THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Op. No. 2014-UP-306 (S.C. Ct. App. filed July 30, 2014)

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras, Daniel Simpson, Above All Services, Inc., Carter Lumber Company, Efficient Painting Contractors, Inc., Creative Concepts, and Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the ..... Petitioner.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Did the Court of Appeals err when it based its decision on a "sufficiency of the evidence" argument that was not presented below and that exceeds the scope of the summary judgment record?

II. Did the Court of Appeals err in failing to hold that the circuit court's reasoning was incorrect and that in accordance with Rule 1008 of the South Carolina Rules of Evidence, a dispute about whether a writing exists raises a question of fact for the fact-finder?

III. Did the Court of Appeals err when it refused to acknowledge the petitioner's argument that the circuit court's decision on the petitioner's request for sanctions was based on circular analysis which constitutes an error of law?

STATEMENT OF THE CASE

This case involves section 37-10-107 of the South Carolina Code, which is sometimes called the Lender Statute of Frauds. The statute provides that in order to maintain a lawsuit based on someone's promise to lend money, the complaining party must have received a writing that includes the material terms of the loan agreement.

Here, the complaining party claims to have received that sort of writing but to have then given custody of that writing to the lender, who allegedly destroyed it.

The circuit court granted summary judgment to the lender and held that a party cannot use oral testimony to satisfy the Lender Statute of Frauds.

The Court of Appeals reasoned the case differently and held that *if* oral testimony *is* admissible, the petitioner failed to prove its claim with clear and convincing evidence.

This case began in April of 2009 as an action to foreclose on four mortgages. American Community Bank was the original plaintiff. Yadkin Valley Bank & Trust purchased this bank and was eventually substituted as the plaintiff.

The principal defendants in the case were Oaktree Homes, which was a residential homebuilding company, and Dawne and Tom Ras, who were Oaktree's principals. Oaktree was the borrower on the loans in question. The other defendants were included in the suit because they had judgments or liens against some of the properties.

The abbreviated version of this dispute is that Oaktree did not contest the foreclosures, but it brought several counterclaims alleging that the bank had committed to participate in *another* loan — a rather large development loan — only to impermissibly back out of that loan moments before the closing. Oaktree said this led to the loss of roughly $2.5 million in profit and that it ultimately caused Oaktree's business to fail.

The principal issue that the parties litigated to the circuit court involved the Lender Statute of Frauds.

The bank sought summary judgment on multiple grounds, one of which was that the Lender Statute of Frauds required Oaktree to physically produce a written loan commitment and that under the best evidence rule, any oral testimony about the writing's existence was inadmissible. See, e.g. (App.pp.209-211) (from the bank's summary judgment memo).

Oaktree opposed summary judgment with two main contentions.

First, Oaktree disagreed that the statute required the written agreement to be produced. Tom and Dawne Ras testified that Tom and a vice president of the bank had signed a written loan commitment. They further testified that although this person had taken custody of the document after the parties executed it, the parties understood that the loan commitment was firm and binding. (App.pp.418-420; 430-31). Oaktree argued that this satisfied the Lender Statute of Frauds — the statute speaks of a signed contract being

"received" by the borrower. See (App.pp.244-45) (from Oaktree's memo) and (App.pp.347-48) (from the hearing transcript). The bank denied that this signed writing ever existed.

Oaktree's other argument against summary judgment relied on sanctions. Oaktree said the bank had failed to preserve discoverable information both before and during the suit.

Oaktree claimed two instances of misconduct. One was the bank's alleged destruction of the written loan commitment. The other related to electronic information and computer hardware that were destroyed after this lawsuit began. Oaktree proposed that this misconduct counseled in favor of denying summary judgment. See (App.pp.244-48).

Here again, the bank denied that anything inappropriate happened.

The circuit court heard all of the pending motions in May of 2011. The bank was moving for summary judgment on its foreclosure claims as well as on Oaktree's six (6) counterclaims. Oaktree's only pending motion was the motion for sanctions.

Oaktree did not oppose summary judgment on the foreclosures. See (App.p.263, lines 3-17). Oaktree also did not oppose summary judgment on three of its six counterclaims. (App.p.93) (the order) and (App.p.352, lines 18-24) (the hearing transcript).

This meant that the only contested issues were Oaktree's request for sanctions, the bank's request for summary judgment on Oaktree's three remaining counterclaims, and the bank's request for an order denying Oaktree a jury trial on those three counterclaims.

The circuit court granted all of the bank's motions and it denied Oaktree's request for sanctions. This order was filed July 20, 2011. (App.pp.91-112).

The circuit court's order is unusual in that it addresses several issues that were unnecessary in light of the way that the court construed the Lender Statute of Frauds.

For example, the order begins by addressing the issue of whether Oaktree waived its right to a jury trial on the counterclaims. (App.pp.95-98). Then, immediately after the order concludes that the trial would be to a judge and not a jury, the order proceeds to grant summary judgment against Oaktree and end the case, making any discussion about the mode of trial irrelevant. (App.pp.98-112).

The principal basis of the court's decision was that the Lender Statute of Frauds required Oaktree to physically produce a written agreement that satisfied the statute. (App.pp.102-104). The court said oral testimony was inadmissible. (App.p.107).

Although the practical effect of this holding required the court to enter summary judgment in the bank's favor, the order nevertheless additionally concluded that summary judgment was appropriate for other reasons. The circuit court said that a later loan was intended to release the original loan, that the original loan was not a final and binding agreement, and that the bank did not owe Oaktree any duty of care. (App.pp.105-109).

The final section of the circuit court's order denied Oaktree's request for sanctions by reasoning that the court would not sanction the bank because Oaktree could not prove that the written loan commitment had ever existed. (App.p.110). The order also summarily stated that there was no evidence of the bank's willful disobedience. *Id.*

Oaktree served a timely appeal to the Court of Appeals. The appeal involved multiple issues because the circuit court's order covered so many alternative grounds.

Oaktree's general theory on appeal was that the central premise of the circuit court's ruling was incorrect. Oaktree contended that if the parties dispute whether a written agreement exists, oral evidence *is* admissible and the question of who is telling the truth is

a question of fact. Oaktree also argued that all of the circuit court's alternative holdings involved factual disputes and that the circuit court's analysis on sanctions was circular. Finally, Oaktree argued that the circuit court erred in denying its request for a jury trial.

The bank argued that the circuit court's decision was correct and error-free.

The Court of Appeals conducted oral argument in September of 2013. Ten months later, the court filed a memorandum opinion that affirmed the circuit court's decision.

The opinion is not lengthy. See (App.pp.1-3). It recites that other jurisdictions which allow evidence of a lost contract require such evidence to be clear and convincing. Then, the opinion holds that if South Carolina was to follow this approach, Oaktree would still lose because it failed to provide evidence that meets this standard. (App.p.2). Next, the opinion states that the evidence Oaktree submitted was self-serving and contradictory. (App.p.3). The opinion concludes by reasoning that these holdings are dispositive. *Id.*

Oaktree filed a petition for rehearing that presented four issues.

The first issue was that the bank had not raised the sufficiency of the evidence as a ground for summary judgment. (App.p.5). The second issue was that this case was not a "lost contract" case and that the authorities the court cited in its opinion actually counseled *against* the decision to affirm. (App.pp.6-7).

The third issue on rehearing was that the opinion was factually incorrect because the record contained other evidence of the loan agreement in addition to the testimony of Oaktree's principals. (App.pp.7-9). The fourth and final issue was the fact that the court's opinion failed to address Oaktree's argument regarding sanctions. (App.pp.9-10).

The court denied rehearing in an order issued September 18, 2014. (App.p.25).

ARGUMENT

There are three reasons this Court should reverse the Court of Appeals.

First, the Court of Appeals based its decision on a "sufficiency of the evidence" argument that was not presented below and that exceeds the scope of the summary judgment record. The summary judgment arguments were about whether Oaktree had to bring the contract to court; the bank said it did, Oaktree said it did not. The parties never argued about whether there was a "clear and convincing" threshold for summary judgment. None of this was fleshed out in the record or in the briefing.

Second, the circuit court's reasoning is incorrect. If the plaintiff says that the parties signed a contract but the defendant says that it never happened, that dispute is a factual dispute, and the legal system generally resolves factual disputes by way of a trial. The central feature of the circuit court's order is that the Lender Statute of Frauds requires Oaktree to bring the written agreement to court, but the statute says no such thing, and if this was the statute's intention, the law would have been written to make the point clear. The circuit court's holding is also directly contrary to the language of Rule 1008, SCRE, which says that when an issue is raised about whether a writing existed, the issue is for the fact-finder.

These are the principles that should have governed this case's merits. This Court should reverse the lower courts for failing to apply them.

Finally, it was error for the Court of Appeals to refuse to acknowledge Oaktree's argument regarding sanctions. The Court of Appeals could not affirm without addressing this issue, and if the circuit court did not apply the right test to Oaktree's motion, that mistake is an abuse of discretion which requires reversal and a remand.

I. The Court of Appeals erred when it based its decision on a "sufficiency of the evidence" argument that was not presented below and that exceeds the scope of the summary judgment record.

The issue the parties presented to the circuit court was whether a party may satisfy the Lender Statute of Frauds by offering oral testimony that a written contract exists. The Bank chose to argue that the statute required Oaktree to physically produce the contract, and the Bank was successful in persuading the circuit court to agree.

The court's reasoning on this point was not equivocal. It derisively referred to Oaktree's alleged commitment letter as "the phantom letter" and it held that there was no authority which would allow a party in Oaktree's circumstances to offer oral testimony that this writing existed. See (App.pp.102-103).

The Court of Appeals decided a different issue. It reasoned that *if* oral testimony *is* admissible, summary judgment was still appropriate because Oaktree did not present clear and convincing evidence of the writing's existence. (App.p.2). This reasoning is obviously different from the reasoning that the circuit court employed. This begs the question whether the difference in reasoning was fair or foul.

This shift was foul. Parties associate summary judgment with the *existence* of evidence, not its sufficiency. This Court is familiar with the mantra that summary judgment does not involve weighing evidence or deciding credibility. Those are tasks for the fact-finder. *Harris Teeter v. Moore & Van Allen*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010).

The reason this is important is because if the sufficiency of the evidence had been the thrust of the bank's argument, the proceedings below would have gone differently. Oaktree

would have built the record differently, and the parties would probably have argued about whether the clear and convincing evidence standard was even the standard that applied. The controlling principle is the same principle underlying this Court's cautionary instruction that although an appellate court has the authority to affirm a judgment based on any ground that appears in the record, an appellate court is "less likely" to rely on an alternative sustaining ground if the respondent failed to raise that ground to the lower court. See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000). It is generally unfair to decide a case based on reasoning that was not subject to adversarial testing.

In the present case, the Court of Appeals applied a ground that does *not* appear in the record. The sufficiency of proof was not at issue below or in the appellate briefing.

Candor requires acknowledging that there *is* one passing reference to the clear and convincing standard in the record. This reference appears in one of the bank's summary judgment motions, see (App.p.202), but the motion cites no authority and the standard of proof was not discussed in any of the bank's summary judgment memoranda. See (App.pp.205-218; pp.222-232). The parties did not discuss a heightened summary judgment standard during the circuit court hearing, (App.pp.259-361), and the circuit court did not discuss this issue in its ruling. (App.pp.91-112). The argument that the parties presented to the circuit court centered on the type of evidence that was admissible and whether the writing had to be brought to court. The bank did not put the sufficiency of the evidence in play.

The Court of Appeals raised the standard of proof on its own and applied it to a record built around something else. The court should have decided the issues that the parties briefed. It should not have decided an issue that the lower court did not consider.

II. The Court of Appeals erred in failing to hold that the circuit court's reasoning was incorrect and that a dispute about whether a writing exists is a question of fact for the fact-finder.

The central feature of the circuit court's order is that the Lender Statute of Frauds required Oaktree to physically produce a written agreement that satisfied the statute. (App.pp.102-104). The Court of Appeals should have held that this reasoning was incorrect.

The Lender Statute of Frauds has been discussed in only two of this State's published appellate court decisions — *Kerr v. Branch Banking and Trust Co.* and *Sea Cove Development v. Harbourside Community Bank.* Neither case dealt with this question. *Kerr*, 408 S.C. 328, 759 S.E.2d 724 (2014); *Sea Cove Dev.*, 387 S.C. 95, 691 S.E.2d 158 (2010). This appears to be a novel issue.

i. The language of Rule 1008 has direct application and the Lender of Statute of Frauds does not provide differently.

Rule 1008 of the South Carolina Rules of Evidence instructs that when an issue is raised about whether a writing existed, "the issue is for the trier of fact to determine as in the case of other issues of fact." There are no South Carolina cases interpreting this part of the rule, but the language seems relatively clear. "Other evidence" (meaning oral evidence) *is* admissible and the rule specifically provides that the issue is for the fact-finder.

This is different than a dispute about a writing's *contents*. That sort of dispute is governed by other rules. Rule 1002, the current form of the "best evidence rule," provides that the original writing is generally required in order to prove the writing's contents. A different rule, Rule 1004, lists when a party can offer "other evidence" to prove what a writing contains. It covers the situations when a writing has been lost or destroyed, when the

original is not obtainable, and when the original was last in the possession of the opposing party. Again, these rules apply when the parties agree that a writing exists.

Rule 1008 covers a different subject. It seems to provide — quite plainly — that if the parties are disputing whether a writing ever existed, that issue is an issue for the fact-finder. This means that if one person says that the parties signed a contract, but the opposing party says that it never happened, that credibility dispute is a dispute for trial.

Nothing in the Lender Statute of Frauds suggests that Rule 1008 would not apply to disputes about loan agreements. When multiple authorities seem to apply to a case or controversy, this Court has an established practice of reading those authorities in a way that gives effect to all of them rather than some but not others. *Mullinax v. J.M. Brown Amusement Co.*, 333 S.C. 89, 95-96, 508 S.E.2d 848, 851 (1998). These principals usually surface when there is a conflict between two statutes, but this Court has also applied them when reconciling a statute with a court rule. See *Grazia v. S.C. State Plastering*, 390 S.C. 562, 577, 703 S.E.2d 197, 204 (2010) (reversing a circuit court's decision that a statute was incompatible with Rule 23, SCRCP, which allows class actions in certain instances). The upshot is that Rule 1008 must apply unless there is a clear signal that it should not.

The result would still be the same even if Rule 1008 did not exist. The Lender Statute of Frauds speaks only of a writing that the borrower "received." See § 37-10-107(1)(C). The statute does not specify that this writing must be "retained," "produced," or "produced at trial." These words and phrases are not synonyms. Saying that a person must have "received" a document would be a curious way of saying that the person must have continued possession of that document and must physically produce that document in court.

This statute restricts a plaintiff's common law right to bring a lawsuit, and because it changes common law rights, it is to be read narrowly. See, e.g., *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000) (describing why the wrongful death statute is to be construed narrowly). Nobody has suggested that the Lender Statute of Frauds is unclear and leaves room for interpretation, but the rules of construction would counsel in favor of reading the statute in a way that creates the smallest infringement on the common law, not the greatest. "Received" means what it says. It does not mean more.

ii. A different reading of the Lender Statute of Frauds would provide a safe harbor for dishonesty.

Although the language of the statute seems clear, if the Court is inclined to consider matters of policy, it may be instructive to note that a broader interpretation of the statute would provide a safe harbor for dishonesty and fraud. Suppose that Oaktree's version of events is true. Suppose a bank representative gave someone an executed commitment letter and said that the deal was done. Then suppose that the bank representative took custody of that commitment letter under some false pretense and destroyed it.

This conduct would obviously be dishonest, but under the interpretation of the statute that the bank and the circuit court believe to be true, the defrauded party will always lose because there is no writing to put in evidence. The case never gets to court.

This approach transforms a consumer protection statute that was designed to prevent fraud and allows an unscrupulous party to *perform* fraud. This Court has said that the lender statute of frauds is "essentially" a statute of frauds, see *Sea Cove Development*, 387 S.C. at 105, 691 S.E.2d at 163, but that characterization would be inaccurate because there are

several equitable exceptions to the traditional statute of frauds. Courts created those exceptions because they "[would] not permit a statute designed to prevent frauds to be used as an instrument to effect a fraud." *Aust v. Beard*, 230 S.C. 515, 522-23, 96 S.E.2d 558, 562 (1957). That rubric fails if the victim automatically loses and the deceiver always wins.

iii. The cases that the Court of Appeals cited actually support Oaktree's argument and counsel against the decision to affirm.

The Court of Appeals did not interpret the Lender Statute of Frauds or refer to Rule 1008. Instead, it cited four (4) decisions from other jurisdictions as well as *American Jurisprudence*, a secondary authority. (App.pp.2-3).

Two of the cases — *Weinsier v. Soffer* and *Zander v. Ogihara Corp.* — involved cases that had a full record because they had been to trial. *Zander*, 540 N.W.2d 702, 703 (Mich. Ct. App. 1995) (appeal followed a jury trial); *Weinsier*, 358 So. 2d 61 (Fla. Dist. Ct. App. 1978) (appeal followed a bench trial). The present case was resolved on summary judgment. These cases are not comparable.

The third case cited by the Court of Appeals, *Mossman v. Hawaiian Trust Co.*, 361 P.2d 374 (Haw. 1961), actually affirmed an order that *denied* a motion for summary judgment based on the statue of frauds. Like South Carolina's Rule 1008, *Mossman* acknowledges that when the parties disagree on the existence of a writing, that disagreement creates a dispute of fact. 361 P.2d at 380.

The final foreign case that the Court of Appeals cited is *Chakur v. Zena*. See 233 S.W.2d 200 (Tex. Civ. App. 1950). *Chakur* reversed an order for following the same faulty reasoning that the circuit court followed here.

It is fine to consider persuasive authorities when there is no binding case on point, but these cases did not support the decision to affirm. This is not a "lost contract" case. Those cases are governed by Rule 1004, SCRE. The present case involves a dispute of fact, and disputes of fact are resolved through a trial.

III. The Court of Appeals erred when it refused to acknowledge Oaktree's argument regarding sanctions for discovery abuse.

Oaktree presented a two-part argument to the Court of Appeals on sanctions. The first focused on the alleged destruction of the signed commitment letter. The second was tied to the alleged destruction of electronic information.

i. The circuit court erred when it tied Oaktree's request for sanctions to Oaktree's ability to prove that a written loan agreement had existed.

Precedent dictates that in deciding whether and what sanctions to impose, the circuit court should weigh the nature of the violation, the discovery posture of the case, willfulness, and the degree of prejudice. *Laney v. Hefley*, 262 S.C. 54, 60, 202 S.E.2d 12, 15 (1974) (describing the test for sanctions in the context of a party's failure to disclose a witness).

The circuit court did not actively engage in this analysis. Instead, the circuit court reasoned that it would not sanction the bank because Oaktree could not prove that a written loan commitment had actually existed. (App.p.110).

This approach might seem reasonable at first because in order to reach the question of sanctions, the party seeking sanctions would need to show some sort of a violation. Though the circuit court's analysis is not stated in these terms, it effectively reasons that it will not sanction the bank because Oaktree cannot prove that the bank broke any rules.

But this view cannot bear the weight of meaningful scrutiny. The written loan agreement was the central issue of Oaktree's case. Oaktree offered evidence that the commitment letter existed, but the bank denied it. By hitching Oaktree's request for sanctions to Oaktree's ability to prove that the contract existed, the circuit court was requiring Oaktree to prove its case on the merits. If Oaktree could prove the contract, there would be no need to *seek* sanctions. The court's reasoning collapses on itself.

ii. Similarly, the circuit court's reasoning on electronic information failed to go through the appropriate analysis and is controlled by an error of law.

The second part of Oaktree's argument on sanctions was tied to the alleged destruction of electronic information. This argument has to be qualified with the word "alleged" because the parties continue to dispute whether anything was indeed destroyed.

Yadkin Valley Bank & Trust closed on the purchase of American Community Bank the day after the complaint in this case was filed with the clerk of court. (App.pp.191-192). This was in April of 2009.

Sometime later — a bank employee said it was the "middle" of 2009 — the bank replaced "a large number" of American Community Bank's computers and had the hard drives for the old computers physically destroyed. (App.p.486, line 3 - p.487, line 2).

The bank's information technology officer said that he was not notified of a "litigation hold," which is a request to gather data, until the end of 2010. (App.p.402, lines 8-15). That was over a year after this lawsuit began. It was after the bank replaced its computers, and it was after Oaktree went to court on a motion to compel and received an order that required the production of electronically stored information. See (App.p.117).

There is more to the factual background on this topic.

This same bank officer explained in a deposition that there were only eight employees whose e-mails were retained when the two banks merged. (App.p.489, lines 3-15). Derek Franklin, the bank vice president whose conduct is in question, was not one of those employees. (App.p.407). While the bank has the ability to retrieve e-mails between Mr. Franklin and any of the eight retained accounts, the bank *does not* have the ability to retrieve any of Mr. Franklin's e-mails that do not involve one of those accounts, such as e-mails between Mr. Franklin and Oaktree's principals. The deposition testimony is that these sorts of e-mails are irretrievably gone. (App.p.490, line 24 - p.491, line 6). Again, this merger between the banks and this alleged destruction of information occurred after this suit began.

Oaktree raised these issues in a motion for sanctions that was filed in March of 2011. (App.p.195). Two months later — on the eve of the May 2011 hearing on the motion for sanctions *and* the motions for summary judgment — the bank produced a copy of Mr. Franklin's electronic calendar and argued that producing this calendar meant that no information had been destroyed. See (App.p.199, ¶4) (from the bank's memo); see also (App.p.478) (the calendar).

This argument and this new evidence raised a number of issues.

First, the suggestion that nothing had been destroyed is contrary to the testimony from the bank's information technology officer. See (App.p.490, line 24 - p.491, line 6).

Second, the printout of Mr. Franklin's calendar seems to indicate that it was printed in March of 2011, but the bank did not produce it until just before the hearing, two months later. See (App.p.478).

Third, this hearing in May occurred several months after a scheduling order called for discovery in the case to end. The bank spoke of discovery being an obligation that it would continue to fulfill, but in very same hearing, the bank asked the circuit court to grant summary judgment on all of Oaktree's claims and end the case. (App.p.304, line 20 - p.305, line 5; p.308, lines 1-25).

The circuit court in the present case committed the same error that the circuit court committed in *Samples v. Mitchell* — it did not go through the proper analysis. See 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997). The court never described that the bank was obligated to retain information as soon as litigation was reasonably foreseeable, and the court paid no attention to the fact that two days before the summary judgment hearing, the bank produced information that had never been previously produced. The court might ultimately have decided *not* to sanction the bank, but the court was required to ask the right questions and go through the right examination.

iii. The issues of discovery abuse and sanctions were not secondary issues that the Court of Appeals could avoid.

The Court of Appeals could not affirm the circuit court without addressing these issues. Precedent explains that one of the purposes of discovery is to promote out-of-court settlements by having the parties "lay their cards on the table." *Moran v. Jones*, 281 S.C. 270, 275, 315 S.E.2d 136, 139 (Ct. App. 1984); *Martin v. Dunlap*, 266 S.C. 230, 239, 222 S.E.2d 8, 13 (1976). Because some cases do not settle, a closely-related purpose of discovery is that it allows parties to prepare for trial. See *Samples*, 329 S.C. at 113-14, 495 S.E.2d at 217 (recognizing this purpose). The rules are designed to create a climate of fair play. They

exist in order to ensure that whenever the case comes to a head, the parties will have enjoyed a full and meaningful opportunity to prepare the merits of their claims and defenses.

The circuit court's order does not indicate that these principles guided its decision. Nobody likes pressing an issue that deals with sanctions, but the Court of Appeals could not affirm the circuit court without acknowledging Oaktree's argument and rejecting it.

CONCLUSION

This Court should reverse the Court of Appeals. *First*, the court based its decision on a "sufficiency of the evidence" argument that was not presented below. *Second*, the circuit court's construction of the Lender Statute of Frauds is incorrect. *Finally*, it was error for the Court of Appeals to refuse to acknowledge Oaktree's argument on sanctions. The case should be remanded with instructions that the Court of Appeals review the alternative grounds for circuit court's decision as well as the arguments regarding a jury trial.

Respectfully submitted,

March 23, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Brief of Petitioner and Appendix* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

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ATTORNEYS AT LAW

March 23, 2015

VIA HAND DELIVERY

Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
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RE: Yadkin Valley Bank & Trust v. Oaktree Homes, Inc.
Case Tracking No.: 2014-002182

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of the Brief of Petitioner and the original and fifteen (15) copies of the Appendix in regards to this case. I have also enclosed a Proof of Service of these documents on counsel for the Respondent. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: William A. McKinnon, Esquire
Chad McGowan, Esquire
James Sheedy, Esquire
Susan E. Driscoll, Esquire