IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin H. Dukes, III

Master in Equity and Special Circuit Court Judge

Case No. 2011-CP-07-01778

BENJAMIN GECY, ... Appellant,

v.

SOUTH CAROLINA BANK & TRUST, JAIME HAMNER and DEBORAH HAMNER, ... Respondents.

APPELLANT'S INITIAL BRIEF

Robert V. Mathison, Jr.
Attorney for the Appellant
Benjamin Gecy

MATHISON & MATHISON
Post Office Box 5271
Hilton Head Island
South Carolina 29938-5271
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

July 10, 2015

Hilton Head Island, South Carolina.

QUESTIONS PRESENTED

1. Does a material question of fact exist with respect to whether the Defendant SCB&T intentionally interfered with contracts between the Hamner Defendants and the Plaintiff?

2. Does a material question of fact exist with respect to whether the Hamner Defendants breached their contracts with the Plaintiff?

3. Does the Defendant SCB&T, with respect to the cause of action for negligent misrepresentation, owe the Plaintiff a duty of reasonable care?

4. Does a material question of fact exist with respect to whether the Defendant SCB&T engaged in negligent misrepresentation?

5. Does a material question of fact exist with respect to whether the Hamner Defendants engaged in negligent misrepresentation?

6. Should the trial court have continued the summary judgment hearing to compel discovery responses from Defendant SCB&T and to allow additional depositions?

TABLE OF CONTENTS

STATEMENT OF THE CASE

The Plaintiff, Benjamin C. Gecy (herein "the Plaintiff," "Mr. Gecy" or simply "Gecy"), on April 15, 2011, filed a Summons and Verified Complaint naming as defendants South Carolina Bank & Trust (herein "Defendant SCB&T" or "SCB&T," though many quotations from the record use the more abbreviated "SCBT"), and Jaime Hamner and Deborah Hamner (herein, collectively, "the Hamner Defendants," "Mr. and Mrs. Hamner," or simply "the Hamners"). The Defendants duly answered.

Subsequently, on or about June 14, 2011, The Plaintiff filed and thereafter served his First Amended and Verified Complaint bearing that date in which he set forth five causes of action and demanded a jury trial. The five causes of action stated were: (1) Tortious interference with contract, which was brought against Defendant SCB&T only; (2) breach of contract, which was brought against the Hamner Defendants only; (3) civil conspiracy, which was brought against both SCB&T and the Hamner Defendants; (4) negligent misrepresentation, which was also brought against both SCB&T and the Hamner Defendants; and (5) unfair trade practices, which was brought against SCB&T only.

The Defendants answered, and the Hamner Defendants counterclaimed, primarily for the return of earnest money they had paid, as well as for a deposit made to convert a slab foundation to one elevated on piers over a crawl space.

This case was and is essentially a controversy about two contracts between Mr. Gecy and the Hamner Defendants. The first contract dated February 3, 2010 (herein "the Real Estate Contract"), called for the sale of a 6.88 parcel of land at 10 Meredith Lane on Lady's Island in Beaufort County (herein, sometimes, referred to as "the Real Property") by Mr. Gecy to Mr. and Mrs. Hamner for the price of $150,000.00. The second contract was also dated February 3, 2010, and it called for the construction of a house by Gecy on the Real Property (herein "the Construction Contract") in return for the payment of $156,900.00.

The case then unfolded in normal course. On March 19, 2012, the Defendant SCB&T filed a motion for summary judgment that was supported by a single affidavit, namely, that of Diana G. Chalmers in which she swore that she had "[a]t all times . . . declined to sign [a] Road Maintenance Agreement." Chalmers' Affidavit dated November 7, 2011 [herein after referred to as "the Chalmers' Affidavit"].

The Hamner Defendants subsequently "joined" in this motion, though they never filed one of their own.

On May 8, 2012, the Plaintiff's counsel was relieved of the obligation to represent Mr. Gecy any longer. Shortly thereafter, on or about July 7, 2012, Mr. Gecy filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court for the District of South Carolina.

This case was then stayed until after Mr. Gecy was discharged, at which time, in November of 2013, this case was restored to the active roster. So also was the motion for summary judgment restored to the motions roster. That led the Plaintiff, who was constrained after the Bankruptcy to proceed in this case *pro se*, to request the opportunity to conduct additional discovery. His request was granted, and all parties agreed on the date of February 21, 2013, as the date on which the summary judgment would be heard.

Thereafter, the Plaintiff served on the Defendants additional written discovery, including requests for admissions, requests for the production of documents and interrogatories. To some of these timely responses were made. To others, however, the Defendants, and particularly, SCB&T, interposed objections and refused to respond otherwise.

Accordingly, prior to the summary judgment hearing on February 21, 2013, the Plaintiff filed a motion to compel and a motion to continue the hearing until such time as (a) the Defendants furnished such written discovery as might be ordered in response to the motion to compel, and (b) the Plaintiff had taken two additional depositions, for which he had given notice, but which, due to the notice period and conflicts, could not

be held before the summary judgment hearing.

At the hearing on February 21, 2013, Defendant SCB&T presented to the Court and to the Plaintiff, a brief contending that it owed no duty to the Plaintiff. A copy of the brief had been emailed to the Plaintiff the day before the hearing. SCB&T also served an additional affidavit, and the Hamner Defendants presented a revised and amplified affidavit by Jaime Hamner.

Largely ignoring the issue raised by the Chalmers' Affidavit, which had been the platform for and the focus of the motion for summary judgment at the outset, the Defendant SCB&T refused to consent to the continuance, pointed out the length of time that had elapsed since the case had been commenced, and took the position that, because no duty was owed to the Plaintiff, factual questions that might be resolved through additional discovery were simply immaterial.

Evidently convinced by that argument, the trial judge denied the motion for a continuance. And, because the continuance had been sought to afford additional time for discovery not yet provided or completed, and despite his having heard argument about what that unfinished discovery encompassed, by denying the motion for a continuance, the Master also effectively denied the motion to compel by implication.

Thereafter, by Order dated June 5, 2014, the trial judge awarded summary judgment to both Defendants as to all of the Plaintiff's five causes of action. In doing so, he relied upon an inapplicable statute--S.C. Code Ann. § 37-10-107--as well as upon a Circuit Court decision by Judge Roger M. Young (the *Kerr* case), to hold that the Defendant SCB&T owed no legal duty to the Plaintiff.

The Plaintiff timely filed and served a motion for reconsideration under Rules 52 and 59, SCRCP. That motion was heard on August 5, 2014.

By order filed on September 18, 2014, the trial judge revised his previous order to delete any reliance on the inapplicable statute. He also adopted the reasoning in *Kerr v. Branch Banking & Trust Co.,* 408 S.C. 328, 759 S.E.2d 724 (2014), now as decided by the South Carolina Supreme Court, to hold that Defendant SCB&T owed no legal duty to the Plaintiff. In all other respects, however, he embraced his previous decision, thereby confirming the award of summary judgment to both Defendants with respect to all five causes of action in the Plaintiff's Complaint.

This appeal followed.

On appeal, the Plaintiff, as appellant, challenges both the Order dated June 5, 2014, and the Order dated and filed on or about September 18, 2014, and, specifically, the award of summary judgment to all Defendants, but only with respect to the causes of action for intentional interference with contract, breach of contract and negligent misrepresentation.

STATEMENT OF THE FACTS

The evidentiary facts from the Statement of the Case are hereby adopted and by express reference made a part of this Statement of the Facts.

In January of 2010, Mr. Gecy and Mr. and Mrs. Hamner began negotiations about the sale of the Real Property, comprising 6.88 acres of land on Meredith Lane at Lady's Island, in Beaufort County, South Carolina.

It became clear that the Hamners would need to sell the home that they owned at 11 Southern Magnolia Drive in order to make the purchase. Mr. Gecy agreed to assist, and, with his help, a buyer for the Hamners' home was identified. Thus, on or about January 28, 2010, Mr. and Mrs. Hamner executed a contract to sell their existing home.

Also, within the same time period, Mr. Gecy received an offer from a third party to buy approximately one-half of the Real Property at 10 Meredith Lane. However, upon being advised of the offer, Mr. and Mrs. Hamner reassured Mr. Gecy of their intention to purchase the entire 6.88 acres, and so Gecy turned down the offer.

On or about February 3, 2010, the parties made good their intentions by signing both the Real Estate and the Construction Contracts. Once the parties had executed the contracts, upon the recommendation of Mr. Gecy, who was then a customer of SCB&T, Mr. and Mrs. Hamner were referred to Bruce VanHorn at SCB&T to obtain financing in order to fund their obligations under the two contracts in question.

Each of the contracts contained a financing contingency that allowed the Hamners to apply for 100% financing, and, if they failed to qualify, to be exonerated

from the duty to perform. The contracts also provided that, if through no fault of the parties, one or more conditions failed to occur on or before the scheduled closing date, the contracts would be automatically extended for an additional 30 days to allow the problem or problems to be resolved.

After initiating their relationship with SCB&T, Jaime Hamner identified Doug Jacobs as the loan officer with whom he was dealing. In response to inquiries by Mr.Gecy, both Jaime Hamner and Doug Jacobs represented to Mr Gecy that the Hamners had applied for a "VA loan," meaning a loan guaranteed by the Department of Veterans Affairs (herein sometimes "VA").

In addition. Mr. Hamner told Mr. Gecy that the loan for which he had applied had a fixed rate.

SCB&T thereupon notified the parties that, because Meredith Lane was a private road, the bank would require a road maintenance agreement (herein after "the Road Maintenance Agreement" or "RMA"), which was an instrument to assure the continued upkeep of the road. The VA handbook, in certain circumstances, required an RMA, so neither the Plaintiff nor the closing attorney, who was representing both the seller and the buyers, initially thought anything was amiss.

However, the underwriting guidelines for conventional loans do not require an RMA, and, at that time, neither did those for FHA loans. Therefore, both seemed like viable alternatives if obtaining the RMA proved to be problematic.

SCB&T ordered an appraisal of the Real Property, as well as the proposed improvements thereon, from Patrice Moody of Coastal Appraisal Service. The request was not for a VA qualified appraisal.

Furthermore, Ms. Moody owned a residence on property in the vicinity of the Real Property that she had been commissioned to appraise. That made the choice of appraisers questionable in view of the fact the certain property owners living on Meredith Lane, such as John Ferguson, were known to oppose any further development in the neighborhood.

On or about February 25, 2010, Ms. Moody issued her appraisal valuing the land only at 10 Meredith Lane at $115,000.00, which was less than the purchase price, but valuing the land, with the completed house thereon, at $330,000.00, which was more than sufficient to cover the price of the land, plus the cost of construction.

Mr. and Mrs. Hamner desired a change in the house plans, specifically, a raised foundation, with a crawl space underneath, instead of a slab. In order to make this modification, on or about March 5, 2010, the Plaintiff and the Hamner Defendants signed an addendum to the contracts, and the Plaintiff required the deposit with him by the Hamners of $12,400.00, which was the increase in price.

March 5, 2010, also was the closing date established in both of the contracts. The closing date was extended, however, in accordance with the automatic extension provision in the contracts, until Monday, April 5, 2010.

Also, because the Plaintiff was concerned that he might not get paid the full purchase price of the Real Property at closing, SCB&T authorized the Plaintiff, at his

cost, to obtain another independent appraisal. An appraiser, Murray Steen, subsequently submitted a new appraisal in which the Real Property was valued at $150,000.00, and the land with a completed house thereon was valued at $405,000.00. SCB&T accepted the new appraisal without qualification.

In the interim, however, it had become clear that, despite the protests of both the Plaintiff and Mr. Ken Tootle, the closing attorney, Mr. Doug Jacobs, on the behalf of SCB&T, was insisting that the Road Maintenance Agreement be signed by **all** persons whose property adjoined Meredith Lane. This included known opponents of development, such as John Ferguson.

Inquiries to Mr. Jacobs had led him to reveal that the Hamners had a construction loan that was "rolling into" a permanent VA loan. Because the end loan would have a VA guarantee, Mr. Jacobs insisted that VA guidelines applied, and that those guidelines required every property owner on the road to sign.

Although Mr. Jacobs' interpretation was disputed by the closing attorney, and no provision of the VA Handbook appears to validate Mr. Jacobs' insistence upon it, the Plaintiff and the closing attorney made the effort to comply. An RMA was prepared by the closing attorney, in which everyone who had an interest in any title to land adjoining Meredith Lane was named, despite the fact that such was wholly unnecessary to assure continued upkeep of the road.

Because Mr. Gecy had a recorded easement over and across Meredith Lane, which was 50 feet wide, and which he proposed to convey to the Hamner Defendants

along with the Real Property, the RMA was not intended to cure a title problem but only to resolve how the cost of upkeep would be apportioned.

By email dated March 6, 2010, SCB&T approved the proposed RMA and advised the closing attorney to notify the bank of "when this will [be] signed so that we can get a firm closing date."

On or about the same date, Defendant SCB&T also acknowledged that having the RMA signed was the final and only condition to the bank's funding of the Hamner Defendants' loan.

However, on or about March 10, 2010, Jaime Hamner notified the Plaintiff that he had decided not to go through with the purchase. That same day a meeting was held by Mr. Hamner and the closing attorney, at which time the latter explained the automatic extension provisions in the contracts, as well as the current status of the Road Maintenance Agreement. Although unknown to the Plaintiff at the time, SCB&T had also issued a credit denial to the Hamners, which was dated March 10, 2015, and was based, in pertinent part, on the failure to obtain the Road Maintenance Agreement.

Thereafter, the Plaintiff dutifully pursued obtaining the signatures that appeared in the RMA. He secured the written approval of several, as well as the promise by others to attend and sign at the closing.

The Plaintiff also obtained via an email dated March __, 2010, what he believed was a promise to sign the RMA by Ed and Diana Chalmers, provided he Plaintiff complied with certain terms, to which he agreed.

Finally, and most significantly, on or about March 26, 2010, the Plaintiff met with John Ferguson and a surveyor on Meredith Lane at or near the Peal Property. Mr. Hamner had been intimidated by Mr. Ferguson because of his status as a Deputy Sheriff and his previously very outspoken opposition to any development of the Real Property.

However, upon learning that the Plaintiff had a recorded easement, as well as the dimensions of it, Mr. Ferguson agreed to sign the RMA. He also agreed to call Mr. Hamner to give him the good news that he would not hold up the Hamners' closing, which he did, leading Mr. Hamner to thank him.

The following day, March 27, 2010, Mr. Hamner sent to the Plaintiff an email in which he described in detail the porch design that he desired for the house that the Plaintiff was contractually bound to build. Mr. Hamner also supplied color choices for the exterior of the house upon which he and his wife had decided. This email led the Plaintiff to believe that the Hamner Defendants were committed to closing the transaction.

The Plaintiff had Mr. Ferguson sign the RMA. He also advised the closing attorney of Mr. Ferguson's unexpected cooperation. The closing attorney's office, via telephone and email, commencing on Tuesday, March 30, 2010, attempted to obtain the loan package from SCB&T and to schedule the closing.

The attempts continued through April 5, 2010. However, nobody at the bank, including the SCB&T loan officer, Mr. Jacobs, would respond.

Therefore, on Monday, April 5, 2010--the extended date for the closing--Mr. Gecy himself sent an email to Mr. Jacobs to advise him that all of the persons named in the RMA had signed, or had agreed to sign, and he requested that the remaining signatures be an "at closing condition," so that those who had not yet signed could do so at the closing.

Instead of responding directly to Mr. Gecy's request, at 3:20 p.m. on April 5, 2010, Mr. Jacobs advised Mr. Gecy and the closing attorney by email that there would be additional requirements for the closing: According to Mr. Jacobs, in order to fund the loan, SCB&T required the Plaintiff to furnish (a) a copy of the survey, (b) an aerial view of Meredith Lane and (c) the tax records identifying all owners whose property adjoined Meredith Lane.

These were all furnished promptly, despite the fact that the demand for them constituted an unexpected, *post facto* demand by the bank—the same bank which had already approved the form and content of the RMA.

On April 7, and again on April 8, 2010, the closing attorney's office requested a closing date. Finally, on April 8, 2010, SCB&T's loan officer responded via email, "I am waiting on Mr. Hamner to call me back and will let you know when I hear from him."

Indeed, everyone was waiting on Mr. Hamner because the Plaintiff had neither seen nor heard from him since he sent his email on March 27, 2010.

Despite receiving copies of most of the email correspondence since his own email to the Plaintiff on March 27, 2010, Mr. Hamner remained silent, in so far as the Plaintiff and the closing attorney were concerned--for 12 days--through April 8, 2010,

which, according to Mr. Hamner's deposition testimony, was because he was "out of town attending a conference."

However, he must have found the time to speak to a lawyer other than the closing attorney during that same period because, on April 9, 2010, a lawyer to whom SCB&T refers a large percentage of its loans, Frampton Harper, II, wrote a letter on Mr. Hamner's behalf to the closing attorney stating that Mr. Hamner considered "the contract to purchase the acreage located at 10 Meredith Lane . . . null and void." The reason given for that contention was that the Hamner Defendants' financing had been declined because of the "property appraisal" and the Plaintiff's failure to deliver a valid Road Maintenance Agreement by April 5, 2010.

On the following day, April 10, 2010, the closing attorney responded to Mr. Harper by letter setting forth his understanding that all conditions had been met or excused.

Additional facts, most of which were learned through discovery, are discussed in the Argument that follows.

A. STANDARD OF REVIEW

This case is an appeal from an order granting both Defendants summary judgment with respect to each of five causes of action set forth by the Plaintiff in his First Amended and Verified Complaint dated June 14, 2011 [herein after referred to as "the Complaint"]. Thus, the standard of review can be stated clearly:

> When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)(citation omitted). Summary judgment is appropriate when the pleadings, depositions, affidavits and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.;* Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Fleming,* 350 S.C. at 493-94, 567 S.E.2d at 860 (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases involving [an] heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. *Id.* At 330-31, 673 S.E.2d at 803. *Turner v. Milliman,* 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)(quotation marks omitted)[herein After referred to as *"Turner"*].

As noted above, the Plaintiff has appealed only from adverse rulings with respect to three of the causes of action in the Complaint: intentional interference with contract, breach of contract and negligent misrepresentation. None involves an heightened burden of proof as each requires proof only by a preponderance of the evidence. *See Turner,* 392 S.C. at 123, 708 S.E.2d at 769 (negligent misrepresentation), *citing McLaughlin v. Williams,* 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008); *and Todd v. S.C. Farm Bureau Mut. Ins. Co.,* 287 S.C. 190, 193, 336 S.E.2d 472, 473 (1985)("any competent evidence" is sufficient to create a jury issue for intentional

interference); *and Bishop v. City of Columbia,* 401 S.C. 651, 663, 738 S.E.2d 255, ___ (Ct. App. 2013)(scintilla standard applied to evidence of breach of contract); *Garrett Engineering Co. v. Auburn Foundry, Inc.,* 176 S.C. 59, 68, 179 S.E. 693, ___ (1935) (preponderance of the evidence in action for breach accompanied by fraudulent act).

ARGUMENT

INTENTIONAL INTERFERENCE WITH CONTRACT

B. Material Issues of Fact Exist as to Whether Defendant SCB&T Interfered with the Contracts (Question 1).

The Plaintiff has sought damages from the Defendant SCB&T for interfering with its two contracts with the Hamner Defendants. In order to set up a claim for intentional interference with contractual relations [herein after "intentional interference"], the Plaintiff must plead and prove five elements: (1) the contract, (2) the wrongdoer's knowledge [of the contract], (3) his intentional procurement of the breach, (4) the absence of justification, and (5) damages resulting therefrom. F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts,* at 424 (S.C. Bar 4th Ed. 2011)[herein after referred to as "Hubbard & Felix on Torts"], citing *DeBerry v. McCain,* 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981).

Because of the nature of the relationships among the parties, with the Plaintiff participating in the transaction as both the seller of real property and the builder of the house to be constructed thereon, with the Hamner Defendants as the buyers under the real estate contract, as well as the obligors under the construction contract, and with the Defendant SCB&T as the lender to which both contracts were delivered in order to secure financing, there is ample evidence that the two contracts were in existence and that SCB&T was well aware of both.

In addition, neither contract was performed, so, assuming that a breach occurred, the Plaintiff has sustained actual damages because he lost the benefit of his bargain (his expectation interest) under both contracts. Complaint ¶ 50 at 8. He also had out-of-pocket expenses that are recoverable. *Id.*

This treatment of the first two elements of intentional interference may be too facile for the Defendants' liking because, as has been discussed herein below, they contend that the failure of a condition to the contract excused the performance of the Hamner Defendants and thereby prevented a breach from occurring.

The Plaintiff, on the other hand, contends that the Defendant SCB&T imposed a false condition on his relationship with the Hamners, namely, a requirement that the parties to the contracts, as a condition of obtaining financing, secure a road maintenance agreement, that is, an agreement specifying who would be responsible for the upkeep of Meredith Lane, which is a private road leading to the Real Property. Furthermore, as the transaction unfolded, the agreement demanded by SCB&T became increasingly onerous because the bank was insisting that every person whose property adjoined Meredith Lane must sign it.

Although Meredith Lane is a private road, no serious question of access was ever raised by either SCB&T or the Hamner Defendants because the Plaintiff had a recorded easement over and along the road measuring 50 feet in width. Thus, the easement, if conveyed to the Hamners along with the Real Property, was more than adequate to afford not only ingress and egress for them, but also access for all fire and emergency vehicles that might require and be entitled to it under the applicable ordinances.

For the same reason, the road maintenance agreement was not required to remedy any form of defect in the title.

Although the Plaintiff and the closing attorney both protested against, first, the need for a road maintenance agreement, and later, the scope of it, they, nevertheless

made an effort to comply. That effort was induced in response to explicit statements made both by Jaime Hamner and by Doug Jacobs, the loan officer at SCB&T, that Mr. Hamnner was seeking a loan guaranteed by the VA.

The underwriting guidelines for VA loans were known by the Plaintiff and by Ken Tootle, the closing attorney, under certain circumstances, to call for road maintenance agreements, so the suggestion of obtaining one in connection with a VA loan ostensibly being sought by the Hamner Defendants was plausible.

However, from the record, the following facts seem clear: The Hamner Defendants and SCB&T, by and through Mr. Doug Jacobs, told the Plaintiff that the Hamners had applied for a VA loan. (Jacobs Dep. At 65, line 24 through 66, line 4). Mr. Hamner also told the Plaintiff that the loan for which he had applied carried a fixed rate. Later Mr. Jacobs insisted, and the trial court so found, that "[t]he Hamners [had] applied for a 100% construction loan that would, on the completion of construction, roll into a 100% VA loan." Order of September 18, at 3.

None of those statements was true. Written discovery by the Plaintiff had unearthed, before the summary judgment hearing, the Hamners' loan applications. There were in fact two of them. The first had been completed on February 13, 2010. The second, which sought an increase in the loan amount of $12,400.00 to cover the increased cost of raising the foundation for the house, was completed on March 3, 2010.

In neither application was there ***any mention*** of the Department of Veterans' Affairs or of a VA loan—either for construction or as a permanent loan. Instead, the

Hamners had applied for a conventional, permanent loan of 30 years' duration, with an adjustable rate mortgage (herein sometimes "ARM").

Many of the forms included with each application contained a "check the box" feature that provided a "VA loan" as one alternative. However, it was never checked. The box calling for a conventional, uninsured loan invariably was. One form even provided the choice of "construction or construction [converting] to permanent." It was not checked either. (Jacobs Dep. At 73, lines 2-20).

In his deposition, Mr. Hamner had no explanation for why he had told the Plaintiff that he had applied for a VA loan with a fixed rate, when, in fact, the two applications—both of which were signed by his wife and by him--demonstrated that he had not.

In short, every material statement made to the Plaintiff by the Defendants about the Hamners' loan had been false when made. Because they had applied for conventional and not VA financing, ***there was no VA requirement or underwriting guideline that required a Road Maintenance Agreement.***

Even if one were to credit Mr. Jacobs' deposition testimony that the Hamners' loan might, at some point, morph into a VA loan, and that, therefore, in an abundance of caution, the bank's own underwriting guidelines required an RMA (Jacobs Dep. At 32, line 24 through 33, line7), that in itself raises a material question of fact because SCB&T refused to produce its conventional loan guidelines, claiming, *inter alia,* that they were "privileged" and "not relevant." Defendant SCB&T's Response to Request No. 21 of Plaintiff's Second Request for Production. One is constrained to question, if SCB&T had such an internal policy, why was it never produced in response to the Plaintiff's specific discovery request?

Furthermore, if SCB&T's requiring an RMA was just a hedge against the possibility that conventional borrowers, like the Hamners, might ultimately want to switch to a VA loan, why were none of the other prerequisites to obtain a VA loan followed? The bank officers in charge admitted that SCB&T had never ordered a VA qualified appraisal. Upon the request for such an appraisal, the applicant obtains a 12 digit VA loan number. VA Pamphlet 26-7 Revised, Chapter 5, Section 5-5, 3(b). None, however, was obtained for the Hamners, as was admitted by Mr. Jacobs. (Jacobs Dep. At 28, lines 9-17).

Indeed, SCB&T never obtained even a Certificate of Eligibility for Mr. Hamner. *Id.,* Chapter 2, Section 2-2, 1(b). Without such a certificate no VA loan could have been processed.

Finally, the request for a VA qualified appraisal leads, upon its completion, to a review by a VA authorized "staff approval reviewer" (herein "S.A.R."). *Id.*, Chapter 13, Section 13.06. Upon completion of the review by the S.A.R, a Notice of Value is generated. *Id.* Issued in conjunction with the appraisal review, the Notice of Value "must include a list of any conditions and requirements that must be satisfied to be eligible for the VA loan guarantee." *Id.*

It is at this point, in the normal course of a VA loan, that a Road Maintenance Agreement might be specified. However, none of these events occurred with respect to the Hamners' loan, which was, after all, conventional in nature.

In short, Defendant SCB&T did nothing whatsoever to assure that the Hamners might qualify for a VA loan, except, for some reason, insist on a RMA.

Finally, and most significantly, SCB&T never furnished in response to discovery the written policy or guidelines that it ostensibly had requiring that all RMA's must be executed before closing and that they must be signed by all owners whose property adjoined the private road. The VA guidelines, upon which the banks policy is supposedly based, do not say, or even imply, such a draconian approach. Instead, under the heading "PRIVATE ROAD/COMMON-USE DRIVEWWAY," the VA requires only:

> Evidence that use of the private road or common-use driveway is protected by a recorded permanent easement or recorded right-of-way from the property to the public road ***and that a provision exists for its continued maintenance.*** VA Pamphlet 26-7 Revised, Chapter 13, *Value Notices*, Section 13-37 (emphasis added).

Apart from the absence of the written bank policy so radically different than the guideline upon which it was supposedly based, there is other evidence creating a material question of fact. Before the summary judgment hearing, the Plaintiff had located through the Register of Deeds Office an SCB&T mortgage given by a man named Robert S. Walters, Jr., whose property was located on Hester Lane, which is a private road on Lady's Island in Beaufort County.

Mr. Jacobs had testified that SCB&T had always required an RMA to be executed and delivered before closing. (Jacobs Dep, at 35, lines 4-9). He also stated under oath that SCB&T had "never deviated" from the the policy of requiring signatures by all owners whose property adjoined a private road. (Jacobs Dep at 35, lines 10-12).

However, Mr. Walters' mortgage, which, like that for which the Hamners had applied, was a 30 year conventional loan, with an ARM, had been dated on October 25, 2012, and recorded on October 26, 2012. (Jacobs Dep., Plaintiff's Exhibit 26) That was

over 10 months ***before*** Mr. Walters Road Maintenance Agreement for Hester Lane was signed (September 11, 2013) and recorded (September 13, 2013), proving that Mr. Jacobs had dissembled when he testified that RMA's were always obtained by SCB&T before closing. (Gecy Affidavit dated February 19, 2014, Exhibit H-2).

Even more interesting, however, was the fact that, although at least five other owners had property adjoining Hester Lane (Tax Map with Names, Jacobs Dep., Plaintiff's Exhibit 25), Mr. Walters' RMA for Hester Lane was signed by only one person—Mr. Walters (*Id.,* Exhibit H-2)—a fact that should create grave doubt about SCB&T never deviating from its ostensible policy of requiring signatures by all adjoining land owners.

At the summary judgment hearing on February 21, 2014, the Plaintiff, appearing *pro se*, made an offer of proof by way of his affidavit and argument that, if allowed to depose Mr. Walters, for whom a notice of deposition had already been served, Mr. Walters would state that his loan officer at SCB&T was Doug Jacobs, that Mr. Jacobs had personally prepared the Road Maintenance Agreement that Mr. Walters alone had signed, and that Mr. Jacobs had never told him that any of the other owners whose land abutted the Hester Lane would be required to sign.

Indeed, from all appearances, the only reason that an RMA was obtained at all was that Mr. Walters took out his conventional loan with SCB&T with an actual VA loan through SCB&T (no doubt with additional fees and points) that was dated on December 16, 2013 and recorded on December 23, 2013, that is, some two months after the RMA had been recorded. (Jacobs Dep., Plaintiff's Exhibit 22).

Although the recorded documents are all acknowledged and self-authenticating, the testimony of Mr. Walters would have tied Mr. Jacobs directly to the conflict between the SCB&T's stated policies and its actual practices. Confronted with the foregoing offer of proof, however, the trial judge concluded that "no further discovery would contribute to the resolution of the issues in this case." Order of September 18, at 6.

Regardless of what Mr. Walters' deposition would have established, myriad facts exist in the record that tend to show, if not to prove, that the requirements of the Road Maintenance Agreement imposed by SCB&T on the transaction were false, result oriented and, in the light most favorable to the Plaintiff, amounted to a pretext. And it was this pretext that caused the Hamner Defendants to decline to close the transaction.

Accordingly, more than a scintilla of evidence exists with respect to each of the elements of intentional interference with the contracts between the Plaintiff and the Hamner Defendants, and summary judgment with respect to this cause of action must be reversed.

C. Material Issues of Fact Exist as to Whether the Hamner Defendants Breached the Contracts with the Plaintiff (Question 3).

If the condition imposed upon the transaction was false or a pretext, as must be inferred from the discussion at pages 17 through 22, *supra*, then the performance of the Hamner Defendants under the two contracts was not excused by the failure of that condition. Mr. Gecy testified that other loan programs were available that did not require a Road Maintenance Agreement, such as through the FHA or through conventional financing (anywhere except at SCB&T), and that he and Mr. Hamner discussed the Hamners' utilizing those, as well as other alternatives. (Gecy Dep., at 175, lines 6-19). Mr Jacobs' testimony confirms the availability of other lines of credit that would not require an RMA (Jacobs Dep., at), and Mr. Hamner expressly acknowledged the exploration by him and the Plaintiff of "other alternatives" to avoid the requirement of an RMA. (Undated letter from Mr. Hamner to the closing attorney delivered in March of 2010).

Nevertheless, the Hamner Defendants flatly refused to pursue any financing except with SCB&T. From and after the date of the *sub silentio* credit denial letter delivered by SCB&T to the Hamners, it can be inferred that they "liked their chances" of being excused from performance because of John Ferguson's obdurate stance. When his opposition dissolved, Mr. Hamner wrote an email on March 27, 2010, indicating that he was content to close, and then he disappeared for all intent and purposes until after April 5, 2010. During that period, SCB&T would not release the closing package to the closing attorney because they had "not heard from" the Hamners.

The Plaintiff insisted that the Hamners' breach was the result of their refusal to seek alternative financing, despite the clear opportunity. (Gecy Dep., at 175, lines 6-19). However, Mr. Hamner's sending a deceptively reassuring email and then "making himself scarce" so that the closing could not take place as scheduled, seems to be the more material breach.

"This being an action for breach of contract, the burden [is] upon the [plaintiff] to prove the contact, its breach and the damages caused by such breach." *Maro v. Lewis,* 389 S.C. 216, 222, 697 S.E.2d 684, ___ (Ct. App. 2010); *quoting Fuller v. Eastern Fire & Cas. Ins.,* 240 S.C.75, 89, 124 S.E.2d 602, 610 (1962). Under the scintilla standard, there are clearly enough disputed facts to warrant the reversal of the summary judgment on the Plaintiff's breach of contract action.

The Hamner Defendants may well have other defenses, either based on what they were told by SCB&T or otherwise. However, those defenses should be for the jury to decide. If, as has been demonstrated, there is evidence that the condition was but a pretext, the failure of it should not excuse performance by the Hamners.

NEGLIGENT MISREPRESENTATION

D. Defendant SCB&T, with respect to Negligent Misrepresentation, Owes a Duty of Reasonable Care to the Plaintiff (Questions 3 and 4)

In his Fourth Cause of Action, the Plaintiff pleaded a claim for negligent misrepresentation against both SCB&T and the Hamner Defendants. Accordingly,

> To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant had a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a result of his reliance on the representation. *Turner,* 392 S.C. at 123, 708 S.E.2d at 769.

The trial judge also ruled that, with respect to representations by Defendant SCB&T, The Plaintiff was owed no duty and, in any event, was not entitled to rely. In his initial order granting summary judgment, the trial court reached these conclusions by adopting the reasoning in Circuit Court decisions, including that in *Kerr v. Branch Banking & Trust Co.,* 2009-CP-10-07516 (S.C. Bus. Court, Nov. 8, 2011). Order of June 5, at 6-10. In the *Kerr* case, Judge Roger M. Young had applied S.C. Code Ann. § 37-10-107—the so-called Lender's Statute of Frauds—to award summary judgment against the plaintiffs who were shareholders, officers and directors in a corporation, Skywaves, to which BB&T had made a loan and with which BB&T was locked in breach of contract litigation because of BB&T's alleged unjustified refusal to continue funding the loan.

On appeal the South Carolina Supreme Court ruled that, because the statute's application was expressly limited "to suits between lenders and borrowers," S.C. Code Ann. § 37-10-107 could not bar the plaintiffs' tort claims against BB&T. *Kerr v. Branch Banking & Trust Co.,* 408 S.C. 328, 332, 759 S.E.2d 724, ___ n.5 (2014)(one of the tort claims was for negligent misrepresentation)[herein after referred to as *'Kerr'*].

Notwithstanding that conclusion, however, the court then appeared to hold:

> Despite Appellants' efforts to frame their claims as alleged misrepresentations made to them in their capacity as investors, the trial court aptly noted that, at its core, this case revolves around the contractual relationship between BB&T and its customer, Skywaves. That relationship is the subject of a suit between Skywaves and BB&T, which is not before us. Rather, our inquiry here is confined to whether these plaintiffs—as investors, directors, officers and shareholders of Skywaves—may maintain a lawsuit separate from the one brought by

> the company itself, for what amounts to breach of the contract between Skywaves and BB&T. ***We find that there is no basis in the law for finding that BB&T owed any duty to Appellants, as non-customer investors, sufficient to support their claims for negligence, negligent misrepresentation or fraudulent inducement.*** *Kerr,* 408 S.C. 328, 332-33, 759 S.E.2d 724, ___ (emphasis added and footnote omitted).

Evidently, relying on the emphasized language, and, without making an effort to evaluate the distinctions between the *Kerr* case and the case at bar, the trial judge in this case decided that SCB&T owed no duty to the Plaintiff in this case, Mr. Gecy. Compounding the problem was that, in a footnote following the emphasized language quoted above, the Supreme Court, after a discussion of duty, said, "[T]o state a claim for negligent misrepresentation or fraudulent inducement, a party must establish, *inter alia,* that he had a right to rely on a statement made by an opposing party." *Kerr,* 408 S.C. 328, 333, 759 S.E.2d 724, ___ n.6; *citing cf. Turner,* 392 S.C. at 122-23, 708 S.E.2d at 769. That statement, of course, is correct, but it appeared to conflate the notions of duty and reliance.

Had the trial court been looking for a distinction, in the case at bar, both a legal duty to the Plaintiff, and the Plaintiff's right to rely, may have been found in the fact that, unlike the corporate insiders in the *Kerr case,* Mr. Gecy was, at the time he referred the Hamner Defendants to SCB&T, a customer of the bank himself with a relationship involving open lines of credit. (Gecy Dep.at 176, lines 1-8).

Furthermore, in reaching the sweeping generalization in *Kerr*, both the Supreme Court and the trial court ignored this state's long accepted jurisprudence concerning negligent misrepresentation that had been at least 40 years in the making. Thus, in *South Carolina State Ports Auth. v. Booz-Allen & Hamilton,* 289 S.C. 373, 346 S.E.2d

324 (1986)[herein after referred to as *"Booz-Allen"*], the Supreme Court, in finding a legal duty by the defendant with respect to the alleged negligent dissemination of information, said:

> We hold that the duty to use due care, running from a consultant to the commercial competitor who is being critiqued, arises where the consultant undertakes to objectively analyze and compare the attributes of commercial competitors for the purpose of giving one a market advantage over another. 289 S.C. 373, 376-77, 346 S.E.2d 324, 326.

The court also clearly stated:

> A tort-feasor's duty arises from his relationship to the injured party. *Barker v. Sauls,* [289 S.C. 121, 122,] 345 S.E.2d 244 (1986). The Relationship may arise out of the tort-feasor's contractual relationship with a third party. *Booz-Allen,* 289 S.C. 373, 376, 346 S.E.2d 324, 326 (South Carolina citation omitted in the original).

Shortly before the Supreme Court embraced negligent misrepresentation in *Booz-Allen,* the South Carolina Court of Appeals had turned to Section 552 of the *Restatement (Second) of Torts* § 552, at 126 (A.L.I. 1977)[herein after referred to as *"Restatement"*]. Thus, in *Winburn v. Insurance Company of North America,* 287 S.C. 435, 339 S.E.2d 142 (Ct. App 1985)[herein after referred to as *"Winburn"*], to decide a case based in part on negligent misrepresentation, the court expressly relied on *Restatement* § 552, by stating, "A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." *Winburn,* 287 S.C. 435, 441, 339 S.E.2d 142, 146. Then the court quoted the *Restatement* with approval as follows: "The fact that information is given in the course of the defendant's business is a sufficient indication that he has a pecuniary interest in it, even though he

receives no consideration for it at the time. *Winburn,* 287 S.C. 435, 442, 339 S.E.2d 142, 146; *citing Restatement* § 552, Comment d, at 129-30.

Restatement § 552 was cited thereafter in other decisions with approval. *See, e.g., First Fed. Savings Bank v. Knauss,* 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988).

Finally in 1997, in an accountant's liability case that was widely perceived as limiting exposure, *Restatement* § 552 was adopted by the South Carolina Supreme Court as the substantive law of this state:

> We adopt the § 552 standard of liability for the reasons set forth in the Court of Appeals' decision. Under §552 an accountant has a duty to exercise reasonable care or competence in obtaining or communicating information. This section imposes no duty to *disclose* information. *ML-Lee Acquisition Fund, L.P. v. DeLoitte & Touche,* 327 S.C. 238, 240, 489 S.E.2d 470, 471 n.3 (1997)[herein after referred to as *"ML-Lee"], affirming in part and reversing in part* 320 S.C. 123, 463 S.E.2d 618 (Ct. App.1995).

None of these decisions has been overturned. Yet no effort to distinguish them appears in the *Kerr* decision or in the trial court's orders in the case at bar.

Therefore, *Restatement* § 552 remains alive and well as the substantive law of South Carolina, and its provisions appear to validate the Plaintiff's negligent misrepresentation cause of action that was given such short shrift in the trial court.

Restatement § 552, under the heading "Information Negligently Supplied for the Guidance of Others," provides as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by

their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Beyond the shadow of a doubt, the representations made to the Plaintiff by Defendant SCB&T are actionable under Subsection (1), as well as under Subsections (2)(a) and (b) of the *Restatement*. The Plaintiff, who was the seller and the contractor under the two contracts, surely was "one of a limited group of persons for whose benefit and guidance [SCB&T] intend[ed] to supply the information or [knew] that the recipient [Mr. and Mrs. Hamner] intend[ed] to supply it." *Restatement* § 552(2)(a).

In addition, "through reliance upon [the information] in a transaction that [SCB&T] intend[ed] the information to influence, or knew that the recipient so intend[ed] . . . ," the Plaintiff sustained damages. *Restatement* § 552(2)(b).

Please note that, though the trial court seemed to believe that a fiduciary duty between the parties was required for reliance on a negligent misrepresentation to be justifiable, Order of September 18, at 10, no such requirement exists in *Restatement* § 552.

Also, as discussed above, the Plaintiff in this case, at the time that he referred the Hamner Defendants to SCB&T for financing, was himself a customer of SCB&T, albeit with lines of credit that did not involve the Hamners. That, standing alone, should be a sufficient basis for refusing to apply the apparent holding announced in *Kerr* to the Plaintiff's action for negligent misrepresentation in this case.

If it is not, however, it is submitted that *Restatement* § 552 states the general rule applicable to negligent misrepresentation in South Carolina, and that the *Kerr* decision, which, at best, is an outlier, and, at worst, conflicts with the *Restatement,* should be limited to its own facts, which are unusual if not unique.

In *Kerr,* after BB&T's failure to fund the loan (actually, a factoring agreement) placed Skywaves in Bankruptcy, Skywaves sought to enforce its contract against the bank in litigation that was, when *Kerr* was decided, still under way. *Kerr,* 408 S.C. 328, 331-32, 759 S.E.2d 724, ___.

If Skywaves succeeded in its action, it would have received as damages that which it had lost as a consequence of BB&T's failure to fund.

The shareholders, officers and directors in Skywaves, on the other hand, were suing BB&T for misrepresenting the loan in a personal presentation made to them in order to keep Skywaves' business. The individual plaintiffs in *Kerr* sought as damages their lost investments and salaries—in other words, items that could have, and likely would have, been restored or funded if Skywaves prevailed on its breach of contract claim against BB&T.

In short, the damages sought by Skywaves in one action sounding in contract, and those sought by the Skywaves' insiders in another action sounding in tort, were duplicative, that is, essentially compensation for the same loss. Thus, the outcome reached by the Supreme Court in *Kerr* could have been intended, without explicitly so stating, to avoid the possibility of a double recovery to both Skywaves and to its shareholders, officers and directors.

In addition, because the Lender's Statute of Frauds would have applied to bar certain potential claims in Skywaves action against BB&T, *Kerr,* 408 S.C. 328, 333, 759 S.E.2d 724, ___ n.6, but did not apply to the relationship, if any, between Skywaves' insiders and BB&T in their litigation, the potential for inconsistent verdicts in the two cases was very real.

For these reasons, limiting *Kerr* to its own subset of facts would be sound jurisprudence, especially in view of the line of precedents based upon *Restatement* § 552 that are arrayed against *Kerr.* Stated simply, the case at bar is not about a corporate officer bringing an action against a bank for salary that he would have received if the bank had fully funded its loan to the officer's corporation.

To the contrary, the Plaintiff in the instant action, as the disclosed seller and builder under two contracts that had been delivered to Defendant SCB&T, was well within the ambit of "the limited group of persons for whose benefit and guidance [SCB&T] intend[ed] to supply information . . . ." *Restatement* § 552(2)(a). Accordingly, Defendant SCB&T owed the Plaintiff a legal duty, and his reliance was justifiable. *Id.* § 552(1).

E. Material Issues of Fact Exist with respect to whether the Defendants Engaged in Negligent Misrepresentation (Questions 4 and 5).

The writer urges the Court to review the presentation of the facts, and, specifically, those set forth at pages 17 through 22, *supra.* Most of the representations described therein—both by SCB&T's agents and by Mr. Hamner—are statements about "present or preexisting facts," such as the type of loan for which the Hamners had applied. *See, e.g., Turner,* 392 S.C. 116, ___, 708 S.E.2d 766, 770; *citing Davis v. Upton,* 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967)[herein after referred to as *"Davis"*].

However, with respect to other statements, such as the Hamners' indicated willingness to close the transaction, which are more than inflected with a promise about a future event, the fraud and deceit cases state an exception to the rule: "[W]here one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of fact, and actionable as such." *Turner,* 392 S.C. 116, ___, 708 S.E.2d 766, 770, *citing Davis,* 250 S.C. 288, 291, 157 S.E.2d 567, 568.

This same rule with respect to present or preexisting facts has been adopted and applied in negligent misrepresentation cases. *Sauner v. Public Service Auth. of S.C.,* 354 S.C. 397,407, 581 S.E.2d 161, 166 (2003). The *Turner* case appears to have adopted not only the rule but also the exception to it, stating, "An inference of a lack of intent to perform can only be made when nonobservance of a promise is coupled with other evidence." *Turner,* 392 S.C. 116, ___, 708 S.E.2d 766, 770.

It is submitted that the "other evidence" in this case is the Hamners' disappearance during the critical period leading up to the scheduled closing on April 5, 2010.

In so far as SCB&T is concerned, the additional evidence that casts doubt on the bank's professed willingness to close is Mr. Jacobs' imposition of additional requirements on the afternoon of the scheduled closing date, namely his perceived need for a survey, an aerial view and tax map numbers once it became clear that the Plaintiff had obtained the signature of Mr. Ferguson on the Road Maintenance Agreement.

The writer submits that, having addressed the issues of duty and reliance, the facts eloquently undermine the notion that SCB&T was entitled to summary judgment on the Plaintiff's negligent misrepresentation claim.

No separate analysis of the exposure of the Hamner Defendants on the Plaintiff's negligent misrepresentation claim was undertaken by the trial judge in either the Order of June 5, 2014, or the Order of September 18, 2014. Certainly, there is ample evidence in the record that Mr. Hamner made representations to the Plaintiff about his loan application that were false. And the writer is aware of no impediment to one party to a contract being entitled to rely upon the truth of statements made by the other party that relate to the contract.

Accordingly, the Plaintiff is entitled to a reversal of the trial court's orders, and the negligent misrepresentation cause of action should be reinstated against both SCB&T and the Hamner Defendants.

F. The Trial Judge Should Have Continued the Motion for Summary Judgment and Granted Further Discovery to the Plaintiff (Question 6).

In possession of an email that the Plaintiff believed was a promise to sign the RMA, the Plaintiff took the deposition of Mrs. Diana Chalmers in order to establish that, despite the content of her affidavit to the contrary, she had been willing to sign the RMA, albeit upon terms, at or before the scheduled closing date on April 5, 2010. Mrs. Chalmers' deposition was taken on February --, 2014, and she took the position that her husband had sent the email, and only he could comment on the content of it.

The Plaintiff thereupon sought to take Mr. Chalmers' deposition, but could not get it scheduled prior to the summary judgment hearing on February 21, 2014.

Upon finding the SCB&T mortgages and Road Maintenance Agreement involving Mr. Robert Walters, the Plaintiff sought to question Mr. Jacobs about them at his deposition on February --, 2014, but Mr. Jacobs refused to concede that what he had said about the RMA was false, insisting, instead, that differences in the neighborhoods accounted for the different treatment of Mr. Walters and the Hamners

Again, after debriefing Mr. Walters, the Plaintiff served notice to take his deposition, but could not get it scheduled before the hearing.

In addition, the Plaintiff had been seeking forthright answers and responses to his Second Interrogatories, Request for Production and Request for Admissions. An example of what he was seeking appears in Paragraph 21 of his production request, which said, "Provide all underwriting matrices, guidelines or handbooks for SCBT's 100% Construction/Conventional Loan." SCB&T Response dated February 7, 2014,

¶ 21. These would have been key documents in this case, provided they are in existence and are produced.

However, SCBT's response to that request was an objection, asserting that the request sought "private and confidential information that is privileged and not otherwise discoverable." *Id.* In addition, SCB&T objected on the grounds that the request was "not relevant or reasonably calculated to lead to admissible discovery." *Id.*

The Plaintiff, for all of these reasons, on or about February 20, 2014, filed and served a Motion to Compel and a Motion to Continue the hearing until such time as the discovery he sought could be obtained. The motion to continue was denied by the trial judge, which, in view of his decision on summary judgment, necessarily meant that the motion to compel was never reached and thus was denied by implication.

In fairness to the trial judge, it appears from the record of the hearing on February 21, 2014, that he believed that the issue of duty, or lack thereof, would control the entire case, and not just the disposition of the negligent misrepresentation claim against SCB&T.

The Plaintiff, it is submitted, provided the trial judge, by way of his affidavit and otherwise, with enough competent evidence to raise multiple issues of material fact with respect to each cause of action. However, if there is a shortage of proof in some particular, the summary judgment should be reversed as unfounded or premature under the well accepted principles announced in *Schmidt v. Courtney,* 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

CONCLUSION

The Appellant, Benjamin C. Gecy, requests that the Court of Appeals apply the law to the facts it deems pertinent and reverse the Orders of the trial judge dated June 5, 2014, and September 18, 2014, respectively, thereby reinstating the Plaintiff's causes of action for intentional interference with contract, breach of contract and negligent misrepresentation so that the Appellant can proceed to trial on each cause.

Respectfully Submitted,

By: _____

Robert V. Mathison, Jr.
Attorney for the Appellant
Benjamin C. Gecy

MATHISON & MATHISON
Post Office Box 5271
Hilton Head Island
South Carolina 29938-5271
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

July 10, 2015

Hilton Head Island, South Carolina.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin H. Dukes, III

Master in Equity and Circuit Court Judge

Case No. 2011-CP-07-01778

RECEIVED
JUL 14 2015
SC Court of Appeals

BENJAMIN GECY. . . . . Appellant,

v.

SOUTH CAROLINA BANK & TRUST, JAIME HAMNER
And DEBORAH HAMNER . . . . . Respondents.

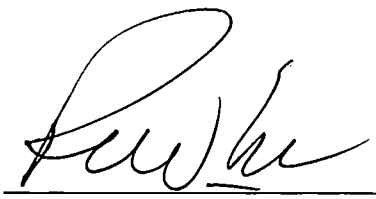
PROOF OF SERVICE

I, Robert V. Mathison, Jr., hereby certify that on July 10, 2015, I filed and served by mail the original and copies of the Appellant's Initial Brief and the Appellant's Designation of Matter To Be Included in the Record on Appeal, both of which are dated July 10, 2015, by depositing same, with sufficient first class postage prepaid, at the United States Post Office at Asheville, North Carolina, addressed as follows:

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

Thomas A. Holloway, Esquire
Harvey & Battey, P.A.
Post Office Box 1107
Beaufort, South Carolina 29901

James J. Wegmann, Esquire
Weidner, Wegmann & Harper, LLC
6 Professional Village Circle
Beaufort, South Carolina 29907



Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

Attorney for the Appellant
Benjamin Gecy

July 10, 2015

Hilton Head Island, South Carolina.

MATHHISON & MATHISON
Post Office Box 5271
Hilton Head Island, SC 29938
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

July 10, 2015

RECEIVED
JUL 14 2015
SC Court of Appeals

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

Re: Benjamin Gecy v. South Carolina Bank & Trust, et al.
Case No. 2011-CP-07-01778

Dear Ms. Kitchings:

Enclosed please find the Appellant's Initial Brief, as well as the Appellant's Designation of Matter to be included in the Record on Appeal.

Also enclosed is the Proof of Service with respect to the brief and designation.

Thank you for your many courtesies.

Sincerely,

Robert V. Mathison, Jr.

RVM:bh
Enclosures
cc: Thomas A. Holloway, Esquire
James J. Wegmann, Esquire
Mr. Benjamin C. Gecy

Mathison
Post Office Box 5271
Hilton Head Island
South Carolina 29938

RECEIVED
JUL 14 2015
SC Court of Appeals

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