THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2010-CP-32-00442
Appellate Case No. 2014-000845

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

v.

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

Of Whom, RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank are ..... Respondents.

Respondents' Return to Petitioners' Petition for a Writ of Certiorari

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Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Respondents RBC Centura Bank and PNC Bank[1], as successor in interest of RBC Centura Bank (hereinafter "RBC"), file this Return to Petitioners' Petition for a Writ of Certiorari as to the unpublished opinion in this matter, *Carew v. RBC Centura, et al.*, Op. No. 2014-UP-069 (S.C. Ct. App. filed February 19, 2014) (Shearouse Adv. Sh. No. 7). This matter does not warrant certiorari review by this Court. RBC requests that this Court deny the petition for the reasons set forth herein.

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[1] PNC Bank, National Association is now the successor by merger to Respondent RBC Bank. This return refers to Respondents in the same manner presented in this caption and to the Court of Appeals to maintain consistency and eliminate confusion.

Rule 242(b) of the South Carolina Appellate Court Rules controls review of certiorari and provides the traditional governing considerations to be applied by this Court. None of the factors exist in this matter. First, this matter does not involve any novel issue of law. Rule 242(b)(1), SCACR. To the contrary, this matter involves nothing more than the application of well-settled and long-standing precedent of this Court, which holds that construction loan agreements, such as the one at issue in this matter, do not and should not impose any duty on the lender, such as RBC, to ensure there are no defects in the construction of the property. The Court of Appeals properly applied that precedent to affirm the circuit court's grant of summary judgment to RBC on each of the Carews' claims. The Court of Appeals rendered that decision without dissent. Rule 242(b)(2), SCACR. The Court of Appeals' decision also adheres to this Court's well-settled and long-standing precedent. Rule 242(b)(3), SCACR. Therefore, the traditional factors weigh heavily against a grant of certiorari, and this Court should deny the petition.

Brief Factual Background

The Carews purchased property located at 34 Edens Point Road in Lexington County on January 23, 2008. {Amended Complaint, R. 25-44, App. p. ___}. The Carews thereafter entered into a contract with Hall Builders on January 30, 2008. {*Id.*}. That contract called for Hall Builders to build the Carews a home on the property. {*Id.*}.

The Carews entered into a construction loan agreement ("the Construction Loan Agreement") with RBC. {Construction Loan Agreement dated February 29, 2008, R. 527-37, App. p. ___}. Under the terms of the Construction Loan Agreement, RBC agreed to provide a loan to the Carews, and the Carews would use the proceeds of the loan to purchase and build a house on the Lexington County property. {*Id.*, R. ___, App. p. ___}. The Carews admitted

they signed and initialed each page of the Loan Agreement. {The Carews' Responses to Appraiser's First Requests for Admission, R. ___ App. p. ___; Transcript of J. Carew Depo. p. 79, line 8 - p. 80, line 3, R. 412-13, App. p.___}.

The Construction Loan Agreement set forth the contract terms in an eleven-page agreement and included, among other things, the duties and responsibilities of RBC as the construction lender.[2] The Construction Loan Agreement unambiguously established that RBC owed no duty to the Carews to inspect the property:

> **[RBC] will not be under any obligation to make inspections and [RBC] will not be under any obligation to instruct the Construction Monitor to conduct inspections. All inspections made by you [RBC] and all inspections made by the Construction Monitor will be for [RBC's] sole and exclusive benefit and they may not be relied upon in whole or in part by [the Carews] or any other person.**

{Construction Loan Agreement § 7.2.2, R. 529, App. p. ____ (emphasis in original)}.

Section 8.4 of the Construction Loan Agreement further provided that:

> **[The Carews] agree that all inspections conducted by [RBC] or the Construction Monitor are for [RBC's] sole and exclusive benefit, and [the Carews] may not, nor may any other person, rely upon such inspections and [the Carews] am not nor is any other person a third party beneficiary of such inspections. [The Carews] agree, for myself and for all other persons other than you, to waive and [the Carews] do hereby waive any present or future rights, if any, [the Carews] or any of such other persons may have relating to or arising out of inspections made by [RBC] or the Construction Monitor - it being understood and agreed that such waiver is material to [RBC] and a material inducement to [RBC] entering into this Agreement with [the Carews] and making the Loan to [the Carews] on the terms and conditions set forth herein and in the other Loan Documents.**

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[2] The references to "you" or "your" in the Loan Agreement referred to RBC, and the references to "I," "me" or "my" referred to the Carews.

{Construction Loan Agreement § 8.4, R. 531, App. p. ____ (emphasis in original)}.

RBC retained an appraiser to (1) perform a "subject-to" completion appraisal and (2) conduct periodic appraisal inspections during construction for RBC. {Construction Loan Agreement, R. 534, App. p. ___}. The Carews agreed that the appraiser would "be an independent contractor, and [the Carews] will pay the costs and expenses associated with the Construction Monitor." {*Id.*}.

In February 2009, Hall Builders encountered financial troubles. {Amended Complaint, R. 29, App. p. ___}. Hall Builders' financial problems were so severe that, on February 11, 2009, the principal of Hall Builders advised the Carews that it would not be able to complete the construction of the home. {*Id.*}. Hall Builders released the Carews from the construction contract that same day. {*Id.*}.

Because of the inability of Hall Builders to complete the construction, several complications arose in the construction of the home. Those complications caused the Carews to use their own funds to bring the level of completion up to the level of funds disbursed as required by the Construction Loan Agreement. {Construction Loan Agreement, R. 527-37, App. p. ___}. Thereafter, the Carews brought suit against RBC and alleged that RBC breached a contract with them and acted negligently in servicing the loan while the home was being constructed. {Amended Complaint, R. 25-44, App. p. ___}.

RBC moved for summary judgment on each of the Carews' claims because the Construction Loan Agreement did not create any duty owed to the Carews, and no common law duty existed pursuant to this Court's established authority. {Motion for Summary Judgment dated January 6, 2012, R. 59-60, App. p. ___; Memorandum in Support, R. 61-130, App. ___}. The circuit court agreed and granted RBC's motion as to each of the Carews'

claims. The circuit court held that RBC was entitled to judgment as a matter of law on the Carews' claims for negligence because RBC did not owe the Carews any duty and on breach of contract claims because the Construction Loan Agreement also did not create any duty owed to the Carews. {Order Granting RBC's Motion for Summary Judgment dated May 17, 2012, R. 13-24, App. p. ___}. The Court of Appeals affirmed in a unanimous unpublished opinion. *Carew v. RBC Centura, et al.*, Op. No. 2014-UP-069 (S.C. Ct. App. filed February 19, 2014) (Shearouse Adv. Sh. No. 7).

Argument

I. The Court of Appeals properly applied this Court's well-settled and long-standing precedent to affirm the circuit court's grant of summary judgment.

This Court has unequivocally held that construction loan agreements and performance by the lender under those agreements do not create or impose any duty on the lender to the borrower. The Court of Appeals and circuit court properly applied that well-settled and long-standing precedent in granting RBC's motion for summary judgment on the Carews' claims. The Carews do not seek to alter this long-standing precedent. Rather, the Carews are merely unhappy with the application of these rules to their meritless claims. Thus, no reason exists to warrant review by this Court. The petition for certiorari should be denied.

This Court has addressed the Carews' claims in an analogous context and held:

> The builder of a house [i.e. the Carews] is entitled to make his own contract with the construction company. In like fashion, a lending institution [i.e RBC] is entitled to make its own contract with one who is building a house. Traditionally, lenders, in making a construction loan, make periodic inspections to assure that the construction loan advancements are being applied appropriately. **This is fundamentally for the protection of the lending institution and does not impose upon the lending institution a duty to see that [the borrower] is getting a job free of defects.** Both the lender and the borrower have a

> common interest in seeing that the construction company builds a building free of defects but, absent a contract, the builder has no common law duty to protect the lender and the lender has no common law [duty] to protect the builder.

Roundtree Villas Association, Inc. v. 4701 Kings Corp., 282 S.C. 415, 422, 321 S.E.2d 46, 50 (1984) (emphasis and bracket language added). Thus, this Court definitively set the precedent in cases such as these: construction loan agreements, such as the one at issue in this matter, do not impose a duty on the lender, such as RBC, to ensure there are no defects in the construction. Therefore, the circuit court correctly applied this precedent to find that RBC owed no duty to the Carews regarding progress inspections during construction. The Court of Appeals properly affirmed. Certiorari is not warranted.

II. RBC performed solely under the terms of the Construction Loan Agreement agreed to by the Carews.

In their petition for certiorari, the Carews claim RBC acted "as more than a mere lender" since it was aware of defects related to the home. *See* Petition p. 2. This argument fails for two reasons. First, the Carews failed to preserve this argument for appellate review. Second, the trial court properly found that RBC did not breach any contractual provision. The Court of Appeals correctly found the issue unpreserved and affirmed the circuit court's grant of summary judgment to RBC. Accordingly, this Court should deny the petition.

The Court of Appeals properly found the Carews' argument not preserved for appellate review. The first time the Carews asserted this argument was in their appellate brief to the Court of Appeals. *Compare* Carews Opposition to RBC's motion for summary judgment *with* Appellants' Initial Brief p. 11. Here, the Carews did not raise this issue to the circuit court in their opposition to RBC's motion for summary judgment or at argument on the motion. The circuit court also did not rule on this argument. Thus, the argument was not preserved for

appellate review. *See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that long-established preservation require that the losing party must both present his arguments to the lower court ***and*** obtain a ruling before an appellate court will review those arguments).

In the petition, the Carews claim they preserved the issue for appellate review because they "provided evidence that RBC Bank acted as more than a mere lender" to the circuit court. *See* Petition p. 2. This misapprehends this Court's established preservation requirements as well as the burden on the Carews as appellants. Our issue preservation rules require the appellant to raise the specific ***argument*** to the circuit court. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (holding that the first step in preserving an argument for appellate review is to actually raise it to the trial court). This requirement enables the circuit court to rule on the argument presented. *Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (holding that imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; *I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("The requirement also serves as a keen incentive for a party to prepare a case thoroughly.").

The appellant cannot introduce evidence, ignore that evidence, and then craft an argument on appeal not raised to the circuit court. Instead, the appellant must raise the specific argument related to that evidence to the circuit court. *Id.* (recognizing that rule is designed to "prevent[] a party from keeping an ace card up his sleeve-intentionally or by chance-in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"). The Carews failed to meet this fundamental preservation requirement.

Even if the Carews had presented this specific argument to the circuit court, the Carews still failed to preserve their argument for review by the Court of Appeals or this Court. The circuit court did not rule on this "more than mere lender" argument in the order granting RBC's motion for summary judgment. {Order Granting RBC's Motion for Summary Judgment dated May 17, 2012, R. 13-24, App. p. ___}. Our preservation rules require the circuit court to rule on the argument in order to preserve the argument for appellate review. *See, e.g., Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000) (holding the circuit court must also rule upon the issue for it to be preserved for review). Thus, the Court of Appeals correctly held the issue was not preserved for review. Accordingly, this Court should deny certiorari.

Second, the Carews' argument lacks merit even if properly preserved. The circuit court properly found RBC adhered to the terms of the Construction Loan Agreement. The Carews alleged that RBC breached Section 6.2 of the Construction Loan Agreement, which governs the completion of improvements to the property. That provision states that the improvements "must be completed" and that RBC Bank is entitled to receive "final lien waivers/releases from the General Contractor." This provision does not place any obligations on RBC and, therefore, cannot support a claim for breach of contract.

Moreover, the circuit court properly held that Sections 7.2.2 and 8.4 placed no obligations on RBC and that RBC adhered to those provisions. Section 8.4 of the Construction Loan Agreement states, in pertinent part, as follows:

> I [the Carews] agree that your [RBC's] failure or the [Appraiser's] failure (1) to discover defects in the Improvements, including errors or omissions in design, workmanship, materials, supplies, fixtures, parts, products or equipment due to non-compliance with the Construction Documents, or due to defects in

> any of the foregoing, will not make either you or the Construction Monitor liable to [the Carews] . . . .

{Construction Loan Agreement, R. 531, App. p. ___}. The plain and unambiguous language of this provision established that, by signing the Construction Loan Agreement, the Carews expressly agreed to release RBC from any liability related to construction defects or defects in the construction progress inspections.[3] The Construction Loan Agreement also established that, although RBC could consider the inspection reports in determining the disbursement process, neither the Carews nor any other person had the right to rely on those reports:

> **[RBC] will not be under any obligation to make inspections and you will not be under any obligation to instruct the Construction Monitor to conduct inspections. All inspections made by [RBC] and all inspections made by the Construction Monitor will be for [RBC's] sole and exclusive benefit and they may not be relied upon in whole or in part by me [Carews] or any other person.**

{Construction Loan Agreement, R. 529, App. p. ____ (emphasis in original)}.

In addition, the only evidence in the record regarding the way disbursements were made undercuts the Carews' position. The undisputed evidence presented to the trial court established that RBC released the funds for disbursement directly to the Carews, who in turn chose what to pay their builder, as was the case for each construction disbursement or draw in this case. {Deposition of Kathy Robertson; R. 287-88; 291-93}. The evidence proved that RBC made loan disbursements based upon the Appraiser's progress inspection reports. Despite the Carews' allegation that disbursements were improperly made due to defects with the construction, the release provision in the Construction Loan Agreement barred any

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[3] The Carews' admission that Mr. Carew failed to read the Loan Agreement does not affect the enforceability of the release provision. See Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("a person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it").

recovery from RBC because RBC disbursed the funds as a result of the reports. Thus, the circuit court properly rejected the Carews' breach of contract claims as a matter of law, and the Court of Appeals correctly affirmed.

III. The Carews agreed in the Construction Loan Agreement to release RBC from any liability related to construction defects, defects in the construction progress inspection, or disbursements of loan proceeds.

In the petition, the Carews claim that the Court of Appeals overlooked evidence of mistakes by RBC under the Construction Loan Agreement. *See* Petition p. 2-3, Argument II. Specifically, the Carews claim that the evidence presented below "demonstrates a breach of RBC Bank's implied covenant of good faith . . . under the construction loan agreement." *Id.* at 3. This argument is without merit, and this Court should deny the petition.

First, the Carews did not seek certiorari on the Court of Appeals' holding that "sections 7.2.2 and 8.4 of the agreement placed no obligations on RBC." *Carew*, Op. No. 2014-UP-069 at p. 2. Thus, the Court of Appeals' determination that the Construction Loan Agreement did not impose any obligations on RBC is the law of the case. *Ables v. Gladden*, 378 S.C. 558, 569, 664 S.E.2d 442, 448 (2008) (holding that an unappealed order, right or wrong, is the law of the case); *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869, 871 (2000). Because RBC owed no duties under the Construction Loan Agreement, the Carews' arguments regarding the alleged evidence of RBC's mistakes in disbursing the loan proceeds cannot be used to impose liability against RBC.

Second, the unambiguous language of the Construction Loan Agreement established that although RBC could consider the inspection reports in determining the disbursement process, the reports could not be used to impose any duty on RBC. {Construction Loan Agreement § 8.4, R. 531, App. p. ___}. Moreover, the Carews contractually agreed that

RBC could rely on the inspection reports in making disbursements of the loan proceeds. {*Id.*}. In sum, the plain and unambiguous language of this provision establishes that, by signing the Construction Loan Agreement, the Carews expressly agreed to release RBC from any liability related to construction defects, defects in the construction progress inspection, and disbursements of loan proceeds.

Moreover, the only evidence in the record regarding the way disbursements were made undercuts the Carews' position. The undisputed evidence presented to the trial court established that RBC released the funds for disbursement directly to the Carews, who in turn chose what to pay their builder, as was the case for each construction disbursement or draw in this case. {Deposition of Kathy Robertson; R. 287-88; 291-93}. Thus, the Carews' argument fails, and this Court should deny the petition.

IV. Long-standing precedent from this Court establishes that RBC did not owe the Carews any duty; therefore, the Carews' negligence claims fail as a matter of law.

In their petition, the Carews claim the Court of Appeals erred in affirming the grant of summary judgment to RBC on their negligence claims because they presented "evidence" of negligent disbursements. *See* Petition p. 3, Argument III. The Carews' evidence argument misapprehends the issues before the Court of Appeals. Alleged evidence of a breach is immaterial if no duty is owed. *Rogers v. South Carolina Dept. of Parole & Cmty. Corr.*, 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995) (holding that before a negligence cause of action can be pursued, a plaintiff must establish the essential element that there was a duty owed to him by the defendant); *Wyatt v. Fowler*, 326 S.C. 97, 101, 484 S.E.2d 590, 592 (1997). Notably, if such a duty is absent, then "there can be no actionable negligence." *Rogers*, 320 S.C. at 255, 464 S.E.2d at 332.

The Court of Appeals held that Appellants' negligence claims failed ***as a matter of law*** because RBC owed ***no duty of care*** under well-settled precedent. *Carew*, Op. No. 2014-UP-069 at p. 1. Because the Carews failed to establish any duty owed by RBC, the claims fail as a matter of law. *See Hannson v. Scalise Builders of S.C.*, 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007) (stating summary judgment is warranted when the non-moving party "fails to . . . establish the existence of an element essential to the party's case"); *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006) (providing that "[i]n a negligence action, a plaintiff must show . . . the defendant owes a duty of care to the plaintiff"); *Roundtree Villas*, 282 S.C. at 422, 321 S.E.2d at 50 (holding periodic inspections during construction are "fundamentally for the protection of the lending institution and do [] not impose upon the lending institution a duty to see that the builder is getting a job free of defects"). Thus, the Carews' argument in their petition for certiorari is immaterial.

The Court of Appeals properly applied this Court's established precedent to affirm the circuit court's finding that RBC did not owe any duty to the Carews, and that the lack of duty was fatal to the Carews' negligence claims. Therefore, this Court should deny the petition.

V. The Carews' damages argument is not properly before this Court, and even if it were, the argument lacks merit.

In their petition, the Carews claim that they suffered resulting damages sufficient to overcome RBC's motion for summary judgment. *See* Petition p. 3-4, Argument IV. This argument lacks merit for multiple reasons.

First, the Carews failed to preserve this argument for appellate review. The circuit court did not rule on this argument (if it even were advanced). Thus, it is not preserved for

review by this Court. *See, e.g.*, *Holy Loch*, 340 S.C. at ___ 531 S.E.2d at ___ (holding the circuit court must also rule upon the issue for it to be preserved for review).

Second, this argument misapprehends the Court of Appeals' ruling. On appeal, the Carews claimed damages by claiming RBC paid for the same construction draws twice. *See* Brief of Appellant p. 9-10. The Court of Appeals rejected this argument, holding that the only evidence in the record was that RBC reimbursed the Carews for this alleged double disbursement, and, therefore, no damages were suffered. *Carew*, Op. No. 2014-UP-069 at p. 1.

The Court of Appeals' ruling on this issue was correct. First, the evidence proved that the Carews—not RBC—paid their builder twice for the same work. {Deposition of Kathy Robertson, R. 287-88, 291-93, App. p. ___}. Second, the only evidence before the trial court was that RBC restored the funds the Carews paid the second time so the Carews would be able to draw against the full amount for future disbursements. {*Id.*}. As a result, the Carews suffered no damages.

Lastly, the Carews' argument appears to be that because they claimed damages, summary judgment was improper. This position is manifestly without merit. In order to prevail in their negligence claims, the Carews were required to prove ***all*** elements of the claim: "(1) defendant owed a duty of care to the plaintiff (2) defendant breached the duty by a negligent act or omission (3) defendant's breach was the actual and proximate cause of the plaintiff's injury and (4) the plaintiff suffered injury or damages." *Jackson v. Swordfish Investments, L.L.C.*, 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005); *Dorrell v. South Carolina Dept. of Trans.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). If a plaintiff fails to establish duty, then "there can be no actionable negligence." *Rogers*, 320 S.C. at 255, 464 S.E.2d at

332. Here, the Carews cannot establish a duty owed by RBC. Accordingly, their damages argument fails.

Conclusion

Based on the foregoing, the petition for a writ of certiorari should be denied.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for RBC Centura Bank, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **RESPONDENTS' RETURN TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI**

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Jennifer B. Lee

May 20, 2014