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.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

ARGUMENT

The master's order should be reversed. As a matter of law, the relationship between the parties is contractual in nature and governed by the loan documents. Ameris Bank did not misrepresent anything to the borrower, did not aid and abet any breach of fiduciary duty by the borrower's agent, and did not become a guarantor of the project's success. Respondents have failed to set forth any evidence to support the master's findings. This case presents nothing more than a commercial real estate investment that ultimately failed through no fault of the lender. Respondents are not entitled to any relief under any theory of law, and the master's order should be reversed.

1. Respondents' theory of the case is illogical.

Respondents attempt to justify the relief granted by the master by arguing that Ameris Bank deliberately and maliciously sought to inflict harm on an ignorant and unwary Linda Gibson. Such a premise is necessary to support the inferences that Respondents seek to draw from the facts and to excuse Respondents' own inattention to and responsibility for their business affairs. But Respondents' overarching theory that Ameris Bank "orchestrated and implemented Gibson's financial downfall," is illogical at best. [Br. p. 12.]

The notion that a bank would orchestrate and implement a customer's financial downfall while the bank is at the same time lending that customer $2.8 million does not make sense. It was in Ameris Bank's interest for the apartment complex project to succeed and for the loan to be repaid. It was not in the bank's best interest to make a loan on a project that it knew was overpriced and destined to fail, or to suffer a $1.8 million

loss, which is what occurred in this case when Gibson walked away from the project and her loan obligations.

It is therefore not surprising that Respondents' theory, in addition to being illogical, is also not supported by the evidence. Ameris Bank did not plot Gibson's financial downfall, nor did a financial downfall occur. Gibson invested in a real estate venture that failed for a variety of reasons unrelated to anything Ameris Bank did or failed to do. Although the results of the project are unfortunate for all who were involved, there is no legal or factual basis to require Ameris Bank to make Respondents whole or to be punished for its conduct.

2. The evidence does not support the existence of a fiduciary relationship.

This case should not be the first appellate court case in South Carolina to hold that a fiduciary relationship existed between a lender and a borrower given that Respondents have failed to identify evidence showing that the relationship between the parties was anything other than contractual in nature and governed by the loan documents.

First, Respondents do not cite any evidence to show that the real estate investment advice allegedly given to Respondents in this case was "part of the services offered by the bank," as required under *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986). Without evidence showing that Ameris Bank was in the business of offering services in the area of real estate investments, Respondents cannot as a matter of law establish that a fiduciary relationship existed.

Second, Respondents do not cite any evidence showing that Linda Gibson had a foundation for believing Ameris Bank was acting on her behalf rather than on behalf of the bank, as required under *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App.

2004). On the contrary, the loan documents Gibson signed demonstrate that the relationship between the parties was that of lender and borrower. [Def.'s Exs. 25, 29, 30, 31.] Gibson herself testified that she did not believe the loan officer, Karl Zerbst, had put aside the interests of the bank, and was acting entirely on her behalf, without regard to the interests of the bank. [Tr. 225:9 – 226:2.]

Third, Respondents fail to show that Ameris Bank was aware of any special trust being reposed in it. According to the loan documents, Ameris Bank did not assume any obligations above and beyond those of an ordinary commercial lender in a construction loan. The loan documents provided multiple rights and remedies in favor of the bank that could be exercised against the borrowers. The existence of these rights and remedies, which were expressly recognized and enforced by the master in the foreclosure phase of this case, is inimical to the existence of a fiduciary relationship in which Ameris Bank was required to act solely in the interest of the borrower.

Fourth, Respondents cannot show that Karl Zerbst was acting as an agent of Ameris Bank prior to the loan closing. During the entire period of time that Gibson says she met with or talked to Zerbst about whether she should purchase the apartments, Zerbst either worked for First Reliance Bank or he was unemployed. [Tr. 118:9-11; 137:13-16; 138:3-5.] Zerbst did not become an employee of Ameris Bank until January 11, 2008. [Def.'s Ex. 40; Tr. 327:16 – 328:17.] There is no evidence in the record showing that Ameris Bank did anything prior to the loan closing to represent to Gibson that Zerbst was its agent.

As a matter of law, an agency relationship cannot be created by the conduct of the agent alone. *See Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App.

2005) ("An agency relationship may not be established solely by the declarations and conduct of an alleged agent."); *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 641-44, 598 S.E.2d 717, 721-22 (Ct. App. 2004) (holding that there is no relationship as a matter of law when the principal has not made any representations to a third party concerning whether someone is an agent). This is fatal to Respondents' argument that Ameris Bank is liable for statements made by Zerbst prior to the loan closing. Even if statements made by Zerbst prior to the loan closing could be attributed to Ameris Bank, the construction loan agreement Gibson signed states: "This Agreement and the other Loan Documents are the complete and final expression of the understanding between [the parties]." [Def.'s Ex. 31, ¶ 20.]

Finally, the evidence is substantively insufficient to create a fiduciary relationship regardless of these other issues. The fact that Zerbst "structured" [1] the loan package while employed at another bank, transferred the loan package from one bank to another, and had a 30-minute conversation with Gibson by phone about the purchase of the apartment complex does not rise to the level of creating a fiduciary relationship. It is the job of loan officers to "structure" loans, to generate business, and to talk to their customers about their transactions. There is nothing about any of this conduct that

[1] Respondents and the master never explain what is meant by the statement that Zerbst "structured" the loan for Respondents. There is no evidence, however, that Ameris Bank did anything other offer to make the loan on certain terms, which were then accepted by the borrower. In this sense, every bank "structures" every loan it makes. This cannot be the basis for a finding that the bank undertook fiduciary duties by offering to make a loan on specified terms.

supports a finding that Zerbst, much less Ameris Bank, thereby knowingly undertook fiduciary duties to the borrower.[2]

3. Gibson is not ignorant and unwary.

Respondents devote a significant portion of their brief characterizing Linda Gibson as a helpless, unsophisticated business woman. They describe Gibson as "the consummate victim." [Br. p. 1.] This conclusion must be evaluated in light of the facts. Gibson is not ignorant or unwary, and is not relieved of her legal responsibility to read and understand the loan documents governing her relationship with the bank and to protect her own interests in the transaction.

"As early as 1924, [the Supreme Court has] recognized that every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986). *See also Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 333, 755 S.E.2d 437, 443 (2014) (stating that "when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents"). "One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it." *Burwell*, 288 S.C. at 39, 340 S.E.2d at 789. "This rule is subject to the exception that if the party is ignorant and unwary, his failure to read the document may be excused." *Id.* at 40, 340 S.E.2d at 789. "This exception is, however, very strictly interpreted by our

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[2] The absence of evidence of a fiduciary relationship cannot be overcome by reference to the demeanor or credibility of the witnesses. Even if everything Gibson said were true, the evidence presented at trial still does not support a finding that Ameris Bank owed the borrower fiduciary duties as a matter of law. The parties' relationship was contractual in nature and governed by the loan documents.

Court." *Id.* "In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered." *Id.* at 40, 340 S.E.2d at 789-90.

In one case, this Court found that an individual who had a high school education and fifteen years' experience operating his own business was not excused from his duty to read the contents of an insurance policy he signed. *Doub v. Weatherly-Breeland Ins. Agency,* 268 S.C. 319, 233 S.E.2d 111 (1977). In another case, the Court determined that a sharecropper with no formal education and who could not read or write was ignorant and unwary under the law. *Austin v. Indep. Life & Accident Ins. Co.*, 296 S.C. 156, 370 S.E.2d 918 (Ct. App. 1988).

Here, the borrower is an LLC, and Gibson, who signed the loan documents on behalf of the borrower, is not ignorant and unwary. Gibson attended two years of college. [Tr. 159:15-17.] She has formed and been a member of multiple LLCs. [Def.'s Exs. 109, 110, 111, 112, 113.] She has served as Trustee of the Paul William Gibson Family Trust since 2003, and has successfully managed the affairs of the trust since that time. [Tr. 166:1–11.] She purchased two multimillion dollar commercial properties within the span of two years. [Tr. 159:18–160:20.]

After terminating Villavicencio, she took over the management of the shopping center, collecting rents, paying bills, arranging for maintenance, and renewing leases as necessary. [Tr. 171:25-172:11.] In 2009, the shopping center generated $192,000 in rents. [Def.'s Ex. 98.] Later, she took over the management and renovations of the 48-unit apartment complex. [Tr. 174:16 - 177:19.] She hired a new contractor, oversaw the construction, and collected rents. [Tr. 172:3 – 11; 177:12-19.] She negotiated with

contractors and subcontractors. [Tr. 176:11-15.] She obtained draws from the bank and disbursed in excess of $200,000 to contractors and others. [Tr. 175:5–10; 176:4-6.]

Moreover, Gibson has managed her personal wealth. In 2009, she received rental income from various real estate holdings of $478,775. [Tr. 168:8-22; Def.'s Ex. 98.] In addition, Gibson testified at trial that she had a 50-year lease on 40 acres of land for which she receives $15,000 per month.[3] [Tr. 88:18 – 89:11.]

Because she is not ignorant and unwary, Gibson is bound by the loan documents she signed, which do not support a finding of a fiduciary relationship.

4. Ameris Bank did not fail to disclose information to Respondents.

Even if the Court were to find that a fiduciary relationship existed between the parties, the record does not support a finding that Ameris Bank breached any fiduciary duty owed to Respondents.

While broad, the duties of a fiduciary are not unlimited. A fiduciary must disclose material facts known to the fiduciary that may affect its customer's interest. *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014); *Burwell v. S.C. Nat'l Bank,* 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986); *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003).

First, there is no evidence that Ameris Bank had any information about the value of the apartment complex that it did not share with Gibson. Ameris Bank and Gibson both had the same appraisal dated September 12, 2007, showing the as-is value of the apartment complex as $2,800,000, and the as-renovated value as $3,700,000. [Def.'s Ex.

[3] This income appears nowhere on Gibson's personal financial statement, perhaps because it goes into the trust she manages.

13.] Ameris Bank did not have any other information about the project's value or its projected cash flow. The witness who testified that the price paid for the apartment complex was "incredible" and "truly ridiculous" and that "there is NO WAY that this property, in this location, in it's [sic] condition at the time was worth anything near the price paid," was not Ameris Bank's expert witness as Respondents state in their brief. Rather, he was *Respondents'* expert witness, Geoffrey Southard, and he reached this conclusion in an email he wrote *two years after* Gibson purchased the apartment complex. [Pl.'s Ex. 37; Tr. 524:15 – 526:7.] This is not information that was known to Ameris Bank, or to anyone, at the time of the transaction. Nor did Respondents introduce any evidence at trial to show that reliance on the appraisal at the time of the transaction was unreasonable.

Second, Ameris Bank's expert witness, Bill Barksdale, did not testify that Ameris Bank should have told Gibson the revenues from the apartment complex would not cover the debt. [Br. p. 17.] This argument is specious on several levels. Barksdale testified in response to a hypothetical question that banks generally have a duty to tell customers when a project will not cover the debt. Barksdale did *not* testify that Ameris Bank should have told Linda Gibson that the project *in this case* would not cover the debt. [Tr. 612:9 – 613:3.] Nor is there any evidence that the rents would not cover the debt service. The appraisal done at the time of the transaction in fact showed that the rents would cover the debt service. [Def.'s Ex. 13.] The rents did not cover the debt service for this project during the construction phase because Villavicencio took more than one building out of service at a time, which caused the rents to be less than had been forecast. [Tr. 106:8-107:6.]

Third, there was no evidence in the record showing that Ameris Bank was aware of risks that were unknown to Gibson. The transaction was not 100% financed as Respondents repeatedly state.[4] Respondents acknowledge the $700,000 injection of cash into the purchase and even seek to recover the "down payment" of $700,000. In any event, Gibson was certainly aware of where the money was coming from to purchase the apartments, and did not need Ameris Bank to tell her what she already knew.

Given the lack of evidence showing that Ameris Bank failed to disclose material facts to Respondents, the breach of fiduciary duty claim fails as a matter of law.

5. Ameris Bank did not breach a duty to supervise the construction.

There is no evidence in the record that Ameris Bank assumed or breached any fiduciary (or other) duties with regard to the management of the construction project and the disbursement of the loan proceeds. The loan documents, which provide the only evidence of the obligations of the parties, do not impose any duties on Ameris Bank beyond those of an ordinary lender. As stated in the documents, those duties are created for the benefit of the bank, and do not run to the borrower in any event. Nor were they violated by Ameris Bank.

The exhibits that Respondents cite related to disbursement of the loan proceeds do not support Respondents' arguments. For example, Respondents' argument that Ameris Bank disbursed large sums of money to contractors or other vendors without Gibson's knowledge is not supported by Defendant's Exhibit 42. [Br. p. 19.] Exhibit 42 is copies of checks and transfer requests.

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[4] Respondents suggest without explanation that if all of the money for the project were borrowed, the relationship between the parties is somehow altered and the rights of the lender are somehow compromised. There is no basis for such a conclusion.

Similarly, Plaintiff's Exhibits 22, 23, and 30 do not support the statement that "Gibson was never made aware of the advances paid by Ameris, nor did Ameris even request her approval before paying the draws." [Br. p. 19.] Exhibit 22 is an email from Ameris Bank to Gibson's daughter in response to a request for a list of transactions. Exhibit 23 is a handwritten memo from Gibson to the bank stating that no further distributions are to be made without written permission from her. Exhibit 30 is an internal memo at Ameris Bank disciplining Benjie Lanier for "several decisions by Benjie that have put the bank in jeopardy." But as established at trial, Gibson expressly authorized Lanier to deal directly with her agent and the project manager, Villavicencio, during the initial months of the project, and all disbursements made during that time were supported by invoices and made payable to a vendor. [Tr. 415:9-22; 436:20 – 437:9; 444:14-16; Def.'s Exs. 41, 42.]

Respondents argue that a lender may have an independent duty to protect a borrower by virtue of the relationship between the parties, citing *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984). In *Roundtree Villas*, the court imposed an independent common law duty of due care (not a fiduciary duty) on the lender because the lender "took over the project[,] undertook to market the units through a corporation it had created[, and] undertook to repair defects which existed to promote sales." *Id.* at 423, 321 S.E.2d at 51. In the present case, however, there is no evidence that Ameris Bank endeavored to take over the apartment complex project or engage in conduct approaching a similar level of involvement as the lender in *Roundtree Villas*. The documents signed by the parties control, and there is nothing in the documents creating an independent duty on the part of Ameris Bank to protect the borrower.

Respondents cite to *Doe ex rel. v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011), for the proposition that "the standard of care may be established and defined by a defendant's own policies and guidelines." [Br. p. 21]. But the *Doe* opinion explains that internal policies are relevant to the standard of care only if the existence of a duty has already been established. *Id.* at 247, 711 S.E.2d at 912. Because no such duty has been independently established in this case, Ameris Bank's internal policies are irrelevant.

Further, the suggestion that the loan officer Benjie Lanier misrepresented the condition of the property during the construction phase is unfounded. Lanier had no reason to mislead Gibson about the condition of the property. The fact that Gibson was "immediately able to recognize issues during her first visit to the project," does not mean that Lanier misled her, although it does establish that Gibson was much more sophisticated in construction and development issues than Respondents otherwise admit. There is nothing in the record to support a finding that Ameris Bank undertook the responsibility "to relay necessary information to Gibson," nor is it clear what Respondents deem to be "necessary information." [Br. p. 20.] Moreover, as Respondents admit in their brief, Gibson's financial advisor and real estate agent, Rolando Villavicencio, 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." [Br. p. 4; Ct. Ex. 3, Gibson Dep. 51:10-25.] He was the one who was responsible for relaying necessary information to Gibson.

Finally, the fact that Zerbst recommended his personal lawyer to Gibson when she was contemplating suing Villavicencio is not evidence of a breach of a fiduciary duty on the part of Ameris Bank.

Because the record in this case does not support a finding that a fiduciary relationship existed between the parties, this Court should reverse the master's order.

6. The evidence does not establish negligent misrepresentation.

Respondents do not cite evidence to support the cause of action for negligent misrepresentation.

First, Ameris Bank did not know that the apartment complex was overpriced and fail to share that information with Gibson. As stated earlier, both parties had the same appraisal. [Def.'s Ex. 13.] Ameris Bank had no information about the value of the property or the projected cash flow that it did not convey to Gibson. Further, Villavicencio represented to Gibson that the fair market value of the apartment complex was $2.8 million. [Br. p. 4; Tr. 183:1-17; 185:11 -186:16; 188:22 – 189:9.]

Second, Ameris Bank did not know the rents would not cover the debt. Again, the appraisal indicated that they would, and there was no other information or business records suggesting otherwise. Neither Respondents nor the master cite any so-called business records to support this finding.

Third, even Zerbst (who was not Ameris Bank's agent at the time) did not know the apartment complex was not a sound investment. Zerbst did not have any information regarding Gibson's finances or the rent projections that indicated the project would fail. Respondents cite nothing to support these statements. There is no evidence in the record to support a finding that Ameris Bank had any information or knew anything about the

purchase price or the project as an investment that Gibson did not already know. In any event, the statement that something is a good investment is an opinion and not actionable. *See AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992) ("A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort.").

Fourth, the fact that the bank may not have approved the loan had it known that the $700,000 equity contribution came from the refinance of another property is not a misstatement of fact. There is no duty on the part of a bank to deny a loan request, and Respondents cannot point to any authority for such a proposition. The denial of the loan would have been for the protection of the bank and had nothing to do with whether the apartments were a good investment, and whether the rents would cover the debt. Further, Gibson was fully aware of the source of the $700,000, and the obligations to 3205 Palm Boulevard LLC, having completed the refinance on August 28, 2007, two months before submitting the loan application to Ameris Bank. [Def.'s Exs. 10, 25]

Fifth, the statement that the rents would cover the debt are not actionable because they were projections based on an existing appraisal. The statement does not become actionable merely because it is a statement made about future events for the purpose of inducing another to act, as argued in Respondents' brief. Instead, there must first be a false representation, and the false representation "must be predicated upon misstatements of fact rather than upon an expression of opinion, an expression of intention or an expression of confidence that a bargain will be satisfactory." *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (Ct. App. 1995). Further, "[t]he distinction between a matter of fact and a matter of opinion is generally

characterized by what is susceptible of exact knowledge when the statement is made." *Id.* at 526-27, 455 S.E.2d at 187.

Sixth, there is no evidence that Zerbst "repeatedly fed" Gibson misrepresentations related to the apartment complex. This is yet another statement in Respondents' brief that is made without any citations to the record.

Seventh, Gibson did not have the right to rely on any alleged misstatements because there was no fiduciary relationship between the parties, and this was an arm's length transaction between mature, educated people. *See Florentine Corp. Inc. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). The law does not require Gibson to have the same experience as a loan officer with twenty-five years' experience to be considered a mature, educated person. Gibson's experience in business and the management of her properties and wealth qualify her as a mature, educated person.

The master apparently agreed, finding that Gibson was 20% at fault for the harm alleged in this case. The master found that Gibson should not have just relied on the advice of Zerbst, Lanier, or Villavicencio; that she could have obtained her own appraisal but did not; and that prior to purchasing the apartments she could have independently determined whether the rents would cover the debt to Ameris Bank and both the loan on her beach house. [Order p. 53.]

Eighth, Ameris Bank did not argue that Gibson was "locked in" to buying the apartments in May 2007. Ameris Bank cited the purchase agreement as evidence that Gibson decided to purchase the apartments and agreed to the purchase price long before the phone call with Karl Zerbst in October 2007. Moreover, by the time she spoke to Zerbst, Gibson had caused 3205 Palm Boulevard LLC to undergo a refinance, signed a

contract with an architectural firm, received a proposal from a contractor, and applied for financing through First Reliance Bank. [Def.'s Exs. 10, 14, 15, 16.]

There are any number of reasons why the project did not result in the returns that Gibson expected, none of which was due to a misrepresentation by the bank. Because Respondents are not able to identify a single false statement made by Ameris Bank (or Zerbst), and Gibson did not have the right to rely, the master's ruling should be reversed.

7. Ameris Bank did not aid and abet a breach of fiduciary duty.

Contrary to what Respondents argue in their brief, Ameris Bank does not contend Villavicencio never breached any fiduciary duties owed to Gibson. Rather, Ameris Bank contends that Respondents failed to present evidence at trial showing that Villavicencio breached fiduciary duties with respect to the apartment complex and that the bank knowingly aided and abetted the breach.

The conclusion made by Ameris Bank's expert witness, Bill Barksdale, that Villavicencio was a "con artist" was made after this case was filed, well after the close of the bank's dealings with Gibson, with the benefit of hindsight and a review of the entire file. It is not evidence that Ameris Bank knew at the time that Villavicencio breached any fiduciary duties to Gibson.

Similarly, the fact that Ameris Bank dealt with Villavicencio is not evidence of knowingly aiding and abetting a breach of fiduciary duty. Gibson and Villavicencio had done business together since 2005 when Gibson purchased the shopping center in Moncks Corner and hired Villavicencio to manage the property for a ten-year term. [Def.'s Ex. 4; Tr. 179:1-7.] Gibson hired Villavicencio as the exclusive agent with respect to the purchase of the apartment complex, and gave him authority to purchase

supplies and make repairs up to $100,000 per month without Gibson's express written consent. [Def.'s Exs. 7, 39; Tr. 232:9-13.] Gibson testified she relied on Villavicencio heavily and regarded him as her real estate and financial advisor. [Tr. 185:25 – 186:16.] After the closing, Gibson expressly authorized the bank to deal with Villavicencio in her absence. [Tr. 436:20 – 437:9.]

Rather than cite evidence to support a finding that Ameris Bank knowingly aided and abetted a breach of fiduciary duty, Respondents argue that Zerbst and Villavicencio worked "in combination" to convince [Gibson] the apartment complex was a good investment for her. But mere allegations of working "in combination" are not evidence of knowingly participating in a breach, if convincing someone to buy something is even a breach.

To support this argument, Respondents state that a defendant can be liable for aiding and abetting a breach of fiduciary duty when he "gives substantial assistance to the other in accomplishing tortious results and his own conduct, separately considered, constitutes a breach of duty to the third person." [Br. p. 31.] This is an incorrect statement of the law. The language comes from Section 876 of the Second Restatement of Torts, which deals with tort liability arising from parties acting in concert. *See* Restatement (Second) of Torts § 876. It does not concern the tort of aiding and abetting the breach of fiduciary duty.

More importantly, in *Future Group, II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996), where Respondents suggest our Supreme Court adopted Section 876's provisions, the court cites to subsection (b) only, which states that a defendant is subject to liability where he "knows that the other's conduct constitutes a breach of duty and gives

substantial assistance or encouragement to the other so to conduct himself." Restatement (Second) of Torts § 876(b) (1979). This is consistent with South Carolina law, which provides that the gravamen of such claims "is the defendant's *knowing* participation in the fiduciary's breach." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E2.d 444, 448 (Ct. App. 2008) (emphasis added).

Accordingly, Respondents cannot rely on their other allegations of tortious conduct by Ameris Bank to establish a claim for aiding and abetting the breach of fiduciary duty. Instead, they must demonstrate that the bank was aware of Villavicencio's breaches of fiduciary duties at the time the breaches were taking place and that the bank knowingly participated in these breaches.[5] Because Respondents cannot do this, the claim fails as a matter of law.

8. Actual damages are improperly calculated.

Respondents' arguments related to the actual damages award are flawed in several respects. First, the fact that Gibson personally guaranteed a commercial note dated August 28, 2007, from 3205 Palm Boulevard LLC to First Citizens Bank for $1,500,000 [Pl.'s Ex. 2] does not entitle her to recover the $700,000 down payment made to purchase the apartment complex. Respondents are not entitled to recover money that they did not themselves contribute. Had Gibson wanted to recover that money, she should have made 3205 Palm Boulevard a party to this case. Further, Ameris Bank did not cause Gibson to

[5] In *Future Group, II*, the Supreme Court reversed the verdict on the cause of action for aiding and abetting breach of fiduciary duty, finding that there was no evidence to support a finding that the defendant bank had actual knowledge of the breach of fiduciary duty by the third party. 324 S.C. at 99, 478 S.E.2d at 50.

refinance the property. Gibson caused the refinance to take place on August 28 2007, two months before Gibson ever dealt with Ameris Bank.

Second, the $23,625 in interest that accrued on a $450,000 loan that 3205 Palm Boulevard LLC obtained to avoid a deficiency judgment after Gibson allowed 3205 Palm Boulevard to go into foreclosure, is likewise not attributable to the conduct of Ameris Bank. The interest did not, as Respondents state in their brief, accrue on the $700,000 down payment. The interest had no connection to the $700,000 down payment or to the loan obtained from Ameris Bank to purchase the apartment complex. The interest accrued on a $450,000 loan that Gibson obtained from First Citizens *three years after* she purchased the apartment complex to avoid a deficiency judgment after Gibson allowed 3205 Palm Boulevard to go into foreclosure. [Pl.'s Ex. 2.]

Ameris Bank should not be responsible for reimbursing an entity that is not a party to this case for interest on a loan that the Ameris Bank did not cause the entity to obtain. 3205 Palm Boulevard did not go into foreclosure because of the commercial loan made by Ameris Bank. 3205 Palm Boulevard went into foreclosure because Gibson allowed it to. Gibson testified that she chose not to sell any of her other assets to create the liquidity necessary to continue making the mortgage payments on 3205 Palm Boulevard. [Tr. 234:21 – 235:16.]

Third, as for the $75,000 that Gibson allegedly put into the project, the tax documents Respondents cite do not support a finding that the money was paid. [Pl. Ex. 8.] Gibson testified that the money came out of her savings account and yet she did not introduce any bank records to support this testimony. [Tr. 94:24-25.]

Moreover, Respondents contend that the money was put into the project because "rental income was insufficient." [Br p. 35.] The insufficiency of rental income could have been caused by a variety of factors, none of which has been attributed to Ameris Bank. Nor did Ameris Bank tell Gibson "that the construction loan alone would suffice for the apartment renovations," as Respondents state on page 36 of their brief. The portions of the transcript that Respondents cite (Tr. 124:15 – 125:6; 141: - 143:3) do not support this statement.

Finally, Ameris Bank did not, as Respondents argue, abandon any issue related to the calculation of actual damages. Ameris Bank thoroughly addressed and provided case law supporting the proper methodology for calculating damages in this case. Ameris Bank's argument that the master erred in applying the 20% comparative fault and the $850,000 setoff to the total award (both actual and punitive damages) is supported by the case law cited in Ameris Bank's brief discussing the purpose behind actual and punitive damages.

Because of the compensatory nature of actual damages, it necessarily follows that any fault attributed to the party seeking to recover actual damages must be deducted from the actual damages award only, and not the actual and punitive damages award combined, as the master did in this case. *See Clark v. Cantrell*, 339 S.C. 369, 381, 529 S.E.2d 528, 535 (2000) (stating that "punitive damages are not reduced by the proportion of the plaintiff's negligence under comparative negligence"). In other words, parties should not be compensated for harm that they themselves cause.

The same logic applies to the setoff. If the purpose of actual damages is to compensate, then the $850,000 that Respondents received from the settlement of the

lawsuit against Villavicencio compensated Respondents for the harm alleged here. Otherwise, Respondents would recover for the same harm twice. By deducting the setoff from the total award, the master misconstrued the purpose of compensatory damages to compensate, and misconstrued the purpose of setoff law to avoid double recovery, resulting in a windfall to Respondents. *See Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 747 (1975), overruled on other grounds *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (explaining that the rationale for providing this credit to a nonsettling defendant is to prevent a double recovery to the plaintiff).

To the extent that Respondents are now arguing the master erred in applying the setoff at all (see footnote 4, page 31 of Respondents' brief), that issue is not properly before the Court. Respondents did not file an appeal challenging the master's application of the setoff, and therefore the master's decision to apply the setoff is the law of the case. *See Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 332, 759 S.E.2d 724, 726 n. 3 (2014) (noting that an unappealed ruling becomes the law of the case). In any event, the master correctly determined that the injury for which Gibson sought to recover in this case was identical to the injury for which she sought to recover in the lawsuit against Villavicencio. *See Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (2012) ("When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law," and "[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off"); S.C. Code Ann. § 15-38-50 (2005).

9. There is no basis for an award of punitive damages.

Respondents fail to cite any evidence to support an award of punitive damages. Respondents completely ignore whether punitive damages are warranted on the facts in

this record, and proceed straight into the analysis of whether the *amount* of the award was justified. Because Respondents completely overlook and do not cite a single fact to support the awarding of punitive damages in the first instance, the Court may treat this failure to respond as a concession that the master's decision to award punitive damages is incorrect. *See First Union Nat'l Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997) (noting that "failure to respond to an argument in a brief could amount to a concession that the trial court ruled incorrectly"). As demonstrated in Ameris Bank's initial brief, there is no evidence to support an award of punitive damages.

As to the amount of the award, Respondents have failed to show that it was justified. First, Gibson was not financially vulnerable. As of October 5, 2009, two years after purchasing the apartment complex, Gibson had a net worth of $18,341,915, with $24,121,275 in assets. [Tr. 170:19-22; Def.'s Ex. 98.] Within two years she purchased two multimillion dollar commercial properties. She controlled multiple business entities and owned real property generating $478,775 in rental income in 2009. [Tr. 168:8-22; Def.'s Ex. 98.] The fact that Gibson found herself living without a refrigerator eating canned tuna in 2008 was a choice.

Second, Respondents do not cite any evidence to support the argument that Ameris Bank's conduct was repeated as opposed to isolated in nature. Literally, there is not a single reference to the record in this portion of Respondents' brief. Respondents cite nothing to support the argument that "[t]he factual record is replete with multiple conversations over a period of months whereby Gibson was pressured and manipulated into entering into this transaction." [Br. at 38.] The evidence simply does not exist.

Further, Respondents fail to explain how any of this "benefitted" Ameris Bank. To the contrary, the record reflects that Ameris Bank lost $1.8 million on this transaction. [Tr. 648:19-22.]

Moreover, Respondents cite nothing to support the argument that the harm allegedly suffered by Gibson was "the result of deceit." There is absolutely no evidence in the record that Ameris Bank was aware the rents would not cover the debt. In addition, Ameris Bank was not the only bank that approved the loan. The loan was also approved by First Reliance Bank. [Def.'s Ex. 22.] Under Respondents' theory, First Reliance Bank is also guilty of deceit because it also approved the loan.

Finally, Respondents' argument that the ratio of actual to punitive damages is 1:1 is incorrect. This argument is based on the *potential* damages to Gibson, which Respondents argue was between $3 and $3.2 million, representing Gibson's "indebtedness and exposure at the time she resolved the foreclosure action." [Br. p. 39.] But these potential damages were never realized. Accordingly, it is wrong to use potential damages in evaluating the ratio between punitive and actual damages. *See Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 591, 686 S.E.2d 176, 187 (2009) ("[I]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded . . . ." (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)).

Here, Gibson walked away from the foreclosure without any damages whatsoever. As part of the settlement of the foreclosure action, Respondents executed deeds in lieu of foreclosure conveying the apartment complex and other real property that served as collateral for the loan to Galt Valley. [Def.'s Ex. 107.] In exchange, the notes

were deemed satisfied, the loan documents canceled, and all litigation pending between Respondents and Galt Valley was dismissed. *Id.*

Because Respondents do not cite to any evidence supporting the awarding of punitive damages in the first instance, and do not explain how an award that is 48 times the amount of actual damages, if any, is justified, the punitive damages award should be reversed.

CONCLUSION

For these reasons and those set forth in Ameris Bank's opening brief, the master's order should be reversed and judgment entered in favor of Ameris Bank.

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March 6, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKERLY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Case No.: 2010-CP-08-2134

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

Respondents,

v.

Ameris Bank, Appellant.

PROOF OF SERVICE

I certify that I have caused the Initial Reply Brief of Appellant and Supplemental Designation of Matter to be served on Respondents by U.S. Mail and electronic mail on March 6, 2015, addressed to their attorney of record, Desa Ballard, Law Offices of Desa Ballard, P.O. Box 6338, West Columbia, South Carolina 29171 and at desab@desaballard.com.

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