

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

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SC Court of Appeals

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## FINAL Reply Brief of Appellant David Jacobs

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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**

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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**

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**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.**

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## **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.

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## **Argument in Reply**

The majority of TD Bank's Brief repeats facts that have not been in dispute since David Jacobs submitted his Answer to the Complaint. He signed the guaranties and the notes became due. That is not an issue.

What is in issue is whether TD Bank honored the duties of good faith and fair dealings and of a fiduciary under the contract and modifications entered into between Carolina First Bank and David Jacobs.

To answer the issues that are in dispute it is essential for a fact finder to know: How was the contract entered into?; How did the parties perform under the contract?; What were the circumstances and context in which the parties performed their obligations?

The Circuit Court, on multiple occasions held that David Jacobs had the right to allege that TD Bank breached its duties of good faith and fair dealings and fiduciary duty. When tested on Summary Judgment, Directed Verdict, and Judgment Not Withstanding the Verdict, the Court upheld the allegations that TD Bank breached its duties under the contract.

Unfortunately for David Jacobs, the Trial Court did not allow him to put in the evidence that would prove it.

### **The Contract, Carolina First, and the TD Bank acquisition.**

When TD Bank took over First Carolina it took the contracts that existed. TD Bank acquired the contracts that First Carolina promised to perform and to use good faith and fair dealings in doing so. The only way to determine what constitutes good faith and fair dealings is to look at the facts of a given case.

Carolina First came to David Jacobs, he did not go to Carolina First. In attracting David Jacobs, Carolina First proposed a relationship far more intimate than just lender and borrower. The principle officers of Carolina First personally came down to Columbia from Greenville to solicit David Jacob's banking business. [Proffer, R. p. 569] They wanted to be part of his team. [Proffer, R. p. 570]

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

Carolina First did what they said it would do. [Proffer, R. p. 570] They became involved, not just when making a loan, but from the initial concept of a project and continuing to guide him through his projects after a loan was made. [Proffer, R. p. 570-571].

## **Carolina First's Actions in Times of Trouble**

TARP is not the only symptom of a recession but it is one of the most clear and succinct evidence that extraordinary economic circumstances existed that were not unique to David Jacobs. There were, however, other obstacles that Carolina First also worked through that were specific to David Jacobs. In the instance of the Newberry Medical Office Building, there was temporary uncertainty in the medical world of the unknown impact of the Affordable Care Act. [Proffer, R. p. 574].

TARP is one of Congress' acknowledgement of the Great Recession and the pressures it brought on individuals, businesses and lenders. TARP and the programs the Treasury Department created under the authority of TARP are clear and easy to understand evidence of these economic pressures.

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]. The Newberry Medical Office Building was 60% preleased, the hospital had just lost its executive staff but would be replacing them, the medical office building was on the campus of the hospital, and the hospital was going to purchase the medical office building. Carolina First knew there was no reason to panic or run away.

Carolina First did not destroy the project and hurt David Jacobs, the doctors who owned 48% of the building [Proffer, R. p. 576], the hospital that wanted to keep it going, and the bank itself in maintaining a well-earned relationship with its strong and productive client. Carolina First did as it had always done with David Jacobs. Carolina First was on the same team and wanted to preserve the asset, the client, and its own future business.

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

Carolina First understood this environment and also knew that in a multi-year project obstacles will appear and changes will need to be made. [Proffer, R. p. 577]. Carolina First accommodated those changes and kept the project viable. Even the ownership was changed to allow the hospital to get an MRI. Carolina First guided David Jacobs through restructuring the ownership. [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. 576]. Payments were being made on the loan until it was called by TD Bank officers. [Proffer, R. p. 576].

### **Carolina First's Response in Middle Sound Project in Wilmington, NC.**

This tract was to be developed into multiple tracts and sold. [Proffer, R. p. 580]. The developers acquired the property with a Carolina First loan. [Proffer, R. p. 581]. Up came a problem of Wilmington's water being contaminated and this delayed the ability of the developers to sell parcels of the tract. Carolina First understood and continued to work through the problems and David Jacobs did likewise and brought sewer to the property and put in infrastructure.

[Proffer, R. p. 581]

## **TD Bank's Betrayal of Good Faith, Fair Dealings and Fiduciary**

### **Obligations**

Then TD Bank took over. Everybody who had been guiding David Jacobs was gone. [Proffer, R. p. 579]. His meetings with the bank stopped. [Proffer, R. p. 579]. Even contacting the bank was virtually impossible. There was no help in dealing with the Recession.

In addition, it later came to David Jacobs that TD Bank had given much more favorable treatment to a much less deserving customer. TD Bank always covered up its disparate treatment with confidentiality agreements from the favored ones so there would be no transparency.

### **TD Bank's Unjustified Negative Disparate Treatment of David Jacobs**

It was only by serendipity that counsel for David Jacobs happened to have another client in which this conduct was revealed. David Jacobs had the highest net worth of any of the bank's customers, yet he got less favorable treatment from his special relationship. This is the evidence that David Jacobs sought to introduce.

The jury was not allowed access to:

(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;

The jury had no choice.

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.

## **I. Evidence about TARP and the Government Efforts to Revitalize the Bank Credit Market**

**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.**

TD Bank tacitly acknowledges that evidence about TARP is relevant. Of course it is relevant because it tends to prove the economic and banking conditions in which Carolina First acted in good faith and dealt fairly, in sharp contrast to the unreasonable and predatory actions of TD Bank. The Bank says several times that even if the evidence is relevant that there is some compelling danger of prejudice which should outweigh its admissibility. That prejudice is alleged on page 14 of the Banks Brief to be an attempt to use "the public's perceived bias against

a “taxpayer bailout”. “ The Bank maintains this relevant evidence should be excluded by Rule 403,SCRE.

The Bank offered no evidence of a public bias against a taxpayer bailout. Many people were saved by these actions. This isn’t some stigmatized party, this is the United States trying to stabilize the economy and get bank lending restored.

Also, the jury is not the public and the judge is not a political commentator. The Court could easily deal with this imagined prejudice with appropriate jury instructions. Courts do it all the time.

The Bank says David Jacobs has shown no cases in which TARP has been admitted between a lender and a borrower. That is no surprise and it is misleading. TARP was only in existence for a short time. The two cases in which the Bank says TARP was not admitted are totally different from this case.

We aren’t offering evidence of TARP to assert that the Bank should use TARP money to give us a loan. That was the assertion in the divided opinion of the Montana Supreme Court which held that the trial court should have applied the law of Michigan and the same in the trial court opinion for N.D. Ct. of Ga. in *Wachovia vs. Lone Pine*.

We are not claiming any bank had to lend us money originating from TARP funds. We are using TARP to show the magnitude of the economic situation of David Jacobs and the public policy of Congress to revive pre-crisis lending, and the manner in which Carolina First treated David Jacobs when the Recession hit. Then we try to compare Carolina Firsts acts of good faith and fair dealing in this context with the acts of bad faith and unfair dealing of TD Bank.

## **II. Evidence about Unfair discriminatory Treatment by TD Bank**

**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. This evidence is critical to show the unfair and bad faith nature of TD Bank's treatment of David Jacobs.

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. This was the only example that TD Bank had not successfully hidden and it is the only disparate treatment example David Jacobs sought to us. It is not repetitive. It is not prejudicial. It shows negative comparative treatment of David Jacobs as a client. It is relevant evidence of unfair treatment and bad faith.

The proffered testimony of David Hilburn about the purchase by Cypress Cove Properties, LLC from TD Bank the loan documents called the Heron Lakes I transaction was essential to prove that TD Bank was not treating David Jacobs in the same favorable way as other borrowers.

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

### **III. The effect of Judge Strickland's using the evidence**

**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.**

These evidentiary rulings constituted reversible error because this evidence was accepted by Judge Joseph Strickland without objection in denying the Motion for Summary Judgment of TD Bank. The next encounter between the evidence and the Court was also in a Motion. This time it was a Motion in Limine. David Jacobs believes that Rule 43 prevents Judge Manning from refusing to consider what Judge Strickland considered.

The Bank correctly argues that an order denying summary judgment does not give rise to law of the case or have any preclusive effect. However, the Bank conveniently ignores the fact that a Motion in Limine is also only creates a preliminary tentative Motion and Ruling. Yet the Bank wants Judge Manning's Order in Limine to have a preclusive effect on Judge Lee.

Regardless of the authority of succeeding judges under this unusual procedure adopted by Judge Manning, Judge Strickland was correct to consider the evidence and Judge Manning was in error.

## Conclusion

If the evidence proffered by David Jacobs is examined it should be overwhelmingly clear that there was a contract in which good faith and fair dealings were huge and which had been performed by both Jacobs and Carolina First.

However, we are not asking the Court to agree that TD Bank breached its duties. We are only asking to be allowed to admit that evidence in a new trial so a jury can decide if TD Bank breached its duties.

This the   jth   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 Appellant Jacob's Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted

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**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 Reply Brief of Appellant David Jacobs, dated March 8, 2016, 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  
Berry, Quackenbush & Stuart, P.A.  
1122 Lady Street  
Columbia, South Carolina 29201  
**Attorney for James A. McFarland**

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**SC Court of Appeals**

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**

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

Dated: March 14, 2016.

# 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

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**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.)