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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville ..... Appellant,

vs.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields, Synovus Financial Corporation, d/b/a NBSC, Branch Banking and Trust Company, Bank of America Corporation, and SunTrust Banks, Inc. ..... Defendants,

Of which Bank of America Corporation, and SunTrust Banks, Inc. are the Respondents.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW:

STATUTES:

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

A. Did the Circuit Court incorrectly grant summary judgment against the Plaintiff over its objection that discovery was incomplete and in the face of the Plaintiff's motion to compel responses to its discovery requests?

B. Did the Circuit Court incorrectly grant summary judgment against the Plaintiff because it ignored the facts concerning the dealings between the Defendant banks and the embezzler, who forged checks on the Plaintiff's account and then deposited them with the Defendant banks?

C. Did the Circuit Court incorrectly grant summary judgment against the Plaintiff because it failed to understand that Sections 3-404 and 405 of the South Carolina Uniform Commercial Code were amended in 2008 to provide that the Plaintiff drawer could recover against the Defendant depository banks under a theory of comparative fault?

STATEMENT OF THE CASE

This action was brought on July 21, 2010 by Overland, Inc. ("Overland") filing a Summons and Complaint with the Court of Common Pleas in Greenville County. On August 10, 2012, Overland filed a Third Amended Complaint (Jury Trial Demanded). Third Am. Compl. p. 1, R. p. 409-452. On March 5, 2014 Respondent Bank of America Corporation ("Bank of America") filed a motion to dismiss Overland's Seventeenth Cause of Action, which the Court denied, holding that "there are issues involving the seventeenth cause of action which could entitle the Plaintiff to judgment." Order, dated May 22, 2014, R. p. 24-26. The Seventeenth Cause of Action is the subject of this appeal. The Seventeenth Cause of Action alleges that Defendant banks Bank of America and SunTrust are liable to Overland because their customer opened accounts at the Defendant banks and used those accounts to deposit forged checks as part of her embezzlement scheme.

On August 22, 2014, SunTrust Bank ("SunTrust") filed a Motion for Summary Judgment. SunTrust Mot. Summ. Jdgmt., R. p. 128-130. On September 3, 2014, Bank of America filed a Motion for Summary Judgment Purely on the Basis of Law as to the 17th and

15th Causes of Action. BOA Mot. Summ. Jdgmt., R. p. 314-316. Overland filed a Motion to Compel Discovery on September 22, 2014, Overland Mot. Compel, R. p. 551-601. The Circuit Court heard argument on October 29, 2014 on both Summary Judgment Motions and the Motion to Compel Discovery and issued an Order filed December 15, 2014, R. p. 1-9, granting the Motions for Summary Judgment on December 15, 2014 and holding Overland's Motion to Compel Discovery moot. Order, Dec. 15, 2014, R. p. 9.

On December 29, 2014, Overland requested an enlargement of time to file Plaintiff's Motion to Alter/Amend or Reconsider Pursuant to Rule 59(e), SCRCP, which the Court granted. Motion for Enlargement, R. p. 114; Order, R. p. 113 and p. 12. On January 7, 2015, Overland filed Plaintiff's Motion to Alter/Amend or Reconsider Pursuant to Rule 59(e), SCRCP, R. p. 66-91, which the Court denied on February 5, 2015. Order, R. p. 10-11.

Overland filed a notice of appeal on March 4, 2015, R. p. 776-790. Overland received the transcript of the summary judgment motion hearing on May 12, 2015.

STATEMENT OF FACTS

This is a case involving many defendants. The portion of the case on appeal involves Defendants Bank of America, and SunTrust and Plaintiff Overland. Briefly, the facts pertaining to this portion of the case are as follows.[1] Overland's former employee, Lara Marie Nance, embezzled at least $1,282,000.00 from Overland over a period of two and one-half years. Third Am. Compl. p. 9, R. p. 409. To accomplish her fraudulent scheme, Nance opened various accounts at Bank of America and SunTrust in the names of companies with which Overland did business. Third Am. Compl. p. 9-10, R. p. 419-420. For example,

[1] The full facts as to all defendants are set forth in the Third Amended Complaint, p. 1-11, R. p. 411-421.

Overland did business with and paid checks to a company called "Taylor Enterprises." Third Am. Compl. p. 9-10, R. p. 419-420. Nance set up an account "Taylor Enterprises," wrote checks to Taylor Enterprises, forged the necessary Overland signature on the checks, and then forged a Taylor Enterprises indorsement on the instrument. Third Am. Compl. p. 9-10, R. p. 419-420. She then deposited the checks into her Taylor Enterprises account. Sometimes she wrote checks to a corporate entity and then deposited the checks into her personal accounts. Transcript p. 60-61, R. p. 854, lines 9-25; p. 855, lines 1-14. Bank of America noticed some of these inappropriate deposits and rejected them, but then let her make the same deposits another day. Affidavit of Peter Seitz, R. p. 349. Nance engaged in a variety of methods of check writing and deposited the checks into several accounts at Bank of America and SunTrust. Third Am. Compl. p. 9-10, R. p. 419-420. She forged signatures on the signature cards for the accounts, provided fictitious names for corporate officers, and provided false social security numbers, all as part of her fraudulent scheme. Depo. Lara Nance, R. p. 924, lines 23-25; R. p. 929, lines 12-19; R. p. 927, line 22; R. p.928, line 4; Affidavit of Michael O'Shea, R. p. 348, Affidavit of Peter Seitz, R. p. 367-408.

Unbeknownst to Overland, Nance, hired as a payroll clerk in 2006, gained access to Overland's ADP accounting system, which allowed her to hide her activities from Overland. Third Am. Compl. p. 4-5, 8, R. pp. 414-415, 8 The checks were drawn on Overland's business accounts, which it maintained with Synovus Financial Corporation d/b/a NBSC and Branch Banking and Trust (BB&T). Third Am. Compl. p. 9-10, R. p. 419-420.

Nance pled guilty to wire fraud in the United States District Court. *United Stats v. Lara Marie Nance*, No. 6:10cr634-1 (Feb. 14, 2011), R. p. 908.

Overland also concurs with the facts set forth in the Background section of the Circuit Court's Order on appeal, pp. 1-2, R. p. 3-4. Those facts, however, are incomplete.

STANDARD OF REVIEW

The Circuit Court granted Bank of America and SunTrust's Motions for Summary Judgment and held that Overland's Motion to Compel Discovery was moot. "Summary Judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (2009). "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 in order to withstand a motion for summary judgment." *Id.* Additionally, in South Carolina, summary judgment should not be granted until the non-moving party has had a full and fair opportunity to complete discovery. *See BPS, Inc. v. Worthy,* 362 S.C. 319, 329-330, 608 S.E.2d 155 (Ct. App. 2005) ("Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery").

A. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF OVER ITS OBJECTION THAT DISCOVERY WAS INCOMPLETE AND IN THE FACE OF PLAINTIFF'S MOTION TO COMPEL RESPONSES TO ITS DISCOVERY REQUESTS?

Overland objected to the Court deciding the Motions for Summary Judgment because discovery as to the issues raised in the Motions for Summary Judgment was not complete. There is no dispute that Overland had requested and was waiting for discovery,

for which the deadlines to produce had passed. Overland Discovery Request of BOA, R. p. 557-573; Overland Discovery Request of Sun Trust, R. p 532-548.; Overland Mot. Compel BOA, R. p. 551-601. The Court held, in the same Order granting the Motions for Summary Judgment, that "in light of this Court's decision to grant Defendants Bank of America and SunTrust summary judgment as to the seventeenth cause of action, the Court finds Overland's Motion to Compel Discovery moot." Order, R. p. 9. Overland objected to proceeding on the Motions for Summary Judgment while discovery was outstanding and alerted the Court that Overland needed the discovery in order to defend against the Motions for Summary Judgment. Overland made this point repeatedly to the Court. In Overland's written response to Defendants Bank of America and SunTrust's motions for summary judgment, Overland stated:

> "[Bank of America] and SunTrust must first comply with discovery dutifully before the Court entertains its summary judgment motions. . . . BOA and SunTrust have been unwilling to produce the operations and/or control manuals implemented by the bank, which would detail their procedures for opening new accounts, for depositing checks and/or item processing, and their account monitoring practices. These are not abstract features to a bank. The Bank Secrecy Act mandates that all financial institutions implement Customer Identification Programs in order to prevent fraudulent activity and terrorism. The Affidavit of Peter Seitz, dated October 21, 2014, explains in detail the importance for requiring BOA and SunTrust to produce their manuals and the relevance it would have in determining liability in this case. This Court should not allow BOA and SunTrust to continue hiding its

banking operations manuals while also claiming no genuine issues of fact are at issue." Overland Response Mot. Summ. Jdgmt. p. 5-6, R. p. 337-338.

The affidavit of Peter Seitz alerted the Court to the need for the requested discovery materials. "In order to evaluate the defendant banks' compliance with their procedures for negotiating checks, I would need to review the requested discovery." Affidavit of Peter Seitz, R. p. 350.

Additionally, at the hearing, Overland brought to the Court's attention that the summary judgment hearing was premature due to outstanding discovery:

> "Just to point out the significance of why more discovery is needed and how their motion for summary judgment is not factually right for today is the fact that we have asked for their account opening procedures and their policies with respect to depositing of check items.
>
> We need those - - we need those manuals and those policies so that we can compare whatever their internally prescribed procedures are for opening accounts and depositing checks. We need to compare them to what actually happened, what Nance did so that we can determine whether or not there's any liability. We also need to compare them to whatever is the accepted general usage within the banking industry. . . .
>
> So again, the motion is not right today. The law is clear on what the standard of care is. They have not complied with discovery in producing these manuals that would allow the trier of fact to make the determination."
>
> Transcript, p. 14-15, R. p. 808, lines 11-25, R. p. 809, lines 1, 16-20.

And again later in the hearing:

"And we have not been able to schedule depositions because we don't have a lot of the manuals and protocols that we have been requesting so that we can actually take a good factual deposition, Your Honor." Transcript p. 63, R. p. 857, lines 16-20.

The Defendant banks had withheld needed discovery and the discovery was still outstanding as of the day the summary judgment motions were heard.[2] Overland still needed the remaining documents that were the subject of the motions to compel discovery and the time to take depositions once the documents were produced.[3]

Again, Overland advised the Court that summary judgment was premature in while the discovery remained outstanding and depositions were incomplete in Overland's Motion to Alter/Amend or Reconsider Pursuant to Rule 59(e), SCRCP. Overland Mot. to Reconsider, pp. 5-6, R. p. 70-71. In that motion, Overland objected to the Court granting Summary Judgment because discovery was incomplete and Overland needed the discovery to defend fully against the Summary Judgment Motions. Overland Mot. to Reconsider, pp. 5-6, R. p. 70-71. Overland even supplemented its response with a letter to the Circuit Court citing two South Carolina cases that hold that summary judgment should not be granted until the non-moving party has had a full and fair opportunity to complete discovery. *See BPS, Inc. v. Worthy,* 362 S.C. 319, 329-330, 608 S.E.2d 155 (Ct. App. 2005) ("Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999)

[2] As a sharp litigation practice that left Overland no time to utilize the discovery, on the eve of the hearing for the motion to compel discovery and motions for summary judgment, Bank of America provided "an additional couple of hundred documents and some updated responses;" however, the manuals and protocols were still not produced. Transcript, p. 63, R. p. 857, lines 4-6.

[3] Overland and the Defendant banks discussed the outstanding discovery and the banks agreed to provide the documents at the hearing; however, the discovery had not yet been provided to Overland and as of today has not been provided.

("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"). Overland Letter, January 29, 2015, R. p. 92-112.

The Circuit Court's Order itself demonstrates why the granting of Summary Judgment was premature, when the Court stated, "Overland has failed to show that Defendant banks' procedures varied in any way from general banking usage . . . Further, Overland has not provided any evidence that Bank of America or SunTrust failed to exercise ordinary care in their maintenance of Ms. Nance's accounts." Order, p. 6, R. p. 8. Overland was deprived of the discovery it requested and deprived of taking factual depositions on the basis of the discovery requested, all of which was directed at the very issues on which the Court decided Overland had failed to provide evidence. Defendant banks that withheld the discovery were rewarded with an Order granting their motions for summary judgment because they withheld requested discovery.

Summary judgment was premature in this case because Bank of America and SunTrust withheld needed discovery and that was brought to the Court's attention.

B. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT IGNORED THE FACTS CONCERNING THE DEALINGS BETWEEN THE DEFENDANT BANKS AND THE EMBEZZLER, WHO FORGED CHECKS ON THE PLAINTIFF'S ACCOUNT AND THEN DEPOSITED THEM WITH THE DEFENDANT BANKS?

Despite the Defendant banks' withholding of crucial discoverable evidence, Overland provided the Court with sufficient evidence of the dealings between Bank of America and SunTrust and the embezzler Lara Nance to overcome the motions for summary judgment. The evidence Overland provided is far more than a mere scintilla of evidence for a trier of fact to apply to the law, which is all that is required to make summary judgment inappropriate. "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 in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (2009). Overland provided the Court with evidence that:

- Lara Nance opened two checking accounts at Bank of America using a false Social Security Number and did not produce any documentation to Bank of America or SunTrust that she was doing business as Taylor Enterprises and Atlantic British. (Exhibit A - *Deposition of Lara Nance, Pg. 53, lines 23-25; Pg. 111, lines 12-19*). Depo. Lara Nance, Pg. 53, lines 23-25; Pg. 111, lines 12-19) R. p. 924, lines 23-25; p. 929, lines 12-19); Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.
- Lara Nance admitted to forging Charlie Nance's signature on the authorization cards at SunTrust (Exhibit B – *Deposition of Lara Nance, Pg. 101, line 22 – Pg. 102, line 4*). Depo Lara Nance, p. 101, line 22 – p. 102, line 4, R. p. 927, line 22 – p. 928, line 4; Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.
- Bank of America and SunTrust deposited for Lara Nance third party corporate checks that were not payable to her and bearing forged endorsements (See, *Affidavit of Michael O'Shea*). Affidavit Michael O'Shea; R. p. 374-377; Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.
- Bank of America refused to deposit many of Nance's stolen checks because they were not properly payable, yet it allowed Nance to re-deposit *those same checks on a later date* (See, *Exhibit A to Affidavit of Peter Seitz*). Affidavit of Peter Seitz, R. p. 349; Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.

The trier of fact, in this case a jury, is necessary to determine whether Bank of America and SunTrust were liable in this matter. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (requiring a mere scintilla of evidence in order for the non-moving party to survive summary judgment). The applicable statutes, discussed more fully in the next section of this brief, have implemented a comparative fault analysis with this fact pattern in mind. *See*, S.C. Code §36-3-405, *Official Comment 4*. The Overland suit is identical to the case scenarios discussed within the official commentaries, which provides for recovery from a depository bank, such as Bank of America and SunTrust, for all or part of the loss suffered by the victimized employer, such as Overland.

Accordingly, summary judgment was inappropriate in this case because Overland provided far more than a mere scintilla of evidence to support its claims. The Circuit Court's decision granting summary judgment should be reversed.

C. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT FAILED TO UNDERSTAND THAT SECTIONS 3-404 AND 405 OF THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE WERE AMENDED IN 2008 TO PROVIDE THAT THE PLAINTIFF DRAWER COULD RECOVER AGAINST THE DEFENDANT DEPOSITORY BANKS UNDER A THEORY OF COMPARATIVE FAULT?

In 2008, the South Carolina Commercial Code was revised to provide that drawers may recover against depository banks pursuant to sections S.C. 36-3-404(d)[4] and 405(b)[5]

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[4] **SECTION 36-3-404.** Imposters; fictitious payees.

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable (Section 36-3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the

under a theory of comparative fault. This revision implemented an earlier revision to the Standard Uniform Commercial Code. The commentary to 36-3-404(d) provides, "[i]n those cases . . . (referring to situations in which the bank taking the check for collection failed to exercise ordinary care in detecting the fraud) . . . the drawer has a cause of action against the offending bank to recover a portion of the loss. The amount of loss to be allocated to each party is left to the trier of fact. . . . [3-404(d) is] new and changes prior law."

In this case, the drawer is Overland and the banks taking the checks for collection that are alleged to have failed to use ordinary care are Bank of America and SunTrust. Sections 404(d) and 405(b) provide Overland causes of action for the banks' failures to

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person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(c) Under Subsection (a) or (b), an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which Subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss. (emphasis added).

[5] S.C. Code Ann. §36-3-405(b), entitled "Employer's responsibility for fraudulent endorsement by employee," provides that, "For the purpose of determining the rights **and liabilities** of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. **If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.**" (emphasis added).

exercise ordinary care. There is no South Carolina case on point interpreting the revised S.C. 36-3-404(d) and 405(b). However, the Virginia Supreme Court, in *Gina Chin v. First Union Bank*, 256 Va. 59, 500 S.E.2d 516 (Va. 1998) (interpreting its state's revised S.C. 36-3-404(d) and 405(b)) applied that state's identical provisions and held that a drawer has a cause of action against a depository bank in a forgery case and in a double forgery case, which this case is. The *Gina Chin* Court held,

> "While First Union is correct that the UCC provides a drawer with a cause of action against a drawee bank that charges a drawer's account based on checks constituting a forged signature of the drawer, its conclusion that §§8.3A-404 and 405 cannot be utilized by a drawer against the depository bank in a double forgery situation is *erroneous.* (emphasis added).

Virginia's UCC 8.3A-404 and 405 are the same as S.C. Code 36-3-404 and 405[6]. *See also Victory Clothing Co. v. Wachovia Bank*, February Term 2004, No. 1397, 2006 Phila. Ct. Com. Pl.

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[6] **SECTION 36-3-405**. Employer's responsibility for fraudulent indorsement by employee.

(a) In this section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) "Responsibility" with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

LEXIS 146, 59 U.C.C. Rep. Serv. 2nd (Callaghan) 376 (C.C.P. Phila. March 21, 2006 (Abramson J.) (a negligent depository bank may be liable to drawer for a double forgery under §§3-404 and 3-405). The Circuit Court erred as a matter of law when it did not recognize that Overland is the drawer[7] with a cause of action against Bank of America and SunTrust pursuant to S.C. Code 36-3-404 and 405.

The Circuit Court also erred when it couched Overland's Seventeenth Cause of Action as one in contract, because this case is between a bank and a non-customer. This case is governed by the Uniform Commercial Code. A drawer is entitled to bring a cause of action against a depository bank for redress of its losses. As the *Gina Chin* Court stated, "The revisions to §§ 8.3A-404 and 405 changed the previous law by allowing 'the person bearing the loss' to seek recovery for a loss caused by the negligence of any person paying the instrument or taking it for value based on comparative negligence principles." Accordingly, Overland, as the drawer and person that suffered the loss, is entitled to seek redress against the banks that participated in the loss. It is for the *trier of fact* to allocate the respective comparative fault among the parties. Additionally, as argued above, the failure of the banks

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(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. **If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.**

(c) Under Subsection (b), an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person.

[7] The Circuit Court's Order, page 5, first full paragraph, seems to refer to Overland as a "drawee" rather than as the "drawer."

to provide the requested discovery deprived Overland and the Court of the necessary information regarding the Defendant banks' fault. Overland did provide the Court with more than a mere scintilla of evidence that the banks failed to exercise ordinary care resulting in loss to Overland, but was deprived of being able to show the Court the full weight of the evidence that lies within the respective bank's procedure manuals and protocols. See Arguments A and B above.

Finally, the Circuit Court opinion, page 5, suggests that Bank of America and SunTrust would not be liable to the drawer because automated teller machines (ATM's) were used for **some** of the transactions. However, that is not the law. While S.C. Code Ann. § 36-3-103(a)(9) *initially* lessens a bank's obligations regarding deposits at ATMs, it only lessens it for the time-period between a deposit and when the bank pursuant to its policies and procedures, all of which must be done using ordinary care, reviews it. Banks do not get a free pass simply because they have moved teller functions to automated processes; the UCC simply shifts the timeframe for completing their obligations of ordinary care. Because deposits have a hold period until the funds are cleared into and useable by the depository accounts, banks have the time to use ordinary care to review the automated transactions. As argued above, because discovery was withheld by the banks regarding their protocols and manuals, the information necessary to evaluate each bank's compliance with ordinary care was withheld from Overland and the Court.

Moreover, Bank of America did reject some deposits when Nance attempted to deposit corporate checks into her personal account, which demonstrates that Bank of America's policies and protocols do not allow such deposits; however, Bank of America later allowed the same deposits to be completed. Affidavit of Peter Seitz, R. p. 349. Additionally, Nance's banking at the Defendant banks was not only via ATM's. Subpoena Information in

United States v. Nance, No. 6:10 cr 634-1 (Feb. 14, 2011). R. p. 917. Nance was well known at Defendant Bank of America. Plaintiff's Third Am. Comp. p. 7, ¶26, R. p. 417, ¶ 26.

The Court's reliance on contract cases,[8] UCC cases that predate the UCC revisions, and cases that do not seek redress under the 2008 revisions that resulted in the current S.C. Code 36-3-404 and 405, are factually and legally distinct from this case and not applicable. For example, *Read v. First National Bank of Habersham*, 286 S.C. 534, 335 S.E.2d 359 (1985), was decided before the UCC revision and is factually distinct because it involved an Employer v. Drawee Bank fact pattern analyzed under 3-406(a), not an Employer v. Depository Bank case to be evaluated under 3-404(d) and 3-405(b). *Read* did not prohibit a negligence cause of action under 3-404(d) or 3-405(b)[9], but even under the precursor to the current South Carolina UCC, the *Read* Court in *dicta* stated that: "[l]iability for accepting a check for deposit into an incorrect account lies with the depository bank." *Id.* 286 S.C. at 542-43, 335 S.E.2d at 364. That is exactly what occurred here. Defendant Bank of America deposited checks made payable to "Taylor Enterprises" into Lara Nance's **personal** checking account (See, Affidavit of Peter Seitz), R. p. 349; Transcript p. 60-61, R. p. 854, lines 8-25; R. 855, lines 1-14.

The Circuit Court erred as matter of law and its decision should be reversed.

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[8] The Court relied upon the following cases for the proposition that a non-customer may not rely on a bank's duties to its customer as a basis for a claim: *Kerr v. Branch Banking & Trust Co.,* 408 S.C. 328, 759 S.E.2d 724 (2014); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Florentine Corp. v. Peda I, Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985); *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220 (4th Cir. 2002); and *McCallum v. Rizzo*, 1995 WL 114812 (Mass. Super Ct. Oct. 13, 1995). None of these cases was brought pursuant to the 2008 South Carolina Statute (36-3-404 and 405) that specifically provides for the cause of action at issue here. The only case in this group that was even decided after S.C. Code 36-3-404 and 405 were enacted, is the *Kerr* case, which has nothing to do with the application of S.C. Code 36-3-404 and 405.

[9] Instead, the *Read* Court dismissed the plaintiff's conversion cause of action. Furthermore, the *Read* case does not represent South Carolina's current double forgery law because the UCC provisions regarding double forgery cases changed in 2008.

CONCLUSION

The order of the Circuit Court should be reversed (a) because the Court heard the summary judgment motions prematurely while Overland was deprived of the discovery it needed to defend fully the motions; (b) because Overland presented sufficient evidence to overcome the motion in spite of the Defendant banks' wrongful obstruction of discovery; and (c) because the Court misunderstood the South Carolina laws on the obligation of a depository bank to a drawer. Summary judgment is not appropriate when further inquiry in the facts of the case is desirable to clarify a correct application of the law. *Bennett v. Investors Title Ins. Co.,* 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).

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September 28, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville ..... Appellant,

vs.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields, Synovus Financial Corporation, d/b/a NBSC, Branch Banking and Trust Company, Bank of America Corporation, and SunTrust Banks, Inc. ..... Defendants,

Of whom, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and SunTrust Banks, Inc. are the Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served copies of the Initial Reply Brief of Appellant and Amended Designation of Matter on the following by mailing a copy of the same via First Class, U.S. Mail, postage prepaid on the date set forth below to the addresses below:

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