

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516  
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a  
Charles A.B. Moore

Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant, Charles A. Moore, hereby moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case. Appellant believes that important issues of first impression are presented in this appeal in regards to evidentiary standards for the admissibility of affidavits submitted in support of summary judgment motions, which issues merit *en banc* review. Appellant incorporates by reference the Record filed in this appeal and both of Appellant's final briefs, including the issues and arguments raised therein. In addition, Appellant respectfully submits that the court may have overlooked or misapprehended certain material facts or arguments raised in this case, in the following sections of its Order affirming the trial court's decision:

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1. MISSING PROOF OF AFFIANT'S PERSONAL KNOWLEDGE

The court's Order finds that "the affidavit submitted in support of Capital Bank's summary judgment motion sufficiently demonstrated the affiant's personal knowledge." However, this finding is conclusory. The court does not state the facts in the Foster Affidavit (R. pp. 28-29) which the court believes demonstrate personal knowledge on behalf of the affiant. The court's failure to find these specific facts makes it impossible for a higher court to review this court's factual determination for potential error. The trial court also made similar conclusory findings regarding the affiant's personal knowledge (R. p. 105, lines 15-19). So far no court in this judicial process has been willing to identify the specific facts in the Foster Affidavit which prove that the affiant had the personal knowledge necessary to make that affidavit competent for purposes of granting partial summary judgment against the Appellant.

The court notes that Rule 56(e) requires that an affidavit "show affirmatively that the affiant is competent to testify to the matters stated therein." This requires more than the mere allegation of "knowledge of the records" (R. p. 28, par. 1), which is not even an allegation of personal knowledge, that the affiant makes in the Foster Affidavit. Indeed, even a mere allegation of personal knowledge itself would not be sufficient under Rule 56(e) without stating facts tending to prove that personal knowledge exists (see cases cited at App. Brief p. 10).

The court cites the *Englert, Inc. v. Netherlands Ins. Co.* case in its Order for the proposition that an affiant's status as a vice-president alone was insufficient to prove that he had the necessary personal knowledge to make his affidavit competent. However, the court overlooks the fact that in this case the affiant claims only that he is an unspecified

“employee” of Capital Bank, N.A., which is far less than claiming to be an officer of the company as did the affiant in the *Englert* case. Therefore, the *Englert* case actually supports Appellant's case on our facts, not Respondent's case.

The court cites the *Sides v. Greenville Hosp. Sys.* case for the proposition that “[o]nce the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial.” However, as this case states, until such time as the moving party (here the Respondent) carries its burden (such as by presenting a competent affidavit in support of its summary judgment motion), no duty to respond applies to the opposing party and the opposing party may prevail without even having to raise a defense (see case cited at App. Brief p. 8). If the Foster Affidavit does not allege facts that prove that the affiant had the personal knowledge necessary to make the affidavit, then the trial court abused its discretion in granting partial summary judgment to the Respondent.

## 2. PREMATURE SUMMARY JUDGMENT

The court's Order finds that “the trial court did not abuse its discretion in granting summary judgment prior to the completion of discovery because the record does not demonstrate that further discovery would have contributed to the resolution of the issue of Moore's liability.” However, the court overlooks the fact that it appears that the sole reason that the trial court found that summary judgment was not premature was the fact that this matter had been pending on the court's docket since 2011 (R. p. 101, line 12). However, the record reveals that there was a controlling scheduling order which showed that the time allowed to complete discovery had not yet expired (R. p. 1), including time reserved to take depositions of Respondent's affiants and witnesses. The *Baughman v. Am. Tel. & Tel. Co.* case cited by the court provides that a party opposing summary

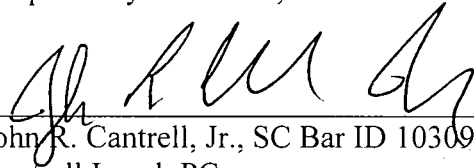
judgment should be given a “full and fair opportunity to complete discovery.” Appellant believes that it was fundamentally unfair for the trial court to grant summary judgment before the Appellant's full time to complete discovery under the scheduling order was finished, since this prejudiced Appellant's ability to verify the facts alleged by Respondent in its Complaint and in the Foster Affidavit, which was used against Appellant in Respondent's summary judgment motion.

Regarding the record demonstrating that further discovery would have contributed to the issue of Appellant's liability, the court overlooks several arguments in this regard. These arguments were detailed in Appellant's Final Brief at pages 7 and 15.

WHEREFORE, Appellant requests that this court issue an order granting rehearing or rehearing *en banc* in this case.

Dated April 1, 2015.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
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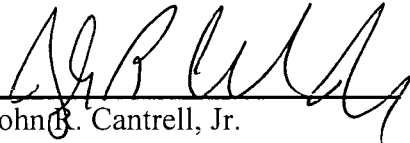
Charles A. Moore a/k/a  
Charles A.B. Moore

Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing or Rehearing En Banc on Capital Bank, N.A. by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2015, addressed to its attorney of record, Christopher T. Colwell, Post Office Box 22828, Charleston, South Carolina 29413-2828.

April 1, 2015

  
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April 1, 2015

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

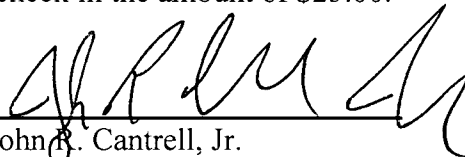
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Case No. 2013-001516

Dear Miss Kitchings:

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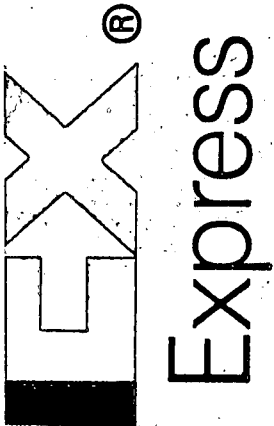
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Also enclosed is our filing fee check in the amount of \$25.00.



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cc:  
Christopher T. Colwell  
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Post Office Box 22828  
Charleston, South Carolina 29413-2828  
Attorney for Respondent  
(843) 579-7000



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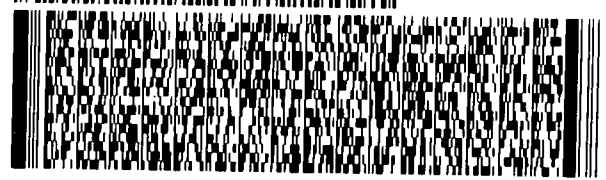
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John Cantrell, Jr. Phone 843-297-2454

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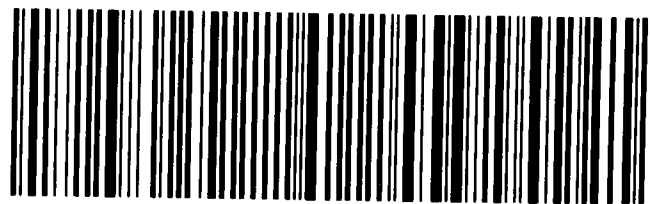
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