

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

The Honorable R. Knox McMahon

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Case No. 11-CP-29-00873

Appellate Case No. 2014-001505

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Wells Fargo Bank, N.A.,  
Successor by merger to Wachovia Bank, N.A., ..... Respondent,

v.

Ronald P. Pappas, a/k/a Ronald Peter Pappas, and  
Camine Pappas, ..... Appellants,

And

Ronald P. Pappas, a/k/a Ronald Peter Pappas, and  
Camine Pappas, ..... Cross-Plaintiffs,

v.

Wells Fargo Bank, N.A.,  
Successor by merger to Wachovia Bank, N.A., ..... Cross-Defendant.

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INITIAL REPLY BRIEF OF APPELLANTS

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MAR 09 2015

**SC Court of Appeals**

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CASES: SOUTH CAROLINA COURT OF APPEALS

*Robertson v. First Union Natl. Bank*, 350 S.C. 339, 565 S.E.2D 309 (Ct.App. 2002) . . . . .

## ARGUMENTS

### ROBERTSON IS NOT APPLICABLE PRECEDENT

The Respondent WELLS FARGO BANK has cited, in its argument, the case of *Robertson v. First Union Natl. Bank*, 350 S.C. 339, 565 S.E.2D 309 (Ct.App. 2002). In that case, Robertson had plead various causes of action against his bank similar to those advanced by the Appellants here. He sought additional discovery relating to an appraisal. This Court confirmed the grant of summary judgment below. *Robertson, supra*. This Court in *Robertson* characterized the state of discovery in *Robertson* as follows:

We agree with the trial court that any further depositions would not have assisted Appellants. Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case. [Citations omitted.]  
*Robertson v. First Union Natl. Bank*, 350 S.C. at 346-47, 565 S.E.2d at \_\_\_\_.

The state of discovery in *Robertson* cannot apply in the case at hand. In *Robertson*, the Defendants hoped to find unknown evidence. Here, the Appellants clearly plead a refusal to turn over the existing evidence in question. RECORD ON APPEAL, Amended Answer and Counterclaim, Para. 26., p.\_\_\_\_. The Appellants clearly requested the appraisal at the deposition of RONALD P. PAPPAS, and was assured by Respondent's Counsel it would be turned over "if we have it". RECORD ON APPEAL, Deposition of Pappas, p.167, l.24 – p.168, l.12, p.\_\_\_\_.

In *Robertson*, the Appellants wished to develop evidence. Here we have evidence (the 2009 appraisal), whose existence is not denied, which has not been turned over. No reason for that failure was asserted to the Court below and no reason for that failure is cited in the Respondent's Initial Brief.

### EFFECT OF MISSING EVIDENCE

The Respondent's argument is essentially that the appraisal, even if turned over, cannot affect the facts before the Court below and cannot give rise to defensive matter.<sup>1</sup>

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<sup>1</sup> The Respondent Bank argues the 2009 appraisal has no probative value. That fact cannot be determined in absence of the actual appraisal. The Appellants would also point out that, depending on the substance of that document, the fact of its suppression, of itself, furnishes a

Disclosure of the missing appraisal can only result in a few alternatives: each alternative mandates further discovery by the Appellants, and precludes summary judgment. Those alternatives are:

- 1) The appraisal does not exist.

In that event, the Appellants were charged for an appraisal that was not made. As set out in the Affidavit of Appellants' counsel below, the value of the mortgaged property in 2009 was less than that at the time of the original mortgage. RECORD ON APPEAL, Affidavit of counsel, p.\_\_\_\_. By being deprived of an accurate 2009 appraisal, the Appellants were not placed on notice of the lowered value, were thereby prevented from pursuing any legal remedies they possessed at that time, and continue to be prevented by the Bank's non-disclosure.

- 2) The Appraisal exists and shows the earlier, 2006 value for the real property.

In that event, despite a 2009 appraisal backing the Bank's refinance at the original price, the Appellants' expert is prepared to testify that the 2009 appraisal is incorrect. The Appellants should be allowed to inquire as to whether any pressure was brought to bear on the appraiser by the Bank or its agents. The Appellants would also have the right to inquire into the methods of the 2009 appraiser, and the motives of the Bank in denying it access to appraisal so that these matters can be explored.

- 3) The Appraisal exists and shows a later, lesser value for the real property.

In that event, the Bank was placed on notice of a lowered value in 2009 which information it has continued to refuse to the Appellants. This alternative provides the clearest basis for the existing claims of fraud, negligent misrepresentation and violation of the South Carolina Unfair and Deceptive Practices Act.

The Respondent Bank may wish to argue with the above alternatives and the analyses above. The fact remains that neither the Respondent Bank, nor this Court, can state what facts may develop until the document is produced and discovery is completed.

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basis for the Appellants' causes of action.

## IMPROPER ATTRIBUTION OF WAIVER BY THE APPELLANTS

The Respondent Bank argues that the Appellants clearly did not rely on the 2009 appraisal. That assertion is true only insofar as RONALD PAPPAS acknowledged the appraisal was never received. RECORD ON APPEAL, Deposition of Pappas, p.157, l.16 – p.158, l.5 and p.167, l.24 – p.168, l.14, p.\_\_\_\_. Again, however, Mr. PAPPAS (or any Bank customer) certainly had the right to assume the 2009 appraisal he paid for was accurate and competently completed. This is precisely the point in contest, and the same cannot be settled in the absence of the document in question.

The Respondent cannot claim waiver based upon a document that was requested and whose disclosure has been refused. As stated in *State EX REL. Birchmorh v. State Bd. Of Canvassers*, 78 S.C. 461, 59 S.E. 145 (1907):


By waiver is meant the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. Therefore, in order to constitute waiver, the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such right.

[*Id.*, 78 S.C. 461, 59 S.E. at 148.]

### CONCLUSION

For all those grounds stated herein, and in the Brief of the Appellants, the Order of the Trial Court granting summary judgment should be reversed.

Respectfully submitted,

  
\_\_\_\_\_  
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Attorney for Appellants

March 6, 2015

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LANCASTER COUNTY  
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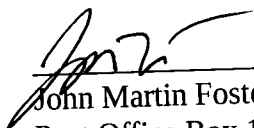
I certify that I have served the Initial Reply Brief of Appellants, dated March 6, 2015, on the following counsel of record:

S. Sterling Laney, III  
Hugh M. Claytor  
Womble Carlyle Sandridge & Rice, LLP  
550 South Main Street, Suite 400  
Greenville, SC 29601

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

March 6, 2015

  
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March 6, 2015

The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: Wells Fargo Bank, N.A., Respondent,  
v. Ronald P. Pappas and Camine Pappas, Appellants.

Appellate Case No. 2014-001505

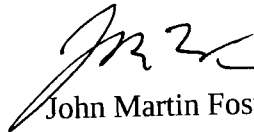
Dear Ms. Kitchings:

In accordance with Rule 208, S.C.A.C.R., enclosed herewith please find the original and one (1) copy of the Appellants' Initial Reply Brief, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondent with copies of the said Initial Reply Brief, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely yours,

  
John Martin Foster

jmf/  
enclosures

cc: Client File

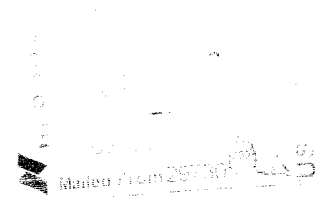
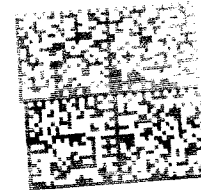
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