THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D Craig Brown , Circuit Court Judge

Case No 2010-CP-21-131

Mark Fountain, Appellant,

v

First Reliance Bank, Thomas C Ewart and Ernest Pennell, Defendants

Of whom First Reliance Bank and Thomas C Ewart are, Respondents

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INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

While Appellant's Statement of the Case accurately reports the procedural stages that have occurred in this matter,[1] Respondents do not agree with the incomplete, generalized characterizations given to the summary judgment arguments (Appellant's Brief at pp 2-3), the Court's Order of summary judgment (Appellant's Brief at pp 3-4), the arguments for reconsideration (Appellant's Brief at p 4), or the Court's Order denying reconsideration (Appellant's Brief at p 5) Moreover, the Appellant's characterizations introduce contested matters into the Statement of the Case – prohibited by SCACR 208(b)(1)(C)

As an example of such a contested matter, with regard to the Order of Summary Judgment, it is stated that "The Court did not address the record evidence that Fountain relied on at the hearing to show abuse " (Appellant's Brief at p 4) Similarly, with regard to the Order Denying Reconsideration, it is stated that "The court *yet again* failed to address the record evidence that Fountain relied on to show an abuse " (Appellant's Brief at p 5)(emphasis added) The Respondents disagree with these characterizations

The Summary Judgment Order devotes over 3 pages to the issue of privilege (Summary Judgment Order, R pp 11-14) and devotes additional analysis to the facts and circumstances surrounding the alleged defamatory statement (R pp 3-4) Likewise, after considerable analysis, the Order Denying Reconsideration clearly concludes "there are no controverted facts to submit a question of privilege abuse to the jury " (R p 23)

The Respondents should not be bound, as contemplated by SCACR 208(b)(2), by the Appellant's characterizations of arguments and Orders which are fully available for this Court's

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[1] Most importantly, this matter is before the Court on an appeal from the trial court's decision to grant summary judgment against the claim of Appellant Fountain that he was defamed by Respondents Ewart and First Reliance That Order of summary judgment was the subject of a motion to reconsider which was briefed, heard, and denied

review Thus, for Respondents' Statement of the Case, the Respondents crave reference to the actual arguments made and Orders issued

STATEMENT OF FACTS

1 The Statement And It's Context

In this case, the Appellant Mark Fountain, together with Ernest Pennell, sought a loan from Respondent First Reliance Bank for the debt reorganization and operation of a combination convenience store – restaurant At the time (approximately December 2008), the store was actually owned by Pennell and his existing 50% corporate partner in that store, Cromwell "Bud" Rawls [2] Fountain Deposition, R p 138 Pennell and Fountain were together exploring this store business opportunity with a plan for Fountain to manage the reorganized store Fountain had previously failed as a manager of such a store and this was well known to First Reliance (discussed in part 2 of the Facts below)

Also at the time, the Pennell-Rawls store was under financial distress from first-mortgage holder Carolina First Bank Fountain Deposition, R p 135 – R p 137 [3] Pennell estimated the principal balance of this first mortgage at $1 2 M Pennell Deposition, Appendix p 1 lines 2- 14 In order for their proposed business opportunity to achieve fruition, Fountain and Pennell needed to secure refinancing of this first mortgage They also needed to secure sufficient financing to fund the desired buy out of Mr Rawls Additionally, refinancing was needed to pay off approximately $200,000 in delinquent charges for fuel previously supplied to the store Fountain

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[2] The convenience store – restaurant involved was known at the time as the "Hess Mart " It is located at the corner of Irby Street and Darlington Street in the City of Florence Pennell Deposition, R p 172 and R p 173 The objective of the proposed new financing was confirmed by Pennell in his deposition examination by Appellant's counsel R p 179 See also Complaint ¶ 6 (R p 25)

[3] Pennell confirmed that ultimately a foreclosure action was begun by Carolina First Bank Pennell Deposition, R p 174

Deposition, R p 132 line 14 to R p 134 At the time of their approach to First Reliance Bank, one other lender had already turned down the Fountain-Pennell request [4]

In this action, Fountain seeks damages for Respondent Ewart's[5] true statement (hereinafter "the Statement") that Ewart's employer, Respondent First Reliance, "would not loan [Pennell] the money if [Appellant Fountain] was involved in the business "[6] Fountain's Deposition, R p 140, Lines 5-6 [7] This statement was privately made only to Pennell This one-time statement is the only alleged defamation by either Ewart or First Reliance Once the Statement was made, the Statement was repeated by Pennell to Fountain alone, this occurred when Fountain called Pennell on the phone -- almost as soon as Pennell left First Reliance Bank [8] Pennell Deposition, R p 190, Lines 19-21, and R p 191, Line 23-R p 192, Line 8

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[4] The other bank approached was First Citizens Bank in Dillon Pennell Deposition R p 175 – R p 176 Fountain also testified about an apparently unsuccessful approach made to Upstate Mortgage for financing Fountain Deposition, R p 152 lines 9-15, R p 155 line 22 to R p 156 line 23

[5] Ewart was an experienced bank loan officer – one who had been involved with convenience stores and had lent to franchises and fast food stores "a long time " Ewart Deposition, R p 221 line 5- Appendix p 2 line 17, see also R p 197 line 4 – p 198 (8 years at First Reliance and previous experience at other banks)

[6] The truth of the Statement is not denied by Appellant's Brief (at pages 14-15) which instead seeks to impose liability based upon some suggested tertiary level of innuendo which will be addressed in this Brief's argument

[7] A similar version of the statement is found in the Appellant's complaint Complaint ¶ 9 Ewart admitted privately advising Pennell that "if [Fountain] was going to be managing the operation, we would not be making the loan " Ewart Deposition, page 6 lines 18-21 Interestingly, Pennell's recitation of the Statement is even more benign Pennell described Ewart's Statement regarding the loan denial as "under the present status, First Reliance could not make the loan " Pennell's Deposition, R p 188, Lines 12-19 Pennell did testify that "reading between the lines" he believed that the basis for the denial was Mr Fountain's involvement in the business management team Pennell's Deposition, R p 188, Line 15-R p 189, Line 12

[8] Inexplicably, the Appellant had previously asserted a defamation claim against Pennell for repeating the statement, at the Appellant's request, to the Appellant's attorney at the time

2 Appellant's Management History And Credit History

Within a short span of years preceding the alleged defamation in this case, Fountain had defaulted on a tractor and motorcycle loan,[9] defaulted on a line of credit for business,[10] defaulted on a boat loan,[11] and defaulted on credit card debt [12] In total, this debt neared or exceeded $200,000 Respondent Ewart dealt first hand with issues related to Fountain's personal debt while Ewart was employed at Carolina First Bank [13]

In addition to this personal debt, Fountain was a participant in a limited liability company which operated a Bojangles chicken franchise in three locations including a Timmonsville Bojangles – Citgo store combination (similar to the Pennell store which had been a Hardees – Hess combination) Fountain worked at the Timmonsville location on a daily basis, drawing a paycheck, and assisting with store management Fountain Deposition, R p 115 line 25 – R p 121 line 13, R p 123 lines 14-24 This Bojangles franchise incurred debt from Bank of America[14], *the Respondent First Reliance Bank* ($20,000 to 25,000)[15], Mutual Savings Bank[16],

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Pennell's Deposition, R p 193, Line 15-R p 195, Line 21 Following summary judgment with regard to defamation claims, the Appellant has abandoned the defamation claim against Pennell Appellant's Brief at p 3, footnote 1

9 Fountain Deposition, R p 144 line 8- R p 145 line 7 (First Reliance)

10 Fountain Deposition, R p 145 line 22—R p 147 line 2 (First Federal, $194,000 00)

11 Fountain Deposition, R p 145 line 8-15 (Carolina Bank)

12 Fountain Deposition, R p 147 line 25- R p 148 line 19 (BB&T, $3,400)

13 Fountain Deposition, R p 166 line 21 – R p 167 line 9

14 Fountain Deposition, R p 117 lines 16-25

15 Fountain Deposition, R p 123 lines 10-13

16 Fountain Deposition, R p 121 lines 22-24

and Carolina First Bank ($100,000) [17] Respondent Ewart was employed at Carolina First Bank at the time (before First Reliance) and was involved with the Bojangles' loan from Carolina First Bank Fountain Deposition, R p 121 line 25 – R p 123 line 9

As one of the Bojangles franchise owners, the Appellant was also a personal guarantor of this limited liability company's debt Fountain Deposition R p 125 lines 7-16 The Bojangles franchise also incurred debt from contractual obligations with vendors – some of which were also personally guaranteed by Fountain Fountain Deposition, R p 148 line 24 – R p 150 line 17 (Toyko Leasing)

No more than 5 years before the alleged defamation,[18] the Bojangles limited liability company failed to be profitable and resulted in additional judgments against Fountain Fountain Deposition R p 125 line 19 – R p 126 line 20 Fountain could not give an accounting for his share of the company debt and had not contributed to satisfaction of the company debt since sometime in 2008 (or earlier) when he became unemployed for over a year with health issues Fountain Deposition R p 129 line 8 – R p 131 line 7 As a result, the Appellant conceded the obvious -- that his credit worthiness was "poor" Fountain Deposition, R p 152 lines 3-6

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17 Fountain Deposition, R p 123 lines 7-9

18 Appellant testified that the Ewart related events surrounding the Bojangles' failure occurred 3-5 years prior to the December 2008 alleged defamation Fountain Deposition, R p 169 line 20 – R p 170 line 3

3 The Facts Demonstrate A Legitimate Decision To Decline This Proposed Loan

Despite this backdrop of financial failure, Fountain apparently imagines himself with a clean financial slate and portrays himself in his Brief as a recently trained and successful manager Appellant's Brief at 26 Fountain's Brief further implies that he and his wealthy financial partner are entitled to a private commercial loan for their new business opportunity [19] In reality at the time, Fountain was a failed manager and risky borrower well known as such to the Respondent Ewart (from his Carolina First Bank experience) and his employer First Reliance Bank (from its own Bojangles' loan experience)

A Appellant's Failures Were A Relevant Consideration

Much of Fountain's Brief is devoted to distancing himself from his financial failures of the past including minimizing his management role with the Bojangles' franchise [20] Regardless of what kind or level of management Fountain was supposed to provide at Bojangles, he was some kind of paid daily manager for a failed commercial enterprise Fountain himself testified that management information is relevant to a lender's risk assessment in making a lending decision (Fountain Deposition, R p 153 lines 11-18), Fountain's Brief implies, however, such information was irrelevant and therefore it would necessarily be malicious to consider such information Appellant's Brief at pp 24-26 (suggesting loan refusal was reckless, not reasonable)

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[19] Appellant's Brief at p 8 and p 25 (Pennell was "worth over $1 million and possibly over $2 million ") Of course, the potential security of Pennell's wealth isn't as significant when the needed financing was also over $1 million and possibly $2 million (including mortgage refinance, vendor debts, and partner buy-out)

[20] Appellant's Brief at p 6, p 12, and p 25

B Nothing In The Record Supports Existence Of Disregarded Skills Or Experience

Repeatedly the Appellant's Brief seeks to demonize Respondent Ewart for his actual knowledge of Fountain's financial failures by implying that the Fountain had some new training and experience that made this new convenience store-restaurant risk very different from his previous convenience store-restaurant experience (only 5 years earlier) Appellant's Brief at p 26 (Ewart's knowledge was old, never bothered to update, obsolete)

In his deposition, Fountain had plenty of opportunity to detail any newly acquired training or relevant experience, yet *Fountain s deposition reveals he worked less than a year as the director of a largely volunteer organization (Boy Scouts) he had been out of work over a year and he had no additional experience or training in running a convenience store or a restaurant* Fountain did advise that he felt he had "learned from his mistakes" Fountain Deposition, R p 132 line 14 – R p 133 line 14 Fountain's highly touted position as Timmonsville town administrator[21] did not begin until 2010[22] and thus is of no relevance to the events of 2008 Moreover, Fountain points to no specific education, training, or experience now used as town administrator that was present in December 2008 and relevant to running a convenience store – restaurant

C Profferred Bank Expert's Opinion Is A Red Herring

The implication of loan entitlement is also made, in part, by Fountain's assertion that the loan denial "violated the bank's policies and existing bank regulations" Appellant's Brief at 10 and 26 (citing the affidavit of Fountain's proffered banking expert) Referring to the proffered

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[21] Appellant's Brief at p 12 ("Fountain was a *good enough* manager to later be hired as Timmonsville's Town Administrator ")(emphasis added), p 17 ("now a Town Administrator"), and p 26 ("his qualities that prompted his hire as a Town Administrator ")

[22] Fountain Deposition, R p 131 lines 8 - 20

expert's affidavit, however, the record reveals that the alleged banking violations did not effect the lending decision made in this case For example, one regulation allegedly violated is the failure to retain the loan application Seitz Affidavit ¶ 6(b)(ii) (R p 244) Not only was Fountain unaware if an application was ever completed[23] (Ewart testified it was not[24]), the failure to retain any such paperwork *after* the loan decision is not relevant to the decision itself Another proffered violation is the alleged failure to obtain the applicant's financial information (Seitz Affidavit ¶ 6(b)(i) R p 244) – this despite the Fountain's testimony that the lender was told of the financial distress behind the need for debt restructure [25]

Additionally, the expert's affidavit is non-sensical on its face the affidavit notes that both Mr Ewart's incentive plan and generic "federal bank examiners" were both encouraging a reduction in the bank's commercial real estate concentration, then the affidavit declares that a decision to fund "the loan sought by Mr Pennell's entity would have reduced the bank's commercial real estate concentration " Seitz Affidavit ¶ 6(c) (R pp 244-245) Obviously, the Pennell-Fountain proposed mortgage restructure would be a commercial loan secured by commercial real estate Notably, the proffered expert works in compliance and not in actual lending Seitz Affidavit ¶ 1 and 2 R p 242 In contrast to this nonsense, Respondent Ewart testified as to specific lending criteria and guidelines applicable and considered in meeting with Fountain-Pennell Ewart Deposition, R p 227 line 16 – R p 234 line 25

Finally, the bank "policies" allegedly violated were general directives from the Bank Board of Directors to "seek out" borrowers and "book desirable loans " Seitz Affidavit ¶ 6(a) (i-iv) (R p 243-244) The Bank didn't need to seek out this risky proposal, Fountain and Pennell

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23 Fountain Deposition, R p 141 lines 20-25

24 Ewart Deposition, R p 200 line 22 – R p 201 line 6

25 Fountain Deposition, R p 141 line 4 – R p 143 line 1

sought out the Bank -- and it hardly was a desirable loan Indeed, in light of the obvious risk, the factors recited by Ewart, and the general concern of bank regulators with commercial real estate lending, the bank officers would have been negligent to consider a loan like the Fountain-Pennell proposal

ARGUMENT

I The True Statement Was Not Defamatory

A The Statement Is Literally True

The Statement here did not defame Fountain Simply put, the Statement was about what First Reliance actually would or would not do The Statement *was not* "Mark Fountain is not trustworthy " The Statement *was not even* that "Mark Fountain is a poor manager "

The Statement was simply that the bank would not make the loan – and in the light most favorable to Fountain – that the bank would not make the loan with Fountain involved In fact, Pennell expressly denied any elaboration as to why First Reliance would not want Fountain involved Pennell Deposition, R p 189 lines 13-18 The record contains no evidence of any elaboration beyond this limited, guarded, private Statement

Of course, the Statement is undeniably true on its face – it is uncontroverted that First Reliance would not[26] and did not[27] make any loan to Pennell for the proposed business opportunity involving Fountain This literal truth is not denied by Appellant's Brief Appellant's Brief at 14-15 A Statement that is true is not actionable as defamation As noted by Professors Hubbard and Felix in their treatise on South Carolina torts

> Defamatory matter which is true is not actionable Unless the First Amendment is involved, defendant has the affirmative burden of proving that the matter is substantially true If this affirmative defense is established, the defendant cannot be held liable for the defamatory effect of the publication

F P Hubbard & R L Felix, The South Carolina Law of Torts (2d ed 1997) pages 478-479 See Wesav Financial Corp v Lingefelt, 316 S C 442, 450 S E 2d 580 (1994)

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[26] Ewart Deposition, R p 203 lines 18-22

[27] Pennell Deposition, R p 188 lines 12-19

While Fountain complained that the Statement was "inappropriate", Fountain Deposition, R p 140 lines 16-18 and R p 154 lines 13-18, Fountain's opinion of a banker's true, blunt, and private comment does not control South Carolina defamation law *Tellingly at the same time he complained of inappropriateness he admitted the appropriateness of a lender considering the management knowledge and management experience for a potential borrower* [28] Fountain Deposition, R p 153 lines 11-18 Fountain can't have it both ways As the trial court so appropriately concluded, "Not every disappointment in life is an actionable tort " Summary Judgment Order, p 16 (R p 17)

B There Is No Reasonable Defamatory Implication

1 There Is No "Plain" Insinuation

In an effort to render the bank's reasonable business decision defamatory, the Plaintiff speculates that the Statement has an implied defamatory meaning It is true that an insinuation may be actionable as defamatory "if it is false and malicious *and the meaning is plain* " Tyler v Macks Stores of South Carolina, Inc , 275 S C 456, 458, 272 S E 2d 633, 634 (1980)(emphasis added) The first five definitions listed in the Encarta on-line dictionary for the word "plain" are clearly visible, easily understood, simple and ordinary, candid, and pure Thus if an implication or innuendo is to be relied upon to raise a defamatory meaning, *that implication or innuendo still must be clearly visible easily understood simple and ordinary candid and pure* [29]

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[28] In addition, Fountain's proffered expert suggest it might violate bank policy not to offer some explanation for the bank's position Seitz Affidavit ¶ 6(a)(iii) (R p 244)

[29] Consistent with Tyler and the definition of "plain", the trial court allowed that if the Statement had a defamatory *per se* implication that was "the clear, exclusive implication" (such as Fountain was "dishonest" or had an "unfit" character), then the matter would be appropriate for jury consideration Summary Judgment Order, p 10 (R p 11) Seizing on the use of "clear" and "exclusive", the Appellant's Brief falsely accuses the trial court of requiring actionable

In this case, however, *even the Appellant failed to articulate a plain implied defamatory meaning* Fountain Deposition, R p 165 lines 8-16 (" it speaks for itself it upsets me ") The trial court found it would have to speculate to try and reach some non-expressed defamatory meaning Summary Judgment Order, pp 8-9 (R pp 9-10) If a jury would have to speculate as to some defamatory meaning, there is no "plain" defamatory meaning sufficient to survive summary judgment

Relying on Adams v Daily Telegraph Printing Co , 292, S C 273, 356 S E 2d 118 (Ct App 1986), Fountain argues that any true words remotely "capable" of offensive innuendo are actionable as defamation While the *dicta* of the Adams opinion is broad, it is only *dicta* addressing a one-of-a-kind case in a very preliminary procedural posture [30] Despite this broad *dicta*, Adams does not allow that any speculative or unreasonable interpretation of an otherwise

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implied defamation to satisfy a tripartite requirement of being "clear, exclusive, and direct" (Appellant's Brief at pp 11-14) -- a requirement Appellant suggests is inconsistent with the legal standard found in Tyler and Adams v Daily Telegraph Printing Co , 292 S C 273, 356 S E 2d 118 (Ct App 1986) The trial court never said that a defamatory meaning had to be "clear, exclusive, and direct " But consistent with Tyler and Adams, the trial court did refuse to submit a speculative meaning that was not direct, was not clear, and certainly was not exclusive Tyler and Adams will be discussed in greater detail in section B(2) of this Brief

[30] The Adams court admittedly and needlessly borrowed dated language from the 1940 opinion of Flowers v Price, 192 S C 373, 6 S E 2d 750 (1940) The Adams opinion expressly acknowledges that the language is from a case addressing "*a demurrer to a complaint*" – a procedural challenge to the sufficiency of the pleading alone prior to the adoption of the South Carolina Rules of Civil Procedure 292 S C at 279, 356 S E 2d at 122 (emphasis added)

In Flowers, the Supreme Court understandably reversed the trial court which had inexplicably sustained the demurrer to the complaint holding that the defendant's *plainly rhetorical* public question to the plaintiff ("how do we know that you did not take his tobacco and put it on yours and carry it over to the other warehouse?") did not necessarily imply larceny – even though it immediately followed a public declaration that "someone stole thirty pounds of another man's tobacco back here in the warehouse " The Supreme Court used broad language to analyze the pleadings at this understandably forgiving stage of the matter but the Court still subjected the pleadings to an objective review noting that the defamatory meaning must be understood in the "natural sense" "when all the alleged facts and circumstances are considered "

benign statement can be parlayed into a tort-based lottery ticket The Adams court *clearly* requires that the alleged defamatory construction or implication of the statement must be "reasonable" in order to survive Id , 292 S C at 279, 356 S E 2d at 122 (demurrer question is whether publication is capable of "any *reasonable* construction that renders the words defamatory ")(emphasis added)

Moreover, as the trial court here noted (Order Denying Reconsideration at 1-2, R pp 20-21), it is important to put the Adams opinion in its unique factual context Adams involved two publicly broadcast statements that *were designed* to invite a broad public inference of criminal conduct – indeed murder [31] The implication of criminal conduct has historically and consistently been recognized as actionable *per se* in our courts In this case, there was a *private* business discussion, not two public television broadcasts Here there was no elaboration at all, much less an express invitation to draw a conclusion of criminal conduct Here there is no implication of criminal conduct or any other type of *per se* defamation – such as innuendo about character The exceptional facts of Adams open no door to the opportunist Fountain unable to articulate his defamation

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[31] In Adams, the family members of two murdered boys used a press conference to bait other members of the family to come forward and take "truth serum" or undergo "truth testing" regarding the boys' unsolved murders The family at the press conference also announced that those other family members had hired an attorney to advise them on these matters The family at the press conference also invited the public to "draw their own conclusion" from the remaining family's alleged refusal to cooperate In Adams, apparently it was true that Mr Adams had employed an attorney and was refusing to cooperate further with law enforcement The defamatory innuendo expressly invited in Adams – criminal conduct by Mr Adams – apparently was not true (or could not readily be proven)

2 There Is No Comment Upon Character Here

Seeking to fit into the narrow liability window of Tyler and Adams, where a remote defamatory meaning may be clearly implied by a true statement, Appellant's Brief uses a form of the word "unfit" 23 times, this is 23 times more than that word is found in Ewart's Statement This term's repeated usage is a not so subtle, but erroneous, suggestion that the Statement's possible meaning is that Fountain is "dishonest" or has a character "unfit" to work at a convenience store

As noted by the trial court, most of the decisions addressing the character-type of *per se* defamation have involved licensed or regulated professionals Summary Judgment Order, (R p 11), Rule 59(e) Order, (R p 21) Those cases have involved statements that *directly* commented upon a person's fitness for a trade or profession See, e g , Boling v Clinton Cotton Mills, 163 S C 13, 161 S E 195 (1932)(statement that minister "would not keep his word" was actionable *per se*), Moshtaghi v The Citadel, 314 S C 316, 443 S E 2d 915 (Ct App 1994)(statement that professor was "dishonorable" and engaged in "illegal" conduct was actionable *per se*)

Appellant suggest that the "unfitness" category of slander *per se* is not limited to licensed or regulated professions In support of this suggestion, the Appellant cites to Tyler and Eubanks v Smith , 292 S C 57, 354 S E 2d 898 (1987) While these cases may not involve licensed or regulated professionals, each of these cases does involve implications of wrongful or criminal conduct – not some general unsuitability for an occupation [32] Thus, they are also distinguishable from the facts at bar where no criminal conduct was implied

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[32] Tyler involved a store employee terminated immediately after the termination of the manager and the administration of a polygraph to employee, Tyler argued that the timing of

Appellant also cites to Prosser & Keeton, On the Law of Torts§112 for the argument that this unfitness category of slander *per se* applies to all forms of business including blacksmiths and tenant farmers Not only are none of the annotated cases from South Carolina, the text of the treatise further provides that a "more general reflection" upon the plaintiff's "qualities" lacks the "special significance" to be actionable Prosser & Keeton §112, (citing Restatement of Torts §573 and Bruno v Schukart, 12 Misc 2d 383, 177 N Y S 2d 51(1958)(where even calling plaintiff a "liar" and "crook" was not actionable absent some showing of business impact)) Even inferring the statement here meant that Appellant was a poor manager, this is nothing more than a "general reflection" – supported by historical performance

Appellant also cites the cases of Capps v Watts , 271 S C 276, 246 S E 2d 606 (1978), and Goodwin v Kennedy , 347 S C 30, 552 S E 2d 319 (Ct App 2001), in his effort to expand the scope of this *per se* category of defamation to any type or degree of alleged "unfitness" – even statements or implications that don't include crimes or moral failings These cases, however, involve very public and very direct statements that reasonably could impugn the personal character of their targeted persons Capps involved not only inactionable "words of abuse and scurrility", it also involved a comment that "cast doubt upon [Plaintiff's] mental

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these events insinuated wrong doing The court found the complaint's allegations sufficient to survive demurrer, it was not ruling on summary judgment

Eubanks involved the implication of criminal conduct by City employees Eubanks also involved press releases, not private conversations, in which the continuing investigation of the employees is described as looking for "criminal wrong doing" and "violations of the law " Eubanks also involved a speaker who knew that his insinuations of wrong doing were false as the city employees were actually the whistle-blowers in the matter

Other cases cited by Appellant involve similar suggestions of criminal conduct See McBride v School District of Greenville County, 389 S C 546, 698 S E 2d 845 (Ct App 2010)(stolen school property), Parish v Allison, 376 S C 308, 656 S E 2d 382 (Ct App 2007)("conned" elderly woman could imply crime of moral turpitude), Richardson v State-Record Co , Inc , 330 S C 562, 499 S E 2d 822 (Ct App 1998)(driving homicide), Mains v Kmart Corp , 297 S C 142, 375 S E 2d 311 (Ct App 1988)(shoplifting)

competence " 271 S C at 282 and 286, 276, 246 S E 2d at 609 and 611-12 Goodwin involved the use of a specific historical racial epithet, once rhetorically used by Malcom X, that "assailed [Plaintiff's] integrity and decision-making" and attributed "racism and bias" to the Plaintiff in the performance of his work duties Again, Ewart's Statement here is not one that impugns the personal character of Fountain [33]

3 Any Implications Are True

The truth is also a defense to alleged defamatory insinuation Accord Tyler v Macks Stores of South Carolina, Inc , 275 S C 456, 458, 272 S E 2d 633, 634 (1980) (noting that actionable insinuation must be false) Although not articulated, the logical implication of the Statement is that First Reliance lacked sufficient faith in Fountain's management skills to make a loan to a Fountain-related enterprise Even this implication is focused on First Reliance, not Fountain Again, this arguable implication is clearly true – First Reliance *did* lack faith in Fountain's management skills [34] In addition, as noted by the trial court, even other remote implications or component parts of the bank's implied lack of faith in Fountain are also either true[35] or non-actionable opinion

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[33] Appellant also cites Anderson v The Augusta Chronicle, 365 S C 589, 619 S E 2d 428 (2005), which affirmed the Court of Appeals decision, 355 S C 461, 585 S E 2d 506 (2003), which reversed the trial court's directed verdict in a public figure defamation where that figure was accused of lying about his National Guard service There is no such character accusation in this case

[34] Specifically, Defendant Ewart testified that First Reliance had concerns because of Plaintiff's prior involvement with and management of other businesses that had difficulty repaying their loans Ewart deposition, R p 207 line 15 – p 212 line 24, p 215 24 line 2 – p 216 line 20, p 220 line 5 – p 221 line 4

[35] As stated by the trial court,

> For example, perhaps a remote component implication is that Fountain had a bad credit rating, Fountain confirmed this was true Fountain Deposition, page 68 line 14 – page 69 line 6 Perhaps a remote

4 Any Implications Are Protected General Opinions of Creditworthiness

The trial court also held that to the extent that Ewart's Statement implied opinions of Fountain's creditworthiness, these were constitutionally protected opinions Summary Judgment Order at 9 footnote 11 (R p 10) Appellant's Brief suggests that the constitutional protection afforded opinion in not applicable because the Statement implies fact, not opinion Appellant's Brief at 20-21 Again, Respondent asserts, and the trial court found, that all reasonable assertions of fact found in the Statement are true This should be affirmed because there is no evidence to the contrary, only speculation The Court's footnote was perhaps unnecessary dicta, but to the extent that creditworthiness is "opinion" it should be constitutionally protected or at least not actionable This is consistent with the "general reflection" language referenced in Prosser & Keeton and is consistent with the cases addressing the reporting of credit scores [36] Of course, the Statement here was even more benign than a direct report on the credit of Plaintiff

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> component implication is that Fountain had a history of adverse legal judgments, true -- Fountain described these in his deposition Fountain Deposition, page 61 line 8 – page 67 line 24 Perhaps a remote component implication is that Fountain had a history of involvement with a failed Bojangles franchise which had debt with First Reliance, true again -- Fountain described this in his deposition Fountain Deposition, page 20 line 25 – page 31 line 20 Perhaps a remote component implication is Fountain's lack of specialized experience in distressed business turn-arounds, Fountain did not profess any such specialized skills but rather testified that he had learned from his mistakes Fountain Deposition, page 40 line 14 – page 41 line 14
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> Summary Judgment Order, p 9-10 (R pp 10-11)

[36] South Carolina has applied the qualified privilege to financial matters such as credit agency reporting and other banking concerns See, e g , Cullum v Dun & Bradstreet, 228 S C 384, 90 S E 2d 370 (1955) ("the defense of qualified privilege is available to a mercantile agency in respect to reports on the credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter ")

II The Publication Of The Statement Was Privileged [37]

A Privileged Publications Defined

"The second major element of defamation is an *unprivileged* publication to a third party" Fleming v Rose, 338 S C 524, 526 S E 2d 732 (Ct App 2000)(emphasis added) Our Supreme Court has held, "A communication on a subject in which the person communicating has an interest is qualifiedly privileged if made in good faith, limited in its scope to the requirements of such interest or duty, and made to a person having a corresponding interest or duty" Cullum v Dun & Bradstreet, 228 S C 384, 90 S E 2d 370 (1955) [38] "The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits" Woodward v Weiss, 932 F Supp 723 (D S C 1996)(citing Manley v Manley, 291 S C 325, 353 S E 2d 312, 315 (S C Ct App 1987) quoting Conwell v Spur Oil of Western South Carolina, 240 S C 170, 125 S E 2d 270, 274-75 (1962))

In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court Boone v Sunbelt Newspapers, Inc , 347 S C 571, 556 S E 2d 732 (Ct App 2001) While the potential abuse of a privilege is often a question for the

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[37] Obviously, the question of privilege need only reached if the Court first determines that the statement could reasonably be defamatory

[38] See also Conwell v Spur Oil Co of Wester South Carolina, 240 S C 170, 125 S E 2d 270 (quoting from 33 Am Jur , Libel and Slander §126, page 124)(also citing Fitchette et al v Sumter Hardwood Co 145 S C 53, 142 S E 828, McClain v Anderson Free Press, 232 S C 448, 102 S E 2d 750) , F P Hubbard &R L Felix, The South Carolina Law of Torts (2d ed 1997) page 508

jury, Id , 347 S C at 582, 556 S E 2d at 736, it is for the Court to determine in the absence of a factual controversy Woodward v South Carolina Farm Bureau Ins Co , 277 S C 29, 32-33, 282 S E 2d 599, 601 (1981)

B Facts Support Privilege Here And This Is Unchallenged

Although the exact nature of the relationship between Pennell and Fountain may be disputed, there is no question that they were together exploring a shared business opportunity in a convenience store and were together exploring the financing needed for that purpose Complaint ¶¶ 6-8 (R p 25) Pennell and Fountain had made exploratory bank trips together See, e g , Fountain Deposition, R p 160 line 3 – p 161 line 14 ("I told him [bank president] that I was going to be running the store ")

The Statement was made only to Pennell The Statement was not made to anyone else and thus, not made to anyone who did not share that common business association with Fountain Consistent with this association, Pennell loyally did not share the information except with Fountain or as directed by Fountain

The Statement was made in good faith and solely for the purpose of communicating the concern with the loan, and was only made to the customer seeking the loan The Statement was not published to persons uninvolved in these endeavors nor was it published in such a way that it was heard by any person other than one who had some type of relationship with Fountain [39]

Under the circumstances, where the Statement was cautiously made in connection with a common business interest, the trial court properly held the Statement was privileged as a matter of law **Appellant's Brief concedes that a qualified privilege existed in this case ("*We are***

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[39] In contrast, the Defendant in Abofreka v Alston Tobacco Co , 288 S C 122, 341 S E 2d 622 (1986), posted an employee memorandum about the Plaintiff in a location visible to third-parties thereby losing the qualified privilege The Defendant in Conwell v Spur Oil of Western South Carolina, 240 S C 170, 125 S E 2d 270, (1962), however, was entitled to a qualified privilege for an erroneous letter about the Plaintiff's debts that was only sent within corporation

not, however, arguing about the privilege's existence") **and implicitly concedes that the necessary shared interests were therefore present** Appellant's Brief at 23 -24 (emphasis added)

C The Record Contains No Facts To Support Abuse Of Privilege

Given that a privilege is not contested in this case, the issue is whether there is any evidence to warrant the possible abuse of privilege being submitted to the jury There is not To allow such submission would be to allow the jury to speculate The trial court correctly refused to allow it

As noted in the Appellant's Brief, pages 22-23, our Supreme Court's fact-specific analysis in Swinton Creek Nursery v Edisto Farm Credit, ACA, 334 S C 469, 514 S E 2d 126 (1999), recognized two means by which a qualified privilege could be abused These include making a statement in good faith that goes beyond the scope of what is reasonable under the duties and interests involved, and making a statement that is in reckless disregard of the purported victim's rights 334 S C at 486-487, 514 S E 2d at 13

In its analysis, the Swinton Creek Court quoted with approval from Woodward v South Carolina Farm Bureau Ins Co , 277 S C 29, 32-33, 282 S E 2d 599, 601 (1981), which provides that – in the absence of controverted facts -- ***"it is for the court to say in a given instance whether or not the privilege has been abused or exceeded."*** In that Woodward gate-keeping role, the trial court here determined that there was no evidence (or controverted facts) to support a finding of abuse and thus no need to have a jury speculate This gate-keeping call was a sound decision and deserving of deference

1 No Evidence of The Statement Exceeding A Reasonable Scope

The Appellant has conceded the existence of shared interests by not challenging the existence of the privilege here Accordingly the question is whether the scope of those shared

interests has been exceeded by the Statement There is no evidence to suggest that the scope of the privilege has been exceeded

The nature of the multiple shared interests in this case is undisputed Both Pennell and Fountain had the same shared interest in the proposed loan for their joint business opportunity in the store First Reliance and Ewart shared an interest with customers in establishing and maintaining positive banking relationships including sound lending relationships [40] Moreover, First Reliance and Pennell also had a shared interest in a pre-existing bank-customer relationship [41] Accordingly, the issue presented in this case is whether, *in the context of these shared interests and relationships*, there any evidence that the Statement was unreasonably made somewhere or to someone outside the scope of these shared relationships There is none

Fountain presented no evidence that Ewart and First Reliance communicated to anyone other than a person with interests aligned with Fountain in this business opportunity This single limited communication was also limited to someone with an interest in a continued banking relationship – not a stranger

Fountain's Brief argues that the outcome here should be the same as in the similar case of Swinton Creek Nursery v Edisto Farm Credit, ACA, 334, S C 469, 514 S E 2d 126 (1999) While Appellant suggests the case is "spot on", Brief at 22, the trial court accurately discussed how the similarities were not the dispositive features of the case Order Denying Reconsideration at 3-4 (R pp 22-23)

Swinton Creek also involved alleged defamation by a lender's explanation accompanying a loan denial – a statement to the borrower (Durwood Collins, Jr) that the Plaintiff-seller

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[40] The Bank's general interest in customer relationships is even noted in the proffered expert's recitation of the Bank board's proactive guidelines to positive customer relationships including good loans Seitz Affidavit, ¶ 6(a) (R pp 243-244)

[41] Pennell Deposition, R p 186 line 20 – p 187 line 10

(Nursery) was in "financial distress" Unlike the case at bar, the Swinton Creek borrower did not have aligned interests the allegedly defamed party (the Nursery) Collins and the Nursery were not joint ventures, confidants, or partners – they were involved in an arms-length transaction, Collins and the Nursery had not jointly pitched a common financing proposal to the bank Here, the Statement was made to a potential borrower represented to the lender as aligned in privity with the proposed manager [42]

While the lender in Swinton Creek testified that he wrote[43] the statement to essentially warn an inexperienced borrower of the enterprise risk, the Court noted that the comment arguably went too far – in that the borrower was not planning to buy the "enterprise" but only some of its assets [44] Moreover, the Court found that this warning could have been provided without referring to the Nursery at all Swinton Creek recognized that the scope of the privilege would encompass an effort to guide the borrower into a successful loan application, but again,

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[42] The Fountain-Pennell relationship was essentially represented to the bank as a pre-existing fiduciary one Fountain Deposition, R p 132 line 14 – p 134 line 7 (" Mr Pennell presented me as a, as a partner, that I was coming in "), p 157 lines 10-24 ("Mr Pennell was still interested about me going in the partnership with him on that store And then he wanted me to, he told me about some of the financial problems that were, they were having And as far as a loan, loan wise, about if I would go to some places with him to see if he could help, help him secure a loan ") Accord Pennell Deposition, R p 175 line 7 – p 176 line 8, p 180 line 7 – p 181 line 23 (describing joint Pennell/Fountain trips to potential lenders First Citizens Bank in Dillon and First Reliance)

[43] Yet another distinction from the case at bar, written defamatory statements, unlike verbal comments, are presumed to be malicious -- shifting the burden to the writer to rebut this presumption Swinton Creek, 334 S C at 485, 514 S E 2d at 134 The oral statement here is not presumed to be malicious and it was Appellant's burden to prove malice in this record The absence of any such proof is discussed more thoroughly in section C(2) below

[44] Thus, implicit in the Supreme Court's opinion is the concept that a plan to purchase the entire enterprise would have expanded the scope of privileged commentary to allow for the discussion of the enterprise's financial condition Here a discussion of store management is reasonable and expected where the loan purpose was to reorganize and allow for continued store operations

the Court suggests that perhaps this could have been done without the "financial duress" comment

Fountain's Brief suggests that Ewart could have likewise warned Pennell of the store loan risk without mentioning Fountain at all [45] Brief at 24 But unlike Swinton Creek where the lender commented directly about the Nursery's "financial duress", Ewart did not say anything directly about Fountain's outstanding judgments, or financial and management failures of the past – things that Fountain claims to have fully predisclosed to Pennell anyway [46] And unlike Swinton Creek, where the limited asset-purchase scope of the loan made the "financial duress" of the seller unnecessary to the loan risk assessment, the management of the store was essential to the risk assessment of the Pennell-Fountain proposal – *even Fountain says so* [47] So even if the Statement implied management concerns with Fountain, those carefully and privately stated concerns would have to be expressed to provide the loan guidance recognized by Swinton Creek as within the privilege

Of course, another distinction is that the "financial duress" condition was disputed and the factual basis for the "financial duress" comment was also disputed in Swinton Creek whereas the factual history of Fountain's business and management failures is not in dispute – it

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[45] Of course, that is exactly how Pennell recounted the Statement Pennell's Deposition, R p 188, Lines 12-19 ("under the present status, First Reliance could not make the loan ")

[46] Fountain Deposition, R p 132 line 14-p 133 line 14 While Fountain asserts that he was damaged by the Statement because Pennell subsequently declared Fountain's store management contract null and void, Pennell contends that the proposed store refinancing and Rawl's buy-out were necessary conditions precedent to the contract's validity Given that Fountain himself claims to have made full disclosure of his credit history and management failings of the past to Pennell, then Ewart's statement allegedly implying the same adverse facts could not be the cause of any damages Of course, this issue was not and need not be reached since the statement was not defamatory and was properly made in a privileged setting

[47] Fountain Deposition, R p 153 lines 11-18

comes from his own testimony Because the Nursery denied sharing "financial duress" information with the lender during a "side bar conversation", the jury could have also found that such information was inappropriately derived and shared from the Nursery's existing banking relationship with the same lender -- the Nursery actually prevailed against the lender in the original trial on its invasion of privacy claim) Id , 334 S C at 476, 514 S E 2d at 129

Here there is no factual controversy here about Fountain's credit rating, his credit history, and his business management experience – all admitted by him in deposition – and noted by the trial court Summary Judgment Order pages 9-10 (R pp 10-11) Furthermore, Fountain admitted the appropriateness of considering such factors in making lending determinations – all while still asserting the bank's limited private comments to his business confidant were "inappropriate "[48] Fountain Deposition, R p 140 lines 16-18 and p 154 lines 13-18 Thus, there are no controverted facts required by Woodward to submit a question of privilege abuse to the jury

While Fountain seeks an activist Court to expose commercial speakers to "exceeding the scope" liability for anything other than a mere "yes" or "no", the trial court wisely recognized that the defamation law of this State *should not* and *does not* so gag necessary business communications As the trial court stated, "The liability urged by [Fountain] would chill legitimate private commercial communications needed in our free market economy " Indeed, strict liability exposure as urged by the Appellant is not consistent with existing context-based jurisprudence and would stifle economic development

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[48] As the Respondents noted in their Response to the Rule 59(e) motion R p 91 note 3, "It was not the bank who drug Fountain into the conversation, however, it was the Pennell-Fountain venture that was represented to the bank as a reasonable lending risk – represented by Fountain himself in his own initial approach to these Defendants " Fountain Deposition, R p 160 line 3 – P 161 line 14 (***"I told him [bank president] that I was going to be running the store "***)

2 No Evidence The Statement Was In Reckless Disregard Of Rights

The "ignored"[49] evidence that Fountain suggests supports the alleged reckless nature of the Statement is not about the Statement at all It is about the loan decision Appellant's Brief, at 24-26 No evidence is offered that suggests actual ill will by Ewart or malice by Ewart So, Fountain seeks to focus on the loan decision As Respondent noted in the trial court, "Fountain wants the Court to transform this defamation case into a banking case " Response to Motion for Reconsideration, (R p 90) Of course, there is no evidence to suggest that this was anything other than a neutral, objective, and sound business decision by Ewart and First Reliance

Fountain suggests that recklessness of the Statement could reasonably be implied by a jury because *perhaps* a more diligent bank review of his management training and experience, or *perhaps* perfect compliance with certain bank policies and regulations would result in a different assessment [50] This speculative approach to looking for recklessness is not even supported by Fountain's own expert That expert's affidavit does *not* say and does not even imply that *but for* Ewart's reckless loan analysis, this risky loan should have been positively considered or made Seitz Affidavit (R pp 242-245)

Of course, there is no evidence that the loan decision was reckless As outlined in the Facts above, Fountain was a proven risky borrower and a management failure His 2010 employment by the small town of Timmonsville adds nothing to the loan analysis made in 2008, moreover, he could point to nothing that objectively improved his store management skills from

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[49] See Appellant's Brief, pp 4-5 and 24-25

[50] Again, Respondent suggests a question of fact is created based upon banking standards – which have nothing to do with defamation law Fountain would have this Court presume that a lender is required to do business with any person and make them sizeable loans While the bank, like anyone, owes a duty not to defame, it owes no duty to lend money to persons in whom it lacks confidence, indeed, Bank officers would breach duties owed to shareholders and regulators to make negligent loans

a few years earlier other than he "had learned from [his] mistakes" The financial net worth of his proposed associate, Mr Pennell, was essentially no more than the amount of financing needed and again, even his expert offered no opinion that this financial backing rendered the loan declination reckless [51] See Seitz Affidavit (R pp 242-245)

[51] Appellant's Brief tries to pit Ewart's judgment in declining the loan against the initial politeness of the Bank President and other officers Obviously this is a false conflict and constitutes no evidence of maliciousness as Appellant seeks to imply

CONCLUSION

The facts are uncontroverted A bank officer simply informed a customer of a concern with a loan proposal With a shared interest in the possibility of such lending, the bank shared this concern in a limited, professional manner with the potential borrower who was represented to be sharing in the Plaintiff's proposed endeavor The loan concern expressed was the true concern This was simply good banking practice

Thus, Appellant's complaint is based upon a the true, private expression to the Appellant's business associate of a bank's concerns with a proposed loan to the Appellant's business venture The Statement did not directly comment upon the Appellant, his character, his history, or his skills There is no clearly visible defamatory meaning included within the Statement that would classify the Statement as "defamatory *per se*" and the Plaintiff has offered no evidence of any malice, either actual or implied

In the case at bar, there is no public statement, there is no targeted victim, there is no direct comment, and there is no character implication The communication here was limited, supported, in good faith, and truthful both on its' face and in its' implications The initial recitation of the Statement occurred in privileged circumstances with no evidence to support any claim to abuse of privilege

The Courts of this state have never been so active so as to expose a legitimate private business conversation to potential liability without these factors The trial court reached the proper conclusion in two well reasoned orders As the Court aptly noted, "not every business

disappointment can be manipulated into some legal theory of recovery" Accordingly, the trial court orders should be affirmed

Florence, South Carolina

December 20, 2011

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FIRST RELIANCE BANK AND
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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D Craig Brown , Circuit Court Judge

Case No 2010-CP-21-131

Mark Fountain, Appellant,

v

First Reliance Bank, Thomas C Ewart and Ernest Pennell, Defendants

Of whom First Reliance Bank and Thomas C Ewart are, Respondents

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief received by the Court on December 23, 2011, complies with Rule 211(b), SCACR

January 10, 2012

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM FLORENCE COUNTY
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Mark Fountain, Appellant,

v

First Reliance Bank, Thomas C Ewart and Ernest Pennell, Defendants

Of whom First Reliance Bank and Thomas C Ewart are, Respondents

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PROOF OF SERVICE

I certify that I have served Respondents' Final Brief by depositing copies of the same in the United States mail, postage prepaid, on December 20th , 2011, to all counsel of record at the following addresses

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