

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2012-CP-26-5546

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SC Court of Appeals

Robert Shelley, a/k/a RDS Investments, LLC,
a/k/a ROS Investments, LLC..... Appellant

vs.

Horry County State Bank and HCSB Financial Corporation..... Respondents

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

This case is before the court based on the trial court's grant of summary judgment on all causes of action. The issues are as follows:

- I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S BREACH OF FIDUCIARY DUTY CAUSE OF ACTION?
- II. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S UNIFORM SECURITIES CAUSE OF ACTION?
- III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S NEGLIGENCE CAUSE OF ACTION?
- IV. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CIVIL CONSPIRACY CAUSE OF ACTION?
- V. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS HAD RUN ON THE CLAIM?
- VI. DID THE TRIAL COURT ERR IN FINDING THAT THE SECURITIES LAW EXEMPTED SECURITIES IN A BANKING OR DEPOSITORY INSTITUTION?
- VII. DID THE TRIAL COURT ERR IN FINDING THAT THE TRANSACTION WAS AN ISOLATED NONISSUER TRANSACTION?
- VIII. DID THE TRIAL COURT ERR IN HOLDING THAT THE SECURITIES LAW EXEMPTS ANY TRANSACTION THAT CONSISTS OF AN OFFER TO AN EXISTING SHAREHOLDER?

STATEMENT OF THE CASE

This matter involves a civil lawsuit by Shelley against Horry County State Bank and HCSB Financial Corporation. Shelley brought suit alleging four causes of action including breach of fiduciary duty, violation of the South Carolina Uniform Securities Act of 2005, negligence and civil conspiracy. Shelley purchased 1,000 shares of stock after being solicited via telephone by employees of the Bank. He subsequently bought additional shares. The trial court heard this matter on summary judgment and granted Defendant's

motion on all causes of action. Plaintiff filed a motion for reconsideration which was denied on October 15, 2014. Appellant timely perfected its appeal on November 25, 2014.

STANDARD OF REVIEW

It is well settled in this state that summary judgment may not be granted if there is a scintilla of evidence. See *Hancock v. Midsouth Management*, 381 S.C. 326, 673 S.E.2d 801 (S.C. 2009). Our Supreme Court has advised the circuit courts repeatedly to invoke summary judgment cautiously and that all reasonable inferences must be viewed in the light most favorable to the non-moving party. See *Knight v. Austin*, 396 S.C. 518, 722 S.E.2d 802 (S.C. 2012).

Finally, because summary judgment is a drastic remedy, it should rarely be invoked so no person will be improperly deprived of a trial of disputed material facts. *Murphy v. Tindall*, 384 S.C. 50, 681 S.E.2d 28 (S.C.App. 2009).

ARGUMENT

I. **THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S BREACH OF FIDUCIARY DUTY CAUSE OF ACTION.**

This case involves the purchase of shares of stock from Horry County State Bank in July 2009 and October 2009. The Plaintiff was personally solicited by employees of the Bank. Unbeknownst to Plaintiff a bank employee sold the stock which was owned by a vice-president of the bank, not by the bank itself. After purchasing the stock the Plaintiff's value of the stock dropped to less than ten cents per share within months.

Plaintiff brought a cause of action for breach of fiduciary duty. This Court has repeatedly held that the issue of fiduciary relationship is one to be determined by the trier of fact. See *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (S.C. App. 2005). Further, a fiduciary relationship exists when one has confidence in another so that the latter,

in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. See also *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003) (stating bank may be held to a fiduciary duty to disclose material facts if it undertakes to advise).

In this case, Plaintiff's counsel had provided to the Court HCSB Financial Corporation's Code of Business Conduct and Ethics dated September 10, 2007. The Code of Ethics states in pertinent part:

Section 2 - Fair Dealing

No director, officer or employee shall take unfair advantage of anyone through manipulation, concealment or abuse of privileged information, misrepresentation of material facts or any unfair dealing practice. (R. ____).

Section 6 - Personal Investments

You should avoid entering into transactions in which it may appear that you are improperly benefiting from your relationship with the Company. This applies also to investment by members of your immediate family. (R. ____).

Section 3 - Honest and Candid Conduct

Each Director, Officer and Employee must:

Act with integrity, including being honest and candid while still maintaining the confidentiality of information where required or consistent with the Company's policies. (R. ____).

Also, the Horry County State Bank Code of Business Conduct and Ethics states that Horry County State Bank is "committed to conducting all aspects of their business in accordance with the highest ethical and legal standards." (R. ____).

The evidence in this case viewed in the light most favorable to the non-moving party as is required under Rule 56 is as follows:

The evidence revealed that Jane Cannon, a head teller at Horry State Bank, contacted Robert Shelley to sell Debbie Guyette's (a vice president of Horry County State

Bank) stock to Shelley. (Depo. of Cannon, p. 12, lines 12-25); that Cannon never advised Shelley that Guyette was the owner of the stock and that Shelley knew both Cannon and Guyette and at one point Shelley asked Guyette whose stock it was (Depo. of Guyette, p. 38, lines 20-25; p. 39, lines 1-8); that no documents or prospectus was ever given by Cannon to Shelley when the stock was sold (Depo. of Cannon, p. 11, lines 13-16); that at one point Shelley asked Guyette whose stock it was and she did not answer (Depo. of Guyette, p. 15, lines 9-12; p. 14, lines 18-19); that bank employees solicited Shelley for both sales of stock by Cannon calling Shelley on the phone (Depo. of Shelley, p. 55, lines 6-12; p. 60, lines 1-6); that Shelley felt he was misled and it “stuck in his crawl” (Depo. of Shelley, p. 66, lines 1-25); and that the bank repeatedly sold stock to other people using this procedure (Depo. of Guyette, p. 17, lines 1-25).

In viewing the testimony in the light most favorable to Shelley, summary judgment should not have been granted. Clearly, employees of Horry County State Bank solicited Shelley to purchase stock and failed to advise Shelley as to who owned the stock—an omission of material fact in the sale of stock. See *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437 (S.C. 2005) (Evidence indicates Leventis may have been “effecting transactions in securities” since he marketed and referred investors to the program.) (Supreme Court reverses trial court’s grant of summary judgment concerning Cowburn’s allegations Leventis violated the South Carolina Uniform Securities Act) (Act provides a private right of action for buyers of securities against “any person who ... offers or sells a security in violation of S.C. Code Ann. § 35-1-810). The way in which the stock sale was handled by Defendants’ employees violated the Bank’s own Code of Business Conduct and Ethics, in particular fair dealing by an officer (Guyette, the vice-president) in the handling of her

personal investments (the sale of the stock to Shelley that benefited her) , and the failure to be honest and candid in her conduct with Shelley who was both a customer and a buyer of the stock in question.¹ It is for these reasons that the court erred in granting summary judgment especially since the issue of fiduciary relationship between a customer and a bank is one to be determined not by the court but by the jury based on a secret sale to an unknowing buyer when material information was withheld by the Bank.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S UNIFORM SECURITIES ACT CAUSE OF ACTION.

The Plaintiffs brought a lawsuit in which one of their causes of action was for violation of the South Carolina Uniform Securities Act. See S.C. Code Ann. § 35-1-1490(2). This Act holds the seller such as Guyette or the Bank (an aider and abetter) liable for an omission to state a material fact. The record establishes that Cannon contacted Shelley on behalf of the Bank (without disclosing Guyette was the Seller) and asked if Shelley wanted to purchase stock. Because Cannon was acting as an employee of the Bank, it is a reasonable inference for Shelley to believe that this stock was owned by the Bank and not by an undisclosed third party. (See Depo. of Cannon, p. 12, lines 1-25; Depo. of Guyette, p. 38, lines 20-25; p. 39, lines 1-8; and p. 15, lines 9-12.)

In fact, the deposition of Guyette, the owner of the stock and a vice-president at the Bank, establishes that she had Cannon call Shelley and did not advise Shelley she wanted to sell the stock (Depo. of Guyette, p. 22, lines 1-25). Also, when Shelley asked who the owner of the stock was, she remained silent (Depo. of Guyette, p. 15, lines 9-12; p. 14, lines 18-19). Further, Shelley was never advised affirmatively by either Guyette or Cannon that

¹ Shelley in his deposition stated if Guyette had told him: "I don't know how I would have felt at that time." (Depo. of Shelley, p. 84, lines 1-6).

Guyette was the seller and the money was taken directly out of Shelley's account by a cashier's check and paid to Guyette with Shelley never being given a copy of the check. (Depo. of Shelley, p. 90, lines 1-22). Also, Horry County State Bank employees would have meetings on a weekly basis to decide when somebody wanted to sell the stock to determine who knew the person that might want to buy it (Depo. of Guyette, p. 18, lines 18-22). Also, Denise Floyd and Ron Page and other bank officers, were intimately involved in the sale of stock and that at bank employee meetings they discussed who wanted to buy stock and who was going to call the prospective purchaser to sell the stock (Depo. of Guyette, p. 18, lines 1-25). No prospectus was offered when the stock was sold in this manner (Depo. of Guyette, p. 20, lines 1-25). Further, no financial information was ever given when someone was solicited to purchase stock (Depo. of Guyette, p. 20, lines 1-25). A list of the names of prospective purchasers was kept in Ron Page's office (Depo. of Guyette, p. 21, lines 1-5). All stock purchases were handled through debit transactions at the bank (Depo. of Guyette, p. 22, lines 7-9) and no one was ever advised that the purchase of the stock was from a private seller and that it was not being sold by the Bank (Depo. of Guyette, p. 22, lines 1-25). Horry County State Bank was put under an FDIC Compliance Order in 2010 and the stock took a dip in value immediately after that occurred. (Depo. of Guyette, p. 23, lines 22-25).

The South Carolina Uniform Securities Act of 2005 specifically allows for lawsuits for an omission to state a material fact. This is patterned after the United States Securities and Exchange Act of 1934, 15 U.S.C. § 77(A) to 77(AA) (1981). Omissions of material fact do not require that the nine elements of fraud be proven to recover as in common law actions for fraud.

South Carolina's courts have discussed who a "seller" is under the Uniform Securities Act. In *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (S.C.App. 1987), the Court of Appeals had an opportunity to discuss this very issue. In *McCall*, the Court of Appeals stated:

We are aware of no South Carolina cases construing this section of the Act for the purpose of deciding when a person who participates in a sale is a "seller."

The Act is similar to the Federal Securities Act of 1933, 15 U.S.C. §77a to 77aa (1981). In the absence of South Carolina authority, we look to federal cases for guidance. *Carver v. Blanford*, 288 S.C. 309, 342 S.E.2d 406 (1986). Two basic tests may be gleaned from the various federal cases.

The Second and Third Circuits require strict privity, absence scienter or some special relationship, for a person to be a "seller." See *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 344 (2d Cir. 1987) (strict privity absent scienter); *Collins v. Signetics Corp.* 605 F.2d 110, 112 (3d Cir. 1979) (strict privity absent special relationship).

The Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits hold generally that a person who is either in privity with a buyer or significantly participates in a sale is a "seller". See *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 363-64 (4th Cir. 1986) and *Stokes v. Lokken*, 644 F.2d 779, 785 (8th Cir. 1981) (participation equals substantial factor causing transaction to occur); *Junker v. Crory*, 650 F.2d 1349, 1360 (5th Cir. 1981) (persons who are motivating force behind the sale; direct and proximate causation of buyer's injury); *Davis v. Avco Financial Services, Inc.*, 739 F.2d 1057, 1067 (6th Cir. 1984); and *SEC v. Rogers*, 790 F.2d 1450, 1456 (9th Cir. 1986) (persons whose acts are necessary to and substantial factor in transaction; direct and proximate causation of buyer's injuries); *Foster v. Jesup and Lamont Securities Co., Inc.* 759 F.2d 838, 843-44 (11th Cir. 1985) (participation equals substantial causative factor directly and proximately causing buyer's injury). (362 S.E.2d at 31)

In *McCall*, this Court adopted neither of the tests cited above, but noted purely ministerial acts do not constitute significant participation in the sale of a security.² Later the

² This is yet another reason why summary judgment is not appropriate—a novel issue exists in this matter. See *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (S.C.App. 2003) ("we find it extremely troubling this case was resolved on a summary judgment basis especially considering the injury to Schmidt and the novel issue involved in this case.")

Supreme Court in *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) noted that a person “who offers or sells a security” within the meaning of the Securities Act is not limited to the owner who passes title, however, to come within the definition a nonowner must solicit the purchase and be motivated at least in part to serve his own financial interest or that of the owner of the security. The Supreme Court in adopting this rule cited *Pinter v. Dahl*, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed. 2d 658 (1988) (legislative purpose of the Securities Act is to provide truth in the sale of securities and a predictable application of liability).

Based on these cases the record creates a genuine issue of material fact in that Cannon specifically contacted Shelley on behalf of the Bank, asked him to purchase those shares, failed to disclose that she was offering the shares owned by a Bank Vice-President, Debra Guyette. (See Depo. of Cannon p. 12, lines 12-25). Further, the record reveals that Horry County State Bank actively tried to sell people’s shares and that Ron Page, a bank officer, kept a list of people selling shares in his office. (Depo. of Guyette, p. 21, lines 1-5). Also Guyette testified that she was aware of more than a dozen transactions which were performed by bank employees calling prospective buyers (Depo. of Guyette, p. 23, lines 12-15); that the same transaction method was involved at all branches (Depo. of Guyette p. 23, lines 16-18); that the stock took a dip in 2010 after a consent Order of Supervision from the FDIC (Depo. of Guyette, p. 23, lines 16-25; p. 24, lines 1-15); that federal regulators came to the bank in 2010 with their concerns (Depo. of Guyette, p. 24, lines 4-6); that there were no rules or regulations by Horry County State Bank or its holding company as to how bank employees were to sell the stock (Depo. of Guyette, p. 21, lines 4-10); that no financial information was ever given to any person who wanted to purchase stock in the manner that was done in this case (Depo. of Guyette, p. 20, lines 5-15); that members of the bank would

sit down as a group together and determine who wanted to buy shares and who was going to call those people about the shares (Depo. of Guyette, p. 19, lines 11-20); that bank employees would have meetings to decide when someone wanted to sell stock to determine who knew a person that wanted to buy the stock so that they could be called by that bank employee (Depo. of Guyette, p. 18, lines 18-25); that Ron Page handled more transactions based on the number of people they knew (Depo. of Guyette, p. 18, lines 1-10); and that Ms. Guyette handled about a dozen transactions of the sale of stock using the same technique used in this case (Depo. of Guyette, p. 17, lines 10-20).

The issue of whether or not there was an omission of material fact is not an issue for summary judgment. In *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (S.C.App. 1984) this Court noted that the failure to make the offending statements does not mean that a person is not liable. Mere presence at the transaction and failure to speak constituted omission to state a material fact from which a jury could find liability. The Court also noted S.C. Code § 35-1-1500 provides “every person who materially aids in the sale of a security is liable to the same extent as the seller under § 35-1-1490.”

Appellant believes that based on this testimony and the fact that this issue was decided on summary judgment that the court erred and that there were genuine issues of material fact. Appellant asserts that at a minimum these genuine issues of material fact include whether or not Horry County State Bank and its employees were “sellers” because of their extensive involvement in the transactions which were made by the Bank to prospective purchasers without identifying the sellers of the securities. As a result, Defendant’s Motion for Summary Judgment as to the second cause of action should have been denied and Appellant believes that it was error to grant such a motion.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S NEGLIGENCE CAUSE OF ACTION.

Appellant also brought a negligence cause of action which the trial court granted summary judgment on and ended this case. Appellant respectfully suggests that since the transcripts of Shelley, Cannon and Guyette were presented at the hearings, that there were genuine issues of material fact as to whether the Bank was liable for negligence for its employees failing to advise Shelley as to who was offering the stock. This is especially true in light of the bank's precarious financial situation which came to light after the stock was sold. Further, there were also genuine issues of material fact as to whether or not Horry County State Bank employees had violated the bank's Code of Business Conduct and Ethics, more particularly, Section 2 entitled "Fair Dealing", Section 6 entitled "Personal Investments" and Section 3 entitled "Honest and Candid Conduct". (R. ____). The evidence presented in the light most favorable to the non-moving party was that Guyette had Cannon contact Shelley to sell her stock and failed to disclose that she was the owner of the stock despite being asked by Shelley on several occasions. (Depo. of Guyette, p. 12, lines 12-25). It is for this reason that Defendant's motion for summary judgment should have been denied and Appellant asserts error in granting the motion.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CIVIL CONSPIRACY CAUSE OF ACTION.

The trial court also granted summary judgment on the civil conspiracy cause of action brought by Appellant against the Bank. South Carolina law holds that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; and (3) causing plaintiff special damages. *Pridgen v. Ward*, 391 S.C. 238, 243, 705 S.E. 2d 58 (61-62 Ct. App. 2010).

In this case, the depositions of Guyette and Cannon both indicate a genuine issue of material fact as to civil conspiracy. In the deposition of Guyette she testified that employees of the bank met to discuss who was going to contact prospective buyers of bank shares (Depo. of Guyette, p. 19, lines 10-20); that no prospectus was ever given (Depo. of Guyette, p. 20, lines 1-5); that bank employees would have meetings to decide when somebody wanted to sell stock and determine who knew the person that wanted to buy the stock (Depo. of Guyette, p. 18, lines 18-25); and that Ron Page, another bank officer, handled more transactions just based on the number of people he knew (Depo. of Guyette, p. 19, lines 2-8). Further Cannon testified that she contacted Shelley to discuss whether or not he wanted to purchase stock (Depo. of Cannon p. 12, lines 12-25; that she never disclosed who owned the stock (Depo. of Cannon p. 9, lines 24-25); and that shortly thereafter federal regulators took over under an order of supervision (Depo. of Guyette, p. 22, lines 22-25). Appellant asserts that this evidence in the record shows more than a scintilla of evidence and thus summary judgment should have been denied by the Court. This Court has held on numerous occasions that summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of disputed material facts. See *Murphy v. Tindall*, 384 S.C. 50, 681 S.E.2d 28 (S.C.App. 2009). In this case, there were genuine issues of material fact as to this cause of action and thus the Court should not have granted summary judgment based on the record contained herein.

V. THE TRIAL COURT ERRED IN FINDING THAT THE STATUTE OF LIMITATIONS HAD RUN ON THIS CASE.

The trial court in its Order Granting Summary Judgment found that there was a three year statute of limitations for securities claims. However, the trial court does not explain

how it reached this conclusion. In fact, S.C. Code Ann. § 35-1-509(j) provides in pertinent part:

A person may not obtain relief:

(1) under subsection (b) for violation of Section 35-1-301, or under subsection (d) or (e), unless the action is initiated within three years after the violation occurred; or

(2) under subsection (b), other than for violation of Section 35-1-301, or under subsection (c) or (f), unless the action is instituted within the earlier of three years after discovery of the facts constituting the violation or five years after the violation.

The evidence in this case is that the stock purchase occurred on July 17, 2009 while the complaint was not filed until July 19, 2012 the Plaintiff did not discover the omission as to who the seller of the stock was until sometime after July 17, 2009. Plaintiff in his deposition testified he found out in July 2012 when he called the Bank because he didn't have all his stock certificates. (Depo. of Shelley, p. 83, lines 1-13). Under S.C. Code § 35-1-509(j) the operative language is "within the earlier of three years after discovery of the facts constituting the violation or five years after the violation."

In this case, Shelley was well within the statute of limitations and accordingly summary judgment was inappropriate. It follows that because the statute of limitations in this case deals with the discovery of the wrongdoing that the court should not have granted summary judgment on the negligence cause of action, the securities cause of action, the breach of fiduciary duty cause of action or the civil conspiracy cause of action. It follows that the purchase date of the securities (July 17, 2009) was not the date the Plaintiff discovered he had been deceived as to the owner of the securities. Accordingly, summary judgment should not have been granted. See *Moriarty v. Garden Sanctuary Church*, 341 S.C. 320, 534 S.E.2d 672 (S.C. 2000) ("The important date under the discovery rule is the date that a plaintiff discovers the injury") ("the statute of limitations is triggered not merely

by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another”) *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615, 617 (1997).

VI. THE TRIAL COURT ERRED IN FINDING THAT S.C. CODE ANN. § 35-1-202 IS APPLICABLE.

The trial court in its Order found that this was “an isolated nonissuer transaction”. See S.C. Code Ann. § 35-1-202(1) a “nonissuer transaction is defined as a transaction not directly or indirectly for the benefit of the issuer and issuer is defined as a person that issues or proposes to issue security. The official comments to § 35-1-202 explain that the exemption is generally “intended to cover the occasional sale by a person.” Here, the Bank, through a common plan and/or scheme was offering securities, or at the very least aiding and abetting the offering of securities, on a regular basis. The testimony was that a Bank employee would contact a proposed purchaser, usually for an undisclosed third party, and ask the purchaser if they wanted to purchase stock (Depo. of Cannon, p. 12, lines 1-25; Depo. of Guyette, p. 38, lines 20-25; p. 39, lines 1-8; p. 15, lines 9-12). Further, Ron Page and other bank officers were intimately involved in the sale of the stock and at bank meetings they discussed who might want to buy the stock and who was going to call a prospective purchaser to sell the stock (Depo. of Guyette, p. 18, lines 1-25). Also, Horry County State Bank employees would have meetings on a weekly basis to discuss whether anybody knew a person who wanted to buy the stock and determined who knew the person that might want to buy it. (Depo. of Guyette, p. 18, lines 18-22). Horry County State Bank and its employees were intimately involved in the sale of the stock, promoted the stock and actually called prospective purchasers while never revealing who the seller was of the stock. Accordingly, this was not an “isolated nonissuer transaction” nor was it an occasional sale

since Horry County State Bank directly solicited persons who do not wish to be disclosed to sell stock on numerous occasions as this was their established business practice. Under those circumstances, the Court inappropriately found that this was an isolated nonissuer transaction. (South Carolina Courts narrowly construe exemptions under the Securities Act because securities laws are remedial in nature and therefore should be liberally construed to protect investors. *McGaha v. Mosely*, 283 S.C. 268, 322 S.E. 2d 461 (Ct.App. 1984).)

VII. THE TRIAL COURT ERRED IN FINDING THAT THE SECURITIES OF A BANK WERE EXEMPT FROM THE SECURITIES ACT.

The trial court also held under S.C. Code Ann. § 35-1-201 that securities of a bank or depository institution were exempt. However, this is not the case here in that Horry County State Bank was selling and/or offering for sale stock by an undisclosed buyer to a purchaser. The stock in question in this case was not owned by the Bank; however, the Bank was actively soliciting the buyer in the handling of the sale of the stock. Further, the Bank made it appear like it was selling the stock itself when in fact the Bank was selling the stock for others. This omission of fact was a violation of S.C. Code Ann. § 35-1-501(2) in that the appearance given to prospective purchasers was that the Bank was the owner of the stock when in fact the bank was not the owner of the stock and the Banks' officers, agents and/or employees were acting on behalf of an undisclosed seller. This conduct violates S.C. Code Ann. § 35-1-501(2) which provides in pertinent part: "to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading". It also violates S.C. Code Ann. § 35-1-502(3) "to engage in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person."

The Court's Order also finds that the Defendants' actions were exempt under S.C. Code Ann. § 35-1-202. However, the exemptions only apply to S.C. Code Ann. § 35-1-301 through S.C. Code Ann. § 35-1-306 and S.C. Code Ann. § 35-1-104. This section does not apply to other sections in the Uniform Securities Act which the Plaintiff has brought in this case. In particular, S.C. Code Ann. § 35-1-501 (general fraud) is not covered by the exempt transactions section of the Act. (See Official Comment 1 to S.C. Code Ann. § 35-1-501 provides that "Section 501...was modeled on Rule 106-5 adopted under the Securities and Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933"). See also *Gordon v. Drews*, 358 S.C. 598, 606, 595 S.E.2d 864, 868 (Ct.App. 2004) (stating that exemptions under the Act must be narrowly construed to protect investors). Accordingly, the Court should not have granted summary judgment on this ground.

VIII. THE TRIAL COURT ERRED IN HOLDING THAT SHELLEY WAS NOT ENTITLED TO A PROSPECTUS PRIOR TO PURCHASE OF THE STOCK.

Shelley has brought suit arguing that prior to the purchase of the stock he was entitled to a prospectus. The circuit court dismissed the claim stating there were no private causes of action and the Bank was not required to give Shelley a copy of the prospectus prior to purchase. The court noted there was no rule in South Carolina requiring a prospectus be presented to a stock purchaser. However, South Carolina law does require that a prospectus be offered at or before the date of purchase. See S.C. Code Reg. 13-501(10) (Dishonest or Unethical Practices by Broker, Dealers and Agents). S.C. Code Reg. 13-501(10) is the law of the state and the court was remiss in failing to hold that Shelley should have been given a prospectus at the time of sale. It is for this reason the court's ruling on S.C. Code Ann. § 35-1-504 should be overturned. In fact, Shelley's deposition establishes he never even got the stock certificates (much less the prospectus) and that upon

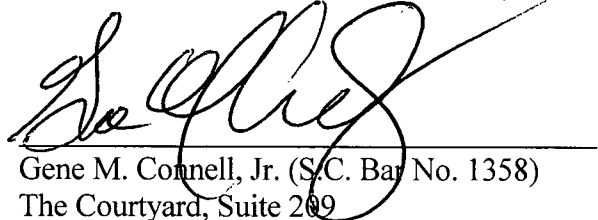
finally receiving them he discovered for the first time in 2012 that the stock had not been owned by Horry County State Bank but by Guyette (Depo. of Shelley, p. 83, lines 1-13). Accordingly, Appellant requests that the Court overturn this ruling of the circuit court based on clearly established South Carolina regulations concerning the handling of securities.

CONCLUSION

For the reasons set forth above, Appellant requests that this Court reverse the trial court's Order Granting Summary Judgment and returning this matter to the circuit court for trial.

Respectfully submitted,

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May 8, 2015
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED

MAY 12 2015

CASE NO. 2012-CP-26-5546

SC Court of Appeals

Robert Shelley a/k/a RDS Investments, LLC
a/k/a ROS Investment, LLC..... Appellant

vs.

Horry County State Bank and HCSB Financial Corporation..... Respondents

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served **Initial Brief of Appellant** on the Respondents, through counsel of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Thomas William McGee, III, Esquire
Nelson Mullins Riley & Scarborough LLP
P. O. Box 11070
Columbia, SC 29211-1070

DATE OF MAILING: May 8, 2015

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 8th day of May, 2015.

Marie P. Freeman
Notary Public for South Carolina
My Commission Expires: 6/11/24

KELAHER, CONNELL & CONNOR, P.C.

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May 8, 2015

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

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MAY 12 2015

SC Court of Appeals

Re: Appellate Case No. 2014-002571
Robert Shelley v. Horry County State Bank and HCSB Financial Corporation
C/A No. 2012-CP-26-5546
Our File No. 2012-0104C

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above-captioned matter:

- (1) Original and one copy of Initial Brief of Appellant, with Proof of Service;
- (2) Original and one copy of Appellant's Designation of Matter to be Included in Record on Appeal, with Proof of Service;
- (3) Self-addressed, stamped envelope for return of a filed copy of each to this office.

By copy of this letter, we hereby serve copies of the Initial Brief and Designation of Matter on Respondents through counsel of record.

With best regards, I am

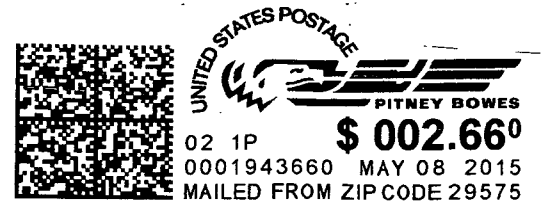
Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: T. William McGee, III, Esquire



KELAHER, CONNELL & CONNOR, P.C.

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SC Court of Appeals

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