrating First Citizens lack of ordinary care is a ground for its motion.

First Citizens' reasoning and that adopted by the Circuit Court concerning whether moving for summary judgment on Appellants' "claims" suffices as notice of a party's grounds for summary judgment totally eviscerates and renders worthless Rules 56 and 71, SCRCP. If

First Citizens' logic is taken to its natural conclusion, all that is required when moving for summary judgment is a single sentence stating "no genuine issue of material fact exists as to all the plaintiff's claims." Such an interpretation places the non-moving party in the impossible position of anticipating every possible reason why the moving party might believe (whether reasonably or unreasonably) that it is entitled to summary judgment on the non-moving party's claims. This is simply not permitted or contemplated by our rules of court.

First Citizens also attempts to distinguish the cases cited by Appellants in support of the proposition that it is improper for the Circuit Court to rule on or grant relief based on an issue not raised in a party's motion. Although these cases have some factual differences from the case at hand, they all generally stand for this proposition. These factual differences do not undercut the general applicability of the cited cases.

In short, Appellants did not come forward with evidence demonstrating a genuine issue of material fact exists regarding First Citizens' failure to exercise ordinary care in response to the Motion for Summary Judgment because First Citizens did not shift the burden to Appellants to do so under Rule 56. Had First Citizens simply stated in its motion that it was entitled to summary judgment because of an absence of such evidence, Appellants would have presented a scintilla or more of evidence to defeat the motion. Simply put, Appellants did not present such evidence because it was not and should not have been required of them in response to First Citizens' motion. Therefore, the Circuit Court's ruling granting summary judgment in favor of First Citizens is in error and must be reversed.

II. First Citizens Stipulated This Case Would be Treated as a Newly Filed Action Once Restored and it Should Have Been Treated as Such

Pursuant to Rule 40(j), SCRCP, the parties agreed to remove this case from the trial docket in June 2009. (R. pp. 26-27). In the stipulation filed with the Court and executed by First

Citizens' counsel, First Citizens agreed the case would be restored to the General Docket and would proceed from there as a newly filed action. In addition, the case was given a new, 2009 civil action number when it was restored. The hearing on First Citizens' motion for summary judgment was held only three (3) months after the case was restored.

First Citizens contends the only relevant time period with regard to the propriety of summary judgment is the length of time the action was pending prior to its removal from the trial docket. This position is in direct conflict with First Citizens' own stipulation that the case would proceed as a newly filed action after restoration. First Citizens did not need to consent to remove the case from the trial docket, but could have insisted on trial in June 2009. It did not do so, but rather jointly agreed with Appellants to strike the case from the trial docket. First Citizens also could have insisted that its consent to a Rule 40(j) dismissal be accompanied with a stipulation that the case return to the trial docket when restored or that it be treated as pending since 2007. Again, First Citizens did not do so.

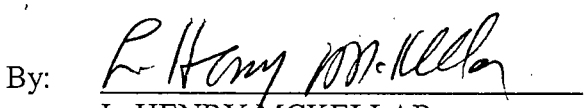
This case was a newly filed action with a new civil action number at the time of the summary judgment hearing. Under such circumstances, summary judgment was premature and Appellants should have been permitted to continue to develop their case as necessary. Cf. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery"); Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.P.A., 320 S.C. 470, 465 S.E.2d 765, 771 (Ct. App. 1995) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court reverse the decision of the Circuit Court granting summary judgment in favor of First Citizens.

Respectfully submitted,

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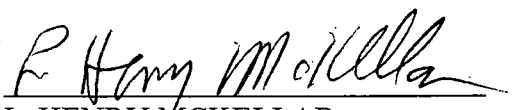
The undersigned certifies that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[Signature Page to Follow]

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PROOF OF SERVICE

I hereby certify that I served Final Reply Brief of Appellants upon Respondent First Citizens Bank and Trust Company, Inc., by placing a copy in the United States mail, postage prepaid, to counsel of record, John T. Lay, Esquire, Wesley D. Few, Esquire and Jake S. Barker, Esquire, Ellis Lawhorne & Sims, PA, P.O. Box 2285, Columbia, SC 29202, on September 1, 2011.

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