THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2013-CP-10-1686
APPELLATE CASE 2015-001848

Church of God and Church of God of South Carolina, ...Appellants,

v.

Mark Estes, Patricia Estes, Michael Timothy Brooks, Individually and as Trustee for Church of God at North Charleston Trust, Adam Boyer, Individually and as Trustee for Church of God at North Charleston, Rolando River Osorio As Trustee For Church Of God At North Charleston Trust and North Palm Ministries, Inc., North Palm Community Church and Crescom Bank, Successor by Merger to Community First Bank, Defendants.

Of Whom Crescom Bank is the .....Respondent,

v.

Thomas Propes and Marc Campbell, Third Party Defendants.

INITIAL BRIEF OF RESPONDENT

Matthew E. Tillman
Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street
P. O. Box 999
Charleston, South Carolina 29402
(843) 722-3400

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment to Respondent Crescom Bank, Successor by merger to Community First Bank ("Respondent") on May 11, 2015 and the circuit court's July 29, 2015 denial of the Appellants' motion for reconsideration (collectively, the "Summary Judgment Order")[1]. In 2007 and 2009 respectively, Respondent made two loans in the amounts of $700,000.00 and $75,000.00 to the North Charleston Church of God ("NCCOG"), a former congregation of the Appellants. Both loans were secured by mortgages encumbering church property located at 5505 North Rhett Avenue, North Charleston, South Carolina (the "Property"). The NCCOG defaulted on these loans in 2009. The validity of these loans and mortgages is central to the claims against Respondent.

Appellant Church of God is the national body which delegates authority to regional organizations, including the Appellant Church of God of South Carolina. The Church of God of South Carolina has oversight over the local congregations within its territory, including the NCCOG. The Appellants allege that the pastor, exhorter and trustees[2] of the NCCOG obtained two loans from Respondent and encumbered Church property without proper authorization from the Appellants, as governing bodies. The Appellants later assumed ownership of the encumbered Church property, sold it to the existing tenant, and repaid all amounts owed by the NCCOG to Respondent, without protest. Despite repaying the loans, the Appellants retroactively challenged the validity of the Respondent's mortgages and asserted numerous causes of action by which

[1] On July 29, 2011, as evidenced by the Articles of Merger filed of record with the South Carolina Secretary of State and the RMC Office of Charleston County, South Carolina, Community FirstBank merged into Crescent Bank, with the surviving entity known as CresCom Bank, Respondent herein.

[2] The pastor, exhorter and trustees are co-defendants in the subject lawsuit. The claims against those individuals remain pending.

Appellants sought repayment of the equity in the Property. The circuit court properly granted summary judgment to the Respondent on numerous grounds.

STATEMENT OF FACTS

The NCCOG was formerly a local congregation of the Appellants until its dissolution on approximately March 22, 2010. (Thomas Propes Dep. at 263-264). Appellant Church of God of South Carolina, which was a part of the larger national Church of God, had oversight over the NCCOG. The Church of God of South Carolina is managed by a State Overseer who may appoint District Overseers to carry out the business of the Church.

Pursuant to the 2008 Church minutes, Church of God congregations hold real property in trust for the benefit of the Appellant Church of God. (2008 Church of God minutes). However, the Church of God minutes are not recorded in the Charleston County Register of Deeds Office.

In 1985, Lillian Buckner conveyed the Property to the NCCOG. (NCCOG Deed). The deed describes certain approvals that were required prior to conveyance or encumbrance of the Property:

> The said Local Board of Trustees shall have full right, power and authority to sell, exchange, transfer and convey said property, or to borrow money and pledge the said real estate for the repayment of the same, and to execute all necessary deeds, conveyances, etc., provided the proposition shall first be presented to a regular or called conference of the said local church, presided over by the State Overseer of the Church of God, or one whom he may appoint, and the project approved by two-thirds of all members of the said local congregations present and voting.

(NCCOG Deed).[3] The NCCOG owned the Property from 1985 until the District Overseer for the Church of God of South Carolina dissolved the NCCOG on or about March 22, 2010. (Thomas Propes Dep. at 263-264). At that point, the Church of God of South Carolina became the owner of the Property.

Mark Estes was pastor of the NCCOG and District Overseer for the Appellant Church of God of South Carolina. (Second Amended Complaint at 7). Patricia Estes was the Exhorter of the NCCOG. (Mark and Patricia Estes collectively referred to as the "Estes Defendants"). (Second Amended Complaint at 8). Defendants Adam Boyer, Timothy Brooks and Rolando Osorio ("Trustee Defendants") were the trustees of the NCCOG. (Second Amended Complaint at 9). On October 11, 2005, Mark Estes incorporated North Palm Ministries, Inc. ("NPM"). The North Charleston Church of God operated as NPM from that date forward. (Secretary of State printout for NPM).

On or about October 15, 2007, the NCCOG received a loan from Respondent in the amount of $700,000. (2007 HUD-1). It hired a local attorney to close this loan. (6/14/13 Ltr. Kefalos to Chard). The note is signed by the Trustee Defendants, as is the mortgage on the Property in favor of the Respondent ("2007 Mortgage"). (2007 Note and Mortgage). The Trustee Defendants provided the closing attorney with a resolution signed by NCCOG Recording Secretary Lisa Carey indicating that the members and financial supporters of the Church unanimously approved the transaction. (10/8/07 Resolution). The proceeds of this loan were used to pay off an existing loan secured by a mortgage to First Reliance Bank, as well as other debts of the Church. (2007 HUD-1). In addition, the NCCOG received proceeds in the amount of $310,809.43. (2007 HUD-1).

[3] It is undisputed that this deed is the only recorded document setting forth procedures for approval of real property transactions for the NCCOG.

On or about October 9, 2008, the NCCOG moved to a new location and leased the Property to Seacoast Church. (Seacoast Lease). The lease term was five years, ending in 2013, and by its terms Seacoast Church agreed to pay the North Charleston Church of God the initial rent of $9,200.00 per month. (Seacoast Lease at 7). The lease amount increased periodically, to $10,500.00 per month. The lease also contained an option to purchase, in amounts starting at $1,625,000.00 and increasing to $1,775,000.00 by the end of the term. (Seacoast Lease at 7).

On or about March 23, 2009, The North Charleston Church of God received a loan from Respondent in the amount of $75,000.00. It hired the same local attorney to close this loan as well. (2009 HUD-1). The note is signed by the Trustee Defendants, as is the mortgage on the Property in favor of Respondent. (2009 Note and Mortgage). As with the prior loan, the Trustee Defendants provided the closing attorney with a resolution signed by NCCOG Recording Secretary Lisa Carey indicating that the members and financial supporters of the Church unanimously approved the transaction. (12/4/08 Resolution). The North Charleston Church of God/NPM received proceeds in the amount of $74,032.50. (2009 HUD-1).

In the latter months of 2009 and early months of 2010, Mark Estes and Appellant Church of God of South Carolina's State Overseer Thomas Propes discussed certain grievances that Mr. Estes had with the Church of God. (1/3/10 Ltr. Estes to Propes). These discussions culminated in Pastor Mark Estes' resignation as a pastor and District Overseer with the Church of God on March 12, 2010. (3/12/10 Ltr. Estes to Propes). No later than March 12, 2010, Thomas Propes became concerned about the NCCOG congregation and the status of the Property. (Propes Dep. at 74-76). On March 22, 2010,

Appellant Church of God of South Carolina State Overseer Propes appointed pastor Marc Campbell as the new District Overseer and tasked him with handling disposition of the Property. (3/22/10 Ltr. Propes to Campbell).

Marc Campbell received a copy of the 2007 and 2009 Mortgages. (Campbell Dep. at 33). He spoke with representatives of the Respondent and determined that the loans were in default. (Campbell Dep. at 26-27). Campbell entered negotiations with the lessee of the Property, Seacoast Church. This culminated in the sale of the Property to Seacoast Church on July 15, 2010 for $780,000.00 – less than half of the purchase option amount contained in the Seacoast Lease. (Seacoast Lease; Campbell Dep. at 148). Pastor Campbell, as acting District Overseer for the Appellants, did no due diligence prior to selling the Property. He did not order an appraisal, did not speak with a real estate broker, did not list the Property, nor did he market the Property to any potential buyer other than Seacoast Church. (Dep. of Campbell at 53-55).

Appellants never funded the purchase, maintenance or improvement of the Property. (Campbell Dep. at 65). Nevertheless, the Appellants took possession of the Property and sold it to Seacoast Church on July 15, 2010. (Seacoast HUD-1). Upon selling the Property, the Appellants repaid the Respondent's loans, without protest in any form, in return for satisfaction of the 2007 and 2009 Mortgages. (Campbell Dep. at 51-52). The Appellants also received $20,000.00 in the transaction, despite the fact that Appellants never contributed financially to the purchase, maintenance or renovation of the Property. (Seacoast HUD-1). Respondent duly satisfied the mortgages, having no information that the Appellants contested the validity of those mortgages.

ARGUMENT

This appeal is to be determined using summary judgment standard applied by the circuit court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). In evaluating a motion for summary judgment, a court must view "the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). However, if, after granting such deference to the non-moving party, it is apparent to the court that "there is no genuine issue as to any material fact,"' and the moving party is entitled to judgment '"as a matter of law,'" the court should grant summary judgment. *Id.* (quoting S.C. R. Civ. P. 56(c)).

I. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT ALL OF THE APPELLANTS' CAUSES OF ACTION AGAINST RESPONDENT ARE BARRED PURSUANT TO THE VOLUNTARY PAYMENT DOCTRINE.

There is no dispute that, after assuming ownership of the Property in March 2010, the Appellants sold the Property and repaid the loans made from Respondent to NCCOG. The Appellants did so without protest and with full knowledge that the Appellants had not authorized the loans and mortgages through the process set forth in their own Minutes.[4] (Plf. Answers to Interrogatories at 9-10). "[A] person cannot use the courts to recover money voluntarily or consensually paid with full knowledge of all of the facts and without fraud, duress, or extortion in some form." 66 Am Jur 2d *Restitution and Implied Contracts* § 92 (2014). "Thus, it is universally recognized that money voluntarily paid under a claim of right to payment and with knowledge of the facts by the

[4] As set forth herein, the church Minutes were not recorded, and therefore neither the Respondent nor the closing attorney had record notice of their contents. However, the Appellants contend that the 2007 and 2009 loans and mortgages were unauthorized pursuant to the Minutes, and their knowledge of this contention occurred long before the Respondent's loans were repaid and the 2007 and 2009 mortgages were satisfied.

person making the claim cannot be recovered on the ground that the claim was illegal, or that there was not liability to pay in the first instance." *Id.* Further, the "question of whether a payment is voluntary or involuntary is one of law where the facts are undisputed . . .." *Id.* Under South Carolina law, "all payments are presumed to be voluntary until the contrary is made to appear." *Baker v. Allen*, 220 S.C. 141, 151, 66 S.E.2d 618, 622 (1951) (*citing Moody v. Stem*, 214 S.C. 45, 51 S.E.2d 163 (1948)). Therefore, the burden is on the payor to show that the payment was made involuntarily. *Id.* This is a difficult burden to overcome, and even evidence of payment under protest may not be sufficient to establish that the payment was made involuntarily. *Baker*, 220 S.C. at 151, 66 S.E.2d at 622.

In their Second Amended Complaint and answers to discovery requests, Appellants admitted that they were aware of the 2007 and 2009 Mortgages and the fact that the debt may have been unauthorized by them prior to selling the Property and paying the debt owed to Respondent. (Second Amended Complaint at ¶56, Answers to Interrogatories at ¶¶ 9-10). There is no evidence that the Appellants protested or expressed any concerns to Respondent prior to paying the debt. Having made the payment with full knowledge, the Appellants must cite evidence that the payment was involuntary – that is, the payment was the result of fraud, duress, or extortion. They have failed to do so, and therefore the circuit court properly granted summary judgment as to all causes of action against Respondent based on the voluntary payment defense.

The Appellants attempt to circumvent the voluntary payment defense by arguing that the Appellants did not know how the NCCOG had used the proceeds from the loans at the time the Appellants repaid Respondent in 2010. (Appellants' Brief at 8-10). These

are merely statements of immaterial facts. There is no dispute that the Appellants actually knew that the subject loans and mortgages may not have been properly authorized by them at the time the Appellants repaid the loan, and this alleged lack of proper authority is Appellants' only challenge to the validity of the Respondent's mortgages. (Second Amended Complaint at ¶56, Answers to Interrogatories at ¶¶ 9-10). The fact that the Appellants claim to have later discovered that their own congregation used the money for an allegedly improper purpose is of no consequence. Appellants knew of the basis of their present claim against Respondent on the day they repaid the loans. Rather than challenging the validity of the mortgage or otherwise paying under protest, Appellants paid Respondent. Appellants voluntarily repaid the loans, and they are barred from recovering that money.

Likewise, the case law cited by the Appellants in support of their argument is distinguishable. In *Freeman v. J.L.H Invs., LP*, 414 S.C. 362, 778 S.E.2d 902 (2015), the car dealer to whom the payment was made had violated the South Carolina Regulation of Manufacturers, Distributors and Dealers Act, S.C. Code Ann. §§ 56-15-10 to -600 (2006 & Supp. 2014) ("Dealers Act") by failing to properly charge a closing fee in an automobile transaction. The Court held that the consumer's payment of the closing fee was not voluntary because she did not have full knowledge of what comprised the fee and the dealer could not have explained what comprised the fee, as required by the Dealers Act. *Id.* The *Freeman* case cannot be analogized to the present matter. Respondent violated no statutes, and there is no contention that it was responsible for the ultimate disposition of the loan funds. The loans and mortgages were either authorized pursuant to the Appellants' regulations or they were not. The Appellants knew that the loans may

not have been properly authorized by their own procedures and repaid the loans anyway. The ultimate use of the funds by the NCCOG is a red herring, immaterial to the voluntary payment defense, and not sufficient to create an issue of fact.

II. THE CIRCUIT COURT PROPERLY IMPOSED A TWO YEAR STATUTE OF LIMITATIONS ON THE APPELLANTS' SLANDER OF TITLE CLAIM AND PROPERLY GRANTED SUMMARY JUDGMENT AS TO THAT CAUSE OF ACTION BASED ON VIOLATION OF THE STATUTE.

South Carolina does not have a statute expressly referring to the period of limitations for slander of title actions. However, most courts that have considered the issue have held that, in the absence of an express statute, the statute of limitations applicable to libel and slander applies. 50 Am. Jur. 2d *Libel and Slander* § 541 (2014); *Hosey v. Central Bank of Birmingham, Inc.*, 528 So. 2d 843, 844 (Ala. 1988) (internal quotations and citations omitted) ("While we have never determined what the statute of limitations is for an action for slander of title, we find that the view generally adopted in the jurisdictions in which the question has arisen is that in the absence of a statute expressly made applicable to such actions, the statute of limitations governing actions for libel and slander is applicable to actions for slander of title."); *Old Plantation Corp. v. Maule Industries, Inc.*, 68 So. 2d 180, 182 (Fla. 1953) ("While there is authority to the contrary (and we shall refer to this later), we conclude that the great weight of authority in this Country is that the Statute of Limitations applicable to libel and slander is equally applicable to actions for slander of title.")

In South Carolina, the statute of limitations governing libel and slander is two years. S.C. Code Ann. § 15-3-550(1). Further, the discovery rule does not apply to slander of title claims. 50 Am Jur 2d *Libel and Slander* § 541 (2014) ("A right of action for slander of title accrues, and the statute of limitations commences to run, at the time of

the publication of the slander."); *Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) ("The trial court was correct in granting Peeples's motion for summary judgment because South Carolina has not adopted the discovery rule in libel and slander cases.")

There is no dispute that the closing attorney duly recorded the 2007 Mortgage in the Charleston County RMC Office on October 24, 2007 and duly recorded the 2009 Mortgage on March 27, 2009. (2007 Mortgage; 2009 Mortgage). The Appellants' slander of title claim accrued on these respective dates of publication. Therefore, the two year period of limitations expired on October 24, 2009 and March 27, 2011, respectively. The Appellants commenced this action on March 20, 2013, long after the expiration of the period of limitations.

The Appellants urge the Court to adopt the ten year statute of limitations applicable to actions for recovery of real property to govern slander of title actions. The Appellants fail to cite any jurisdiction that has adopted such a liberal period of limitations, either by statute or common law. Appellants support their argument by citing *Selby v. Taylor*, 57 N.C. App. 119, 290 S.E.2d 797 (N.C. App. 1982), a case in which the North Carolina Court of Appeals applied the applicable three year statute of limitations for trespass to real property in a slander of title case. Like North Carolina, South Carolina has a three year statute of limitations governing actions "for trespass upon or damage to real property." S.C. Code Ann. § 15-3-530. The Appellants also fail to cite any law in which the discovery rule has been applied to toll the statute of limitations in a slander of title action.

Even assuming the circuit court were to apply the three year statute of limitations to the slander of title cause of action, the claim is time barred. Respondent recorded both mortgages before March 20, 2010. The cause of action for slander of title accrued on the date of recordation. Therefore, the slander of title cause of action is time barred regardless of whether the circuit court applied the two-year or three-year statute of limitations, and the circuit court properly granted summary judgment as to the slander of title claim.

III. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' AIDING AND ABETTING BREACH OF FIDUCIARY CAUSE OF ACTION.

The elements for the cause of action for aiding and abetting a breach of fiduciary duty are: "(1) a breach of a fiduciary duty owed to the plaintiff[;] (2) the defendant's knowing participation in the breach[;] and (3) damages." *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Id.; see Gordon v. Busbee*, 397 S.C. 119, 133-34, 723 S.E.2d 822, 830 (Ct. App. 2012) (affirming the grant of directed verdict in favor of an attorney on aiding and abetting breach of personal representative's fiduciary duty and finding that even if the attorney should have conducted additional investigation into the assets of the estate, that does not constitute evidence of actual knowledge of improper activity on the personal representative's part).

The circuit court properly held that there is no evidence that Respondent had actual knowledge of, or participated in, the alleged breaches of fiduciary duty committed by the Estes Defendants and the Trustee Defendants. The Appellants allege that the Estes Defendants and Trustee Defendants breached their fiduciary duties by: (1) failing to seek or obtain authorization for signing mortgage documents; (2) failing to inform Plaintiff of

diverting the funds in amounts exceeding $385,000.00 for personal purposes or for the benefit of Defendant North Palm Ministries; (3) misappropriating over $385,000.00 in Plaintiffs' funds and assets, which have not been repaid; (4) failing to inform Plaintiffs that they had used their resources to form, develop and conduct business as a new church, unaffiliated with the Plaintiff; and (5) failing to protect the assets of the Trust for which they were acting as Trustees. (Second Amended Complaint). There is no evidence that Respondent had any knowledge of any of these alleged breaches at the time it made the loans to the NCCOG. To assume otherwise would be nonsensical. Respondent had no incentive to place its capital at risk by participating in an alleged scheme perpetrated by its borrower.

The Appellants cite only three immaterial facts – one of which is not in record – to support the contention that Respondent knew of, and participated in, the alleged breaches of fiduciary duty by the Estes Defendants and Trustee Defendants. The first is the language in the deed itself, which provides:

> The said Local Board of Trustees shall have full right, power and authority to sell, exchange, transfer and convey said property, or to borrow money and pledge the said real estate for the repayment of the same, and to execute all necessary deeds, conveyances, etc., provided the proposition shall first be presented to a regular or called conference of the said local church, presided over by the State Overseer of the Church of God, or one whom he may appoint, and the project approved by two-thirds of all members of the said local congregations present and voting.

(1985 Deed). The Appellants argue that the deed charged Respondent with knowledge of certain consent requirements that were ignored. (Appellant's Brief at 14). First, this is not even an argument that Respondent had actual knowledge of the failure to obtain consent. To be *charged* with knowledge is the very definition of constructive, rather than actual

knowledge. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 63, 504 S.E.2d 117, 122 (1998) ("Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts.") Furthermore, there is no evidence that Respondent had any knowledge that the requirements set forth in the deed were not met. This is borne out by the second immaterial fact cited by the Appellants: the allegation that the resolution provided by the NCCOG did not contain written approval from the State Overseer. (Appellants' Brief at 15). As one can plainly see from the deed, written approval from the State Overseer is not mentioned as a requirement. Thus, there is no evidence that Respondent was charged with or gained any knowledge of any such requirement.

Finally, the Appellants argue that the NCCOG disclosed its intent to purchase new Church property with the loan proceeds on their loan application. (Appellants' Brief at 15). The loan application is not part of the record and may not be considered by the Court. *Cobb v. Benjamin*, 325 S.C. 573, 581, 482 S.E.2d 589, 593 (Ct. App. 1997).

Further, this disclosure is irrelevant – there remains no evidence that Respondent had any knowledge that the use of loan proceeds to purchase new Church property violated any fiduciary duty owed from the NCCOG to the Appellants or that Respondent actively participated in that purchase. Appellants have presented no evidence related to the loans or the loan proceeds to meet its burden with regard to the existence of a fiduciary duty, nor any damages resulting therefrom. All of the relevant evidence demonstrates that Respondent was simply a lender who loaned money to NCCOG with the expectation that it would be repaid. To the extent any of the other parties breached

fiduciary duties to the Appellants, those parties did so without the assistance of Respondent.

IV. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE APPELLANTS' CONVERSION CAUSE OF ACTION BECAUSE APPELLANTS NEVER HAD A RIGHT TO THE PROCEEDS OF THE LOAN AND THOSE PROCEEDS CONSTITUTED A DEBT TO RESPONDENT.

Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990). To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property. *Crane v. Citicorp Nat'l Servs., Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 52 (1993) (superseded by statute on other grounds).

The Appellants contend that Respondent converted their funds by receiving payment on notes that were improperly obtained and refusing to return those funds after demand by the Appellants. (Appellants' Brief at 16).

First, there is no evidence indicating that Appellants have established title or right to possession of the funds at the time of the alleged conversion. As set forth above, the Respondent loaned money to the NCCOG, and was repaid upon the sale of Property owned by the NCCOG at the time of the loan. The Appellants never had a right to possession of the funds, as Appellants were not the borrower. Therefore, Appellants' conversion claim must fail.

In addition, the funds to which the Appellants claim a right of possession constituted the voluntary repayment of a loan made by Respondent to Appellants' local congregation. It was nothing more than repayment of a debt, and thus there is no conversion as a matter of law. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497,

220 S.E.2d 116, 119 (1975) ("However, there can be no conversion where there is a mere obligation to pay a debt.") Indeed, "where there is merely the relationship of debtor and creditor, an action based on conversion of the funds representing the debt is improper." *Id.* (citations omitted). Therefore, the circuit court properly granted summary judgment as to the Appellants' conversion cause of action.

V. THE CIRCUIT COURT PROPERLY HELD THAT THE APPELLANTS WERE BOUND BY THE CONDUCT OF THE ESTES DEFENDANTS, TRUSTEE DEFENDANTS AND CLOSING ATTORNEY.

There is no dispute that the closing attorney for both of the subject loan transactions was hired by Appellants' congregation, the NCCOG. *Chase Home Fin., LLC v. Risher,* 405 S.C. 202, 213, 746 S.E.2d 471, 477 (Ct. App. 2013) (citing S.C. Code Ann. § 37-10-102(a)) ("We agree that in a standard real estate transaction, the closing attorney represents the borrower.") The NCCOG provided its attorney with a unanimous resolution signed by NCCOG Recording Secretary Lisa Carey, in which Ms. Carey certified that the congregation and financial supporters of the Church unanimously approved the transactions. (10/8/07 Resolution; 12/4/08 Resolution). Armed with the resolutions, the NCCOG's attorney closed the 2007 and 2009 loan transactions, which the Appellants now claim were unauthorized.

The closing attorney, and not the Respondent, was charged with ensuring that the subject transactions were conducted with the requisite authority. The closing attorney had no record notice of the church Minutes. Even if there was any evidence that the closing attorney failed to ensure that NCCOG had the requisite authority, his conduct is imputable to the Appellants. *Koutsogiannis v. BB&T,* 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) ("In the attorney-client relationship,

clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority.")

Respondent rightfully relied on Appellants' closing attorney to ensure that the Appellants' congregation obtained the proper approvals. There is no evidence in the record which implicates the closing attorney in any fraudulent behavior intended to conceal information from the Appellants. Therefore, the fraud exception to the standard rules of agency is not implicated. As such, the closing attorney's actions and knowledge are binding on the Appellants, and they cannot now claim ignorance of the loans and mortgages. The circuit court properly imputed the closing attorney's behavior and knowledge to the Appellants and dismissed the claims against Respondent based on that finding.

The Appellants are also bound by the 2007 and 2008 resolutions provided by NCCOG Recording Secretary to the closing attorney. Those resolutions evidence unanimous authorizations for the NCCOG to proceed with the loan transactions. (10/8/07 Resolution; 12/4/08 Resolution). These authorizations are binding on the Appellants whether or not the NCCOG Recording Secretary followed Church of God protocol for certifying financial transactions.

Indeed, South Carolina has long recognized that an agent may bind the principal if the agent is acting within the scope of his agency, even if those actions violate corporate policy. In *Hutchison v. Rock Hill Real Estate & Loan Co.,* 65 S.C. 45, 43 S.E. 295 (1902), a corporation's secretary certified in writing that a certain resolution had been passed by the directors authorizing the execution of a bond and

an assignment of assets. The court held that the corporation was bound by such certified resolution whether or not it had been passed as a matter of fact:

> We will next consider whether the action of R. Lee Kerr, secretary and treasurer, was binding upon the corporation, even admitting that the resolutions were not authorized by the board of directors. At the foot of the resolution marked "B" is the following certificate: "I, R. Lee Kerr, secretary of the Rock Hill Real Estate and Loan Company, do hereby certify that the above is a true copy of the resolution adopted by the board of directors of the Rock Hill Real Estate and Loan Company, at a meeting held on date above written, and that the same has been duly enrolled in the minute books of the said company..."... **The signing of the certificates was within the scope of his employment, and therefore, even if they were unauthorized and fraudulent on the part of R. Lee Kerr, his action was nevertheless binding upon the corporation.**

Id. at 306 (emphasis added). In reaching the holding in *Hutchison,* the court reasoned, "Seeing that someone must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger." *Id.* In other words, as a matter of policy, the court would rather punish a board of directors for confiding in deceitful officers than third parties who interact therewith in good faith. Therefore, the NCCOG's Recording Secretary bound the Appellants when she provided the 2007 and 2008 resolutions to the closing attorney. There is simply no evidence to the contrary.

Further, there is no allegation that the NCCOG Recording Secretary acted solely in her own interests, as the Appellants' allege without citation. She is not named as a defendant in the lawsuit, and there are no allegations against her in the Second Amended Complaint. (Second Amended Complaint). Therefore, there exists no evidence that supports Appellants' contention that the 2007 and 2008 resolutions are subject to the fraud exception. The 2007 and 2008 resolutions are

binding on the Appellants, and the circuit court properly charged the Appellants with the approval of the transactions set forth in those resolutions.

VI. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO APPELLANTS' CONVERSION AND AIDING AND ABETTING CAUSES OF ACTION BECAUSE THOSE CLAIMS ARE BARRED BY THE THREE YEAR STATUTE OF LIMITATIONS.

The circuit court properly held that Appellants' aiding and abetting breach of fiduciary duty and conversion causes of action are governed by a three year statute of limitations. S.C. Code Ann. §15-3-530. The limitations period "begins to run when the plaintiff knew or by the exercise of reasonable diligence should have known that he had a cause of action." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405-406, 680 S.E.2d 778, 782 (Ct. App. 2009) (citations and quotations omitted). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Id.* at 406, 680 S.E.2d at 782. "When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court." *Id.* at 407, 680 S.E.2d at 782. The Appellants had both actual and constructive notice that the NCCOG mortgaged the Property prior to March 20, 2010 – over three years before Appellants filed this lawsuit.

The Estes Defendants resigned their Church of God credentials by letter dated March 12, 2010. No later than that date, Church of God of South Carolina State Overseer Thomas Propes became so concerned with the status of the North Charleston

congregation and the Property that he named Marc Campbell as District Overseer and asked him to investigate:

> Once it was obvious to me that we had not only lost lead pastor, staff, an entire congregation, I immediately amalgamated both districts into one district and named Marc Campbell as district overseer. Not hav[ing] reports from North Charleston, not knowing because I had no way to track what had been going on there, I asked him to begin to investigate, to meet with the Estes because I knew they had a relationship, try to get for me any information that he could concerning the exodus of the congregation, where we were on any property issues that might be lingering, try to find out if there was monies owed, to whom, to give me as detailed briefing as he possibly could, which he agreed to do so.
>
> Q. And those concerns regarding the exodus of the church, their financial situation, the real estate situation, all of those concerns became apparent when the credentials were surrendered?
>
> A. Yes.

(Propes Dep. at 76:12 – 77:6). It is therefore undisputed that Appellants' State Overseer had actual concerns about the status of the Property no later than March 12, 2010, the date on which Mark Estes resigned his credentials as pastor and District Overseer. Whether or not the Appellants later discovered problems with the NCCOG finances is an immaterial fact. No later than March 12, 2010, the State Overseer plaintiff knew that the Appellants' rights may have been invaded. The statute of limitations expired three years after that date, at the latest.

Mark Estes' resignation was not the only fact clearly placing the Appellants on notice of a potential claim. For the entire time period relevant to this lawsuit, the Appellants required every congregation, including the NCCOG, to complete a Monthly Treasurer's Report to send to the office of the Church of God of South Carolina and Church of God. (Propes Dep. at 60-61). These Monthly Treasurer's Reports provide the method by which the local Churches report certain financial data, including church

property value ***and indebtedness***. (Monthly Treasurer's Report). The NCCOG habitually failed to complete and submit the Monthly Treasurer's Report and never completed the property valuation and indebtedness section. (Missing Reports Summary). The Appellant Church of God was so concerned that, in 2008 and then again in 2009, it sent letters to Defendant Mark Estes asking for payment of certain tithing funds and proper completion of Monthly Treasurer's Reports. (7/10/08 Ltr. Robinson to Estes; 9/25/09 Ltr. Robinson to Estes). The concerns were so great that, on October 23, 2009, the Appellant Church of God wrote a letter to State Overseer Thomas Propes asking Pastor Propes to intervene. (10/23/09 Ltr. Robinson to Propes).

Despite these concerns, the Appellants never followed up on the missing reports and information. There is no dispute that the Appellants were on notice of deficient reporting – as well as potential issues with Church financials and the Property – as early as 2008. Had the Appellants performed the diligence required under South Carolina law, they would have discovered the duly recorded loans and mortgages five years before they filled this lawsuit. Therefore, the circuit court properly held that there is no genuine issue of material fact regarding the date on which Appellants had constructive knowledge of their claim against Respondent and the claim is time barred.

On January 13, 2010, Defendant Mark Estes sent a letter to State Overseer Propes in which he expressed his concerns with Church leadership and promised to account for checks that had bounced. (1/13/10 Ltr. Estes to Propes). In the letter, Mark Estes noted that the checks bounced because "checks given to us by the ***other church assuming our lease bounced.***" Overseer Propes received and reviewed this letter. (Propes Dep. at 63-64). In this letter, Defendant Estes clearly informs State Overseer Propes that another

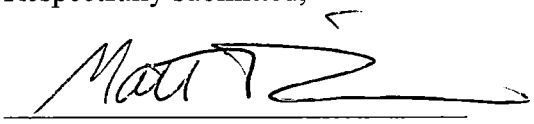
Church is leasing the Property. A person of common knowledge and experience would realize that the NCCOG was, at the time, leasing its sanctuary to another Church body. At the very least, this information placed Overseer Propes on notice of a potential issue with the Property. Overseer Propes does not recall this sentence in the letter, but admitted that it may have caused him to wonder where the North Charleston congregation was conducting services "if [he] gave it thought." (Propes Dep. at 68). Whether or not the Appellants' State Overseer "gave it thought" is irrelevant. The undisputed fact is that he received notice that the NCCOG had leased its Church building to another entity – yet another fact placing the Appellants on notice of a potential claim more than three years prior to the commencement of this lawsuit.

Only one reasonable inference may be drawn from the facts in the case as set forth above – the Appellants knew or should have known that they had a potential claim related to the Property more than three years prior to the date on which this lawsuit was filed. Therefore, the circuit court properly granted summary judgment as to the conversion and aiding and abetting breach of fiduciary duty claims.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Court AFFIRM the circuit court's grant of summary judgment.

Respectfully submitted,



Matthew E. Tillman
Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street
P. O. Box 999
Charleston, South Carolina 29402
(843) 722-3400

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2013-CP-10-1686
APPELLATE CASE 2015-001848

Church of God and Church of God of South Carolina, ...Appellants,

v.

Mark Estes, Patricia Estes, Michael Timothy Brooks, Individually and as Trustee for Church of God at North Charleston Trust, Adam Boyer, Individually and as Trustee for Church of God at North Charleston, Rolando River Osorio As Trustee For Church Of God At North Charleston Trust and North Palm Ministries, Inc., North Palm Community Church and Crescom Bank, Successor by Merger to Community First Bank, Defendants.

Of Whom Crescom Bank is the ..... Respondent,

v.

Thomas Propes and Marc Campbell, Third Party Defendants.

PROOF OF SERVICE

I do hereby certify that on the 12th day of January 2016, I served a copy of the within *Respondent's Initial Brief* and *Respondent's Designation of Matter* in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid addressed to:

George J. Kefalos, Esq.
46 A State Street
Charleston, South Carolina 29401
Attorney for Appellant

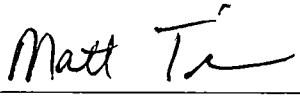
Oana D. Johnson, Esq.
Janik, L.L.P.
One Carriage Lane, Building H
Charleston, South Carolina 29407
Attorney for Appellant

C. Steven Moskos, Esq.
4000 Faber Place Drive
Suite 300
North Charleston, South Carolina 29405
Attorneys for Defendants Mark Estes, Patricia Estes, Adam Boyer, individually and as Trustee for Church of God at North Charleston and Michael Timothy Brooks, individually and as Trustee for Church of God at North Charleston Trust; North Palm Ministries, Inc. and North Palm Community Church

Carol B. Ervin, Esq.
Brian L. Quisenberry, Esq.
Young Clement Rivers, LLP
25 Calhoun St., Suite 400
Charleston, South Carolina 29401
Attorneys for Church of God of South Carolina, Thomas Propes and Marc Campbell

Rolando Rivera Osorio
8241 Preakness Drive, Lot 211
North Charleston, SC 29420
Defendant Pro Se

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



Matthew E. Tillman
Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street
P. O. Box 999
Charleston, South Carolina 29402
(843) 722-3400

ATTORNEYS FOR RESPONDENT

January 12, 2016

WOMBLE CARLYLE SANDRIDGE & RICE
A LIMITED LIABILITY PARTNERSHIP

5 Exchange Street
Charleston, SC 29401

Mailing Address:
Post Office Box 999
Charleston, SC 29402
Telephone: (843) 722-3400
Fax: (843) 723-7398
www.wcsr.com

Matthew E. Tillman
Attorney at Law
Direct Dial: 843-720-4629
E-mail: mtillman@wcsr.com

January 12, 2016

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

Re: Church of God, et al. v. Mark Estes, et al.
Appellate Case 2015-001848
WCSR File No: 85249.0040.9

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Respondent's Initial Brief and Respondent's Designation of Matter in the above action. Please return the filed, time stamped copy to me via our courier.

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Matt Tillman

Matthew E. Tillman

MET/cbc
Enclosures: as stated

cc with encl: George J. Kefalos. Esq.
Oana D. Johnson, Esq.
C. Steven Moskos, Esq.
Carol B. Ervin, Esq.
Brian L. Quisenberry, Esq.
Rolando Rivera Osorio

FOLD on this line and place in shipping pouch with **bar code and delivery address** visible

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2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
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