THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-In-Equity

Case No. 2008-CP-08-130

Jacob Davison, ... Petitioner,

v.

David Scaffe and Wachovia Bank, N.A..... ..... Respondents.

RESPONDENT WACHOVIA BANK, N.A.'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

February 17, 2012

Robert E. Sumner, IV
Amy D. Jowers
Moore & Van Allen PLLC
40 Calhoun Street, Suite 300
Charleston, SC 29401
Ph. (843) 579-7000
Fax (843) 579-8718
Attorneys for Wachovia Bank, N.A.

Pro Se Petitioner:

Jacob Davison
9519 Barcellona Court
Fairfax, VA 22031
PH. (703) 691-0780

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Now comes Respondent Wachovia Bank, N.A. ("Wachovia"), pursuant to Rule 242, SCACR, and hereby files this Return in response to Petitioner's Petition for Certiorari. A separate memorandum of law is not attached as Wachovia's citations of legal authorities are included within this Return. See, Rule 240(c)(2), SCACR.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Does the record contain sufficient evidence to support the trial court's ruling that Wachovia certified the Official Check and disbursed the cash prior to receiving the Rule to Show Cause?

2. Did the Court of Appeals properly apply the abuse of discretion standard in affirming the trial court's ruling that Wachovia did not violate the Rule to Show Cause?

3. Did Petitioner preserve his argument over whether Wachovia bore the burden of proof in the underlying transaction?

4. Does UCC Article 4 govern the dispute over the transaction at question?

5. Did the Court of Appeals correctly rule that Petitioner failed to preserve certain issues for review?

6. Did Petitioner preserve his arguments regarding the award of damages and attorney's fees?

7. Did the Court of Appeals properly grant Respondent's Motion to Strike Matter from the Record and deny Petitioner's Motion to Take Judicial Notice?

COUNTER-STATEMENT OF THE CASE

On February 27, 2008, Davison obtained a judgment against David Michael Scaffe in the amount of $17,766.33, plus interest and costs. Scaffe, an investment banker and friend of Davison's who was arrested on gambling charges in April of 2008, allegedly defrauded Davison and others out of hundreds of thousands of dollars through a Ponzi scheme. (R. p. 53, line 8 – p. 57, line 17). On April 2, 2008, the Honorable Roger Young signed a Rule to Show Cause and Order for Supplementary Proceedings (the "Rule to Show Cause") in the matter between Davison and Scaffe. (R. p. 15). The Rule

to Show Cause ordered Mr. Scaffe to appear before the court and contained the following provision, "It is further ordered that any transfer or other disposition of the property of the Defendant [Scaffe] not exempt from execution and any interference therewith is forbidden." Id.

On January 2, 2009, Wachovia received from Davison a subpoena for records relating to Scaffe's account.[1] On March 4, 2009, Davison filed the following as to Wachovia: (1) Petition and Rule to Show Cause for Contempt of Court, (2) Petition and Rule to Show Cause Regarding Seized Property; and (3) Petition and Rule to Show Cause for Compensatory Contempt Damages. The court did *not* sign the proposed Petitions. Additionally, on March 4, 2009, Davison filed a Memorandum in Support of Motion for Execution on Judgment.

On May 4, 2009, the Honorable Robert E. Watson, Master-in-Equity for Berkeley County, South Carolina, presided over a hearing on Davison's Petition and Rule to Show Cause for Compensatory Contempt and Motion for Execution on Judgment. Davison, who is an attorney, represented himself. (R. p. 6). The court considered the evidence presented at trial and on June 5, 2009, issued an order finding: (1) Wachovia was not in contempt for violation of the Rule to Show Cause; and (2) Wachovia owed no damages to Davison for the manner in which it handled the transaction with its customer. (R. pp. 6-14).

On June 30, 2009, Petitioner filed a Notice of Appeal, and on October 30, 2009, Petitioner filed the Initial Brief of the Appellant. On December 31, 2009, Wachovia filed

[1] Wachovia provided responsive documents on at least two separate occasions: January 23, 2009, and April 27, 2009. (See, Letter from Counsel for Wachovia to the Master, April 29, 2009) (R. pp. 705–07).

the Initial Brief of the Respondent. On February 11, 2010, Petitioner filed a Motion to Certify this appeal to the Supreme Court on the grounds that it presents issues of "significant public interest" and "conflicts with legal principles of major interest." Before Wachovia could file a Return, the Supreme Court denied the Motion to Certify.

On June 27, 2011, the Court of Appeals filed Unpublished Opinion No. 2011-UP-328, which affirmed the trial court's ruling in favor of Wachovia. Three days later, on June 30, 2011, Petitioner filed a Petition for Rehearing en Banc seeking a rehearing en banc. On July 25, 2011, Wachovia filed a Return to the Petition for Rehearing en Banc. On July 30, 2011, Petitioner filed a Reply to Wachovia's Return, and on September 20, 2011, the Court of Appeals denied Petitioner's request for rehearing and issued a substitute Opinion. On November 17, 2011, Petitioner filed the Petition for Certiorari (the "Petition").

FACTS

This appeal arises out of a retail banking transaction. On April 22, 2008, at 14:54, Wachovia received an incoming wire transfer of $60,000.00 for Scaffe's account. (R. pp. 625–26; and R. p. 268, line 24 – p. 269, line 7). Later on the same day, Scaffe entered Wachovia's Long Point Road Branch and filled out a withdrawal ticket in the amount of $58,850.00, for which he requested a certified check in the amount of $51,850.00 and $7,000.00 in cash. (R. p. 623; and R. p. 258, lines 10–25). Scaffe hand-dated the withdrawal ticket "4/22/08." (R. p. 623; and R. p. 259, line 23 – p. 260, line 8).

At 15:22:35, bank teller Kathy Allen placed a telephone call to the Wachovia Verification Department to verify the funds for the high-dollar check request. (R. pp. 625–26; and R. p. 267, lines 8–12). The Verification Department called First Federal and verified that the $60,000.00 wire transfer was legitimate and that there were no holds on

the funds. (R. p. 268, line 13 – p. 269, line 7). The Verification Department issued an approval number, which Ms. Allen wrote on the withdrawal ticket as, "APP#7184693." (R. p. 623; and R. p. 264, lines 5–12). At the same time, Ms. Allen verified the signature on the account and was assigned a verification number, which she wrote on the counter withdrawal ticket as "EDIVTDS#781870." (R. pp. 623–24; and R. p. 260, line 24 – p. 261, line 25).

For the transaction, Ms. Allen generated an Official Check, Official Check Credit, and Cash Out Teller Credit. (R. pp. 627–29). The Official Check bears the amount of $51,850.00 payable to the order of "Mrs. Emilie McCombs" and the automatically-stamped date of "04/22/2008." (R. p. 627; R. p. 278, lines 6–7; and R. p. 279, lines 15–25). The Official Check also bears the Wachovia logo and signature of Kathy Allen. (R. p. 627; R. p. 277, line 21 – p. 278, line 5). The reverse side of the Official Check bears several processing stamps dated "04/24/2008" and "04/25/2008." (R. p. 627).

The Official Check Credit includes the amount of $51,850.00 payable to the order of "Mrs. Emilie McCombs" and the automatically-stamped date "04/22/2008." (R. p. 628; and R. p. 292, lines 1–14). The Official Check Credit also bears the signature of Ms. Allen. (R. p. 628; and R. p. 292, lines 15–18). The reverse side of the Official Check Credit bears a processing stamp dated "04/23/2008." (R. p. 628; and R. p. 292, line 24 – p. 293, line 7). The Cash Out Teller Credit bears the amount of $7,000.00 and an automatically stamped date on the front side that is indecipherable. (R. p. 629; and R. p. 294, line 17 – p. 295, line 11). The reverse side of the Cash Out Teller Credit bears a processing stamp dated "04/23/2008." (R. p. 629). Ms. Allen conceded that it is possible that the stamped date on the front of the Cash Out Teller Credit is "04/23/08" but

maintained that any reference to April 23, 2008, was in relation to the banking day or processing date, and not the date of the transaction. (R. p. 425, line 10 – p. 426, line 11).[2]

According to the Daily Transaction Register, which is maintained by Wachovia's computer system, Ms. Allen initiated the transaction at 15:15 on April 22, 2008, and completed the transaction at 15:22 on April 22, 2008. (R. p. 630; R. p. 301, lines 17–22; and R. p. 304, lines 9–13). Ms. Allen provided both an Official Bank Check in the amount of $51,850.00 and cash in the amount of $7,000.00 to Scaffe on April 22, 2008. (R. p. 308, line 5 – p. 309, line 5). The information was uploaded into the computer system at 21:55 on April 23, 2008, as was the ordinary practice of Wachovia. (R. p. 630; and R. p. 299, lines 15–24).

At 15:51 on April 22, 2008, Davison faxed and Wachovia received a copy of the Rule to Show Cause at Wachovia's legal processing center in Philadelphia, Pennsylvania. (R. p. 652; and R. p. 316, lines 2–14). Davison represented in his cover letter to Wachovia that the language of the Rule to Show Cause constituted an "asset freeze order." (R. p. 652). Wachovia froze Scaffe's account at 16:56 on April 23, 2008, and sent a letter notifying Mr. Scaffe of the restraint on April 24, 2008. (R. pp. 653–54; R. p. 655; R. p. 323, lines 17–25; and R. p. 325, lines 8–22). Wachovia did not stop payment on the Official Check in the amount of $51,850.00 or attempt to reclaim the $7,000.00 cash withdrawal.

---

[2] Wachovia's policies and procedures dictate that the banking day ends at 2:00 p.m. and that all transactions occurring after 2:00 p.m. are considered to have occurred on the following calendar day. (R. p. 631; R. p. 649; and R. p.299, line 25 – p. 300, line 12). This practice is widespread in the banking industry and is authorized by S.C. Code Ann. § 36-4-107 (1966).

STANDARD FOR REVIEW BY WRIT OF CERTIORARI

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. "Only when exceptional circumstances exist will the writ be issued." Jean H. Toal, et al, Appellate Practice in South Carolina 275 (2d Ed. 2002). "The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.
(2) Where there is a dissent in the decision of the Court of Appeals.
(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
(4) Where substantial constitutional issues are involved.
(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

There are two issue preservation requirements when petitioning the Supreme Court to review a Court of Appeals' decision by writ of certiorari. First, the issue must have been raised in the initial arguments to the Court of Appeals. Rule 242(d)(2), SCACR. Second, the issue must have been raised in a petition for rehearing before the Court of Appeals. Id. If a petitioner fails to comply with *both* requirements, the issue is not preserved for consideration by the Supreme Court.

ARGUMENTS

Petitioner has failed to demonstrate any "special and important" reasons for the Supreme Court to grant the Petition. The appeal presents no novel questions of law. There was no dissent at the Court of Appeals. The lower unpublished opinion does not conflict with Supreme Court precedent and presents no constitutional issues or federal

questions. While it is difficult to comprehend the discrete grounds supporting the Petition, Respondent addresses the Questions Presented in turn, below.

I. The Record contains sufficient evidence to support the trial court's ruling that Wachovia certified the Official Check and disbursed the cash prior to receiving the Rule to Show Cause.

Questions Presented 1-4 in the Petition concern the trial court's ruling that Wachovia certified the Official Check and disbursed the cash prior to receiving the Rule to Show Cause. Petitioner presented no basis upon which the Supreme Court should review the Court of Appeals' ruling on this finding by the trial court.

Based on the evidence presented at trial, the trial court found that "Wachovia received a notice of legal proceeding under S.C. § 36-4-303, after certifying payment on a check." (R. p. 5, ¶21). After trial and more emphatically on appeal, Petitioner has challenged this finding based on his classification of the check in question. On this issue, Wachovia employee Kathy Allen testified at trial as follows:

Q:	**"Official Check," what exactly does that mean?**
A:	**An official check is a check that is backed by the bank. It is guaranteed funds. Generally they are purchased if a customer is worried about a check coming back for non-sufficient funds or -**
Mr. Davison:	**May I object.**
Master Watson:	**What is your objection?**
Mr. Davison:	**This specific check.**
Master Watson:	**She is just telling me what that specific reference is. An official check is guaranteed funds by the bank. Is that correct?**
Witness:	**Correct, yes.**

(R. p. 243, line 4 – p. 244, line 4). In Petitioner's proposed order to the trial court, Final Brief, Petition for Rehearing, and Petition for Certiorari, Petitioner cites to no evidence or testimony presented at trial that comes to bear on the issue of check classification. Petitioner ignores the testimony of Ms. Allen and relies, instead, upon his own personal interpretation of the myriad exhibits he presented.

Petitioner states in the Petition that "all 'teller's checks' as well as 'cashier's checks' are now 'certified checks' and that all precedents related to these checks was [sic] wrongly decided." (Petition, p. 12.) Petitioner's position is incorrect and grossly overstates the scope of the Court of Appeals' ruling. On page 2 of its unpublished opinion, the Court of Appeals noted, "Evidence in the record indicates Wachovia certified the $58,850.00 check and paid Scaffe $7,000.00 in cash prior to receiving notice of Davison's judgment against Scaffe." The trial court and Court of Appeals merely found that the evidence presented *in this case* proved that the check was "certified" before the bank received the Rule to Show Cause.

The Court of Appeals' unpublished opinion on this point, affirming the trial court, does not conflict with existing precedent. Petitioner argues that the Court of Appeals overturned Specialty Flooring Company, Inc. v. Palmetto Federal Savings Bank of South Carolina, 302 S.C. 107, 394 S.E.2d 13 (Ct. App. 1990). This is simply not the case. Specialty Flooring does not involve a freeze order or any other notice of a legal proceeding. Instead, Specialty Flooring examines a bank customer's right to request stop payment on a "certified" check under S.C. Code Ann. § 36-4-403 ("A customer may order to his bank stop payment of any item payable for his account..."). The South Carolina Reporter's Comment to the July 1, 2008, amendments to Article 4 recognizes

Specialty Flooring as a decision "addressing stop payment orders under former Section 36-4-403." S.C. Code Ann. § 36-4-403, South Carolina Reporter's Comment (2008).

The facts of the present case are distinguishable from Specialty Flooring. In the present case, Davison, who was not a customer of Wachovia, sought a compensatory contempt remedy for Wachovia's failure to stop payment on a check issued to Wachovia's customer prior to receiving the Rule to Show Cause. While Wachovia maintains that the Rule to Show Cause did not bind Wachovia, Petitioner argues that the Rule to Show Cause was an asset freeze order. Either way, the Rule to Show Cause was a notice that falls under S.C. Code Ann. § 36-4-303. As the Court of Appeals recognized, Specialty Flooring is not binding precedent on the present case, and the Court's unpublished opinion has no effect on the holding in Specialty Flooring.

Petitioner also argues that the case, Quistgaard v. EAB European American Bank & Trust, 583 N.Y.2d 210, 182 A.D.2d 510 (1992), which was relied on by the trial court, overrules S.C. Code Ann. § 36-4-303. Again, this is not the case. In Quistgaard, the trial court considered a third-party check that had been stamped "CERTIFIED" by the defendant bank prior to receiving a stop payment order. The appellate court in Quistgaard concluded, "once the check was stamped 'CERTIFIED' and signed by the bank's agent" there was no question of whether the check was certified. Id., 583 N.Y.2d at 211. Applying the identical provision to S.C. Code Ann. § 36-4-303, the appellate court in Quistgaard ruled,

> **Once a bank has accepted a check by certifying it, it is limited in its right to refuse to honor the check. Thus, under UCC 4-303, a bank must make payment on a certified check regardless of a subsequently received stop order.**

Id., 583 N.Y.2d at 212. Quistgaard in no way overrules S.C. Code Ann. § 36-4-303; rather, it serves as evidence that the Court of Appeals properly applied UCC 4-303 in the present case.

Petitioner further argues that the Court of Appeals overturned Wachovia Bank of South Carolina v. Thomasko, 339 S.C. 592, 529 S.E.2d 554 (Ct. App. 2000). Like the cases above, Thomasko is not affected by the present case. In Thomasko, Wachovia sought to recover an overpayment made to its customer when she exchanged foreign currency at the bank. Id. at 594, 529 S.E.2d at 555. Wachovia made the overpayment by way of a cashier's check. Id. Two days later, Wachovia discovered the mistake and requested that the customer return the overpayment; the customer refused. Id. at 595, 529 S.E.2d at 555. Wachovia did not stop payment on the cashier's check. After attempting to collect the overpayment, Wachovia filed its action for unjust enrichment. Id. The Court of Appeals affirmed the trial court's grant of summary judgment in favor of Wachovia on the grounds that the customer failed to raise any viable defenses. Thomasko does not examine the classification of the check issued to the customer and does not involve a freeze order or stop payment order. The Court of Appeals' unpublished opinion in the present case does not overrule Thomasko.

Petitioner's position on check classification has been inconsistent and evolving with each step of the litigation process. For instance, Petitioner stated twice on the record at trial that the check in question was a "teller's check." (R. pp. 169, 180). In Petitioner's Brief, however, Petitioner stated, "The $51,850 check is not a 'teller's check' because its issuer is IPS, which is not a bank." (Final Brief of the Appellant, p. 37).

Again in the Petition for Rehearing en Banc, Petitioner stated "the check is a 'teller's check'..." (Petition for Rehearing en Banc, p. 4).

As a second example, Petitioner stated in his Final Brief, "Respondent is not the true drawer of the check... The true drawer is IPS." (Final Brief of Appellant, p. 37). In the Petition for Rehearing en Banc and the Petition, however, Petitioner states without qualification, "Wachovia is labeled the 'drawer' on the check... Wachovia signed the check as 'drawer'." (Petition for Rehearing en Banc, p. 3).

Petitioner has attempted to confuse the issues to create the impression of a mistake in the underlying rulings. His arguments are not supported by the evidence in the record.[3] Petitioner chose to call no witnesses to substantiate his own theories and interpretations at trial. Based on the evidence presented, the trial court found that Wachovia certified the Official Check prior to receiving the Rule to Show Cause. The Court of Appeals correctly held that the trial court did not abuse its discretion in so ruling. Despite Petitioner's arguments to the contrary, the Court of Appeals' affirmation of the trial court's ruling does not present a "special and important" reason for review by the Supreme Court.

II. The Court of Appeals properly applied the abuse of discretion standard in affirming the trial court's ruling that Wachovia did not violate the Rule to Show Cause.

Petitioner argues in Question Presented 5 of the Petition that the Court of Appeals should not have applied an abuse of discretion standard to the trial court's contempt ruling. Petitioner argues that de novo review is required because supplementary

[3] Petitioner focuses, instead, on the unpublished New York case, Dominican Fathers v. Chase Manhattan Bank, et al. and memo allegedly presented by Mr. Montgomery at the Connecticut Bar Association. Neither has any binding effect on South Carolina courts.

proceedings are equitable in nature, but this contradicts his position during the trial phase of this case. In his "Memorandum in Support for Execution of Judgment," Petitioner requested relief in the form of "compensatory contempt damages against Wachovia." (R. p. 18, ¶ 4). During the hearing and in his proposed order, Petitioner stated that he was seeking damages for contempt. At the hearing, Petitioner agreed that the sole issue before the court was whether Wachovia violated Judge Young's order:

> **The Court: . . . That is what I think we are here for today and those very narrow issues are – and you can correct me if I am wrong – the very narrow issue today is: Did Wachovia Bank violate Judge Young's order dated April 3rd 2008 by allowing some of Mr. Scaffe's money to leave their bank? Isn't that the narrow issue we are here for today?**
>
> **Mr. Davison: Yes, sir.**

(R. p. 88, lines 14–25.)

Petitioner's proposed order even requested "Compensatory Contempt Damages," citing Cheap-O's Truck Stop v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002) (R. pp. 676–77), which is properly referenced in the trial court's order. (R. pp. 13–14, ¶¶ 31–32).

An appellate court should reverse a decision regarding contempt "only if it is without evidentiary support or the trial judge has abused his discretion." Miller v. Miller, 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007) (citing Durlach v. Durlach, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (quoting Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840 (1988))).

> **The determination of contempt ordinarily resides in the sound discretion of the trial judge. "In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." "Once the moving party has made out a**

> **prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order."**

Miller, 375 S.C. at 454, 652 S.E.2d at 760 (internal citations omitted).

The Court of Appeals acknowledged that the trial court ruled on contempt and applied the correct standard of review. The Court of Appeals' application of the abuse of discretion standard does not necessitate review by the Supreme Court.

III. Petitioner failed to preserve his argument over whether Wachovia bore the burden of proof in the underlying transaction.

Petitioner argues in Question Presented 6 of the Petition that Wachovia bore the burden of proof at trial. Petitioner failed to raise this issue in his Petition for Rehearing en Banc and, thus, waived this issue for consideration by the Supreme Court. See Rule 242(d)(2), SCACR.

IV. UCC Article 4 governs the dispute over the transaction in question, which included an official check and a cash disbursement.

Petitioner argues in Question Presented 7 of the Petition that UCC Article 4 does not apply because one of the items utilized in the over-the-counter transaction was a counter withdrawal slip. Petitioner failed to raise this issue in his Petition for Rehearing en Banc and, thus, waived this issue for consideration by the Supreme Court. See Rule 242(d)(2), SCACR.

Nevertheless, the trial court and the Court of Appeals properly applied UCC Article 4 to the present case. As stated above, the transaction in question involved an Official Bank Check in the amount of $51,850.00 and cash in the amount of $7,000. (R. p. 308, line 5 – p. 309, line 5). Chapter 4 is entitled, "Bank Deposits and Collections." See S.C. Code Ann. §§ 36-4-101, et seq. (1966). The Official Comment, which addresses the purpose of Chapter 4, states: "The tremendous number of checks handled

by banks and the country-wide nature of the bank collection process require uniformity in the law of bank collections.... There is needed a uniform statement of the principal rules of the bank collection process with ample provision for flexibility to meet the needs of the large volume handled and the changing needs and conditions that are bound to come with the years." S.C. Code Ann. § 36-4-101, Official Comment (1966).

The trial court applied S.C. Code Ann. § 36-4-303, in ruling that notice in the present case came too late to require Wachovia to take action. Section 36-4-303's Official Comment No. 1 states:

> **The comments to Section 4-213 describe the process through which an item passes in the payor bank. Prior to this process or at any time while it is going on, the payor bank may receive knowledge or a legal notice affecting the item, such as knowledge or a notice that the drawer has filed a petition in bankruptcy or made an assignment for the benefit of creditors; may receive an order of the drawer stopping payment on the item; may have served on it an attachment of the account of the drawer; or the bank itself may exercise a right of setoff against the drawer's account. Each of these events affects the account of the drawer and may eliminate or freeze all or part of whatever balance is available to pay the item.** ***Section (1) states the rules for determining the relative priorities between these various legal events and the item.***

S.C. Code Ann. § 36-4-303, Official Comment No. 1. (1966) (emphasis added). Section 36-4-303's Official Comment No. 2. states:

> **The rule is that if any one of the several things has been done to the item or if it has reached any one of several stages in its processing at the time the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised, the knowledge, notice, stop-order, legal process or setoff** ***comes too late*****, the item has priority and a charge to the customer's account may be made and is effective.**

S.C. Code Ann. § 36-4-303, Official Comment No. 2. (1966) (emphasis added). The language of the statutes in Chapter 4, taken with the clear intent spelled out in the Official

Comments, leaves no question that § 36-4-303 provides the framework for the present case—to determine whether the Rule to Show Cause was served on Wachovia too late to require Wachovia to take action. The application of UCC Article 4 in the present case is not a "special and important" issue necessitating review by the Supreme Court.

V. The Court of Appeals correctly ruled that Petitioner failed to preserve issues for appeal.

Questions Presented 8–10 of the Petition concern the preservation of issues for appeal from the trial court. Petitioner argues that by rejecting his proposed order in favor of the order submitted by Wachovia, the trial court ruled on all issues contained therein. Petitioner misapprehends the standard for issue preservation in South Carolina.

"An issue which was raised below but not ruled upon by the trial judge is not preserved for review." Cook v. S.C. Dep't of Highways, 309 S.C. 179, 183, 420 S.E.2d 847 849 (1992). Although Petitioner may have raised an issue in his proposed order, if the trial court did not specifically address the issue in its ruling, it is not ruled on and not preserved. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55, 58 (1997) (citing Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (stating where trial judge did not explicitly rule on issue at trial and party did not make Rule 59(e), SCRCP, motion to amend for a ruling, it is error for an appellate court to consider the issue)); Power v. Allstate Ins. Co., 312 S.C. 381, 383, 440 S.E.2d 406, 407 (Ct. App. 1994) (finding issue not preserved because the trial court did not address it in its order and Petitioner did not request the trial court to rule upon it in any motion made pursuant to Rule 59(e), SCRCP). The Court of Appeals' ruling that Petitioner failed to preserve issues for appeal was proper and does not constitute a basis for review by the Supreme Court.

The Court of Appeals applied the proper analysis for issue preservation and, thus, there is no basis for the Supreme Court to review this issue.

VI. Petitioner failed to preserve his arguments regarding the award of damages and attorney's fees.

Petitioner argues in Questions Presented 11–12, against precedent, that Wachovia should be liable to him for $58,850.00, despite the fact that Petitioner's judgment against Davison was only in the amount of $17,766.33, and that pro se Petitioner is entitled to attorney's fees. Petitioner failed to raise these issues in his Petition for Rehearing en Banc and, thus, waived this issue for consideration by the Supreme Court. See Rule 242(d)(2), SCACR. Petitioner also failed to preserve these issues for appeal to the Court of Appeals. See Substituted Opinion, p. 3, ¶3. Even if the issues were preserved for appeal, the trial court properly denied Petitioner's requested relief.

A. Petitioner is not entitled to a judgment against Wachovia in the amount of $58,850.00.

Petitioner cited no authority that entitles him to damages in the amount of $58,850.00. Davison asked the trial court to rule that he is entitled to damages in the amount of $58,850.00, nearly three times the amount of his judgment against Mr. Scaffe. Davison cited to Deer Island Lumber Co. v. Virginia-Carolina Chemical Co. v. Wilkins as the controlling legal authority for this proposition. 111 S.C. 299, 97 S.E.2d 833, 834 (1919). Deer Island, a case that is ninety years old, does not support Davison's argument.

In Deer Island, a judgment creditor sought to enjoin the bank account of a corporation on the belief that the account was actually maintained by the judgment debtor. Deer Island, 111 S.C. at 302, 97 S.E.2d at 833. The judgment creditor obtained an injunction from the trial court freezing the account, and the corporation sought to

dissolve the injunction. Id. The trial court appointed a receiver to manage the account and permitted the corporation to adjudicate its interest in the account. Id. The corporation appealed the trial court's order, seeking to release the frozen account. Id. The central question on appeal was whether the trial court had the authority to freeze the account. Id. at 303, 97 S.E.2d at 834. The Supreme Court stated, "a judgment creditor may by the plain words of the statute arrest a fund in the hands of a third party, and alleged by such creditor to belong in truth to the judgment debtor, and proven *prima facie* to so belong, and hold the funds until the issue of ownership shall be decided." Id. The holding had nothing to do with the award of damages to the judgment creditor. Rather, the Supreme Court affirmed the trial court's ability to freeze an account pending a final determination on the ownership of the account.

In the present case, there is no question of who owned the bank account held in the name of Scaffe. The trial court was not asked to rule on this issue. Davison obtained a judgment against Scaffe in the amount of $17,766.33, plus interest and costs, and initiated supplementary proceedings to recover the judgment from Scaffe. See supra p. 1. While Davison alleges that there are other potential creditors of Scaffe, this issue was not before the trial court. Davison was acting alone, as a judgment creditor, in an attempt to satisfy his outstanding judgment. Davison presented no authority that permits him to recover for other potential creditors who may or may not exist.

B. Pro se Petitioner is not entitled to an award of attorney's fees.

Davison cited no statute or contract that entitles him to attorney's fees in the underlying action. "The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296 (1989) (citing Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443

(1978)). In fact, there is no statute or contract permitting the award of attorney's fees in this case. Davison states in his brief, "The agreement giving rise to the judgment also provides for reasonable attorney's fees from Scaffe." (See, Initial Brief of Appellant, p. 47). An agreement between Davison and Scaffe has no bearing on whether Wachovia should be required to pay Davison's attorney's fees in this matter. Even if an agreement, as described, exists, Davison rightly acknowledges that a pro se litigant is not entitled to attorney's fees in this state. Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000).

The Court of Appeals' conclusion that these issues were not preserved for appeal was appropriate and does not merit review by the Supreme Court.

VII. The Court of Appeals properly granted Respondent's Motion to Strike Matter from the Record and denied Petitioner's Motion to Take Judicial Notice.

Questions Presented 13–15 of the Petition pertain to the Court of Appeals' rulings on the Petitioner's appellate motions. Petitioner now seeks the Supreme Court's review of rulings denying his attempts to present evidence that was not offered at trial or made a part of the Record on Appeal (the "Record"). Petitioner argues that the Court of Appeals erred in striking matter from the record and in refusing to take judicial notice of materials submitted by Petitioner. However, Petitioner has presented no reason why the rulings require review by the Supreme Court.

On October 30, 2009, Petitioner filed a Designation of Matter to be Included in the Record on Appeal. On January 4, 2010, Wachovia filed a Motion to Strike Portions of the Proposed Record on Appeal. As stated in the Motion, Petitioner improperly sought to include in the Record: (i) articles provided with the Proposed Order of Appellant [after trial] and (ii) Request to Take Judicial Notice of June 2 newspaper article with June 2

article. As precedent, Wachovia relied on Williamsburg Rural Water & Sewer Co. v. Williamsburg County Water & Sewer Authority, 363 S.C. 566, 627 S.E.2d 690 (2006) (ruling that the appellate court's ruling, which relied on an affidavit that was attached to a post-trial motion, was erroneous). The Court granted Wachovia's Motion to Strike on February 2, 2010. On February 11, 2010, Petitioner filed a Petition for Rehearing on the Motion to Strike. On March 1, 2010, the Clerk of the South Carolina Court of Appeals issued a letter stating that the Court would not entertain a petition for rehearing on a motion that was not dispositive of the appeal.

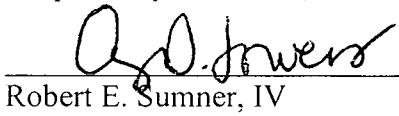
Four months later, on July 30, 2010, Petitioner filed a Motion to Take Judicial Notice. Wachovia filed a Return on August 10, 2010. As pointed out in the lengthy Return, Petitioner once-again attempted to improperly supplement the record on appeal with documents that did not contain facts subject to judicial notice. On August 13, 2010, Petitioner filed a Reply to Wachovia's Return, and on September 2, 2010, the Court denied the motion. The Court held that Petitioner was "essentially asking to supplement the record with documents not presented" below.

The Court of Appeals considered Petitioner's attempts to supplement the Record several times. While it is true that judicial notice can be taken at any stage of a proceeding, the facts and documents Petitioner sought to include were not indisputable. E.L. Masters Sr. v. Rodgers Dev. Group, S.C., Inc., 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984). The Court of Appeals' ruling on these motions does not merit review by the Supreme Court.

CONCLUSION

For the above-referenced reasons, the Court should deny Petitioner's Petition for Certiorari and affirm the unpublished opinion issued by the Court of Appeals.

Respectfully submitted,



Robert E. Sumner, IV
Amy D. Jowers
Moore & Van Allen PLLC
40 Calhoun Street, Suite 300
Charleston, SC 29401
Ph. (843) 579-7000
Fax (843) 579-8718
Attorneys for Wachovia Bank, N.A.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-In-Equity

Case No. 2008-CP-08-130

Jacob Davison, ... Petitioner

v.

David Scaffe and Wachovia Bank, N.A., ... Respondents

PROOF OF SERVICE

I certify that I have served Wachovia Bank, N.A.'s Return to Petitioner's Petition for Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on February 17, 2012, addressed to Petitioner Jacob Davison, 9519 Barcellona Court, Fairfax, VA 22031.

February 17, 2012

Robert E. Sumner, IV
Amy D. Jowers
Moore & Van Allen PLLC
40 Calhoun Street, Suite 300
Charleston, SC 29401
Ph. (843) 579-7000
Fax (843) 579-8718
Attorneys for Wachovia Bank, N.A.