THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr, Circuit Court Judge

Case No. 2009-CP-10-2433

Floyd E. Jernigan ..... Respondent,

v.

Suzanne Boone Katz and Bank of America, N.A. ..... Defendants,

Of Whom Suzanne Boone Katz is ..... Respondent,

And Bank of America, N.A. is ..... Appellant.

INITIAL BRIEF OF APPELLANT

Bryson M. Geer
Merritt G. Abney
NELSON MULLINS RILEY & SCARBOROUGH, LLP
151 Meeting Street/6th Floor
Charleston, SC 29401
(843) 853-5200

Attorneys for Appellant, Bank of America, N.A.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

I. THE JOINT ACCOUNT & JERNIGAN'S REMOVAL 4

II. THE DISPUTED PAYMENTS 5

III. HOW THE DISPUTED PAYMENTS OCCURRED 7

IV. LAW ENFORCEMENT INVESTIGATION & JERNIGAN'S ARREST 9

V. THE CHARGE AGAINST JERNIGAN DISMISSED & EXPUNGED 12

ARGUMENT 15

I. JERNIGAN'S NEGLIGENCE CLAIM WAS SUBSUMED BY HIS CLAIMS FOR DEFAMATION AND MALICIOUS PROSECUTION 15

II. KATZ FAILED TO STATE A CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL HARM OR PRESENT EVIDENCE SUFFICIENT TO SUPPORT IT. 23

III. KATZ DID NOT ASSERT A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS OR PRESENT EVIDENCE SUFFICIENT TO SUPPORT IT. 31

A. Katz Did Not Pursue a Claim For Intentional Infliction of Emotional Distress. 31

B. The Evidence Was Insufficient to Support a Claim for Intentional Infliction of Emotional Distress. 32

1. No Evidence of Intentional or Outrageous Conduct 32

2. No Evidence of Severe Emotional Distress 35

IV. KATZ FAILED TO PRESENT ANY EVIDENCE THAT THE BANK PROXIMATELY CAUSED HER ALLEGED INJURIES. 36

A. Causation in Fact 37

B. Legal Causation 40

V. THE BANK OWED NO TORT DUTIES OF CARE TO KATZ AND JERNIGAN. 40

VI. THE DAMAGE AWARDS WERE EXCESSIVE AND UNSUPPORTED BY THE EVIDENCE. 43

CONCLUSION 44

TABLE OF AUTHORITIES

Page

Cases

Abadian v. Lee,
117 F.Supp.2d 481 (D. Md. 2000) 17

AJG Holdings LLC v. Dunn,
392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011) 35, 36

Aller v. Law Office of Schriefer,
140 P.3d 23 (Colo. App. 2005) 36

Alonso v. McAllister Towing of Charleston, Inc.,
595 F. Supp. 2d 645 (D.S.C. 2009) 28

Anderson v. Stanco Sports Library, Inc.,
542 F.2d 638 (4th Cir. 1976) 20

Bell v. Bank of Abbeville,
208 S.C. 490, 38 S.E.2d 641 (1946) 21

Bell v. Dixie Furniture Co., Inc.,
285 S.C. 263, 329 S.E.2d 431 (1985) 33

Boone v. Sunbelt Newspapers, Inc.,
347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001) 20

Boykin Anchor Co., Inc. v. AT & T Corp.,
825 F.Supp.2d 706 (E.D.N.C. 2011) 17

Burwell v. South Carolina Nat'l Bank,
288 S.C. 34, 340 S.E.2d 786 (1986) 41

Bushardt v. United Investment Co.,
121 S.C. 324, 113 S.E. 637 (1922) 15, 43

Caddell v. Gates,
284 S.C. 481, 327 S.E.2d 351 (Ct. App. 1984) 26, 40

Chazen v. Centennial Bank,
61 Cal. App. 4th 532 (Cal. App. 1998) 41

Citizens & S. Nat'l Bank of South Carolina v. Lanford,
313 S.C. 540, 443 S.E.2d 549 (1994) 41

Constant v. Spartanburg Steel Prods., Inc.,
316 S.C. 86, 447 S.E.2d 194 (1994) 21

Corder v. Champion Rd. Mach. Int'l Co.,
283 S.C. 520, 324 S.E.2d 79 (1984) 34

Crocker v. Crocker,
281 S.C. 154, 314 S.E.2d 343 (Ct. App. 1984) 31

Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.,
395 S.C. 40, 717 S.E.2d 589 (2011) 44

Crowell v. Herring,
301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990) 20

Deel v. Home Depot USA, Inc.,
2010 U.S. Dist. LEXIS 53131 (D.S.C. 2010),
adopted by 2010 U.S. Dist. LEXIS 53127 (D.S.C. 2010),
affm'd by 399 Fed. Appx. 786 (2010) 28

Doe v. Batson,
345 S.C. 316, 548 S.E.2d 854 (2001) 40

Doe v. Greenville County School Dist.,
375 S.C. 63, 651 S.E.2d 305 (S.C. 2007) 28, 37

Doe v. Howe,
367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) 28, 29, 36

Doe v. Howe, III,
2007 WL 7306130 (Ct. Com. Pl. 2007) 29

Doe v. North Greenville Hosp.,
318 S.C. 459, 458 S.E.2d 439 (Ct. App. 1995) 28, 29

Dominick v. Index Journal Co.,
99-CP-24-370, 2001 WL 1763977 (S.C. Com. Pl. 2001) 16

Dooley v. Richland Mem. Hosp.,
283 S.C. 372, 322 S.E.2d 669 (1984) 26

Erickson v. Jones Street Publishers, LLC,
2002 WL 34129778 (S.C. Com. Pl. 2002) 16, 19

Erickson v. Jones Street Publishers, LLC,
368 S.C. 444, 629 S.E.2d 653 (2006) 15, 16, 17, 18, 19, 43

Felton v. Schaeffer,
229 Cal. App.3d 229 (Cal. App. 1991) 17

Folkens v. Hunt,
290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986) 34

Ford v. Hutson,
276 S.C. 157, 276 S.E.2d 776 S.C. (1981) 25, 26, 29, 33, 35

Fountain v. First Reliance Bank,
398 S.C. 434, 730 S.E.2d 305 (2012) 21

Foxfire Village, Inc. v. Black & Veatch, Inc.,
304 S.C. 366, 404 S.E.2d 912 (Ct. App. 1991) 41, 42

Glass v. Glass,
276 S.C. 625, 281 S.E.2d 221 (1981) 31

Hansson v. Scalise Builders of South Carolina,
374 S.C. 352, 650 S.E.2d 68 (2007) 25, 32, 35, 36

Hudson v. Zenith Engraving Co., Inc.,
273 S.C. 766, 259 S.E.2d 812 (1979) 24

Kinard v. Augusta Sash & Door Co.,
286 S.C. 579, 336 S.E.2d 465 (1985) 23, 27, 29

Lema v. Bank of America, N.A.,
375 Md. 625, 826 A.2d 504 (Md. 2003) 41

Lipman v. Atlantic Coast Line Rail Co.,
108 S.C. 151, 93 S.E. 714 (1917) 33

Mayhill Homes Corp. v. Family Fed. Sav. And Loan Assn.,
284 S.C. 60, 324 S.E.2d 340 (Ct. App. 1984) 31

McCaskey v. Shaw,
295 S.C. 372, 368 S.E.2d 672 (Ct. App. 1988) 27

McSwain v. Shei,
304 S.C. 25, 402 S.E.2d 890 (1991) 33

Mellen v. Lane,
377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008) 37

Michel v. Michel,
289 S.C. 187, 345 S.E.2d 730 (Ct. App. 1986) 31

Mitchell, Jr. v. Fortis Ins. Co.,
385 S.C. 570, 686 S.E.2d 176 (2009) 44

O'Brien v. Alexander,
898 F. Supp. 162 (S.D.N.Y. 1995) 17

Padgett v. Colonial Wholesale Distrib. Co.,
232 S.C. 593, 103 S.E.2d 265 (1958) 26

Parrish v. Allison,
376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) 20

Ravan v. Greenville County,
315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) 41

Regions Bank v. Schmauch,
354 S.C. 648, 670 S.E.2d 432 (Ct. App. 2003) 41

Rhodes v. Sec. Fin. Corp. of Landrum,
268 S.C. 300, 233 S.E.2d 105 (1977) 24, 25

Ross v. Gallant,
551 P.2d 79 (Ariz. App. 1976) 17

Rutland v. S.C. Dept. of Transp.,
390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010) 26

Sabb v. S.C. State Univ.,
350 S.C. 416, 402 S.E.2d 231 (2002) 33

Save Charleston Found. v. Murray,
286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985) 34

Shipman v. Glenn,
314 S.C. 327, 443 S.E.2d 921 (Ct. App. 1994) 34

Simmons v. Tuomey Reg. Med. Ctr.,
341 S.C. 32, 533 S.E.2d 312 (2000) 41

South Carolina Ports Auth. v. Booz-Allen & Hamilton, Inc.,
289 S.C. 373, 346 S.E.2d 324 (1986) 41

Stewart v. State Farm Mut. Auto. Ins. Co.,
341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000) 28

Stone v. Bethea,
251 S.C. 157, 161 S.E.2d 171 (1968) 40

Stoutt v. Banco Popular de Puerto Rico,
320 F.3d 26 (1st Cir. 2003) 20

Talbert v. United States,
932 F.2d 1064 (4th Cir. 1991) 17

Van Leer v. Deutsche Bank Sec., Inc.,
2012 U.S. App. LEXIS 9091 (4th Cir. 2012) 42

Wachovia Bank Nat. Ass'n v. Beane,
397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012) 30

Whitten v. American Mut. Liab. Ins.Co.,
468 F. Supp. 470 (D.S.C. 1977) 23

Wilcox v. Richmond & D.R. Co.,
52 F. 264 (4th Cir. 1892) 24

Wright v. Sparrow,
298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989) 34

Statutes

31 U.S.C. § 5318(g)(3)(A) 20

Rules

S.C. Rule of Civil Procedure 52(b) 3

S.C. Rule of Civil Procedure 59(e) 3

Other Authorities

F. Patrick Hubbard & Robert L. Felix,
The South Carolina Law of Torts § 2A (4th ed. 2011) 24

Restatement (Second) of Torts § 46 (1965) 25

STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court err in awarding damages to Jernigan under a negligence theory, where the negligence claim was subsumed by his claims for defamation and malicious prosecution, which the trial court dismissed for lack of evidence?

2. Did the circuit court err in holding Katz could recover against the Bank for negligent infliction of emotional harm in the absence of physical or pecuniary harm, where she failed to state a claim for negligent infliction of emotional distress or present evidence sufficient to support such a claim under South Carolina law?

3. Did the circuit court err in holding, *sua sponte*, in an order denying the Bank's post-trial motions that Katz could also recover for "outrage" or intentional infliction of emotional distress, where Katz did not plead or otherwise pursue such a claim prior to, during or even after trial?

4. Did the circuit court err in holding, *sua sponte*, that Katz could recover for "outrage" or intentional infliction of emotional distress, where Katz presented no evidence of intentional and outrageous conduct by the Bank or "severe" emotional distress?

5. Did the circuit court err in finding for Katz, where she presented no evidence that the Bank proximately caused her alleged injuries and failed to establish by expert testimony that her alleged emotional distress manifested in objectively verifiable physical symptoms?

6. Did the circuit err in holding that the Bank owed duties of care in tort to Jernigan and Katz, where the Bank's relationship with them was merely contractual and it owed no independent duties of care?

7. Did the circuit court err in awarding excessive damages to Katz and Jernigan, where the amounts of the awards were unsupported by any evidence?

STATEMENT OF THE CASE

This case arises from five online bill payments totaling approximately $1,100 made by Plaintiff/Respondent Floyd Jernigan ("Jernigan") in January 2007, from a deposit account owned by Defendant/Respondent Suzanne Boone Katz ("Katz" and, jointly with Jernigan, "Respondents") and maintained with Defendant/Appellant Bank of America, N.A. (the "Bank"). Until 2004, Katz and Jernigan were married and owned the account jointly. In connection with their divorce, in 2004, they jointly requested that Katz be made sole owner of the account. When Jernigan subsequently made online payments from the account without Katz's authorization, she reported him to law enforcement and, eventually, he was arrested and charged with a crime. The charge was subsequently dismissed.

Jernigan filed this lawsuit on April 17, 2009, asserting claims in connection with the above against Katz and the Bank[1] for negligence, slander and malicious prosecution and additional claims against Katz only for false arrest and imprisonment and intentional infliction of emotional distress. (Compl.). Jernigan alleged that he did not intend to make online payments from Katz's account and that the payments resulted from Bank error and occurred without his knowledge. (Compl. ¶ 9). He further alleged that Katz maliciously sought to have him arrested and that the Bank failed to acknowledge its error. (Compl. ¶¶ 17, 25).

On June 8, 2009, Katz asserted counterclaims against Jernigan for conversion, invasion of privacy and breach of contract, and cross-claims against the Bank for negligence and breach of contract. (Katz Ans./Cr.Cl/Ctr.Cl.). Katz claimed that Jernigan

[1] A consent order was entered on September 20, 2010, substituting the Bank of America, N.A. in place of Bank of America Corporation as the proper party defendant.

intentionally accessed her account online without her authorization and converted her funds for his own use. (Ans./Ctr.Cl/Cr.Cl ¶¶ 42, 46-47). She also asserted that the Bank breached contractual duties and duties of care to her in failing to prevent him from accessing her account. (Ans./Ctr.Cl/Cr.Cl ¶¶ 51-56). Jernigan and Katz settled their claims against each other prior to trial, leaving only their respective claims against the Bank. (Tr. I 4:1-5:25).

A bench trial commenced on September 13, 2011. The Bank moved pursuant to SCRCP 52(b) for a non-suit and judgment as a matter of law as to all claims at the close of Respondents' case and at the close of its own case. (Tr. II 138:9-161:23; 269:14-273:7). The court granted the Bank's motion in part and entered judgment for the Bank on Jernigan's claims for defamation and malicious prosecution, but denied the motion as to Jernigan's claim for negligence. (Tr. II 138:9-154:1). The court also denied the Bank's motion as to Katz's claims for breach of contract and negligence but ultimately required her to elect a remedy, and Katz elected to recover under a negligence theory. (Tr. II 154:3-161:23).

Following trial, on December 12, 2011, the court entered separate orders awarding $100,000 in actual damages to Katz on her negligence claim and $85,000 in actual damages to Jernigan on his negligence claim. (Katz Order 12/12/11); (Jernigan Order 12/12/11). The trial court denied Respondents' requests for punitive damages against the Bank. (Tr. II 279:8-20; 280:18-20). The Bank filed a motion pursuant to SCRCP 52(b) and 59(e) to alter or amend the trial orders, which the trial court denied. (Katz Order 3/22/12); (Jernigan Order 3/22/12). In denying the Bank's post-trial motion, the trial court, *sua sponte*, ruled that in the event Katz should not have been allowed to

recover under a negligence theory, the judgment should stand because the Bank's conduct toward her amounted to "outrage" and breach of fiduciary duty, despite the fact that Katz did not plead either theory, move to amend her pleadings to assert them, or even reference them before or during trial. (*Compare* Ans./Ctr.Cl/Cr.Cl. *with* Katz Order 3/22/12, pp. 4-5, 7). The Bank timely served its notice of appeal on April 3, 2012. (Not. App.).

STATEMENT OF THE FACTS

I. THE JOINT ACCOUNT & JERNIGAN'S REMOVAL

Prior to 2004, Jernigan and Katz were married and jointly owned a deposit account maintained with the Bank ending in account number 8854 (the "8854 Account"). They separated in 2003 and divorced in April 2005. (Tr. I 112:15-113:11). In connection with the divorce, they sought to sever joint ownership of the 8854 Account and make Katz the sole owner. (Tr. I 89:5-23). To that end, on January 5, 2004, Jernigan executed and submitted a Customer Removal Authorization Agreement (the "Removal Agreement"), which authorized and directed the Bank to remove him as an owner of the 8854 Account. (Tr. I 43:22-44:2; 89:5-23); (Pl's. Ex. 1). At or around the same time, Katz executed a signature card listing her as the sole owner of the 8854 Account (the "Signature Card"). (Pl's. Ex. 1).

Upon receipt of the executed Removal Agreement and Signature Card, the Bank promptly removed Jernigan as a co-owner and authorized user of the 8854 Account, such that his name no longer appeared on the account statements. (Tr. I 190:11-191:9; 253:1-255:2) (Bank Ex. 9, p.2). However, the Bank employee who removed Jernigan from the account inadvertently failed to take an additional step required to de-link the 8854

Account from Jernigan's account profile in the Bank's online banking system. (Tr. I 191:9-13; 253:1-255:2). As a result, despite having been removed as an owner of the account, Jernigan remained able to access the 8854 Account through online banking and the Bank's bill-pay system ("BillPay") after January 2004. (*Id.*).

After Jernigan executed and submitted the Removal Agreement in January 2004, the 8854 Account continued to appear among the list of accounts available to him when he logged on to the Bank's online banking website. (Tr. I 71:9-23). Jernigan became aware of this and, on multiple occasions after January 2004, he intentionally accessed the 8854 Account without Katz's permission to view account activity. (Tr. I 72:2-21); (Bank Ex. 31, ¶ 11). On each such occasion, Jernigan knew at the time that because he had previously submitted the Removal Agreement he was not an owner or authorized user of the 8854 Account and should not have been able to access it online. (Tr. I 72:2-25); (Bank Ex. 31, ¶ 12). Jernigan never informed the Bank of his continued ability to access the 8854 Account, and it therefore remained available to him for online access until the Bank discovered the error on January 18, 2007 and immediately corrected it. (Tr. I 71:15-25; 73:1-3; 252:10-25); (Bank Ex. 10).

II. THE DISPUTED PAYMENTS

On January 17 2007, Jernigan made five online bill payments totaling approximately $1,100 via Billpay from the 8854 Account without Katz's authorization (the "Disputed Payments"). (Tr. I 73:4-7). On the following day, Katz checked her account balance online and discovered payments to payees she did not recognize. (Tr. I 91:17-92:5). She called the Bank that evening to inquire about the missing funds. (Tr. I 92:8-13); (Bank Ex. 36, ¶¶ 1-2). During telephone conversations that evening, the Bank

and Katz initially discussed the possibility that an unknown third party had accessed her account information, but a Bank employee subsequently determined and informed Katz that it was Jernigan who had effected the payments. (Tr. I 92:17-93:2); (Bank Ex. 36, ¶¶ 3-4). Katz told the Bank that Jernigan was her ex-husband and inquired specifically how he had been able to access her account. (Tr. I 92:24-93:19). In response, a Bank employee named Derek LaMonte ("LaMonte") candidly acknowledged to Katz that Jernigan was able to make the Disputed Payments online because the Bank made an error in that it failed to eliminate his ability to access the account online when they submitted the Removal Agreement and Signature Card in 2004. (Tr. I 110:13-111:19, II 124:15-24); (Bank Ex. 36, ¶ 7).

Katz testified that when LaMonte told her the above, he did not speculate to her about Jernigan's state of mind in making the Disputed Payments. (Tr. I 110:20-111:17). In fact, she acknowledged that neither LaMonte nor any other Bank employee ever told her that Jernigan must have made the payments with the intention to steal from her. (Tr. I 110:20-111:17; II 124:15-125:2); (Bank Ex., ¶ 10). Rather, what the Bank told Katz that evening and consistently thereafter was that the Bank made an error in 2004 by failing to eliminate Jernigan's ability to access the account online, but that the Disputed Payments still could not have occurred without Jernigan's active participation in that he had to have selected the 8854 Account online as the account from which the payments should be made. (Tr. I 110:20-111:17); (Bank Ex., ¶ 7).

According to Katz, a Bank employee she spoke with on the night she reported the Disputed Payments also told her to report the matter to law enforcement. (Tr. I 94:2-7). The Bank has no record of this, but it is the Bank's policy to advise customers to report

any suspicious account activity to law enforcement. (Tr. I 244:3-245:5). Bank officials testified at trial that the purpose of the policy is to allow the authorities trained to investigate potential criminal activity to do their jobs. (*Id.*).

Once Katz notified the Bank of the Disputed Payments, it immediately de-linked the 8854 Account from Jernigan's online profile and thereby eliminated his ability to access the account online in the future. (Tr. I 252:10-25). Subsequently, on January 22, 2007, the Bank also contacted Jernigan directly and obtained his authorization to transfer and did transfer funds from his own deposit account at the Bank (the "4502 Account") to the 8854 Account in an amount sufficient to reimburse Katz for the Disputed Payments. (Tr. I 47:5-48:13). Thus, the missing funds were returned to Katz's 8854 Account on the second business day after she reported them and the third business day after their withdrawal.[2] (Tr. I 47:5-48:13); (Bank Ex. 2).

III. HOW THE DISPUTED PAYMENTS OCCURRED

Bank witnesses testified at trial that the Disputed Payments could only have occurred by precisely the same mechanism explained to Katz on the night she reported the transactions to the Bank - namely, by Jernigan selecting the 8854 Account as the account from which to pay the bills. (Tr. II 236:16-237:8). In order to make an online payment through the Bank's BillPay system, the customer must first log on to the Bank's website and enter his personal user name and password. (Tr. II 229:4-12). Once the customer enters this information, he arrives at an accounts overview page, which lists all of the accounts maintained with the Bank to which the customer has access. (Tr. II 229:13-230:17). In order to make a payment from any of the listed accounts, the

[2] Katz reported the Disputed Payments on the evening of February 18, 2007, a Thursday. The reimbursement funds posted to her account on January 22, 2007, which was the following Monday. (*See* Bank Ex. 2).

customer then selects the BillPay tab, which brings him to the BillPay system where he must then enter the information necessary to initiate a payment. (Tr. II 230:18-23); (Bank Ex. 16). The customer must then enter and confirm four pieces of information regarding the intended payment: 1) the party to whom payment should be made, 2) the date of payment, 3) the amount to pay, and 4) the account from which payment should originate (the "Pay-From Account"). (Tr. II 230:24-236:2); (Bank Ex. 16). The BillPay system makes payment only as specifically directed by the customer, and it never makes payment from an account other than the one selected by the customer. (Tr. II 236:3-15). Consequently, the only way in which the Disputed Payments could have occurred is by Jernigan selecting the 8854 Account as the Pay-From Account. (Tr. II 236:16-237:8).

Jernigan testified that he intended to make the Disputed Payments from his own 4502 Account, rather than the 8854 Account. (Tr. 1 49:1-19). He admitted, however, that he does not recall the online session when he made the Disputed Payments, that he didn't look at the BillPay screen to confirm that the 4502 Account was selected as the Pay-From Account, and that he doesn't know which account appeared as the Pay-From Account for the Disputed Payments. (Bank Ex. 31, ¶ 9-12). Nevertheless, he believes that the payments were made from the 8854 Account rather than the 4502 Account because – unbeknownst to him when he went online to schedule the Disputed Payments – the 4502 Account was "frozen" or "restricted." (Tr. I 51:12-55:13). He speculated that, as a result, the BillPay system "defaulted" to the 8854 Account as the source of payment. (*Id.*).

It is true that, due to Jernigan's attempt to deposit a relatively large check drawn on insufficient funds, the 4502 Account was placed into a restricted status that would

have prevented any *check* activity on the account between January 11 and January 16, 2007 (the "Restriction"). (Tr. II 239:10-240:24); (Bank Ex. 11). However, the evidence at trial demonstrated that the Restriction could not possibly have caused the Disputed Payments to be paid from the 8854 Account for several reasons. (Tr. 243:14-20). First, Jernigan's 4502 Account was **not** restricted in any manner on the dates the Disputed Payments were made – January 17 and January 19 – and several debits in fact posted to Jernigan's 4502 Account during this period. (Tr. I 76:2-20; II 240:16-24); (Bank Ex. 3).[3] Second, while the Restriction was in effect, it applied only to paper checks, not electronic payments such as the Disputed Payments at issue here. (Tr. II 240:25-243:2); (Bank Ex. 17). Finally, under no circumstances does the Bank's BillPay system "default" to another deposit account linked to the customer's profile in the event that the Pay-From Account selected by the customer is unavailable. (Tr. II 236:3-15). A customer must affirmatively select the Pay-From Account to make a payment. (Tr. II 234:15-236:15). In short, the Disputed Payments could not have occurred without Jernigan affirmatively selecting the 8854 Account as the Pay-From Account. (*Id.*). Jernigan presented no evidence to the contrary to support his theory that the Restriction caused the Disputed Payments to be paid from the 8854 Account.

IV. LAW ENFORCEMENT INVESTIGATION & JERNIGAN'S ARREST

On January 20, 2007, two days after she initially reported the Disputed Payments to the Bank, Katz contacted the Charleston Police Department ("CPD") and reported that

[3] The transactions that occurred in the 4502 Account between January 17 and January 19 included paper checks, electronic funds transfers and debit card transactions. (Tr. I 76:2-20; II 240:16-24); (Bank Ex. 3). If the account had been "frozen" (i.e. no debit activity of any kind) on the dates in question, none of these transactions could have occurred. (Tr. II 239:10:240:2); (Bank Ex. 31, ¶ 9). Consequently, the evidence unequivocally demonstrated that no restriction of any kind was in place on the 4502 Account on the dates in question, and Jernigan presented no evidence to the contrary.

Jernigan fraudulently accessed her 8854 Account. (Tr. I 153:17-154:2). The investigation was assigned to Sgt. Donald Dequigan ("Dequigan"), who initially contacted Katz shortly after she made the report. (Tr. I 165:4-11); (Bank Ex 29). Katz informed Dequigan that she believed Jernigan deliberately made the Disputed Payments from her account. (Tr. I 168:7-22); (Bank Ex. 29). In early February, Dequigan contacted Jernigan, who told him the Disputed Payments occurred through "bank error". (Tr. I. 168:20-170:8). According to Dequigan, however, Jernigan never described the nature of the error or mentioned his theory advanced in this litigation that the Bank made the payments from the 8854 Account due to the Restriction that was in effect earlier in the month on his own 4502 Account. (*Id.*). Jernigan likewise never conveyed his theory regarding the alleged effect of the Restriction to Katz or anyone at the Bank prior to his arrest, even after he learned from subsequent communication with CPD that Katz was continuing to press charges. (Tr. I 77:3-78:17). In fact, the Bank never learned of Jernigan's theory regarding the alleged effect of the Restriction until well into the discovery phase of this litigation. (Tr. I 245:18-246:1).

After his initial conversation with Jernigan, Dequigan informed Katz that if she wanted to press charges she would have to sign an affidavit in support of a warrant for Jernigan's arrest, but Katz declined. (Tr. I 156:1-15). Consequently, the investigation remained largely inactive until April 3, 2007, when Dequigan closed the file for lack of prosecution. (Tr. I 156:1-15); (Bank Ex. 29). Dequigan had not contacted the Bank at this point, and there is no evidence that anyone from law enforcement communicated with the Bank regarding the incident before the file was initially closed in April. (Tr. I 170:22-171:17); (Bank Ex. 29).

The following month, however, Katz again contacted Dequigan and informed him that she wanted to press charges and wanted Jernigan to be arrested. (Tr. I 170:13-21). When she re-opened the investigation, Katz had been fully reimbursed for the Disputed Payment for more than three months. (Tr. I 47:5-48:13); (Bank Ex. 2). During this period, however, Katz and Jernigan were back in family court in connection with her allegation that Jernigan failed to pay her a portion of his retirement pension to which she was entitled pursuant to the divorce proceedings. (Tr. I 116:7-11; 146:5-147:1). Shortly after Dequigan reopened the CPD investigation, Katz executed an affidavit in support of a warrant for Jernigan's arrest. (Tr. I 103:22-104:7; 156:13-157:2); (Pl's. Ex. 5.).

During this entire investigation, Dequigan had only one communication with the Bank. (Tr. I 171:9-12). He testified that he contacted the Bank via telephone at some point no earlier than May 5, 2007. (Tr. I 171:9-15). He does not recall the name of the person he spoke with or her position with the Bank (he vaguely recalled a first name "Barbara" but wasn't sure it was correct). (Tr. I 170:22-171:5). Although he prepared and filed reports regarding his interviews with other witnesses and other activities performed in the course of the investigation, there is not a single reference in the CPD file regarding any communication with the Bank and no Bank representative appears in the witness list provided by CPD to the Solicitor's Office. (Tr. I 173:3-18; II 164:8-165:25) (Bank Ex. 29). Nevertheless, Dequigan testified that the woman he spoke with appeared to be familiar with the Katz matter and that when he asked her how someone would be able to access another person's account online, she responded that the person would need an "access code". (Tr. I 171:18-24). She did not tell Dequigan that the payments must have been made deliberately, and he did not ask her whether they could

have been an accident. (Tr. 171:25-172:9). Nevertheless, based on her comment and the affidavit and information provided to him from Katz, Dequigan concluded that there was sufficient evidence of a crime to obtain an arrest warrant. (Tr. I 159:6-18).

Because Jernigan was a physician accused of non-violent crime with no prior criminal record, CPD policy called for the warrants officer to give him a courtesy call or other notice prior to making an arrest to allow him the opportunity to turn himself in. (Tr. I 172:10-18). Jernigan returned from an out-of-town trip on May 24, 2007, to find a business card from a warrants officer at his home. (Tr. 78:18-79:7). He had been out of town for as much as a week prior to his return and didn't know how long CPD had been trying to contact him. (*Id.*). When Katz learned that CPD was trying to contact Jernigan in connection with the warrant, she intervened and told them that Jernigan would not answer their call and would not even answer the door if they went to his house. (Tr. I 116:16-117:3). Subsequently, on May 25, 2007, CPD arrested Jernigan at his home on the charge of obtaining goods by false pretences in connection with the Disputed Payments. (Tr. I 167:6-19). He was released on bond later the same day. (Tr. I 63:5-11).

V. THE CHARGE AGAINST JERNIGAN DISMISSED & EXPUNGED

After Jernigan's arrest and release, the case went to the Charleston County Solicitor's Office, where it was assigned to and primarily handled by Assistant Solicitor Kimberly Steele ("Steele"). (Tr. II 163:20-25). During her investigation, Steele contacted the Bank to determine how the Disputed Payments occurred. (Tr. II 166:1-167:4). The Bank representative she spoke with acknowledged that the Bank made an error in failing to eliminate Jernigan's ability to access the 8854 Account online, but explained to her – as the Bank had previously explained to Katz – that the Disputed

Payments still would have required affirmative conduct on Jernigan's part in selecting the Pay-From Account. (Tr. II 166:15-167:1). The Bank did not comment to Steele one way or the other regarding Jernigan's state of mind in making the payments. (Tr. II 167:2-4). Based largely upon her conversations with the Bank, Steele determined there was insufficient evidence that Jernigan made the Disputed Payments with criminal intent to prosecute. (Tr. II 167:21-24).

In the course of her investigation, Steele informed Katz multiple times that she did not believe there was sufficient evidence to prosecute Jernigan. (Tr. II 168:11-16). In response, Katz told Steele that Jernigan made the payments "just out of maliciousness" in retaliation for disputes that had arisen in connection with their divorce settlement and insisted that the case be prosecuted. (Tr. II 168:3-170:17); (Bank Ex. 30). In connection with her effort to keep the prosecution open, on July 23, 2007, Katz wrote a letter to Ken Lewis, who at the time was Chairman and CEO of the Bank. (Bank Ex. 5); (Tr. I 105:12-106:1). The stated purpose of the letter was to request an investigation into how the Disputed Transactions occurred in order to provide the information to the Solicitor. (*Id.*).

In response to Katz's letter, William Nevarez ("Nevarez"), a senior analyst and assistant vice president with the Bank, performed an investigation into the Disputed Payments. (Tr. I 181:21-183:2, 192:3-199:17); (Bank Ex. 4). In connection with his investigation, Nevarez spoke with Katz, who told him that she believed Jernigan made the Disputed Payments deliberately and maliciously and asked Nevarez to state in writing that Jernigan had to have acted deliberately. (Tr. I 240:13-242:6).[4] Nevarez refused.

[4] Katz did not dispute Nevarez's testimony on this point. She testified that she "can't say either way" whether or not she told Nevarez that she believed Jernigan accessed her account deliberately, and doesn't know whether she asked Nevarez to state in writing that he made the payments deliberately. (Tr. II 126:5-24).

(*Id.*). In a letter to Katz dated August 3, 2007, he provided an explanation consistent with what Katz was told on the night she initially reported the Disputed Payments to the Bank - that as a result of the Bank's "inadvertent error", Jernigan's ability to access the 8854 Account online was not eliminated in January 2004. (*Compare*, Bank Ex. 6 with Bank Ex. 36, ¶¶ 6-7). Nevarez further stated in the letter that the Bank could not "determine or comment on the state of mind or intent of Mr. Jernigan in accessing the account in question". (Bank Ex. 6).

While Katz's stated purpose in writing to Lewis initially was to obtain information to assist the Solicitor's Office, Steele testified that Katz never provided her with Nevarez's response or its substance.[5] (Tr. II 171:15-172:9). Steele further testified that if she had received the letter, she would have dismissed the charge against Jernigan sooner than she did. (*Id.*). Ultimately, despite Katz's efforts to keep the case open, the Solicitor's Office never indicted Jernigan, Steele dismissed the charge against him in March 2008, and the Court ordered the arrest expunged in May of the same year. (Tr. I 80:9-13; II 172:18-173:10); (Bank Ex. 21).

---

[5] Katz testified that she doesn't recall whether she provided the letter or its substance to the Solicitor's Office. (Tr. I 117:4-118:7).

ARGUMENT

I. JERNIGAN'S NEGLIGENCE CLAIM WAS SUBSUMED BY HIS CLAIMS FOR DEFAMATION AND MALICIOUS PROSECUTION.

The crux of Jernigan's suit against the Bank was that it encouraged Katz to report the Disputed Payments to law enforcement and made inaccurate statements to Katz and law enforcement regarding how the Disputed Payments occurred, resulting in his arrest. (Tr. I 6:20-25; 10:5-21). Jernigan expressly pled causes of action for malicious prosecution and defamation, both of which the trial court properly dismissed due in part to the lack of evidence that the Bank acted with malice or that its statements were defamatory. (Tr. II 138:9-154:1). The trial court erred, however, in allowing Jernigan to recover for the same conduct under a simple negligence theory. The error was prejudicial because it allowed Jernigan to circumvent the more stringent requirements of proof for malicious prosecution and defamation and ignored the valid defenses with which the Bank obtained dismissal of those claims. Having determined that Jernigan failed to prove his claims for defamation and malicious prosecution, the trial court should have dismissed the negligence claim as well for the same reasons.

The South Carolina Supreme Court has expressly held that a claim based upon an allegedly defamatory statement must be brought in an action for defamation and not one for negligence. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 482, 629 S.E.2d 653, 673-74 (2006).[6] In *Erickson*, the plaintiff, a guardian *ad litem*, alleged that the defendant newspaper publisher published defamatory statements about her, including that she failed to properly investigate a juvenile case assigned to her, manipulated a family court judge and had a sexual relationship with the father of her client. *Id.* at 456-457, 629

[6] Similarly, a claim alleging that a defendant falsely procured the plaintiff's arrest must be brought as one for malicious prosecution. *Bushardt v. United Inv. Co.*, 121 S.C. 324, 330, 113 S.E. 637, 639 (1922).

S.E.2d at 660. In addition to defamation, the plaintiff asserted causes of action for negligence and invasion of privacy. *Id.* at 462, 629 S.E.2d at 663. The publisher defended the case in part on the ground that in order to establish liability, the plaintiff had to demonstrate that it published the statements with actual malice, which she was unable to do. *Id.* at 458-59, 629 S.E.2d at 661. It moved to dismiss the negligence claim on the ground that allowing the plaintiff to recover on a negligence theory would permit her to circumvent the more stringent elements of defamation. *Erickson v. Jones Street Publishers, LLC*, 2002 WL 34129778, *3 (S.C. Com. Pl. 2002). The plaintiff argued that the negligence claim was not merely a repackaging of its defamation claim, but rather was also based upon the defendant's failure to properly investigate the underlying facts before publication, including the failure to speak with the plaintiff to obtain her side of the story. *Id.*, at *3; 368 S.C. at 458, 629 S.E.2d at 661.

The trial court in *Erickson* dismissed the negligence claim on the ground that allowing a plaintiff to recover for a defamatory publication under a negligence theory would defeat the purposes of defamation law and undermine its heightened pleading requirements. *Id.* at 4. The court explained that the protections afforded to a defendant in connection with a defamation claim would be worthless if a plaintiff could merely recover on the same facts through the backdoor via a negligence theory. *Id.* (citing *Dominick v. Index Journal Co.*, 99-CP-24-370, 2001 WL 1763977 (S.C. Com. Pl. 2001)). It also expressly rejected the plaintiff's argument that she should be allowed to recover for the defendant's negligence in failing to properly investigate the facts prior to publication, apart from the publication itself. As the Court explained:

> Erickson alleges that Publisher was negligent in the methods it used to collect information leading to the

> publication concerning Plaintiff. . . . [Publisher's] (sic) failure to properly investigate, if that is the case, was not the proximate cause of the alleged injury to Plaintiff. If Publisher had not published anything following a poor investigation, Plaintiff would never have been the wiser. It was when Publisher published the alleged false statements about Plaintiff that resulted from alleged improper investigation which caused any injury.

Id. at 4. In short, the defendant's investigation was part and parcel of the publication, and the plaintiff could not avoid having to satisfy the elements of defamation by pleading the investigation as negligent conduct separate and apart from the allegedly defamatory statement. *See id.; see also, Talbert v. United States*, 932 F.2d 1064, 1066-67 (4th Cir. 1991) (similarly dismissing negligence claim under Maryland law where gravamen of suit was defendant's alleged defamatory statements and rejecting plaintiff's argument that claim should survive dismissal based on defendant's negligence in failing to maintain accurate records on which defamatory statements were based).

The Supreme Court in *Erickson* affirmed dismissal of the negligence claim and held that "[a] claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common and constitutional law." *Erickson*, 368 S.C. at 482, 629 S.E.2d at 673-74.[7] Because of the

[7] Courts in other jurisdictions have agreed. *See Talbert*, 932 F.2d at 1066-67 (holding "[a]rtful pleading cannot alter the fact that [plaintiff's negligence claim] 'resound[ed] in the heartland of the tort of defamation'" and was therefore barred by the Federal Tort Claim Act's exemption from liability for defamatory statements"); *Boykin Anchor Co., Inc. v. AT & T Corp.*, 825 F.Supp.2d 706 (E.D.N.C. 2011) (dismissing plaintiff's negligence claims because "plaintiff's allegations place his 'negligence' and 'gross negligence' claims in the heartland of defamation"); *O'Brien v. Alexander*, 898 F. Supp. 162, 173 (S.D.N.Y. 1995) (dismissing negligence claim because facts alleged in support demonstrated it was merely restatement of plaintiff's defamation claim); *Abadian v. Lee*, 117 F.Supp.2d 481, 489 (D. Md. 2000) (applying Virginia law) (dismissing plaintiff's negligence claim because "a plaintiff cannot prevail on a negligence claim after she loses a defamation claim based on the same proceedings"); *Felton v. Schaeffer*, 229 Cal. App.3d 229, 238-39 (Cal. App. 1991) (dismissing negligence cause of action because "allowance of a negligence claim under these or similar circumstances would substantially undermine, if not effectively eliminate, the area currently occupied by libel law"); *Ross v. Gallant*, 551 P.2d 79 (Ariz. App. 1976) (holding plaintiff's negligence claim was subsumed by his defamation claim because "[d]efamation is the gist of the [plaintiff's] claim. . . . [and] the legal rules which pertain to defamation apply").

common law and constitutional privileges unique to defamation law and its more stringent pleading requirements, a plaintiff cannot recover under a negligence theory for what is, in essence, a defamation claim. *See id.* This is true even where negligence is the fault standard applicable to the defamation claim, because the applicable privilege defenses and correspondingly increased fault standards in the face of such privileges would be absent in a cause of action for simple negligence.

As in *Erickson*, Jernigan's claim for negligence in the instant case was based upon the same conduct as his claims for defamation and malicious prosecution, which the trial court dismissed. Jernigan's claims were based upon the factual allegation that the Bank provided information to Katz and law enforcement regarding how the Disputed Payments occurred, which allegedly insinuated that Jernigan committed a crime. (Tr. II 141:1-25). Jernigan made no additional factual allegations in support of the negligence claim that he did not also allege in support of his other claims. (*Compare* Compl. ¶¶ 26-27 to Compl. ¶¶ 20-21, 24-25). All of his claims arose from the same events and allegations. (*Id.*). In fact, Jernigan expressly pled the negligence claim as an alternative theory of recovery to the extent that the conduct alleged in support of his other causes of action "was not malicious or motivated by self-interest." (Compl. ¶¶ 26-27). Thus, Jernigan's negligence claim is nothing more than a defamation claim by another name.

Moreover, the trial court expressly based the negligence award upon the Bank's allegedly defamatory statements. The trial court ruled that the Bank was negligent "in misleading Katz and the police to believe that [the Disputed Payments] could not have been made from Defendant Katz's account without deliberation on the Plaintiff's part." (Jernigan Order 12/12/11, p. 5). During trial, the court even stated prior to dismissing the

defamation claim that it did not believe the Bank's statements rose to the level of defamation, but that they likely could provide the basis for a negligence claim. (Tr. II 143:12-19). Thus, having determined that Jernigan could not satisfy the elements of his other claims, the trial court impermissibly turned to negligence as an alternative theory of recovery for the same alleged conduct. (*Id.*). *Erickson* squarely precludes this result. *Erickson*, 368 S.C. at 482, 629 S.E.2d at 673-74.

The fact that the court also based its ruling upon the Bank's alleged failure to fully investigate how the Disputed Payments occurred does not salvage the claim. As in *Erickson*, the Bank's investigation into the Disputed Payments (or alleged lack thereof) was part and parcel of its statements about how they occurred. *Erickson, LLC*, 2002 WL 34129778, at *4. The failure to adequately investigate could not possibly have harmed Jernigan absent a statement by the Bank that was inconsistent with the facts that a "proper" investigation allegedly would have revealed. Under *Erickson*, in order to recover based upon the Bank's statements or the allegedly inadequate investigation that produced them, Jernigan had to satisfy the elements of defamation. *Erickson*, 368 S.C. at 482, 629 S.E.2d at 673-74. Having dismissed the claims for defamation and malicious prosecution, the trial court erred in allowing Jernigan to recover in negligence based upon the same conduct.

The trial court's error was prejudicial because it effectively nullified the Bank's defenses to the defamation claim, including privilege, substantial truth and lack of special damages. The Bank's statements to Katz and law enforcement upon which Jernigan's negligence claim was based were either absolutely or qualifiedly privileged under the law of defamation, such that, at a minimum, he should have been required to prove actual

malice in order to recover.[8] This Court has squarely held that statements to law enforcement made in connection with an investigation are absolutely privileged and may not form the basis of a defamation claim under any circumstances. *See Crowell v. Herring,* 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) ("We hold the absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, *including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it.*") (emphasis added). Moreover, federal law confers absolute immunity on "any financial institution that makes a voluntary disclosure of any possible violation of law...to a government agency...or requires another to make any such disclosure". 31 U.S.C. § 5318(g)(3)(A); *Stoutt v. Banco Popular de Puerto Rico,* 320 F.3d 26, 29-31 (1st Cir. 2003) (holding the statute protects disclosures of any possible violation of law or regulation to government authorities regardless of whether or not the statement was made in good faith). Thus, the Bank's statements to Dequigan in connection with his investigation were absolutely privileged and cannot constitute the basis for recovery.

Additionally, the Bank's statements to Katz were subject to a qualified privilege. Under South Carolina law, any communication made in good faith on any subject matter in which the person communicating it has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable. *Constant v. Spartanburg Steel Prods.,*

---

[8] To recover for defamation, Jernigan would have had to establish: (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication. *Parrish v. Allison,* 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007). Substantial truth is an absolute defense to a claim for defamation. *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638 (4th Cir. 1976); *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 580, 556 S.E.2d 732, 737 (Ct. App. 2001).

Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). If the communication is privileged, the plaintiff must prove actual malice. *Bell v. Bank of Abbeville*, 208 S.C. 490, 494, 38 S.E.2d 641, 643 (1946). The privilege applies in the instant case because the Bank made the statements to Katz in connection with her request for information regarding funds missing from her account. Thus, the statements were made by a party required to speak – the Bank – to a party with a corresponding interest in the matter – Katz, as the account owner. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) (statement by officer of defendant bank to plaintiff's joint venture partner that allegedly insinuated plaintiff was an unfit businessman was made in context of bank's response to joint venture's loan request and was therefore qualifiedly privileged as a matter of law). Because the statements were privileged, Jernigan's claim must fail because, as the trial court recognized, there is no evidence the Bank acted with malice toward Jernigan. (Tr. II 143:12-144:13).

Furthermore, there is no evidence that the Bank's statements to Katz regarding how the Disputed Payments occurred were untrue. Katz acknowledged that the Bank told her on the night she reported the Disputed Payments and consistently thereafter that: 1) Jernigan was the person who made the Disputed Payments; 2) he was able to make them because the Bank inadvertently failed in 2004 to eliminate his ability to access the 8854 Account online; and 3) in order to make the payments online Jernigan had to have selected the 8854 Account as the source of payment. (Tr. I 110:20-111:19); (Katz Supp. Admis. ¶ 7). It was undisputed at trial that statements #1 and #2 were accurate. (Tr. I 73:4-7; 191:9-13; 253:1-255:2). Regarding statement #3, the Bank introduced a mountain of evidence explaining why the only explanation for how the Disputed

Payments occurred is that Jernigan selected the 8854 Account as the Pay-From Account. (Tr. II 229:1-237:8). Katz admitted that the Bank did not speculate to her about Jernigan's state of mind in making the Disputed Payments or state that he must have selected her account with the intention to steal from her. (Tr. I 110:20-111:17); (Katz Supp. Admis. ¶ 10). In his letter responding to Katz's request that the Bank put in writing that Jernigan made the payments deliberately, Nevarez specifically told her that the Bank wouldn't comment on Jernigan's state of mind. (Bank Ex. 6). Thus, the only evidence introduced at trial regarding how the Disputed Payments occurred demonstrated that the Bank's statements to Katz were true.

In response, Jernigan produced nothing more than a theory that the Restriction on his 4502 Account somehow caused the BillPay system to make the Disputed Payments from the 8854 Account. The Bank witnesses explained in exhaustive detail why the Restriction could not have had any impact on the Disputed Payments. (Tr. II 229:1-237:8). Jernigan didn't present a shred of evidence in rebuttal. Indeed, the trial court expressly noted during Jernigan's closing argument that there was no evidence that the Restriction played any role in these events. (*See* Tr. II 276:9-20) ("I understand that's your theory, but there's just absolutely no evidence there."). Consequently, there is no evidence that the Bank's explanation to Katz regarding how the transactions occurred was untrue.

The trial court therefore correctly dismissed Jernigan's claims for defamation and malicious prosecution but committed prejudicial error by allowing him to recover under a negligence theory. The rulings are inherently inconsistent and effectively nullified the Bank's meritorious defenses to the defamation and malicious prosecution claims. This

Court should therefore vacate the award and dismiss Jernigan's negligence claim.

II. KATZ FAILED TO STATE A CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL HARM OR PRESENT EVIDENCE SUFFICIENT TO SUPPORT IT.

Katz alleged no pecuniary loss, no physical injury and was never in danger of physical harm. The only harm she alleged was emotional distress, and the only causes of action she pled were breach of contract and negligence. South Carolina law recognizes only two causes of action for infliction of emotional injury: intentional infliction of emotional distress and negligent infliction of emotional distress. Katz did not plead a cause of action for intentional infliction of emotional distress or any other intentional conduct by the Bank. She cannot establish a claim for negligent infliction of emotional distress because South Carolina courts have expressly limited the claim to "bystander recovery". *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985) (recognizing negligent infliction of emotional distress as a cause of action only for bystanders witnessing accidents involving close relations). Consequently, the emotional injuries Katz alleged are not recoverable under South Carolina law.[9]

The trial court erred in allowing Katz to recover for her alleged emotional injury under a simple negligence theory. The court apparently assumed that a cause of action for "negligence" alleging purely emotional injury is not governed by South Carolina law regarding "negligent infliction of emotional distress". (Tr. II 154:13-156:15); (Post-Trial Hrg. Tr. 4:16-10:1). Obviously, if that were the case, every plaintiff would simply avoid the heavy burden of proof for intentional infliction of emotional distress and negligent

[9] Katz also pled breach of contract, but South Carolina courts have never permitted recovery for emotional injury resulting from breach of contract. *See, e.g., Whitten v. American Mut. Liab. Ins. Co.*, 468 F. Supp. 470 (D.S.C. 1977) ("[T]he law of this state makes no provision for the recovery of emotional distress or mental anguish resulting from breach of contract, no matter what the intent of the breaching party was in failing to fulfill its obligations.").

infliction of emotional distress claims by styling their claim as one for "negligence" instead. If allowed to stand, the court's ruling would render irrelevant the heightened standards of pleading and proof for claims alleging purely emotional injury developed by South Carolina courts over the last half century.

Traditionally, South Carolina law did not recognize emotional injury unaccompanied by physical or pecuniary harm. *See Wilcox v. Richmond & D.R. Co.*, 52 F. 264, 267 (4th Cir. 1892) ("[W]e know of no decided case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action"). The primary reasons for courts' reluctance to impose liability for purely emotional harm included the subjective nature of the injury and corresponding difficulties of proof, the indefinite extension of the emotional consequences of a given act, and the fact that imposing a general duty to use due care to protect the emotional well-being of others would invite wasteful litigation over often trivial matters. *See* F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* § 2A (4th ed. 2011).

Over the past century, the South Carolina Supreme Court gradually expanded liability for emotional distress unaccompanied by contemporaneous physical or pecuniary harm, but, in recognition of the policies described above, expressly limited recovery to situations involving severe emotional distress caused by a defendant's willful or malicious conduct. *See, e.g., Rhodes v. Sec. Fin. Corp. of Landrum*, 268 S.C. 300, 302, 233 S.E.2d 105, 105 (1977) (holding that a defendant is not liable for a plaintiff's emotional distress without a showing that the distress inflicted was "extreme or severe"); *Hudson v. Zenith Engraving Co., Inc.*, 273 S.C. 766, 259 S.E.2d 812 (1979) ("In order to prevail in a tortious action in which the sole damages alleged are those of mental anguish,

plaintiff must show that the conduct on the part of defendant was extreme and outrageous, causing distress that is of an extreme or severe nature.") (*citing Rhodes*, 268 S.C. at 302, 233 S.E.2d at 105 and *Restatement (Second) of Torts* § 46 (1965)).

Then, in 1981, the Supreme Court in *Ford v. Hutson* expressly defined the circumstances under which a plaintiff may recover for infliction of emotional harm in the absence of other harm. 276 S.C. 157, 276 S.E.2d 776 S.C. (1981). Recognizing that without clear limitations the tort had the potential to result in a flood of litigation, the Court carefully limited the claim to situations involving intentional and outrageous conduct resulting in emotional distress so severe that no reasonable man could be expected to endure it.[10] *Id.* at 162, 276 S.E.2d at 778. More recently, the Supreme Court in *Hansson v. Scalise Builders of South Carolina* recognized and reaffirmed "the heightened burden of proof articulated in the second and fourth elements of the tort, insisting that in order to prevail in a tort action alleging damages for purely mental anguish, the plaintiff must show both that the conduct on the part of the defendant was 'extreme and outrageous,' and that the conduct caused distress of an 'extreme or severe nature.'" 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007).

After *Ford*, damages for purely emotional or mental harm caused by another party's negligent – as opposed to intentional and "outrageous" – conduct remained unavailable in the absence of accompanying physical or pecuniary injury. *See Ford*, at 162, 276 S.E.2d at 778 (expressly limiting recovery to cases involving "intentional or

[10] *Ford* established the following elements of a claim for intentional infliction of emotional distress: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it. *Id.* at 162, 276 S.E.2d at 778.

reckless" and "extreme and outrageous" conduct by the defendant).[11] In *Dooley v. Richland Mem. Hosp.*, decided three years after *Ford*, the Supreme Court expressly declined to recognize a cause of action for negligent infliction of emotional distress. 283 S.C. 372, 374, 322 S.E.2d 669, 670 (1984). The plaintiffs claimed that the defendant hospital negligently misidentified their son as an individual seriously injured in an automobile accident causing them emotional injury. *Id.* The Court noted that although it had recently recognized a cause of action for intentional infliction of emotional distress in *Ford*, the case before it could not satisfy the elements announced in *Ford* because the conduct alleged was merely negligent. *Id.*

In another case decided the same year as *Dooley*, the Court of Appeals held that damages for mental anguish and emotional distress were not recoverable for an attorney's professional negligence in overlooking an easement in a chain of title. *Caddell v. Gates*, 284 S.C. 481, 484, 327 S.E.2d 351, 352-53 (Ct. App. 1984). The plaintiff testified at trial that as a result of the defendant's negligence, she had frequent crying spells and headaches, lost weight, was under psychiatric care and receiving medication and had changed from a strong-willed, hard-working, aggressive and fun-loving person to a very weak, quiet, timid, crying and negative recluse. *Id.* In reversing the jury verdict for the plaintiff, this Court held that the damages alleged by plaintiff were available only when the elements of intentional infliction of emotional distress are satisfied. *Id.* at 483, 327 S.E.2d at 352 ("Suffice it to say that the conduct complained of must be intentional or

[11] A possible exception to this rule existed at one time for negligent infliction of emotional harm caused by contemporaneous awareness that serious physical injury could have resulted, even though it did not. *See Padgett v. Colonial Wholesale Distrib. Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958) (recovery for mental distress with physical manifestations allowed without direct bodily injury where defendant crashed his truck into the front door of plaintiff's house while plaintiff was home watching television); *but see, Rutland v. S.C. Dept. of Transp.*, 390 S.C. 78, 85, 700 S.E.2d 451, 455 (Ct. App. 2010) (South Carolina does not permit recovery for pre-impact fright).

reckless and so outrageous as to be inconsonant with and intolerable in a civilized society.").

The following year, the Supreme Court for the first time recognized a cause of action for merely negligent infliction of emotional distress in *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985); *see also*, *McCaskey v. Shaw*, 295 S.C. 372, 374, 368 S.E.2d 672, 674 (Ct. App. 1988) (recognizing that *Kinard* "created a new cause of action" for negligent infliction of emotional distress). The Court in *Kinard* held that a mother could recover damages for negligent infliction of emotional distress where she and her daughter were riding in a car when a load of roof trusses fell from the defendant's truck and she witnessed her daughter become severely injured in the wreck. *Id.* at 583, 336 S.E.2d at 467. However, the Court very narrowly defined the limits of the claim to by-stander situations and expressly held that recovery is allowed only where the distress manifests with physical symptoms capable of objective diagnosis and is established by expert testimony. *Id.* at 582, 286 S.C. at 467.[12] In carefully limiting the claim, the Court again responded to the concern over unfettered liability and that claims for emotional harm are easy to manufacture, explaining that "[d]eveloping any cause of action necessarily includes setting limits. Such limits are required to control liability." *Id.*

The *Kinard* Court expressed no opinion as to whether a claim for emotional injury based on negligent conduct may be recognized in factual settings other than the bystander scenario. *Id.* at 581 n.2, 336 S.E.2d at 466 n.2. However, South Carolina courts since

[12] To establish a claim for negligent infliction of emotional distress under *Kinard*, a plaintiff must establish: 1) the defendant's negligence caused death or serious injury to another; 2) the plaintiff was a bystander in close proximity to the accident, 3) the plaintiff and the victim were closely related; 4) the plaintiff witnessed the incident; and 5) exhibited physical manifestations of emotional distress as established by expert testimony. *Kinard*, at 582, 336 S.E.2d at 467.

have repeatedly held that negligent infliction of emotional distress applies only to bystander recovery and have refused to extend its application to other factual settings. *See Doe v. Greenville County School Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (S.C. 2007); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 154, 533 S.E.2d 597, 603 (Ct. App. 2000); *Doe v. North Greenville Hosp.*, 318 S.C. 459, 465, 458 S.E.2d 439, 442 (Ct. App. 1995); *Alonso v. McAllister Towing of Charleston, Inc.*, 595 F. Supp. 2d 645, 650 (D.S.C. 2009); *Deel v. Home Depot USA, Inc.*, 2010 U.S. Dist. LEXIS 53131 *12 (D.S.C. 2010), *adopted by* 2010 U.S. Dist. LEXIS 53127 (D.S.C. 2010), *affm'd by* 399 Fed. Appx. 786 (4th Cir. 2010).

In a factual situation comparable to the one at issue in the instant case, this Court in *North Greenville Hospital* found that a plaintiff could not recover for emotional distress he suffered based upon a hospital's alleged negligence in releasing his medical records. *Id.* at 465, 458 S.E.2d at 442. The records contained information regarding sexual abuse suffered by the plaintiff as child, and he claimed that the unauthorized disclosure of this information caused him to experience severe emotional distress. *Id.* at 462, 458 S.E.2d at 441. In affirming dismissal, this Court explained that the plaintiff could not state a claim for intentional infliction of emotional distress because the record contained no evidence that the hospital acted intentionally, and he could not state a claim for negligent infliction of emotional distress because the cause of action is "limited to bystander recovery." *Id.* at 465, 458 S.E.2d at 442.

More recently, in *Doe v. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005), this Court again recognized that damages for purely emotional distress are not recoverable in the absence of other harm. The plaintiff alleged that the defendant, her former attorney,

committed professional negligence and breached fiduciary duties to her, causing her emotional distress. *Id.* at 439, 626 S.E.2d at 28. The Court affirmed the trial court's dismissal of the professional negligence claim on statute of limitations grounds but remanded the claim for breach of fiduciary duty with instructions to the trial court to set forth the particular grounds on which it based dismissal of the claim. *Id.* at 448, 629 S.E.2d at 39. In doing so, the Court provided the trial court with a number of grounds on which dismissal could validly have been based, including that damages for "emotional injuries would not be recoverable absent evidence that Doe sustained pecuniary losses as well." *Id.* at 449, 629 S.E.2d at 39, n. 27.

On remand, the trial court expressly dismissed the fiduciary duty claim on the ground that the plaintiff could not recover for purely emotional distress damages based upon the defendant's negligent conduct in the absence of pecuniary harm. *Doe v. Howe, III*, 2007 WL 7306130, *4-6 (Ct. Com. Pl. 2007). After citing the quoted language above from this Court's opinion, the trial court further elaborated upon the direction provided to it from the Court of Appeals:

> South Carolina has not recognized a claim against an attorney, under any theory, where the client did not suffer actual pecuniary damages, but only sustained emotional injuries, absent outrageous conduct on the part of the attorney. South Carolina law is also clear that, in the absence of actual physical or pecuniary injury, emotional distress damages are recoverable only in limited circumstances where the defendant acts outrageously....South Carolina has not recognized any other theories [other than intentional and negligent infliction of emotional distress] under which a plaintiff, in the absence of a physical injury or economic damages, may recover damages for solely emotional injuries.

Id. at *5 (*citing Ford, North Greenville Hosp.*, and *Kinard*).

Finally, in a case decided just this year, this Court held that damages for emotional pain and suffering were unavailable for a defendant bank's alleged negligence in mismanaging a financial account, even where the plaintiff presented evidence of pecuniary harm. *Wachovia Bank Nat. Ass'n v. Beane*, 397 S.C. 612, 617, 725 S.E.2d 715, 718 (Ct. App. 2012). The plaintiff customers alleged that the bank mismanaged a securities account pledged as collateral for a loan, causing it to underperfom financially. *Id.* at 615, 725 S.E.2d at 716-117. The trial court charged the jury that it could award the plaintiff's pain and suffering in addition to financial losses in connection with the bank's negligence. *Id.* at 617, 725 S.E.2d at 718. This Court explained that damages for pain and suffering are intended to compensate a plaintiff for physical pain or emotional response to the alleged harm and that pain and suffering are not a recoverable element of harm in an action for a bank's mismanagement of its customer's account. *Id.*

As the case law set forth above makes clear, recovery for emotional distress – in the absence of physical or pecuniary harm – is available only where the plaintiff pleads and proves the elements of intentional infliction of emotional distress or negligent infliction of emotional distress. South Carolina courts have limited these causes of action to specific factual settings and established heightened requirements for their pleading and proof. Allowing a plaintiff to avoid those requirements by pleading mere negligence renders the requirements superfluous and creates an alternative path to recovery for alleged harm that would not otherwise be actionable. Because Katz never alleged that the Bank caused death or serious physical injury to another and that she was in close proximity to the accident, she cannot recover for negligent infliction of emotional harm. Consequently, the trial court erred in allowing her to recover under a negligence theory,

and the judgment for Katz should therefore be vacated and her negligence claim dismissed.

III. KATZ DID NOT ASSERT A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS OR PRESENT EVIDENCE SUFFICIENT TO SUPPORT IT.

As an alternative to its finding that Katz could recover under a negligence theory, the trial court concluded for the first time in its order denying the Bank's post-trial motion that its conduct was "outrageous", apparently attempting to allow Katz to recover under an intentional infliction theory as well. (Katz Order 3/22/12, p. 3-4). This finding was error because Katz never pled a claim for intentional infliction of emotional distress or outrage or moved to amend to assert such a claim. Nor did she request a ruling on that basis at trial or the post-trial stage. In any event, no evidence was introduced at trial that would support the claim.

A. Katz Did Not Pursue a Claim For Intentional Infliction of Emotional Distress.

Katz did not plead a cause of action for intentional infliction of emotional distress or provide any indication prior to, during, or even after trial that she intended to proceed on such a theory. A court's judgment must conform to both the pleadings and proof and be in accordance with the theory of action on which the pleadings are framed and the case was tried. *Glass v. Glass*, 276 S.C. 625, 281 S.E.2d 221 (1981); *Michel v. Michel*, 289 S.C. 187, 345 S.E.2d 730 (Ct. App. 1986); *Crocker v. Crocker*, 281 S.C. 154, 314 S.E.2d 343 (Ct. App. 1984); *Mayhill Homes Corp. v. Family Fed. Sav. and Loan Assn.*, 284 S.C. 60, 324 S.E.2d 340 (Ct. App. 1984). By finding for Katz on a theory not advanced by the pleadings or at trial (via an order on a post-trial motion, no less), the trial court denied the Bank the opportunity to defend against the entry of the judgment on a ground on which

the award rested.[13] *Id.* A court cannot *sua sponte* award relief based on claims not pled, not tried, and for which the defendant had no notice of a need to present a defense. *See id.* Elementary due process considerations should prevent the trial court's *post hoc* alternative justification for the damages award. Consequently, to the extent Katz's recovery was based upon the tort of outrage or intentional infliction of emotional distress, the ruling plainly should be reversed.

B. The Evidence Was Insufficient to Support a Claim for Intentional Infliction of Emotional Distress.

Even if Katz had pled a claim for intention infliction of emotional distress, the evidence did not support such a claim. To recover for intentional infliction of emotional distress, a plaintiff must establish: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of the defendant caused plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "so severe" such that "no reasonable man could be expected to endure it." *Hansson*, 374 S.C. at 356, 650 S.E.2d at 70.

1. No Evidence of Intentional or Outrageous Conduct

The first two elements require that the defendant's conduct be both intentional or reckless and "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community." *Hansson*, 374 S.C. at 356, 650 S.E.2d at 70. The record demonstrates that the Bank's conduct

[13] The order at issue denying the Bank's post-trial motion was prepared by Katz's attorney and signed without alteration by the trial court. (Katz Order 3/22/12).

cannot reasonably be considered intentional or reckless, much less so extreme and outrageous as to establish a claim for intentional infliction of emotional distress. The cases in which South Carolina courts have found outrageous conduct generally involve a confrontation between the parties and direct abuse of the plaintiff by the defendant. *See, e.g., McSwain v. Shei*, 304 S.C. 25, 29, 402 S.E.2d 890, 892 (1991) (employer forced employee to perform exercises in public which exposed her inability to control her bladder), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 402 S.E.2d 231 (2002); *Bell v. Dixie Furniture Co., Inc.*, 285 S.C. 263, 264-65, 329 S.E.2d 431, 432-33 (1985) (defendant cursed at plaintiff and refused to accept payment of judgment amount plaintiff was required to pay defendant); *Ford v. Hutson*, 276 S.C. 157, 164-65, 276 S.E.2d 776, 779-80 (1981) (defendant made multiple threats of physical harm through personal confrontations with profane and insulting remarks); *Lipman v. Atlantic Coast Line Rail Co.*, 108 S.C. 151, 93 S.E. 714 (1917) (defendant-carrier used abusive and insulting language in confrontation with plaintiff-passenger).

Based on the foregoing, the Bank's conduct doesn't remotely approach the level of "outrage". Viewing the evidence in the light most favorable to Katz, the most that can be said is that when the Bank removed Jernigan from the 8854 Account title as Jernigan and Katz requested, it inadvertently failed to take the additional step of de-linking the 8854 Account from Jernigan's online profile. Once this fact was brought to the Bank's attention, it immediately de-linked the 8854 Account and eliminated Jernigan's ability to access it again and within 2 business days returned the missing funds to Katz's account. There is no evidence whatsoever that the failure to de-link the account was intentional or motivated by ill-will or reckless indifference. Neither is there any evidence that Bank

employees confronted or verbally abused Katz. To the contrary, Katz described the Bank employees with whom she personally interacted as "very gracious", "concerned for me", "as nice as he could be" and "very nice and helpful". (*See* Tr. I 97:8-14; 98:6-21; II 89:20-25; 94:1-2). At worst, the Bank's conduct amounted to a simple oversight – the result of a bona fide error – which it corrected immediately upon learning of the issue.

South Carolina courts have routinely dismissed claims of outrageous conduct based on facts far more egregious than those present here. *See, e.g., Corder v. Champion Rd. Mach. Int'l Co.*, 283 S.C. 520, 324 S.E.2d 79, 81 (1984) (plaintiffs' allegation that they were fired in retaliation for exercising their legal rights was insufficient as a matter of law to constitute outrage); *Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921, 922-23 (Ct. App. 1994) (supervisor's actions of verbally abusing and threatening an employee with cerebral palsy with the loss of her job and ridiculing the employee's speech impediment to the extent the employee was physically ill and had to leave work early was insufficient to state a claim for intentional infliction of emotional distress); *Wright v. Sparrow*, 298 S.C. 469, 381 S.E.2d 503, 505-06 (Ct. App. 1989) (allegations that supervisor built a case to justify firing the plaintiff by loading her with responsibility while stripping her of authority and by changing the manner of performing certain duties and then accusing her of not following directions held insufficient as a matter of law to constitute the tort of outrage); *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986) (affirming dismissal of claim for intentional infliction of emotional distress on ground that actions of accounting firm in falsely accusing client of committing a crime did not rise to level of outrage); *Save Charleston Found. v. Murray*, 286 S.C. 170, 333 S.E.2d 60, 66 (Ct. App. 1985) ("[m]erely converting someone's promissory note and

maliciously bringing against the person a civil action based on the note is not conduct that, as a matter of law, 'exceeds all possible bounds of decency' and is 'atrocious and utterly intolerable'"). Consequently, the trial court's alternative ruling that the Bank's conduct was outrageous is contrary to South Carolina law and should be reversed.

2. No Evidence of Severe Emotional Distress

In *Hansson*, the Supreme Court also emphasized the heightened standard of proof requiring that a plaintiff demonstrate that the distress alleged was so severe that no reasonable man could be expected to endure it. 374 S.C. at 356, 650 S.E.2d at 70 ("Under the heightened standard of proof for emotional distress claims emphasized in *Ford*, a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, 'I suffered emotional distress' would be irreconcilable with this Court's development of the law in this area."). The plaintiff's claim in *Hansson* that he lost sleep and developed a habit of grinding his teeth was insufficient to survive summary judgment. *Id.* at 356, 650 S.E.2d at 70; *see also*, *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 169, 708 S.E.2d 218, 223 (Ct. App. 2011) (plaintiffs failed to establish severity as a matter of law despite testimony that the defendant's actions caused them to become "emotionally ill," lose twenty pounds, develop high blood pressure and digestive problems and required them to take medication for high blood pressure and nervousness).

Katz alleged no distress that could satisfy the heightened standard of proof reaffirmed in *Hannson*. From an objective standpoint, any stress associated with the discovery that Jernigan made payments totaling $1,100 from her deposit account is not a

stress "so severe that no reasonable person could endure it," particularly given that she was almost immediately reimbursed. In any event, Katz's own testimony regarding her damages amounts to little more than the statement "I suffered emotional distress", precisely what the Supreme Court in *Hannson* and this Court in *Dunn* warned against. (Tr. II 81:13-121:24). The only specific manifestation of distress she referenced was the allegation that her pre-existing irritable bowel syndrome was "heightened," apparently around the time she was deposed in connection with this litigation. (Tr. II 109:20-110:5).[14] Even if she had proven a causal link between her irritable bowel symptoms and the Disputed Payments (which she didn't), these are exactly the types of complaints that the *Dunn* court deemed insufficiently severe as a matter of law. *Dunn*, at 169, 708 S.E.2d at 223. In addition, as discussed more fully in Section IV below, the testimony of Katz's treating psychiatrist established only that she suffered from depression, for which she was diagnosed *three years before the Disputed Payments occurred* and that she would have been depressed regardless of the events at issue here. (*See* Sec. V, below). There is no evidence in the record of any emotional distress that could satisfy the severity requirement under *Hansson* and *Dunn*. Consequently, the trial court's alternative ruling allowing Katz to recover under an intentional infliction theory that she never even pled was error.

IV. KATZ FAILED TO PRESENT ANY EVIDENCE THAT THE BANK PROXIMATELY CAUSED HER ALLEGED INJURIES.

Even if the Court were willing to expand recovery for negligent infliction of emotional harm to the facts of this case, Katz's claim still fails as a matter of law because

[14] Katz cannot recover from the Bank for stress caused by her participation in the litigation. As this court has noted in a case affirming dismissal a claim for emotional distress resulting from legal malpractice, litigation inherently causes parties to suffer emotional distress. *Howe*, 367 S.C. at 448, 626 S.E.2d at 33 (*citing Aller v. Law Office of Schriefer*, 140 P.3d 23 (Colo. App. 2005)).

the only reasonable conclusion that may be drawn from the evidence is that the Bank did not proximately cause Katz any cognizable harm. To show that the defendant was the proximate cause of an injury, the plaintiff must establish both causation-in-fact and legal causation. *Mellen v. Lane*, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). The cause-in-fact requirement is met by showing the injury would not have occurred but for the defendant's negligence. *Id.* In the case of a claim for infliction of emotional distress, the distress must also be manifested by objectively verifiable physical symptoms and established by expert testimony. *Doe v. Greenville County School Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (S.C. 2007) (plaintiff seeking to recover for negligent infliction of emotional distress must show that his emotional distress "manifests itself by physical symptoms capable of objective diagnosis and established by expert testimony"). The legal cause requirement is met by establishing the plaintiff's injury was foreseeable. *Id.* at 278–79, 659 S.E.2d at 245.

A. Causation in Fact

Katz failed to demonstrate that the Bank caused her alleged injuries or to establish by expert testimony that her emotional distress manifested in objectively verifiable physical symptoms. The medical evidence introduced at trial consisted of the deposition testimony and treatment notes of Katz's treating psychiatrist from 2004 to 2009, Lucy Preyer, M.D. ("Preyer").[15] Preyer testified that the only medical condition for which she diagnosed Katz was "major depression" and that she made the diagnosis in 2004, three

[15] Katz attempted to introduce the medical records of Annette Anderson Bilton, M.D., a general practitioner who Katz claimed to have visited in connection irritable bowel syndrome. The bank objected on grounds of hearsay and authentication (Bilton did not testify). (Tr. II 111:10-118:3). The Court required Katz to redact all subjective comments by Bilton contained in the records and allowed only the redacted versions into evidence. (*Id.*). Ultimately, Bilton did not testify and no evidence was presented regarding any opinions she may or may not have held related to this case. (*Id.*).

years before the events at issue in this case occurred. (Preyer Tr. 15:5-20; 20:4-16; 26:22-27:3). Preyer also testified to numerous factors contributing in varying degrees to Katz's depression that long pre-dated the Disputed Payments, including her relationship with her mother, her divorce, issues with her children and the failure of her business venture to take off. (Preyer Tr. 25:21-24; 38:13-24; 39:6-24; 78:17-:79:3). Preyer did not recall Katz ever mentioning the Disputed Payments during the entire course of her treatment, and she acknowledged that her treatment notes contain no reference to them. (Preyer Tr. 11:3-13:9; 65:65:2-14).

In fact, Preyer identified February 2007, the month immediately following Katz's discovery of the Disputed Payments, as the date on which Katz's depressive condition initially "stabilized". (Preyer Tr. 21:19-22:13). Her treatment notes from February 7, 2007, the first session after the events at issue occurred, state that Katz was "doing well" and was "not depressed or agitated". (Preyer Tr. 39:25-41:8); (Depo. Ex. 1, p. 15). Likewise, the notes from the next session in March state that Katz was "doing well" and "sleeping well" and provide no mention of the Disputed Payments or any indication of an adverse impact to her health during this time period. (Preyer Tr. 42:9-43:15); (Depo. Ex. 1, p. 14). Preyer made no changes to Katz's medication as a result of either session. (Preyer Tr. 42:1-8; 43:7-9); (Depo. Ex. 1, p.14-15). She further testified that Katz's condition when she initially began seeing Preyer in 2004 (three years before the Disputed Payments) was debilitating to the point that she could not work, and she identified August of 2007, the same month in which Katz was corresponding with Nevarez about the Disputed Payments, as the point in time at which Katz's condition had improved to the level that she was "possibly" able to work again. (Preyer Tr. 54:23-58:20). Thus, the

only reasonable inference that can be drawn from Preyer's testimony is that Katz's condition actually improved over the period of time in which the events occurred that are at issue in this case.

Preyer also testified that she did not personally observe in Katz any physical symptoms of emotional harm. (Preyer Tr. 30-31). She noted that depressive adults often present as highly somatic, but that was not the case with Katz. (Preyer Tr. 30:11-31:7). The only physical manifestations of Katz's condition of which Preyer was aware were "low energy" and "sleeplessness", and she only became aware of these symptoms from subjective reports by Katz. (Preyer Tr. 30:11-32:9). Preyer did not state when Katz reported the symptoms or whether the reports coincided with any event at issue in this case. (*Id.*). The last time Preyer examined Katz was in 2009, more than two years before trial, and at that time her depression was in remission and she suffered from no other mental health condition to Preyer's knowledge. (Preyer Tr. 36:4-25). Thus, Katz failed to establish by expert testimony any objectively verifiable medical symptoms resulting from conduct by the Bank.

The sole basis on which the trial court found medical causation was a single statement by Preyer that the Disputed Payments constituted one in a series of events beginning prior to 2004 that contributed to Katz's depression. (Preyer Tr. 27:17-22). However, Preyer testified that she was unable to assign any degree of causation to the Disputed Payments "because [Katz] had been so stressed all along", and she candidly acknowledged that Katz would have been depressed regardless of whether or not the Disputed Payments occurred. (Preyer Tr. 29:3-20; 32:4-14). Thus, Katz failed to produce evidence sufficient to raise a reasonable inference that the alleged harm would

not have occurred but for the Bank's negligence, which amounts to a failure of proof on an essential element of her claim – assuming the court were willing to extend recovery for negligent infliction of emotional harm to the factual situation presented in this case.

B. Legal Causation

To prove legal causation, Katz had to prove that it was reasonably foreseeable that the Bank's conduct would cause her severe emotional distress. "The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability." *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968). "One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen." *Id.* at 161–62, 161 S.E.2d at 173.

As a matter of law, it was not foreseeable that a Bank employee's inadvertent failure to de-link the 8854 Account from Jernigan's online profile would cause Katz's depression. *See, e.g., Caddell*, 284 S.C. at 484, 327 S.E.2d at 353 ("[A]n attorney employed to examine title cannot reasonably be expected to foresee that an error made by him in the title examination might proximately cause his client to suffer serious psychic trauma. . . ."). If the law were otherwise, it would impose upon the Bank an unlimited duty to protect the emotional well-being of its customers, even from minor or idiosyncratic mental distress. The courts of this state have never before sanctioned such unlimited and disproportionate liability, and this Court should not do so in this case.

V. THE BANK OWED NO TORT DUTIES OF CARE TO KATZ AND JERNIGAN.

To succeed on a negligence claim, a plaintiff must establish a duty of care owed by the defendant to the plaintiff. *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). In order for negligence liability to attach, the parties must have a relationship

recognized by law as the foundation of a duty of care. *Ravan v. Greenville County*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993). In the absence of a duty to prevent an injury, foreseeability of that injury is insufficient to establish liability. *South Carolina Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 375, 346 S.E.2d 324, 325 (1986). If there is no duty, the defendant is entitled to judgment as a matter of law. *Simmons v. Tuomey Reg. Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000).

South Carolina courts have consistently noted that the bank-customer relationship is a limited one. *See, e.g., Regions Bank v. Schmauch*, 354 S.C. 648, 671, 670 S.E.2d 432, 443-44 (Ct. App. 2003) ("the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature"); *Citizens & S. Nat'l Bank of South Carolina v. Lanford,* 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994) (holding that bank did not have a duty to explain guaranty agreement); *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (holding that relationship between mortgagee and mortgagor imposed no fiduciary obligations on mortgagee). The relationship of bank and depositor is founded on contract, "which is ordinarily memorialized by a signature card that the depositor signs upon opening the account." *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 538 (Cal. App. 1998); *Lema v. Bank of America, N.A.*, 826 A.2d 504, 511-512 (Md. 2003) (relationship between bank and deposit account customer is a contractual one governed by signature card and deposit account agreement).

Under South Carolina law, where a duty owed arises merely from an agreement of the parties, breach of that duty does not create a cause of action for negligent conduct. *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 375, 404 S.E.2d 912, 918 (Ct.

App. 1991); *see also, Van Leer v. Deutsche Bank Sec., Inc.*, 2012 U.S. App. LEXIS 9091, *15 (4th Cir. 2012) ("Dealings between a bank and its customer generally do not allow for claims sounding in negligence. In such an instance, the relationship between the bank and customer is contractual in nature, not giving rise to an independent duty.").

The Bank owed no duties of care to Jernigan and Katz that could support the negligence awards. The Bank's relationship with Jernigan and Katz was contractual, and the mutual obligations related to the deposit accounts were contained in the Deposit Account Agreement and Online Banking Agreement between the Bank and its customers. (*See* Bank Ex. 12; Bank Ex. 14; Bank Ex. 15).[16] To the extent that the awards were based upon the Bank's failure to fully eliminate Jernigan's access to the 8854 Account, any specific duty owed by the Bank in that regard arose from its contractual agreement to remove him. (*See* Pl's. Ex. 1, Removal Agreement). Indeed, Katz expressly pled that the Bank's obligation was a contractual one and that the failure to eliminate Jernigan's online access constituted breach of contract. (Ans./Ctr.Cl./Cr.Clm. ¶¶ 51-53). Apart from its contractual obligations set forth in the Deposit Account Agreement and the specific contractual agreement to remove Jernigan from the account, the Bank owed no affirmative duties to Jernigan and Katz. Mere contractual obligations cannot support tort liability. *Foxfire Village, Inc.*, at 375, 404 S.E.2d at 918.

The crux of Jernigan's claim, however, was not the Bank's conduct related to the removal, but rather was its allegedly defamatory statements about how the Disputed

[16] By their signatures on the Signature Cards for the 8854 Account and 4502 Account, respectively, Katz and Jernigan agreed to be bound by the Deposit Account Agreement as amended from time to time. (*See* Bank Ex. 1; Bank Ex. 13). The Bank entered into evidence without objection the Deposit Account Agreements in effect in January 2004 (Bank Ex. 14), when Jernigan was initially removed from the 8854 Account and the Deposit Account Agreement and Online Banking Agreement in effect in January 2007, when the Disputed Payments were made. (Bank Ex. 15); (Bank Ex. 12); (Tr. I 71:4-6).

Payments occurred. Any duties owed by the Bank in this regard were limited to the negative duties to refrain from defaming him or acting with malice or ulterior motive in invoking the legal system. *See Erickson*, 368 S.C. at 482, 629 S.E.2d at 673-74 (an action based on alleged defamatory statements must be brought as claim for defamation, not negligence); *Bushardt*, 121 S.C. at 330, 113 S.E. at 639; ("If a lawful arrest has been improvidently procured, without probable cause, the plaintiff's remedy lies in an action for malicious prosecution . . . ."). As explained above, to recover based upon the Bank's statements to Katz and law enforcement, Jernigan had to prove the elements of a claim for defamation or malicious prosecution, which the trial court ruled he failed to do. Consequently, the trial court erred in finding that the Bank owed duties of care in negligence to Jernigan and Katz.

VI. THE DAMAGE AWARDS WERE EXCESSIVE AND UNSUPPORTED BY THE EVIDENCE.

Finally, the trial court abused its discretion in denying the Bank's motion for a reduction in the amounts of the damage awards. The judgment in Katz's favor is excessive and unsupported by any evidence because she suffered no pecuniary loss or cognizable emotional harm as result of the Bank's conduct.

Similarly, the award of $85,000.00 to Jernigan is excessive and unsupported by the evidence because Jernigan established no quantifiable damages other than the minimal amounts he paid to make bail and to his criminal defense attorney to get the criminal charge expunged, which totaled $2,650.00. (Jernigan Order 12/12/11). No employer took adverse action against him, and there is no evidence that anyone other than his son and girlfriend at the time witnessed his arrest or that anyone beyond the individuals involved in the case became aware of it. (Tr. I 79:11-80:22). He took no

medication and received no treatment of any kind for emotional distress in connection with the events at issue in this case because he determined he didn't need it. (Tr. I 80:23-81:10). He was released on the same day of his arrest, and the charges against him were ultimately dismissed and later expunged. (Tr. II 172:18-173:10); (Bank Ex. 21).

Consequently, the judgments against the Bank bear no relationship to any conceivable harm and are unsupported by the record. If this Court does not dismiss the claims against the Bank, it should remit the amount of the awards or, or failing that, remand to the trial court for reduction of the awards to conform to the evidence in the record. *See Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 594, 686 S.E.2d 176, 188 (2009) (appellate court remitting excessive damages award rather than remanding for new damages determination); *compare Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 66, 717 S.E.2d 589, 603 (2011) (remanding for new damages calculation).

CONCLUSION

For the foregoing reasons this Court should reverse the judgments of the trial court and render judgment for the Bank, or failing that, reduce the amounts of the judgments, or failing that, remand to the trial court for reduction of the amounts.

SIGNATURE ON FOLLOWING PAGE

NELSON MULLINS RILEY & SCARBOROUGH LLP

Bryson M. Geer
SC Bar No. 13606
E-Mail: bryson.geer@nelsonmullins.com
Merritt G. Abney
SC Bar No. 71893
E-Mail: merritt.abney@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Defendant Bank of America, N.A.

October 3, 2012

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr, Circuit Court Judge

Case No. 2009-CP-10-2433

Floyd E. Jernigan ..... Respondent,

v.

Suzanne Boone Katz and Bank of America, N.A. ..... Defendants,

Of Whom Suzanne Boone Katz is ..... Respondent,

And Bank of America, N.A. is ..... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **Initial Brief of Appellant**

Counsel Served:

Geoffrey H. Waggoner, Esq.
Waggoner Law Firm
PO Box 865
Mt. Pleasant, SC 29465

Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq.
The Richter Law Firm
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464

Donna Horn, Administrative Assistant

October 3, 2012