

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

HON MARVIN H DUKES, III, MASTER-IN-EQUITY

Case Number 2009-CP-07-3945

HARBOURSIDE COMMUNITY BANK, As Servicing Agent for
THE SAVANNAH BANK, N A ,

RESPONDENT,

VS

ALPHONSE STALLIARD, OLDFIELD CLUB, and
OLDFIELD COMMUNITY ASSOCIATION, INC ,

DEFENDANTS

Of Whom ALPHONSE STALLIARD is the

APPELLANT

FINAL BRIEF OF THE RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	11
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	5
ARGUMENT NUMBER 1	6
ARGUMENT NUMBER 2	8
ARGUMENT NUMBER 3	12
ARGUMENT NUMBER 4	18
CONCLUSION	23

TABLE OF AUTHORITIES

CASE LAW

<i>Bean v Carolina Cent Railroad Company, Inc</i> , 392 S C 532, 709 S E 2d 99 (SCApp 2011)	6, 13
<i>Cafe Associates Limited v Gengross</i> , 305 S C 6, 406 S E 2d 162 (1991)	12
<i>Dawkins v Fields</i> , 354 S C 58, 580 S E 2d 433 (S C 2003)	12, 21
<i>Doe ex rel Doe v Batson</i> , 435 S C 316, 548 S E 2d 854 (S C 2001)	22
<i>Ellis v Davidson</i> , 358 S C 509, 518, 595 S E 2d 817, 822 (SCApp 2004)	11
<i>Graves v Horry-Georgetown Technical College</i> , 391 S C 1, 704 S E 2d 350 (SCApp 2010)	11
<i>Jones v Lott</i> , 387 S C 339, 692 S E 2d 900 (S C 2010)	7, 13
<i>McKnight v South Carolina Dept of Corrections</i> , 385 S C 380, 684 S E 2d 566 (SCApp 2009)	17
<i>Normandy Corp v South Carolina Department of Transportation</i> , 386 S C 393, 688 S E 2d 136 (SCApp 2009)	6, 13
<i>P P G Industries, Inc v Orangeburg Paint & Decorating Center, Inc</i> , 297 S C 176, 375 S E 2d 331 (SCApp 1988)	12, 14-17
<i>Priest v Brown</i> , 302 S C 405, 396 S E 2d 638 (SCApp 1990)	12, 17
<i>Redwend Limited Partnership v Edwards</i> , 354 S C 58, 581 S E 2d 496 (SCApp 2003)	12
<i>Wilder Corp v Wilke</i> , 330 S C 71, 497 S E 2d 731 (S C 1998)	13

COURT RULES

Rule 210(h), SCACR	13
Rule 56(f), SCRCP	20, 21
Rule 208(b)(1)(B), SCACR	1, 6, 7, 13
Rule 208(b)(1)(C), SCRCP	8, 13

Rule 212, SCACR	13
Rule 56, SCRCF	1, 11, 12, 17
Rule 56(f), SCRCF	1, 23
Rule 56(f), SCRCF	1

STATEMENT OF ISSUES ON APPEAL

1 When the Appellant's "Statement of Issues Presented" fails to include any complete or specific assignments of error, should the Court of Appeals dismiss the appeal pursuant to Rule 208(b)(1)(B), SCACR?

2 Where the Appellant has failed to appeal from separate rulings of fact and law of the Trial Judge that support the judgment, must the Court of Appeals affirm the Trial Judge's Order?

3 Where the Appellant failed to offer evidence that supports each of the elements of his claim or defense, was summary judgment properly granted by the Trial Court under RULE 56, SCRCPP?

4 When the Appellant failed to comply with the requirements of Rule 56(f), SCRCPP, by failing to submit affidavits explaining why discovery was not completed within the time limits of the Scheduling Order, why the Motion for Continuance was not timely served, or what relevant evidence the Appellant believed the delays would enable him to uncover, did the Trial Judge properly deny the Appellant's Motion for Continuance?

STATEMENT OF THE CASE

This action was commenced by Harbourside Community Bank, as servicing agent for the Savannah Bank, N A (hereinafter, the “Savannah Bank ”), seeking to enforce a note and foreclose a mortgage given by Alphonse Stalliard (hereinafter, “Stalliard”), on August 24, 2009 Stalliard filed his answer on or about January 5, 2010, in which he denied the material allegations of the Savannah Bank’s Complaint, and alleged certain affirmative defenses On May 14, 2010, a Consent Order for Bifurcation was entered that bifurcated the trial of the mortgage foreclosure action from the trial related to the Savannah Bank’s claim for a deficiency judgment and Stalliard’s defenses to it ¹ The Savannah Bank filed its Amended Complaint on May 18, 2010 ² The trial of the foreclosure case was held on June 25, 2010, and resulted in an Order of Judgment and Foreclosure, in the amount of One Million Eight Hundred Thirty Four Thousand Five Hundred Four and 41/100 (\$1,834,504 41) Dollars The subject property was thereafter sold on August 2, 2010, to the Savannah Bank, and the bid at the foreclosure sale was Six Hundred Fifty Thousand and no/100 (\$650,000 00) Dollars

On November 10, 2010, a Consent Scheduling Order was entered in the case that set the following deadlines

- 1 Stalliard was required to file an answer to the Amended Complaint of the Savannah Bank on or before November 15, 2010
- 2 Stalliard was required to identify his experts by December 1,

¹ See May 14, 2011, Consent Order of Bifurcation (R Pages A-108 to A-110)

² See May 18, 2010, Amended Complaint (R Pages A-79 to A-87)

2010

- 3 The Savannah Bank, was required to identify its experts by January 1, 2011
- 4 Stallhard and the Savannah Bank were required to complete discovery by February 15, 2011, and the time to respond to discovery is twenty (20) days upon penalty of sanctions in the amount of Five Hundred and no/100 (\$500 00) Dollars per day for every day this Court adjudged the discovery to be late
- 5 Stallhard and the Savannah Bank were required to file all pretrial motions by March 15,2011 ³

Stallhard filed his Answer to the Amended Complaint on November 15, 2010
The Savannah Bank filed its Reply and Restatement of Affirmative Claim on November 17, 2010 and on March 15, 2011, the Savannah Bank filed its Notice of Motion and Motion for Summary Judgment, supported by Affidavit of Sally A Gardocki, Esq , the Affidavit of Diane Sala, and the Affidavit of Attorneys Fees of the Savannah Bank's counsel ⁴ On April 8, 2011, a hearing was noticed on the Savannah Bank's Notice of Motion and Motion for Summary Judgment ⁵

On May 2, 2011, Stallhard filed his Motion to Enlarge Time for Discovery and to Continue Hearing on Plaintiff's Motion for Summary Judgment ⁶ On May 11, 2011, the Savannah Bank filed its Return to Motion to Enlarge Time for Discovery

³ See November 10, 2010, Consent Scheduling Order (R Pages A-21 to A-23)

⁴ See March 15, 2010 Notice of Motion and Motion for Summary Judgment, Affidavit of Sally A Gardocki Esq , and, Affidavit of Diane Sala (R Pages A-25 to A-32, A-53 to A-58, A-59 to A-78)

⁵ See April 8, 2011 Notice of Hearing on Plaintiff's Summary Judgment Motion (R Page A-222)

⁶ See May 2, 2011, Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank s Motion for Summary Judgment (R Pages A-105 to A-107)

and to Continue Hearing on the Savannah Bank's Motion for Summary Judgment ⁷
The Savannah Bank's Motion for Summary Judgment was heard on May 16, 2011,
and on June 2, 2011, the Hon Marvin H Dukes, III, entered his Order granting the
Savannah Bank's motion ⁸

Stalliard timely served his Notice of Appeal on July 5, 2011 ⁹

⁷ See May 11, 2011, Return to Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank's Motion for Summary Judgment (R Pages A-99 to A-104)

⁸ See June 2, 2011, Order Granting Summary Judgment (R Pages A-3 to A-23)

⁹ In his Statement of the Case, Stalliard makes statements that are not supported by the record for this case. Specifically on pages 3 and 4 of the Brief of the Appellant, Stalliard alleges that his attorney spoke to a material witness "who was then a criminal defendant in a pending case before the United States District Court." There is nothing in the record that supports the statement concerning any criminal prosecution of an alleged witness.

STATEMENT OF FACTS

Insofar as is necessary for a resolution of this appeal, the Savannah Bank has set forth the facts it believes to be relevant in the arguments that appear below ¹⁰

¹⁰ In his Statement of the Facts, Stalliard makes statements that are unsupported by the Record. In the last paragraph on page 4 of the Brief of the Appellant, Stalliard includes text related to criminal proceedings against an individual. The record does not contain evidence in support of this statement. In addition, on page 5, Stalliard alleges that the loan that he obtained from the Savannah Bank was a strawman loan similar to loans the media and Federal indictments have described in similar Beaufort County transactions involving the same person(s) involved in Stalliard's loan. There is nothing in the record to support the statement. Finally, on page 7 of the Brief of the Appellant, the following statement appears: 'Mr. Stalliard testified that he gave S.C. a power of attorney, but a copy of that document is not in the bank file or closing file, and it is believed the power of attorney was for another property in New Jersey.' This statement is supported only by text in an affidavit submitted by Stalliard at the hearing on the Motion for Summary Judgment (See May 13, 2011, Stalliard Affidavit, R. Pages A-49 to A-52). The Trial Judge specifically stated that he was not accepting this particular statement, and Stalliard has not appealed from that ruling (See June 2, 2011, Order Granting Summary Judgment, pp. 5-6, Note 10, R. Pages A-7 to A-8). Accordingly, there is nothing in the record to support this statement in the 'Statement of Facts.'

ARGUMENT NUMBER 1

STALLIARD'S STATEMENT OF ISSUES ON APPEAL DOES NOT SPECIFY THE ERROR OF LAW OR FACT THAT STALLIARD APPEALS FROM THE STATEMENT OF ISSUES ON APPEAL VIOLATES RULE 208(b)(1)(B), SCACR, AND THE APPEAL SHOULD BE DISMISSED

In his Brief, Stalliard states the following as the "Issues on Appeal"

- 1 DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT
- 2 DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE¹¹

Rule 208(B)(1)(B), SCACR, reads as follows

(B) Statement of Issues on Appeal A statement of each of the issues presented for review The statement shall be concise and direct as to each issue, and may be stated in question form Broad general statements may be disregarded by the appellate court Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal

Rule 208(B)(1)(B), SCACR, requires an appellant to state in concise terms the precise issue that the appellant wishes for the appellate court to review The appellate court will not consider any point not set forth in the Statement of Issues on Appeal ¹²

Rule 208(b)(1)(B), SCACR, has been interpreted to require that each ground be " so distinctly stated that the reviewing court may at once see the point at which it is called on to decide without having to "grope in the dark" to ascertain the

¹¹ See Brief of Appellant, p 3

¹² Rule 208(b)(1)(B), SCACR, *Bean v Carolina Cent Railroad Company, Inc* , 392 S C 532, 709 S E 2d 99 (SCApp 2011), *Normandy Corp v South Carolina Department of Transportation*, 386 S C 393, 688 S E 2d 136 (SCApp 2009)

precise point at issue”¹³

Stallhard has failed to state any legal or factual point in the “Statement of Issues on Appeal” Under the express language of Rule 208(B)(1)(B), SCACR, “Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal ”

Because Stallhard has failed to state any legal or factual issue with any degree of particularity, his appeal should be dismissed under the authority of Rule 208(b)(1)(B), SCACR

¹³ *Jones v Lott*, 387 S C 339, 692 S E 2d 900 (S C 2010)

ARGUMENT NUMBER 2

BECAUSE STALLIARD FAILED TO APPEAL FROM FINDINGS IN THE TRIAL JUDGE'S ORDER THAT INDEPENDENTLY SUPPORT THE JUDGMENT, THE OTHER FINDINGS ARE NOW THE LAW OF THE CASE, AND STALLIARD'S APPEAL SHOULD BE DISMISSED UNDER THE "TWO ISSUE RULE"

In his June 2, 2011, Order, the Trial Judge found that Stalliard's loan with the Savannah Bank, and the construction of the house that was accomplished with the proceeds from the loan, were handled on Stalliard's behalf by individuals Stalliard authorized to act on his behalf ¹⁴ The Trial Judge found, based on Stalliard's own testimony, that individuals named Steve Corba and Blair Witkowski were acting with his authorization and on his behalf in their dealings with the Savannah Bank in connection with this loan. The essence of Stalliard's argument is that the Savannah Bank relied on bad information when it made the loan to Stalliard. That is of no avail to Stalliard, though, because the only evidence in the record is that the information, bad or not, was supplied by those Stalliard put in position to provide the information, and who were acting on Stalliard's behalf ¹⁵ The Trial Judge so found and Stalliard has not appealed from this finding. Further, there is no evidence

¹⁴ See June 2, 2011, Order of Hon. Marvin H. Dukes, III, Paragraphs 3, 5, 18, 19, 21, 22, 23, 24 and 25 (R. Pages A-9, A-10, A-14, A-15, A-13, A-14, A-15, A-16, A-17)

¹⁵ Indeed, Stalliard admits as much. In his Statement of Facts in the Brief of the Appellant, the following statement appears:

Mr. Stalliard did not deny that he was aware that S. C. and B. W. were securing a loan to purchase property in his name and construct a residence, and he did not deny that he executed a power of attorney giving his settlement agent the authority to close the transaction.

Under Rule 208(b)(1)(C), SCRCP, the following appears:

any matters stated or alleged in appellant's statement shall be binding on appellant.

in the record to contradict the Trial Judge's finding¹⁶

The Trial Judge also credited the testimony of Sally A Gardocki, who closed the loan for Stallhard under the authority of a Power of Attorney given by Stallhard. Ms Gardocki testified that Stallhard was made aware of the form and content of the closing documents, and that he approved the same. Ms Gardocki's testimony was

Mr Stallhard was made aware of the form and content of the closing documents, including but not limited to the Note, Mortgage and HUD-1 Closing Statement, and Alphonse Stallhard approved the same and authorized the closing¹⁷

Stallhard did not raise any issue related to this finding in his "Statement of Issues on Appeal", and did not appeal this finding.

The Trial Judge found that Stallhard signed a loan modification document eight (8) months after the closing of the loan in which he expressly affirmed the validity of the loan made to him by the Savannah Bank¹⁸. Among other things, the Trial Judge based his finding that Stallhard's defenses failed based on the finding

¹⁶ Stallhard went so far as to testify that Steve Corba was acting pursuant to a power of attorney given to him by Stallhard in connection with this matter (See Deposition of Alphonse Stallhard, p 29, l 24 to P 30, l 25, R Pages A-139 to A-140). In an Affidavit that was not served until the day of the Summary Judgment hearing, Stallhard attempted to repudiate his own testimony on this point. While the Trial Judge accepted the late-filed affidavit, he did so stating that the proffered testimony relating to Mr Corba and the power of attorney would not be accepted or considered by him. Stallhard has not appealed from that ruling of the Trial Judge. See June 2, 2011, Order of Hon Marvin H Dukes, III, pp 5-6, Note 10, Paragraph 3 (R Pages A-7 to A-8), Deposition of Alphonse Stallhard, p 30, l 21-25 R Page A-140).

¹⁷ Affidavit of Sally A Gardocki, Paragraph 5 (R A-54). Stallhard admits that he signed the Power of Attorney, and that he knew Ms Gardocki would use it to close the loan. See Deposition of Alphonse Stallhard, p 11, l 24, to p 12, l 25, p 17, l 17 to p 18, l 14 (R Pages A-121 to A-122, Pages A-127 to A-128), Affidavit of Sally A Gardocki, Paragraphs 4 and 5 (R Pages A-53 to A-54). Stallhard did not dispute Ms Gardocki's affidavit testimony quoted above. He testified that he did not recall. See May 13, 2011, Affidavit of Alphonse Stallhard, paragraph 4 (R Page A-50).

¹⁸ See Affidavit of Diane Sala, Paragraphs 3, 5 and Exhibit B (R Pages A-60, Pages A-71 to A-72).

related to the loan modification¹⁹ Although Stallhard mentions this finding in his Brief, he raised no issue concerning it in his “Statement of Issues on Appeal” Further, he does not challenge the finding, and does not challenge the finding that he executed the Loan Modification so that he could continue to receive the benefits of the loan²⁰ Indeed, in Stallhard’s own argument, he asserts that he signed the Loan Modification to ensure that the construction of the house would be completed²¹

Stallhard did not appeal from this finding of the Trial Judge²² The only mention that Stallhard makes of this finding is as follows

Harbourside argued at hearing that independent of whether it had any duty to verify the income and loan application data, Stallhard expressly ratified the loan by executing a loan modification tendered to him in 2008 toward the end of the construction In fact, Stallhard testified that the loan modification document was tendered to him not by the bank, but through B W , with whom the bank was corresponding, and that he was led by B W to believe that he had to sign the modification document to ensure that the construction would be finished²³

Each of these unchallenged findings forms a separate and independent basis

¹⁹ See June 2, 2011, Order of Hon Marvin H Dukes, III, Para 6, 7, 26 and 27 (R Pages A-10, A-11, A-17)

²⁰ See June 2, 2011, Order of Hon Marvin H Dukes, III, paragraphs 6, 7 and Note 18 (R Pages A-10, A-11)

²¹ See Brief of Appellant, p 9 This is consistent with Stallhard’s testimony in his affidavit, as follows

I executed a loan modification documented in this matter in May, 2008 because I was informed by e-mail from Blair Witkowski that Harbourside’s personnel had contacted him and that the execution of the document was necessary to ensure funding and completion of the construction of the home on the property

See May 13, 2011, Affidavit of Alphonse Stallhard, paragraph 10 (R Page A-51)

²² No issue related this finding of the Trial Judge is raised by Stallhard in his Statement of Issues on Appeal See Argument Number 1 above

²³ See Brief of Appellant, p 9

for the granting of the Motion for Summary Judgment filed by the Savannah Bank Stallhard did not file an appeal from these findings, and these findings are now the law of the case

Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case ²⁴ Further, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted ²⁵

²⁴ *Graves v Horry-Georgetown Technical College*, 391 S C 1, 704 S E 2d 350 (SCApp 2010)

²⁵ Rule 56, SCRCF, *Ellis v Davidson*, 358 S C 509, 518, 595 S E 2d 817, 822 (SCApp 2004)

ARGUMENT NUMBER 3

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT STALLIARD'S ARGUMENT THAT ANY ACT OF THE SAVANNAH BANK CONSTITUTED LENDER NEGLIGENCE, OR THAT SUCH IS RECOGNIZED AS A DEFENSE TO A SUIT TO ENFORCE A NOTE AND MORTGAGE

Under Rule 56, SCRPC, Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law²⁶ In determining whether any material issues of fact exist, the evidence and all inferences that can be drawn from the evidence must be viewed in the light most favorable to the party resisting the motion²⁷ The purpose of Summary Judgment is to expedite the disposition of cases that do not require the services of a fact finder²⁸ Summary Judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ It is not sufficient that one create an inference that is not reasonable, or an issue of fact that is not genuine²⁹ For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action³⁰

In his second argument, Stalliard argues that there is evidence in the record of "lender negligence", "unconscionable conduct", and "unclean hands" on the part

²⁶ *Cafe Associates Limited v Gengross*, 305 S C 6, 406 S E 2d 162 (1991)

²⁷ *Redwend Limited Partnership v Edwards*, 354 S C 58, 581 S E 2d 496 (SCApp 2003)

²⁸ *Dawkins v Fields*, 354 S C 58, 580 S E 2d 433 (2003)

²⁹ *Priest v Brown*, 302 S C 405, 396 S E 2d 638 (SCApp 1990)

³⁰ *P P G Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, 297 S C 176, 375 S E 2d 331 (SCApp 1988)

of the Savannah Bank sufficient to defeat the Motion for Summary Judgment ³¹
Stalliard's argument fails for the following reasons

1 Parts of Stalliard's argument are based on material that is not in the Record for this case. The entire first paragraph appearing under Stalliard's "Argument II" consists of matters that were not argued to the Trial Judge, and which do not appear in the record for this case. The Court of Appeals should disregard this text, under the authority of Rule 210(h), SCACR, which reads

Except as provided by Rule 212 and Rule 208 (B)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the record on appeal

Also, an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review ³²

2 Stalliard's argument that an issue of fact exists is based on the deposition testimony of Susan Kieffer, a former employee of the Savannah Bank. Ms. Kieffer's testimony does not reveal any evidence to support Stalliard's claims. With respect to Ms. Kieffer's testimony, Stalliard raises 3 points, as follows

(a) Stalliard's first point is that Ms. Kieffer did not have a strong recollection of

³¹ The Savannah Bank responds to Stalliard's second argument reserving its rights under the arguments presented under Argument Number 1 above. The Savannah Bank reiterates that Stalliard raised no issue concerning lender negligence, unconscionable conduct, and unclean hands in his Statement of Issues on Appeal, and these arguments should be disregarded by this Court. Rule 208(b)(1)(B), SCACR, *Bean v. Carolina Cent. Railroad Company, Inc.*, *supra*, *Normandy Corp. v. South Carolina Department of Transportation*, *supra*, *Jones v. Lott*, *supra*.

³² *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (S.C. 1998). We point out again that no issue concerning this text was raised in Stalliard's Statement of Issues on Appeal. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal. Rule 208(b)(1)(B), SCACR.

the detail of what she or her superiors did to verify the information contained on Stallhard's loan application³³ Stallhard does not point to any authority for the proposition that the mere fact that a particular witness may not have a strong recollection on a given point is sufficient to create a genuine issue of material fact That is especially so in this case, since Stallhard has failed to point to any authority for the proposition that the matters and things testified to by Ms Kieffer are evidence of the existence of any of the elements of the defenses asserted by Stallhard³⁴

(b) Stallhard's second point relates to a notation on an "Underwriting Approval Sheet" that was made by a person other than Ms Kieffer³⁵ Ms Keiffer's testimony was

Q Okay On number 8 there's something on the next page It says handwritten stated income next to the typewritten verbal VOE, which I assume is verification of income, within 14 days of closing Who would have written stated income?

A I'm not sure on that one

Q And what does stated income mean in your banking parlance?

A Stated income, he stated his income

Q What does that mean? Why would somebody write that next to verbal verification of income within 14 days?

Mr Coltrane object to the form of the question You're asking the witness to speculate about something somebody else did You can answer it if you can

³³ See Brief of Appellant, p 8

³⁴ Stallhard offered no expert testimony, by way of affidavit or otherwise, that any act of the Savannah Bank was evidence of any misfeasance or malfeasance on the part of the Savannah Bank, and offered no testimony from any witness that any of the things testified to by Ms Keiffer are evidence of any misfeasance or malfeasance on the part of the Savannah Bank As was stated above, an issue is 'material' only if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, *supra*

³⁵ See Brief of Appellant, p 9

By Mr Mogil

Q And I'll restate it to say it says on here stated income Do you know why it says stated income next to verbal VOE?

A No ³⁶

In the absence of some evidence as to who made the notation that Ms Keiffer was questioned about, for what reason the notation was made, and some testimony that the indication of "stated income" on the "Underwriting Approval Sheet" is evidence of "lender negligence", "unconscionable conduct", or "unclean hands" on the part of the Savannah Bank, Ms Keiffer's testimony is insufficient to create any genuine issue of material fact ³⁷

(c) Stalliard's third point also relates to the "Underwriting Approval Sheet" that is Exhibit 1 to Susan Keiffer's deposition ³⁸ Stalliard argues that Ms Keiffer's inability to explain why one item was not initialed by Ms Keiffer creates an issue of fact sufficient to preclude summary judgment ³⁹ Ms Keiffer's testimony on this point was

Q The last item says number 30, compliance to be reviewed and confirmed accurate to the processor for P but no initials next to that

A Alright Compliance to be reviewed and confirmed accurate Well-

Q And that's the only item on this sheet that has the P in it that's not initialed Do you remember why that was initialed on this one?

³⁶ See Deposition of Susan Keiffer, p 40, l 4 to p 41, l 2, Exhibit 1 (R Pages A-202, A-203, A-216)

³⁷ An issue is material only if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, supra

³⁸ See Deposition of Susan Keiffer, Exhibit 1 (R Pages A-215 to A-217)

³⁹ See Brief of Appellant, p 9

A No Compliance to be reviewed would be a processors—it would be underwriting—I mean compliance
Q It says P there next to 30, right?
A I know
Q Are you saying that’s abnormal, it shouldn’t say P?
A Yes
Q Who would have created this form?
A I’m not sure who created it
Q Who normally created when you were working there?
A I guess the compliance officer, I’m not sure
Q Earlier you testified that the underwriter would have typed in these conditions?
A Yes
Q But the form itself in terms of whose job it was you don’t know who created that?
A The underwriter would have done this
Q So on this one you believe the underwriter put P when it normally would be something else?
A Yeah
Q And who was the underwriter on this file?
A Kris Parker
Q Do you recall any other loans, just out of your recollection where you worked on, where it would have said P there?
A No, I can’t remember ⁴⁰

As with the previous testimony of Ms Keiffer, the absence of some evidence as to who made the notation that Ms Kieffer was questioned about, for what reason the notation was made, and some testimony, expert or otherwise, that the notation is evidence of a “lender negligence”, “unconscionable conduct”, or “unclean hands” on the part of the Savannah Bank, there is simply no evidence that creates any genuine issue of material fact ⁴¹

Stallhard concludes his argument with the following assertion “ In sum,

⁴⁰ See Deposition of Susan Keiffer, p 43, l 19 to P 45, l 11 (R Pages 205 to A-207)

⁴¹ Again, an issue is ‘material only if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc*, *supra*

[Appellant] argues that Harbourside “owed him a duty of care to properly underwrite his loan, verify the information on his loan application including his income, and make the loan according to the conventional loan underwriting guidelines in force at the time ”⁴² Stalliard fails to provide any evidence from any expert or any other person that any of the acts complained of by Stalliard are evidence that the Savannah Bank failed to do these things Because Stalliard has failed to offer evidence in support of these arguments, there is no genuine issue of material fact present with respect to them ⁴³

Because there is no evidence in the record that any of the things complained of by Stalliard are evidence of some misfeasance or malfeasance on the part of the Savannah Bank, Stalliard’s argument is simply conjecture and speculation that a jury could find Ms Keiffer’s testimony to be evidence of something Arguments that are based on conjecture and speculation are insufficient to create a genuine issue of material fact ⁴⁴

⁴² See Brief of Appellant, p 10

⁴³ Rule 56, SCRCF, *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc* , *supra*

⁴⁴ *McKnight v South Carolina Dept of Corrections*, 385 S C 380, 684 S E 2d 566 (SCApp 2009), *PPG Industries, Inc v Orangeburg Paint & Decorating Center, Inc* , *supra* , *Priest v Brown*, *supra*

ARGUMENT NUMBER 4

STALLIARD MOVED FOR A CONTINUANCE OF THE SCHEDULED HEARING ON THE SAVANNAH BANK'S MOTION FOR SUMMARY JUDGMENT BUT DID NOT SUBMIT ANY AFFIDAVIT EXPLAINING WHY DISCOVERY WAS NOT COMPLETED WITHIN THE TIME LIMITS OF THE SCHEDULING ORDER, WHY THE MOTION WAS FILED MORE THAN TWO MONTHS AFTER THE DISCOVERY DEADLINE PASSED AND MORE THAN ONE MONTH AFTER THE SAVANNAH BANK FILED ITS MOTION FOR SUMMARY JUDGMENT, OR WHAT RELEVANT EVIDENCE STALLIARD BELIEVED THE DELAY WOULD HAVE ENABLED HIM TO UNCOVER UNDER RULE 56(F), SCRPC, THE TRIAL JUDGE PROPERLY DENIED THE MOTION

The Record for this case reveals the following time line of the various actions undertaken by the parties to this case is relevant to Stalliard's Motion to Enlarge and for Continuance ⁴⁵ The time line is as follows

- 1 This case was commenced by the filing of a Summons and Complaint on August 24, 2009
- 2 Stalliard filed his Answer and asserted Affirmative Defenses on January 5, 2010
- 3 Stalliard filed Interrogatories and a Notice to Produce on January 7, 2010
- 4 The Savannah Bank responded to the Interrogatories and Notice to Produce on February 16, 2010, and supplemented the interrogatory answers on March 9, 2010
- 5 The Savannah Bank and Stalliard entered in to a Consent Order to Bifurcate Stalliard's defenses/counterclaims from the Foreclosure action on May 13, 2010
- 6 The foreclosure action was heard on Jun 25, 2010, and the subject property was sold on August 2, 2010
- 7 On November 10, 2010, the Savannah Bank and Stalliard entered into a Consent Scheduling Order which set the following deadlines

⁴⁵ The Savannah Bank makes this argument reserving its arguments presented under Argument Number 1 above

- (a) Stalliard was required to file an answer to the Amended Complaint of the Savannah Bank, on or before November 15, 2010
 - (b) Stalliard was required to identify his experts by December 1, 2010
 - (c) The Savannah Bank was required to identify its experts by January 1, 2011
 - (d) The Parties were required to complete discovery by February 15, 2011. The time to respond to discovery was shortened to twenty (20) days
 - (e) The Parties were required to file all pretrial motions by March 15, 2011
- 9 The Savannah Bank served its interrogatories and notice to produce on Stalliard on November 16, 2010
- 11 Stalliard did not respond to the discovery requests in 20 days, and on January 3, 2010, the Savannah Bank filed its Motion to Compel
- 12 Prior to the February 15, 2011, deadline for completion of discovery, Stalliard noticed the depositions of Judd Tracy and Susan Keiffer. Although the depositions were noticed prior to the deadline, the depositions were taken subsequent to the discovery deadline in order to accommodate the witnesses. No party objected to taking the depositions subsequent to the discovery deadline.
- 14 On March 15, 2011, the Savannah Bank filed and served its Motion for Summary Judgment on Stalliard.
- 15 On May 2, 2011, more than two months after the discovery deadline passed, and more than one and one half months after the Savannah Bank served its Motion for Summary Judgment, Stalliard moved to extend the time for discovery and to continue the hearing on the Savannah Bank's summary judgment motion.⁴⁶

⁴⁶ See May 11, 2011, Return to Stalliard's Motion (R. Pages A-99 to A-104)

In the Motion to Enlarge Time for Discovery and to Continue Hearing on the Savannah Bank's Motion for Summary Judgment, Stalliard made the following claims, none of which were supported by an affidavit

1 Stalliard had recently contacted an unidentified "material" witness, said to be previously "believed to be unavailable." No facts were provided by affidavit as to what efforts to contact this witness had been made in the 16 months that had elapsed since Stalliard first appeared in this case, and no facts were provided by affidavit as to what relevant information was learned from the unidentified witness, or what relevant information he believed would be uncovered through further discovery.⁴⁷

2 That he tendered supplemental discovery requests to the Savannah Bank. These requests were served April 25, 2011, in violation of the Scheduling Order, without leave of Court.⁴⁸

3 Stalliard made reference to material he contended should have been produced by the Savannah Bank in response to his discovery requests. No explanation was given as to why a motion to compel was never filed, or why Stalliard did not raise this issue for more than a year after the Savannah Bank responded to Stalliard's

⁴⁷ The bare assertions of Stalliard's Motion were not a sufficient basis for the Court to grant it. Under Rule 56(f), SCRPC, a party must file affidavits setting forth the reasons he has been unable to secure evidence. Rule 56(f), SCRPC, reads

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just

⁴⁸ Again, Stalliard failed to submit an affidavit indicating what evidence he believed would be revealed through the late filed discovery requests

discovery requests ⁴⁹

4 Stallhard stated he wished to depose an additional unidentified officer of the Savannah Bank, without a supporting affidavit identifying the officer, stating why the deposition was not taken between January 5, 2010, when he appeared in the case, and February 15, 2011, when the deadline for discovery passed, or what evidence he believed would be revealed through the deposition

5 Item number 6 in Alphonse Stallhard's motion revealed his intent. Having seen the Savannah Bank's summary judgment motion, he wished to engage in a fishing expedition in an effort to find some way to controvert the motion. Stallhard wished to engage in discovery to " fully determine *if there are material fact issues* " (emphasis supplied) ⁵⁰ Under Rule 56(f), SCRPC, Stallhard was required to show by affidavit what relevant evidence he believed to exist, and he did not do so ⁵¹

Stallhard failed to provide any basis for the Trial Judge to grant his Motion, and he failed to comply with the requirements of Rule 56(f), SCRPC. In order to have made the showing necessary to extend the discovery period and continue the hearing on the Savannah Bank's Motion for Summary Judgment, Stallhard was required to file an affidavit or affidavits showing facts that were sufficient to justify

⁴⁹ No facts are provided by affidavit as to why the information Stallhard sought would have been relevant

⁵⁰ See Stallhard's Motion to Enlarge Time for Discovery and to Continue Hearing on Plaintiff's Motion for Summary Judgment, Page 2, Paragraph 6 (R Page 106)

⁵¹ Stallhard has not filed any affidavit demonstrating any likelihood that further discovery will uncover any relevant evidence, which was necessary in order for the Trial Court to have granted his motion. See *Dawkins v Fields*, 354 S C 58, 580 S E 2d 433 (S C 2003)

the same ⁵²

Because Stallhard failed to show any facts by affidavit as to why discovery was not completed within the time limits of the Scheduling Order, why his Motion was filed more than two months after the discovery deadline passed and more than one month after the Savannah Bank filed its Motion for Summary Judgment, or what relevant evidence the delays would have enabled him to uncover, the Trial Judge properly denied the Motion ⁵³

⁵² *Doe ex rel Doe v Batson*, 435 S C 316, 548 S E 2d 854 (S C 2001)

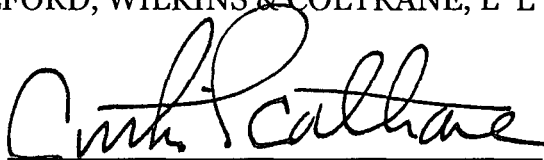
⁵³ *See* June 2, 2011, Order of Hon Marvin H Dukes, III, p 5, n 9 (R Page A-7)

CONCLUSION

Stalliard has failed to demonstrate the existence of any genuine issue of material fact upon which this Court could reverse the Trial Judge's Order granting Summary Judgment. In addition, Stalliard has failed to appeal alternate findings of the Trial Judge that support the Trial Judge's Order. For these reasons, the Savannah Bank urges this Court to dismiss this appeal and affirm the June 2, 2011, Order of the Hon. Marvin H. Dukes, III.

Respectfully Submitted

ALFORD, WILKINS & COLTRANE, L L C

By 

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This 02 Day of December, 2011

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

11

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

HON MARVIN H DUKES, III, MASTER-IN-EQUITY

DEC 16 2011

SC Court of Appeals

Case Number 2009-CP-07-3945

HARBOURSIDE COMMUNITY BANK, As Servicing Agent for
THE SAVANNAH BANK, N A ,

RESPONDENT,

vs

ALPHONSE STALLIARD, OLDFIELD CLUB, and
OLDFIELD COMMUNITY ASSOCIATION, INC ,

Of Whom ALPHONSE STALLIARD is the

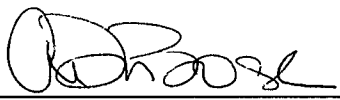
APPELLANT

CERTIFICATE OF MAILING

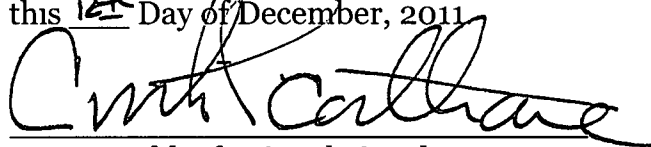
I, Amanda DuBose, Paralegal with the law firm of Alford, Wilkins & Coltrane, LLC,
certify that I have this date, served one copy of the Final Brief of the Respondent and one
Copy of the Rule 211(b), SCACR, Certification by depositing a copy of the same at the United
States Post Office, with first class postage affixed thereto, and addressed as follows

Michael W Mogil, Esq
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ALFORD, WILKINS & COLTRANE, LLC

By 
Amanda DuBose, Paralegal

Sworn to and Subscribed before me
this 12th Day of December, 2011



Notary Public for South Carolina
My Commission Expires 3 12 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM BEAUFORT COUNTY
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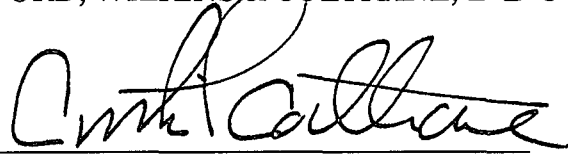
RULE 211(b) CERTIFICATION

I, Curtis L Coltrane, the undersigned attorney for the Respondent in this case, hereby certify that the Final Brief is identical to the Initial Brief served under Rule 208, SCACR, except (1) references in the Initial Brief have been revised to indicate where the material appears in the Record on Appeal, and, (2) obvious typographical errors and the spellings which were contained in Initial Brief have been corrected. No other changes have

been made

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