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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Appellate Case No.: 2014-001487

Linda Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust, and Heritage Seven, LLC,

Respondents,

v.

Ameris Bank, Appellant.

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STATEMENT OF ISSUES ON APPEAL

I. Did the master-in-equity err in concluding that the bank owed the borrower (a limited liability company) a fiduciary duty in a $2.8 million dollar commercial loan transaction for a real estate venture that ultimately failed?

II. Did the master-in-equity err in concluding that the bank was liable for negligent misrepresentation for telling the borrower that the transaction was a "good deal" and that the "rents would cover the debt"?

III. Did the master-in-equity err in concluding that the bank knowingly aided and abetted the borrower's real estate agent in breaching a fiduciary duty?

IV. Did the master-in-equity err in awarding actual and punitive damages, and is the punitive damages award so excessive that it violates the due process clause of the United States and South Carolina Constitutions?

STATEMENT OF THE CASE

This is an appeal from an order entering judgment in favor of Heritage Seven LLC and Linda Gibson, individually and as Trustee of the Paul William Gibson Family Trust, (collectively, "Respondents") on causes of action for breach of fiduciary duty, negligent misrepresentation, and aiding and abetting a breach of fiduciary duty. [Ord.]

This case began as a foreclosure action. On June 14, 2010, Appellant Ameris Bank filed a foreclosure action against Respondents for failing to pay two notes: one for $2,810,164.50 and the other for $50,071.96. [Compl.] On July 20, 2010, Respondents answered the complaint, asserting counterclaims of negligent misrepresentation, civil conspiracy, and equitable relief. [Answer & Countercl.] On September 27, 2011, Respondents amended the counterclaims, alleging counterclaims of negligent misrepresentation, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. [Am. Compl.] On October 20, 2011, Ameris Bank answered the amended counterclaims, denying the allegations and asserting numerous affirmative defenses. [Answer] The foreclosure action settled on December 1, 2010, with Ameris Bank's assignee of the loan accepting a deed in lieu of foreclosure. [Def. Ex. 107.] The counterclaims remained, however, and were tried on May 22 and 23, 2012, and August 14, 2012 before the Berkeley County Master-in-Equity. [Order.]

On August 8, 2013, the master entered judgment for Respondents on all causes of action and awarded actual damages of $1,153,625 and punitive damages of $3,551,232. *Id.* The master found Gibson 20% at fault for the harm alleged, and rather than apply the deduction to the actual damages only, applied it to the total award of actual and punitive damages. *Id.* Additionally, the master applied an $850,000 setoff to the total award

(rather to the actual damages only), for the money received in the settlement of the case that Respondents filed against Rolando Villavicencio and others for the same injury. [Order; Def.'s Ex. 108.] The final judgment was for $2,913.886. [Order] On July 10, 2014, the bank served a notice of appeal. [Notice of Appeal.]

STATEMENT OF FACTS

This case involves a $2.8 million loan that Ameris Bank made to Heritage Seven LLC for the purchase and renovation of an apartment complex in North Charleston, South Carolina. [Def.'s Exs. 31, 32, 34.] Linda Gibson is the sole managing member of Heritage Seven, LLC. [Tr. 91:8-11; 165:10-16.] Gibson guaranteed the loan in her individual capacity and as Trustee of the Paul William Gibson Family Trust. [Def.'s Ex. 29, 30.]

A. Linda Gibson

Linda Gibson is a multimillionaire. As of October 5, 2009, she had a net worth of $18,341,915, with $24,121,275 in assets. [Tr. 170:19-22; Def.'s Ex. 98.] Gibson's assets are primarily income-producing real estate. [Def.'s Exs. 5, 11, 17.] In 2009, she received $478,775 in rental income. [Tr. 168:8-22; Def.'s Ex. 98.] Gibson attended two years of college. [Tr. 159:15-17.] She has formed and been a member of multiple LLCs. [Def.'s Exs. 109, 110, 111, 112, 113.] She has served as Trustee of the Paul William Gibson Family Trust since 2003, and has successfully managed the affairs of the trust since that time. [Tr. 166:1–11.]

B. Rolando Villavicencio and Heritage Seven LLC

Rolando Villavicencio was a realtor for ReMax Professional Realty in Charleston. Linda Gibson met Villavicencio and his wife Portia at church in 2004, and they became

friends soon after Gibson's husband died. [Tr. 111:11-14; 621:14-623:8.] In 2005, Gibson sold one of the two beach houses she owned at the Isle of Palms (600 Carolina Boulevard). [Tr. 73:2-19.] Upon selling the beach house, Gibson executed a 1031 exchange to defer paying capital gains tax on the proceeds of the sale. [Tr. 73:20 – 764:10; 161:22-162:6; Ct. Ex. 3, 34:25-35:19.] She asked Villavicencio and Portia to help her find a suitable commercial property for the exchange. [Ct. Ex. 3, 34:25-35:19.]. Villavicencio identified a shopping center in Moncks Corner. [Tr. 73:18-19; 160:8-14.] The purchase price was $2.4 million. [Tr: 160:12-14; Def.'s Ex. 3.]

On November 20, 2005, Gibson formed Heritage Seven, LLC, to purchase the shopping center. [Def.'s Ex. 111.] Gibson obtained financing through First Reliance Bank. [Pl.'s Ex. 32; Def.'s Ex. 1.] Karl Zerbst was the loan officer and Benjamin Lanier was the credit analyst. [Pl.'s Ex. 32.] The sale closed on December 15, 2005. [Def.'s Exs. 2, 3.] Heritage Seven LLC hired Villavicencio and ReMax Professional Realty to manage the shopping center for a ten-year term. [Def.'s Ex. 4; Tr. 179:1-7.]

C. Karl Zerbst

Karl Zerbst is a former employee of Ameris Bank. Gibson met Zerbst in late 2004 when he was working for First Reliance Bank. [Tr. 118:9-11.] Gibson opened a CD and a checking account through him. [Tr. 118:12-16.] When asked how often she met with Zerbst in 2004 and 2005, Gibson testified, "Probably two or three times." [Tr. 118:17-20.] As noted above,

In November 2005, Zerbst was the loan officer who structured the loan made to Heritage Seven LLC to purchase the shopping center. [Tr. 118:21 – 119:20.]

D. North Charleston Apartment Complex

In 2007, Villavicencio approached Gibson about purchasing a 48-unit apartment complex in North Charleston. [Ct. Ex. 3, 44:1 – 52:5.] Villavicencio was familiar with the property because he was the property manager and the exclusive listing agent for the seller. [Ct. Ex. 3, 35:22-36:31; Ct. Ex. 10, 18:15-19:1; Def.'s Ex. 9.] The property was listed for $2.8 million. [Tr. 183:1-4.] Villavicencio painted "a great picture" for Gibson about converting the apartments into condominiums and selling them for $90,000 - $100,000 per unit.[1] [Ct. Ex. 3, 44:1 – 52:5.] He told her that he thought the price was a good deal and that it would be a good investment for her. [Ct. Ex. 3, 44:1 – 52:5; Ct. Ex. 10, 38:25-39:8.] Gibson considered Villavicencio to be her financial advisor and she was "relying on him heavily." [Ct. Ex. 3, 49:8–11.] Gibson asked Villavicencio if she should offer something less than the list price, and he said no, that the seller would not take anything less. [Tr. 183:1-13; 624:6-625:21.] On May 7, 2007, Gibson signed a contract to purchase the property for $2.8 million. [Def.'s Ex. 6.]

Gibson decided not to sell any of the real estate she owned to generate cash to buy the apartments. [Tr. 191:2-19.] Instead, she chose to refinance the beach house owned by 3205 Palm Boulevard, LLC.[2] [Ct. Ex. 3, 63:15-64:20; Def.'s Ex. 43, last page.] The refinance closed on August 28, 2007, and generated approximately $667,000 in cash, which Gibson used to purchase the apartment complex. [Def.'s Ex. 10; Tr. 193:23-194:11.]

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[1] Villavicencio was not able to find a bank that would finance the proposal to convert the apartments into condominiums and sell them. [Tr. 183:18 – 184:20.] So he suggested that the apartments be renovated and leased, which Gibson agreed to. *Id.*

[2] Gibson formed 3205 Palm Boulevard, LLC, in 2002, and was a 50% owner. [Def.'s Ex. 109; Tr. 191:14-192:18.]

In September 2007, Heritage Seven LLC submitted a loan application to First Reliance Bank, the same bank that financed the purchase of the shopping center. [Def.'s Ex. 15.] As part of the application process, Villavicencio prepared and submitted multiple personal financial statements on Gibson's behalf.[3] [Ct. Ex. 3, 14:9-21; Tr. 425:20-426:10; Ct. Ex. 10, Villavicencio Dep. 87:11 – 88:17.] One statement, dated April 30, 2007, shows Gibson having a net worth of $53,797,162. [Def.'s Ex. 5.] Another statement, dated August 30, 2007, shows Gibson having a net worth of $53,005,766. [Def.'s Ex. 11.] Yet another statement, dated September 30, 2007, shows a net worth of $52,682,766.[4] [Def.'s Ex. 17.]

In connection with the loan application, First Reliance ordered an appraisal of the property. [Def.'s Ex. 13.] The appraisal, dated September 12, 2007, showed an as-is value of the apartment complex of $2,800,000, and the as-renovated value of $3,700,000. *Id.* The appraisal also contains information about projected rental revenue upon completion of the renovations. *Id.*

On September 17, 2007, Gibson (on behalf of Heritage Seven, LLC) signed a contract with an architectural firm, agreeing to pay $20,000 for various architectural services, including oversight during the renovations. [Def.'s Ex. 14; Tr. 230:23-231:2.] The agreement states that the owner selected The Triton Group as the contractor. [Def.'s

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[3] Villavicencio played an active role in communications with the bank. [Def.'s Exs. 23, 24, 27.] He was the go-between between Gibson and the bank. [Ct. Ex. 10, 181:6-10.]

[4] These numbers were much higher than Gibson's actual net worth at the time, primarily because the statements represented that the 55 acres that Gibson owned on Daniel Island were worth $27.5 million. [Def.'s Exs. 5, 11, 17.] Gibson's 2010 financial statement showed the same property valued at $5.5 million. [Def.'s Ex. 98.] Nonetheless, Gibson allowed the inflated statements to be submitted to both First Reliance and Ameris, and both banks relied upon the statements in processing the loan application for the apartment complex. [Def.'s Exs. 15, 18, 22.]

Ex. 14.] The contract with The Triton Group is dated September 26, 2007, and shows a contract price not to exceed $700,000 for the renovations. [Def.'s Ex. 16.]

On October 4, 2007, while the loan application was pending, Karl Zerbst left First Reliance Bank. [Tr. 368:19-21; 369:21–370:1.] At some point after leaving the bank, Zerbst received a call from Villavicencio. [Tr. 392:5-16.] Villavicencio wanted to know where Benjamin Lanier, who also used to work at First Reliance, had gone to work, and Zerbst told him Ameris Bank. *Id.* Zerbst notified Lanier that Villavicencio would be calling. [Tr. 400:9 – 401:2; 422:12-16.] Lanier set up a meeting with Villavicencio at the apartment complex. [Tr. 400:24 – 401:2.] Zerbst attended the meeting and gave Villavicencio certain of the loan application documents from First Reliance, including the appraisal, and Villavicencio in turn gave them to Lanier.[5] [Tr. 401:20 – 402:2.] Zerbst did this without any instruction from Ameris Bank.[6]

After the meeting with Lanier and Zerbst, Villavicencio sent Lanier an email stating that he had received a call from Ben Brazell at First Reliance Bank, who said that he was not able to submit the loan package to the loan committee when promised. [Def.'s Ex. 114.] The email, dated October 19, 2007, states:

> it also appears he has a lot more important stuff on his plate at the moment than our loan.
>
> as you know, we no longer have time to waste.

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[5] Lanier described the delivery of the documents as "staged." [Tr. 403:7-14.] By delivering the documents to Villavicencio instead of directly to Lanier, Zerbst was presumably trying to avoid violating a non-compete agreement he had with First Reliance Bank that prevented him from working in the Charleston area for a year. [Tr. 374:6-16.]

[6] Zerbst was not employed by Ameris Bank or any bank at this time. Although Zerbst had spoken to Ameris Bank about working there, he did not become an employee of the bank until January 11, 2008. [Def.'s Ex. 40; Tr. 327:16 – 328:17.]

> we should have closed this project months ago.
>
> anyway, with the above, let this be our official request for ameris bank to proceed with processing for above loan.
>
> you had mentioned you may be able to provide us a commitment letter by early next week.

Id.

On or about October 25, 2007, Heritage Seven, LLC, submitted a commercial loan application to Ameris Bank. [Def.'s Ex. 25.] The application is signed by Gibson as managing member of Heritage Seven LLC. [Def.'s Ex. 25; Tr. 211:16-22.] The amount requested is $2,800,000. [Def.'s Ex. 25.]

Sometime in October 2007, prior to the loan closing, Gibson called Karl Zerbst. [Tr. 137:24–138:2.] Zerbst was no longer working for First Reliance Bank and had not yet begun working for Ameris Bank.[7] [Tr. 137:13-16; 138:3-5.] Gibson reached Zerbst on his cell phone. She did not know where he was when he accepted the call or what information he had in front of him. [Tr. 213:10 – 214:4; 216:8-13.] She testified that the call lasted approximately thirty minutes, and that she believed that they talked "a little bit about the appraisal," about the location and the rents, and about whether Zerbst felt like the apartment complex was a good property for her "so that [she] could at least make a

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[7] Ameris Bank has maintained throughout this case that Zerbst was not an agent of the bank in October 2007; that the bank did nothing to represent to Gibson that Zerbst was authorized to act on the bank's behalf; and that as a matter of law, Zerbst cannot create an agency relationship through his conduct alone. *See Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005) ("An agency relationship may not be established solely by the declarations and conduct of an alleged agent."). *See also Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 641-44, 598 S.E.2d 717, 721-22 (Ct. App. 2004) (holding that there is no relationship as a matter of law when the principal has not made any representations to a third party concerning whether someone is an agent). The master's finding to the contrary is incorrect as a matter of law.

little money on it, that it was a better cash flow than the beach house that [she] had, and that [she] was going to be able to pay for it." [Tr. 141:2-10.] Gibson testified:

> That was my main concern, was whether or not -- I was borrowing millions of dollars. I'm not -- I don't know a lot about business, but I do know that I cannot spend more money than I take in, and that was the bottom line for me. Is this going to be a suitable property where the rents would cover my debt? And hopefully this thing would -- once it was renovated, they assured me that the rents were going to increase because of the renovations. I mean, even the appraisal showed that, that they said it -- it went from 2.8 million to 3.7 million because of the renovations. So they said that the rents would come in at almost double and that would be taken care of. So that was my main concern and that was what I talked about with Karl.

[Tr. 141:11 – 142:2.]

When asked what Zerbst told her, Gibson stated: "Well, he didn't disagree with that. He never once said any negative thing about that property, that it wouldn't fly, that it wouldn't do me a service, that it was all – he and Mr. Villavicencio both assured me." [Tr. 142:3-8.] She concluded that the apartments were a good deal because Zerbst did not say anything negative. [Tr. 219:4-8.] She testified that Zerbst "thought it was a good investment" and "always assured [her] that the rents would cover the debt." [Tr. 142:22-23; 156:4-5.]

E. The Closing and Loan Documents

Ameris ultimately approved the loan, and the closing took place on November 2, 2007.[8] [Def.'s Exs. 26, 37.] Prior to the closing, on October 25, 2007, Ameris gave Gibson a commitment letter indicating the bank's intention to approve the loan. [Def.'s Ex. 26.] This was done at a grand opening party for Ameris's Charleston office. [Tr.

[8] The loan was also approved by First Reliance Bank. [Def.'s Ex. 22; Tr. 365:8-20.]

125:25-128:20.] The commitment letter outlined the terms of the loan agreement and explained the purpose of the loan, the rate and fees, the maturity, the terms, the collateral, and the conditions precedent.[9] [Def.'s Ex. 26.]

On November 2, 2007, the day of the closing, Gibson signed a Construction Loan Agreement with Ameris Bank, individually and on behalf of Heritage Seven LLC. [Def.'s Ex. 31; Tr. 207:14-22.] The agreement contains numerous provisions regarding the responsibilities of the parties. [Def.'s Ex. 31.] According to the agreement, Heritage Seven LLC was responsible for choosing an architect or other construction consultant to periodically inspect the project's progress to protect the borrower's interests. *Id.* ¶ 5. The agreement states that *the borrower* "will apply or cause Project contractors and suppliers to apply the Loan disbursements only to work actually done and materials actually incorporated in the Project and scheduled to be paid under the Disbursement Schedule." *Id.* ¶ 14(N). The agreement states that any inspections done by the bank are solely for the benefit of the bank. *Id.* ¶ 8(D). The agreement further states that the bank is "not obligated to inspect, supervise, prevent Construction Liens, or inform [the borrower] about the Project's progress or performance," and the bank and its consulting architect act for the protection of the bank. *Id.* ¶ 14(V). The agreement also contains an indemnity clause requiring the borrower to defend, indemnify, and hold harmless the bank for anything that anyone does or fails to do concerning the property. *Id.* ¶14(D).

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[9] Gibson testified that she signed the commitment letter at the grand opening party and that she was under the influence of alcohol when she did so. [Tr. 125:25-128:20.] She was not able to produce a signed copy of the letter, however, and the letter did not obligate her to close on the loan in any event. [Def.'s Ex. 26.] The commitment letter simply indicated the bank's intention to make the loan and stated that funding was contingent upon a successful closing, which was not scheduled to take place until November 2, a week after the party. *Id.*

The agreement outlines events of default and remedies that the bank may pursue. *Id.* ¶¶ 15, 16. Finally, the agreement states: "This Agreement and the other Loan Documents are the complete and final expression of the understanding between [the parties]." *Id.* ¶ 20.

Prior to the closing, Gibson did not do any independent research or investigation to evaluate the property. [Tr. 181:24-182:15.] Although she understood that she could have obtained a second opinion about the purchase price, she never did. [Tr. 181:24 – 182:3; 224:3-23.] She did not review any cash flow statements or income statements for the property. [Tr. 181:24-182:15.] She never saw the rent rolls for the property. [Tr. 185:12-17.] She inspected only one of 48 units. [Tr. 181:12-20.] She did not hire an architect or a contractor to inspect the property. [Tr. 182:8 – 10.] She did not ask anyone (other than Villavicencio) to prepare an estimate of the cost necessary to convert the apartments into condominiums or to renovate them to generate higher rents. [Tr. 182:11-15; 185:19-23; 214:12-18.]

F. Renovations of the North Charleston Apartment Complex

After the loan closed, the renovations began. Villavicencio was responsible for supervising the construction and visited the apartment complex almost every day. [Def.'s Ex. 39; Ct. Ex. 10, Villavicencio Dep. 194:25-195:13; 207:20-23.] Gibson did not visit the project during the first five months of construction because of health issues. [Tr. 104:22-105:19.] Nonetheless, she would call Villavicencio from time to time to see how things were going. [Tr. 107:3-6.] Villavicencio told her that everything was going fine and that the project was proceeding as planned. *Id.* On February 7, 2008, Villavicencio sent an email to Lanier at Ameris Bank stating that "we should start seeing units

completed and ready for leasing next month." [Def.'s Ex. 48.] He further stated, "we are moving along as planned." *Id.*

At the end of March 2008, after the renovations had been underway for approximately five months, Gibson visited the property for the first time. [Tr. 104:22-105:15.] Upon her arrival, she observed that "a lot of things" had gone wrong with the project. [Tr. 106:8-9; 108:14-15.] For instance, she saw that three buildings were being worked on instead of one, which was contrary to the plan to renovate one building at a time. [Tr. 106:8-107:6; Def.'s Ex. 58.] According to Gibson, each building was supposed to take four to six weeks to complete. *Id.* Instead, not a single building had been completed and the buildings were completely "demolished," having no windows or doors. *Id.*

On her drive home after visiting the property, Gibson testified that "a wave of fear came over [her]" and she "had to make a decision to go down there eventually." [Tr. 108:1-6.] In May 2008, Gibson moved to the apartment complex to take over the day-to-day management and supervision of the project. [Tr. 108:23-110:7.] One of the first things she did was fire the crew that Villavicencio had hired. [Tr. 108:7-9.] Gibson said they were "young people" who "didn't seem to be competent construction people." *Id.* Gibson interviewed several people before hiring a crew, and officially replaced Triton Construction with a new contractor. [Tr. 108:24-25; Def.'s Ex. 57.] Under her supervision, two buildings were renovated and half of a third. [Tr. 109:7 - 11.]

On June 3, 2008, Gibson formed Seven Oaks Apartments, LLC. [Def.'s Ex. 113.] Gibson intended to transfer the apartments into this LLC at a later date but never did. [Tr. 166:20 – 168:3.]

G. Litigation against Villavicencio

By May 28, 2008, Gibson had officially terminated Villavicencio as the property manager for both the apartment complex and the shopping center. [Def.'s Ex. 52; Tr. 108:1-109:15.] On July 28, 2008, Linda Gibson, Heritage Seven LLC, and Seven Oaks Apartments LLC filed an action against Villavicencio, ReMax, the appraiser, and others, asserting causes of action for breach of contract and an accounting. [Def.'s Ex. 60.] On August 11, 2010, the complaint was amended to allege causes of action for breach of contract, breach of contract accompanied by a fraudulent act, constructive fraud, conversion, negligence, negligent supervision, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and violation of the Unfair Trade Practices Act.[10] [Def.'s Ex. 65.] The amended complaint alleged that Villavicencio and other defendants represented that the purchase price of the apartment complex was its market value and that it was a suitable investment for Gibson when in fact it was not. *Id.* The complaint further alleged that Villavicencio and others breached fiduciary duties owed to Gibson and her entities. *Id.*

In February 2012, the case against Villavicencio and others settled. As a result of the settlement, Gibson and her entities received $850,000. [Def.'s Ex. 108.]

H. Negotiations with Ameris Bank and Default

At the end of the 2008, Gibson entered into negotiations with Ameris Bank to modify the terms of the loan. [Def.'s Exs. 72, 76, 82, 84; Tr. 644:4-8.] The construction

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[10] Gibson changed counsel between the filing of the initial complaint and the amended complaint. Andrew Epting and George Kefalos, who are among the counsel who represented Respondents at the trial in the present case, filed the amended complaint. [Def.'s Ex. 65.] John West and Gedney Howe also represented Respondents in this case. [Am. Compl.] Mr. Howe did not appear at trial.

loan contemplated a construction completion date of December 2, 2008, and because the renovations were not going to be completed by that time, Ameris worked with Gibson to extend the terms of the loan. [Def.'s Exs. 31, 72, 76, 82, 84; Tr. 644:4-8.]

On January 9, 2009, Heritage Seven LLC executed a renewal note in the amount of $2,809,681.86, with an interest rate of 6.0%, which was more favorable than the prior rate of 7.75%. [Def.'s Ex. 34, 87.] Gibson guaranteed the renewal note personally and as Trustee of the Paul William Gibson Family Trust. [Def.'s Exs. 85, 86.]

On June 2, 2009, Zerbst and Lanier met with Gibson at the apartment complex to discuss the fact that Heritage Seven LLC was behind on the loan. [Pl.'s Ex. 50.] Gibson reported that the apartment complex was 56% occupied, and that the vacant units included the eight units in building 3 that was still being renovated. *Id.* Gibson further reported that several of the tenants had either lost their income or did not have the money to pay their rents. *Id.* She had to evict tenants and find new ones. *Id.* Lanier memorialized the meeting in a memo, stating, "Getting the project completed is paramount to the success of this loan performing." *Id.*

In addition to the renewal note, on October 1, 2009, Ameris Bank loaned Heritage Seven LLC $50,071.96 to pay the property taxes that became due on the property. [Def.'s Exs. 96, 97.]

Gibson never fully completed the renovations and stopped making payments on the both loans. On June 14, 2010, Ameris Bank initiated foreclosure proceedings. [Compl.] Prior to initiating the proceedings, Ameris met with Gibson and her attorney,

Robert Papa, to try to reach a resolution.[11] [Pl.'s Exs. 35, 60, 63.] Ameris even offered to defer $300,000 of the amount due. *Id.* Gibson declined all proposals. [Pl.'s Ex. 57.]

On July 14, 2010, one month after initiating the foreclosure proceedings, Ameris Bank sold the mortgage loan to Galt Valley, LLC, for approximately $975,000. [Def.'s Ex. 115; Tr. 647:9-13.] On December 1, 2010, Galt Valley and Respondents settled the foreclosure action. [Def.'s Ex. 107.] As part of the settlement, Heritage Seven LLC executed deeds in lieu conveying the apartment complex and other real property that served as collateral for the loan to Galt Valley. *Id.* In exchange, the notes were deemed satisfied, the loan documents canceled, and all litigation pending between Respondents and Galt Valley was dismissed. *Id.*

Ameris lost approximately $1.8 million on the transaction. [Tr. 648:19-22.]

STANDARD OF REVIEW

"An action in tort for damages is an action at law." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). An appellate court "will not disturb the trial court's factual findings unless they are without evidence reasonably supporting those findings." *Id.* Questions of law, however, "may be decided with no particular deference to the trial court . . . ." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009).

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[11] Prior to hiring Papa, Gibson was represented by The Richter Firm. The Richter Firm represented Gibson in the lawsuit against Villavicencio. [Tr. 85:13-20.] According to Gibson, the firm withdrew as counsel due to a conflict of interest. [Tr. 103:17-23.] Larry Richter had previously represented Karl Zerbst in connection with his non-compete agreement. [Tr. 367:17-22.]. Neither Richter nor his law firm ever represented Ameris.

ARGUMENT

This case involves a $2.8 million commercial loan for a real estate venture that ultimately failed. The parties to the transaction were an LLC and a bank. The master erred in four respects. First, the master erred in concluding that the bank owed the borrower a fiduciary duty of care. The bank did not undertake to advise the borrower as a part of the services offered by the bank and did not accept any confidence that the borrower may have placed in it. The relationship was arms-length. Second, the master erred in concluding that the bank was liable for negligent misrepresentation. The bank did not make any false representations to the borrower, and any reliance by the borrower was not justified given the arms-length nature of the transaction. Third, the master erred in concluding that the bank aided and abetted a breach of fiduciary duty by the borrower's real estate agent. This conclusion is wholly unsupported by the evidence and as a practical matter does not make sense. It was in the bank's financial interest for the real estate venture to be successful. It was not in the bank's interest to harm the borrower or to aid anyone in doing so. Fourth, the master erred in awarding actual and punitive damages, and the punitive damages award is so excessive that it violates due process and must be reversed.

Because of these errors, this Court should reverse the master's order and enter judgment in favor of Ameris Bank.

I. The bank did not owe the borrower a fiduciary duty.

To begin, Ameris Bank did not owe Linda Gibson or Heritage Seven LLC a fiduciary duty as a matter of law.

"Whether a fiduciary relationship exists between two people is an equitable issue for the judge to decide." *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). "A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." *Id.* at 250, 599 S.E.2d at 472. "A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *Id.; accord Hendricks v. Clemson Univ.*, 353 S.C 449, 458, 578 S.E.2d 711, 715 (2003).

"The term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him." *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). "As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship." *Id.* "The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party." *Id.*

Accordingly, "a fiduciary relationship cannot be created by the unilateral action of one party." *Moore*, 360 S.C. at 251, 599 S.E.2d at 472. "To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing." *Id.* Further, "[t]he evidence must show the entrusted party actually accepted or induced the confidence placed in him." *Id.*

A fiduciary relationship does not exist when the entrusted party is unaware of the special trust being reposed in it. *Burwell,* 288 S.C. at 40-41, 340 S.E.2d at 790; *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Steele v. Victory Sav. Bank,* 295 S.C. 290, 294, 368 S.E.2d 91, 93 (Ct. App. 1988).

A. South Carolina courts have never imposed a fiduciary duty on a bank in the commercial lending context.

The general rule in South Carolina is that a bank does not owe fiduciary duties to its customers. *See, e.g., Burwell v. S.C. Nat'l Bank,* 288 S.C. 34, 340 S.E.2d 786 (1986); *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Rush v. S.C. Nat'l Bank*, 288 S.C. 560, 343 S.E.2d 667 (Ct. App. 1986). The normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature. *Burwell*, 288 S.C. at 40, 340 S.E.2d at 790. The same is true of the relationship between a mortgagee and mortgagor. *See Brown v. C&S Real Estate Servs., Inc.*, 314 S.C. 463, 445 S.E.2d 463 (Ct. App. 1994). In limited circumstances, however, a fiduciary relationship may arise between a bank and a customer when the bank "undertakes to advise the customer as a part of the services the bank offers." *Burwell,* 288 S.C. at 40, 340 S.E.2d at 790.

There is not a single appellate court decision in South Carolina in which the court has found that a fiduciary relationship existed between a lender and a borrower, and certainly no case where the court found that a fiduciary relationship existed in the commercial lending context. For example, in *Burwell v. S.C. Natl. Bank*, the court rejected the plaintiff's contention that he had a fiduciary relationship with the bank, finding that the fact that the customer bargained with the bank before signing various loan documents indicated that the customer knew that the transaction was an arms-length

transaction. 288 S.C. at 48, 340 S.E.2d at 790. Given these circumstances, the plaintiff could "not reasonably have believed that [the banker] was acting on his behalf instead of on behalf of [the bank]." *Id.* Additionally, the court found that there was no evidence that the bank was aware of the alleged trust being placed in it. *Id.*

In another case, the plaintiff claimed that the bank owed her a duty of care under a negligence standard because she was in a vulnerable position and was dependent on the bank for guidance. *Regions Bank*, 354 S.C. at 670, 582 S.E.2d at 443. The court rejected this contention, finding that the plaintiff was involved in the operation of a business, had loaned money in the past, and had guaranteed other loans. *Id.* Because of this prior experience, the court found that the plaintiff "was not in a vulnerable position, and the bank owed her no special duty of care." *Id.* at 670, 582 S.E.2d at 443-44. The court also rejected the plaintiff's contention that she had a fiduciary relationship with the bank. The plaintiff contended that she placed her trust in the bank and relied on the loan officer for information and advice. The court disagreed, finding no evidence that that the plaintiff placed a special trust in the bank or the loan officer, and no evidence that the plaintiff sought advice or asked questions of the bank prior to signing the documents. *Id.* at 671, 582 S.E.2d at 444.

Here, the master erred as a matter of law in concluding that a fiduciary relationship existed between the parties. This case involves a $2.8 million commercial loan transaction between a limited liability company and a bank. The relationship between the parties was that of lender and borrower.

Respondents did not present any evidence that Ameris Bank undertook to advise Linda Gibson with respect to the soundness of the apartment complex as an investment.

The evidence presented was that at some point prior to the closing, Gibson called Zerbst. He did not call her. No one from Ameris reached out to Gibson to offer her real estate investment advice. In any event, Ameris Bank does not offer real estate investment advice as part of the services offered by the bank. Richard Sturm, President of Ameris Bank, South Carolina, testified that Ameris does not offer investment advice, does not act as a real estate broker, does not list properties owned by third parties for sale, does not advise people how much to pay for property or how much to sell property for, does not perform appraisals, does not do any real estate development, does not offer rental management services, and does not manage construction projects or act as a contractor. [Tr. 636:5 – 638:14.] Respondents did not present any evidence to refute this.

Further, the fact that Gibson respected and trusted Zerbst's judgment does not give rise to a fiduciary relationship as a matter of law. The fact that a person or company has previously conducted business with a banker and feels comfortable with that particular banker does not convert the relationship into a fiduciary one. Respondents did not present any evidence that the bank accepted or induced any trust that Gibson may have placed in it. The bank did not give Gibson any reason to believe that it was acting on her behalf instead of its own. The bank was the lender. As the lender, the bank's interests were naturally adverse to the borrower's. Gibson signed multiple documents acknowledging this. [Def.'s Exs. 29, 30, 32, 34, 85-89, 96, 97.] In the event Heritage Seven LLC did not repay the loan, the bank had the right to file an action for foreclosure, which the bank eventually did.

Moreover, Gibson bargained with the bank. In 2008, Gibson successfully negotiated a loan modification with a lower interest rate than the prior loan. [Def.'s Ex.

87.] The fact that Gibson bargained with the bank before signing the various renewal note documents indicates that she knew that the relationship was arms-length. Additionally, the bank was not in superior position with respect to transaction. Gibson was the person who best knew her financial affairs. The bank did not have any information about Gibson's finances or about the apartment complex that Gibson did not have.

Finally, the master's finding that Gibson was 20% at fault for the harm suffered undermines the conclusion that the parties had a fiduciary relationship. If the parties were truly in a fiduciary relationship, Gibson should have been able to rely on Zerbst's advice. Instead, the master found that Gibson should *not* have "just relied on the advice of Mr. Zerbst, Mr. Lanier, and Mr. Villavicencio." [Order p. 53.] The master found that she should *not* have "simply relied on the appraisal accepted by Ameris" and "could have obtained her own appraisal prior to closing on the loan but she did not." *Id.* The master found that she "did not independently determine if the rents from the apartment complex would pay for the loan and the loan on her beach house prior to purchasing the apartment complex." *Id.* These findings are contrary to a finding that the parties had a fiduciary relationship.

B. The statements made by the bank did not give rise to a fiduciary relationship.

Karl Zerbst's statements that he thought the apartments were a good investment and that the rents would cover the debt did not give rise to a fiduciary relationship.

The South Carolina Court of Appeals addressed a similar question in the case of *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005). In that case, a customer asked a bank employee for an opinion on an investment. The bank employee

stated: "I've been here two years, and these guys have never missed a payment, and they're always on time, and it seems good to me." 366 S.C. at 43, 619 S.E.2d at 450. The court found that the statement "it seems good to me" "does not amount to rendering advice such that [the customer] would rely on its authenticity for purposes of imposing a fiduciary duty on a bank." *Id.* at 43-44, 619 S.E.2d at 450.

Courts in other jurisdictions have reached similar conclusions. In one case, the court held that the vice president's statement to a customer that the purchase of a piece of property was a "good deal" did not create a fiduciary relationship between the bank and the customer. *Berry v. First Nat'l Bank of Olney*, 894 S.W.2d 558, 560 (Tex. Ct. App. 1995). In another case, the court held that "expressing an opinion on a business deal, where there is no reason to believe that the customer's trust and confidence exceed that of an ordinary arms-length commercial transaction, cannot establish a fiduciary relationship." *Tippens v. Round Island Plantation LLC*, 2009 WL 2365347, *12 (S.D. Fl. 2009). Even if the plaintiffs' characterization of the relationship were true, the fact remained that the banker "was a loan officer, not an investment adviser." *Id.* Further, "[o]ffering an opinion on occasion is not tantamount to accepting a role as a personal advisor." *Id.*

"Further, no confidential relationship exists between a bank and its customers merely because the customer had advised with, relied upon, and trusted the bankers in the past." *Baxter v. Fairfield Fin. Servs., Inc.*, 704 S.E.2d 423, 429 (Ga. Ct. App. 2010); *see also Silver v. Countryside Home Loans, Inc.*, 760 F. Supp. 2d 1330 (S.D. Fla. 2011) (finding allegations that lender and borrower had developed a friendship and had a number of telephone conversations were insufficient to establish a fiduciary relationship).

Here, the fact that Karl Zerbst did not say anything negative about the project, told Gibson that he thought the apartments were a good investment, and assured her that the rents would cover the debt does not give rise to a fiduciary relationship as a matter of law. By offering his opinion, Zerbst did not take on the role of a financial advisor. Zerbst was a loan officer. He was not a real estate investment advisor. Gibson asked him what he thought and, based on the information he had, which she had too, he offered his opinion. The conversation was casual. Zerbst was standing in his kitchen. [Tr. 310:18-20.] Gibson did not arrange to meet with him in person to go over the financial information in any detail. Zerbst was not even employed at the time.[12] [Tr. 370:5-9.]

Further, Zerbst did not know anything more about the apartment complex than Gibson did. The statement was based on information contained in the appraisal, which Gibson had access to and could have evaluated on her own or with the assistance of a financial advisor or real estate agent who did not also represent the seller. Zerbst did not conduct any additional investigation that would have provided him with information that was unavailable to Gibson. The statement was not a guaranty that the project would be successful and did not create a fiduciary relationship as a matter of law.

C. The parties' relationship was governed by the loan documents.

Any suggestion that the parties had a fiduciary relationship is directly undermined by the loan documents.

In analyzing the nature of the relationship between the parties, courts look to the written agreements signed by the parties. *See Cowburn v. Leventis*, 366 S.C. 20, 619

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[12] As noted above, Zerbst did not join Ameris Bank until January 8, 2011, and Ameris maintains that Zerbst was not acting as an agent for Ameris Bank when the conversation with Gibson took place.

S.E.2d 437 (Ct. App. 2005) (finding that the custodial agreement specifically limited the bank's duties); *Trotter v. First Fed. Sav. & Loan Ass'n*, 298 S.C. 85, 89, 378 S.E.2d 267, 269 (Ct. App. 1989) ("The relationship is usually defined by the contractual agreement between the depositor and the bank.").

Here, the loan documents signed by the parties show that their interests were adverse. Gibson signed multiple documents obligating Heritage Seven LLC to repay the debt and allowing the bank to use any and all remedies available under the law to collect the amount due, including filing a lawsuit for foreclosure, which the bank eventually did. Gibson signed promissory notes. [Def.'s Exs. 34, 87, 96.] She signed mortgage agreements. [Def.'s Exs. 32, 88, 89.] She signed guaranties. [Def.'s Exs. 29, 30, 85, 86, 97.] None of these documents evince a fiduciary relationship between Gibson, Heritage Seven LLC, and Ameris Bank, and Gibson never contested the enforceability of the loan documents.

The loan documents also show that the bank did not take on fiduciary responsibilities with respect to the renovations. The construction loan agreement signed by Gibson on November 2, 2007, individually and on behalf of the borrower, Heritage Seven LLC, states that the *borrower* was responsible for choosing an architect or other construction consultant to periodically inspect the project's progress and quality to protect the borrower's interests. [Def.'s Ex. 31.] The *borrower* was obligated to ensure that the loan disbursements went into the project. *Id.* The bank was not obligated to inspect or supervise the project or inform the borrower of the progress. *Id.* Any inspections done by the bank were *solely for the benefit of the bank*. *Id.* Further, the agreement states that "[t]his Agreement and the other Loan Documents are the complete

and final expression of the understanding between you and me." [Def.'s Ex. 31, ¶ 20.] Similar language appears in the other loan documents Gibson signed. [Def.'s Exs. 32-34, 85-89.]

Additionally, the commercial loan application that Gibson submitted after her conversation with Zerbst expressly states that Gibson was not relying on Ameris Bank or any of its agents or employees. [Def.'s Ex. 25.] The application states: "Loan Applicant represents that none of the parties named in this application have relied on advice from the Lender in applying for or receiving any credit." *Id.*

D. Even if a fiduciary relationship existed, the evidence does not support a finding of breach.

Assuming, arguendo, the parties had a fiduciary relationship, Respondents did not present any evidence to support a finding of breach. Ameris Bank acted in good faith toward Gibson and Heritage Seven LLC at all times, and the master's findings to the contrary are wholly unsupported by the evidence.

When a fiduciary relationship arises between a bank and a customer, the bank is charged with a duty to disclose material facts that may affect the customer's interest. *Burwell v. S.C. Nat'l Bank,* 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986); *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003). "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004).

By way of comparison, in the broker-dealer context, where fiduciary duties are generally owed, the scope of the duty is limited. The duties owed "often include the duty

to account for all funds and property belonging to the buyer, to refrain from acting adversely to the buyer's interest, to avoid engaging in fraudulent conduct, and to communicate any information he or she may acquire that would be the buyer's advantage." *Cowburn v. Leventis*, 366 S.C. 20, 37-38, 619 S.E.2d 437, 447 (Ct. App. 2005). But the duties do not include a duty to "investigate for any unknown potential risks of [an] investment." *Id.* at 38, 619 S.E.2d at 447.

Similarly, banks are not guarantors of success for real estate investments made by their customers. Courts in other jurisdictions explicitly recognize that "[p]ublic policy does not impose upon the Bank absolute liability for the hardships which may befall the business venture it finances." *Wagner v. Benson*, 161 Cal. Rptr. 516, 520 (Cal. Ct. App. 1980). Stated another way, "the success of the [customer's] investment is not a benefit of the loan agreement which the Bank is under a duty to protect." *Id.* "A commercial lender is not to be regarded as the guarantor of a borrower's success and is not liable for the hardships which may befall a borrower." *Altman v. PNC Mortg.*, 850 F. Supp. 2d 1057, 1073 (E.D. Cal. 2012). "A commercial lender is entitled to pursue its own economic interest in a loan transaction." *Id.* at 1075.

Here, Ameris Bank did not do anything that would constitute a breach of a fiduciary duty. The bank did not fail to disclose any material facts to the borrower. Ameris did not have any information about the quality of the investment or the projected revenue that the borrower did not have. There is no evidence in the record that anyone at Ameris Bank knew that the revenues would not cover the debt, or knew that the apartment complex was not a good investment and yet failed to disclose that information

to Gibson. The statements made by Zerbst were supported by the third-party appraisal of the property, which Gibson had too.

Further, the master's findings concerning the bank's conduct extend far beyond the limited scope of duties that the bank would owe even if a fiduciary relationship existed. First, there was nothing wrong with way the loan was structured or approved. The project was not 100% financed. There was a significant equity contribution of approximately $700,000 made with proceeds from the refinance of the beach house owned by 3205 Palm Boulevard LLC. Gibson chose to leverage another asset to make that contribution. Gibson knew that money had been obtained through a refinance, and she could assess the risks of that decision as well as anyone. Further, the fact that the loan was approved quickly does not support a finding of breach.

Second, the suggestion that the bank knew that the loan should not have been made but made it anyway does not make sense. Bill Barksdale, an expert witness who testified on behalf of Ameris Bank, testified that banks do not lend money for projects that they do not believe are going to be successful. [Tr. 555:13-20; Def.'s Ex. 19.] If a bank approves a loan, it means the bank "think[s] it's an acceptable and bankable risk" and there is no problem with telling that to the borrower. [Tr. 563:23 – 564:3.] The bank relies on the borrower's due diligence in making a decision whether to approve a loan. [Tr. 563:4-7.] In approving a loan, the bank is not guaranteeing that the project is going to perform in the way that the borrower thinks it is going to. [Tr. 556:14-17.] Barksdale further testified that it does not make sense for a bank to make a loan on a project that it thinks is going to fail. [Tr. 559:6 – 560:18.] It costs the bank more to try to pursue other

remedies than it does just to get repaid if the project's a success, it takes more time, and the bank generally does not come out ahead. [Tr. 559:6 – 560:18.]

Third, Ameris Bank did not breach any duty to the borrower with respect to the construction loan disbursements. Every check that the bank wrote for the project was made payable to a vendor or to Gibson. [Def.'s Exs. 41, 42.] Not a single check was made payable to Rolando Villavicencio. [Tr. 444:14-16; Def.'s Exs. 41, 42.] All requests for disbursements made by Villavicencio were supported by invoices, and the checks were made payable to the vendors. [Tr. 415:9-13.] After the money was disbursed, it was the borrower's responsibility to ensure that the money was going into the project and that the work was being done. [Def.'s Ex. 31, ¶14(N).] *See also First Fed. Sav. & Loan Ass'n of S.C. v. Dangerfield*, 307 S.C. 260, 264, 414 S.E.2d 590, 593 (Ct. App. 1992) (finding that once the loan proceeds were disbursed in accordance with the loan agreement, the bank "had no duty to superintend the affairs of the corporation to see that the proceeds of the checks were applied to the corporation's business").

The only time that disbursements were not supported by invoices was when Linda Gibson took over the project. [Tr. 444:17-20; 447:4-8.] When Gibson took over, she would call-in to make a request for a draw, the money would be deposited into her checking account, and she would cut a check off the account without providing a supporting invoice. [Tr. 447:9-14.] Lanier, who handled the disbursements, had no knowledge of any money being withdrawn from the Heritage Seven LLC checking account without Gibson's knowledge. [Tr. 450:22-25.] Gibson was in complete control of the account and the only other person with authority to sign was her daughter, Elizabeth. [Tr. 451:1-4.] In fact, Gibson did not complain about the manner in which the

funds were disbursed until the middle of 2009, long after she took over the project, and when she did, her complaint was with Villavicencio and not Ameris. [Tr. 450:19-21.]

The internal memo drafted by Karl Zerbst about the manner in which the disbursements were handled does not support a finding of breach. [Pl.'s Ex. 30.] The memo says nothing about breach of a duty owed to the borrower. Instead, the memo states that certain of Lanier's actions "have fallen short of giving the customer an exceptional experience while banking at Ameris." *Id.* The memo criticizes Lanier for not taking ownership of the project "to ensure the bank's interest is protected." *Id.* The memo also states that Lanier "must remember not to risk the bank during construction projects." *Id.*

The memo states that the owner was not aware of $378,000 in disbursements and that the requests for the advances were made by the project manager (Villavicencio) and that Lanier should have required Gibson to sign off on each advance. *Id.* But as established at trial, Gibson authorized Lanier to deal with Villavicencio during the initial months of the project, and all disbursements made during that were supported by invoices and made payable to a vendor. [Tr. 415:9-22; 436:20 – 437:9; 444:14-16; Def.'s Exs. 41, 42.] Additionally, as for the $290,000 in disbursements that Zerbst says were not supported by invoices, those distributions were made during the time that Gibson took over the project, and Gibson never complained about them. [Tr. 444:17-20; 447:4-8.]

At best, the memo shows that the bank did not follow its own internal policies. But a bank's failure to follow its own internal lending does not establish liability with respect to the borrower as a matter of law. *See Whitley v. Taylor Bean & Whitaker Mortg. Corp.*, 607 F. Supp. 2d 885, 902 (N.D. Ill. 2009) ("Where the law does not

impose a duty, one will not generally be created by a defendant's rules or internal guidelines."); *Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 758 F. Supp. 2d 476, 485 (S.D. Ohio 2010) ("There is not a general duty of care owed by lenders . . . especially not one that would create tort liability based on internal lending guidelines.").

Similarly, the internal email from Don Snipes, Senior Vice President at Ameris, does not establish breach of any duty owed by the bank. [Pl.'s Ex. 31.] Snipes wrote the email before the bank completed its analysis of the file. Once the analysis was performed, the bank determined that it was not responsible for Gibson's problems. When asked about the email in his deposition, Snipes testified as follows:

> Q: Sure. And when you say that you might have some culpability in her problems – do you see that sentence?
> A: Yes.
> Q: -- does that mean that you think the bank contributed to her problems?
> A: I don't – I don't -- at the time I was concerned – again, I have since gone back and looked at those advances, and after reviewing the advances, they do not – they appear to be appropriate. And most of the advances again were deposited into a checking account in the name of Heritage Seven or Seven Oaks.
> Q: Okay. Are you saying that you think that you today don't have some culpability in the problems?
> A: I do not.
> Q: You do not think the bank has any culpability for her problems?
> A: No.
> Q: Well, that's what you wrote back in July 3, 2009.
> A: Right. That was based on conversations with Karl, and since then I have verified specifically the draws and disbursements.

[Tr. 286:15 – 287:14.]

Fourth, Ameris Bank did not have a duty to inspect the project for the borrower's protection. It was the borrower's responsibility to ensure that the vendors were doing

their job, and that the money disbursed was going into the project. The construction loan agreement plainly states that the borrower "will apply or cause Project contractors and suppliers to apply the Loan disbursement only to work actually done and materials actually incorporated in the Project . . . ." [Def.'s Ex. 31, ¶ 14(N).] The agreement also states that the bank is "not obligated to inspect, supervise, prevent Construction Liens, or inform [the borrower] about the Project's progress or performance . . . ." Ex. 31, ¶ 14(V).]

In any event, Ameris *did* inspect the project. Lanier testified that he visited the project two or three times and saw that work was being done. [Tr. 438:3-11.] He never saw a dead construction site. *Id.* Ameris Bank did not act with total disregard for the project or its progress. But any inspections done by the bank were for the benefit of the bank and not for the benefit of the borrower. This is consistent with the arrangement agreed upon by the parties in the construction loan documents.

Absent a contract, "the lender has no common law [duty] to protect the [borrower]." *Roundtree Villas Assn., Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 422, 321 S.E.2d 46, 50 (1984) (explaining that lenders traditionally "make periodic inspections to assure that the construction loan advancements are being applied appropriately," and that such inspections are "fundamentally for the protection of the lending institution"); *see also Rudolph v. First S. Fed. Sav. & Loan Assn.*, 414 So.2d 64, 71 (Ala. 1982) ("The mere relationship of lender/borrower, including the lender's right of inspection at the borrower's cost, does not, of itself, give rise to a duty of due care to the borrower in the lender's exercise of that right."); *Jordan v. Atl. Neighborhood Hous. Servs. Inc.*, 320 S.E.2d 215, 216 (Ga. Ct. App. 1984) (explaining the general rule that there is no liability

for damages by purchaser against a lender because the inspections are normally not made for the benefit of the owner but are instead made for the benefit and protection of the lender). "[T]he burden is on the borrower, seeking to impose liability, to prove the lender's voluntary assumption of activities beyond those traditionally associated with the normal role of a money lender." *Rudolph*, 414 So.2d at 71.

Because the record does not contain any evidence to support a finding that the bank assumed any duties above and beyond those traditionally associated with a money lender, and because the bank did not owe any such duties as a matter of law, the master erred in concluding that Ameris was liable for breach of fiduciary duty.

II. The bank did not misrepresent anything to the borrower.

Ameris Bank did not misrepresent anything to Linda Gibson or to Heritage Seven LLC. The master's finding of liability with respect to negligent misrepresentation is incorrect as a matter of law.

To prove negligent misrepresentation, a plaintiff must establish the following: "(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010).

In the case at hand, the master identified the following statements as giving rise to liability for negligent misrepresentation: (1) Zerbst's statement that "the rents would

cover the debt"; (2) Zerbst's statement that the apartments were "a good deal"; and (3) "the structuring of the loan to include borrowing the down payment of $700,000" such that the apartments were purchased with "100% borrowed money." [Ord. p. 38.]. None of these statements gives rise to a claim for negligent misrepresentation.

A. The statements were not false.

The first and most basic requirement of a claim for negligent misrepresentation is that the alleged representation must be false. *Carolina Chloride, Inc., v. Richland Cnty.*, 394 S.C. 154, 163-64 714 S.E.2d 869, 873 (2011). Without falsity, the statement is not actionable and does not give rise to liability in tort. *See id.*

"Not every statement made in the course of commercial dealings is actionable at law." *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992). "A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort." *Id.* Stated differently, "[t]he false representation must be predicated upon misstatements of fact rather than upon an expression of opinion, an expression of intention or an expression of confidence that a bargain will be satisfactory." *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (Ct. App. 1995). "The distinction between a matter of fact and a matter of opinion is generally characterized by what is susceptible of exact knowledge when the statement is made." *Id.* Further, a statement "cannot be predicated on unfulfilled promises or statements as to future events." *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 770 (2011).

Here, the statements made by Karl Zerbst were not false. First, the statement that the "rents would cover the debt" is a statement about future events and is neither true nor false. Indeed it was never determined in this case whether the rents would ultimately cover the debt because the borrower never completed the renovations. Even if the statements could be proven true or false, there is no evidence in the record that the bank had any information showing that the rents would *not* cover the debt. To the contrary, the bank had an appraisal that indicated a level of income to support the statement that the rents would cover the debt. Second, the statement that the apartments were "a good deal" is not false. It is a statement of opinion. As a statement of opinion, it cannot form the basis for a claim of negligent misrepresentation as a matter of law. Third, the manner in which the loan was structured is not a statement, and there is no evidence in the record that the bank misrepresented anything about the structure of the loan to Linda Gibson. Gibson signed multiple loan documents at the closing in 2007 and again in 2009 acknowledging the loan structure and promising to repay the debt.

B. The borrower did not have the right to rely.

Even if the statements were false, Gibson did not have the right to rely and any reliance was not justified.

In addition to proving falsity, a plaintiff must demonstrate that she justifiably relied on the statement. *Carolina Chloride, Inc., v. Richland Cnty.*, 394 S.C. 154, 163-64, 714 S.E.2d 869, 873 (2011). "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010). "Reliance can be justified only if the relationship of the parties is such that

the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made." *Harrington v. Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996).

"Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely." *Florentine Corp. Inc. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). *See also Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003) (same); *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 270 (Ct. App. 1993) (same). "This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Id.* There can be no liability for "matters which plaintiff could ascertain on his own in the exercise of due diligence." *Carolina Chloride*, 394 S.C. at 164, 714 S.E.2d at 874.

"The principle of the right of reliance upon representations is closely bound up with a duty on the part of the plaintiff to use some measure of protection and precaution to safeguard his own interest." *Regions Bank*, 354 S.C. at 673, 582 S.E.2d at 445. "The right to rely must be determined in light of the plaintiff's duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him." *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005). "It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests." *Id.*

Despite the master's characterization of Gibson as an unsophisticated business person, she was engaged in a sophisticated transaction and had both the financial resources and the common sense to seek advice from any number of professionals before

entering into the transaction. This was not the first $2 million+ commercial property that Gibson had purchased. In 2005, she purchased a commercial shopping center for $2.4 million. [Tr. 159:18–160:20.] She did so by executing a 1031 tax exchange with proceeds she received from the sale of a beach house she had an interest in to defer paying capital gains taxes. [Ct. Ex. 3, 34:25-35:19; Tr. 161:22-162:6.]

Gibson's ability to handle sophisticated business matters is also supported by the fact that when she discovered that the renovations on the apartment complex were not going as planned, she took charge of the project with assistance from her daughter. [Tr. 174:16-177:19.] Gibson hired a new contractor, oversaw the construction, and collected rents. [Tr. 172:3 – 11; 177:12-19.] She negotiated with contractors and subcontractors. [Tr. 176:11-15.] She obtained draws from the bank and disbursed in excess of $200,000 to contractors and others. [Tr. 175:5–10; 176:4-6.] She made decisions about how to pay the money and what documentation to require. [Tr. 176:7-10.] She maintained detailed handwritten notes about the work that had been done and that needed to be done. [Def.'s Ex. 64.] In addition, she took over the management of the shopping center, collecting rents, paying bills, arranging for maintenance, and renewing leases as necessary. [Tr. 171:25-172:11.]

Moreover, Gibson failed to protect herself and to ascertain whether the apartment complex was in fact a good investment. The master's finding that she was 20% at fault supports this. For starters, she failed to negotiate the $2.8 million purchase price. [Tr. 183:1-13; 624:6-625:11; Def.'s Ex. 6.] Further, she did nothing to independently ascertain the value of the property. She did not obtain an appraisal. [Tr. 181:24 – 182:3.] She did not review any cash flow statements or income statements for the property. [Tr.

181:24-182:15.] She never looked at the rent rolls for the property. [Tr. 185:12-17.] She inspected only one of 48 units. [Tr. 181:12-20.] She did not hire an architect or a contractor to inspect the property. [Tr. 182:8 – 10.] She did not ask anyone (other than Villavicencio) to prepare an estimate of the cost necessary to convert the apartments to condominiums or to renovate them to generate higher rents. [Tr. 182:11-15; 185:19-23; 214:12-18.]

This failure to negotiate the purchase price and to independently ascertain the value of the property forecloses relief as a matter of law. *See Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2009) (holding that the trial court properly granted summary judgment in favor of the bank because the plaintiffs did not negotiate the purchase price and made no effort to independently ascertain the value of the property before buying it).

On top of all this, when it came time to close, Gibson did not read any of the documents she signed. [Tr. 209:12-18.] She did not ask any questions of the closing attorney about the documents. [Tr. 209:16-18.] Nonetheless, she understood that the promissory note obligated the borrower to repay the debt on the terms set out in the note. [Tr. 210:2-5.] She understood that she owed the money regardless of whether the project was a success. [Tr. 210:6-16.] She understood how much money she had, what her assets were, what her income was, the loan amount, and the terms of the loan. [Tr. 221:12-19; Tr. 222:11-15.]

Finally, Gibson's reliance on Zerbst for advice about whether she should purchase the apartment complex was not reasonable. Zerbst was a loan officer. He was not in the business of buying and selling real estate. There was no evidence was presented to show

that Zerbst had any expertise in the area of real estate or that he knew anything more about the apartment complex than Gibson or Villavicencio did. Gibson was in the best position to determine whether the apartments were a good investment and whether the rents would cover the debt. As a wealthy person with two years of college and multiple real estate investments, she had the ability to seek advice to determine whether the apartment complex was a good investment. Gibson's failure to act with diligence to protect her interests precludes liability for negligent misrepresentation as a matter of law.

C. The statements did not cause the harm alleged.

Even if the statements could be considered misstatements of fact and Gibson was justified in relying on them, the master erred in concluding that the statements caused the harm alleged.

At the time Zerbst made the statements, Gibson had already done the following: (1) signed a contract agreeing to purchase the property for $2.8 million [Def.'s Ex. 6]; (2) signed an "Exclusive Right to Buy / Buyer Agency Contract" with Re/Max Professional Realty [Def.'s Ex. 7]; (3) signed a "Dual Agency Agreement" with Re/Max Professional Realty and the seller [Def.'s Ex. 8]; (4) caused 3205 Palm Boulevard LLC to refinance the beach house to obtain cash to put into the apartments [Def.'s Ex. 10]; (5) signed a contract with an architectural firm [Def.'s Ex. 14]; (6) received a proposal from Triton Construction stating that the contract price for the construction will not exceed $700,000 [Def.'s Ex. 16]; (7) obtained a third-party appraisal [Def.'s Ex. 13]; and (8) applied for financing with First Reliance Bank [Def.'s Ex. 15]. In other words, the project was well underway at the time Gibson made the call to Zerbst.

Moreover, the success of this real estate venture was contingent upon a lot of things going well that were unrelated to the loan or to the bank. For example, evidence was presented that the price for the apartment complex was too high, and yet it is the price that Gibson agreed to pay. [Tr. 522:19-523:4.] Villavicencio, who was in charge of the project and who prepared the budget, had no prior experience with a project of this kind. [Ct. Ex. 10, Villavicencio Dep. 102:13-105:21.] The budget Villavicencio prepared showed the total cost of renovations as $688,814.18, which did not include the cost of a licensed contractor, structural engineer, or architecture fees. [Def.'s Ex. 123.] Villavicencio began renovating three buildings at once, instead of one at a time, as he and Gibson had agreed, which prevented the units from being rented while the construction was taking place. [Tr. 106:8-107:6.] The contractor that Gibson hired (Triton Construction) did not do the work it said it was going to do. The windows that were ordered were the wrong size, causing a $35,000 mistake. [Tr. 452:20 – 453:14.]

These are just some of the things that went wrong with the project, and Ameris Bank was not responsible for any of them. Ameris did not set the listing price and did not hire Villavicencio to run the project. Ameris did not prepare the budget, hire the contractors, or supervise the work. Ameris was not responsible for whether the apartments ultimately rented or whether the rents covered the debt. Given these facts, and the fact that Gibson committed herself to the purchase price and the project long before she ever called Karl Zerbst, the statements by Zerbst could not have caused the harm alleged.

Accordingly, the master erred as matter of law in concluding that Ameris Bank was liable for negligent misrepresentation.

III. The bank did not aid or abet a breach of fiduciary duty by the borrower's agent.

The master erred in concluding that the bank aided and abetted a breach of fiduciary duty by Respondents' real estate agent and financial advisor, Rolando Villavicencio. There is no evidence in the record that Ameris Bank knew anything about a breach of fiduciary duty by Villavicencio or knowingly participated in any such breach.

"The elements for the cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." *Vortex Sports & Entm't, Inc. v. Ware's*, 378 S.C. 197, 204, 662 S.E2.d 444, 448 (Ct. App. 2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Id.* To prove this cause of action, the plaintiff must present evidence of actual knowledge of the third party's breach of fiduciary duty. *See Gordon v. Busbee*, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (Ct. App. 2012) (affirming the grant of directed verdict on a claim for aiding and abetting breach of fiduciary duty when the plaintiff "presented no evidence [the defendant] had actual knowledge" of the breach of fiduciary duty by the third party); *Future Grp., II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) (reversing the trial judge's verdict in favor of plaintiff on its claim for aiding and abetting breach of fiduciary duty when there was no evidence in the record that the defendant bank had actual knowledge of the breach of fiduciary duty by the third party).

Here, it was undisputed that Gibson and Villavicencio had a fiduciary relationship. Gibson and Villavicencio had done business together since 2005 when Gibson purchased the shopping center in Moncks Corner and hired Villavicencio to manage the property for a ten-year term. [Def.'s Ex. 4; Tr. 179:1-7.] Gibson hired

Villavicencio as the exclusive agent with respect to the purchase of the apartment complex, and gave him authority to purchase supplies and make repairs up to $100,000 per month without Gibson's express written consent. [Def.'s Exs. 7, 39; Tr. 232:9-13.] According to Gibson, she relied on Villavicencio heavily and regarded him as her real estate and financial advisor. [Tr. 185:25 – 186:16.]

But there was no evidence presented that Ameris knew that Villavicencio breached any fiduciary duties owed to Gibson or that Ameris knowingly participated in any such breach. The only evidence in the record supporting a claim that Villavicencio breached a fiduciary duty was Gibson's testimony that Villavicencio stole "several hundred thousand dollars from managing the shopping center and the apartments." [Tr. 72:4-8, 112:20-23.] Later, when asked how Villavicencio was stealing from her, Gibson testified that "Villavicencio started writing checks to himself and to his wife paying themselves on commissions we had not agreed to." [Tr. 155:23 – 116:6.] Ameris Bank had nothing to do with the commission payments and was not the custodian of the account from which those checks were written. Further, Ameris had nothing to do with the shopping center, so to the extent Villavicencio stole money related to his management of the shopping center, Ameris Bank would have no knowledge of that either. With respect to the apartments, as discussed above, every check that was written for the project was either made payable to a vendor or made payable to Gibson. [Tr. 444:14-16; Def.'s Exs. 41, 42.] Not a single check was made payable to Villavicencio. *Id.* Additionally, every check was supported by an invoice, except for when Gibson took over the project. [Tr. 444:17-20; 447:4-8.]

Even if the record contained evidence of breach by Villavicencio with respect to the apartment complex, there was no evidence showing that Ameris knew about the alleged breach, or knowingly aided or abetted it. Although the internal email from Don Snipes states that Villavicencio *may have* "siphoned off some of the loan proceeds," the email does not indicate that anyone at Ameris *knew* that Villavicencio was doing so or knowingly assisted him. [Pl.'s Ex. 31.] Likewise, although the internal memo from Zerbst criticizes Lanier for disbursing funds at Villavicencio's request, the memo does not indicate that Lanier or anyone else at Ameris had reason to believe that Villavicencio was doing anything improper, particularly when Gibson authorized the bank to deal with him, and he had been acting on her behalf all along. [Tr: 415:16-19; 436:20 – 437:3; Pl.'s Ex. 30; Def.'s Exs. 21, 23, 24, 27.]

Finally, it does not make sense for the bank to aid and abet any alleged wrongdoing by Villavicencio. It was in Ameris's financial interest for the project to succeed. Ameris did not have any incentive to assist Villavicencio or to harm Respondents.

Because there is no evidence in the record establishing that Ameris knowingly participated in a breach of fiduciary duty by Villavicencio, the master erred as a matter of law in concluding that the bank was liable for aiding and abetting a breach of fiduciary duty.

IV. The master erred in awarding actual damages and punitive damages, and the punitive damages award is excessive and violates due process.

Even if the master's conclusions regarding liability were correct, the master erred in awarding actual and punitive damages, and the award should be reversed.

A. The actual damages award is incorrect as a matter of law.

"Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375-76 (2005). "The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred." *Id.*

Here, the actual damages award is incorrect as a matter of law because Respondents are not entitled to recover for harm they did not incur, and Respondents have been fully compensated through the settlement of the case against Villavicencio. The master awarded actual damages as follows: (1) $700,000 from the refinance of 3205 Palm Boulevard, LLC, which was used to make an equity contribution toward the purchase of the apartment complex; (2) $23,625 in interest from a $450,000 loan that 3205 Palm Boulevard LLC acquired in 2010 from First Citizens Bank [Pl.'s Ex. 2]; (3) $355,000 for the value of the Klister Lane property that served as collateral for the apartment complex loan; and (4) $75,000 in money that Gibson testified that she personally contributed to the apartment renovations. [Order.]

First, the master erred in awarding Respondents the $700,000 equity contribution and the $23,625 in interest because those damages were incurred by 3205 Palm Boulevard, LLC, and not by Linda Gibson or Heritage Seven LLC. [Def.'s Ex. 10; Tr. 191:20-192:10.] Linda Gibson's status as a member of 3205 Palm Boulevard LLC does not permit her to recover damages on behalf of the LLC. *See* S.C. Code Ann. § 33-44-201 (2006) ("[A] limited liability company is a legal entity distinct from its members.");

Wasko v. Farley, 947 A.2d 978 (Conn. Ct. App. 2008) (providing that a member of an LLC may not bring an individual action for a wrong committed to the LLC or its members). Additionally, the refinance of 3205 Palm Boulevard LLC and the loan obtained in 2010 are independent transactions wholly unrelated to the loan transaction in this case. Ameris Bank cannot be said to have caused this harm.

Second, the master erred in awarding the $75,000 that Gibson testified that she put into the project[13] because there is nothing in the record to support a finding that Ameris Bank represented to the borrower that the construction loan would be sufficient to complete the renovations or that Gibson would not have to use any of her own money to complete the project. The fact that Gibson chose to put her own money into the project should not have become the responsibility of the bank.

Accordingly, $798,625 ($700,000 + $23,625 + $75,000) of the $1,153,625 in actual damages awarded was improper as a matter of law. The remaining $355,000 in actual damages for the Klister Lane property that served as collateral for the apartment complex loan is set-off by Respondents' recovery of $850,000 in the lawsuit against Villavicencio (as determined by the master), and is even further reduced by the master's finding that Gibson was 20% at fault. As a result, Respondents have suffered no recoverable actual damages.

Even if the actual damages award was proper, the master's calculation is incorrect. The actual damages award of $1,153,625 should have first been reduced by the master's finding that Gibson was 20% at fault, and then reduced once again by the setoff

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[13] Gibson did not introduce any bank records or cancelled checks to support this testimony.

of $850,000, for a total of $72,900 in actual damages. Instead, the master applied the 20% discount and the $850,000 setoff to the entire award, including the punitive damages award, which resulted in the award being more than what Respondents were entitled to recover given the comparative fault finding and the purpose of setoff law to prevent double recovery.

B. The facts do not justify an award of punitive damages.

"In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Taylor v. Medenica,* 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). This standard requires that the conduct extend beyond even gross negligence. *See Bell v. Atl. Coast Line R. Co.,* 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943) ("While punitive damages are recoverable for negligence so gross or reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness, yet they are not awarded in this state for mere gross negligence.").

"Conduct is wilful, wanton, or reckless when it is committed with a deliberate intention under such circumstances that a person of ordinary prudence would be conscious of it as an invasion of another's rights." *Carter v. R.L. Jordan Oil Co., Inc.*, 301 S.C. 84, 85, 390 S.E.2d 367, 368 (Ct. App. 1990). "It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the tortfeasor." *Id.* Where there is no evidence of conscientious conduct that is willful, wanton, and in reckless disregard of the plaintiff's rights, the appellate court must reverse the award of punitive damages. *See id.* (reversing the award of punitive damages, finding "no evidence from which to infer conscious wrongdoing" by the defendant); *Cohen v.*

Allendale Coca-Cola Bottling Co., 291 S.C. 35, 40-41, 351 S.E.2d 897, 900 (Ct. App. 1986) (reversing the award of punitive damages after determining there was "simply no proof of a present consciousness of wrongdoing on [the defendant]'s part"). Further, "the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (Supp. 2013).

When the trial court's award of actual damages is improper, an award of punitive damages must be reversed. *See Moore v. Benson*, 390 S.C. 153, 165, 700 S.E.2d 273, 279-80 (Ct. App. 2010) (reversing punitive damages award based on lack of actual damages); *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148-49, 641 S.E.2d 53, 60-61 (Ct. App. 2007) (same).

Here, this Court should reverse the punitive damages award for at least two reasons. First, as explained above, Respondents have suffered no actual damages. With no actual damages, Respondents are not entitled to punitive damages. The punitive damages award must be reversed on this basis alone.

Second, the record does not support a finding that the bank acted willfully, wantonly, or in reckless disregard of Respondents' rights. There is no evidence in the record that the bank acted with deliberate intention to harm Respondents or invaded their rights. This case involved a sophisticated commercial loan transaction between an LLC and a bank. There is no evidence in the record that the bank had a "present consciousness of wrongdoing." Respondents failed to present any evidence to support such a finding and failed to meet the high burden of proof of clear and convincing evidence.

Not only does the record not support a finding of willful and wanton conduct, but the exact opposite is true. Ameris Bank acted in good faith toward Linda Gibson and

Heritage Seven LLC at all times. The fact that the apartment complex project did not become the profitable investment that Gibson hoped it would be is not because of the conduct of the bank. The bank was the lender. The bank was not Gibson's real estate agent, personal investment advisor, or project supervisor. The project ultimately belonged to Linda Gibson, and she was the one who was responsible for making it a success. The bank's role was to lend money, and the borrower's role was to pay the money back.

There are several examples of the bank's good faith in the record. For instance, in 2008 when it became apparent that the renovations were not going to be completed on time, the bank worked with Gibson and agreed to a renewal note with a lower interest rate. [Def.'s Exs. 34, 87.] In 2009, when Heritage Seven LLC got behind on the monthly payments, the bank offered to loan Gibson money to bring the loan current. [Pl.'s Ex. 50.] On October 1, 2009, the bank loaned Heritage Seven LLC $50,000 to pay property taxes. [Def.'s Ex. 96.] Around this same time, the bank met with Gibson and her attorney, Robert Papa, to come up with a plan to repay the debt, even offering to defer $300,000 of the amount due. [Pl.'s Ex. 60, 63.] But Gibson rejected these proposals and walked away from the project and the loan obligations, causing the bank to incur a $1.8 million loss. [Pl.'s Ex. 57; Tr. 648:19-22.]

Because the record does not support a finding of willful or wanton conduct on the part of the bank, the master erred in awarding punitive damages.

C. The award is excessive and violates due process.

Even if the record supported an award of punitive damages, which it does not, the award is excessive and violates due process.

The standard of review for a punitive damages award is de novo. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009). In determining whether a punitive damages award violates due process, courts consider "(1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award, (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in similar cases." *Id.* at 587-589, 686 S.E.2d at 185-186. These factors stem from *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). Although the factors from *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), remain relevant to the due process analysis, they are only relevant to the extent that they add substance to the *Gore* guideposts. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

1. Reprehensibility

"Reprehensibility is 'perhaps the most important indicium of the reasonableness of a punitive damages award.'" *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (quoting *BMW of N. Am. v. Gore*, 517 U.S. 559, 565 (1996)). "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* "In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Here, the record does not support a finding that the bank's conduct was reprehensible. To begin, the harm suffered by Gibson, if any, was economic in nature, which typically weighs against a finding of reprehensibility. Further, there is no evidence in the record that the bank demonstrated an indifference or reckless disregard for the health or safety of others. Moreover, Gibson was not a person of financial vulnerability. She is a multimillionaire who was engaged in multi-million dollar loan transaction for the second time. She controlled entities that owned beach houses at the Isle of Palms, a commercial shopping center, and real property with tenants generating $478,775 in rental income in 2009. [Tr. 168:8-22; Def.'s Ex. 98.] This case did not involve repeated actions or actions of malice, trickery, or deceit. Reprehensibility simply does not exist.

2. Ratio

Although the United States Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 (quoting *State Farm v. Campbell,* 538 U.S. 408, 425 (2003)). "[W]hen determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at

185. "Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive award." *Id.*

In the case at hand, the punitive damages award goes outside the bounds of any acceptable ratio. Even if the calculation of $1,153,625 in actual damages is correct, an award of $3,551,232 in punitive damages is excessive. The actual damages amount must be reduced by the finding that Gibson was 20% at fault ($1,153,625 x .20 = $230,725), and then set-off by the $850,000 previously recovered for the same injury. Once those considerations are taken into account, the actual damages award is reduced to $72,902. This makes the award of $3,551,232 in punitive damages *48 times the amount of actual damages*. The unreasonableness of this ratio forecloses the need for further analysis under this factor. In any event, there is no conduct to be deterred and there is no harm likely to result from any conduct by the bank with respect to the loan in this case or any other.

3. Comparative Penalty Awards

"When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." *Mitchell*, 385 S.C. at 588-89, 686 S.E.2d at 186.

The bank is not aware of any comparable cases. South Carolina courts have never found that a lender owes a borrower a fiduciary duty in a commercial lending context and have never found that a bank is liable for the failure of a real estate venture. Further, the harm suffered in this case was economic in nature and resulted from a variety of factors,

including Respondents' own negligence as determined by the master. In addition, the borrower walked away from the project and allowed the property to go into foreclosure, leaving Ameris Bank with a $1.8 million loss.

The award of punitive damages should be reversed.

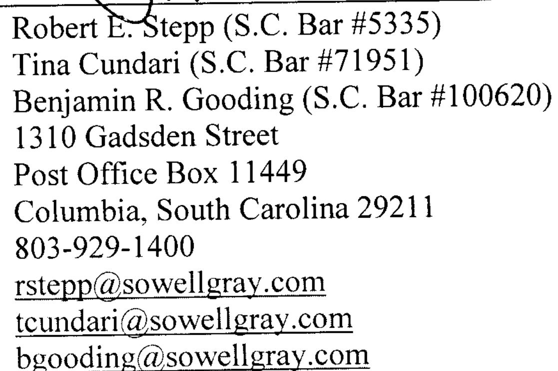
CONCLUSION

The master's order should be reversed. The record does not support a finding of liability on any cause of action in the complaint. Ameris Bank did not owe the borrower a fiduciary duty, did not misrepresent anything to the borrower, and did not knowingly aid or abet the borrower's agent in breaching a fiduciary duty.

If the judgment is not reversed, this case will set a dangerous precedent about the circumstances under which a bank may become liable to a borrower in the commercial lending context.

Judgment should be entered in favor of Ameris Bank.

SOWELL GRAY STEPP & LAFFITTE, LLC



By: ______________________

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November 10, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKERLY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Case No.: 2010-CP-08-2134

Linda Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust, and Heritage Seven, LLC,

Respondents,

v.

Ameris Bank, Appellant.

PROOF OF SERVICE

I certify that I have caused the Initial Brief of Appellant and Designation of Matter to be served on Respondents by U.S. Mail and electronic mail on November 10, 2014, addressed to their attorney of record, Desa Ballard, Law Offices of Desa Ballard, P.O. Box 6338, West Columbia, South Carolina 29171 and at desab@desaballard.com.

SOWELL GRAY STEPP & LAFFITTE, LLC

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November 10, 2014

BY HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Edgar A. Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Linda Gibson and Heritage Seven, LLC, Respondents v. Ameris Bank, Appellant
Civil Action No.: 2010-CP-08-2134
SGSL File No.: 6285/1500

Dear Ms. Kitchings:

Enclosed are the original and one (1) copy of the Initial Brief of Appellant, Designation of Matter, and Proof of Service. Please file the originals and return the filed-stamped copies to my office by our courier.

By copy of this letter and as evidenced by the Proof of Service, I am serving these documents on counsel for Respondents.

Very truly yours,

Tina M. Cundari

cc: By US and Electronic Mail
Desa Ballard, Esq.

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NOV 10 2014
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