

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Knox McMahon, circuit court Judge

Civil Action No. 2011-CP-26-1718
Appellate Case No. 2014-000331
Appellate Case No. 2014-001736
Consolidated Appeal

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SC Court of Appeals

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

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Bank of North Carolina, successor in interest to Beach First National Bank,¹ (“**BNC**,” “**the Bank**,” or “**Respondent**”) filed the instant action against Waterfall Investors 2, LLC (“**Waterfall**”) and Dr. Raymond E. Cleary, III, D.D.S. (“**Cleary**”) (collectively, “**Appellants**”) on February 23, 2011, in Horry County seeking the foreclosure of certain real property, collection under an assignment of rents, appointment of a receiver, and judgment against Cleary pursuant to a personal guaranty. Appellants filed an Answer and Counterclaim on March 30, 2011, asserting a number of affirmative defenses and counterclaims. BNC filed a Reply on May 6, 2011.²

BNC filed a Motion for Summary Judgment on August 22, 2012. It later filed an Amended Motion for Summary Judgment on October 25, 2012, adding additional grounds based on assignable FDIC “special powers,” as set forth in 12 U.S.C. § 1821, 1823 and 1825, and further developed in D’Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 62 S.Ct. 676 (1942) and those cases which follow. After extensive memoranda were filed, a hearing was held before the Honorable Benjamin H. Culbertson on December 5, 2012. By Order dated November 13, 2013, Judge Culbertson denied the motion.

¹ On April 9, 2010, Beach First National Bank (“**Beach First**”) was closed by the Office of the Comptroller of the Currency, which then appointed the FDIC as Receiver. To protect depositors, the FDIC subsequently entered into a purchase and assumption agreement with the Bank of North Carolina to assume certain deposits of Beach First.

² BNC later filed an Amended Reply on June 1, 2011, and a Second Amended Reply on November 4, 2013, adding additional affirmative defenses.

The case was tried in Conway the week of November 4, 2013, before the Honorable R. Knox McMahon. On the fourth day of trial, the jury returned a verdict in favor of BNC as to all affirmative claims in the litigation, as well as those counterclaims and defenses asserted by Appellants. (T., p. 682).³ On November 8, 2013, the circuit court entered a ruling in conformity with the jury's verdict.

On November 19, 2013, Appellants moved the court for a new trial and judgment notwithstanding the verdict. After each side filed a memorandum, the matter was set for hearing. On December 17, 2013, Judge McMahon heard the motion and denied the same. February 5, 2014 Order.

On November 26, 2013, BNC filed a Motion for Attorneys' Fees, Litigation Costs, and Appraisal Fees, which included affidavits of attorneys' fees and costs from its counsel, and an affidavit for appraisal fees. Appellants filed an objection to the motion, which was also argued at the December 17, 2013 hearing. The court held in abeyance its ruling to permit BNC to confidentially disclose invoices relating to the legal services and costs provided. Respondent produced under seal certain time sheets, invoices, and expenses as requested by the court. By Order dated July 8, 2014, the court granted the motion.

On February 20, 2014, Appellants filed a Notice of Appeal as to the February 5, 2014 Order denying Appellants' Motion for New Trial and JNOV. On August 12, 2014, Appellants filed a Notice of Appeal as to the July 8, 2014 Order granting BNC's Motion

³ Reference to the trial transcript denoted as "T., p. ___."

for Attorneys' Fees, Litigation Costs and Appraisal Fees. By Order of this Court, the two appeals were consolidated.

STATEMENT OF THE FACTS

This is an appeal of a foreclosure action related to a commercial real estate investment of 160 acres of vacant land on S.C. Highway 90 at Mt. Zion Road in Little River Township, Horry County, South Carolina (the "**Waterfall Property**"). Doctor Cleary, a dentist practicing in Surfside Beach, first acquired a partial interest in the Waterfall Property in January 2006. (T., p. 190). At that time, he believed the Waterfall Property contained just over twenty-three (23) acres of uplands that could be developed, but he did not perform any due diligence of his own regarding the value of the Waterfall Property or wetlands on the same. (Id., at pp. 193, 246-48). Believing that he could increase the number of upland acres through silviculture and various means of wetlands mitigation, Cleary decided to purchase all of the ownership interest in Waterfall, the LLC that held the Waterfall Property, in June 2006. (Id., at pp. 201, 237). At trial, Cleary acknowledged the speculative nature of this investment, testifying that while he had hoped there were more uplands on the Waterfall Property, he was certainly aware there was a chance that it did not. (Id., at p. 237).

To finance the June 2006 buyout of his partners' ownership interests in Waterfall, Cleary approached Beach First for financing. (Id., at p. 195). Ironically, Cleary was at that time Chairman of the Board of Directors of Beach First National Bank. He also served on the Bank's loan committee, which evaluated sizable loans (over \$2-3 million)

related to real estate investments such as the Waterfall Property.⁴ (Id., at pp. 385-87). Importantly, Cleary was already an investor in the Waterfall Property when he first approached Beach First, by way of his partial ownership interest in Waterfall. In June 2006, Beach First issued a \$2 million loan to Cleary.

In September 2007, Senator Cleary requested that Beach First refinance the June 2006 loan and increase the loan amount from \$2 million to \$3 million, in order to pay for development costs and create an interest reserve. (Id., at pp. 415-16). Throughout 2008 and 2009, Cleary continued to ready the Waterfall Property for development until he learned that the United States Army Corps of Engineers had concerns over wetlands. (Id., at pp. 216-22). In December 2009, Cleary finally commissioned a formal wetlands delineation on the Waterfall Property, which found roughly fifty (50) upland acres on the same, less than Cleary thought at the time but more than double the number believed at the time of his initial investment in the Waterfall Property. (Id., at p. 222, 275).

In April 2010, Beach First failed and was closed by the FDIC. Its assets, including the Waterfall loan, were purchased by Respondent. Cleary was not placed on the Board of Respondent after April 2010. Appellants stopped making payments to Respondent on the \$3 million loan in September 2010, after Cleary met with BNC representatives and advised of a “cash flow” issue. (Id., at pp. 229, 466).

In Appellants’ Statement of Facts, Appellants spend a number of pages summarizing *their version* of the facts, with which the jury obviously disagreed.

⁴ Dr. Cleary has also served as a State Senator, representing District 34 (portions of Horry and Georgetown Counties) since 2005.

Appellants frequently omit or misstate the testimony of BNC witnesses – or testimony from Cleary himself – that contradicts their factual rendition. For example:

- Cleary claims to have been an inexperienced real estate investor, with no knowledge about wetlands, notwithstanding his positions as Chairman of the Board of Beach First and a South Carolina legislator. App.’s Am. Initial Brief, at pp. 8-9. However, BNC’s witness, Katie Huntley (“**Huntley**”), testified that as of June 2006, she understood Cleary to be a prudent and experienced real estate investor, because he (1) had several other real estate investment loans with Beach First, (2) served on the Bank’s loan committee, and (3) routinely participated in the evaluation of numerous commercial real estate loans. (T., pp. 385-87, 409). Further, on cross-examination, Cleary admitted to having experience dealing with wetlands issues on a prior real estate investment; and he further admitted to knowing that, without a formal wetlands delineation from the United States Army Corps of Engineers, there was no way to determine with certainty the number of wetland acres on a parcel of property. (Id., at pp. 235-36, 248).

- Cleary now claims that he conditioned both the June 2006 and September 2007 loans on Beach First (the Bank where he was Chairman of the Board) verifying to him (1) the number of upland acres on the Waterfall Property and (2) the value of that property, and that he relied on such “verifications” in getting these loans (on property he already owned). App.’s Am. Initial Brief, at pp. 10-12, 16. However, Huntley, the Beach First employee whom Cleary approached about both loans, discredited that claim. She testified that Cleary placed no conditions on his financing requests, and never conditioned the loans on Beach

First confirming the value of the Waterfall Property or the number of wetland acres on the same. (T., pp. 389-90, 416-17). Huntley also testified that had Cleary asked Beach First to “verify” the number of upland acres on the Waterfall Property or the value of the same, she could not have done so, because federal regulations prohibit a bank from advising a borrower as to the wisdom of his or her investment.⁵ (Id., at pp. 389-90, 416-17). Huntley’s testimony was supported by BNC’s expert witness, Jim Watson (“**Watson**”), who testified that a bank is not in the business of advising borrowers on the wisdom of their investments. In forty years of lending money, Watson had never heard of a borrower conditioning his request to borrow money on the bank’s verification of the value or condition of property. (Id., at pp. 492, 503).

⁵ Regarding Huntley’s discussions with Cleary in 2006 and 2007, Appellants claim in their Initial Brief that “[t]hough, she initially testify [sic] that the conversations with Dr. Cleary regarding the initial \$2 million loan did not include any prerequisites for his taking out the loan or requirements regarding wetlands, after reviewing her notes from the meetings and the loan applications she agreed with the testimony of Dr. Cleary.” App.’s Initial Brief, at p. 16. This statement does not accurately reflect Huntley’s testimony at trial. On cross-examination, consistent with her prior testimony, Huntley stated that in both 2006 and 2007, Cleary discussed with her the existence of wetlands on the Waterfall Property and his hope that he would have more uplands as he continued to develop the same. (T., pp. 453-54). However, Huntley *never* agreed with the testimony of Cleary that his request for a loan was conditioned on anything. Rather, Huntley testified with certainty that Cleary “never asked me to verify [the wetlands on the Waterfall Property].” (Id.)

- Cleary also claims that he relied on the appraisals ordered by Beach First in conjunction with the underwriting of the 2006 and 2007 loans, in making his decision to enter into the transactions. App.’s Am. Initial Brief, at pp. 10-12. However, Cleary admitted on cross-examination that, based on his experience as the former Chairman of the Board of Directors of Beach First and having served on the loan committee of the Bank, an appraiser’s client is the bank, and an appraisal report is written for the Bank’s exclusive use. (T., pp. 272-73). Huntley testified that Cleary, in his experience serving on the loan committee, would have frequently worked with commercial appraisals and been very familiar with their purposes. (Id., at pp. 385-86). Watson confirmed that the reason banks order real estate appraisals is to verify that enough equity exists in the property to secure repayment of the loan, consistent with federal guidelines. (Id., at p. 501). Watson further testified that an appraisal would never be performed for the benefit of a borrower. (Id., at pp. 501-02).

- Cleary maintained at trial, and argues on appeal, that the reason he stopped making payments on the loan was because he was misled by the appraisal reports. App.’s Am. Initial Brief, at p. 14. Cleary further claims that when he met with BNC in October 2010 to discuss Appellants’ default on the loan, he specifically discussed the appraisals and demanded that that BNC sue the appraiser for those amounts owed on the loan. Id. However, Josh Wise (“Wise”), a former BNC employee who was present at this meeting, had a very different account. Wise testified that Cleary never mentioned the appraisal reports, nor suggested that BNC take legal action against the appraiser. (T., pp. 466-67). Rather, Cleary

stated he stopped making payments on the loan due to a shortage of cash flow. (Id., at p. 466). Wise testified that Cleary actually downplayed the issue of the then-recent United States Army Corps of Engineers' delineation, suggesting that he could meet with the Corps' representatives and "take them to lunch" to have some of the wetlands converted to uplands. (Id., at p. 467).

At the conclusion of the evidence, both BNC and Appellants moved for a direct verdict, both of which were denied. (Id., at pp. 555-70.) Following closing arguments, the circuit court charged the jury and it began its deliberations. (Id., at pp. 627-63). The jury initially returned with a verdict finding: (1) in favor of BNC on its breach of contract claim against Appellants and Appellants' counterclaims against BNC for fraudulent inducement, fraud and misrepresentation, and negligent misrepresentation; and (2) in favor of Appellants on their breach of contract counterclaim against BNC, but awarding Appellants zero dollars. (Id., at p. 675). After consulting with the attorneys for Appellants and BNC, the circuit court determined that the jury's initial verdict was inconsistent and charged the jury that it must either find in favor of BNC or, if it finds in favor of Appellants, it must award some amount of money damages. (Id., at pp. 676-81). *Neither side objected at that time to the court's additional charge.* The jury subsequently returned a verdict in BNC's favor on all claims, including Appellants' breach of contract counterclaim.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' NEW TRIAL MOTION.

This Court should uphold the circuit court's denial of Appellants' motion for a new trial. The jury's verdict is supported by the evidence and consistent with South

Carolina law; and Appellants failed to preserve their unfounded objections about the Bank's closing argument and the testimony of the Bank's expert witness.

Under South Carolina law, a trial court has the discretion to grant or deny a motion for a new trial, Hildreth v. County of Kershaw, Op. No. 2005-UP-134, *3 (S.C.Ct.App. filed Feb. 22, 2005). Such a motion should be granted only if the verdict "is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives," Brinkley v. S. Carolina Dep't of Corr., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct.App.2009). An appellate court has a "limited standard of review" of a trial court's decision to grant or deny a new trial motion. Hildreth, at *3. In fact, an appellate court only can reverse a denial of a new trial motion if the circuit court abused its discretion and its "findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Brinkley, at 185, 687 S.E.2d at 56. Furthermore, in evaluating a trial court's denial of the new trial motion, the appellate court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Id. at 185-86, 687 S.E.2d at 56. As explained below, the circuit court was well within its discretion in denying Appellants' new trial motion.

A. The Jury's Verdict Is Within the Scope of the Evidence Presented at Trial.

Appellants argue that they are entitled to a new trial because the evidence does not support the jury's verdict. However, when viewed in the light most favorable to the Bank, the jury's verdict clearly is supported and "within the scope of the evidence," Hildreth, at *3, and, consequently, the circuit court was within its discretion in denying

Appellants' new trial motion. The jury returned a verdict in favor of the Bank on all claims – the Bank's breach of contract cause of action, which was based on loan documents that Appellants executed in the Bank's favor, and on Appellants' counterclaims for fraudulent inducement, negligent misrepresentation, fraud and misrepresentation, and breach of contract and the covenant of good faith and fair dealing. At trial, there was ample evidence and testimony to lead a reasonable jury to believe that the Bank was entitled to a verdict on its breach of contract claim and that Appellants had failed to satisfy their burden of proof with regard to their counterclaims. As a result, the circuit court did not abuse its discretion in denying Appellants' new trial motion.

1. Ample Evidence Supports the Jury's Verdict in Favor of Respondent on the Breach of Contract Claim.

Sufficient evidence in the record supports the jury's verdict in favor of Respondent on its breach of contract claim. In order to prevail on a breach of contract action, a party must establish "the existence of the contract, its breach, and the damages caused by such breach," which "serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct App.2009). In support of its claim, the Bank presented the testimony of a "current officer and book keeper for the Bank," Joel Foster ("**Foster**"), who, at the time of trial, "had oversight on the loan in question." App.'s Am. Initial Brief, at p. 14. Foster testified about the existence of the Notes, Mortgage, and Guarantee ("**the Loan Documents**"), and Appellants' breach of and default under the same. (I., pp. 106-16). Foster also "swore as to the amount the Bank" "was owed under" the Loan Documents. App.'s Am. Initial Brief, at p. 14. According to Foster, Appellants owed the Bank sums that included a principal balance of

\$2,499,630.00, interest of \$373,112.57, late fees, and reimbursements for property taxes. (T., pp. 132-34).

In summary, the jury's verdict of \$2,906,788.59 in favor of the Bank unquestionably is "within the scope" of the evidence presented at trial; it certainly is not "wholly unsupported" or "shockingly disproportionate to the injuries suffered [so as to indicate] that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.'" Hildreth, at *3 (internal citation omitted). See also Youmans ex rel. Elmore v. S. Carolina Dep't of Transp., 380 S.C. 263, 271, 670 S.E.2d 1, 4-5 (Ct.App.2008) ("Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence'"). As a result, the circuit court was within its discretion in finding sufficient evidence in the record to support the jury's verdict on the breach of contract claim.

2. The Record Supports the Jury's Finding that Appellants Failed to Prove Their Counterclaims.

Ample evidence also exists to support the jury's rejection of Appellants' counterclaims for fraudulent inducement, negligent misrepresentation, fraud and misrepresentation, and breach of contract and the covenant of good faith and fair dealing. In an effort to prove their counterclaims, Appellants pursued the dubious theory that Senator Cleary was somehow "naïve" in regard to real estate investment loans, and detrimentally relied on the representations of middle management bank employees regarding the Property's wetland acreage in making his investment decision. App.'s Am. Initial Brief, at p. 7. Appellants had the burden of proving their counterclaims by a preponderance of the evidence, or, with regard to their fraud claims, by clear and convincing evidence. See Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 769

(2011) (noting that, to establish liability for negligent misrepresentation, plaintiff must prove the claim's requisite elements "by a preponderance of the evidence," and the elements of a fraud claim by clear and convincing evidence.) The jury was "free to accept or reject in whole or in part the testimony of any witness." Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct.App.1997). In this case, an abundance of testimony and evidence undercut Appellants' counterclaims and the testimony of Cleary, Appellants' only fact witness.

Despite Cleary's claim that he had little, if any, experience in real estate investing and had no experience working with wetlands, he admitted on cross-examination that the Waterfall Property was *not* his first commercial real estate investment and that he had previously encountered a similar wetlands issues with another coastal investment property. (T., pp. 235:3-236:9; 243:3-8). Additionally, evidence showed that Cleary, Beach First's Chairman of the Board, actually served on the Bank's loan committee, during which time he reviewed numerous real estate investment loans similar to this one. (Id., at pp. 257:9-16; 336:20-337:1; 385:9-387:9; 409:4-12). Some of the key evidence contradicting Cleary's testimony was as follows:

- (1) Huntley and Wise testified that Cleary never even requested full copies of the Bank's appraisals or indicated that his refinancing was contingent upon receiving the contents of the appraisals (id., at pp. 387:23-389:18; 469:16-470:7);
- (2) Huntley testified that Cleary never asked her to "verify" the number of wetland acres on the Waterfall Property, and, if he had made such a request, she would have declined to do so, even though he was Chairman of the Board (id., at 389:15-390:3);

(3) Huntley and Watson testified that any appraisal the Bank ordered was for the *Bank's* sole and exclusive use, and not for a customer's (*id.*, at pp. 386:18-24; 412:4-14; 501:24-502:6); and

(4) Cleary admitted that he knew the only way to determine wetlands acreage with certainty was to obtain a formal wetlands delineation from the United States Army Corps of Engineers (*e.g. id.*, at pp. 242:23-243:2; 248:20-24).

Accordingly, there was ample evidence and testimony in the record to support the jury's finding that Appellants failed to prove their counterclaims (whether by a preponderance of the evidence or, as to the fraud claims, by clear and convincing evidence). Consequently, the circuit court was well within its discretion in denying Appellants' new trial motion.

3. The Mere Existence of Contradictory or Inconsistent Evidence Is Not Grounds for a New Trial.

Despite Appellants' protestations otherwise, the existence of vastly contradictory evidence at trial does not justify or necessitate a new trial. Appellants go to great lengths in their Amended Initial Brief to describe their evidence at trial regarding the Bank's alleged negligence, recklessness, and bad faith and they argue that "an award finding the [B]ank was not irresponsible or at the very least negligent should have been found to be so shocking as to manifestly show it had only been the result of improper motives and confusion" by the jury. *App.'s Am. Initial Brief*, at p. 24. Appellants conveniently forget that the presentation of contradictory evidence is *commonplace at any trial* and is consistent with the jury's duty to determine the credibility of evidence presented. *Small v Pioneer Mach., Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct.App.1997) ("[I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a

witness,” and a jury is “imbued with broad discretion” to determine the credibility of such evidence). Moreover, the argument fails in light of the appellate court’s standard of review, which is ““limited to consideration of whether evidence exists to support the trial court’s order,”” and, under South Carolina law, “[a]s long as there is conflicting evidence,” the appellate court cannot “disturb” the trial judge’s decision. Youmans ex rel. Elmore v. S. Carolina Dep’t of Transp., 380 S.C. 263, 271, 670 S.E.2d 1, 4-5 (Ct.App.2008) (internal citation omitted). It is undisputed that the parties presented “conflicting evidence” to the jury, and the jury had “broad discretion in determining credibility or believability of witnesses.” Small, at 465, 494 S.E.2d at 843. Thus, the circuit court’s decision to deny a new trial should not be “disturbed.” Youmans, at 271, 670 S.E.2d at 4-5.

B. The Jury’s Verdict Was Consistent with South Carolina Law.

Not only was the jury’s verdict supported by sufficient evidence in the record, but it is also consistent with South Carolina law. Appellants argue that grounds for a new trial exist because, after deliberation, the jury initially returned an inconsistent verdict form in which it found in favor of Appellants on their breach of contract and duty of good faith and fair dealing counterclaims, but awarded zero dollars (\$0.00) in damages. Following Appellants’ objection to the verdict as inconsistent, the circuit court instructed the jury to either find for the Bank on the counterclaims or award some amount of damages to Appellants on those claims. Specifically, the circuit court, *without Appellants’ objection*, charged the jury:

Your verdict indicates in favor of the Defendants in the amount of zero. Under our law I’m referring you back with these instructions. [A]s to Defendants claim for breach of contract including the covenant of good faith and fair

dealing you must either find in favor of the Plaintiff or if you find in favor of the Defendant you must award some amount of money damages all right. So with those instructions only as to that one cause of action I will resubmit this to you for your further deliberations as to only that cause of action Mr. Foreman.

(T., p. 680:6-24). In Stevens v. Allen, 342 S.C. 47, 50, 536 S.E.2d 663, 664 (2000), the South Carolina Supreme Court instructed trial courts to issue such an instruction to juries that return an inconsistent verdict. Per the Stevens court, when there is an inconsistent verdict that finds the defendant liable but awards zero damages and “the issue [of the inconsistency] is raised,” “a trial judge should resubmit” the verdict to the jury “with instructions to either find for the defense or award some amount of damages.” Stevens, at 49-50, 536 S.E.2d at 664. Following resubmittal, “[i]f the jury cannot reach a consistent verdict, the trial court may then order a new trial nisi or a new trial absolute.” Id., at 53, 536 S.E.2d at 666. In so finding, the Stevens court specifically held that “if a jury finds the plaintiff has failed to prove damages proximately caused by the defendant[,] then its verdict should be for the defendant.” Id.

After the circuit court resubmitted the verdict, the jury, consistent with its initial finding that Appellants had zero damages, returned a verdict on Appellants’ counterclaims in favor of the Bank that was consistent with the holding of Stevens and South Carolina law. Because the jury returned a “consistent verdict,” id., the circuit court did not abuse its discretion in denying Appellants’ motion for a new trial.⁶

⁶ Appellants baldly assert that the jury’s verdict was the result of improper motives including “exhaustion” and “the desire to go home at 10:00 p.m.,” App.’s Am. Initial Brief, at p. 26, but there is absolutely no evidence to support those conclusions — the jury never indicated a desire to adjourn its deliberations for the day, nor did it give any

C. **Appellants Failed to Timely Object to the Bank’s Closing Argument; Consequently, the Circuit Court Correctly Held that Appellants Were Not Entitled to a New Trial for Allegedly Prejudicial Comments.**

Appellants also contend that they were entitled to a new trial based on the Bank counsel’s closing argument which mentioned Cleary’s personal financial information. However, the circuit court properly held that the Bank’s closing argument was not a basis for a new trial because Appellants failed to timely object to the allegedly prejudicial comments. Furthermore, the Bank’s argument was proper in light of the evidence in the record.

As Appellants acknowledge in their Amended Initial Brief, they “did not contemporaneously object” to the Bank’s closing argument. App.’s Am. Initial Brief, at p. 27. Under South Carolina law, an opposing party generally must *immediately* object to an improper argument made by counsel during closing argument, or the objection is waived. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986) (“We have held that the proper course to be pursued when counsel makes an improper argument is for opposing counsel to *immediately* object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon.”) (internal citation omitted) (emphasis added). See also Ligon v. Norris, 371 S.C. 625, 633, 640 S.E.2d 467, 471, n.1 (Ct.App.2006) (noting that when a party fails to “timely object to the closing argument,” the issue is “not preserved for appellate review”). Thus, in Varnadore, the South Carolina Supreme Court held that a party’s objection to an

indication that it was “exhausted.” Appellants also never requested that the court stop the jury from further deliberations that day. This Court should reject Appellants’ insinuation that a well-rested jury could not possibly find Dr. Cleary’s testimony less than credible.

improper closing argument “[*after closing arguments*, and out of the presence of the jury” was not “timely.” *Id.* at 159, 345 S.E.2d at 714 (emphasis in original). Similarly, in *Webb v. CSX Transportation, Inc.* 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005), the South Carolina Supreme Court held that the defendant’s “complain[t that] the jury was erroneously allowed to focus on its net worth” in the plaintiff’s closing argument was “not preserved for appellate review” because “there was no contemporaneous objection.”

Similar to *Varnadore* and *Webb*, Appellants failed to make a timely objection to the Bank’s closing argument. Instead of immediately objecting to the comments during or even right after the Bank’s closing argument, Appellants delayed and did not raise the issue until their *post-trial* Motion for a New Trial. As a result, the objection was untimely and the circuit court properly rejected it as a ground for a new trial.⁷

Even if Appellants had timely objected to the Bank’s closing argument, such an objection had no merit because the Bank’s reference to Cleary’s income and net worth was based on previously admitted evidence about Cleary’s finances that Appellants never moved to strike from the record. During trial, Huntley testified about the Bank’s

⁷ South Carolina courts have recognized a limited, “narrow” exception to the “general rule,” and permitted a subsequent challenge without a contemporaneous objection, in “flagrant cases where a “vicious inflammatory argument” is made that “results in clear prejudice” and “constitutes abuse of a party or witness,” *Dial v. Niggel Associates, Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998) (closing argument that plaintiff’s counsel had engaged in deceit and lies and that the defendant, because of his race, had been “railroaded” into pleading guilty in a related criminal case, did not warrant a new trial in the absence of a contemporaneous objection). Such an exception rarely is applied, and, regardless, has no applicability in this case, especially given that the Bank’s closing argument was proper in the light of the evidence.

underwriting process for the loan, including its analysis of Cleary's (the loan's guarantor) financial ability to repay the requested loan. Although the circuit court sustained Appellants' objection to the introduction of *specific* dollar amounts regarding Cleary's income and net worth, it permitted Huntley to testify that the Bank approved the loan because of Cleary's significant income and net worth and his ability to make the roughly \$20,000.00 monthly payments on the multi-million dollar loan. (T., pp. 391:5-399; 402:23-403:3; 406:20-409:12; 410:2-411:8). Not only was such testimony permitted, but Appellants never moved to strike previously introduced, specific testimony about Cleary's income and net worth. Consequently, Appellants "cannot be heard to complain or appeal" about such evidence or its use in the Bank's closing argument. State v. Primus, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000) ("[T]he cases are legion in holding if an appellant objects and the objection is sustained but he does not move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain or appeal").

D. The Circuit Court Correctly Held that Appellants Were Not Entitled to a New Trial Based on the Admitted Testimony of the Bank's Expert Witness.

Appellants complain that that they are entitled to a new trial because the circuit court erred in permitting certain testimony of the Bank's expert witness, Watson. Appellants argue that the circuit court wrongly overruled their objection to allowing Watson, whom the court admitted as a commercial mortgage loan expert, to opine about "matters outside" his designated expertise, such as the Bank's negligence relating to its "review of and reliance on the appraisals in question" App.'s Am. Initial Brief, at p. 29. Accordingly, they submit that the circuit court's "ruling was an error" entitling them to a

new trial. Id. However, Appellants' argument is baseless because Appellants failed to adequately preserve their objections to Watson's testimony. Moreover, the circuit court was within its discretion in allowing Watson's testimony.

1. The Record Is Insufficient to Permit Appellate Review of the Circuit Court's Rulings on Appellants' Objections to Watson's Testimony.

Appellants' argument that the circuit court erred in permitting certain testimony of the Bank's expert witness, Watson, is not preserved for appellate review.⁸ Appellants, who have "the burden of providing a sufficient record" for appeal, either failed to obtain rulings by the circuit court or did not adequately preserve the basis for their objections to Watson's testimony. As the South Carolina Supreme Court has recognized, an issue is not preserved for appellate review if it wasn't "ruled upon by the trial judge," or if the circuit court's ruling on the issue does not appear in the "Record on Appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). In Dunbar, the Supreme Court held that it was improper for an appellate court to address an argument that "was not raised to the trial court below for a ruling," Dunbar, at 143, 587 S.E.2d at 694. In Helms, it "decline[d] to address the merits of Appellants' claim" that it was entitled to a new trial based on an improper jury charge, because the charge in question was "not in the Record on Appeal." Helms, at 339, 611 S.E.2d at 487.

⁸ Appellants, in disregard of Appellate Court Rule 208(b)(4), failed to provide specific references to the record regarding the allegedly improper Watson testimony, Appellants' objections to that testimony, or the circuit court's rulings on those objections.

As in Dunbar and Helms, Appellants likewise failed to preserve for appellate review their objections to Watson's expert testimony. Notably, the circuit court's Order denying Appellants' new trial motion does not even address Appellants' new argument that the trial court erred in permitting Watson to provide expert testimony about the Bank's alleged negligence. App.'s Am. Initial Brief, at p. 30. See also Feb. 5, 2014 Order, at pp. 8-10.⁹ Based on the trial transcript, Appellants either withdrew their objections to Watson's testimony, or had a sidebar conversation that was never recorded.

Significantly, Appellants failed to ever obtain a ruling by the circuit court on their first objection to Watson's expert testimony. Following a question to Watson about a "commitment letter," Appellants' objected, arguing that the line of questioning was outside the scope of Watson's designated expertise, which the Bank had identified in discovery as relating to "the reasons for which a lender is required to order appraisals in commercial loans along with the intended use and purpose of said appraisals." (T., pp. 493-94). However, *prior to the circuit court's ever ruling upon that objection*, Appellants' counsel notified the trial court that "perhaps [his] objection was premature."

MR. GLEISSNER: I've now stated my objection for the record and if he goes into other matters then we can deal

⁹ In the Order, the circuit court only addressed Appellants' argument that it had erred in allowing Watson to testify about the "facts of the case or the subject loan." Feb. 4, 2014 Order, at pp. 8-10. In the Order, the trial court held that Appellants failed to properly object to such testimony, that such an argument was "waived," and that, "even if a proper objection had been made at trial," it would have been meritless because the Bank's expert disclosure "was sufficient" to put Appellants on notice that Watson may "testify as to the 'use and purpose' of 'appraisal[s] in commercial loans' as they were used in the underlying loan at issue in the case." Id., at pp. 9-10.

with that when he attempts to go into other matters. Fair enough?

THE COURT: Thank you.

MR. FLOYD: That's all I have Your Honor.

THE COURT: Bring in the jury.

(Id., at p. 496:4-13). As a result, the trial transcript never reflects any ruling by the circuit court regarding Watson's ability to "testify as an expert on [] unrelated matters," App.'s Am. Initial Brief, at p. 29. Consequently, Appellants did not preserve the issue for appellate review.

Likewise, Appellants' subsequent "objections" to Watson's testimony were not preserved for appellate review due to an insufficient record. After Appellants' withdrawal of the above objection, the basis for Appellants' other objections and the circuit court's rulings on those objections were stated *off the record* or never elaborated upon. For example:

Q: Are you familiar with Beach First National Banks policies and procedures that existed at this time?

A: Yes sir.

Q: How are you familiar with them?

A: I had a previous case involving Beach First.

MR. GLEISSNER: I have to renew my objection.

THE COURT: Step up here a minute.

Whereupon a bench conference was had.

THE COURT: You may ask your next question Mr. Floyd.

(Id., at p. 504:11-21).

Q: Do you believe that Beach First National Bank complied with federal regulations when it reviewed the 2006 appraisal?

MR. GLEISSNER: I need to renew my objection.

THE COURT: I'll overrule that objection.

MR. GLEISSNER: Thank you Your Honor.

(Id., at p. 505:7-12).¹⁰ Without the basis for the objections and the circuit court's overruling of those objections in the record, it is impossible for this Court to determine

¹⁰ Additional instances of vague objections and rulings on such objections include:

Q: All right. As a professional mortgage loan officer would you have accepted the appraisals in this case?

A: Yes sir.

Q: Even though they had varied values you still would have accepted them?

A: Yes sir.

Q: Why is that?

MR. GLEISSNER: I have to renew my objection again.

THE COURT: I'm not tracking Mr. Gleissner. If you'll step up here.

Whereupon a bench conference was had.

Q: MR. FLOYD: Mr Watson just a few more questions.

Id., at pp. 505:24-506:13.

whether the circuit court erred in overruling the objections. Under South Carolina law, a “trial judge’s general ruling[s, like those above, are] insufficient to preserve the specific issue for appellate review,” Shealy v. Aiken Cnty., 341 S.C. 448, 460, 535 S.E.2d 438, 444 (2000); and appellate courts “will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true,” S. Carolina State Highway Dep’t v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 181 (1962). See also id. (“The transcript of record is the source of [an appellate court’s] information as to what occurred in the trial of the case below; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto.”). Because the trial transcript fails to provide the requisite details about Appellants’ objections to Watson’s testimony, the matters were not preserved for appellate review.

A: -- These appraisals are properly done properly submitted.

MR. GLEISSNER: I have to renew my objection to this testimony.

THE COURT: Thank you. So noted.

MR. GLEISSNER: Overruled my objection

THE COURT: Overruled yes sir.

Id., at p. 507:15-21.

2. The Circuit Court Did Not Abuse Its Discretion in Permitting Watson's Testimony.

Based on the Bank's timely designation of Watson's expertise, the circuit court was well within its discretion in permitting Watson's testimony in any event. "The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). On appeal, "[t]he trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion," which occurs "when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." Id. See also Todd v. Joyner, 385 S.C. 509, 513, 685 S.E.2d 613, 616 (Ct.App.2008).

In this case, the Bank timely disclosed Watson as its expert witness in June 2013, almost five months before trial. Bank's Second Supp. Answers to First Set of Int., at p. 1. In doing so, they notified Appellants that Watson was "expected to testify with regard to the reasons for which a lender is required to order appraisal(s) in commercial loans along with the intended use and purpose of said appraisal(s)." Id. "[D]iscovery responses regarding experts do not, indeed cannot include everything that an expert witness will state at trial," Walker v. Gann, 955 So. 2d 920, 928-29 (Miss.Ct.App.2007), and the Bank's designation for Watson was sufficiently broad enough to encompass and alert Appellants to the possibility of Watson's testimony about the appraisals in question and the propriety of the Bank's acceptance and reliance upon the same. At trial, Appellants only objected to Watson's testimony that: the Bank complied with federal regulations when it reviewed the 2006 appraisal (T., p. 505); that, "[a]s a professional mortgage loan officer," Watson would have "accepted the appraisals in this case" (id., at pp. 505-06);

and the appraisals were “properly done, properly submitted” (*id.*, at p. 507).¹¹ Not only does the “objected to” Watson testimony clearly fall within the scope of Watson’s commercial loan appraisal expert designation, but it is also within the realm of the broad subject matter of expertise for which the court, *without Appellants’ objection*, admitted Watson to testify – commercial mortgage loans. (*Id.*, at pp. 485:15-489:9.)

As a result, Appellants were on notice of Watson’s “objected to” testimony, and it certainly was within the circuit court’s discretion to permit such testimony and to deny Appellants’ motion for a new trial on the grounds of the admitted Watson testimony.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS’ MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON APPELLANTS’ AFFIRMATIVE DEFENSE OF COMPARATIVE NEGLIGENCE.

Not only did the circuit court not err in denying Appellants’ new trial motion, but it also did not err in denying Appellants’ directed verdict and JNOV motions on the Bank’s comparative negligence defense because: (1) Appellants sued the Bank for negligent misrepresentation, a cause of action to which comparative negligence is an affirmative defense;¹² (2) there was sufficient evidence in the record to support the defense; and (3) the jury did not even find Appellants to be comparatively negligent.

¹¹ Notably, Appellants never challenged the detail provided by the Bank’s expert disclosure of Watson, and, they elected not to depose Watson during discovery to flesh out the details of his expert opinions.

¹² In their Amended Initial Brief, Appellants argue that the circuit court erred in allowing the affirmative defense to “Appellants’ actions for negligent misrepresentation and fraud.” *App.’s Am. Initial Brief*, at p. 32. However, based on the trial transcript, the parties’ directed verdict arguments and the court’s finding were limited to permitting the

In analyzing motions for both directed verdict and JNOV, a trial court is “required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt.” Creech v. S. Carolina Wildlife & Marine Res. Dep’t, 328 S.C. 24, 28-29, 491 S.E.2d 571, 573 (1997). The appellate courts have a limited standard of review, and they only reverse the decision “when there is no evidence to support the ruling below.” Id.; Hildreth v. County of Kershaw, Op. No. 2005-UP-134, *2 (S.C.Ct.App. filed Feb. 22, 2005) (appellate court must uphold the denial of a directed verdict or JNOV motion if “the evidence yields more than one inference or its inference is in doubt,” and it does not have the “authority to decide credibility issues or to resolve conflicts in the testimony or evidence”). Here, case law and evidence support the circuit court’s denial of Appellants’ directed verdict and JNOV motions regarding the Bank’s affirmative defense; therefore, this Court should affirm the same.

A. Comparative Negligence Is a Defense to Negligent Misrepresentation.

Because “[r]ecovery in negligent misrepresentation cases is based upon negligent conduct,” § 30-1 NEGLIGENT MISREPRESENTATION - ELEMENTS, Anderson, S.C. Requests to Charge - Civil, § 30-1 (2009), courts recognize comparative negligence

affirmative defense as to Appellants’ negligent misrepresentation claim. T., pp. 559-566. Likewise, the circuit court’s Order denying Appellants’ JNOV Motion only addressed the applicability of the defense to Appellants’ negligent misrepresentation claim. Order, at pp. 6-7. Thus, the defense’s application to Appellants’ fraud claim is not preserved for appellate review.

as an affirmative defense to the cause of action. 22 A.L.R.5th 464, Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation (1994) (“The prevailing view is that comparative negligence principles are applicable to negligent misrepresentation.”). See also Prime Retail Dev., Inc. v. Marbury Eng’g Co., 270 Ga.App. 548, 552, 608 S.E.2d 534, 538 (Ct.App.2004) (holding that a comparative negligence defense is applicable to a negligent misrepresentation claim, and, because “there was some evidence of negligence” on the part of the plaintiff, the trial court “did not err in charging the jury on comparative negligence”). In applying the defense to negligent misrepresentation claims, courts reason that “there is no [basis] to differentiate negligent misrepresentation from any other forms of negligence, and, therefore, the ordinary rules as to comparative [] negligence should apply” to the claim. Id., at § 2. Although there is limited South Carolina case law regarding the defense’s application to negligent misrepresentation claims,¹³ a South Carolina district court, in Serfass v. CIT Grp./Consumer Fin., Inc., No. 8:07-CV-00090-GRA, 2008 WL 351116, at *4 (D.S.C. Feb. 7, 2008), acknowledged the defense’s applicability to the cause of action. In Serfass, the defendant moved for summary judgment on plaintiff’s negligent misrepresentation claim, and the plaintiff simultaneously moved to strike the defendant’s comparative negligence defense. The court granted both motions. Recognizing the defense’s application to the negligent misrepresentation claim, the court held: “Considering the Court’s decision to grant [the] Motion for Summary Judgment on the claim for negligent misrepresentation, the Court will grant Plaintiffs’ Motion to Strike the

¹³ Significantly, Appellants cite no South Carolina cases holding the defense is inapplicable to a negligent misrepresentation claim.

defense of comparative negligence.” Id. Thus, comparative negligence was a proper defense to Appellants’ negligent misrepresentation claim.

B. The Circuit Court’s Denial of the Motions Is Irrelevant Because the Jury Did Not Find Appellants To Be Comparatively Negligent; Nonetheless, Ample Evidence Supported the Bank’s Comparative Negligence Defense.

Even if comparative negligence were not a proper defense to a negligent misrepresentation claim, Appellants’ argument is a red herring because the jury found in favor of the Bank on Appellants’ negligent misrepresentation counterclaim, and did not even determine whether Appellants were comparatively negligent. See, e.g., Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (“An erroneous jury instruction . . . is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction.”). In any event, sufficient evidence supported the Bank’s comparative negligence defense and the circuit court’s decision to deny Appellants’ directed verdict and JNOV motions regarding the same.

In order to prove their claim for negligent misrepresentation, which was based on the Bank’s purported representations in appraisals about the Waterfall Property’s wetland acreage, Appellants had to establish that, among other things, they “justifiably relied on the representation.” Quail Hill, LLC v. County of Richland, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010). However, at trial, the Bank elicited testimony from Cleary that he performed no due diligence of his own before purchasing his interest in the Waterfall Property in 2006 or before refinancing and increasing his investment in 2007. (T., pp. 193, 246-48). In fact, Cleary never inspected the Waterfall Property himself or commissioned a wetlands delineation until December 2009, long after both of the subject loans were issued. (Id., at pp. 235-36, 246-47, 275). Furthermore, Bank witnesses

testified that Cleary never requested full copies of the Bank's appraisals, (id., at pp. 387-89, 469-70), and never asked the Bank to "verify" the number of wetland acres, (id., at pp. 389-90). Additionally, prior to ever learning that Bank-ordered appraisals showed between 39 and 94 acres of wetlands, Cleary was aware of a previous preliminary designation that the Waterfall Property contained substantially more wetlands (136 acres), and a United States Army Corps of Engineers' opinion that the Property contained approximately 107 acres of wetlands. (Id., at pp. 250, 275-76). Such awareness was significant given Cleary's admission that he knew that the only way to determine wetlands acreage with any degree of certainty was to request a formal wetlands delineation from the United States Army Corps of Engineers, (e.g. id., at pp. 242-43, 248).

Thus, evidence supported the circuit court's denial of Appellants' directed verdict and JNOV motions on the Bank's comparative negligence defense.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE BANK'S MOTION FOR COSTS AND FEES.

In this convoluted case that resulted in a one week trial and a jury verdict of \$2,906,788.59 in favor of the Bank, the circuit court did not abuse its discretion in granting the Bank approximately \$278,000.00 in costs and attorneys' fees because such an award is authorized by contract, is reasonable, and is supported by the evidence in the record. As a result, the Court should affirm the trial court's Order granting the costs and fees.

Appellants concede that “attorneys’ fees were authorized by contract” in this case, App.’s Am. Initial Brief, at p. 37,¹⁴ and, in such an instance, “the award of attorney’s fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown.” Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). “Factors to be considered by the trial court in making a determination as to [the amount of reasonable] attorneys[’] fees are: (1) [t]he nature, extent and difficulty of the legal services rendered; (2) [t]he time and labor necessarily devoted to the case; (3) [t]he professional standing of counsel; (4) [t]he contingency of compensation; (5) [t]he fee customarily charged in the locality for similar legal services; and (6) [t]he beneficial results obtained.” Dedes v. Strickland, 307 S.C. 155, 160, 414 S.E.2d 134, 137 (1992). “Consideration should be given to all six criteria in establishing reasonable attorney’s fees” because “none of these six factors is controlling.” Baron Data Sys., at 384, 377 S.E.2d at 297. “On appeal[,] an award of attorney’s fees will be affirmed so long as sufficient evidence in the record supports each [of the above] factor[s].” Seabrook Island Prop. Owners’ Ass’n v. Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 435 (Ct.App.2005).

In this case, the circuit court “gave ample consideration to the foregoing [] factors in determining the attorneys’ fee award” and the amount of attorneys’ fees awarded is reasonable and supported by evidence; consequently, the circuit court did not “abuse [its] discretion” in awarding the Bank roughly \$278,000.00 in costs and attorneys’ fees. Dedes, at 160, 414 S.E.2d at 137.

¹⁴ Two contracts, the personal guaranty that Dr. Cleary signed and the promissory note that Waterfall executed, granted the Bank attorneys’ fees for all collection and enforcement expenses related to those contracts. Guaranty, at ¶ 5; Note, at p. 2.)

A. Nature, Extent, and Difficulty of Services Rendered

The circuit court's attorneys' fee award was reasonable given the complexity and nature of the claims and counterclaims in this case. Although the Bank's foreclosure and collection action against Appellants did not initially involve incredibly complex legal or factual matters, Appellants voluntarily chose to pursue numerous, convoluted affirmative defenses and counterclaims against the Bank, under at least six (6) different theories. In such circumstances, South Carolina law holds that the creditor is not only entitled to recover the fees incurred in prosecuting its own claims, but also those incurred in defending against counterclaims "intertwined" with its claims under the loan documents. Charleston Lumber Company, Inc. v. Miller Housing Corporation and Robert E. Miller, Jr., 318 S.C. 471, 458 S.E.2d 431 (Ct.App.1996) (Granting a creditor attorneys' fees incurred in defending against counterclaims because the "facts and issues surrounding the promissory note were intertwined with those of the counterclaims which required extensive discovery and transformed a normally uncomplicated action on a note into complex litigation.").

Appellants' defenses and counterclaims unquestionably were intertwined with the Bank's claims under the Loan Documents,¹⁵ and they "required extensive discovery and transformed a normally uncomplicated action on [loan documents] into complex litigation" that resulted in a one week trial. Id. See also Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989) (upholding trial court's fee award, and

¹⁵ See Answer and Counterclaims, at pp. 4-11 (alleging, among other things, that the Bank engaged negligent misrepresentation and fraud to induce Appellants to execute the Loan Documents).

recognizing that plaintiff “had to expend considerably more time and effort on the case because the defendants had transformed a simple collection action into complex litigation”). In particular, Appellants’ factual allegations involved a number of witnesses (estimated at 10-15) who were current and former employees of the Bank, as well as business partners of Cleary, and they spanned a multi-year timeframe of alleged events and occurrences. The complexity of the litigation was also heightened by Appellants seeking to void the Bank’s mortgage and demand for a seven figure monetary judgment against the Bank above and beyond the Waterfall Property’s value. Moreover, the fact that the original lender, Beach First, had been closed by the FDIC and its assets purchased by BNC – a fact well known to Cleary, who served as Chairman of the Board of Beach First – obligated the Bank to assert certain federal defenses to the affirmative defenses and counterclaims asserted by Appellants.

B. Time and Labor Devoted to Case

Furthermore, the circuit court’s award was reasonable in light of the amount of time and labor needed by the Bank to prosecute its collection claims, defend the numerous, complex affirmative defenses and counterclaims, and try the case for one week. As noted above, due to the scope and convolution of Appellants’ defenses and counterclaims, discovery was extensive – there were an estimated 10-15 witnesses with personal knowledge of information related to Appellants’ assertions; written discovery produced in excess of 1,600 pages of information; and the Bank employed expert witnesses to rebut Appellants’ affirmative defenses, counterclaims, and expert testimony. Additionally, the Bank engaged in necessary legal research to combat Appellants’ counterclaims. See Super Duper, Inc. v. Mattel, Inc., No. 6:05-1700-HFF-WMC, 2009

WL 866463, at *4 (D.S.C. Mar. 31, 2009) (permitting an attorneys' fee award to include over \$20,000.00 in legal research charges).

Although the Bank expended substantial time and labor prosecuting its claims and defending against Appellants' defenses and counterclaims, it also reasonably mitigated its litigation costs by, among other things, having the attorney with the lowest hourly rate, Bradley A. Floyd ("Floyd"), perform a majority of the discovery related tasks. For example, Floyd handled the written discovery and conducted all depositions with no other attorney for the Bank in attendance. Furthermore, to avoid duplication of efforts, Womble Carlyle primarily handled all matters related to the difficult, federal law privileges and protections without involvement from Floyd, and the Bank never had more than two (2) attorneys present at any court appearance (and when multiple attorneys were present, each handled separate and distinct matters in order to mitigate costs).¹⁶ See Taylor v. Taylor, 333 S.C. 209, 508 S.E.2d. 50 (Ct.App.1998) (Noting that the Court "will not criticize a party for hiring more than one attorney, provided their work is not duplicated and the complexity of the case demands it.").

C. Professional Standing of Counsel.

The circuit court's award also was reasonable given the Bank's counsels' professional standing, a finding that Appellants do not dispute. Martindale-Hubbell, the premier organization related to peer review assessment of attorneys professional standing, denotes an AV rating for both of the Bank's firms, indicating that the firms have a preeminent status and that their peers have ranked them at the highest level of

¹⁶ It should be noted that Appellants also had two (2) attorneys present at trial and at various hearings throughout the case.

professional excellence. Moreover, the Bank’s attorneys have significant litigation experience – the lawyers from the Floyd firm have over 55 years of combined litigation experience (with its founding partner, Dalton B. Floyd, Jr., amassing over 50 years of litigation experience in South Carolina courts alone), and the Womble Carlyle lawyers have a combined 35 years of litigation experience in South Carolina and North Carolina courts.

D. Contingency of Compensation.

Appellants argue that the circuit court “failed to consider any evidence” or “make findings of fact regarding the contingency of compensation,” and, therefore, its award of attorneys’ fees and costs should be reversed. App.’s Am. Initial Brief, at p. 40. However, such an argument is baseless given the circuit court’s express finding that, in regard to contingency of compensation, “Plaintiff’s counsel represented Plaintiff on a fee-based billing schedule.” Order Granting Fees and Costs, at 10.¹⁷ See Baron Data Sys.,

¹⁷ Notably, in determining reasonable attorneys’ fees, South Carolina family courts evaluate additional factors regarding the “contingency of compensation,” including “the abilities of the parties to pay, their respective financial conditions, and the effect of the attorney’s fees on each party’s standard of living.” McClerin v. McClerin, 310 S.C. 99, 104-05, 425 S.E.2d 476, 479 (Ct.App.1992). However, the parties’ ability to pay attorneys’ fees is not a required consideration outside of family court cases. See, e.g., Stuart v. Stuart, Op. No. 2007-UP-021, *3 (S.C.Ct.App. filed Jan. 12, 2007) (“In deciding whether to award attorneys’ fees, the *family court* should consider” “each party’s ability to pay his or her own fees.”) (emphasis added). Thus, Appellants’ argument that the circuit court’s Order granting fees should be reversed because the court failed to “consider any evidence of whether [the Bank] would be able to pay the fees if an award was not made, App.’s Am. Initial Brief, at p. 40, is unfounded.

Inc., at 385, 377 S.E.2d at 297 (in upholding a trial court's award of attorneys' fees, finding that the "contingency of compensation" factor was "[n]ot applicable since this was not a contingency case").

E. Fee Customarily Charged in Locality.

The hourly rates charged by the Bank's counsel are consistent with the rates customarily charged in the geographic locations for each firm. The Floyd Firm primarily provides legal services in the Grand Strand and Pee Dee areas of South Carolina and the firm engaged in a review of other firms' hourly rates when it determined hourly rates for its attorneys. Moreover, the hourly rates employed are normal, if not lower, for similar commercial litigation matters and attorneys with like capabilities and experience.

Womble Carlyle has offices throughout the United States, but the attorneys involved in this matter are based out of the Greenville, South Carolina office. The respective rates of these attorneys are commensurate with rates customarily charged for commercial litigation matters involving complex issues of federal law akin to the issues raised in the present case. Notably, Womble Carlyle's attorneys in this matter, Clayton M. Custer and Michael J. Bogle, have been involved in 15-20 cases for the Bank involving the federal defenses in coordination with the FDIC referenced hereinabove.

F. Beneficial Results Obtained

The circuit court's award to the Bank of \$278,657 76 in attorneys' fees is also reasonable in light of the beneficial results that the Bank obtained — it prevailed on all of its claims and recovered an almost \$3 million verdict against Appellants, and it successfully defended against Appellants' counterclaims and their attempt to obtain a substantial, seven figure monetary judgment against the Bank.

Appellants' effort to nitpick at the Bank's attorneys' fees and their complaints that the Bank was not entitled to recover fees spent on a denied summary judgment motion and on expert witnesses are groundless and lack any basis in law. In fact, the South Carolina Court of Appeals has upheld the award of fees expended during the unsuccessful defense of claims directly intertwined with those for which a contract provides attorneys' fees. Charleston Lumber Co., Inc., 318 S.C. at 482-83, 458 S.E.2d at 438 (Ct.App.1996). In Charleston Lumber, the circuit court, pursuant to the parties' promissory note, awarded the creditor, who prevailed on its claim to collect under the note, nearly \$55,000 in attorneys' fees, a "significant amount" of which the creditor spent "defending counterclaims on which [it] was unsuccessful." Id. On appeal, the debtor argued that the creditor was not entitled to fees spent on the counterclaims that it lost. The Court of Appeals disagreed, finding that the "facts and issues surrounding the promissory note were intertwined with those of the counterclaims," and therefore, the attorneys' fee award was "within the sound discretion of the trial judgment." Id., at 483, 458 S.E.2d at 439. Likewise, in this case, the Bank's summary judgment motion unquestionably was "intertwined" with the "facts and issues" surrounding the Loan Documents, and the circuit court was well within its discretion in awarding the Bank the attorneys' fees incurred for the motion. Furthermore, the Bank's employment of expert witnesses was a direct and necessary response to Appellants' filing of affirmative defenses and counterclaims and naming of their own expert witnesses — all of which were, once again, "intertwined" with the "facts and issues" surrounding the Loan Documents. Id.

In sum, the circuit court sufficiently considered all of the requisite factors in determining a reasonable attorneys' fee award. The circuit court did not abuse its discretion in awarding the Bank roughly \$278,000.00 in costs and attorneys' fees, and this Court therefore should affirm the decision.

CONCLUSION

For the reasons stated herein, BNC respectfully requests that this Court AFFIRM the circuit court's denial of Appellants' Directed Verdict Motion; Order denying Appellants' Motion for a New Trial and JNOV; and Order granting BNC's Motion for Attorneys' Fees, Litigation Costs, and Appraisal Fees.

December 8, 2014
Greenville, South Carolina



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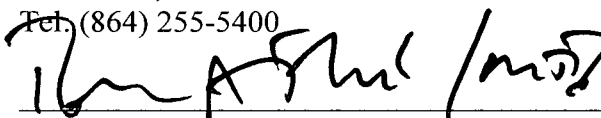
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Civil Action No. 2011-CP-26-1718
Appellate Case No. 2014-000331
Appellate Case No. 2014-001736
Consolidated Appeal

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

v.

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

PROOF OF SERVICE

I certify that on December 8, 2014 I have served a copy of the **INITIAL BRIEF OF RESPONDENT** on the Appellants by U.S.P.S. First Class Mail, postage paid, addressed to its attorneys as follows:

Richard R. Gleissner, Esquire
Gleissner Law Firm, LLC
1237 Gadsden St., Suite 200A
Columbia, SC 29201

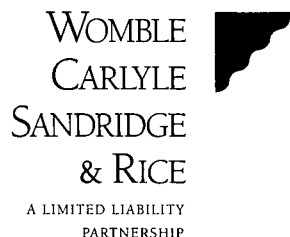


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DEC 11 2014

SC Court of Appeals



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December 8, 2014

Ms. Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
1015 Sumter St.
Columbia, SC 29201

RE Bank of North Carolina v Waterfall Investors
Civil Action No. 2011-CP-26-1718
Appellate Case No. 2014-000331
Appellate Case No. 2014-001736
Consolidated Appeal

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the **INITIAL BRIEF OF RESPONDENT AND RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL.**

Please return a file-stamped copy of each in the envelope provided.

With best regards, I remain

Very truly yours,

Michael J. Bogle

MJB/scc
Enclosures

cc: With Enclosures:
Richard R. Gleissner, Esq.

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SC Court of Appeals

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