THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No: 2011-CP-26-1718
Court Of Appeals Number:

Waterfall Investors 2, LLC and Raymond E. Cleary, III .... Appellants,

v.

Bank of North Carolina, Successor In Interest to Beach First National Bank.........Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the Trial Court erred in not granting the Appellants a new trial based upon the improper award by the jury, the improper use of excluded evidence, and the improper testimony of Respondent's expert?

Whether the Trial Court erred in not granting a directed verdict and later denying Appellants motion for judgment notwithstanding the verdict on Respondents improper claim of comparative negligence?

STATEMENT OF THE CASE

Bank of North Carolina, successor in interest to Beach First National Bank, (the "Respondent" or the "Bank"), brought this action foreclosure on a mortgage, assignment of rents, appointment of a receiver, and collection under a guaranty against Waterfall Investors 2, LLC ("Waterfall") and Raymond E. Cleary, III ("Dr. Cleary", collectively "Appellants"), later amended on February 23, 2011. *See Amended Lis Pendens and Complaint, p. 1.* Appellants filed and served on Respondent their Answer and Counterclaim on March 30, 2011. *See Answer and Counterclaims, p. 1.* Respondent then filed and served Appellants with its Reply to Appellants Counterclaims on May 6, 2011. *See Reply of Plaintiffs to Counterclaim of Defendant, p. 1.* On June 1, 2011, the Respondent filed and served its amended reply to Appellants counterclaims. *See Amended Reply of Plaintiff to Counterclaims of Defendants, p. 1.* On November 4, 2013, the Respondent filed and served its second amended reply to Appellants counterclaims. *See Second Amended Reply of Plaintiff to Counterclaims of Defendants, p. 1.* A trial was had on November 4th through the 7th 2013. *See Trial Transcript of Trial dated November 4-7, p. 1.* On November 8, 2013, the Circuit Court entered a decision in conformity with the verdict of the Jury reached after 10:00 p.m. on November 7, 2013. *See Jury Verdict, p. 1.* The Appellants received the entered decision on the following Monday, November 11, 2014. Appellants moved the Circuit Court for

a new trial and judgment notwithstanding the Verdict November 19, 2013. *See Motion for New Trial and JNOV, p. 1.* Pursuant to the instructions from the Court filed a Memorandum in support of the motion on November 21, 2014. On December 17, 2013, the Circuit Court heard several post-trial motions including Appellants motion for new trial and JNOV. *See Transcript of Hearing on December 17, 2013, p. 1.* The Circuit Court denied the motions of Appellants. *See Order Denying Appellants' motion for New Trial and JNOV, p.1.* Appellant timely filed a notice of appeal. This appeal was filed on May 16, 2014.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott*, 326 S.C. 89, 92 n. 1, 485 S.E.2d 97, 99 n. 1 (1997). The reviewing court should "view the actions separately for the purpose of determining the appropriate standard of review." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). In reviewing an action at law tried to a jury, the Court's jurisdiction extends only to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence that reasonably supports the jury's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Questions of law are decided with no particular deference to the trial court. *Wiegand v. U.S. Automobile Association*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). In light of this, the court may correct errors of law in both legal and equitable actions. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C.Code Ann. § 14–8–200 (Supp.1998)). Similarly, in determining whether the evidence sustains the

verdict, the appellate court must consider the evidence as a whole. *See McCown v. Muldrow*, 91 S.C. 523, 74 S.E. 386 (1912).

As this appeal involves errors of law, the standard of review is without any particular deference to the trial court. In an appeal of an order granting a new trial pursuant to the thirteenth juror doctrine, the appellant bears the burden of "demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993) (citing *Gray v. Davis*, 247 S.C. 536, 148 S.E.2d 682 (1966)). In appeals from refusals to grant prayers for instructions, it is necessary to consider the main or general charge to the jury by the court and to "weigh the instructions as a whole in order to determine whether they were sufficiently full and were free from error prejudicial to appellant." *Levesque v. Clearwater Mfg. Co.*, 209 S.C. 494, 502, 41 S.E.2d 92, 95 (1947). Finally, in ruling on motions for directed verdict, "the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions whe[n] either the evidence yields more than one inference or its inference is in doubt." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The Appellate Court will reverse the circuit court's rulings on directed verdict motions when there is no evidence to support the rulings or when the rulings are controlled by an error of law. *See Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003) (internal citation omitted).

FACTS

The controversy in this case stems from a representation made by Beach First National

Bank, the predecessor to Bank of North Carolina as to the number of acres of upland included in a parcel of real property located in Horry County, South Carolina (the "Property"). The Appellants, Waterfall and Dr. Cleary, allege that they relied upon the Bank representation of the amount of upland acres included in a faulty real estate appraisal to the Appellants detriment. In this case, the Property consists of a nearly one hundred and sixty acre tract of vacant land located on SC Highway 90 at Mt. Zion Road.

Dr. Cleary has served as a director of several banks. He became a director with Waccamaw State Bank in 1980 and later chairman of the Board for Beach First National Bank ("Beach First" or the "Bank") in 1988. P. 197, 263. Earlier in 1988, Beach First was founded and created in large part by Ms. Huntley at the urging of several of her banking friends and colleagues. Trial Transcript p. 382-383. She had a reputation among her peers for being extremely well experienced in banking matters. Trial Transcript p. 382. At that time, she and her colleagues began selecting directors of the board of the Bank. Trial Transcript p. 383-384. One of the directors selected by Ms. Huntley was Dr. Cleary. Trial Transcript p. 384. At the time, he was an orthodontist in Myrtle Beach and an acquaintance of several of the other Directors through his limited role with Waccamaw State Bank. Trial Transcript p. 384. He was selected as the chairman of the board, where he remained until he stepped down. Trial Transcript p. 387. During his time as a director, Dr. Cleary developed a clear sense that the policies put in place at the banks would provide the shareholders, community, and others the trust that loans would be thoroughly scrutinized before being approved. Trial Transcript p. 266-269.

Dr. Cleary's experience outside of his role as director of a bank was limited to previously investing in a small number of single home residential developments and one single building

commercial lot. Trial Transcript p. 182. Prior to this project and business relationship with the developer, Mr. Crawford, testified that he had no experience with investing in developments of the type in this litigation. Trial Transcript p.186, 409. His experience gained as a director of the bank was limited to participation with loan committees on the approval of real estate loans. Trial Transcript p. 409. All of these loans would have been put together and initially approved by Ms. Huntley. Trial Transcript p. 384. While Dr. Cleary is a member in multiple LLC's, these entities are primarily vehicles for holding assets that are personal in nature and in no way investments or developments. Trial Transcript p.182-184. He is also a member of an LLC which controls his Dental Practice in Myrtle Beach, South Carolina, and another which controls his wife's paralegal practice. Trial Transcript p.184.

During Dr. Cleary's time with Beach First in late 2005, he was approached by Mr. Crawford, a successful developer with Dream Homes Development Group, with several opportunities to purchase property to be developed by Mr. Crawford's company and then later sold for profit. Trial Transcript p. 186, 234, 245. The investors would provide initial funding, and later funds for additional development. Trial Transcript p. 186, 234, 245. During this time, Mr. Crawford approached Dr. Cleary and several other investors, about the Property at question in this litigation with the opportunity for it to be developed. Trial Transcript p. 186-189, 234, 245. Mr. Mellinger, a CPA and one of the initial investors in the development, set up the entities that were to hold and own the properties. Trial Transcript p. 189, 245. This included the Appellant, Waterfall. Trial Transcript p. 189. Dr. Cleary invested in the project through an initial investment of $110,000 in Waterfall. Trial Transcript p. 191. Through initial conversations with Mr. Crawford, Cleary and the other investors were under the understanding that the Property had a

likely realization of 23.36 acres of uplands, with the potential of more through development. Trial Transcript p. 193-194, 234. At the time, there was a preliminary wetlands delineation showing approximately 23 acres of uplands. Trial Transcript p. 250. On January 31, 2006, Waterfall purchased a two-thirds interest in the Property from Potomac Timber Investors 501, Inc. Trial Transcript p. 190.

Later in 2006, Mr. Crawford approached the investors with the opportunity to invest more funds with the understanding that he believed the property may have as much as 80 acres of uplands. Trial Transcript p. 195. Upon being apprised of this offer, Dr. Cleary approached the Bank, specifically Ms. Huntley, in late May or June about the ability to take out financing with this investment in mind. Trial Transcript p. 195-196, 388. At the time, Ms. Huntley was in charge of overseeing the Banks procedures of preparing loans and the accompanying documents to make sure that they were in compliance with federal regulations. Trial Transcript p. 384. As a founder of the Bank, Ms. Huntley garnered a great deal of respect from Dr. Cleary regarding her expertise in this area. Trial Transcript p. 195-196. Dr. Cleary and Ms. Huntley spoke extensively about the investment and the importance of the wetlands. Trial Transcript p. 195-196, 451-455. They both spoke about the need for an appraisal and its value as an independent verification of the value of the property. Trial Transcript p. 195-196, 451-455.

At that time, Dr. Cleary requested a loan in an amount of two (2) million dollars. This would provide what was believed to be enough cash to buy out the other investors, finish the development, and enough for an interest reserve to make payments on the interest accrued on the Note until the property was later sold. Trial Transcript p. 416. While Ms. Huntley states that the land did not pay for the note, she later clarifies that the land did in fact pay for the note through

the interest reserve. Trial Transcript p. 449. Dr. Cleary, as a Director for the Bank, was accustomed to relying on the independent verification of the appraisal as Bankers would not get independent verification outside of the Appraisal. Trial Transcript p. 207-209, 438, 447. The bank did have, and Dr. Cleary was aware of, procedures to verify the documents relied upon in any appraisal that would need to be independently verified. Trial Transcript p. 209. In this case, the Bank did not, however, independently verify or review the documents referred to and relied upon in these appraisals. Trial Transcript p. 209, 439.

On June 14, 2006 an appraisal was done by R. Bruce Owen (the "Previous Appraisal") on the property which resulted in an "as is" value being estimated at four million dollars ($4,000,000) with 66.68 acres of uplands. When this appraisal came back with 66 acres of uplands, which verified what Mr. Crawford was telling Dr. Cleary, Dr. Cleary agreed to buy out the other interests of the investors and use the additional funds for further development. Trial Transcript p. 199. The Bank, similarly, relied upon the information contained in the appraisal. Trial Transcript p. 447. Dr. Cleary relied upon the information expressed by the bank in the appraisal. Trial Transcript p. 196, 201, 259. On June 30, 2006, Waterfall purchased the final one-third interest from Waterfall Investors 1, LLC. Trial Transcript p. 252. The cumulative purchase price was for a stated consideration of $1,909,870.

After additional development by Mr. Crawford, Dr. Cleary was approached to make certain additional investments in the property in light of Mr. Crawford's belief that the property may yield greater than 130 acres of uplands. Trial Transcript p. 201. Dr. Cleary then requested an additional million dollars in financing and an independent appraisal from the Bank and Ms. Huntley. Trial Transcript p. 273, 416. The total amount of the note would be for three (3) million

dollars, the largest portion paying off the previous note, a large portion being held in reserve for interest payments, and the smallest portion going towards additional development costs. Trial Transcript p. 416, 439. In the discussions with Beach First, Waterfall and Dr. Cleary wanted to be as conservative as possible. Trial Transcript p. 197, 206. Specifically, Beach First was informed that any financing would have to be no more than around half of the current value of the Property. Trial Transcript p. 197. Similarly, Beach First represented in its commitment letter of July 30, 2007, that the commitment was contingent upon an appraisal that was satisfactory to Beach First being not less than $4,615,000.00.

On July 27, 2007 Beach First confirmed the employment of the real estate appraisal firm Jayroe Appraisal Company ("Jayroe") to appraise the Property. Jayroe agreed to appraise the Property and provide Beach First with "a limited appraisal with summary report including the information, the methods of analysis used, and the conclusions drawn in the valuation process." In the only conversation between the two, Jayroe contacted Waterfall and Waterfall informed Jayroe that, to his knowledge, no engineering report had been completed. Trial Transcript p. 204. While several engineers were contacted and consulted for purposes of improving the Property, none had created or attempted to create a report to this point. Trial Transcript p. 192.

As a result of receiving this Appraisal, Beach First then represented the value of the Property to Waterfall in the amount of $6,870,000 and represented to Waterfall and Dr. Cleary that there were 121 acres of uplands that could be developed on the property. Trial Transcript p. 213. Beach First provided to Waterfall and Dr. Cleary the first three pages of the Appraisal. Trial Transcript p. 212. In deciding to take out the additional note and mortgage, Dr. Cleary heavily relied upon the representations of the Bank that there were 121 acres of uplands. Trial

Transcript p. 210-212. Dr. Cleary was never informed of the Bank's or Appraisers reliance upon unverified reports in its appraisal of the Property and was never informed that Jayroe had breached its agreement with the Bank in relying upon representations of third parties or in failing to properly comply with the Uniform Standards of Professional Appraisal Practices ("USPAP"). Trial Transcript p. 205, 210-212. In the regular course of the Bank's business it later ordered two appraisals by Jayroe, one in August 2008 and the other in December of 2009. Trial Transcript p. 219-221. Both of these appraisals contained the same improper and unsubstantiated claims relied upon by Dr. Cleary and the Bank as the first Appraisal. Trial Transcript p. 219-221. In his cursory review of the Appraisals, Dr. Cleary assumed the Bank had properly complied with the heightened standards set for it in reviewing appraisals. Trial Transcript p. 269-270.

In late 2008, Dr. Cleary was informed that the Army Corp. of Engineers was going to issue a ruling regarding the use of the Property. Trial Transcript p. 221-222. Through some independent investigation, Dr. Cleary learned that the Army Corp. of Engineers was going to issue a cease and desist order preventing Mr. Crawford from completing the development. Trial Transcript p. 219-220. At that time, Dr. Cleary hired an engineer, Mr. Floyd, whom Dr. Cleary was informed had a relationship with the Army Corp. of Engineers to handle any issues that were being presented. Trial Transcript p. 220. Around this time, Dr. Cleary became informed of the importance of the final delineation that the Army Corps. Of Engineers had to perform. Trial Transcript p. 220, 235. Sometime in early 2010, Dr. Cleary received the delineation from the Army Corp. of Engineers which found that the Property only contained roughly 53 acres of uplands. Trial Transcript p. 222-224. In total, Dr. Cleary invested over $4 million in the Property which would likely be valued at less than $1.8 million due to the delineation. Trial Transcript p.

227-228.

After receiving the delineation, Dr. Cleary began to go through his documents to try and understand how an investment he was told by the Bank would be worth almost $7 million dollars was suddenly worth less than he had invested. Trial Transcript p. 229-230. After some investigation, Dr. Cleary discovered that the appraisals relied upon extremely faulty findings and documents. Trial Transcript p. 229-230. During this time, Dr. Cleary continued to make payments to the Bank and was current through September of 2010. Trial Transcript p. 229. After finally realizing the misstatements of the Bank and being unable to continue to sink money into the investment, Dr. Cleary approached the Bank in order to make a good faith arrangement. Trial Transcript p. 230-231, 465-470. The Bank refused to either bring an action against the appraiser or work out a settlement structure that was reasonable with Dr. Cleary and Waterfall. Trial Transcript p. 230-231, 465-470.

In February 2011, the Bank filed this action against Dr. Cleary and Waterfall as an action of foreclosure on the Property. In their response, Appellants alleged the Bank recklessly and negligently made several misrepresentations concerning the Property resulting in reliance on behalf of the Appellants. Additionally, Appellants asserted that the Bank breached the contract it now sued upon and did not act in good faith. The Bank responded with a general denial, asserted immunities under the Financial Institutions Reform, Recovery, and Enforcement Act, and pled the defense of comparative negligence.

The trial was had the week of November 4, 2013. The Bank presented a current officer and book keeper for the Bank who asserted the Bank's documents, including the notes, mortgage, guarantees, and their assignments and renewals, were kept in the ordinary course. Trial

Transcript p. 101-117. He asserted that he currently had oversight on the loan in question. Trial Transcript p. 97-99. The officer then swore as to the amount the Bank alleged was owed under the Notes, Mortgage, and Guarantee. The officer further asserted his role with the Bank was to work with loans in default, particularly those that had been mishandled by the Bank. Trial Transcript p. 98. Specifically, the Bank was particularly aggressive in regards to speculative real estate financing. Trial Transcript p. 98. On cross examination, he testified that the only survey regarding wetlands delineation relied upon by the Bank and in the Bank's file was a drawing included in the Jayroe Appraisal. Trial Transcript p. 153. He then testified that the drawing had no indicia of a formal survey. Trial Transcript p. 174-175. The Respondent then rested its case. Trial Transcript p. 178.

The Appellants then presented the testimony of Dr. Cleary. Trial Transcript p. 181. He testified to the aforementioned facts. Specifically, he testified to his justified reliance on the misstatements of the Bank and its representatives. Further, Dr. Cleary testified to the Bank's failure to act in good faith in regards to discovery of the misrepresentations of the Bank and his further making payments. Finally he testified to the damages that resulted.

Appellants then presented two expert witnesses. The first was, Mr. Segars, a real estate appraiser and certified instructor for courses necessary for licensing of appraisers. Trial Transcript p. 288-289. Mr. Segars testified as to the mistakes and improprieties contained in the Appraisals relied upon by the Bank and later presented to Dr. Cleary. Specifically, he testified that the Appraisal failed to appraise the Property "as-is", failed to verify information received or relied upon from third parties, improperly relied upon the drawing previously mentioned as a trustworthy source of information, failed to include any language regarding the impact of

delineations of the property or any lack thereof, and failed to make the reader aware that the report relied heavily upon an unverified drawing. Trial Transcript p. 293-296, 298-303. The second was, Ms. Childress, an expert in the standard of care for banking officials. Trial Transcript p. 310-315. Ms. Childress testified as to the gross negligence of the Bank and the Appellants' right to rely on the representations of the Bank. Specifically, she testified that Dr. Cleary had a right to rely upon the misrepresentations in the commitment letter and the bank breached its standard of care when (a) it failed to acquire a survey of the Property relating to the wetlands, (b) it failed to require a verification of the documents relied upon in the appraisal, (c) it failed to require some explanation as to the reliance on the drawing in the appraisal, (d) it failed to require some verification relating to the drawing relied upon, (e) it failed to follow up on any of the patent defects in the drawing and appraisal, (f) it failed to require the Appraiser produce reference materials, (g) it failed to review any reference materials, (h) it failed to verify the information in the appraisal was correct, (i) it failed to verify that the appraisal was in compliance with USPAP guidelines, and (j) it failed to bring an action against the Appraisal company. P. 316-333. The Respondents then rested. Trial Transcript p. 376.

In response, the Appellant called two employees of the Bank and an expert in the use of appraisals in banking. The first fact witness was Mrs. Huntley, the chief credit officer and founder of Beach First. Trial Transcript p. 384. She testified as to many of the facts previously stated. Though, she initially testify that the conversations with Dr. Cleary regarding the initial $2 million loan did not include any prerequisites for his taking out the loan or requirements regarding wetlands, after reviewing her notes from the meetings and the loan applications she agreed with the testimony of Dr. Cleary. Trial Transcript p. 389-390, 416, 451-453. She

similarly testified that Banks routinely rely upon appraisals for purposes of determining specific details effecting the value of property, that such reliance is reasonable, and that the Bank did in fact rely on the appraisals at issue in this action. Trial Transcript p. 438, 437. During Mrs. Huntley's testimony, some evidence regarding Dr. Cleary's net income in 2006 was proffered with objection. The Court held that such evidence was not only irrelevant but any mention of specific numbers was improper. Trial Transcript p. 397-401. Similarly, the Court held that any discussion regarding Dr. Cleary's income and any "raw figures" would be prejudicial. Trial Transcript p. 399, 401, 403.

The second fact witness was Mr. Wise, a commercial relationship manager. Trial Transcript p. 462. He testified as to some of the facts previously stated, including the attempts by Dr. Cleary to discuss the Banks misrepresentations and his ability to continue making payments. He similarly testified that he did not review the appraisal and only took a cursory review of the appraisal with Dr. Cleary. Trial Transcript p. 464, 468.

Finally, Respondent presented its expert witness, Mr. Watson. After brief testimony, Mr. Watson was qualified by the Court as an expert in commercial mortgage loans. Trial Transcript p. 485. He briefly testified as to what a commercial loan entails. Trial Transcript p. 489-490. Similarly, he testified to part of the Banks due diligence and described the Banks practices of "doing its homework." Trial Transcript p. 491. He was then asked to testify in regards to the Bank's commitment letters and Appellants objected. Trial Transcript p. 492. The grounds for the objection being that the testimony was outside of the scope of which he was offered as defined by the Respondent's answers to interrogatories. Trial Transcript p. 493-496. Respondent then clarified to the Court that the testimony was intended to only relate to "reasons for which a lender

is required to order appraisals in commercial loans, along with the intended use and purpose of said appraisals." Trial Transcript p. 494. The objection was then retracted by Appellants. Mr. Watson then goes on to describe the two reasons a bank gets an appraisal. Trial Transcript p. 501. He testified that;

> "First is to document your loan, make sure you have enough equity in that property that you are quite likely to get your money back. Second reason is the federal government has many, many requirements for appraisals. The federal government wants to be sure – the regulators, OCC, FDIC, all of the different regulators, they require banks to get appraisals under certain guidelines, specific instructions on how you do it. When the regulators come to visit your bank, it is not fun, but they come pretty regularly. They want to see are you getting appraisals, are you doing the proper job of getting appraisals."

Trial Transcript p. 501. When asked to explain to the jury what the Bank does with an appraisal his only testimony was,

> "the appraisal has to be reviewed by someone who is not connected to that loan. It has to be an independent review. Some banks have a separate department to do this sort of thing. I know at Anchor Bank the loan officer would give the review form to another loan officer. It depends on how your bank is set up, but the bottom line is the appraisal has to be reviewed by someone other than people that approved this loan."

Trial Transcript p. 502. There was no mention of the regulations involved, let alone any specific regulations. He was then asked to testify as to the Banks policies and procedures, at which Appellants renewed their objection as testimony would fall outside of the scope proffered. Trial Transcript p. 504. The court allowed the line of questioning. Trial Transcript p. 504. Mr. Watson then summarily agreed that the Bank complied with federal regulations when it order the appraisals. Trial Transcript p. 504. When asked about whether the bank complied with federal regulations in its review of the appraisals, against Appellants continued objection, Mr. Watson summarily agreed. Trial Transcript p. 505. Finally, when asked about whether he would have relied upon the appraisals in evaluating the property, against Appellants' continued objection, he

summary stated, "yes, sir." Trial Transcript p. 506. After testifying that he and the Bank are not professional appraisers or environmental experts and that the Bank needs to rely on outside experts he summarily states that the appraisals were "properly done, properly submitted." Trial Transcript p. 507. Appellants again objected to this testimony as outside of the scope proffered. Trial Transcript p. 507. The only reason for such conclusions proffered by Mr. Watson was; "I read all three of the appraisals, [...] I reviewed every one of them. In fact, last night I did a cursory review of all three to make sure I knew what I was going to say today." Trial Transcript p. 507. On cross examination, Mr. Watson testified that he was unfamiliar with all of the policies within banking and that he was specifically unfamiliar with the policies of the most resent bank for which he worked. Trial Transcript p. 509. After being shown the policy he agreed that a fundamental and overarching policy of banks is that they are fiduciaries to borrowers and that a failure to "rigorously enforce standards of conduct that preempt possible criticism" was a breach of trust. Trial Transcript p. 509-510. The Respondent then rested. Trial Transcript p. 590.

At the end of the evidence, Appellants' motion for a directed verdict on Respondent's comparative negligence defense was denied. During closing arguments Respondent's attorney stated, "[Dr. Cleary] seemed to be doing pretty good for himself. In fact, [Mrs. Huntley] testified that his annual income was as high as $1 million." Trial Transcript p. 598-599. The jury was charged on breach of contract, good faith and fair dealing, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and comparative negligence. The verdict form to be filled out by the jury was explained by the judge. At 5:48 PM on November 7, 2013, the jury was sent out to begin deliberations. Trial Transcript p. 664. Two hours later, the foreperson submitted a request for definitions of wording. Trial Transcript p. 664. The Court requested

additional clarity as to the request and the foreman returned a request for definitions regarding the fraud, misrepresentation, and good faith and fair dealing. The Court, in response, again charged the jury as to these causes of action. Trial Transcript p. 667-674. Several hours later, the jury returned with a verdict at 9:52 PM. Trial Transcript p. 675. On the verdict form, the jury found in favor of Respondent on the grounds of breach of contract in the amount of $2,906,788.59 and in favor of the Appellants on the grounds of Breach of contract and duty of good faith and fair dealing in the amount of $0. Trial Transcript p. 675. The Appellants immediately objected to the verdict as inconsistent and requested instructions to the Jury of the inconsistency and request a new verdict. Trial Transcript p. 676-677. Against Respondents objections, the Court again charged the jury. Trial Transcript p. 677-680. The Court charged the jury that "as to [Appellants'] claim for breach of contract, including the covenant of good faith and fair dealing, you must either find in favor of the [Respondent], or if you find in favor of the [Appellants], you must award some amount of damages." Trial Transcript p. 680. Five minutes after being sent back for deliberations, the foreman returned with a question for the Court at 10:15 PM. Trial Transcript p. 681. The foreman asked "[c]an we change our ruling from the [Appellants] to the [Respondent] rather than determining the amount?" Trial Transcript p. 681. The Court responding by restating the original charge. Trial Transcript p. 682. At 10:19 PM, seconds after receiving their answer, the Jury returned with a verdict in the Respondent's favor on all counts.

Following the jury's discharge, the judge asked if there would be any motions to which the parties responded affirmatively and gave the parties two weeks to file the motions. After the hearing, Appellant's motions for judgment notwithstanding the verdict and new trial was denied.

LEGAL ARGUMENT

I. The evidence presented at trial, the actions of Respondent's counsel, and the conduct and decisions of the jury dictate that the Trial Court erred in not granting the Appellants a new trial.

The Appellants were entitled to a new trial because: (1) the verdict and trial circumstances indicate the verdict was reached as the result of an improper motive, reflects the jury's confusion, and is unsupported by the evidence; (2) the Jury's verdict was tainted by the use of excluded evidence in the Plaintiff's closing arguments; and (3) the Jury's verdict was tainted by the Court's failure to exclude testimony by the Plaintiff's expert that was not disclosed prior to trial. Rule 59(a) of the South Carolina Rules of Civil Procedure ("SCRCP") provides in relevant part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59, SCRCP. In ruling on a new trial motion, a trial judge has the discretionary power to grant a new trial absolute or nisi in a law case upon his disapproval of the verdict on factual grounds, and in this role he has been recognized and designated as the "thirteenth juror." *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975). The trial judge's failure to grant a new trial was based upon errors of law and conclusions of fact without evidentiary support. South Carolina law dictates that the Court erred in not using its discretion to grant a new trial.

A. Jury's award was grossly excessive, was reached as a result of improper motive, reflects the jury's confusion, and was unsupported by evidence.

The Trial judge erred in not granting a new trial based upon the jury's improper award. The trial court's authority to correct, modify, amend, or interfere with the jury's verdict is

embraced in the power to grant new trials. *Anderson v. Aetna Casualty & Sur. Co.*, 175 S.C. 254, 178 S.E. 819 (1934). The court may grant or refuse a new trial or, in a proper case, grant a new trial nisi, but should do one thing or the other. *Id.* Traditionally, the trial judge in South Carolina, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983); *see also Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct.App.1995)(under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion). Similarly, a trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Brabham v. Southern Asphalt Haulers, Inc.*, 223 S.C. 421, 76 S.E.2d 301 (1953). As the verdict of the jury was inadequate, inconsistent, reflected the jury's confusion, and excessive, the trial court erred in not granting a new trial.

The jury's determination of damages, while entitled to substantial deference, dictates that a new trial absolute be granted based on the excessiveness of the verdict. A new trial may be granted if the amount clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives. *Id.* Similarly, the trial judge has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive. *McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). "When a party moves for a new

trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). The test employed by the court in determining whether or not to set aside a verdict on the grounds of either excessiveness or inadequacy is whether the verdict is so shocking as to manifestly show the jury was moved by considerations not founded on the evidence and/or the instructions of the trial judge. *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973).

The verdict in this matter was grossly excessive in light of the evidence presented and reflects that it was reached as a result of improper motives and confusion. The Respondent failed to present any evidence that refuted the claims of Appellants regarding the Banks negligence, recklessness, and bad faith. The evidence presented by Respondents related to several irrelevant arguments that served to only confuse the jury. First, to whom the appraisal is prepared for and regarding the use of the appraisal ad nauseam. Such evidence had no relevance and, while repeatedly and proudly relied upon throughout the presentation of evidence, served no purpose other than to confuse the jury. Second, questions regarding whether the Appellants were aware of whether a final determination of the Wetlands had to be made by the Army Corp of Engineers were conflated with his ability to rely on statements by the Bank prior to any such knowledge. This only served to further confuse the jury. Third, the fact that the value of the property derived by the Appraisal was merely opinion and that all of the parties were aware the value in the Appraisal was opinion was of no import. The Appellants testified that the opinion was never relied upon, but rather the explicit findings of fact within the appraisal regarding the number of

acres of uplands and the number of acres of wetlands. Fourth, that after using the Bank to verify the number of uplands through an appraisal of the property, the Appellants could have had additional verification of the verification. This evidence was in direct conflict with the Banks own testimony that reliance on the verification by the appraisal was not only justified, but "always" done by the Bank itself. Fifth, a great deal of evidence was presented that insinuated that the Appellants had a great deal of money and that Dr. Cleary had developed a project similar to this one at the exact same time as he developed the Property in dispute. Finally, and somewhat surprisingly, the Bank incessantly suggested that it was harmed by its own negligence and recklessness. This evidence in toto, however, fails to refute and only supports claims of negligence and recklessness on the part of the Bank. At the very least it fails to meet the burden required by Respondent to refute the evidence presented by Defendants. After such evidence being presented an award finding the bank was not irresponsible or at the very least negligent should have been found to be so shocking as to manifestly show it had only been the result of improper motives and confusion.

South Carolina law dictates that such scant evidence should have resulted in the granting of a new trial as a matter of law. In *Youmans ex rel. Elmore v. S. Carolina Dep't of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008), a case involving a mother of deceased motorist bringing a wrongful death and survival action against the Department of Transportation, the Court of Appeals held that the trial court erred in finding that mere conclusory statements of an expert witness regarding comparative negligence could, by law, support a finding of the jury of comparative negligence. The trial court referred to statements by an expert that he "ruled out" certain causes of the damage. *Id.* The claimant in *Youmans* had presented a lay witness and two

experts as to the comparative negligence. The respondent in *Youmans* presented a single expert as to the comparative negligence. In the present action, the Respondent has, similarly, presented one expert witness whose testimony was improper and more conclusory than that of the expert in *Youmans* as to whether he would have relied on the Appraisal. He made no mention of how the Bank met its duties in the statements made in the commitment letter, or how it fulfilled its own Bank or federal regulations. He simply made the statement that the Bank had met its duties. On cross examination he admitted that the Bank was a fiduciary to Dr. Cleary. He admitted he was not familiar with the policies of the bank he had previously worked for. He testified he had no knowledge of any of the multitude of cases or previous instances of actions by banks against appraisers for faulty appraisals. Such testimony, under South Carolina law and *Youmans*, would be considered no evidence as to the Appellants comparative negligence or the negligence of the Bank.

In the present case, there was ample, if not a monumental amount, of evidence regarding the negligent and reckless actions and misrepresentations of the Plaintiff. After the presentation of the evidence of such reckless and negligent acts, the jury, exhausted after a full day of trial, began deliberating at 6:00 p.m. After several hours, the jury requested an explanation of the law, specifically a clarification of bad faith along with other elements of the verdict form. After an additional lengthy debate, the jury returned with a verdict which found that the Plaintiff had acted in bad faith, but awarded the Defendants $0 dollars on that claim. After clarifying that the jury must find some amount of damage or in the alternative for Plaintiff, the jury asked the court whether they actually had to calculate the damage to the Defendants or if they could simply find in favor of the Plaintiff. Such a question, in light of the surrounding facts, was clear evidence that

either the jury was still confused as to the law or was considering the length of time required in calculating such damages as opposed to considering the law.

South Carolina law, as expressed by the Supreme Court, would find that the verdict returned in favor of the Plaintiff on all grounds after previously finding bad faith is legally incorrect and grounds for granting a new trial. Clearly, the circumstances surrounding the verdict, establishes without question that the decision to find in favor of the Plaintiff was the result of "improper motives", specifically, the jury's confusion, exhaustion, and the desire to go home at 10:00 p.m. In *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 734 S.E.2d 148 (2012), the Supreme Court reversed a circuit court's denial of a motion for new trial based upon a finding that the verdict of the jury was legally incorrect. After evidence being presented at trial which established certain claims of the complainant, which was limited to three lay witnesses' testimony, the jury appeared unclear as to the effect of the counterclaims of the respondent. *Id.* After a simple clarification of the law to the jury they returned a verdict in favor for the complainant in an amount of $0. *Id.* The Supreme Court held that such a finding "was not 'merely inadequate,' but also legally incorrect." *Id.* at 242, 159. The exact same circumstances were present in this action, except that after another attempt by the Court to clarify the law, the Jury made clear they simply wanted an answer that afforded them the ability to go home. Such facts provide grounds for a new trial as a matter of law. Thus, the verdict of the jury was inadequate, inconsistent, reflected the jury's confusion, and excessive, and the trial court erred in not granting a new trial.

B. The Jury's verdict was tainted by the use of excluded evidence in the Respondent's closing arguments

The trial court, similarly, erred in not granting a new trial based upon the prejudicial

effect upon the verdict by Respondent's improper comment in closing arguments. It is improper for counsel to make a "closing argument to the jury ... calculated to arouse passion or prejudice." *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 231, 317 S.E.2d 748, 755 (Ct.App.1984). A Trial Judge should grant a new trial upon a showing that the award is "actuated by passion, caprice, or prejudice." *Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558. The trial court's finding that certain evidence was prejudicial and the Respondent's later improper use of that evidence in its closing arguments is clear evidence of the jury's verdict being actuated by prejudice. The closing argument invited the jury to base its verdict on passion rather than reason. Thus, the trial court erred in not granting a new trial.

As a primary matter, while Appellant did not contemporaneously object to the Respondent's use of the excluded evidence during closing argument, the trial court had the right to order a new trial upon the Appellant's objection post-verdict as it relates to this conduct. *See State v. Northcutt*, 372 S.C. 207, 226, 641 S.E.2d 873, 883 (2007)(finding while proper course may have been immediate objection, issue was preserved). Thus, the Appellants raising their objection to the use of the precluded evidence in the closing argument after the Respondent's attorney finished his remarks, does not preclude the trial court or this Court from ordering a new trial based upon such prejudice.

The Respondent's counsel intentionally and explicitly mentioning Dr. Cleary's annual income so as to arouse prejudice in the jury should have resulted in the granting of a new trial. The South Carolina Supreme Court has found that the admission of such evidence to not only be prejudicial, but "highly prejudicial." *See Branham v. Ford Motor Co.*, 390 S.C. 203, 241, 701 S.E.2d 5, 25 (2010). In *Branham*, the Supreme Court found that the use of inadmissible evidence

in closing arguments, denies the party a fair trial as a matter of law. *Id.* 390 S.C. 203, 235, 701 S.E.2d 5, 22 (citing *Scoggins v. McClellion*, 321 S.C. 264, 269, 468 S.E.2d 12, 15 (Ct.App.1996)). Similarly, the Supreme Court in *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 734 S.E.2d 641 (2012), held that presentation of such evidence, even in relation to punitive damages, ***must*** result in a new trial. Just as in this case, the trial court in *Sulton* properly declined to admit financial forms indicating the wealth of the Defendant and only allowed limited testimony. *Id.* In this matter, the trial court limited that testimony as to the Banks process of considering Dr. Cleary's wealth. Respondents' counsel, in direct contravention of the Court's ruling, stated that Dr. Cleary was "doing pretty good for himself," and had an annual income "as high as $1 million." Not only were these statements factually incorrect, but legally improper.

It was improper for two reasons. First, the information was presented to the jury through counsel's arguments without supporting evidence. *See South Carolina Dept. of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct.App.2003)("Arguments made by counsel are not evidence."); *O'Leary–Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct.App.2006)("Closing arguments must be confined to evidence in the record and reasonable inferences therefrom."). Second, informing the jury of a person's net income is improper under *Branham*, and the prejudicial effect of doing so is self-evident. Net income has no necessary relation to net worth or ability to repay the obligation. It could be that Dr. Cleary had no net worth. Similarly, and as Appellants' counsel argued, it could be that the income was not solely Dr. Cleary's. Putting this huge sum of money into the minds of the jury, reflecting the Defendant's purported net income but accounting for none of his expenses and obligations, was certainly misleading and stirred the jury to be bias against him. *See Branham*, 390 S.C. 203, 701

S.E.2d 5. Thus, the trial court should have granted a new trial as a matter of law.

C. The Jury's verdict was tainted by the Court's failure to exclude testimony by the Respondent's expert that was not disclosed prior to trial.

The trial judge abused its discretion in not granting a new trial based upon the improper evidence presented to the jury by Respondent's only expert witness. Prior to trial, in response to interrogatories propounded by Appellants, respondents stated: "Mr. Watson is expected to testify with regard to the reasons for which a lender is required to order appraisals in commercial loans, along with intended use and purpose of said appraisals." At trial, Appellants moved to exclude the expert testimony of Mr. Watson in regards to any matters outside of the scope of said description, such as the Banks negligence relating to the review and later reliance on the appraisals. Appellants argued they were not informed he would be used as an expert at trial in regards to the negligence of the bank and, therefore, were not afforded the right to depose the witness regarding such testimony. Respondents countered that because they had indicated he would be an expert witness, allowing him to testify as an expert would not be a surprise to Appellants. The trial court ruled Mr. Watson could testify as an expert on the unrelated matters due to Respondent listing him as an expert witness. The court's ruling was an error and should have later resulted in the Court ordering a new trial.

By the terms of Rule 33, SCRCP, "interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party." Therefore, "there is a continuing duty on the part of the party from whom information is sought to answer a standard

interrogatory, such as the one requesting the party list any expert witnesses whom the party proposes to use as a witness at the trial of the case." *Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128, 132 (2003). The parties' disclosure of information before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing. *Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982). When it appears a violation of Rule 33 has occurred, it lies within the discretion of the trial court to decide what sanction, if any, should be imposed. *Jackson v. H & S Oil Co., Inc.*, 263 S.C. 407, 211 S.E.2d 223 (1975)(case decided under former Circuit Court Rule 90). There are specific and limited times when a party should be permitted to use witnesses, exhibits, photographs, etc. which have not been disclosed before trial because of circumstances arising after the trial has begun, e.g., unexpected testimony. *Reed*, 277 S.C. 310, 316, 286 S.E.2d 384, 388. "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). The Trial court erred in not precluding the testimony of Mr. Watson outside of the scope originally proffered and abused its discretion by not considering the appropriate factors.

The trial court improperly determined Respondents should be allowed to present expert testimony on a topic not previously disclosed to Appellant in their responses to the interrogatories. Under South Carolina law, before ruling, the trial court should ascertain the type of witness involved, the content of the evidence, the explanation for the failure to properly name the witness in answer to the interrogatory, the importance of the witness' testimony, and the degree of surprise to the other party. *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974). In light of all these factors, it may then determine to "permit the witness to testify, it may exclude the

witness, or it may grant the continuance so that the other side may take the deposition of the other witness or otherwise prepare to meet his testimony." *Id.* at 262 S.C. 54, 59, 202 S.E.2d 12, 14. The trial court failed to properly consider the several factors as dictated by Laney.

The trial court's consideration of the allowance of such evidence was limited to the statement of the objection by Appellants' attorney, a brief rebuttal of Respondent's attorney stating that the proposed testimony would somehow fall within the defined scope as indicated by the Respondent's response to the interrogatory. The court then allowed the introduction of the testimony. Upon future instances of the Respondent improperly introducing testimony, the Appellants' objections were met by a simple ruling that the objection was overruled. The court failed to consider Respondent's explanation for their failure to amend its response to the interrogatory or to simply more broadly state the proposed testimony so as to avoid limiting the testimony to facts the Appellants were willing to stipulate. The Respondent's counsel failed to give any defense for such a failure. The court failed to consider the importance of Mr. Watson's testimony. He was in fact the only expert proffered by the bank able to testify as to its negligence. While the testimony later proved inept, such testimony was heavily relied upon by Respondent. Finally, the court failed to consider the degree of surprise to respondents. The Respondent was well aware of the scope of the testimony the experts proffered by Appellants. Similarly, they should have been well aware of the areas of negligence the experts were intended to testify about. The Appellants responses to Respondent's interrogatories appropriately stated the scope of the testimony and the depositions of those witnesses further gave notice. The testimony of those witnesses at trial in no way provided an excuse for additional testimony outside of the scope previously disclosed by Respondent as is required under South Carolina law. *See Reed, supra.*

Not only is the trial court's failure to consider these factors grounds for new trial, but even if considered, the factors dictated that the trial court erred in not excluding Mr. Watson's testimony regarding those areas of negligence. Thus, the trial judge abused its discretion in not granting a new trial based upon the improper evidence presented to the jury.

II. The Trial Court erred in not granting a directed verdict and later denying Appellants motion for judgment notwithstanding the verdict on Respondent's claim of comparative negligence.

The trial court improperly permitted the Respondent's affirmative defense of comparative negligence. Under South Carolina law, the trial court may grant the motion when the case presents only issues of law. Rule 50(a), SCRCP. A motion for a new trial may be joined with the JNOV motion or prayed for in the alternative. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). The grounds raised in the directed verdict motion, however, are the only ones that may properly be reasserted in a JNOV motion. *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 195 S.E.2d 830 (1973). Thus, a motion for a JNOV is merely a renewal of the directed verdict motion. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (2006). As argued on their motion for directed verdict and judgment notwithstanding the verdict, the counterclaim was improper as there was no action for which it was to apply, it confused the jury, and there was no evidence of negligence by the Appellants.

A. The Respondent's action for comparative negligence serving only to confuse the jury was improper as an affirmative defense to Appellants' actions for negligent misrepresentation and fraud.

Under South Carolina's comparative negligence jurisprudence, it was improper for the Respondent to bring a counterclaim for comparative negligence in response to Appellants' claims of negligent misrepresentation and fraud. The causes of action for which Appellants alleged against Respondent necessarily entailed elements that are in direct conflict with the elements of comparative negligence. Under South Carolina law, a necessary element of a cause of action for negligent misrepresentation and fraud includes the complainant's justifiable reliance on the statements made by respondent. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 266, 536 S.E.2d 399, 405 (Ct. App. 2000). As such, a showing that claimant is in any way unjustified or acts unreasonably in relying upon the alleged statement by respondent results in a complete bar of relief. Id. The result of South Carolina courts including this as an element in these claims was to make an affirmative defense for comparative negligence based upon such unjustified or unreasonable reliance improper. Thus, the trial court erred in not directing a verdict against Respondent.

The Supreme Court of South Carolina has held that, under the comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage. *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). By this method, "each party's relative fault in causing the plaintiff's injury will be given due consideration." *Id.* 392 S.C. at 293, 709 S.E.2d at 615. In *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991), this Court stated that, under comparative negligence "a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." *Id.* at 245, 399

S.E.2d at 784. "The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence." *Id.* Thus, by allowing Respondent's claim of comparative negligence, the court improperly charged the jury that, under South Carolina law, had the Appellants unreasonably relied upon the statements of the Respondent, but said unreasonableness was to a lesser degree than that of Respondents negligence, the Appellants could still recover under its negligent misrepresentation cause of action. Not only is such an instruction confusing, but it is in direct contradiction of South Carolina law.

The Trial Court's err in not directing a verdict on the Respondent's claim of comparative negligence is grounds for reversal. While charging the jury on the one hand that the Appellants reliance must be reasonable only to later state it must only be partially reasonable is improper. A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error. *State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000). "When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). The allegation by Respondent that Appellants unreasonably relied upon the statements of the bank is not grounds for comparative negligence and, therefore, the Appellants motion for directed verdict was improperly denied.

B. The Trial Court erred in not granting the directed verdict on Respondent's affirmative defense of comparative negligence as there was no evidence presented of Appellants' negligence.

The evidence presented by Respondents failed to meet the required standards as set by

South Carolina law. South Carolina law holds that in ruling on a motion for directed verdict, the trial court must view the evidence and all its reasonable inferences in the light most favorable to the nonmoving party. *Long v. Norris & Assocs. Ltd.*, 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct.App.2000). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. *Id.* Further, courts are prohibited from submission of speculative, theoretical, and hypothetical views to the jury. *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct.App.2006). Simply, the issue is submitted to the jury whenever there is ***material*** evidence tending to establish the issue in the mind of a reasonable juror. *The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct.App.2005)(emphasis added). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct.App.2002); *Long*, 342 S.C. at 568, 538 S.E.2d at 9. In essence, the court must determine "whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). Thus, Respondent's failure to present any material evidence establishing the Appellants' negligence bars such a claim from going to the jury or an award by the jury against the Appellants.

Respondents failed to present any material evidence of Appellants' comparative negligence. Comparative or contributory negligence is a "want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." *Berberich, Supra.* Thus, under South Carolina law, Respondent was

required to show evidence that Appellants failed to act with due care. [N]egligence is the failure to use due care," i.e., "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973). It is often referred to as either ordinary negligence or simple negligence. Whether one is negligent or prudent depends in large measure on all of the surrounding circumstances, and failure to use due care, amounting to negligence, may be proved by direct as well as by circumstantial evidence. *Howell v. Hairston*, 261 S.C. 292, 298, 199 S.E.2d 766, 768-69 (1973). Under this definition, the trial court should have granted Appellants motion for a directed verdict.

When the facts are viewed in the light most favorable to the Respondent, the record shows Dr. Cleary had no experience in investing in developments dealing with commercial property with such extensive wetlands. When Dr. Cleary discussed the investment with Ms. Huntley, her discussion regarding the need for an appraisal affirmed any experience he gained as a banking director and relying on verification by an appraisal company. Further, no evidence was presented that a reasonable person would not rely on such statements included in the appraisal. If anything, the Respondent presented copious evidence that all of the parties involved and the Bank's own expert would have done just as Dr. Cleary did. While Respondent hinted and insinuated that Dr. Cleary's financial status provided him some additional credence as an investor, such evidence is not material to whether he acted with care. Further, the Respondent alluded to Dr. Cleary's ability to either get another appraisal or some other form of verification of the statements made by the Bank. Not only is such "evidence" not considered under an evaluation of due care, but the Banks own witnesses testified that they would not have independently verified the appraisal. *See Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005).

Finally, Dr. Cleary's knowledge of the final delineation of the Property being done by the Army Corp of Engineers does not refute his testimony that he did not know how such a delineation occurred. The final delineation could have been a mere formality or acceptance of another engineer's delineation. Such a belief is reinforced by the fact that previous preliminary delineations had been performed and subsequent appraisers did not give credence to them or reference the necessity of a final delineation. Therefore, no material evidence was presented that Dr. Cleary did not act with due care. The trial court erred in denying Appellant's motion for JNOV because of the lack of any material evidence reasonably supporting the jury's findings.

CONCLUSION

The trial court erred in not ordering a new trial or granting a judgment notwithstanding the verdict. The verdict of the jury was inadequate, inconsistent, reflected the jury's confusion, and was excessive. Similarly, the Jury's verdict was tainted by the use of excluded evidence in the Plaintiff's closing arguments and the Court's failure to exclude testimony by the Plaintiff's expert that was not disclosed prior to trial. Similarly, the action for comparative negligence was improper. Not only was it legally incorrect and only served to confuse the jury, but the Respondent failed to produce any evidence of the Appellants own negligence. Thus, the trial judge's failure to grant a new trial based upon errors of law and conclusions of fact without evidentiary support is grounds for reversal. South Carolina law dictates that the Court erred in not using its discretion to grant a new trial and grant Appellants directed verdict.

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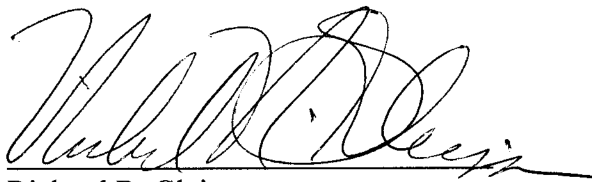
By: 

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July 28, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No: 2011-CP-26-1718

Waterfall Investors 2, LLC and Raymond E. Cleary, III .... Appellants,

v.

Bank of North Carolina, Successor In Interest to Beach First National Bank ...... Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, on July 28, 2014, addressed to its attorneys of record as follows:

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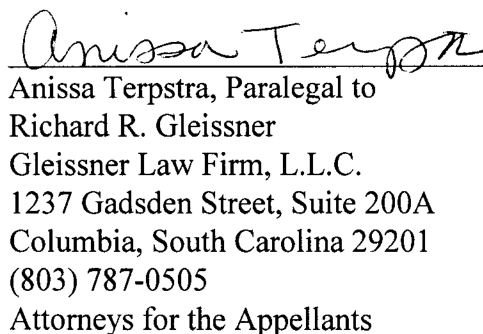

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