THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

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SC Court of Appeals

Appellate Case No. 2014-001487

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

Respondents

v.

Ameris Bank,

Appellant.

RESPONDENT'S INITIAL BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err as in concluding that Ameris owed a fiduciary duty to Gibson in connection with the commercial loan?

II. Did the trial court err in concluding that Ameris made negligent misrepresentations to Gibson, including that the transaction was suitable for her and that income would cover the full expense of the loan obligations which were used to finance the transaction?

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

IV. Did the trial court err in its calculation of actual and punitive damages?

STATEMENT OF THE CASE

Respondents do not dispute the Statement of the Case contained in the Initial Brief of Appellant Ameris Bank.

STATEMENT OF FACTS RELEVANT TO ALL ISSUES

Ameris' factual recitation is a fanciful telling of the story it wishes had been the case, not the case that was presented. Ameris begins by trying to paint Linda Gibson (hereafter "Gibson") as a sophisticated business woman who is apparently responsible for her own wealth. "Linda Gibson is a multimillionaire." (App.Br. p.2). While that may be technically true, she is the consummate victim: a new widow with no business acumen yet with assets she had never managed, falling prey to men who sought to, and did, take advantage of her, misuse her money, and expect to walk away with no consequence for their actions. Almost every story of tragedy begins the same way, and this case is no different.

Trial of Gibson's counterclaims against Ameris was held over the course of three days before the Trial court. As noted in the final order, the evidence presented including three days of trial testimony, approximately 200 exhibits, and deposition testimony of several witnesses. [Order]

The Trial court concluded, in part, that Gibson is a 66 year old widow, having lost her husband of twenty-seven years around Christmas 2003. [Tr. 69:9-23] She is a high school graduate who did take some liberal arts courses briefly in college. From the time of the birth of her first child in 1980 until 2008, she worked to raise her two daughters and care for her mother after she developed breast and lung cancer. [Tr. 70:18 – 71:1] In her

words, she had relied upon her husband to handle all the "business and financial aspects of things" until his death, and was only passingly familiar with the term "1031" and that it was "some sort of tax devi[c]e" that could be used after the sale of property. [Tr. 71:14-24; Tr. 73:20 – 74:5] She did not know the meaning of terms such as "cash-out" or "refinance" and relied on others to know about such matters. [Tr. 203:8-12]

The assets Gibson controlled were primarily in real estate, and inherited from her father and later her husband. [Tr. 87-89; Def.'s Exs. 5, 7, 11, 17] Following her inheritance of these assets, she was still primarily focused on her family, not her assets. [Tr.72:9-14] Although she has had a crash course in business during the failure of the transaction that is the subject of this litigation, she was an unsophisticated party when entering the subject transactions, as determined by the Trial court. [Order] Even Ameris does not seriously contend Gibson was a sophisticated businesswoman.

Gibson is a woman of faith, and met Rolando Villavicencio (Villavicencio) through her church, where Villavicencio and his wife were in leadership roles. (Tr. 111:11 – 112:19). Villavicencio was a real estate agent at Re/Max and in December 2005, Villavicencio suggested that Gibson purchase a shopping center for $2.4 million. [Def.'s Ex. 3; Tr. 73:10-19; 160:12-20] Gibson later hired ReMax and Villavicencio to manage that property for a ten-year term. [Def.'s Ex. 4; Tr. 179:1-7]

Financing for that purchase was done with First Reliance Bank (Reliance) in Charleston. Karl H. Zerbst, Jr. was employed in the banking business for 26 years. [Tr. 373:6] He worked on the shopping center transaction along with Benjamin R. Lanier (Lanier), a credit analyst at Reliance. Gibson had met Zerbst via introduction from a

tenant[1] "right after" her husband died. (Tr. 117:10 – 118:5). At the time, Zerbst was employed at Reliance in Charleston, S.C. Zerbst and Gibson initially worked together to open a couple of accounts at Reliance, a CD account and checking account, and she met with him several times before the significant transaction involving the purchase of a shopping center. [Tr. 118:12-20] During those early interactions, Gibson already was asking Zerbst for advice for how she should invest her money at the bank and receiving advice in return. [Tr. 118:21-24]

Zerbst and Lanier assisted and advised Gibson in the financing of the shopping center. [Tr. 74:18 – 75:5] Mr. Lanier was the credit analyst for the shopping center transaction and Zerbst was his superior. In advising Gibson about this transaction, Zerbst and Lanier structured the transaction to involve Gibson placing a second mortgage on a home she owned on Isle of Palms to produce cash for the necessary down payment. [Tr. 122:12 – 24, Pl. Ex, 32] As a result, the shopping center was purchased with a hundred percent borrowed monies. The idea for and the entire structure of the deal came from Zerbst and Lanier, on whom Gibson relied. During the time of the purchasing and financing of the shopping center Gibson's complete reliance upon her associates, Villavicencio and Zerbst and Lanier, became obvious.

Although the shopping center transaction is not directly the basis for the claims tried in this case, the Trial court correctly concluded that considerable and credible insight into the relationship between Gibson, Villavicencio, Zerbst and Lanier in terms of the fiduciary relationship between those parties could be gleaned. [Order] The involved

[1] This tenant had been secured by a lease negotiated by Gibson's husband just before his death. (Tr. 89:3-9).

persons were the same between the shopping center transaction and the later purchase of the Northwoods Garden Apartments (hereinafter "apartments") as well as the financing structure involving a primary loan and separate loan to secure additional funds for the primary aspect of the transaction (shopping center and apartments respectively). Clearly, the idea and structure did not originate with Gibson.

In 2007, Gibson was informed by Villavicencio of the existence of an apartment complex, and he encouraged her to purchase the complex many times, despite her protests that she did not have the money for such a transaction. [Tr. 203:1-4] Villavicencio was familiar with the apartment complex because he was the property manager and was the exclusive listing agent for the seller. [Ct. Ex. 3, Gibson Dep. 35:22 - 36:31; Def.'s Ex. 9] Villavicencio represented to Gibson that the fair market value of the apartment complex was $2.8 million. [Tr. pgs.182-83, 185-86, 188-89] The $2.8 million in 2007 for the apartment complex was double what the previous owner, AbesPro, paid for the property in 2003. [Tr. 525] Ameris' own expert later characterized that price as "incredible" and "truly ridiculous" and "there is NO WAY that this property... was worth anything near the price paid." (emphasis original) [Tr. 524:22 – 526:9, Pl. Ex. 37]

Villavicencio also told Gibson that he would handle everything, from helping her obtain financing, to overseeing the renovations, to leasing and selling the renovated apartments, to managing the property, [Ct. Ex. 3, Gibson Dep. 51:10-25] Gibson acted on Villavicencio's advice and signed a contract to purchase the apartments for $2.8 million in May 2007. [Pl. Ex. 19] She had doubts over insufficient funds for the deal. [Tr. 124:3-14] She nevertheless proceeded because Villavicencio (and later Zerbst) convinced her it was a good deal for her and rents would cover the debt. [Tr. 124:15- 125:6]

When Villavicencio first reached out to Reliance bank and Zerbst about the proposed purchase of the apartment complex, Zerbst' very first question in response was to inquire whether Gibson even knew about the proposed transaction, evidencing a clear understanding of the extent to which Gibson was reliant on others when engaging in these transactions. [Tr. 324:9-24] As part of the ensuing loan application process, Reliance ordered an appraisal which was completed on September 12, 2007 and showed the as-is value of the apartment complex as $2.8 million and the as renovated value as $3.7 million. [Def.'s Ex. 13]

The loan contemplated through Reliance was for $2.8 million and required $700,000 as a down payment. Lanier was aware of the loan being worked up for Gibson. [Tr. 457:12-17] The structure ultimately arranged by Zerbst in September 2007 involved a $700,000 down payment towards the total loan amount. [Pl. Ex. 67] But Gibson had no cash to make the $700,000 down payment as a result of her repeated refusal to sell any other property to come up with those funds as part of the deal. [Tr. 200:25- 201:22] Zerbst advised Gibson that if Reliance was going to finance the purchase, she should get-a loan on her beach house for the $700,000 down payment. [Tr.123; Pl. Ex. 67] Gibson followed that advice and refinanced the beach house with First Citizens bank to secure the necessary funds. This of course would have resulted in another 100% borrowed funds transaction, just as was done previously. The result was to eliminate any and all liquidity that Gibson might have had.

Zerbst met with the CEO of Reliance on October 4, 2007, the result of which was his termination the very next day. [Tr. 329:2-9, Pl. Ex. 38] Lanier left First Reliance on or about October 9-10, 2007, just a week after Zerbst's departure, and began work at

Ameris on October 11, 2007. [Tr. 457:3-11] Zerbst was not officially hired by Ameris until January 11, 2008. [Def. Ex. 40] Despite Zerbst's gap in official employment between the two banks, he was nevertheless instrumental in steering Gibson away from Reliance and having her follow himself and Lanier over to Ameris to complete the apartment purchase transactions. Gibson was the stick which Zerbst dangled in front of Ameris to cement Ameris' pursuit of him.

Zerbst had a non-compete agreement with Reliance that prevented his immediate transition to Ameris after his termination from Reliance, which he sought to negotiate away in exchange for his promises not to solicit existing customers of Reliance at any other banking institution. [Pl. Ex. 38] The offer was rejected, and Reliance ultimately ended up engaged in litigation with Zerbst and Ameris regarding alleged violation of the non-compete agreement. [Tr. 336:1-7] A very reasonable inference made just on that information alone would be that just such solicitation (including Gibson) occurred at the direction of Zerbst, especially when Zerbst acknowledged that bringing new business in would be advantageous for someone looking for employment[2] in the banking industry. [Tr. 335]

Zerbst was in frequent contact with Ameris employees during this period, as to his own employment as well as regarding Gibson and her potential purchase of the apartment complex. During this time of negotiations with Reliance, Zerbst's email production shows he was actively corresponding with Mr. Bogan of Ameris who was keeping the bank's

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[2] Zerbst testimony at trial (Tr. 335:22-25):

> Q: Would you agree that any loan officer looking for a new job with a new bank would want to create new business for his new employer?
>
> A: Absolutely.

attorney informed. [Pl. Ex. 39] Ameris' employee Lanier testified that Zerbst maintained an office in the Ameris building on Archdale Street and made calls and checked emails during the non-compete period. [Deposition of Lanier, Court Exhibit 7, pg 216]

Of significance, it was also during this time that Zerbst was working diligently with Lanier (who was now directly employed with Ameris) to have Gibson's loan moved from Reliance to Ameris. Zerbst represented to Gibson that Reliance was not going to give her a loan but assured her that Ameris would help her. Zerbst told her that he had given the loan documents from Reliance to Lanier at Ameris. [Tr. 129] Zerbst also assured Gibson that he would ultimately be handing the matter for her at Ameris. [Tr. 137] Both of these assurances by Zerbst came to be true.

Shortly after Lanier began to work at Ameris on October 11, 2007 (within 5 to 10 days) he received a phone call from his former superior, Zerbst. [Tr. 399; 464] Zerbst told Lanier that he was sending Gibson to him to process the loan application for the apartments through Ameris. [Tr.400 – 401] Lanier was aware that the loan was initially being processed at Reliance when he and Zerbst were employed there. [Tr. 457:12-17] Approximately the day or day after Lanier received the call, Zerbst made arrangements to have Lanier pick him up at a Publix store and travel together to the apartment complex. [Tr. 400-403] As they traveled to the site, Zerbst had with him a package of documents relating to Gibson's loan dealings with Reliance. *Id.* He did not hand the package to Lanier during that travel or discussed their contents. *Id.* Instead, after arrival at the apartment complex, Zerbst made an elaborate show of delivering the package to Villavicencio, including an announcement as to what he was doing. [Tr. 402:21 – 403:14] Villavicencio

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then in turn told Lanier that he wanted Ameris to handle this transaction. *Id.* Gibson was not at this meeting.

Lanier never questioned the package transfer, despite the fact that he thought it seemed "staged." [Tr. 403:9-14] He simply took the package as if handed to him directly by his superior Zerbst and used information in that package as a guide for the loan application and the rental cash flow analysis at Ameris. [Tr. 404] He admitted that the loan application he put together at Ameris was very similar to the one structured by Zerbst at Reliance. [Tr. 406] That loan committee application was dated October 22, 2007. [Tr. 406:1-2] The very next day, October 23, 2007, that $2.8 million loan application for a new customer of the bank was already approved by John Hipp, state president for Ameris. [Pl. Ex. 29] Lanier admitted the "fast turnaround" was likely a product of Ameris being in a "growth strategy" with the new opening of the Charleston office. [Tr. 406:21-408] At the time it was submitted and approved, it had not been reviewed by Gibson. [Tr. 407:10-18]

But Gibson had personally communicated with Zerbst during October 2007 about this loan to express her concerns about the transaction, having a thirty minute conversation with Zerbst. [Tr. 137:24 – 138:19] Zerbst testified that he was in his kitchen during this phone call. [Tr. 310] The content of that communication differs when Gibson or Zerbst are asked to recall the nature of their discussion, and ultimately the Trial court accepted Gibson's recollection that the conversation was wide ranging discussion, against the acknowledged background of her inexperience in such matters, whether the transaction as a whole was appropriate for her and whether the rents would cover debt maintenance. [Tr. 141-143:1]

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At the request of Ameris, Gibson attended the grand opening gala for the new Charleston branch of Ameris on October 25, 2007 where she was made to feel like a celebrity by being paraded around and introduced. [Tr. 125:25 – 127:11] A $2.8 million dollar loan was a large loan for a market like Charleston. [Tr. 335:19-21] Gibson was offered alcohol, which she does not normally consume, but it was a "special night" so she accepted. [Tr. 127:12-18] It was only as the party was winding down that Villavicencio (and Villavicencio's wife) and Gibson were ushered by Lanier into an office and Gibson was asked to sign loan documentation which she likely would not have understood even if she had not been drinking wine that evening. [Tr. 127:23 – 129:2; Pl. Ex. 20] It was there that she first learned of certain other property she owned, known as the Klister Lane which contained a cell phone tower, being required collateral for the loan. Id. That Klister Lane property would be among the assets Gibson lost following the failure of the apartment transaction. Gibson later signed the Construction Loan Agreement on November 2, 2007 – the day of the closing, just under two weeks after the "staged" meeting and start of the loan process. [Def.'s Ex. 31]

Shortly after the loan closing, Gibson was admitted to the hospital and remained ill for a period of four or five months, which prevented her from personal attention to the apartment complex. [Tr. 105] This period was while renovation of the apartments was ongoing. Prior to Gibson's first personal visit to the site becoming possible, she talked to Villavicencio who assured her everything was fine, on schedule and on budget. [Tr. 107:1-6] Gibson also talked to Lanier during this period, who visited the apartment several times during Gibson's time away for health reasons [Tr. 107:9-25; 437:22 – 438:5] Based on those reports, Gibson believed everything was going fine with the renovations.

When Gibson was able to view the progress of the work in late February early March 2008, she found that everything was completely opposite to what she had been told. [Tr. 107:20-25] She called the bank about the accounting of the money and discovered that about half of the renovation money was gone and not one of the apartment buildings had been completed. [Tr. 108:10-24] Ameris disbursed large sums to contractors or other vendors, including, ReMax. [Def. Ex. 42] Gibson was never made aware of the advances paid by Ameris, nor did Ameris ever request her approval before paying the draws. [PI. Ex. 23, 22, 30]

Ameris failed to inspect the project to ensure the improvements and draw requests were consistent with the project costs. [Pl. Tr. Ex. 30; Tr. 383-394, 392-396] Ameris never verified the contractor on the project and did not require a contract or AIA document or any other information in support of work being completed. [Pl. Ex. 30; Tr. 415] There are no disbursement requests in the Ameris file as required by the loan agreement. Ameris' own records reflect that it paid $290,000 in construction draws that are not supported by invoices. [Pl. Ex. 30] Ameris' records do include a memorandum from May 2009 placing Lanier on probation for "lack of judgment" for his actions in relation to handling of the renovations. [Pl. Ex. 30]

When her health permitted, Gibson personally moved to the apartment complex in May 2008 to take over daily management and supervision. [Tr. 108:23-110:7] She saved money as best she could, living in the office at the apartments, and at one point living off of tuna fish out of a can, peanut butter and protein bars because she gave a tenant her refrigerator. [Tr. 108 – 110:9] Gibson injected $75,000 in personal funds towards the project. [Tr. 94:16-25] Despite her efforts, the apartment loan was in default by November

2008. [Tr. 644:24-645:1] Gibson sued Villavicencio in July 2008. [Def. Ex. 60] In 2012, that case was resolved via settlement with a total recovery from the defendants of $850,000.

Gibson reworked the loan with Ameris for a lower interest rate in January 2009 and personally guaranteed the note as well as provided a guarantee by her husband's family trust. [Def. Ex. 34, 85-87] Zerbst later began asking for more collateral as security for the apartment loan, but Gibson was suspicious of doing so. [Tr. 152:7-13]. Zerbst steered her into seeking counsel of a lawyer who Zerbst considered his personal attorney, but never bothered to tell Gibson this was Zerbst's own attorney, the one representing Zerbst in the non-compete suit brought by Reliance [Tr. 103:24 – 104:2, Tr. 150:7 – 151:4, Tr. 338:18 – 339:5-15] Gibson was led into a meeting with that lawyer by Zerbst under the guise of receiving legal counsel regarding her troubled loans, only to be surprised and set upon by various parties seeking to obtain her financial assets for their own benefit. [Tr. 152:15 – 154:13] As the parties were leaving that meeting, Zerbst told Gibson that the apartments were overpriced, rents were not going to cover the debts owed, and the loan was a mistake. [Tr. 157]. It was only upon her lawyers' withdrawal on November 2009, citing a conflict of interest, that Gibson learned of Zerbst' connection with the lawyer he had referred Gibson to. [Pl. Ex. 61, Tr. 103:24 – 104:2].

On June 14, 2010, Ameris initiated foreclosure proceedings. [Compl.] Ameris later sold the debt to Galt Valley, LLC (hereinafter Galt) for $975,000. [Def. Ex. 115; Tr. 647:9-13] On December 1, 2010, Galt settled the foreclosure action. [Def. Ex. 107] Gibson was forced to convey the apartments and other collateral by executing deeds in lieu, with all litigation dismissed and the loan documents cancelled in return. [Def's Ex. 115.] These proceedings follows.

Issue One

Ameris accepted, then breached, fiduciary duties to its unsophisticated customer Gibson.

The relationship between Ameris with Gibson was much more than a mere creditor-debtor relationship typical of most banking transactions and daily business. Ameris orchestrated and implemented Gibson's financial downfall by jumping on the Zerbst bandwagon and facilitating his scheme, holding Gibson up as its case study initial splash into the Charleston market. Recognition of that unusual relationship, coupled with Ameris' failure to honor even its basic attendant obligations (given that special relationship that directly lead to damages suffered by Gibson) does not require any modification or expansion of existing South Carolina law. Ameris cannot insulate itself from the obligations it undertook to Gibson by suggesting it was not acting as a fiduciary. The evidence is completely contrary.

A. Ameris was not immune from establishing a fiduciary relationship in favor of Gibson under South Carolina law.

A fiduciary relationship "exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). The exact boundaries of such relationships have never been defined, and intentionally left elastic to address new or peculiar situations. "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a

fiduciary relationship may spring." Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599; 358 S.E.2d 150, 152 (Ct. App. 1987).

Ameris contends that there is no decision from South Carolina that has found a fiduciary relationship in the context of a lender and borrower (App.Br. p. 17). However, Ameris cannot cite to any opinion that has precluded the formation in the context of a bank and its customer. In fact, our Supreme Court has recognized that while the "normal" relationship between a bank and its depositor is a creditor-debtor relationship rather than a fiduciary one, it has nevertheless expressly stated and recognized that in certain "limited circumstances" such a "fiduciary relationship may be created between a bank and a customer." Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). Just because those circumstances have not yet been confirmed in an appellate opinion does not preclude a proper finding of such a relationship, as was made in this matter and as discussed infra. Ameris' dealings with Gibson are precisely that case.

B. Gibson placed special trust in Ameris and its agents, who accepted that trust and thereby established a fiduciary relationship for Gibson's benefit.

The "limited circumstances" wherein a fiduciary relationship may be formed between bank and customer includes when "the bank undertakes to advise the customer as a part of the services the bank offers. Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." Burwell at 40-41, 790. A fiduciary relationship is more than a casual one, and as a general rule it cannot be created unilaterally, but requires that the fiduciary must have actually accepted or induced the confidence placed in him or her. Steele v. Victory Sav. Bank, 295 S.C. 290, 368 S.E.2d 91 (Ct.App. 1988). "Whether a fiduciary relationship exists between two people is an

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equitable issue for the judge to decide." Moore v. Moore, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). As noted by the trial court, with regards to cases previously decided by the appellate court in which the Court did not find the existence of a fiduciary relationship, "the facts of those cases are clearly different and are not even close to the circumstances and facts of this case." [Order p. 19.].

As referenced in the statement of facts and discussed infra, Gibson was a very unsophisticated party to the transactions being proposed and executed with her funds and guarantees. Her history of the apartment transaction necessary starts before with her history on the shopping center transaction, which was structured by Zerbst and Lanier and Villavicencio to be a 100% borrowed transaction. Gibson started relying upon Zerbst for his evaluation of her deals when discussing this shopping center, and started receiving his evaluation of potential transactions beyond mere loan terms. [Tr. 119:10-20]. The entire reason she sought advice from Zerbst initially, and not just her real estate agent Villavicencio, was because Villavicencio was just a realtor looking to buy and sell, while Gibson "was interested in talking to a banker that would know about the transactions and also for his advice on whether this was, you know, good for me." [Tr. 74:18 – 75:5]. And Zerbst from the very beginning gave her that advice, acting as an Ameris agent at the critical points in time. Id.

Later, with regards to the apartment complex, Lanier and Zerbst worked together first while employed at Reliance, and then later on behalf of Ameris, to work up the loans necessary to complete the transaction. Of course this transaction was similar to the shopping center structure, and the documents bridged the transition between Reliance and Ameris without significant change. [Tr. 406]. And Gibson's reliance and unusual dealings

with Lanier and Zerbst, on behalf of their respective employers (or, in the case of Zerbst, potential employer), bridged that gap as well.

Zerbst, while ostensibly unemployed but as determined by the Trial court already clearly acting in the interests of Ameris by steering business its way, evidenced his special personal relationship with Gibson by conducting his elaborate transfer of documents to Lanier. And everyone there at that meeting, which Lanier later characterized as "staged," were there with knowledge that they were all acting on behalf of Gibson. Within just a few days, Lanier submitted the loan application up the chain of command at Ameris before Gibson had even seen or signed the documentation. [Tr. 407:10-18].

Between the time of signing the contract in May for the purchase and the actual closing at the beginning of November, Gibson had several conversations with Zerbst about the nature of the deal itself, not restricted merely to explanation of mere terms. That included a personal meeting with Gibson and Villavicencio in Zerbst' office at Reliance. Zerbst' own recollection and description of that meeting shows it went well beyond what loan terms would be available, and explored the entire business strategy for the apartments; to wit, how he viewed the property as a "B" property, and how it could be changed to a "B plus" or "A" with a different targeted group of tenants. [Tr. 355:5 – 357:22]. Zerbst told Gibson she should be safe in covering both debts related to the transaction with the rental income. [Tr. 317-318].

Those communications continued right up until the closing, even after Zerbst' departure from Reliance and during the period he was determined to be selling himself to Ameris by working on behalf its behalf before his official start of employment. Zerbst orchestrated Gibson's move to Ameris by telling her there were problems at Reliance and

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she "would be better served" at Ameris. [Tr. 129:8-22]. Communications continued later, involving at one point a 30 minute phone call with Zerbst during which Zerbst spoke to Gibson from his own kitchen. [Tr. 137:24 – 138:19; 140:25 – 143:1; Tr. 310]. They discussed the appraisal and the rents among other general aspects of the transaction, and specifically through the lens of reliance on how the prior shopping center transaction had been done. [Tr. 220:8-25]. Ameris' brief refers to that conversation as "casual," but that casualness is in stark contrast to the formality typically expected with an arm's length transaction. Under Ameris' theory, while Zerbst was supposedly unemployed, his engagement in such a communication distinguishes itself as atypical of a normal arm's length commercial transaction as Ameris portrays them to be. It is instead indicative of a special trust placed in Zerbst[3] and special trust accepted by Zerbst while acting on behalf of Ameris.

Further, as noted by the Trial court, Ameris introduced zero credible evidence that Gibson negotiated any term of the initial loan or the collateral that was to be used to secure the loans. [Order p. 24.] The only credible evidence is that Gibson was very reluctant to enter into the transaction, and only proceeded after assurances from those, at Ameris, she believed to be acting with her best interests in mind as well. All negotiation cited by Ameris concerns mitigation efforts engaged in by Gibson after the apartment transaction was in place and floundering. Zerbst, as agent of Ameris, induced and advised Gibson regarding the loan, thereby creating a fiduciary relationship between Ameris and Gibson.

[3] This trust extended past the closing on this loan of course, as evidenced in part by Gibson's heeding of Zerbst' recommendation that she hire a particular lawyer to help her address issues with Villavicencio. Only later did Gibson find out that lawyer already represented Zerbst. [Tr. 150:7-18].

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C. Ameris Breached Its Fiduciary Duty Owed to Gibson.

A party in a fiduciary relationship with another subjects itself to liability to the other for harm resulting from a breach of its duties. Moore v. Moore, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). When a fiduciary relationship exists with respect to a bank and its customer, the bank must disclose material facts that may affect the customer's interest. Burwell v. S.C. Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). There must be a disclosure of "all known information that is significant and material" and "silence may constitute fraud." Moore at 251, 472 (Ct. App. 2004). Such facts requiring disclosure are those that "may affect [that borrower's] interests." Burwell at 40-41, 340 S.E.2d at 790.

It is the function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform. Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 711 S.E.2d 908 (2011). The court may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." Doe ex rel. Doe at 247, 912 (internal citations omitted). Ameris' own expert witness admitted Ameris had a duty to tell Gibson that the project revenue would not carry the loan. [Tr. 612:11-24] The fiduciary obligations owed by Ameris and its agents to Gibson as established by the court were breached by Ameris, and resulted in damages sustained by Gibson.

Throughout the loan origination and project construction processes, Ameris and its agents assumed the duty of advising Gibson to undertake the project, and how to finance the project. Gibson made clear her doubts about the project and desire to only enter it if it were safe. Ameris had a duty to advise her that it was not only not "safe" or "good" but in fact was risky given the 100% effective financing of the project split across two loans.

Zerbst himself admitted the transaction was not good and should never have occurred as the rental proceeds would not cover debt service. [Tr. 157]. Yet that was exactly how the loan was intentionally structured, considered and pitched to Gibson. [Tr. 317:23-14; Tr. 140:25 – 142:12.]. It is clear from Gibson's testimony that had she been told that information sooner, that it was being set up in a way that was inconsistent with what Zerbst knew about the rental income, she would not have gone through with the transaction given her doubts even while being told the deal was a good one.

Ameris' own expert stated that there was "NO WAY" (emphasis original) that the property was worth anything near the price paid, and "a look at the income/expense statements will reveal this." [Pl. Ex. 37]. Given the duty assumed by Ameris, it at least had a duty to tell Gibson how easily the price could be potentially demonstrated to be inflated, yet there is no evidence it did so. It was a failure to advise Gibson about information she needed, and a failure of Ameris to review the documentation itself to find the obvious information that it knew was so important to Gibson; documentation they knew she was not looking for or even aware existed given her unsophistication.

Further, the 100% financing of the transaction was not disclosed as risky and itself sufficient to call into question the entire transaction. Lanier disclaimed knowledge of the source of the $700,000 down payment, which Zerbst disputed. [Tr. 349:19 – 350:2].

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Lanier acknowledged it would have made a big difference in the consideration of the loan, however. [Tr. 453:15- 454:2]. Don Snipes, regional credit officer and senior V.P. of Ameris, testified that if he had known the $700,000 was sourced from another loan, he would have looked less favorably on the loan, and strongly doubted it would have been approved. [Tr. 276:13-278:2]. If it would have made a big difference to Lanier and Snipes in terms of analyzing the prospects for the success of the transaction, it certainly was "material" for purposes of explaining to Gibson the effect it had on the transaction in full. Again, given Gibson's doubts about the transaction, it is obvious the risks involved with 100% financing were not fully disclosed to her, or the loan would not have gone forward.

D. Breach of Duty continued after execution of the loan documents.

Ameris and its agents let down Gibson after execution of the loan documents, and in doing so further breached their duties that arose as a result of the unique relationship discussed supra. Ameris disbursed large sums to contractors or other vendors, including, REMAX, on its own, without any knowledge of or input from Gibson. [Def. Ex. 42] Gibson was never made aware of the advances paid by Ameris, nor did Ameris ever request her approval before paying the draws. [Pl. Ex. 23, 22, 30]. Zerbst and Lanier both knew of the hospitalization of Gibson soon after the loan was closed and during the time the renovation was to take place, and Zerbst agreed that Lanier did not exercise that control properly. [Tr. 392:21 – 393:4, 396:14-19]. Despite that control, Zerbst stated that "it became apparent that not all the money did go into the project." [Tr. 395:15-19] Ameris never verified the contractor on the project and did not require a contract or AIA document or any other information in support of work being completed. [Pl. Ex. 30; Tr. 415] There are no disbursement requests in the Ameris file as required by the loan agreement. Ameris

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simply disbursed loan proceeds with no protection whatsoever. Gibson contended at trial, and Zerbst agreed, that Gibson should have been advised, and had her approval obtained, for advances made. [Tr. 395:14-21] Zerbst testified regarding a lack of documentation in the file. [Tr. 395:25 – 396:19]

Ameris cites authority stating that "the lender has no common law [duty] to protect the borrower" even when inspections are completed. Roundtree Villas Assn., Inc. v. 4701 Kings Corp., 282 S.C. 415, 422, 321 S.E.2d 46, 50 (1984); [App.Br. p. 30]. However, that opinion acknowledges an exception where there is an independent obligation, such as by virtue of the relationship of the parties. Id. Of course in this instance, as discussed supra, there was a special trust and relationship, a fiduciary one, which required more of Ameris than a free flow of money to contractors.

Lanier did visit the project site on several occasions. [Tr. 107:9-25; 437:22 – 438:5] And while he explained away his failure to recognize failures in the process while there on those visits, the barely recuperated Gibson, a documented neophyte in such matters, was immediately able to recognize issues during her first visit. [Tr. 106-107] Additionally, what he had reported to her and what she observed were "opposite" which is evidence the information communicated was false, not just missing. Having undertaken a special relationship and engaged in an opportunity to relay necessary information to the beneficiary of that relationship, Lanier and Ameris failed to meet their obligations.

Ameris has internal documentation that evidences an acknowledgment that they had undertaken special duties and failed to meet those obligations. Lanier was the subject of a memo in May 2009 that cited him for "lack of judgment" regarding the disbursements. [Pl. Ex. 30] While Don Snipes, Ameris' Regional Credit Officer and Senior V.P, stated in

an email that "we have some culpability in [Gibson's] problems as we did not manage the construction loan as we should have and potentially aided in her former property manager at REMAX may have siphoned off some of the loan proceeds." (emphasis added) [Pl. Ex. 31].

Ameris contends that "at best, the [Lanier disciplinary] memo shows that the bank did not follow its own internal policies." [App.Br. p. 28]. However, as stated above, the standard of care may be established and defined by a defendant's own policies and guidelines. Doe ex rel. Doe. Ameris' admission that it and its employees deviated from its own policies and guidelines with regard to the apartment loan is evidence of a breach of the standard of care.

Additionally, the Trial court found that Zerbst' actions, while openly employed by Ameris, in steering Gibson to legal counsel that was already personal counsel for Zerbst was a further breach of fiduciary duty. [Tr. 150:7 – 151:4] Gibson had no knowledge of that counsel's connection to Zerbst. [Tr. 103:24 – 104:2] She was led into a meeting in August 2009 by Zerbst under the guise of receiving legal counsel regarding her troubled loans, only to be surprised and set upon by various parties seeking to obtain her financial assets for their own benefit. [Tr. 152:15 – 154:13] Gibson felt betrayed by those actions, evidence they were contrary to the duty of loyalty and full disclosure owed by a fiduciary.

E. Loan documents do not preclude a finding of a fiduciary relationship when Ameris' agents were knowingly dealing with someone as completely unsophisticated as Gibson.

A relationship between a customer and her bank is "usually" defined by the contractual agreement between them. Trotter v. First Fed. Sav. & Loan Ass'n, 298 S.C.

85, 89, 378 S.E.2d 267, 269 (Ct. App. 1989). A borrower is normally responsible for reading loan documents related to the borrower's transaction if the contents thereof would reveal contrary information. Burwell at 40, 340 S.E.2d at 789. However, "usually" allows for exceptions to the norm, as does the Burwell case, which specifically recognizes an exception if a party is "ignorant and unwary," in which case the failure to read the document may be excused." Id., Thomas v. Am. Workmen, 197 S.C. 178, 182, 14 S.E.2d 886, 887 (1941); Austin v. Indep. Life & Accident Ins. Co., 296 S.C. 156, 160, 370 S.E.2d 918, 921 (Ct.App.1988). "In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered." Id.

In Burwell, the party claiming ignorance was a graduate of the Wharton School of Business at the University of Pennsylvania, had held directorship positions with national and international companies, and negotiated over the use of collateral on the day the loan guarantees were executed. Id. at 790. That party was clearly not "ignorant and unwary" and stands in stark contrast to Gibson's lack of sophistication.

To wit, Gibson is a 66 year old widow, having lost her husband of twenty-seven years around Christmas 2003. (Tr. 69:9-23). She graduated high school, and took some liberal arts courses briefly in college. From the time of the birth of her first child in 1980 until 2008, she was not employed, and instead worked to raise her two daughters and care for her mother after she developed breast and lung cancer. (Tr. 70:18 – 71:1). She had relied upon her husband to handle all the "business and financial aspects of things" until his death, and was only passingly familiar with the term "1031" and that it was "some sort of tax devi[c]e" that could be used after the sale of property. (Tr. 71:14-24; Tr. 73:20 –

74:5). Her assets were primarily in real estate, and inherited from family: her father and later her husband. (Tr. 87-89; Def.'s Exs. 5, 7, 11, 17). At the time, she was still primarily focused on her family, not her assets. (Tr.72:9-14). Zerbst admitted at trial that "she was not well experienced like many customers" he met with through his employment with a bank. (Tr. 307:18-23). She was the classic "sitting duck" for manipulation and exploitation.

Ameris portrays Gibson as a sophisticated millionaire, but those assets were not acquired through her skill or business acumen, but rather landed in her lap. Net worth is not a proxy for sophistication. The sudden assumption of responsibility for such assets serves to highlight her *vulnerability* after the death of her husband, not how secure or savvy she was. To wit, Ameris' brief catalogs Gibson's mistakes that it agrees justify the 20% comparative fault determination: she failed to negotiate the purchase price of the apartments, failed to independently ascertain the value of the property or obtain an appraisal, review cash flow statements or income statements for the property, look at the rent rolls, inspect more than one (1) of the 48 units, or hire an architect. [App.Br. p. 35-36, with citations to the record].

While Ameris holds Gibson up as a pitiful businesswoman, it ignores the very point those failures underscore – that she was in near complete reliance upon other trusted parties, and openly made that reliance known, because of her unsophistication. [Tr. 226:8-11]. That reliance manifested itself throughout, but was obvious from the beginning. Zerbst' very first question in response to learning about the potential purchase of the apartment was to inquire whether Gibson even knew about the proposed transaction,

evidencing a clear understanding of the extent to which Gibson was reliant on others when engaging in these transactions. [Tr. 324:9-24].

As to the loan documents themselves and whether they put Gibson on notice or should have been controlling to defeat any fiduciary obligations, trial testimony is informative. When questioned at trial about her failure to read and understand the loan documents, the following exchange occurred:

> Q. Is it your testimony that they should have told you that you should read the documents that you were signing for a $2.8 million loan?
>
> A. Mr. Stepp, this really was the first -- they knew that I was inexperienced in buying -- doing this. And I trusted them, and they knew I trusted them. In so many words they knew that I did not know what I was doing, and both of those boys knew that. And if they thought in any way that this was not good for me, they should have expressed that and not had me sign pages of documents that I don't think anybody ever reads or can understand with the verbiage.
>
> I don't even know what half of this stuff is that you're asking me about now that I've signed it. I don't know any of these things.
>
> THE WITNESS: Judge Watson, I just don't -- they knew that I relied on their opinion and their advice on this.
>
> Q. To the point that you didn't even have to read the loan documents; is that right?
>
> A. Well, I know from what you're telling me that there are a lot of things in here that I have guaranteed and signed off on and such, but I don't understand those things, and they knew that.

[Tr. 226:3 – 227:3].

It was not merely that Gibson was ignorant and unwary as required to excuse disclaimers written into the loan documents; she openly communicated that condition

leading up to the loan execution and continuing afterwards as a plea for assistance. Shedid so to an extent that it was obvious to those at Ameris that she was proceeding in reliance on its agents. Willingness to proceed in the face of that knowledge is the sort of situation that justifies recognition of the exception to the general rule.

Further, as Lanier admitted during his testimony, the loan documents use "boilerplate" language that may or may not be applicable to the instant transaction, the determining factor being solely at the whim of the bank. [Tr. 413:8 – 414:25]. The Trial court, as noted in the final order, had "carefully observed the demeanor and manner in which each witness testified. I noticed such things as their tone of voice, gestures, hesitation or readiness to answer questions, their sincerity, and other mannerisms, all of which assisted in my evaluation of their credibility." [Order, p. 1]. The Trial court concluded, based on all those factors that give context and depth to the bare documents and transcript record, that Ameris' efforts to enforce the loan documents was selective, and whenever it suited Ameris, which was inappropriate given the personal and fiduciary nature of the relationship between Gibson and Ameris' agents. [Order, p. 25]. The Trial court found Gibson's testimony "much more sincere and credible," confirming that this was a situation in which the usual deference to contractual language was not appropriate or equitable. [Order, p. 26].

This issue is without merit.

Issue Two

AMERIS MISREPRESENTED FACTS REGARDING THE PROPOSED APARTMENT TRANSACTION AND CAUSED GIBSON TO SUFFER IN RELIANCE UPON THOSE STATEMENTS.

Where damage is pecuniary in nature, the tort of negligent misrepresentation requires six elements be met: "(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated the truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." Redwend Ltd. P'ship v. Edwards, 354 S.C. 456, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003) (citing Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996); Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999)). Further, the tort claim is allowed when the misrepresented facts cause the plaintiff to transact business. Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). Ameris' agents and expert testified that Ameris had a duty not to mislead and that if it undertook to give advice, the advice should be accurate, complete and honest. [Tr. 607-612; Bogan depo. p. 26-38]

A. Ameris Misrepresented Facts to Gibson.

The most basic threshold inquiry is whether the representations made were false. Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 163-164, 714 S.E.2d 873 (2011). Ordinarily, a claim will not arise unless the statements relate to a present or preexisting fact, not predicated on future events. Davis v. Upton, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967). Further, a claim cannot be predicated on expression of opinion. Winburn v.

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Ins. Co. of N. America, 287 S.C. 435, 339 S.E.2d 142 (Ct. App 1985). The dividing line between matters of fact and matters of opinion is typically decided by what can be shown as exact knowledge when the statement is made. Bishop Logging Co. v. John Deere Indus. Equipment Co., 317 S.C. 520, 527, 455 S.E.2d 183, 187 (Ct. App. 1995).

A statement of fact may be found given the existence of business records. Gilbert v. Mid-South Machinery Co., Inc. 267 S.C. 211, 227 S.E.2d 189 (1976). Assessing the first element of negligent misrepresentation, Ameris argues that the false representations were made based on opinions or future events, and thus not actionable. However, the statements were actionable for two reasons. First, where facts are known to the contrary of statements made, the individual making the statements is liable for misrepresentation. See Gilbert v. Mid-South Machinery Co., Inc., 267 S.C. 211, 227 S.E.2d 189 (1976) (statement about profitability of business actionable as statement of fact if based on existing business records).

Gibson was told the purchase price could be sustained by rental income, despite a price more than double the prior purchase price just 4 years prior, and "NO WAY" that the property was worth the purchase price in the words of Ameris' own expert as looking at the income/expense statements would reveal. [Tr. 524:22 – 526:9, Pl. Ex. 37] Zerbst's statements regarding the loan being sound and the apartment being a good investment were misrepresentations because Zerbst knew that his statement was not true, for any investor, but especially for Gibson, based on his knowledge of Gibson's finances, the project's rent projection and how it had not changed significantly since the prior complex sale for half the cost, and projected debt service. It was factually, certainly, false that this transaction was within Gibson's clearly defined parameters of needing to be self-funding and not

supported by disposal of other assets. [Tr. 200:25 – 201:18] Ameris' own employees confirmed that 100% financing as used in this apartment purchase was not safe or "good" as it would have resulted in denial of the loan when properly considered. [Tr. 276:13-278:2] The Trial court determined the statements were made based on existing business records, and therefore are statements of fact, shown by subsequent events to be demonstrably inaccurate when made.

Further, even assuming the statements were mere projections, if such a statement about the future is made to induce another's act, and whereby the other would not have acted if not for that statement, the statements are again actionable. See Bishop Logging Co. v. John Deere Indus. Equipment Co., 317 S.C. 520, 455 S.E.2d 183 (S.C. Ann. 1995). Ameris wished to loan Gibson the money for the apartment complex; regardless of the project's success, the collateral for the loan would cover, exceedingly, and default by Gibson. Gibson explained her consistent reluctance to take on this purchase, which was assuaged by those representations made by Villavicencio and Zerbst that reassured her. That was the reason she communicated so often with Zerbst, and therefore Ameris, to ask the same questions about suitability of investment, signaling an obvious reliance that made the misrepresentations actionable even if deemed to be about future projections.

B. Gibson Relied on Ameris' Statements.

Ameris contends that Gibson did not have the right to rely upon the misrepresentations repeatedly fed to her regarding the apartment purchase. But reliance is justified where the defendant was in a superior position to the one who relied on the statements. Harrington v. Mikell, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996). The totality of the circumstances, including the positions and relations of the parties, must

be considered. Quail Hill, LLC v. Cnty. Of Richland, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010). The positions of the parties includes a requirement that the court look to whether the relationship was confidential or fiduciary, not just arms-length. Florentine Corp. Inc. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985).

Ameris cites authority that states where there is the absence of a fiduciary relationship, there is no right to rely, which is a correct statement of law, but irrelevant. As discussed extensively supra, this was certainly a fiduciary relationship. Likewise, this was not an interaction between educated, experienced equals, as Gibson's undisputed lack of sophistication makes clear. Zerbst and his quarter-century of banking familiarity dwarfed Gibson's openly acknowledged ignorance and inexperience. Contrary to Ameris' critique of her failures to uncover the falsity of the representations, Gibson was trying to be diligent. She just had the misfortune of falling prey to unscrupulous professionals at every turn, all of whom were serving Ameris' interests, not hers.

C. The false statements led directly to Gibson's suffered harm.

Ameris argues that Gibson was locked in to the transaction notwithstanding the false representations. (App.Br. p. 37). However, the contract agreeing to purchase the apartments signed in May was done with Gibson clearly indicating she was not ready or sure about closing. [Tr. 124:6-10]. The contract lacked consideration, and was contingent on financing, but did not mention financing details. No escrow funds were put down when that contract was signed. The referenced refinance of the beach house was done in anticipation of this transaction, but had only shifted debt, not accumulated more, and thus would have been equally useful even without subsequent addition of the apartment complex debt.

This issue is without merit.

Issue Three

VILLACENCIO'S BREACH OF FIDUCIARY DUTIES TO GIBSON WERE SUBSTANTIALLY ASSISTED BY AMERIS.

The trial court awarded recovery for Gibson's third cause of action, aiding and abetting breach of fiduciary duty. Recovery requires (1) a fiduciary duty owed to a person; (2) a third party's knowing participation in the breach of that duty; and (3) damages. Vortex Sports & Entm't, Inc. v. Ware's, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Id. There was ample evidence supporting the trial court's finding of the existence of a fiduciary relationship between Gibson and Villavicencio, and Ameris conceded that threshold issue in its brief. [App. Brief p. 39] Despite that concession, Ameris alleges two errors in the trial court's examination of the requisite elements for a finding of liability as to this claim, neither of which have merit.

A. Villavicencio breached his fiduciary duties.

Ameris contends that there was insufficient evidence in the record that Villavicencio had ever breached his duties that arose as a result of the acknowledged fiduciary relationship between himself and Gibson. However, that was not really ever disputed; it was the elephant in the room. Gibson first testified that she terminated Villavicencio as "a result of the mismanagement of properties, stealing – I discovered that he had stole several hundred thousand dollars from managing the shopping center and the apartments." [Tr. 71:25 – 72:8]. She later elaborated that in addition to stealing from her, Villavicencio "along with Mr. Zerbst put me into some investments that were good for

them but bad for me." [Tr. 112:20-25]. Gibson's testimony did not minimize Villavicencio's misconduct to theft, as Ameris claims. The term "mismanagement" and reference to acting in his own self-interest with respect to investments (including the apartment complex) is more than adequate description from a lay witness as to the breaches of fiduciary duty committed by Villavicencio. That is especially true when those breaches are so fully revealed via other testimony and documentation contained within the record on appeal, including Villavicencio's mismanagement of the renovation efforts and related construction loan proceeds during Gibson's illness, as well as the earliest relevant breach related to Villavicencio's scheming with Lanier and Zerbst to push through this apartment investment despite contrary bests interests of Gibson[4]. Villavicencio's breach of fiduciary duty was obvious to everyone but Ameris, apparently.

B. Ameris had knowledge of the breaches and substantially assisted them.

Ameris also argues that despite evidence of breach by Villavicencio with respect to the apartment complex, there was no evidence that Ameris knew about the alleged breach or knowingly aided or abetted it. The record demonstrates otherwise.

Under South Carolina law, one is liable for harm resulting to a third person from the tortious conduct of another if one "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself" or "gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

[4] Ameris is also seeking a full off-set of funds recovered by Gibson against Villavicencio in separate litigation. Since that recovery was for breaches unrelated to the apartment complex, and thus factually distinguished from claims against Ameris in this litigation, then the off-set would be inappropriate.

See Restatement (Second) of Torts § 876(b) and (c) (1979) as cited by the South Carolina Supreme Court in Future Group, II v. NationsBank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996).

Ameris' own tortious conduct is explored extensively supra, and a great many of the acts and omissions committed by its agents and employees directly involved Villavicencio, while many of the others substantially assisted him in his own breaches of duty. Mr. Barksdale concluded after his review of the file that Villavicencio was a con artist. [Tr. 608]. And Zerbst admitted they had their suspicions about Villavicencio. [Tr. 324] When Villavicencio first reached out to Reliance bank and Zerbst about the proposed purchase of the apartment complex, Zerbst' very first question in response was to inquire whether Gibson even knew about the proposed transaction. [Tr. 324:9-24]

Yet from the record it is apparent that Villavicencio excluded Gibson from much of the discussion with Ameris. Ameris obliged by dealing directly with Villavicencio in the transfer of the loan documents from First Reliance to Ameris, allowing the use of an appraisal meant for another bank at Villavicencio's request, and accepting a wildly-inflated financial statement from Villavicencio. The financing, with the risky 100% loan structure, was worked out between Villavicencio, Lanier and Zerbst in a joint effort noticeably lacking involvement of Gibson, who had not even seen the loan application by the time it had already been approved by the state president of Ameris. [Tr. 407:10-18]

Actions linking Ameris and Villavicencio that did involve Gibson were no less damning for this claim. Gibson relied on Villavicencio heavily and regarded him as her real estate and financial advisor. [Tr. 185:25 – 186:16] But she also wanted to know the advice of Zerbst. [Tr. 75:1-3]. Gibson then repeatedly referenced how "they," meaning

Villavicencio and Ameris employees or agents, had worked in combination to convince her of the falsity that the apartment transaction was a wise investment for her. [Tr. 124:6-21, 142:7 – 142:12][5]. Villavicencio (and his wife) participated in the surprise document execution at the gala event. [Tr. 127:23 – 129:2].

The purchase of the apartments, at their inflated price that further benefitted Villavicencio as both buyer and seller's agent on the transaction[6], could not have been done without the bolstering, substantial assistance of Zerbst, acting on behalf of Ameris.

This issue is without merit.

Issue Four

Damages, both actual and punitive, were justified by the evidence before the trial court and within the confines of constitutional restraints on such awards.

"Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible." Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (S.C. App., 2008) (citing Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000)). These damages are awarded to compensate a litigant "for his actual loss or injury," and the damages "will compensate the party for injuries suffered of losses sustained." Id. The ultimate goal in awarding actual damages is "to restore the injured party... to the same position he was in before the wrongful injury occurred." Id.

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[5] "[Zerbst] and Mr. Villavicencio both assured me... I trusted what they said and I relied on what they said, and that's why I bought that apartment complex." 142:7 – 142:12.

[6] Realtor commission on the purchase was $155,000, not including another $8,000 line item directly to Villavicencio for "Exch. Invest Planning Consult." [Pl. Ex. 12].

The Master attempted to make Gibson whole with an award of actual damages in the total amount of $1,153,625, the sum of the following amounts:

- $700,000 down payment on the loan to purchase the apartments;
- $23,625 in interest paid by Gibson on that borrowed money;
- $355,000 as the value of the Klister Lane property used as collateral for the loan that was subsequently transferred by Gibson to resolve the foreclosure action; and
- $75,000 in personal funds that Gibson invested in the apartments in an attempt to keep the project from failing.

[Order p. 55]

A. Recovery of the down payment was proper.

Ameris first challenges the award of actual damages and asserts that Gibson should not be compensated for the down payment towards the apartment purchase because it was procured via refinance of another piece of property titled in the name of an LLC that was not a party to this action, and that loan was an "independent transaction[] wholly unrelated" to the apartment purchase. [App. Brief p. 42-43]

Ameris' loan to Gibson required a significant down payment amount of $700,000. To procure the necessary funds for the down payment, Gibson used her 50 percent interest in 3205 Palm Boulevard LLC to refinance a beach house held in the LLC's name. [Tr. 78:1-18 – 79:1; Pl. Ex. 67; Tr. 192:11-13]. This was done just as she had used a second mortgage to accomplish the shopping center purchase that was structured by the same parties as the later apartment transaction. [Pl. Ex. 32]. Zerbst knew about the true source of that money for the down payment on the apartments, even though the refinance was

originally done in anticipation of the loan being done through Reliance. Thereafter, Zerbst spoke with Villavicencio and Gibson about the refinance in connection with the down payment for the apartments. [Tr. 317:17-22]. He also testified that Lanier knew Gibson was paying the down payment from borrowed money. [Tr. 349:19 – 350:2].

Ultimately, however, the important fact that Ameris fails to mention is that Gibson personally guaranteed the loan by 3205 Palm Boulevard LLC, paid back interest on a loan associated with the property, and ultimately lost the encumbered property as a result of the foreclosure. [Tr. 81:11 – 18, Pl. Ex. 2]. Additionally, Gibson had a 50% interest in 3205 Palm Boulevard LLC. [Tr. 192:11-13]. Encumbering that property, a half interest of which was an asset of Gibson, diminished Gibson's resources. It made her more vulnerable as it weakened her ability to leverage her assets to meet obligations on the apartment complex (as she had done by using $75,000 in cash as discussed infra.). And thus to fully unwind the apartment transaction and "restore her to the same position" Gibson must be afforded an award that replaces the $700,000 down payment and interest accrued thereon ($23,625) regardless of the intermediary LLC involvement.

B. Gibson's infusion of personal funds into the project is appropriate for inclusion in the award of actual damages.

Ameris challenges inclusion of an award of $75,000 because "there is nothing in the record" that constituted a guarantee to Gibson that her personal funds would not be necessary on the transaction. [App.Br. p. 43].

Gibson testified that she used $75,000 in personal funds from her savings account as an infusion of cash into the struggling project since rental income was insufficient. [Tr. 94:16-25]. Ameris notes Gibson failed to introduce bank records or cancelled checks to

support her testimony. [App.Br. p. 43, footnote 13]. That is irrelevant because Gibson introduced tax documents that supported this testimony. [Pl. Ex. 8] Further, no law was cited that would require anything other than testimony to be sufficient evidence to justify an award. That is especially true since the Master noted in the final order, specifically about this claimed infusion of cash, that

> In observing Ms. Gibson, this Court was impressed with her sincerity, her demeanor and the manner in which she testified. Her credibility was not in doubt. This is sufficient evidence to entitle Ms. Gibson to recover the $75,000 of her personal funds that she contributed to try to keep the project alive.

[Order]

Ameris' agents represented to Gibson that the construction loan alone would suffice for the apartment renovations. [Tr. 124:15 – 125:6; Tr. 141-143:1] But for her being stuck with a floundering transaction despite her best efforts, Gibson would never have had to spend that $75,000. The failures by Ameris and its agents that pushed Gibson into this transaction are thoroughly discussed within the breach of fiduciary portion supra. Accordingly, to "restore her to the same position" demands inclusion of this amount in full.

C. Ameris' argument as to the calculation method is conclusory and thus abandoned.

Ameris' final alleged error as to actual damages regards the manner in which the Master calculated the 20% discount for comparative fault and the $850,000 offset, claiming that those discounts should be taken prior to any calculation of punitive damages. Absolutely no statutory or case law is cited to support this contention; not even non-binding authority. It simply is a conclusory allegation that the calculation should have been done in an alternative manner preferred by Ameris. Interestingly, this Court does not yet need

to answer the question whether comparative negligence should be used to reduce punitive damages at all.

This Court has previously been clear, however, that "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review." Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003). Ameris here offers an alternative calculation method, but no authority or argument as to the necessity of its alternative, and thus this point is not preserved for review.

D. Punitive damages awarded are appropriate in all respects.

Ameris contends that the punitive damage award should be reversed for two reasons. The first is that Ameris contends the award of actual damages was improper. As established supra, however, the award and calculation thereof was without reversible error as alleged. Secondly, Ameris contends that the record does not support a finding that the bank acted willfully, wantonly or in reckless disregard of Gibson's rights. Such a record is required to justify a punitive damage award. Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). In doing so, Ameris has the audacity to claim good faith in all its interactions with Gibson, despite only citing self-serving loss mitigation efforts it undertook for its own benefit. [App.Br. p. 46].

The trial judge is vested with considerable discretion over the amount of a punitive damage award. Austin v. Specialty Transp. Services, 358 S.C. 298, 317, 594 S.E.2d 867 (Ct. App. 2004).The Master used the factors outlined in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) to aid in his consideration of the wrongful conduct by Ameris

and consideration of punitive damages award. Those factors are still relevant to the extent they add substance to other primary guideposts for punitive damage awards recognized by the South Carolina Supreme Court. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176, 185 (2009). Those three guideposts are the degree of reprehensibility of the conduct, ratio between actual/potential harm and amount of punitive damages, and awards in "comparable cases." Id.

1. Ameris' actions were reprehensible.

Three sub-factors related to the guidepost for reprehensibility were evidenced in the record. Specifically whether "the target had financial vulnerability" is relevant for consideration. *Id.* Ameris portrays Gibson has a pampered millionaire, but Gibson's testimony showed that the assets she did have (as opposed to the grossly inflated list created by Villavicencio and blindly accepted by Ameris in connection with the apartment loan [Def. Ex. 11]) were real estate holdings that provided no assistance when she was living without a refrigerator and eating canned tuna shortly after she had emerged from the hospital with health ailments that left her unable to visit her investment for months. [Tr. 108 – 110:9].

Secondly, a recognized aspect of reprehensibility is whether the conduct involved repeated actions or was isolated. Mitchell at 185. The factual record is replete with multiple conversations over a period of months whereby Gibson was pressured and manipulated into entering this transaction, all leveraged on the basis of fiduciary relationships that were long in their creation. Ameris benefitted from that long history, and it is rightly attributed to them despite their involvement only halfway through the apartment transaction consideration by Gibson.

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Thirdly, the harm was the result of deceit, as Gibson was repeatedly advised that the rental income would sustain all debts used to finance the transaction, when the truth was obvious and known to the seasoned banking and real estate professionals who were breaching their duties to Gibson for their own individual and collective financial interest.

2. The ratio of actual and potential harm suffered and punitive damages awarded is within acceptable due process limits.

"There are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." State Farm v. Campbell, 538 U.S. 408, 425-426 (2003). Further, "A court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff." Mitchell, at 187 (emphasis original).

There was ample evidence that Gibson mitigated her damages to a great extent. She infused $75,000 cash into the project from her savings. [Tr. 94:16-25] She lived on site in the office and managing affairs to cut out the expense of property management services. [Tr. 108 – 110:9] She later renegotiated loan terms to extend hope for a successful conclusion. Her indebtedness and exposure at the time she resolved the foreclosure action was between $3 million and $3.2 million. [Tr. 91:3-7]

The ratio between that $3.2 million figure and punitive award is thus only approximately 1:1, certainly well below thresholds repeatedly referenced in case law. State Farm v. Campbell, at 425. ("in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); See Mitchell at 188 (remitting punitive damage award to ratio of 9.2 to 1); James v. Horace

Mann Ins. Co., 371 S.C. 187, 196-97, 638 S.E.2d 667, 671-72 (2006), (upholding a 6.82 to 1 ratio); Mackela v. Bentley, 365 S.C. 44, 614 S.E.2d 648 (Ct.App. 2005) (upholding a 3.75 to 1 ratio); Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct.App.2004) (upholding a 2.54 to 1 ratio); Collins Entertainment Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003) (upholding a 9.96 to 1 ratio); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28 to 1 ratio).

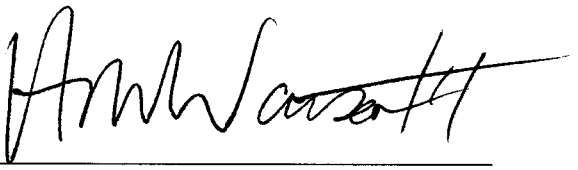
Ameris uses its unjustified calculation methods to contort the calculation of the ratio between Gibson's actual and the ultimate award figure for punitive damages by the trial court. [App.Br. p. 49]. It also ignores the potential damages as discussed supra. As stated, that alternative calculation is flawed and without authoritative support.

Ameris undertook its dealings with Gibson the same way it began its brief to this Court: "Gibson is a multimillionaire." During the transaction, that attitude flourished with reckless and cavalier behavior toward Ameris' obligations to Gibson. She was the perfect victim, and was so victimized. During this appeal, Ameris unavailingly attempts to paint this "multimillionaire" as the architect of her own misfortune.

CONCLUSION

Even now, Ameris argues to shift the blame for its own misconduct to others. Its own records establish its obligation to Gibson, as well as its internal acknowledgement and admission that it is at fault in causing her losses. Yet it looks to this Court to escape responsibility for the damage it caused.

The evidence in the record more than clearly supports the trial court's findings of fact and judgment against Ameris. In the whole of this record, large as it is, Ameris can point to nothing that establishes any honesty or good faith in its dealings with Gibson, while it overlooks the repeated, and acknowledged, incidents of calculated ignorance and greed which motivated its entirety of dealings with Gibson. The judgment of the trial court should be affirmed in its entirety.



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LINDA GIBSON *et al.*

February 9, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Appellate Case No. 2014-001487

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

Respondents

v.

Ameris Bank,

Appellant.

CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on February 9, 2015, I served a copy of the **Respondent's Initial Brief** and **Respondent's Designation of Matter** in the above-captioned case on the following individual by electronic mail and by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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February 9, 2015
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February 9, 2015

Via Hand-Delivery
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, South Carolina 29211

Re: *Linda Gibson v. Ameris Bank*
Appellate Case No: 2014-001487

Dear Ms. Kitchings:

Please find enclosed for filing an original and one (2) copies of the **Respondent's Initial Brief** in the above-referenced matter. Also enclosed are an original and one copy of **Respondent's Designation of Matter** pursuant to Rule 209, SCACR. After both have been filed, please return the clocked copies to our office in the enclosed, self-addressed, stamped envelope.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Harvey M. Watson III
harvey@desaballard.com

cc: *Via U.S. Mail and Email*
Robert E. Stepp, Esq.
Tina Cundari, Esq.