

THE STATE OF SOUTH CAROLINA  
In The Supreme Court  
No. 2012-205647

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APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

**S.C. Supreme Court**

Roger M. Young, Circuit Court Judge

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Cases 2009-CP-10-07515, 2009-CP-10-07517,  
2009-CP-10-07518 and 2010-CP-10-09959

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*2009-CP-10-07515*

James J. Kerr, Crayton Walters, and J.T. Main, LLC, ..... Appellants,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking  
& Trust Company of SC, a/k/a BB&T, and James Edahl, ..... Respondents.

*2009-CP-10-07517*

Ron Konersmann, ..... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking  
& Trust Company of SC, a/k/a BB&T, and James Edahl, ..... Respondents.

*2009-CP-10-07518*

John Voytko, ..... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking  
& Trust Company of SC, a/k/a BB&T, and James Edahl, ..... Respondents.

*2010-CP-10-09959*

Patricia Konersmann, ..... Appellant,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking  
& Trust Company of SC, a/k/a BB&T, and James Edahl, ..... Respondents.

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APPELLANTS' RETURN TO RESPONDENTS' MOTION FOR COSTS

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Appellants file the following Return to Respondents' Motion for Costs in this matter:

### INTRODUCTION

On April 9, 2014, the Supreme Court affirmed the trial court's granting of Respondents' Motions to Dismiss in these cases. In doing so, the Court disagreed with the trial court and Respondents that Appellants' claims were barred by the South Carolina lending statute of frauds, S.C. Code 37-10-107. (*See* S. Ct. Opinion, at p.5 n.5 ("[S]ection 37-10-107 only applies to suits between lenders and borrowers, such as that between Skywaves and BB&T, an[d] it therefore is irrelevant here.")). However, the Court affirmed on the grounds that the Defendants did not owe a duty of care to Appellants.

Oral argument in these consolidated appeals was scheduled for November 6, 2013. On September 19, 2013, Respondent James Edahl was deposed in a related lawsuit. In that deposition, Mr. Edahl — for the very first time — contradicted the positions Respondents have taken throughout this case and *agreed* with Appellants concerning the terms of the capitalization the parties agreed upon. Appellants believed that, had this testimony been presented to the trial judge, he would not have granted Respondents' Motions to Dismiss. As a result, Appellants sought, in the interest of justice, to either get the case remanded back to state court for consideration of those facts or to supplement the record before this Court.

In this regard, on or about October 22, 2013, some of the Appellants filed a Motion to Remand or, in the Alternative, to Supplement the Record on Appeal. Similarly, on or about October 30, 2013, other of the Appellants filed a Motion to Amend

or, in the Alternative to Remand, asking that this Court amend the pleadings to reflect the testimony revealed in Mr. Edahl's deposition. Both of these motions shall be referred to herein as "Appellants' Motions." Appellants' Motions recognized that they sought relief that was unusual because of the extraordinary circumstances presented in this case, where one of the Respondents had contradicted under oath the positions Respondents have taken in these cases. Both of Appellants' Motions were well-supported by South Carolina law. The Supreme Court denied both of Appellants' Motions.

On May 7, 2014, Respondents filed the instant Motion for Costs seeking: (a) the attorneys' fees and costs permitted by the Rules; *and* (b) attorneys' fees incurred in responding to the Appellants' motions discussed above. For the reasons that follow, the Court should deny Respondents' Motion for Costs in Part.

#### **DISCUSSION**

As an initial matter, Appellants do not dispute Respondents' entitlement to the first two items set forth in their Itemized Statement of Costs, totaling \$1,061.30.

However, Appellants strongly object to Respondents' claim that they are entitled to \$7,487.65 for the claimed "Portion of Attorneys' Fee incurred to defend against frivolous motion." (*See* Respondents' Itemized Statement of Costs). South Carolina Rule of Appellate Practice 269 provides that "[w]here a[] . . . motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may . . . impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."

Here, it is apparent that Appellants' Motions were not frivolous or interposed solely for delay. Both of Appellants' Motions were supported by citations to South

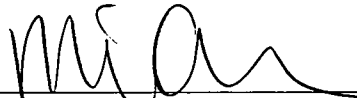
Carolina law. Appellants' Motions were well-reasoned and sought relief that was within this Court's discretion to award. Most importantly, Appellants' Motions were premised upon, and necessitated by, Respondent Mr. Edahl's admission in his deposition that he had been taking untruthful positions in this litigation. Mr. Edahl's testimony was directly contradictory to what Respondents had argued in the trial court. Respondents cannot seriously contend that Appellants' Motions were frivolous. While the underlying Appeal stemmed from Motions to Dismiss, Mr. Edahl's admissions in his deposition altered the entire landscape of these cases. It was entirely proper for Appellants to seek to bring Mr. Edahl's deposition to the attention of this Court.

Moreover, Respondents cannot show that Appellants' Motions were intended to delay. Although they were filed shortly before oral argument in this Court, this was because Mr. Edahl had only been deposed shortly before their filing. Appellants, upon receipt of the transcript of that deposition, diligently proceeded to analyze, prepare and file Appellants' Motions. Appellants did not delay the deposition of Mr. Edahl; to the contrary, the scheduling of Mr. Edahl's deposition occurred so late, to a great extent, to accommodate Respondents' counsel. Simply put, Respondents cannot show that Appellants' Motions were interposed for the sole purpose of delay, so as to support the award of attorneys' fees as a sanction against Appellants.

**CONCLUSION**

For the foregoing reasons, this Court should deny, in part, Respondents' Motion for Costs as set forth above.

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Date: May 19, 2014  
Charleston, South Carolina

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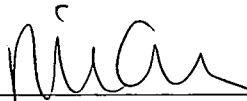
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PROOF OF SERVICE

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I certify that I have served the Appellants' Return to Respondents' Motion for Cost on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 19, 2014, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402.

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