THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon

Case No. 11-CP-29-00873

Appellate Case No. 2014-001505

Wells Fargo Bank, N.A.,
Successor by merger to Wachovia Bank, N.A., ... Respondent,

v.

Ronald P. Pappas, a/k/a Ronald Peter Pappas, and
Camine Pappas, ... Petitioners,

And

Ronald P. Pappas, a/k/a Ronald Peter Pappas, and
Camine Pappas, ... Cross-Plaintiffs,

v.

Wells Fargo Bank, N.A.,
Successor by merger to Wachovia Bank, N.A., and
Cargo Development, LLC,
A North Carolina limited liability Company, ... Cross-Defendants.

PETITION FOR WRIT OF *CERTIORARI*

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Pursuant to Rule 242, S.C.A.C.R, the Petitioners petition for the issuance of a writ of *certiorari* to review the final decision of the Court of Appeals in the matter above.

This Petition is based upon those certain points, factual and legal, which the Petitioners believes the Court of Appeals to have overlooked or misapprehended, as set out herein.

The Petitioners contend that this matter deals with what are, in South Carolina precedent, novel questions of law.

To the extent allowed, the Petitioners restate and by this reference reargues all matter set out in their Briefs and referenced in the Record on Appeal and in the Appendix submitted herewith.

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing herein was made and finally ruled on by the Court of Appeals on June 8, 2016.

BACKGROUND

In May, 2006, the Petitioners RONALD P. PAPPAS and CAMINE PAPPAS purchased, as an investment, a residential lot in what was to be Edgewater, a new subdivision in Lancaster County, developed by Craft Development, LLC. The price was $229,000.00. This subdivision did not perform as expected.

This lot was financed by the predecessor in interest to the Respondent WELLS FARGO BANK, N.A. with a note having a balloon payment in June, 2009. At closing, they were charged with the cost for an appraisal of the lot. They requested a copy of that appraisal. It was not supplied until this action was filed. No reason for that failure has been stated.

By January, 2008, complaints had been made to HUD alleging failures to comply with the Interstate Land Sales Full Disclosure Act by Craft Development.

In July, 2009, at the urging of the bank and upon expiration of the original Note, the Petitioners refinanced with the Bank at a figure of $210,954.69. At the second closing, they were again charged with the cost for an appraisal of the lot. They again requested a copy of that appraisal. Discovery covering that document was served. This request was repeated, and acknowledged, during the Deposition of the Appellant RONALD P. PAPPAS. To date, they have not been supplied with that appraisal. This foreclosure action is premised upon the documents of the second closing.

In December, 2013, the Respondent Bank filed its Motion for Summary Judgment. By their Affidavit and argument at the motion hearing, counsel for Petitioners set out their theory that the undisclosed appraisal must either show a true and lesser figure, which did not support the 2009 refinance, or the former, original figure, which misled the Petitioners and caused them to forego their right to timely plead causes of action under the Interstate Land Sales Full Disclosure Act and otherwise.

The Respondent's Motion for Summary Judgment was granted by Order entered April 11, 2014, written notice of which was received on May 16, 2014. The Petitioners' Motion under Rule 59(a) and (e), S.C.R.C.P. was denied by Order filed June 12, 2014, written notice of which was received on June 13, 2014. This appeal followed.

The unreported decision of the Court of Appeals affirming the decision of the Circuit Court was filed June 8th, 2016.

BASIS OF APPEAL

I. THE PETITIONERS ADEQUATELY DEMONSTRATED THEIR NEED FOR FURTHER, SPECIFIC DISCOVERY UNDER RULE 56(e), S.C.R.C.P.

In their responsive pleading, the Petitioners PAPPAS specifically addressed the appraisals required by the Plaintiff Bank and its predecessor, and the failure to supply the same after their request:

> 19. In the course of the transaction Plaintiff has committed or engaged in the following unfair and/or deceptive acts or practices in violation of Title 39, Chapter 5:
>
> a) knowingly misrepresenting the value of the subject real estate in the appraisal furnished to the Defendants;
> b) negligently appraising the value of the subject real property when the Defendants' reliance thereon and resulting injury (which are alleged hereby) was reasonably foreseeable;
> c) using methods of appraisal that included, but did not disclose the existence of an "extraordinary" or "hypothetical condition" in that the amenities of the subdivision were not funded and the lots unsold, in that the owner and developer had failed to provide proof that it or they had failed to comply with

HUD regulatory requirements, and in the use of comparables to state what was an undisclosed prospective value;

d) failing to supply the Defendants with a copy of the Real Estate Appraisal; and

e) failing to supply the Defendants with a copy of the Real Estate Appraisal after their request therefor.

[*Id.*, Para. 19 of Amended Answer, Counterclaims and Crossclaim, RECORD ON APPEAL, p.34-35.]

In their Affidavit in Response to the Bank's Motion for Summary Judgment [RECORD ON APPEAL, p.266-269], reference was made to the explicit request for the second appraisal, of 2009, in the Deposition of RONALD E. PAPPAS taken in October, 2013. Mr. PAPPAS reiterates the failure to turn over the second Appraisal at [SUPPLEMENTAL RECORD ON APPEAL, p.l57, 1.16 - p. 158, 1.5, and at p.167, 1.24 – p.168, 1.4., RECORD p.40 and 42.] The request for the second Appraisal was restated by Mr. PAPPAS and by his counsel:

24 [Q. Mr. LANEY] Are you aware from the appraisal done in 2009
25 according to HUD, which I believe you established is
1 page 78 of Plaintiffs 13, was that also the same
2 appraiser, the Pigmans, if you know?
3 A.[Mr. PAPPAS] I don't know anything about the second appraisal
4 except that I paid for it.
5 Q. Okay.
6 MR. FOSTER: And I assume that Counsel can
7 supply that to us?
8 MR. LANEY: An appraisal? The 2009?
9 MR. FOSTER: Yes.
10 MR. LANEY:· I'll inquire, and if we have it
11 we'll certainly --
12 MR. FOSTER:· Okay. I have nothing further.

[SUPPLEMENTAL RECORD ON APPEAL, Deposition of RONALD E. PAPPAS, p.167, l.24 – p.168,l.12, RECORD, p.42.]

The Petitioners reiterate that no reason for the failure to produce this document has ever been stated, in any pleading or at the hearing resulting in the Order appealed from.

[SUPPLEMENTAL RECORD ON APPEAL, Deposition of RONALD E. PAPPAS, p.167, l.24 – p.168,l.12, RECORD p.42 and generally.]

Rule 56, S.C.R.C.P, governing summary judgment and the motions to that end, is derived from the former Federal Rule 56. Rule 56(f), S.C.R.C.P. provides:

> **(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

To quote MOORE'S FEDERAL PRACTICE:

> Rule 56 does not require that any discovery take place before a motion for summary judgment can be granted. However, if a party cannot adequately defend a summary judgment motion, Rule 56 (f) provides a means to obtain time for further discovery. If the court finds that a party opposing a summary judgment motion cannot present facts essential to justify the party's opposition, the court may: (1) deny the motion for summary judgment; (2) order a continuance to permit affidavits to be obtained or discovery to be had; or (3) make any other order that is just.
>
> [J. Moore *et al.*, MOORE'S FEDERAL PRACTICE, 56.10[8](a) (3d ed. 1999); footnotes omitted.]

By the Affidavit of Counsel, served on counsel for Respondent by e-mail five days before hearing, the Petitioners address the non-disclosure of the second, 2009 appraisal. [RECORD ON APPEAL, p.266-269.] By the same Affidavit, and in argument on the Respondent's summary judgment Motion, the Petitioners plead their need for the document, and for its examination by their expert.[RECORD ON APPEAL, p.266-269.]

It has usually been held that Rule 56(f) should be liberally construed. *Gonzalez* v. *K-Mart Corp.*, 940 F.Supp. 429, 431 (D.P.R. 1996); *Elliott Assoc., L.P.* v. *Republic of Peru*, 961 F.Supp. 83, 86 (S.D.N.Y. 1997). In that regard, it is certainly true that a party seeking a Rule 56(f) continuance is generally required to demonstrate due diligence in discovery. *Savannah Bank, N.A.* v. *Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012); *Baughman* v. *American Tel. and Tel. Co.*; *Ayala-Gerena* v. *Bristol Myers-Squibb Co.*, 95 F.3d 86, 92 (1st Cir. 1996); *Cannizzaro* v. *Neiman*

Marcus, Inc., 979 F. Supp. 465, 471-472 (N.D. Tex. 1997); *Theotokatos* v. *Sara Lee Personal Prods.*, 971 F. Supp. 332, 343 (N.D.Ill. 1997); *Nidds* v. *Schindler Elevator Corp.*, 113 F.3d 912,921 (9th Cir. 1997) *cert. denied*, -- U.S. --, 139 L. Ed. 2D 287 (1997).

In this matter, the specific document requested was made prior to this action, was plead, had its absence stated by the Appellant RONALD PAPPAS in deposition, was specifically addressed in that deposition by his counsel, and its discovery was undertaken by Plaintiff's counsel. [SUPPLEMENTAL RECORD ON APPEAL, Deposition of RONALD E. PAPPAS, p.167, l.24 – p.168,l.12, RECORD p.42.] It was referenced in their Affidavit in Response to the Plaintiff's Summary Judgment Motion, and at the hearing thereon. [RECORD ON APPEAL, p.266, Para. 7.0 and Transcript of Hearing, p.575,l.23 – p.576,l.22.] The Petitioners submit there can be no reasonable question as to diligent attempts to obtain this document.

To again quote MOORE'S FEDERAL PRACTICE:

> A court may reject a request for time to conduct further discovery, even if properly and timely made, if it deems the request to be based on speculation as to what potentially could be discovered.
>
> [J. Moore *et al.*, MOORE'S FEDERAL PRACTICE, 56.10[8](a) (3d ed. 1999); footnotes omitted.]

In other words, the defending party cannot expect the Court to allow a mere "fishing expedition", but must seek specific, discoverable matter by its Affidavit. *Ortiz Cameron* v. *D.E.A.*, 959 F.Supp. 92,93-94 (D.P.R. 1997); *Mason Tenders Dist. Council Pension Fund* v. *Messera*, 958 F.Supp. 869, 894 (S.D.N.Y. 1997); *City of Rome* v. *Glanton*, 958 F.Supp. 1026, 1039 (E.D.Pa.), *aff'd without op.*, 133 F.3d 909 (3d Cir. 1997); *Theotokatos* v. *Sara Lee Personal Prods.*, *supra*; *Wesley* v. *Don Stein Buick, Inc.*, 996 F.Supp. 1299, 1309 (D.Kan. 1998).

The requested discovery here is specific, as shown by all references thereto: the Amended Answer, Counterclaim and Crossclaim; the request made at the Appellant RONALD PAPPAS' deposition; the Affidavit in Response to the Respondent's Summary Judgment Motion; the colloquy at the hearing on the Motion. The Petitioners have fulfilled all requirements of Rule 56(e) and (f), including that of specificity.

II. THE PETITIONERS HAVE ADEQUATELY ALLEGED COUNTERCLAIMS, AND THE MISSING DISCOVERY IS MATERIAL TO THEIR PROOF.

In the case at hand, the Respondents PAPPAS have specifically alleged Unfair Trade

Practices under the South Carolina Act in their Counterclaim:

> 19. In the course of the transaction Plaintiff has committed or engaged in the following unfair and/or deceptive acts or practices in violation of Title 39, Chapter 5:
>
> a. knowingly misrepresenting the value of the subject real estate in the appraisal furnished to the Defendants;
>
> b. negligently appraising the value of the subject real property when the Defendants' reliance thereon and resulting injury (which are alleged hereby) was reasonably foreseeable;
>
> c. using methods of appraisal that included, but did not disclose the existence of an "extraordinary" or "hypothetical condition" in that the amenities of the subdivision were not funded and the lots unsold, in that the owner and developer had failed to provide proof that it or they had failed to comply with HUD regulatory requirements, and in the use of comparables to state what was an undisclosed prospective value;
>
> d. failing to supply the Defendants with a copy of the Real Estate Appraisal; and
>
> e. failing to supply the Defendants with a copy of the Real Estate Appraisal after their request therefor.

[*Id.*, RECORD ON APPEAL, Para. 19 of Amended Answer, Counterclaims and Crossclaim, p.4-5.]

By its Order, the Circuit Court finds a failure to plead a violation of the UDAP Act which impacts the public interest, as defined under South Carolina precedent. [Order of April 11, 2014, RECORD ON APPEAL, p.5-6.] In *Daisy Outdoor Advertising Co.* v. *Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996), our Supreme Court discussed the question of proof for the impact on the public of an alleged UDAP violation:

> Plaintiffs in prior cases generally have shown potential for repetition in two ways: by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence *(e.g., Jones Chevrolet)*, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts *(e.g., Haley Nursery, Dowd)*. Sometimes, the potential for repetition or other adverse impact on the public interest will be apparent. Conversely, it will sometimes be apparent that an action has no real potential for repetition. For example, unfair or deceptive acts in

the sale of a business itself, or in sales outside the ordinary course of business, are not readily susceptible to repetition and, therefore, have no impact on the public interest.

. . .

Generally, plaintiffs will prove potential for repetition by the two means described above. We decline to hold, however, that those are the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. We expressly reject any rigid, bright line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test.

[Id., 322 S.C. at 498-97, 473 S.E.2d at 51.]

The Petitioners maintain that the actions and inaction of the Respondent with regard to the appraisals and its failure to produce the same are "apparent" in their public impact, in the sense used in *Daisy Outdoor Advertising, supra.* If, however, that position is rejected, it is clear from the above-cited language that this is an issue which the Respondents both can, and are required to, argue and prove within the scope of further discovery and trial. The requirement of public interest will not serve to allow a conclusion that their Counterclaim is without merit. The proof of that Counterclaim relies directly upon the requested, and refused, discovery.

The Respondent's position at argument below was that no cause of action could result from disclosure of the second, 2009 Appraisal. The Petitioners cite in response the language of 51 AM.JUR.2D *Limitation of Actions* § 387 (2002):

It has been held that, to avoid a statute of limitations defense on the grounds of estoppel, the defendant's representation or act must have been calculated to mislead or deceive and to induce inaction by the injured party, or done with the intention that the conduct be acted upon by the plaintiff. However, it has also been held that a defendant is estopped from asserting the statute of limitations if the plaintiff's failure to act within the statutory period results from a reasonable reliance on the defendant's conduct or representations, even if there was no intent to mislead, deceive, or delay the plaintiff. [Ftn.3: *Dever* v. *Simmons*, 292 Ill.App.3d 70, 226 Ill.Dec. 1, 684 N.E.2d 997 (1st Dist. 1997).]

Under either view, the defendant must have had actual or constructive knowledge of the true facts, and the defendant's conduct or deception must include positive efforts or active steps, above and beyond the wrongdoing upon which the plaintiff s claim is founded, to prevent the claimant from suing in time.

> Actual fraud in the technical sense, bad faith, or an intent to mislead or deceive is not essential to create such an estoppel. [Ftn.8: *Wilson* v. *Butt*, 168 Va. 259, 190 S.E. 260, 109 A.L.R. 1434 (1937).]
>
> [*Id.*; footnotes omitted, other than those cited.]

Our Courts are in agreement with the stated principle. In *Kleckley* v. *Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000), the Supreme Court stated:

> Kleckley could have also argued that Northwestern should be estopped from asserting the statute of limitations defense. "Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." *Black v. Lexington Sch. Dist. No. 2,* 327 S.C. 55, 488 S.E.2d 327 (1997) (citations omitted); *see also Holy Loch Distribs., Inc. v. Hitchcock,* 332 S.C. 247, 503 S.E.2d 787 (Ct.App.1998).
>
> [*Id.*, 338 S.C. at 136, 526 S.E.2d at 220.]

In the case at hand, the Respondent Bank had a duty to disclose the 2009 Appraisal required by it and requested by the Appellant. Had the same been disclosed the Petitioners would have been on notice of their rights to pursue a claim based on either an improper Appraisal or one based upon the Respondent Bank's failure to disclose a lessened value for the collateral land. There is a third possibility: that no such Appraisal exists, and the Petitioners were charged for a document that does not exist.

Based upon the information available at the hearing, the Petitioners did not contest the Respondent Bank's Summary Judgment as to their cause of action based upon the Real Estate Settlement and Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* or the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* [RECORD ON APPEAL, Transcript or Hearing, p.26,l.7-10.] The Petitioners acknowledge that under the existing precedent, the doctrine of equitable estoppel will not affect the statutory limitation on RESPA claims. *Moll* v *U.S. Life Title Ins. Co. of New York*, 654 F.Supp. 1012 (S.D.N.Y., 1987).

The unavailability of a RESPA claim does not, however, defeat the viability of the Petitioners' claims under UDAP [RECORD ON APPEAL, Second Defense and Counterclaim, p.33-35.], fraud [RECORD ON APPEAL, Fifth Defense and Counterclaim, p.38-39.] or that for negligent misrepresentation [RECORD ON APPEAL, Sixth Defense and Counterclaim, p.39-41.]. Those causes were, the Petitioners maintain, adequately plead and shall be adequately evidenced by the

discovery they seek. The existence, or non-existence, of the 2009 Appraisal is sufficient bases (under any of the factual alternatives discussed herein) to support each of the three Counterclaims and, thus, to avoid summary judgment.

RESPONSE TO ARGUMENTS OF RESPONDENT

ROBERTSON IS NOT APPLICABLE PRECEDENT

The Respondent WELLS FARGO BANK has cited, in its argument, the case of *Robertson* v. *First Union Natl. Bank*, 350 S.C. 339, 565 S.E.2D 309 (Ct.App. 2002). In that case, Robertson had plead various causes of action against his bank similar to those advanced by the Petitioners here. He sought additional discovery relating to an appraisal. This Court confirmed the grant of summary judgment below. *Robertson, supra*. This Court in *Robertson* characterized the state of discovery in *Robertson* as follows:

> We agree with the trial court that any further depositions would not have assisted Petitioners. Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case. [*Citations omitted.*]
> [*Id.*, 350 S.C. at 346-47, 565 S.E.2d at 350-351.]

The state of discovery in *Robertson* cannot apply in the case at hand. In Robertson, the Defendants hoped to find unknown evidence. Here, the Petitioners clearly plead a refusal to turn over the existing evidence in question. [RECORD ON APPEAL, Amended Answer and Counterclaim, Para. 26., p.35.] The Petitioners clearly requested the appraisal at the deposition of RONALD P. PAPPAS, and was assured by Respondent's Counsel it would be turned over "if we have it". [SUPPLEMENTAL RECORD ON APPEAL, Deposition of Pappas, p.167, l.24 – p.168, l.12, p.42.]

In *Robertson*, the Petitioners wished to develop evidence. Here we have evidence (the 2009 appraisal), whose existence is not denied, which has not been turned over. No reason for that failure was asserted to the Court below and no reason for that failure is cited in the Respondent's Initial Brief.

EFFECT OF MISSING EVIDENCE

The Respondent's argument is essentially that the appraisal, even if turned over, cannot affect the facts before the Court below and cannot give rise to defensive matter.[1]

Disclosure of the missing appraisal can only result in a few alternatives: each alternative mandates further discovery by the Petitioners, and precludes summary judgment. Those alternatives are:

1) The appraisal does not exist.

In that event, the Petitioners were charged for an appraisal that was not made. As set out in the Affidavit of Petitioners' counsel below, the value of the mortgaged property in 2009 was less than that at the time of the original mortgage. [RECORD ON APPEAL, Affidavit of counsel, p.266-269.] By being deprived of an accurate 2009 appraisal, the Petitioners were not placed on notice of the lowered value, were thereby prevented from pursuing any legal remedies they possessed at that time, and continue to be prevented by the Bank's non-disclosure.

2) The Appraisal exists and shows the earlier, 2006 value for the real property.

In that event, despite a 2009 appraisal backing the Bank's refinance at the original price, the Petitioners' expert is prepared to testify that the 2009 appraisal is incorrect. The Petitioners should be allowed to inquire as to whether any pressure was brought to bear on the appraiser by the Bank or its agents. The Petitioners would also have the right to inquire into the methods of the 2009 appraiser, and the motives of the Bank in denying it access to appraisal so that these matters can be explored.

3) The Appraisal exists and shows a later, lesser value for the real property.

In that event, the Bank was placed on notice of a lowered value in 2009 which information it has continued to refuse to the Petitioners. This alternative provides the clearest basis for the existing claims of fraud, negligent misrepresentation and violation of the South Carolina Unfair and Deceptive Practices Act.

1

The Respondent Bank may wish to argue with the above alternatives and the analyses above. The fact remains that neither the Respondent Bank, nor the Court, can state what facts may develop until the document is produced and discovery is completed.

IMPROPER ATTRIBUTION OF WAIVER BY THE PETITIONERS

The Respondent Bank argues that the Petitioners clearly did not rely on the 2009 appraisal. That assertion is true only insofar as RONALD PAPPAS acknowledged the appraisal was never received. [SUPPLEMENTAL RECORD ON APPEAL, Deposition of Pappas, p.157, l.16 – p.158, l.5 and p.167, l.24 – p.168, l.14, RECORD p.40 and 42.] Again, however, Mr. PAPPAS (or any Bank customer) certainly had the right to assume the 2009 appraisal he paid for was accurate and competently completed. This is precisely the point in contest, and the same cannot be settled in the absence of the document in question.

The Respondent cannot claim waiver based upon a document that was requested and whose disclosure has been refused. As stated in *State EX REL. Birchmorh* v. *State Bd. Of Canvassers*, 78 S.C. 461, 59 S.E. 145 (1907):

> By waiver is meant the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. Therefore, in order to constitute waiver, the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such right.
> [*Id.*, 78 S.C. 461, 59 S.E. at 148.]

GROUNDS OF APPELLATE DECISION

The Petitioners' appeal for production of the missing appraisal underlies their claims for fraud and unfair trade practices. The Court recites the requirement that "further discovery will uncover additional relevant evidence . . .", quoting from *Baughman* v. *Am. Tel & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991).

To reiterate: the Petitioners have plead their payment for the second appraisal, their reliance on its (presumed) backing for the value of the property so refinanced, and that such value was either false or withheld due to its accuracy. [*Id.*, Para. 19 and 52 of the Amended

Answer, Counterclaims and Crossclaim, RECORD ON APPEAL, p.34-35, 39, and the Second, Fifth and Sixth Counterclaims generally.]

The burden of the decision of the Court is that these facts will not require the production of the document, or affect the lower Court's grant of summary judgment, because, in fraud the plaintiff must prove a justifiable reliance on the representation [here, such representation would be the substance of the appraisal]. The decision is apparently based upon the legal conclusion that the Petitioners could not have justifiably relied upon that appraisal. To state this more specifically, they had no right to assume the appraisal was correct or, in the event it accurately showed a lesser value, they had no right to information that would have provoked legal remedies at that time.

To state the conclusion as the decision ends its discussion, "whatever doesn't make any difference, doesn't matter.", quoting *McCall* v. *Finley*, 294 S.C. 1, 362 S.E.2d 26, 28 (Ct.App. 1987).

The commentators of AMERICAN JURISPRUDENCE 2D state:

> There is considerable authority to the effect that a mistake of one party known to the other affects the validity of their agreement. This is held to be true where the mistake is obvious on the face of the contract. Accordingly, where there is a mistake that on its face is so palpable as to put a person of reasonable intelligence on his guard, there is not a meeting of the minds, and consequently there can be no contract. If, however, a mistake in an agreement is not in its expression, but in some fact materially inducing it, the mere knowledge in the one party of a mistake in the other apparently does not, *in the absence of a duty to disclose* or other special circumstance, constitute a sufficient ground in equity for avoiding the agreement. Of course, a mistake of one party caused by the fraud of the other warrants relief; and the same is held to be true where the mistake is induced by an innocent misrepresentation of the other party.
> [17A AM.JUR.2D *Contracts* § 220 (2002); footnotes omitted and emphasis added.]

The Petitioners contend the second Appraisal was either false or deliberately hidden from them. The Respondent Bank either engaged in improper behavior or failed to act when it had a duty to do so. The Petitioners had a right to rely on the Bank's actions and duty, and the fact of their reliance is a matter of fact not to be decided by a summary judgment.

The same commentators cite the language of the RESTATEMENT OF CONTRACTS 2D, § 153(b) and 154 to the effect that where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in the Restatement, and the other party had reason to know of the mistake or his fault caused the mistake.

As to the Petitioners' Counterclaim for unfair and deceptive trade practices, the decision disposes of this by a citation of the rule on the adverse effect upon public interest. [Citation omitted.] The Petitioners have cited *Daisy Outdoor Advertising Co.* v. *Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996) to the effect that such impact may be evidenced by showing the Defendant's procedures create a potential for repetition of the unfair and deceptive acts. They argue that such potential has been shown. They have also invoked the language of that decision by which such proof is not limited to the two methods cited therein. The use of misleading information to effect a refinance, or the failure to disclose information that would affect the same, has a prima facie effect upon the public interest.

The unreported decision of the Court of Appeals affirming the decision of the Circuit Court was filed June 8th, 2016.

CONCLUSION

For all the reasons set out and referenced above, the Petitioners request that this Court issue its Writ of *Certiorari* and hear this appeal, and for any other relief to which the Petitioners may be entitled in law or equity.

Respectfully submitted,

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September 8, 2016

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LANCASTER COUNTY
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A North Carolina limited liability Company, ... Cross-Defendants.

CERTIFICATE OF SERVICE

I certify that on September ___, 2016, I served the Petition for Writ of *Certiorari*, the Appendix, and this Certificate of Service on the following counsel of record, parties or persons:

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Attorneys for Respondent
864 255-5417

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

September 8, 2016

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September 8, 2016

The Honorable Daniel E. Shearouse
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Columbia, SC 29211

Re: Wells Fargo Bank, N.A., Respondent,
v. Ronald P. Pappas and Camine Pappas, Appellants.
Appellate Case No. 2014-001505

Dear Mr. Shearouse:

Enclosed for filing please find the following documents in the above matter:
the original and seven (7) copies of the Petition for Writ of *Certiorari*, another original of which is filed with the Clerk of the Court of Appeals;
two (2) copies of those documents submitted as Appendix, consisting of:
Record on Appeal;
Appellants' Briefs;
Respondents' Brief;
Opinion of Court of Appeals
Petition and Memorandum for Rehearing of Respondents;
Order of Court of Appeals on Petition for Rehearing; and
our filing fee of $100.00.

By copy of this letter, I am serving the attorneys for the Respondent with a copy of the Petition, as evidenced by the Certificate of Service. Please return the additional copy of the Petition by the attached self-addressed, stamped envelope. As always, thank you and your staff for your assistance in these matters.

Sincerely yours,

John Martin Foster

jmf/
enclosures

cc: S. Sterling Laney, III
Womble Carlyle Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601
Attorneys for Respondent
864 255-5417

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, S.C. 29211

JOHN MARTIN FOSTER

Attorney at law

The Guardian Building	PO Box 106	803 324 8100
223 East Main Street Suite 520	Rock Hill SC	803 324 8109 Fax
Rock Hill South Carolina 29730	29731-6106	jmfoster@comporium.net

September 8, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29201

Re: Wells Fargo Bank, N.A., Respondent,
v. Ronald P. Pappas and Camine Pappas, Appellants.
Appellate Case No. 2014-001505

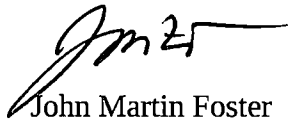
Dear Ms. Kitchings:

In accordance with Rule 242(c), S.C.A.C.R., enclosed herewith please find the original and one (1) copy of the Appellant-Petitioner's Petition for Writ of *Certiorari*, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondent with a copy of the said Petition, as evidenced by the Certificate of Service.

Please return the extra conformed copy of the Petition, with Certificate of Service, to my office in the enclosed self-addressed, stamped envelope. As always, thank you and your staff for your assistance in these matters.

Sincerely yours,



John Martin Foster

jmf/
enclosures

cc: S. Sterling Laney, III
Womble Carlyle Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601
Attorneys for Respondent
864 255-5417

John Martin Foster Attorney
223 East Main St Suite 520
Post Office Box 106
Rock Hill SC 29731-6106

TO:

THE HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF THE COURT OF APPEALS
1015 SUMTER STREET
POST OFFICE BOX 11629
COLUMBIA, S.C. 29211