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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Marvin H. Dukes, III, Master-in-Equity and Special Circuit Court Judge
Case No. 2011-CP-07-1778

Appellate Case No. 2014-002712

Benjamin Gecy,

Appellant,

vs.

South Carolina Bank & Trust, Jaime Hamner and Deborah Hamner,

Respondents,

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA BANK AND TRUST

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STATEMENT OF THE CASE

Appellant filed a Verified Complaint against the Defendants on April 15, 2011 and an Amended Complaint on or about June 14, 2011. (R. p. 035-050; R. p. 084-098). Both Defendants filed Answers and Affirmative Defenses denying the allegations of the Complaint. Hamner's also filed a Counterclaim that was extinguished in the Appellant's Federal Bankruptcy Action. (R. p. 51-76). The parties exchanged extensive written discovery and SCBT filed a Motion for Summary Judgment on March 19, 2012 and Hamners joined the motion shortly thereafter. Appellant's counsel was relieved from representing Appellant on May 8, 2012. The case was stayed on or about July 7, 2012 when Mr. Gecy filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court. After the bankruptcy proceeding was complete the case was restored to the active roster on Motion of the Appellant and the Motion for Summary Judgment was restored to the Motions Roster. Following the time the case was restored, Appellant was granted the opportunity to conduct depositions and, in fact, conducted discovery including the taking of six depositions. All parties including Appellant agreed to the Summary Judgment hearing date of February 21, 2013. During the Summary Judgment hearing, Appellant made a motion for a continuance for more time to take additional depositions. The Court denied the Motion based on the fact that the Motion for Summary Judgment hearing was heard nearly three years after the filing of the Verified Complaint and two years after the filing of the Motion for Summary Judgment. Extensive written discovery was exchanged and all parties to the action were deposed along with five fact witnesses. The Trial Court found that the hearing was not premature because defendant "had a full and fair opportunity to develop the record on this issue and failed to do so." (R. p. 007-008); also see Bayle v. South Carolina Department of Transportation., 344 S.C. 115, 128-29, 542 S.E.2d 736, 742-43 (Ct. App.

2001) (stating it was not error to grant summary judgment because no further discovery would have contributed to the resolution of the case).

In denying the request for a continuance, the Trial Court ruled, "this case was sufficiently mature and all parties have had a full and fair opportunity to develop the record and more than enough time to complete the record for purposes of summary judgment. All parties previously agreed to the hearing date of February 21, 2014. In addition, no further discovery would have contributed to the resolution of issues in the case." (R. p. 008).

FACTS

The Appellant asserted five (5) causes of actions: (1) Tortious Interference with Contract (Defendant SCBT only); (2) Breach of Contract (Hamners only); (3) Civil Conspiracy (both Defendants); (4) Negligent Misrepresentation (both Defendants); and (5) Unfair Trade Practices (SCBT only). Appellant's causes of action stem from two contracts between the Appellant and the Hamners, a married couple both active duty in the Marine Corps Band and stationed in Beaufort, SC, the first for the Hamners to purchase from Gecy a lot located at 10 Meredith Lane on Lady's Island and the second to have Gecy build them a home on that lot. The contracts were form contracts that were filled out by and provided by Appellant for the Hamners signatures. Each contract contained a financing contingency that stated in part, "[b]uyer's obligation under this agreement is contingent on Buyer obtaining said loan." (R. p. 1261; R. p. 1268). The financing contingency in the lot sale contract was not limited to a specific type of loan, amount of loan, interest rate, or loan to value ratio. The financing contingency in the home construction contract was not limited to a specific type of loan, amount of loan, or interest rate but did contain a statement that, "[b]uyer shall apply for a maximum 100% loan (loan-to-value)...." (R. p. 1268).

The Hamners applied for a 100% construction loan from SCBT that would, at the completion of construction, roll into a 100% VA loan. The contracts stated that the original closing date was March 5th, 2010 and both contracts contained a potential thirty (30) day extension to April 5th, 2010 in the event, through no fault of either party, a contingency had not been met. On both March 5th, 2010 and April 5th, 2010, the financing contingency had not been met because, at a minimum, the Appellant had not provided SCBT with a fully executed Road Maintenance Agreement (RMA) which was required by the Bank's underwriting procedures as a condition of loan approval.[1] The Hamners provided SCBT with all the requested documents and information pursuant to the financing contingency and took all actions requested by the Bank to process the loan. The Hamners were ready, willing, and able to perform on the contracts and close on the construction loan on either March 5th, 2010 or April 5th, 2010. A completed and signed Road Maintenance Agreement, as required by SCBT for loan approval, was never provided to the Bank and the contracts, by their very terms, expired on the close of business April 5, 2010.

STANDARD OF REVIEW

This case is an appeal from an order granting summary judgment and the order denying reconsideration of the order granting summary judgment with respect to each of the five causes of action set forth by the Appellant in his Complaint and First Amended and Verified Complaint. (R. p. 004-031).

[1] The Appellants causes of action are all predicated on his belief that the Road Maintenance Agreement, required by SCBT, was an unnecessary condition of loan approval and therefore had SCBT followed "proper" underwriting guidelines, the transaction would have closed. Whether a bank chooses to make a loan or requires a road maintenance agreement as a condition of funding is solely the purview of the Bank and their loan approval process. The deposition testimony offered by the Appellant of the two SCBT employees, Bruce Van Horn and Doug Jacobs, indicates clearly that the road maintenance agreement was a requirement of funding and that the loan was not approved because SCBT never received a signed road maintenance agreement. This is consistent with the SCBT's Credit Denial Letter offered by the Appellant stating, "[d]eclined due to not be able to obtain a Road Maintenance Agreement for the subject property." This is corroborated further by the affidavit of Kenneth Tootle, who was the attorney representing both the Appellant and Hamners in the potential closing of the transaction in which he states, SCBT "also made it clear that my title company could not have any exceptions to the title report."

In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judges findings. In other words, the judges findings are equivalent to a jury's findings in a law action. Townes Associates, 266 S.C. 81, 221 S.E.2d 773 (1975).

Rule 56(c) of the South Carolina Rules of Civil Procedure requires Summary Judgment to be granted if "there is no genuine issue of material fact and ... the moving party is entitled to judgment as a matter of law. S.C.R. Civ. P. 56(c). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by showing, that is pointing out to the trial court, that there is an absence of evidence to support the nonmoving party's case." Baughman v. Am.Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

The purpose of Summary Judgment is to expedite the disposition of cases not requiring the services of fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "The trial court should grant Summary Judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Turner v. Milliman, 381 S.C. 101, 108, 671 S.E.2d 636 640 (Ct. App. 2009) (citing S.C.R. Civ. P. 56(c) and Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003).

LEGAL ANALYSIS

APPELLATE ISSUES WERE NOT PRESERVED AND WAIVED

Issue Preservation: The Two Issue Rule

This court should affirm the circuit court's grant of summary judgment based on the two-issue rule. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm the judgement below in it's entirety unless the appellant appeals all grounds because the unappealed grounds becomes the law of the case. Generally, when the decision of the lower court is based upon more than one ground, the appellate court will automatically affirm the lower court decision if the appellant fails to appeal all of the grounds. Buckner v. Preferred Mut. Ins. Co., 255 S.C 159, 177 S.E.2d 544 (1970), State v. Sampson, 317 S.C. 423, 454 S.E. 2d 721 (Ct.App. 1995). An issue that is not appealed is deemed abandoned, and the lower court's ruling becomes the law of the case. Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism, 325 S.C. 97, 480 S.E.2d 81 (1997).

The Appellant asserted 5 causes of actions: (1) Tortuous Interference with Contract; (2) Breach of Contract; (3) Civil Conspiracy; (4) Negligent Misrepresentation; and (5) Unfair Trade Practices. (R. p. 084-098). The Trial Court granted Summary Judgment on all grounds and all causes of action. Appellant appealed only 3 grounds or causes of actions: (1) Tortuous Interference with Contract; (2) Breach of contract; and (3) Negligent Misrepresentation. Appellant intentionally omitted appealing the grant of summary judgment on the grounds of Civil Conspiracy and UFTPA.

Appellant's arguments are unreviewable. "Under the two issue rule where a decision is based on one or more than one ground, the appellate court will affirm unless appellant appeals all grounds because the unappealed ground will become the law of the case." Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 479, 722 S.E.2d 213 (2011), Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (citing Anderson v. Short, 323 S.C.522, 525, 476 S.E.2d 475, 477 (1996)) see also First Union Nat'l Bank of S.C. v.Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378

(Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

The Appellant did not appeal all of the grounds that the Judgment was based, namely, he did not challenge the Trial Courts determination that Respondents were entitled to Summary Judgment on the causes of actions for Civil Conspiracy and UFTPA based on the finding that appellant "**was a person without privity with the bank (SCBT) and to which no duty was owed under the Hamner's application for financing.**" (Emphasis added). (R. p. 026). Thus under the Two-Issue Rule, this reviewing Court should decline to address the merits of the Appellant's appeal in total.

Claims on the Merits

The Trial Court properly Denied Appellant's Request For A Continuance

The Appellant requested a continuance from the hearing of the Summary Judgment Motion claiming discovery was not complete. The Court properly noted that Appellant filed a Verified Complaint against the Defendants on April 15, 2010. The parties exchanged extensive written discovery and SCBT filed a Motion for Summary Judgment on March 19, 2012 and Hamners joined the motion shortly thereafter. Appellant's counsel was relieved from representing Appellant on May 8, 2012. The case was stayed on or about July 7, 2012 when Mr. Gecy filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court. After the bankruptcy proceeding was complete this case was restored to the active roster on Motion of the Appellant and the Motion for Summary Judgment was restored to the Motions Roster. Since the time the case was restored, Appellant requested, and was granted the opportunity to conduct depositions, and in fact, conducted additional discovery including the taking of five depositions. During a scheduling conference, all parties including Appellant agreed to the Summary Judgment hearing date of February 21, 2013.

During the Summary Judgment hearing, Appellant requested more time to take two (2) additional depositions.

The trial court properly ruled,

> "[T]he Motion for Summary Judgment was heard nearly three years after the filing of the Verified Complaint and two years after the filing of the Motion for Summary Judgment. Extensive written discovery was exchanged and all parties to the action have been deposed along with five fact witnesses. Generally, it is not premature for the trial court to grant summary judgment after all parties have been deposed because the litigants have had a full and fair opportunity to develop the record of the case. See George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 594, 545 S.E. 2d 500, 506 (2001), finding summary judgment was not premature because defendant "had a full and fair opportunity to develop the record on this issue and failed to do so."); also, see Bayle v. South Carolina Department of Transportation., 344 S.C. 115, 128-29, 542 S.E.2d 736, 742-43 (Ct. App. 2001) (stating it was not error to grant summary judgment because no further discovery would have contributed to the resolution of the case).
>
> This case is sufficiently mature and all parties have had a full and fair opportunity to develop the record and more than enough time to complete the record for purposes of summary judgment. All parties previously agreed to the hearing date of February 21, 2014. The Appellant was questioned by the Court extensively concerning the two depositions he wished to take that spawned the Motion for Continuance and after much discussion, and for reasons stated within, no further discovery would contribute to the resolution of issues in the case."

(R. p. 007-008)

Breach of Contract

The Appellant states in his pleadings that the "Hamners failed to perform and thereby unjustifiably breached the Agreement to Buy and Sell Real Estate for 10 Meredith Lane." The Hamners ability to perform was predicated upon obtaining financing of a construction loan from SCBT. It is well settled law in South Carolina that a failure of a financing contingency clause will

excuse the buyer from liability under the contract with the seller. *See*, Storen v. Meadors, 295 S.C. 438, 440, 369 S.E.2d 651, 652 (Ct. App. 1988) and Gregory v. Taylor, 042610 SCCA, 2010-UP-252. The Hamners made a good faith effort to obtain financing and as part of the process and requirements under the financing clause, provided the Bank with all documents and information necessary to obtain financing. In addition, the record is clear that the Hamners assisted the Appellant in attempting to get the required signatures on the Road Maintenance Agreement which was a SCBT requirement for loan approval. (R. p. 008).

The Appellant argues that SCBT's requirement of a Road Maintenance Agreement was an unnecessary underwriting requirement and that the bank should have approved the Hamners loan without it and allowed the closing to go through prior to the April 5th, 2010 deadline. Even if arguably the Road Maintenance Agreement requirement was ultimately found to be unnecessary, the Hamners have no control over the SCBT's underwriting guidelines and the Bank issued a loan denial to the Hamners based on a lack of a fully executed Road Maintenance Agreement. The Court questioned the Appellant extensively as to whether or not he had any evidence that SCBT had approved the loan and the Hamners had refused to close on the approved loan. The Appellant agreed the loan was never approved but again reiterated that it wasn't approved because SCBT made the Road Maintenance Agreement a condition of the loan approval which the Appellant believes is an unnecessary condition to financing approval. (R. p. 009)

The trail court properly held, "[T]here is no genuine issue and the parties all agree that the Hamner loan to purchase the property and build the home was never approved by SCBT either by the original closing date of March 5th, 2010 or by the extension period of April 5th, 2010. Consequently, the financing contingency clauses of the Appellant/Hamner contracts operate to

insulate the Hamners from all contractual liability under the contracts and therefore Appellant's Breach of Contract claim against the Hamners is dismissed with prejudice. (R. p. 009)

Tortious Interference with Contract/No Duty Owed to Appellant

The Supreme Court in Kerr v. Branch Banking and Trust Company, 408 S.C. 328, 759 S.E.2d 724 (2014), affirmed the trial court's decision to grant motions to dismiss and held that the bank did not owe a duty of care to non- customer investors of a company. The Appellant's in Kerr attempted to frame their claims as alleged misrepresentations made to them in their capacity as investors of a company that had a relationship with the bank. The Court aptly noted that, "at it's core, this case resolves around contractual relationships between the bank, BB & T and it's customer, Skywaves Company.... [and] our inquiry here is confined to whether the Appellants – as investors directors, officers, and shareholders of Company-- may maintain a lawsuit [for negligent misrepresentation, fraudulent inducement, negligence, and Unfair Trade Practices Act] ... for what amounts to a breach of contract between Company and BB & T." That Court stated, "[W]e find there is no basis in the law for a finding that the bank BB & T owed a duty to a non-customer investors ..." Id.

Accordingly, the Trial Court properly applied the ruling in Kerr to the instant matter and found as a matter of law "that there is no basis in law to allow Appellant (Gecy), to maintain a lawsuit for the stated claims, as a non-party to the Hamners application to the bank for mortgage financing. (R. p. 135, lines 6-10; R. p. 026) Further more as noted above, it is the law of the case that the unappealed Trial Court ruling that Respondents were entitled to Summary Judgment based on the finding that appellant "**was a person without privity with the bank (SCBT) and to which no duty was owed under the Hamner's application for financing.**" (R. p. 026)

Negligent Misrepresentation

"Notwithstanding the complete bar to Appellant's claims as required by Kerr and by the Two Issue Rule, Appellant's allegations are also insufficient to state a claim for negligent misrepresentation, negligence, conspiracy, interference with contract or lender liability. Appellant's claim for negligent misrepresentation fail as a matter of law because Appellant has not alleged a legally viable false statement or any fact that would tend to create a right for them to rely on any alleged misrepresentation by Defendants. Appellant's only claim appears to be that the lender's underwriting requirement for an RMA was not proper and should not have been required as a condition of a loan. In this case, there is no false statement claimed. Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); Robertson v. First Union Nat'l Bank, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001); West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

A negligent misrepresentation case requires that there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. See Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 526–27, 455 S.E.2d 183, 187 (Ct. App. 1995) (finding statements by equipment seller concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud). More specifically, the alleged false representation must be of a present or pre-existing fact. See Spires v. Acceleration Nat'l Ins. Co., 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on

unfulfilled promises or statements as to future events. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation be false at the time it is made. See GSM Dealer Servs., Inc. v. Chrysler Corp., 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law).

Appellant at most has only alluded to and alleged that "[d]efendants made a false statement to Appellant regarding their intention to close the loan and/or their reasons for failing to close the loan. (See Paragraph 74 Amended Complaint). (R. p. 095). Even if taken as true, such a representation does not relate to present or pre-existing fact cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation.

No Right to Rely

In addition to showing that a false representation was made, an Appellant must also show that he had a right to rely on such representation in order to pursue a claim for either negligent misrepresentation or fraudulent misrepresentation. See GSM Dealer Servs., Inc. v. Chrysler Corp., 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). Appellant did not have a right to rely on any statements because Appellant did not have a fiduciary relationship with either defendant. When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, as is the case here, there is no right to rely. Lands Inn, Inc., supra. (citing Florentine Corp. v. PEDA I., Inc., 339 S.E.2d 112, 114 (S.C. 1985)); see also First Savings Bank, FSB v. Capital Investors, Inc., 450 S.E.2d 83 (Ct. App. 1994), rev'd in part on other grounds, 459 S.E.2d 307 (S.C. 1995).

Appellant makes no allegations as to any fiduciary relationship between SCBT and them. Instead, as the bulk of Appellant's allegations reflect, the relationship at issue is the one between

SCBT and Hamners and Appellant and Hamners but not Appellant and SCBT. Appellant has not alleged any specific facts that would create a fiduciary relationship between Appellant and SCBT. Accordingly, Appellant has not sufficiently pled and cannot establish that he had a right to rely on any alleged false statements by SCBT.

Additionally, Appellant cannot establish a claim for negligent or intentional lender liability against SCBT. To prove such a claim, Appellant must establish a duty of care, a breach of that duty and damages proximately caused by the breach. McKnight v. South Carolina Dept. of Corrections, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, SCBT had no duty to Appellant. Appellant alleges that "SCBT owed Appellant a duty of care because SCBT possessed expertise or special knowledge that would ordinarily make it reasonable for Appellant to rely on SCBT and because SCBT had pecuniary interest in the transaction and [SCBT] breached its duty of by failing to exercise care." (See paragraph 77 of the Amended Complaint). (R. p. 095). However, Appellant cannot manufacture an alleged duty on behalf of SCBT. Instead, "duty is generally defined as the obligation to conform to a particular standard of conduct toward another." Murray v. Bank of America, N.A., 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." Id. "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." Id. In this case, SCBT did not have a duty to Appellant as the Hamners were the applicants for financing and Appellant was not. SCBT did not owe any duty to Appellant via Hamners application for financing and, therefore, Appellant cannot establish a claim for negligence or lender liability. Lastly, it is the unappealed ruling of the Trial Court that appellant "**was a person without privity with the bank (SCBT) and to which no duty was owed under the Hamner's application for financing.**" (R. p. 026)

Respondent notes that Appellant has made some arguments citing Restatement 552(2)(b) as cited in Windburn v. Insurance Company of North America, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985) to attempt to infer some plausible claim against Respondent SCBT. That case involved the adjustment of boat repairs and has no application to this case at bar. First and foremost, Restatement 552(2)(b) has no application to the facts of this case whereas the South Carolina Supreme Court has clearly stated in the 2014 decision in Kerr (supra) that a lender such as SCBT in this case has no duty whatsoever to a non-customer non-party to a financing application as was the case between the Hamners and SCBT. In addition, the Appellant only raised the Restatement 552 argument for the first time during his Motion for Reconsideration. A party may not use a post trial motion to raise an issue that could have been raised at trial. Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995).

Civil Conspiracy and SCUTPA

Although Appellant did not appeal the Trial Court's grant of Summary Judgment on the grounds of Civil Conspiracy and Unfair Trade Practices, it important to note that the trial court specifically ruled within the analysis of these causes of actions that, "Appellant, as a person without privity with the bank and to which no duty is owned under Hamners application for financing...." (R. p. 030). Accordingly, it is also the law of the case that the bank owned no duty to the Appellant for any cause of action arising from the Hamners application for mortgage financing with SCBT.

CONCLUSION

A review of the relevant documents, trial transcript and legal authorities in this case leads to the inescapable conclusion that the issues presented in Appellant's initial brief were not properly preserved for consideration by the Appellate Court. The law of this State is clear that issues must

be properly preserved in order to be considered on appeal. This basic principal continues to be reaffirmed by South Carolina's appellate courts. It is equally clear as to how issues must be preserved. These procedures were not followed by Appellant and the appeal is accordingly fatally deficient.

Notwithstanding failure to preserve the issues appealed, the record demonstrates the Trail Court properly Granted Summary Judgement to Respondents as to all causes of actions claimed.

For the foregoing reasons, Respondent requests this court to affirm the Trial Court's Order Granting Summary Judgment and Order Denying the Motion for Reconsideration and asks the court to affirm the decisions below for any ground appearing in the record, as provided by Rule 220(c); Rule 207(b)(2), SCACR.

Respectfully submitted,

HARVEY & BATTEY, P. A.

By: Thomas A. Holloway

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March 31, 2016

CERTIFICATE OF COUNSEL

Respondent, South Carolina Bank & Trust, by and through its undersigned attorney, certifies that the Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,
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Beaufort, South Carolina
March 31, 2016

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PROOF OF SERVICE

I certify that I have served the ***FINAL BRIEF OF RESPONDENT, SOUTH CAROLINA BANK & TRUST*** in the above matter upon the following counsel of record:

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