

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 24 2015

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

S.C. Supreme Court

Case No. 2011-CP-23-8578
Appellate Case No. 2014-002638

Francis P. Maybank and Jane H.P. Maybank, as trustee for
the Francis P. Maybank Family Insurance Trust,Plaintiffs

Of whom Francis P. Maybank is.....Respondent/Appellant,

v.

BB&T Corporation, Branch Banking & Trust Company,
successor in merger to Branch Banking & Trust Company of
SC, and Sterling Capital Management, LLC, successor in
merger to BB&T Asset Management, LLCAppellants/Respondents,

**Reply in Support of Motion to File Portions of the
Record on Appeal Under Seal**

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules and the Supreme Court's Administrative Order 2014-04-15-02, Appellants/Respondents BB&T Corporation, Branch Banking & Trust Company, and Sterling Capital Management, LLC ("hereinafter "Defendants") hereby file their reply in support of their motion to file certain limited portions of the record on appeal in this matter under seal. The record on appeal in this matter consists of over 5560 pages, and Defendants' motion seeks to seal only 26 of the hundreds of trial exhibits. Significantly, these limited trial exhibits were previously ordered sealed by the trial court after the conclusion of the trial and Respondent/Appellant did not oppose their sealing at that time. (See

Respondent/Appellant's Return at p. 5). The documents in question consist of confidential and proprietary information, including employee incentive data, personnel records, fee charts, proprietary communications, forms and presentations, and records relating to customers.

This Court's Administrative Order 2014-04-15-02 requires Defendants to renew their motion to seal in this forum. Sealing of these documents in the appellate record is even more appropriate than the prior uncontested sealing of the documents at the trial court record, as appellate records are more easily accessible via internet databases than trial exhibits maintained in a circuit court's physical records.

In determining whether filing under seal is proper, a court must consider the seven factors outlined in Rule 41.1(b), SCRCP. Those factors are: (1) ensuring the parties' rights to a fair trial or hearing; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests; and (7) why the public interest is best served by sealing the documents. Additionally, a court *may* consider: (8) public interest in the proceeding; (9) the private or public status of the litigants and case generally; (10) whether release would enhance the public's understanding of an important historical event; (11) whether the public already has access to information contained in the records; and (12) whether a particular decision will sustain or offend the fundamental interests of public access. *Ex Parte Capital U-Drive It, Inc.*, 369 S.C. 1, 12, 630 S.E.2d 464, 470 (2006). A review of these factors shows that they weigh in favor of protecting the

confidentiality of the subject documents through an order sealing those documents from public access.

With regard to the first and second factors, Respondent/Appellant asserts that the need to ensure a fair trial and the need for witness cooperation are no longer relevant because the trial has been completed. This is incorrect. Defendants raise numerous issues in this appeal that could result in a new trial, such as the inappropriate inclusion of BB&T Corporation as a defendant despite the lack of personal jurisdiction and the improper “expert” testimony of John Freeman.

Appellant/Respondent next contends that because the trial was open to the public and the trial exhibits were freely used during the trial, that Defendants had no expectation of confidentiality. In order to allow the free flow of the trial, Defendants did allow all exhibits to be used freely in open court. However, this was done with the expectation that the limited exhibits that are the subject of this motion would be protected following the trial. This protection was accomplished when the trial court, without any opposition from Respondent/Appellant, sealed these limited exhibits following the close of the trial. The content of these exhibits is such that the danger from disclosure by their use as trial exhibits was minimal. Thus, it was reasonable for Defendants to agree to their free use at trial. However, the danger from disclosure as part of an easily accessible publicly available database is far greater, making their sealing in this instance more necessary and reasonable.

With regard to the fourth factor of the public significance of the proceeding, Respondent/Appellant improperly attempts to characterize this private dispute as a matter of significant public or professional significance. It is not. This is not an action

addressing the use of public property or funds or which involves any state agencies or government officials. The matters at issue concern the private investing decisions and the personal investment account for a single individual. But for the lawsuit, the public would have been completely unaware of any of the events which were addressed at trial.

Respondent/Appellant contends that no harm would result to Defendants from the disclosure of these exhibits. This is also incorrect. The trial exhibits that the Defendants seek to protect under seal reflect an array of sensitive business information, including information related to customers who are not parties to this litigation. These documents also include confidential and proprietary business strategies and analysis, proprietary human resources materials, a policy manual, internal presentations, as well as the personal performance reviews of employees of the Defendants. Respondent/Appellant suggests that the limited number of exhibits involved in this motion somehow weighs against Defendants as to this factor. To the contrary, the fact that Defendants seek only to seal approximately 6% of the record¹ on appeal illustrates that this request to seal has been reasonably limited to the documents that are appropriate for this treatment.

With regard to the existence of alternatives to sealing, Respondent/Appellant suggests that redactions will be sufficient to provide any necessary protection. This is incorrect. While redactions have been made to protect account numbers, and other information outlined in Administrative Order 2014-04-15-02, they do nothing to protect the proprietary information contained in the relevant exhibits or the privacy of the personnel records.

¹ The records Defendants request be sealed consist of a total of 346 pages. The entire record on appeal in this matter is over 5,560 pages.

Respondent/Appellant next asserts that the public interest is best served by not sealing the limited exhibits at issue. Specifically, Respondent/Appellant asserts that, because, in his opinion, the private performance evaluations are positive, there is no need to provide Defendants, or the employees involved, with any protection. This misses the point. Privacy is not limited only to matters that reflect negatively. Privacy is properly applied to matters that are private.

Thus, the mandatory factors set forth in Rule 41.1(b) weigh in favor of sealing the limited exhibits that are the subject of this motion. In addition to these factors, this Court set forth five discretionary factors (mentioned above) that may also be considered. *Ex Parte Capital U-Drive It, Inc.*, 369 S.C. 1, 12, 630 S.E.2d 464, 470 (2006). The first and second discretionary factors are public interest in the proceeding and the private or public status of the litigants and case. As previously discussed, this case is about the private investing decisions and the personal banking and investment accounts for a single individual. Put simply, there is no public interest involved in this private dispute.

The third discretionary factor is whether the release would enhance the public's understanding of an important historical event. As Respondent/Appellant acknowledges, this case is not "an important historical event." Thus, this factor has no bearing.

The fourth discretionary factor is whether the public already has access to the information at issue. Because the trial court properly sealed these exhibits, the public does not have access, and Defendants seek to continue this protection in this Court. Finally, the fifth and last discretionary factor is whether a particular decision will sustain or offend the fundamental interests of public access. Here, granting this motion to seal will not offend the fundamental interests of public access. Approximately ninety-four

percent of the record (over 5200 pages) remains freely accessible to the public. This request has been tailored to apply only to matters which require this heightened protection.

Conclusion

Based on the above, this Court should grant this motion and order that the limited number of trial exhibits that were previously sealed by the trial court shall remain sealed within the record on appeal in this matter.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown
D. Larry Kristinik
Michael J. Anzelmo
Brian P. Crotty
1320 Main Street
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

William S. Brown
104 S. Main Street, 9th Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Appellants/Respondents BB&T Corp.,
Branch Banking & Trust Co., and Sterling Capital
Management, LLC

September 24, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-8578
Appellate Case No. 2014-002638

Francis P. Maybank and Jane H.P.
Maybank, as trustee for the Francis P.
Maybank Family Insurance Trust, Plaintiffs,

Of whom Francis P. Maybank is the, Respondent/Appellant,

v.

BB&T Corporation, Branch Banking and
Trust Company, Successor in merger to
Branch Banking and Trust Company of SC,
and Sterling Capital Management, LLC,
Successor in merger to BB&T Asset
Management, LLC, Appellants/Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants/Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy to the following address(es):

Pleadings: Reply in Support of Motion to File Portions of the Record on Appeal Under Seal

Counsel Served:

Mitchell M. Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad Johnston, Esquire
John M.S. Hoefler, Esquire
Tracey Colton Green, Esquire
Willoughby & Hoefler, P.A.
Post Office Box 8416
Columbia, SC 29202

Bruce W. Bannister, Esquire
Bannister, Wyatt & Stalvey LLC
Post Office Box 10007
Greenville, SC 29603



Roxanne E. Daniel
Administrative Assistant

Sept. 24, 2015