

The State Of South Carolina  
In The Court of Appeals

Appeal from Richland County Court of Common Pleas

RECEIVED

Alison Renee Lee, Circuit Court Judge MAR 14 2016

Civil Action No. 2012 – CP 40 -07540 SC Court of Appeals  
Appellate Case: 2015-000730

TD Bank, NA, successor by Merger  
with Carolina First Bank, Respondent,  
v.

David H. Jacobs, Appellant  
v.

TD Bank, NA, successor by Merger  
with Carolina First Bank, Respondent,  
v.

David H. Jacobs and James McFarland, Defendants,  
Of Whom David H. Jacobs is the Appellant

---

**Appellant David Jacobs' FINAL BRIEF**

---

---

Charles E. Carpenter Jr.  
4825 Portobello Rd.  
Columbia, SC 29206  
803-758-2886  
Charlie@CarpenterAppeals.com

Gerald D. Jowers  
1802 Sumter Street  
Columbia, SC 29201  
803-765-9620  
**Attorneys for Appellant David Jacobs**

The State Of South Carolina  
In The Court of Appeals

Appeal from Richland County Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Civil Action No. 2012 – CP 40 -07540  
Appellate Case: 2015-000730

TD Bank, NA, successor by Merger  
with Carolina First Bank, Respondent,  
v.

David H. Jacobs, Appellant  
v.

TD Bank, NA, successor by Merger  
with Carolina First Bank, Respondent,  
v.

David H. Jacobs and James McFarland, Defendants,  
Of Whom David H. Jacobs is the Appellant

---

**Appellant David Jacobs' FINAL BRIEF**

---

---

Charles E. Carpenter Jr.  
4825 Portobello Rd.  
Columbia, SC 29206  
803-758-2886  
Charlie@CarpenterAppeals.com

Gerald D. Jowers  
1802 Sumter Street  
Columbia, SC 29201  
803-765-9620  
**Attorneys for Appellant David Jacobs**

Table of Contents

Table of Authorities ..... i-ii

Questions Presented ..... 1

**I. In his defense of TD Bank’s action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his evidence about TARP and the government bailout because it is relevant and critical to David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

**II. In his defense of TD Bank’s action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his documentary evidence and witness David Hilburn which would show TD Bank’s more favorable treatment of another guarantor in the Heron Lakes I matter because it is relevant and critical to David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

**III. Judge Joseph Strickland had already heard and accepted the evidence and testimony in his hearing and denial of TD Bank’s Motion for Summary Judgment on the issues of liability of TD Bank for breach of its duties and this should not have been overruled by Judge Manning on a last minute Motion in Limine just before trial. It eliminated from the trial evidence that was relevant and critical to David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

Statement of the Case ..... 2-5

The Defendant McFarland is not Involved in this Appeal ..... 5

Statement of the Facts ..... 5

TD Bank’s Motion in Limine ..... 5-6

David Jacobs’ Proffer ..... 6

Pretrial Evidentiary Rulings by Judge Manning ..... 6

Judge Strickland’s Ruling ..... 6-7

David Jacobs ..... 7

Carolina First Bank ..... 7

The Special Relationship between David Jacobs and Carolina First Bank..... 7-9

Challenges from the Recession, the Affordable Care Act and the Leaving of the Executive Management of Newberry Hospital in the development of the Newberry Medical Office Building ..... 9-10

Carolina First’s Response in Newberry Medical Office Building ..... 10

Middle Sound Project in Wilmington, NC..... 10-11

Carolina First’s Response in Wilmington Project ..... 11-12

TD Bank’s Response ..... 12

Analysis of the Argument..... 13

<b>Context for Evidentiary Questions Presented.....</b>	<b>13-14</b>
<b>The Bank as a Fiduciary under South Carolina Law .....</b>	<b>14-16</b>
<b>The Nature of a Fiduciary Relationship .....</b>	<b>16-17</b>
<b>The Duties of a Fiduciary .....</b>	<b>17-18</b>
<b>TD Bank’s Breach of fiduciary, good faith and fair dealing duties to David Jacobs .....</b>	<b>19</b>
<b>Newberry Medical Office Building and TD Bank’s Breach of Duties .....</b>	<b>19-20</b>
<b>Wilmington North Carolina Project and TD Bank’s Breach of Duties .....</b>	<b>21-22</b>
<b>TD Bank’s wrong interpretation of Good Faith and Fair Dealing .....</b>	<b>22-24</b>
<b>In his defense of TD Bank’s action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his evidence about TARP and the government bailout because it is relevant and critical to David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings .....</b>	<b>24-28</b>
<b>    The Government Bailout, TARP and TD Bank’s     Dominant Position .....</b>	<b>25</b>
<b>    The Troubled Asset Relief Program [“TARP”] and     Congress’s reaction to the Crisis.....</b>	<b>25-28</b>
<b>TD Bank’s Acquisition of Carolina First.....</b>	<b>28</b>

**In his defense of TD Bank’s action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his documentary evidence and witness David Hilburn which would show TD Bank’s more favorable treatment of another guarantor in the Heron Lakes I matter because it is relevant and critical to David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.....28-29**

**Evidence of more favorable treatment in Heron Lake I.....29-30**

**The Nature of TD Bank’s Unequal Treatment of Other Customers and TD Bank’s Policy to Conceal It.....30-33**

**Judge Joseph Strickland had already heard and accepted the evidence and testimony in his hearing and denial of TD Bank’s Motion for Summary Judgment on the issues of liability of TD Bank for breach of its duties and this should not have been overruled by Judge Manning on a last minute Motion in Limine just before trial. It eliminated from the trial evidence that was relevant and critical to David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.....34**

**David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.....34-35**

**Summary of the trial and verdict without the defense evidence.....35-36**

**Conclusion .....36-37**

**Table of Authorities**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Best v. U.S. National Bank of Oregon</i> , 739 P.2d 554 (Or. 1987).....	23
<i>Burwell v. SC National Bank</i> , 288 S.C. 34, 340 S.E.2d 786 (1986).....	15
<i>Ellie v. Miccichi</i> , 358 S.C. 78, 100, 594 S.E.2d 485, 497 (Ct.App. 2004) (quoting <i>Anthony v. Padmar, Inc.</i> , 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct.App. 1995)).....	18
<i>Ellis v. Davidson</i> , 358 S.C 509, 519, 595 S.E.2d 817, 822 (Ct.App. 2004).....	16
<i>Energy Resources Corp., Inc. v. Porter</i> , 14 Mass. App. Ct. at 304 (Brown, J. concurring) .....	18
<i>Few v. Few</i> , 239 S.C. 321, 336, 122 S.E. 2d 829, 836 (1961).....	18
<i>Hendricks v. Clemson Univ.</i> , 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003).....	16
<i>Kiriakides v. Atlas Food Sys. &amp; Servs. Inc.</i> , 338 S.C. 572, 588, 527 S.E.2d 371, 379 (Ct.App. 2000).....	18
<i>Kuzuik v. Bees Ferry Assocs.</i> , 342 S.C. 579, 597, 538 S.E.2d 15, 24 (Ct.App. 2000).....	18
<i>Maccaro v. Andrick Dev. Corp.</i> , 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct.App.1984) (internal citations omitted) .....	24
<i>Market Street Associates L.P. v. Frey</i> , 941 F.2d 588 (7th Cir. 1991).....	23
<i>McCarter v. Willis</i> , 299 S.C. 198, 200, 383 S.E.2d 252, 253 (Ct.App. 1989).....	18
<i>Meinhard v. Salmon</i> , 249 N.Y. 458, 164 N.E. 545 (1928).....	18

O’Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992).....	17
<i>Ramage v. Ramage</i> , 283 S.C. 239, 246, 322 S.E.2d 22, 27 (Ct.App. 1984).....	18
<i>Redwend Ltd. P’ship v. Edwards</i> , 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct.App. 2003).....	16, 18
<i>Regions Bank v. Schmauch</i> , 354 S.C. 648, 670 582 S.E.2d 432, 444 (Ct. App. 2003).....	16
<i>Regions Bank</i> , 354 S.C. at 670, 582 S.E.2d 444 .....	16
<i>SSI Med. Servs., Inc. v. Cox</i> , 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990).....	17
<i>Steele v. Victory Sav. Bank</i> , 295 S.C. 290, 293, 368 S.E.2d 91, 92 Ct.App. 1988) .....	17
<i>Time Warner Cable V. Condo Services Inc</i> , 381 SC 275 , 672 SE2d 816 (Ct App 2009).....	24
<i>White Stone Partners, L.P. v. Piper Jaffray Cos.</i> , 978 F. Supp. 878 (D. Minn. 1997).....	23
<b><u>Statutes</u></b>	
<i>Restatement (Second) of Contracts § 205</i> .....	23
<i>§ Comment d to § 205</i> .....	23
<i>Rule 43 (l) of the SCRCP</i> .....	34
<b><u>Other</u></b>	
<i>“In Crisis, Canadian Banks Survive and Thrive” Forbes Article of December 11, 2008 by Robert Elliot</i> .....	25
<i>Troubled Asset Relief Program Public Law 110-343</i> .....	26, 35
<a href="http://www.tdbank.com/aboutus/company_history.html">www.tdbank.com/aboutus/company_history.html</a> .....	28
<i>Washington Examiner Staff</i> , November 9, 2015 .....	30

## Questions Presented

I. In his defense of TD Bank's action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his evidence about TARP and the government bailout because it is relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.

II. In his defense of TD Bank's action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his documentary evidence and witness David Hilburn which would show TD Bank's more favorable treatment of another guarantor in the Heron Lakes I matter because it is relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.

III. Judge Joseph Strickland had already heard and accepted the evidence and testimony in his hearing and denial of TD Bank's Motion for Summary Judgment on the issues of liability of TD Bank for breach of its duties and this should not have been overruled by Judge Manning on a last minute Motion in Limine just before trial. It eliminated from the trial evidence that was relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.

## **Statement of the Case**

### **The Defendant McFarland is not involved in this appeal.**

September 7, 2012, TD Bank filed Civil Action No. 2012-CP-40-6074 against Defendant David Jacobs to collect on a Guaranty ("Newberry Guaranty") on a note in the amount of \$7,141,000.00 to Newberry Atrium Professional Center, LLC ("Newberry Atrium") secured by a mortgage on commercial real estate owned by Newberry Atrium.

November 21, 2012, Defendant Jacobs filed his answer to the September 7 Complaint admitting signing the guaranty and that the balance due had not been paid. Defendant Jacobs also alleged in his answer that TD Bank breached its duty of good faith and fair dealing. Based on these allegations, Defendant Jacobs sought to void the guaranty. [Answer, R. p. 89; 91].

November 7, 2012, TD Bank filed Civil Action No. 2012-CP-40-7540 against Defendants David Jacobs and James McFarland to collect on Guaranties ("Atrium Guaranties") on a note in the amount of \$3,000,000.00 to Atrium at Middle Sound Land, LLC, secured by a mortgage on commercial real estate owned by Atrium Middle Sound.

April 8, 2013, Defendant Jacobs filed his answer to the November 7 Complaint admitting signing the note on behalf of Atrium at Middle Sound, admitting that the maturity date on the note was April 4, 2012, and admitting that the balance due on the loan had not been paid [Answer, R. p. 93; 96] . Defendant Jacobs also alleged in his answer that TD Bank breached the duty of good faith and fair dealing. [Answer, R. p. 91; 95 ¶ 17; 20]. Based on these allegations, Defendant Jacobs sought to void the guaranty [Answer, R. p. 96 ¶ 24].

As Defenses to Void the Guarantor Obligation Defendant Jacobs also alleged in his answer the actions of TD Bank that breached its duties and led to the failure of the projects and the wrongful calling of the note and suit on the guaranty:

TD Bank breached its fiduciary duties to David Jacobs by failing to provide permanent financing and by suing him solely on the guaranty acquiring the property at drastically below market value and only applying what it paid in the foreclosure sale to the reduction of the balance on the debt. [Answer, R. p. 95-96 ¶ 16, 18, 24-25] (Testimony in proffer to the court outside the presence of the jury).

On July 11, 2014, Defendant Jacobs filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that TD Bank had sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with the officers of TD Bank will be released from liability. [Supp. Answer, R. p. 101 ¶30].

Based on these allegations, Defendant Jacobs sought to void the guaranty [Supp. Answer, R. p. 99; 101 ¶ 19 & 27].

May 24, 2013, TD Bank filed a motion for summary judgment in both cases against David Jacobs seeking summary judgment on the defenses he raised.

August 16, 2013, Defendant Jacobs filed an affidavit in opposition to TD Bank's motions for summary judgment against him in both cases.

March 24, 2014, Judge Strickland denied TD Bank's Motions for Summary Judgment.

April 3, 2014, TD Bank filed a Motion to Reconsider.

April 23, 2014 Judge Strickland denied the bank's Motion to Reconsider.

July 11, 2014, Judge Manning held a status conference and consolidated the cases for trial and allowed David Jacobs to amend his answer in both cases and scheduled the consolidated cases for a date certain trial on August 12, 2014.

August 7, 2014 the Bank filed a Motion in Limine to exclude virtually all of the evidence that had refuted the Bank's earlier Motion for Summary Judgment.

August 12, 2014, Parties appeared before Judge Manning for trial. Prior to the trial, Judge Manning heard arguments on the Motion in Limine. Based on the extent of the evidence the Defendants planned to introduce that the Bank wanted to exclude from the jury, Judge Manning saw that a long proffer was needed. Judge Manning released the jury and held that Defendants would be provided the opportunity to proffer the testimony and evidence challenged by Plaintiff, and the Court would then decide the motion. That decision would determine the admissibility of the evidence being offered by David Jacobs.

October 3, 2014, Judge Manning issued an order granting in part and denying in part Plaintiff's Motion in Limine Judge Manning denied Plaintiff's motion regarding exclusion of Defendant Jacobs' breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses.

Judge Manning ruled that David Jacobs would be allowed to introduce evidence that TD Bank breached its fiduciary duties and duty of good faith and fair dealing but then he granted Plaintiff's motion regarding exclusion of all evidence, testimony, or reference to the Troubled Asset Relief Program ("TARP"), government bailouts, and the "Heron Lakes I note sale," a specific sale of a note at an allegedly discounted price. Judge Manning denied Plaintiff's motion to exclude Defendant Jacobs' appraiser, Tom Wingard, but granted Plaintiff's motion to exclude witnesses John Hilton, Joe Hawk, and Andrew Syrett (who were not proffered), and David Hilburn (who was proffered) to provide testimony on the Heron Lakes I note sale).

October 6 and 7, 2014 Trial was held before Judge Allison Lee of Case numbers 2012-CP-40-06074 and 2012-CP-40-07540 were consolidated and tried.

October 7, 2014 -The jury returned a verdict in favor of the Plaintiff in the amount of \$2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074 and in the amount of \$1,557,363.29 against Defendants Jacobs and McFarland, jointly and severally, in case number 2012-CP-40-07540.

October 17, 2014, Defendant Jacobs filed a Motion for a New Trial on the grounds that Judge Manning's exclusion of evidence related to TARP and government bailouts and evidence related to the Heron Lakes I note sale, including the testimony of David Hilburn, was improper and prejudicial to his ability to establish his defenses.

February 27, 2015 Judge Lee signed an Order denying the Motion for a New Trail. The Order was filed March 2, 2015 and was received by counsel for David Jacobs on March 6, 2015. April 2, 2015 The Notice of Appeal was signed and was filed on April 3, 2015.

## **Statement of Facts**

### **TD Bank's Motion in Limine**

Immediately before the trial was to begin, TD Bank made a Motion in Limine [Motion in Limine, R. p. 299-300 ] to exclude from the trial:

“(1) any reference, evidence, or testimony regarding an alleged breach by TD Bank of the implied duty of good faith and fair dealing because this testimony is irrelevant, would tend to confuse the jury, and is highly and unfairly prejudicial to TD Bank since there can be no breach of the implied duty of good faith and fair dealing for doing what a contract expressly allows;

(2) any reference, evidence, or testimony on the government's bail-out to the banking industry because the testimony is irrelevant, would likely confuse the jury, and would be highly and unfairly prejudicial to TD Bank, especially since TD Bank did not receive a bail-out;

(3) any reference, evidence, or testimony regarding any unrelated note sales by TD Bank, including but not limited to the Heron Lakes I, LLC, note sale to Sea Ducks, LLC, because the testimony is irrelevant, would likely confuse the jury, and is highly and unfairly prejudicial to TD Bank; and

(4) any testimony from any lay or expert witness that has not been properly or timely disclosed.”

### **David Jacob's Proffer**

Before ruling on this Motion in Limine, Judge L. Casey Manning allowed a proffer of the evidence on August 12, 2014. TD Bank presented its witness and David Jacobs offered himself, David Jacobs, Thomas Wingard, a real estate appraiser, and David W. Hilburn, a fact witness. Defendants' Proffer [Transcript of Hearing before Judge Manning, R. p.481; 500-555; 568-600; 601-610]

David Jacobs proffered:

- (1) the testimony of TD Bank witness Roper Jenkins;
- (2) the testimony of Tom Wingard;
- (3) the testimony of Defendant David Jacobs; and
- (4) the testimony of defense witness David Hilburn.

David Jacobs also proffered the following documents:

- (5) Articles of Merger dated September 30, 2010;
- (6) Document entitled "TD Bank Financial Group to Acquire The South Financial Group";
- (7) July 9, 2012 letter from Defendant Jacobs to Roper Jenkins;
- (8) Loan Sale Agreement between TD Bank and Sea Ducks, LLC related to Heron Lakes I;
- (9) Loan Closing Statement related to Heron Lakes I;
- (10) Email from Roper Jenkins indicating payoff balance of the Heron Lakes I loan; and
- (11) Appraisal Report of Thomas Wingard dated April 29, 2013.

### **Pretrial Evidentiary Rulings by Judge Manning**

Judge Manning ruled that David Jacobs could introduce evidence that TD Bank breached its fiduciary duty and duty of good faith and fair dealing. Yet, among other things, Judge Manning ruled that there would be no evidence, testimony, argument about TARP, Government bailouts, or the Heron Lakes I transaction.

### **Judge Strickland's Ruling**

Judge Joseph Strickland had already previously considered this evidence in his hearing and denial of TD Bank's Motion for Summary Judgment on breach of duties by TD Bank.

## **David Jacobs**

David Jacobs is a real estate developer. He puts the land together, puts the design team together, puts the legal team together, Puts the lending source together - putting all the pieces together to work out all the details to build a development. [Proffer R. p. 568]

He works without any professional staff and only has a woman that helps with the records and bookkeeping. He has thirty years of experience and has learned to build a team of professionals that can work together to undertake a project. These can include banking, a construction company, an architectural team, subcontractors of many types and other professionals. [Proffer, R. p. 569]

## **Carolina First Bank**

Approximately 15 years ago David Jacobs was recruited by and got involved with Carolina First Bank. This relationship was initiated by the Carolina First executive team including President Mack Whittle, Justin Strickland, Larry Scotts and others. They solicited David Jacob's business. [Proffer, R. p.569]

They assured David Jacobs that they wanted to be part of his team. They liked the conservative approach he took with pre-leasing and design. They liked the team he put together and wanted to be part of it. [Proffer, R. p. 570]

## **The Special Relationship between David Jacobs and Carolina First**

David Jacobs was pleased to find that Carolina First did what they said they would do. [Proffer, R. p. 570]

From 2002 until Carolina First was acquired by TD Bank, the Bank advised and guided him through his projects. [Proffer, R. p. 570-571]. The Bank would look at everything that was going on in the project. The bank would become involved from the initial concept, go with him to look at the site and discuss the site with him. The bank would be involved in looking at the tenant or sponsor, the bank would ask him questions. [Proffer, R. p. 571]

The Bank would ask him different ways he could structure a loan and suggest different ways. [Proffer, R. p. 571]. The Bank officers were hands on and guided him through all aspects of developing a project. [Proffer, R. p. 571]

The bank added value to him and he came to rely on their advice, guidance and comments to help keep him in a good conservative direction and to improve the quality of his projects. [Proffer R. p. 571]

The relationship David Jacobs had with Carolina First was significantly different from his previous relationships with other banks. [Proffer R. p. 572] In the past, other banks would basically say here is the money, tell us what you are going to do. [Proffer R. p. 572].

Carolina First helped make the projects better all the way around for everyone. They helped make the projects more viable. They worked on six different projects with Jacobs. These included the Child Development Center at the University of South Carolina. [Proffer, R. p. 573] Carolina First also helped him with not only financing but guidance and advice on two child development centers in Charlotte. [Proffer, R. p. 573]

David Jacobs had confidence in how he and the Bank worked together. [Proffer, R. p. 574] This continued into the Newberry medical office building project. [Proffer, R. p. 574]. The Carolina First executive team and physicians from Newberry would come down to Newberry to look. The Bank officers understood the different structures that they were able to offer the

hospital and physicians and were helpful in strategizing the medical office building type of structure. [Proffer, R. p. 574].

All of the projects that Carolina First joined in were successful as long as the Bank officers from Carolina First were part of David Jacob's development team. [Proffer, R. p. 574].

### **Challenges from the Recession, the Affordable Care Act and the Leaving of the Executive Management of Newberry Hospital in the development of the Newberry Medical Office Building**

While the Newberry medical office building project was underway, the "Great Recession" and the Affordable Care Act put a lot of healthcare projects on hold. [Proffer, R. p. 574]. In the latter part of 2008 the capital environment froze up. [Proffer, R. p. 574]. When these problems came about the Newberry medical office building was already 60 % pre-leased but, at that time, doctors did not understand how, or even if, they were going to be reimbursed under the yet to be implemented Affordable Care Act. [Proffer, R. p. 575]. For that reason they were hesitant to make additional commitment until the effect of the Act on reimbursements became known.

It was a difficult time for everyone including David Jacobs. Carolina First continued with the hands-on approach of the team and was very informed and aware of the issues the team faced. [Proffer, R. p. 575]. On top of these widespread difficulties, within less than a year of completing the medical office building, the Newberry Hospital CEO and full management team left. [Proffer, R. p. 575].

There was an ownership feature that the Newberry medical office building shared with David Jacob's already successful Irmo Medical Center. The overall plan was for the hospital to buy the building. It would have the right of first refusal. This was attractive to the investor or

sponsor physicians because they owned 48 % of the building and David Jacobs owned 52 % of the building. [Proffer, R. p. 576].

The Newberry hospital sought out and actually recruited David Jacobs to replicate what he had done in the Irmo Medical Center. [Proffer, R. p. 577].

### **Carolina First's Response in Newberry Medical Office Building**

Carolina First understood this environment and also knew that in a multi-year project like this, there are changes that develop in the time lines, the environment and everything. [Proffer, R. p. 577]. Carolina First was very accommodating to those changes and granted many of David Jacob's requests to deal with them. [Proffer, R. p. 577]. For example, after the building was completed, the hospital wanted to have an MRI. [Proffer, R. p. 577]. In order to get financing for the MRI, the hospital needed to own the facility and not just be a tenant. [Proffer, R. p. 577]. Carolina First stepped up and guided David Jacobs through a process of restructuring the ownership to allow the hospital to own and occupy the MRI suite. [Proffer, R. p. 578].

Carolina First extended the loan terms many times to protect the property and allow David Jacobs to add more tenants and stabilize the property. [Proffer, R. p. 579]. Payments were being made on the loan until it was called by TD Bank officers. [Proffer, R. p. 579].

Carolina First merged with TD Bank and things changed. Everybody at Carolina First that had been working with David Jacobs and guiding him through the various changes that had been taking place were gone. [Proffer, R. p. 579]. His regular ongoing meetings with guidance from the First Carolina team stopped. [Proffer, R. p. 579].

### **Middle Sound project in Wilmington, NC.**

This was a nine acre tract of land that was to be developed into multiple tracts and sold. [Proffer, R. p. 580]. Carolina First looked at the project and approved it as acceptable for the loan. The developers would have the ability to pre-sell and so they acquired the property with a Carolina First loan. [Proffer, R. p. 581]. Then a major unanticipated and unavoidable problem arose as an obstacle to completing the infrastructure and consummating sales. The town of Wilmington had contaminated water which meant a problem in getting water to the property. [Proffer, R. p. 581].

### **Carolina First's Response in Wilmington Project**

Carolina First understood that they could not sell the property until they had uncontaminated water, and continued to work through the problems with David Jacobs and he continued developing the property. He brought sewer to the property and put in infrastructure but sales continued to be delayed because there was not yet any water hookup. [Proffer, R. p 581].

The loan from Carolina First started out as a construction loan but Carolina First through Larry Scotts, Mike Phillips and others worked through the problem and came up with a solution. [Proffer, R. p. 582].

Then TD Bank took over. While the former Carolina First officers were still on board, TD Bank extended the obligation once for a short time and when TD Bank's replacement officers came in, they sued him on the guaranty. All of the people at First Carolina who had been part of the team on the project were gone. David Jacobs tried to reach out and the local loan officer said they couldn't help. He would need to assign him to a workout officer, and, even that took about a year for any contact. [Proffer, R. p. 583]. It was months before he had a first conversation with a workout officer. After not hearing again for another six or seven months, David called him because the loans were coming due and they needed a workout solution.

[Proffer R. p 583]. That officer told David that he had been reassigned to another department but would get somebody in the workout department to contact him. [Proffer, R. p.583]. It was another six or seven months before he heard from that person. [Proffer, R. p. 583].

Just as with the medical office building loan in Newberry, David Jacobs continued to make payments until TD Bank called the loan. The payments on the Newberry loan came from the cash flow of the property. On the Middle Sound loan, David put in over a million dollars during the recession and the water availability to try to save it. [Proffer, R. p. 583].

### **TD Bank's Response**

TD Bank called the loans and sued him directly on the guaranties. There was no contact from a workout officer, there was no discussion about collateral or anything else. [Proffer, R. p. 584].

In order to try to protect the property, and receiving none of the cooperation and assistance he had been promised and had relied in the past from Carolina First, David Jacobs tried to do a Chapter 11 bankruptcy to reorganize and get some attention toward solving the problem rather than fighting. TD Bank opposed everything that was proposed, would not withdraw the suit on the guaranty and essentially blocked him from doing anything to raise or borrow money. [Proffer, R. p. 585].

TD Bank just ignored the fifteen year relationship of being on the development team and abused the relationship the bank had originated and honored for fifteen years of successful problem solving and successful development. [Proffer, R. p. 586].

The bank behavior switched from being solution oriented to threat oriented. [Proffer, R. p.580].

## **Analysis and Argument**

These are two consolidated cases about guaranties David Jacobs gave to Carolina First which merged with TD Bank. The trial court ruled that David Jacobs could introduce evidence that TD Bank breached its duty of good faith and fair dealing and breach of fiduciary duty but then made it difficult by preventing important proof about how the Bank treated others and what TARP reveals about TD Bank's good faith and fair dealings.

## **Context for the Evidentiary Questions Presented**

All of the Defendant's proffered but excluded evidence was to prove that TD Bank breached its duty of good faith and fair dealing and its fiduciary duty in its collection on the guaranties. It is important to an understanding of what constitutes TD Bank's fiduciary duty, good faith and fair dealing to see each proffer of evidence in the overall context of the actions of TD Bank.

TD Bank engaged in an abuse of power in the bank's relationship established with David Jacobs and abandoned the team effort with him that had been successful in helping him overcome whatever obstacles came up in his development projects. [Proffer, R. p. 586].

During this same time of the recession, David Jacobs had some other real estate investments with some other banks that were just transactional and with whom he had no long term relationship. He was able to work out solutions for every one of those loans and over the next two and a half years or so, he resolved all of the problems, the banks were paid back the loans, and the value of the assets were saved. [Proffer, R. p. 586].

Yet the one bank with which he had established a long term relationship as a result of the bank itself persuading him to bring them in as a member of his development team, not only failed to honor its fiduciary duty but worse, it betrayed him. [Proffer, R. p. 586-587].

TD Bank breached its duty of good faith and fair dealings as well, which in this case is essentially the same. TD Bank called the loan, which elevates the already above market rate by an additional 3% [Default rate in note]. It also added late penalties. Finally, it imposed the costs of attorney's fees on David Jacobs that resulted from TD Banks's own wrongful acts.

Later this oppressive and opportunistic trend would continue when TD Bank first went after David Jacobs on the guaranty and then followed with a delayed foreclosure from which TD Bank acquired the Newberry medical office building at a depressed foreclosure price.

After TD Bank refused to help David Jacobs, it abandoned him and then to its own advantage and Jacobs disadvantage it ratcheted up the interest rate, imposed penalties and costs, got ownership of the medical office building, and gained a money judgment from David Jacobs for the manipulated deficiency.

That is not what a fiduciary does.

That is not good faith.

That is not fair dealing.

## **The Bank as Fiduciary under South Carolina Law**

Carolina First's competitive advantage was precisely to be more than a lender to David Jacobs and to be a member of his team, work together to make projects successful, provide advice, and help prevent problems from arising and help solve any problems that did arise. First Carolina successfully recruited the business of David Jacobs by assurances of being more than

just a lender bank but being a business supporter and advisor and undertaking Jacobs' developments through the combined efforts of Jacobs and the people of First Carolina.

That mutual relationship happened. David Jacobs and First Carolina began doing business together in a mutually supportive joint relationship in which David Jacobs helped First Carolina to recruit bank business and First Carolina helped David Jacobs plan and execute his developments.

Major problems arose that nobody anticipated which made the transactions challenging but which were being jointly worked on by Carolina First and David Jacobs. The larger of the two projects was the medical office building which was constructed on the campus of the Newberry Hospital. Carolina First and David Jacobs worked hard together and modified the construction loan terms many times to enable the Newberry Atrium to increase its leasing from the initial 60% to a level that would support long term financing or fulfill the Newberry Hospitals option to purchase the building.

The most common relationship between a lender and a borrower is the one found in *Burwell v. SC National Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986) where it is only a creditor-debtor relationship rather than a fiduciary one.

However the *Burwell* Court noted that a fiduciary relationship can be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers. There just were no such facts in *Burwell*.

In contrast, in this case there are abundant facts that show a fiduciary relationship. The very marketing plan of Carolina First was based on establishing close relationships that competitor banks did not provide.

Bank officers were going to the site. Bank officers met with the hospital administration, Bank officers talked with the doctors. Bank officers worked out the special arrangement that allowed some tenant ownership and ultimately hospital ownership of the building that was on the hospital campus. These are all actions of trust and assistance that is beyond a simple debtor – creditor relationship. This is side by side participation in management of the development projects.

There are many acts by the Bank of this nature but a good example is what happened when the hospital and doctors wanted to put an MRI in the medical office building but there was a requirement for separate ownership of the space that would house the MRI equipment. The Bank helped design the strategy that would accomplish this need. [Jacob’s proffer testimony, R. p. 577-578]

Fiduciary duties derive from fiduciary relationships. There is no exclusive list of relationships that the law includes as fiduciary. Many are definitely included but all are possibilities because the relationship does not depend on some label.

## **The Nature of a Fiduciary Relationship**

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Ellis v. Davidson*, 358 S.C 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004); *Regions Bank v. Schmauch*, 354 S.C. 648, 670 582 S.E.2d 432, 444 (Ct. App. 2003); *Redwend Ltd. P’ship v. Edwards*, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct. App. 2003). A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458,

578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); *Regions Bank*, 354 S.C. at 670, 582 S.E.2d 444; *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 92 Ct. App. 1988).

South Carolina is a state where relationships are important and it is no accident that a bank out of Greenville, SC bearing the name Carolina First would come to Columbia and seek to establish special business relationships with potential clients, one of whom was David Jacobs.

Even Mac Whittle, the President of Carolina First, came and met with David Jacobs. David Jacobs already had a bank and was operating as a developer. Why should he switch to Carolina First? Because the officers of Carolina First assured him that they would not just make loans but they would be part of his team in creating and carrying out his development projects. David would also help Carolina First find and acquire other business through his contacts.

Carolina First honored the trust and confidence which they induced David Jacobs to place in it. David Jacobs certainly had no reason to expect Carolina First to become oppressive in dealing with him on his projects. David Jacobs certainly had no reason to expect Carolina First to disfavor him and favor other bank clients to his disadvantage.

When TD Bank merged with Carolina First, TD Bank acquired the benefits of this fiduciary relationship between the bank and David Jacobs. TD Bank also took on the responsibilities that fiduciary relationship required. The bank doesn't get to create such a relationship and then just keep the advantages but side step the responsibilities.

## **The Duties of a Fiduciary**

“Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.” *Ellie v. Miccichi*, 358 S.C. 78, 100, 594 S.E.2d 485, 497 (Ct. App. 2004) (quoting *Anthony v. Padmar, Inc.*, 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct. App. 1995)). Their relationship is one of mutual trust and confidence, imposing upon them requirements of loyalty, good faith and fair dealing. *Few v. Few*, 239 S.C. 321, 336, 122 S.E. 2d 829, 836 (1961).

In a famous and often quoted description, Justice Cardozo said in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) fiduciaries owe to one another “the duty of the finest loyalty. ... Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior... the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd.

*Meinhard* has been cited explicitly five times by our state's Court of Appeals and innumerable times by other courts. See *McCarter v. Willis*, 299 S.C. 198, 200, 383 S.E.2d 252, 253 (Ct.App. 1989); *Kuzuik v. Bees Ferry Assocs.*, 342 S.C. 579, 597, 538 S.E.2d 15, 24 (Ct.App. 2000); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 478, 581 S.E.2d 496, 506 (Ct.App. 2003); *Ramage v. Ramage*, 283 S.C. 239, 246, 322 S.E.2d 22, 27 (Ct.App. 1984); and *Kiriakides v. Atlas Food Sys. & Servs. Inc.*, 338 S.C. 572, 588, 527 S.E.2d 371, 379 (Ct.App. 2000).

A party who owes a fiduciary duty to another may breach that duty by what is not said as well as by what is said. A particularly concise expression of this universal rule is “[A] fiduciary’s silence is equivalent to a stranger’s lie.” *Energy Resources Corp., Inc. v. Porter*, 14 Mass. App. Ct. at 304 (Brown, J. concurring).

In this case we aren't talking about somebody's naïve expectation of what another party will do. Carolina First acted as a fiduciary in its dealings with David Jacobs. The normal contractual conduct of good faith and fair dealing in this relationship was the same as what takes place in a fiduciary relationship.

## **TD Bank's Breach of fiduciary, good faith and fair dealing duties to David Jacobs**

From the original establishment of the relationship that the bank itself sought to establish until the point in time when TD Bank abandoned its responsibilities and started treating David Jacobs as a stranger, the bank had negotiated extensions and modifications to fit the needs of the David Jacobs projects of which the bank was a team member.

Yes the technical language of the documents allowed the bank to call for immediate payment in full by the guarantor, but that had never been the understanding or the behavior of the bank until TD Bank saw a distinct predatory advantage in playing hardball which had never been done or anticipated.

## **Newberry Medical Office Building and TD Bank's Breach of Duties**

Here is how the Newberry Medical Office Building project stood when TD Bank destroyed it in violation of the duties of the relationships between the parties. The Medical Office Building was already 60% leased. It is on the campus of the Newberry Hospital who asked David Jacobs to structure the project so the hospital could buy it at a later time. The Hospital isn't going anywhere. The impact of the Affordable Care Act on doctor tenants will become known. While the executive leadership just left, there will be new executive leadership to act for

the Hospital. While there is a recession, the United States Government is pumping billions of dollars into banks and other institutions to stabilize the economy and the financial markets. The asset is a building that isn't going anywhere. While the guarantor has a temporary liquidity problem, the guarantor has a net worth that has never gone below \$20 million.

What is the big risk?

A bank like Carolina First, in the particular relationship it had with David Jacobs, would and should extend the terms of the financing, allow time in which to get additional tenants to stabilize the building loan and comply with its duties. This would leave the bank with its lending profits, it would allow David Jacobs to survive, it would be consistent with the very purpose of Congress's enactment of TARP, and it would serve the hospital's needs. It would save the value of the asset

Carolina First's duties would have been met and the project would have been successful and nobody would be destroyed.

TD Bank knew that David Jacobs had plenty of assets. In fact he had a higher net worth than any of the banks other clients. TD Bank also knew that as a developer, it was the nature of David Jacob's business to leverage his assets and that he did not have a high enough cash flow in the face of the recession to simply write a check for the entire balance.

If a developer can do that, the developer wouldn't need the loan in the first place.

TD Bank knew that the U.S. Congress had enacted extraordinary measures under TARP to encourage banks to extend credit as it was doing before the banking crisis.

TD Bank also well knew that if it demanded full payment and David Jacobs was not in a sufficiently liquid cash situation to pay the full amount of the loan on short notice that the

interest the loan carried would jump up from its already above market 5.5% to 8.5%; more than double the market rate. . [Plaintiff's Exhibit Notes, R. p. 1038; 1074; 1086].

The loan began at the marker rate of Libor plus 1.9%. [Feb. 20. 2007] which meant 3.34%. When the note was initially extended Jacobs agreed to increase the rate to 5.5%. TD Bank could force it up to 8.5%

TD Bank also knew that it could go first after David Jacobs on the guaranty for payment, then bring about a fire sale price foreclosure sale that would manipulate the deficiency to a big number, get that deficiency from David Jacobs, and own the medical office building on the hospital campus.

It doesn't sound much like good faith and fair dealings or fiduciary behavior.

## **Wilmington North Carolina Project and TD Bank's Breach of Duties**

The position of the bank is essentially the same as with the Newberry Medical Office Building. The bank had already thoroughly reviewed the project as appropriate for a project. The City of Wilmington will have to provide uncontaminated water at some point.

While there is a recession, the United States Government is pumping billions of dollars into banks and other institutions to stabilize the economy and the financial markets. The asset isn't going anywhere.

While the guarantor has a temporary liquidity problem, the guarantor has a net worth that has never gone below \$20 million. There is even a second guarantor in place.

What is the big risk?

The bank's duties would have been met and the project would have been successful and nobody would be destroyed. The bank would gain its lending profits. The City of Wilmington would have increased its tax base.

TD Bank knew the U.S. Congress had enacted extraordinary measures under TARP to encourage banks to extend credit as it was doing before the banking crisis.

TD Bank knew that David Jacobs had plenty of assets. In fact he had a higher net worth than any of the banks other clients.

TD Bank also knew that as a developer, it was the nature of David Jacob's business to leverage his assets and that he did not have a high enough cash flow in the face of the recession to simply write a check for the entire balance.

TD Bank also well knew that if it demanded full payment and David Jacobs was not in a sufficiently liquid cash situation to pay the full amount of the loan on short notice that the interest the loan carried would go on steroids.

TD Bank also knew that it could go first after David Jacobs on the guaranty for payment, then bring about a fire sale price foreclosure sale that would manipulate the deficiency to a big number, get that deficiency from David Jacobs, and own asset. It doesn't sound much like good faith and fair dealings or fiduciary behavior.

## **TD Bank's wrong interpretation of Good Faith and Fair Dealing**

TD Bank has said the duty of good faith and fair dealing is only a gap filler and that as long as a party is doing something the contract allows, there can be no breach of a duty of good faith or fair dealing. Setting aside for a moment the fact that there is far more to these

transactions in this relationship than the language of the guaranty, TD Bank is outside South Carolina's interpretation of good faith and fair dealing.

If TD Bank's interpretation of the case law and statutory law were correct there would be no need for the law to impose a duty of good faith and fair dealing.

It has to mean something more than the specific words of a contract or it means nothing and it adds nothing. It is precisely because some exercise their rights under a contract in bad faith and without good will that the doctrine emerged.

*The Restatement (Second) of Contracts § 205* provides:

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

*Comment d to § 205* states:

Good faith performance. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

In examining whether there has been fair dealings and good faith one factor is the relative bargaining power and sophistication of the parties. *Market Street Associates L.P. v. Frey*, 941 F.2d 588 (7th Cir. 1991). Another factor is the behavior of the party in whom discretion is vested. *Best v. U.S. National Bank of Oregon*, 739 P.2d 554 (Or. 1987).

Another factor is whether discretion or some right was exercised in a way that violated the conditions of good faith and unfair dealings. In *White Stone Partners, L.P. v. Piper Jaffray Cos.*, 978 F. Supp. 878 (D. Minn. 1997) a commitment letter allowed the lenders to terminate a

financing agreement if they found the environmental survey unacceptable. The lender was aware the property was less than a mile away from a landfill, and that an environmental assessment had not identified any problems. Three days before the closing, one of the defendants terminated the commitment letter, stating “it was not satisfied with the findings of the environmental survey.” The court reviewed case law from Minnesota and other federal courts and determined that “sole discretion” provisions can be limited by the duty of good faith and fair dealing. The plaintiff alleged sufficient facts that would support an inference of bad faith if proven. The court denied the motion to dismiss.

The court can infer missing terms and can go outside the contract to do it. The South Carolina Court of Appeals has dealt at some length with the application of the duty of good faith and fair dealing in *Time Warner Cable V. Condo Services Inc*, 381 SC 275 , 672 SE2d 816 (Ct App 2009). There the Court of Appeals explained:

[N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts. *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct.App.1984) (internal citations omitted).

**I. In his defense of TD Bank’s action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his evidence about TARP and the government bailout because it is relevant and critical to David Jacob’s efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

## **The Government Bailout, TARP and TD Bank's Dominant Position**

TD Bank was particularly well positioned to take advantage of the Banking crisis because it can acquire but is protected under Canadian law from being acquired. This was well described at the time by the Canadian banking attorney Robert Elliott in his Forbes Article of December 11, 2008 entitled **"In Crisis, Canadian Banks Survive and Thrive."**

Under Canadian law the Canadian banks have a safe haven and are protected from being acquired by foreign banks. However, Canadian banks are free to expand into other countries and so they can be a foreign acquiring bank in the United States.

Elliott goes on to explain that "While national politics limit mergers domestically, Canadian banks have a freer hand to invest outside the country." He notes that Toronto-Dominion Bank has been a major U.S. acquirer.

The economic disaster brought about by the Great Recession created opportunities for a Canadian Bank to acquire large holdings in U.S. Banks at uniquely attractive prices. TD Bank aggressively took advantage of this opportunity and it did so at a time when Carolina First, having become the largest bank of its kind in the state, was uniquely vulnerable. TD Bank was shielded from takeovers by Canadian law but free to spring on U.S. Banks when the time was attractive. And it did.

## **The Troubled Asset Relief Program ["TARP"] and Congress's reaction to the Crisis**

There is little wonder that TD Bank does not want to talk about the Troubled Asset Relief Program. The Newberry Medical Office Building and the Wilmington Project were troubled assets. Congress passed this law in the same time frame of when these assets became troubled. Congress'

purpose was to stabilize the financial markets and to encourage banks to lend money as they had done before the crisis. TD Bank did exactly the opposite of what the Troubled Asset Relief Program was designed to do.

“TARP” is a synonym for **Troubled Asset Relief Program** *Public Law 110-343*.

The Troubled Asset Relief Program (TARP) was signed on October 3, 2008) as a program of the U.S. Treasury to purchase assets from banks to strengthen the financial sector. TARP was part of the government's effort to address the financial crisis.

TARP allowed the Treasury to purchase up to \$700 billion of troubled assets, defined as "(A) residential or commercial mortgages ...and (B) any other financial instrument that the Treasury determines necessary to promote financial market stability.

**TARP had two overriding goals:**

- 1. Promote financial market stability, and**
- 2. Encourage banks to resume lending at levels seen before the crisis, both to each other and to consumers and businesses.**

Carolina First sought and accepted TARP funds. Carolina First acted consistent with what Congressional goals sought. It continued to deal with David Jacobs as it did before the crisis. In Item 2 of the Motion in Limine, TD Bank sought to bar any reference, evidence or testimony about the US government's bailout of the banking industry. The proffered testimony and evidence revealed that the United States Treasury waived over \$200,000.00 in debt owed by Carolina First Bank which was part of the inducement to entice TD Bank to complete this merger. The testimony further indicated that shareholders of Carolina First Bank lost a considerable sum of money in the merger and that TD Bank paid the shareholders of Carolina First only \$.28 per share.

This evidence about TARP, the government bailout, and the terms of the merger of Carolina First and TD Bank is not prejudicial. It is fact.

It is common knowledge that Banks were assisted by the federal government in the recent economic recession and bank crisis. This testimony was a necessary element to show the environment in which TD Bank was acting in order to support David Jacob's cause of action of bad faith and unfair dealing by TD Bank.

Carolina First was then acquired by TD Bank. In addition to a 15 year fiduciary special relationship, even this TARP funding and the national policy behind it by the U.S. Congress did not persuade TD Bank to extend loan terms to David Jacobs at levels seen before the crisis. David Jacobs was entitled to show and the jury was entitled to know these facts.

Of course TD Bank doesn't want the jury to know that it is treating is this guarantor in exactly the opposite manner that people's U.S. tax dollars tried to encourage.

TD Bank acquired a bank that was acting consistently as Congress encouraged which was also how it should act under its fiduciary and implied contractual duties. By law, and by its merger agreement and by the testimony of its officers, TD Bank not only acquired the assets but also became responsible for the liabilities of Carolina First.

Judge Manning denied TD Bank's motion to exclude evidence of TD Bank's breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses. However, he made it virtually impossible for David Jacobs to prove the breaches of good faith and fair dealing and breach of fiduciary duty when he excluded all evidence, testimony, or reference to the Troubled Asset Relief Program ("TARP"), and government bailouts. When David Jacobs is trying to prove that the actions of First Carolina were based on fiduciary duties and when that is not typical bank behavior it is relevant to show that this behavior is encouraged by the TARP

program. It keeps the behavior from appearing unlikely to the jury. It shows it is behavior Congress intended to encourage. It shows what banks operating in good faith should do.

### **TD Bank's acquisition of Carolina First**

TD Bank took its share of U.S. bank acquisitions and mergers including Carolina First. According to TD Bank's website, what is now TD Bank is the result of mergers and acquisitions that became Banknorth which TD Bank acquired in 2004; other mergers and acquisitions that became Commerce Bank which TD Bank acquired in March 31, 2008; and on September 30, 2010 TD Bank also acquired the South Financial Group, Inc. and its subsidiary Carolina First Bank.

At precisely the time the Recession and the banking crisis hit the United States in 2008, TD Bank sought to expand and acquired Commerce Bank in 2008, and rebranded as TD Bank, America's Most Convenient Bank. This was followed in 2010 when TD Bank acquired The South Financial Group, Inc. and its subsidiary **Carolina First Bank**.

[www.tdbank.com/aboutus/company\\_history.html](http://www.tdbank.com/aboutus/company_history.html).

The demise of Carolina First and the protected US expansion opportunity for Toronto Dominion Bank set the stage for a violation of the fiduciary relationship that TD Bank assumed in its acquisition and merger of Carolina First.

It shows that TD Bank was more hardnosed than Congress's intention and it underscores the absence of good faith and fair dealing in its actions toward David Jacobs.

**II. In his defense of TD Bank's action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude**

**his documentary evidence and witness David Hilburn which would show TD Bank's more favorable treatment of another guarantor in the Heron Lakes I matter because it is relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

### **Evidence of more favorable treatment in Heron Lake I**

David Jacobs sought to prove through documents from the transaction and testimony of David Hilburn that TD Bank gave more favorable treatment to another guarantor in the Heron Lake I situation. Judge Manning excluded this as not relevant but it is relevant and critical to show the unfair and bad faith nature of TD Bank's treatment of David Jacobs.

Breach of a fiduciary duty and breach of a duty of good faith and fair dealing are not things a party will admit. Witnesses don't admit they intent for betray a trust or they intend to unfairly discriminate or that they were not in good faith in their actions. They deny any wrongful intent. So a party has to resort not to words but to actions to show what is really going on. It takes circumstantial evidence to prove the effect and consequences of a person's actions.

It involves patterns of behavior that establish a special or fiduciary relationship.

It involves baseline patterns of behavior that constitute good faith and fair dealings with the party, and, baseline patterns of behavior in similar dealings with others so that the context can help show what is fair and done in good faith.

It involves evidence of the motives and opportunities that underlie the wrongful behavior.

This was well explained by a former Solicitor Trey Gowdy from South Carolina when questioning United States Attorney General Loretta Lynch about the Department of Justice's investigation into Lois Lerner's Internal Revenue Service targeting of applications for tax exempt status of conservative organizations compared to treatment of other applications from other organizations. It is virtually impossible to show the unfair treatment of one group unless you are allowed to compare it to the treatment of a different group. In some areas of the law this kind of comparison is not just relevant, it can establish a prima facie case.

Attorney General Loretta Lynch and the Justice Department found "no evidence of any intent to discriminate." House Member Trey Gowdy said, "Never do you have direct evidence of intent." *Washington Examiner Staff*, November 9, 2015.

The same evidentiary need is present in trying to prove that TD Bank had a fiduciary relationship, that it breached its duties in the relationship and that it breached its duty of good faith and fair dealing in its actions to David Jacobs.

However, the Trial Court excluded all the evidence and testimony about Lake Heron I which would prove that TD Bank treated David Jacobs far worse than other clients.

### **The Nature of TD Bank's Unequal Treatment of Other Customers and TD Bank's Policy to Conceal It**

During the discovery phase David Jacobs learned facts that caused him to file a Supplemental Answer in which he alleged an additional defense that TD Bank did not sue on the guaranty but instead sold other notes and mortgages at discounted prices to third parties, did not foreclose, did not gain penalty interest and attorney's fees and did so with full knowledge that the guarantors would be released from liability.

David Jacobs named David Hilburn as an additional witness to testify about the purchase by Cypress Cove Properties, LLC from TD Bank of a note and mortgage and other loan documents called the Heron Lakes I transaction.

TD Bank had taken the deposition of Mr. Hilburn. David Jacobs proffered the testimony of Mr. Hilburn. Mr. Hilburn testified that he represented a company that bought the Heron Lakes I note from TD Bank. The Bank was represented by Roper Jenkins, one of its Vice-Presidents, in that transaction. Mr. Hilburn testified that he valued the asset at more than twice the amount the bank was selling it for and that a precondition of the sale was that the guarantors of the loan would not be sued. Mr. Hilburn testified that this was an unusual stipulation. He said he learned from Roper Jenkins that Jenkins was a friend of the guarantor.

The testimony of Mr. Hilburn contradicts the testimony of TD Bank's only witness, Roper Jenkins. Hilburn's testimony supports the defense of David Jacobs in his Supplemental Answer and concerns matters involving an officer of TD Bank and its principal witness.

If there was a personal relationship between the bank officer and the favored client, it would add strong icing on the cake of different and unfair treatment. It would have helped David Jacobs case immensely to show it.

But that is not the only significance of the Heron Lake I evidence. The demonstration of unfair and disparate treatment of David Jacobs does not depend on that. The proof of unfair and different treatment is in revealing the facts of the Heron Lakes I transactions which stand in stark, very stark, contrast to the David Jacobs facts.

David Jacobs had the highest net worth of any guarantor of any outstanding loan at the time TD Bank demanded that he pay in full, yet TD Bank gave more lenient terms and more lenient litigation tactics to other smaller net worth guarantors.

This testimony was essential to prove that TD Bank was not treating David Jacobs in the same favorable way as other borrowers in violation of the covenant of good faith and fair dealing. The testimony was an integral part of David Jacobs' defense. He was entitled to bring it before the jury.

The existing obligations which TD Bank acquired, but did not honor, included the fiduciary relationship and duties owed by Carolina First to David Jacobs which had been the very basis for recruiting David Jacobs into such a working relationship with the Bank. The existing obligations to David Jacobs of good faith and fair dealings also which the law of South Carolina imposes into the contracts was transferred to TD Bank when it acquired Carolina First.

TD Bank did not honor these obligations.

TD Bank began to put in different employees and to transform a business relationship of cooperative and mutual success into a fear based strict creditor/debtor relationship in the middle of the harshest recession of the century.

Not every bank operates the way Carolina First did (and not every bank in the state grew like Carolina First). But it is the bank TD wanted and got. Carolina First sold David Jacobs on that kind of fiduciary relationship and Carolina First delivered its fiduciary duties to David Jacobs. When TD Bank steps into those shoes it is legally responsible to pay attention to its obligations and fulfill them. It is not enough to just count the money the bank gets, it must perform its reciprocal duties it owes in consideration for the money.

Being a fiduciary is not unfamiliar to banks. Banks always enter into fiduciary relationships in their trust departments, their deposit relationships and some of other discretionary management functions. It is true that many banks do not enter into fiduciary relationships in their lending operations but there is no reason why they cannot. David Jacobs

testified it was a new and welcome experience for him to have a bank as a member of his development team and have their expertise and experience as a valuable part of his success in his developments. It is the reason Carolina First was so successful in gaining market share.

But there it is, in the track record and history of the loan behavior, the site visits, the advice, the coordination, and all of the other things Carolina First did in its relationship with David Jacobs.

Evidence about the actions of TD Bank in the "Heron Lakes I note sale," is important to show a breach of a fiduciary relationship and fair dealings when other customers got more favorable treatment. David Hilburn was excluded and he was proffered to provide testimony on the Heron Lakes I note sale.

In the argument to exclude evidence of disparate treatment with other customers TD Bank pointed out that David Jacobs was just lucky to even know he was treated less favorably because these favored deals have confidentiality provisions that keep them hidden and it was only a coincidence that Jacob's attorney happened to be involved in the Heron Lakes matter.

TD Bank should be more embarrassed than proud of how it secrets its methods with some customers from the eyes of other customers. If there is to be good faith, if there is to be fair dealings, if there is to be a fiduciary relationship, TD Bank should not treat David Jacobs with less favor than other TD Bank customers.

This discriminatory behavior may be widespread but because TD Bank makes customers agree to confidentially if the bank gives them a break, David Jacobs was only able to obtain evidence of the Heron Lakes matter and support it with testimony from John Hilton.

It was reversible error to exclude David Hilburn's testimony and the documentary evidence about the Heron Lake deal.

**III. Judge Joseph Strickland had already heard and accepted the evidence and testimony in his hearing and denial of TD Bank's Motion for Summary Judgment on the issues of liability of TD Bank for breach of its duties and this should not have been overruled by Judge Manning on a last minute Motion in Limine just before trial. It eliminated from the trial evidence that was relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

Each of these evidentiary rulings constituted reversible error because all of this evidence was already accepted by Judge Joseph Strickland in the Circuit Court in denying the Motion for Summary Judgment of TD Bank, NA successor by Merger with Carolina Bank. Plaintiff's Motion in Limine was based on the same arguments that it made in the Motion for Summary Judgment and Motion to Reconsider, Alter or Amend. The same cases are cited in the Motion in Limine as in the two other motions made by Plaintiff.

**Rule 43 (l) of the SCRCR provides:**

“If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.”

Judge Strickland ruled adversely to the Plaintiff Bank twice on the same set of facts and law as the Bank presented in its Motion in Limine. The Motion in Limine bars all the important testimony about the only defenses raised by the Borrower, David Jacobs. The Bank sought the same evidentiary result in its Motion in Limine before Judge Manning as it sought in its Motion

for Summary Judgment before Judge Strickland. The Bank's evidentiary position was denied when the Motion for Summary Judgment was denied and Rule 43(l) bars the Motion in Limine before Judge Manning because the issue has already been heard by Judge Strickland.

Even if Judge Manning and Judge Lee are not prohibited from excluding the evidence the decision of Judge Strickland to review this evidence was the correct decision.

The Order excluding any reference to the bank bailouts, TARP, or to the favorable treatment of one client and unfavorable treatment of David Jacobs unfairly tied the hands of David Jacobs in proving the breach by fiduciary relationship and covenant of good faith and fair dealing.

### **Summary of the trial and verdict without the defense evidence.**

To prove a breach of the fiduciary duty, David Jacobs had to prove the nature of the relationship established between the Bank and himself. To prove what would constitute good faith and fair dealings he had to prove how he had been treated in the past, how he was treated when sued, and how other Bank customers were treated under the same or similar circumstances. In order to prove a breach of the duty of good faith and fair dealings he had to prove the impact of the recession and the actions of First Carolina in seeking and receiving TARP Funds. TARP Funds were not just money for any purpose. One of its primary purposes established by Congress was to "2. Encourage banks to resume lending at levels seen before the crisis, both to each other and to consumers and businesses." David Jacobs needed to prove how the Bank was lending before the crisis and how it was lending after the crisis.

This evidence of getting the benefit of TARP Funds through the merger and then defying the purpose of Congress' enactment of the *Troubled Asset Relief Program Public Law 110-343*

was key in showing TD Bank's bad faith and unfair dealings. The Bank called in the note payment without an extension of time and terms. This by itself was a complete departure from the relationship and course of dealings that had long transpired between the Bank and David Jacobs. But that is not all.

There is an additional predatory element to the Bank's reversal in its dealings with David Jacobs. The act of not extending the terms had the additional adverse effect of multiplying the applicable interest rate under the note. This unfair and unprecedented squeeze play forced David Jacobs into an impossible position. The Bank knew he had more than ample resources and net worth to keep the loan secure but he did not have the liquidity to instantly pay the note in cash.

The Bank well knew this. In fact, it is the very nature of the relationship and transactions between a Bank and a Developer borrower. A developer does not borrow and a Bank does not lend cash so the Developer can sit on the cash and be liquid enough to pay the Bank. The Developer borrows and the Bank lends so that the Developer can use the cash to convert and leverage it into a productive investment which in turn benefits both the Bank and the Developer.

David Jacobs had the strongest financial statement of any Bank customer in the Midlands.

These items of evidence would have simultaneously established that TD Bank breached its fiduciary duty which arose out of the special relationship between the parties as well as its duty of good faith and fair dealings which arose by operation of the law of contracts.

## **Conclusion**

A fiduciary duty, good faith, and fair dealing would be treatment equal to other good customers, restraint from taking advantage of uncontrollable circumstances, behavior consistent

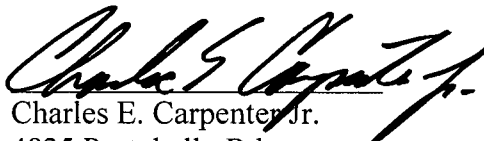
with assurances made, behavior consistent with established previous behavior, compliance with the purposes of specific remedial federal legislation that impacts behavior, behavior that does not betray established patterns of dealing, restraint from punitive behavior, not taking advantage of a parties temporary lack of resources to benefit oneself at the expense of the one to whom you owe performance of your duties.

The exclusion of important evidence to prove TD Bank's violation of its duties was error which prevented David Jacobs from proving his defenses.

This Court should reverse the Order and Judgment of the trial court and grant a new trial in which this evidence is admissible.

This the 8 of March, 2016.

Respectfully Submitted,



Charles E. Carpenter Jr.  
4825 Portobello Rd.  
Columbia, SC 29206  
803-758-2886  
Charlie@CarpenterAppeals.com

Gerald D. Jowers  
1802 Sumter Street  
Columbia, SC 29201  
803-765-9620

**Attorneys for Appellant David  
Jacobs**

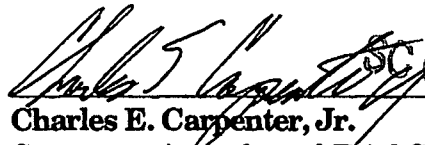
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Appellants' Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

**RECEIVED**

MAR 14 2016

 SC Court of Appeals

Charles E. Carpenter, Jr.  
Carpenter Appeals and Trial Support, LLC  
4825 Portobello Road  
Columbia, SC 2926  
(803) 758-2886

**CERTIFICATE OF SERVICE**

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Appellant, David H. Jacobs, do hereby certify that I have this date served the foregoing Appellant Jacobs' Final Brief, dated March 8, 2015, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, and hand delivery addressed to the parties indicated below:

Leonard R. Jordan, Jr., Esquire  
Jordan Law Firm  
4500 Fort Jackson Boulevard  
Columbia, South Carolina 29209  
**Attorney for James A. McFarland**

Jody A. Bedenbaugh, Esquire  
Paul T. Collins, Esquire  
John T. Moore, Esquire  
Allen Mattison Bogan, Esquire  
Nelson, Mullins Riley & Scarborough LLP  
1320 Main Street 17<sup>th</sup> Floor  
Columbia, SC 29201  
**Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank**

**RECEIVED**  
MAR 14 2016  
SC Court of Appeals

B. Allison Estrada  
B. Allison Estrada  
Paralegal to Charles E. Carpenter, Jr.

Dated: March 14, 2015.

# Carpenter Appeals & Trial Support, LLC

An AV Appellate Practice Law Firm

Charles E. Carpenter, Jr.  
Attorney at Law  
[charlie@carpenterappeals.com](mailto:charlie@carpenterappeals.com)



4825 Portobello Road  
Columbia, SC 29206  
Tel 1-803-758-2886

[www.carpenterappeals.com](http://www.carpenterappeals.com)

March 14, 2016

**RECEIVED**  
MAR 14 2016  
SC Court of Appeals

**Via Hand Delivery**

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

**Re: TD Bank, NA, successor by merger with Carolina First Bank vs. David H. Jacobs  
Appellate Case No. 2015-000730**

Dear Ms. Kitchings:

Enclosed for filing are fifteen bound copies and one unbound copy of Appellant Jacobs' FINAL Brief and fifteen bound copies and one unbound copy of Appellant Jacobs' FINAL REPLY brief in the above referenced matter, along with our original Certificate of Service and Certificate of Compliance for each which are included with the unbound sets.

Please file stamp two of the bound copies (one of each brief) and return to me at the time of filing.

By copy of this letter, we are this day serving a copy of Appellant Jacobs' FINAL Brief and FINAL REPLY Brief on all counsel of record.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

Allison Estrada  
Paralegal for Charles E. Carpenter, Jr.

Enclosures

cc: Leonard R. Jordan, Esquire (w/enc.)  
Jody A. Bedenbaugh, Esquire (w/enc.)  
Paul T. Collins, Esquire (w/enc.)  
John T. Moore, Esquire (w/enc.)  
Allen Mattison Bogan, Esquire (w/enc.)  
Gerald Jowers, Esquire (w/enc.)