THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Appellate Case No. 2014-001487

Linda Gibson, formerly known as Linda Ann Avinger
Individually and as Trustee of the Paul William Gibson
Family Trust, and Heritage Seven, LLC,

Respondent,

v.

Ameris Bank

Appellant

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SC Court of Appeals

PETITION FOR REHEARING

Linda Gibson, formerly known as Linda Ann Avinger Individually and as Trustee of the Paul William Gibson Family Trust, and Heritage Seven, LLC, (hereinafter "Respondents") respectfully petition the Court for rehearing pursuant to Rule 221(a), SCACR of Opinion No. 5488 (S.C.Ct.App. filed May 24, 2017) (Shearouse Adv. Sh. No. 21 at 34). This petition is submitted on the grounds that this Court addressed a legal argument that was not preserved by Appellant for review, as well as overlooking or misapprehending evidence within the record under the properly applicable "any evidence" standard of review for the factual findings of the trial court. For the reasons set forth below, Respondent respectfully asks this Court to grant this Petition for Rehearing and affirm the judgment in favor of Respondent against Appellant in the trial court below.

OVERLOOKED OR MISAPPREHENDED MATTERS

A petition for rehearing shall "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. Accordingly, Respondent respectfully submits that in reversing the decision of the Master-in-Equity, this Court overlooked or misapprehended certain material matters as follows:

I. AGENCY WAS NOT PRESERVED AS AN ISSUE FOR REVIEW.

The Law/Analysis portion of Opinion No. 5488 begins with the statement that Appellant had challenged the agency of Zerbst, which is respectfully submitted as a misapprehension of the law and record before this Court. Op. No. 5488, p. 38. As the Court then immediately declares, with legal citation in support, generally agency is a question of fact. *Id.* at p. 39 (citing *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000)). Yet as the footnote to that initial sentence in the opinion acknowledges, "Appellants asserted during oral argument that there were no factual issues presented to this court for our review." The footnote also acknowledges "agency" was not mentioned or addressed by Appellant's statement of issues on appeal, even though under Rule 208(b)(1)(B), SCACR "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." That rule also states that with respect to the issues on appeal, "Broad general statements may be disregarded by the appellate court." The rules therefore directly require pointed reference to all substantive issues to be considered, neither allowing meaningless, uninformatively broad statements, nor allowing for the wholesale omission as occurred in this matter.

As to the issues articulated in this matter, Appellant instead referenced a dispute as to whether Ameris could owe a fiduciary duty to a borrower, and was similarly focused at oral argument on that issue after the written briefing in this matter. That written briefing matched the

focus of Appellant in its statement of issues and discussion at oral argument, as in the full 50 pages constituting Appellant's brief, a reference to a dispute over agency is merely referenced in two footnotes. In the 23 pages of Appellant's reply brief, agency is referenced in just a few conclusory sentences.

Far from adequately raising such an issue and preserving it pursuant to Rule 208, SCACR and associated caselaw, those minor inclusions in the briefs did not suffice to raise the issue for purposes of reversing the trial judge's factual findings. The incidental references, coupled with failure to include in the statement of issues on appeal, reinforces Appellant's abandonment of those issues as substantive, preserved grounds upon which this Court should engage in a review to justify reversal of the trial court's final order.

II. EVIDENCE WAS PRESENT WITHIN THE RECORD TO SUPPORT THE UNDERLYING DETERMINATION OF AGENCY.

Trial of Respondent's counterclaims against Ameris was held over the course of three days, during which extensive evidence was introduced, including three days' worth of trial testimony, approximately 200 exhibits, and deposition testimony of several witnesses. [R. p. 1]. The trial court eventually produced a final order that contained a significant number of findings of facts supporting his judgment. Accordingly, despite addressing an issue that was not preserved as discussed *supra*, Respondent respectfully submits that the Court overlooked evidence within the record that surpasses the deferential "any evidence" threshold upon which the Court of Appeals should have affirmed, not reversed, the proceedings under review.

In doing so, the Court overlooks extensive evidence establishing the relevant players in the inducement of the loan taken out by Gibson as sufficiently associated with Ameris to hold them accountable for the actions of their agents. To wit:

1. The Trial court correctly concluded that considerable and credible insight into the relationship between Gibson, Villavicencio, Zerbst and Lanier in terms of the fiduciary relationship between those parties could be gleaned from an earlier shopping center transaction, even though it was not directly the basis for the claims tried in this case. [R. p. 4, ¶ 1].

2. In the shopping center transaction, Zerbst and Lanier assisted and advised Gibson, with Lanier acting as credit analyst and Zerbst his superior. [R. p. 186, line 18 – p. 187, line 5].

3. They structured the transaction to involve Gibson placing a second mortgage on a home she owned to produce cash for the necessary down payment, resulting in a 100% financed transaction. [R. p. 234, lines 12-24, R. p. 802]. This matched the later apartment complex loan structuring. [R. p. 235, lines 8-23; R. p. 832].

4. Lanier left First Reliance on or about October 9-10, 2007, just a week after Zerbst's departure, and began work at Ameris on October 11, 2007. [R. p. 552, lines 3-11].

5. Shortly after Lanier began to work at Ameris on October 11, 2007 (within 5 to 10 days) he received a phone call from his former superior, Zerbst. [R. p. 494, lines 10-12; R. p. 559, lines 24 – p. 560, line 1]. Zerbst told Lanier that he was sending Gibson to him to process the loan application for the apartments through Ameris. [R. 495-496]. Lanier was aware that the loan was initially being processed at Reliance when he and Zerbst were employed there. [R. p. 552, lines 12-17]. At that point, Zerbst became an agent of Ameris, and the trial judge concluded accordingly.

6. Ameris' actions confirmed that they were allowing Zerbst to act as their agent and handle the matter, despite no formal employment until months later. That includes Zerbst not

merely sending Gibson over to Ameris, but one day later personally arranged a strange meeting between he, Lanier and Villavicencio. Lanier eventually picked up Zerbst from a grocery store and travelled together to the apartment complex. [R. pp. 495-498]. Zerbst had with him a package of documents relating to Gibson's loan dealings with Reliance, but did not deliver them until making an elaborate show of delivering the package to Villavicencio. [R. p. 497, line 21 – p. 498, line 14]. Villavicencio then in turn told Lanier that he wanted Ameris to handle this transaction. *Id.* It was solely because of Lanier's direct agency with Ameris, and Zerbst bringing the loan to Ameris, that Ameris was able to foist the loan upon Gibson.

7. Lanier never questioned the package transfer, even though he thought it seemed "staged." [R. p. 498, lines 9-14]. Instead Lanier, the Ameris employee, simply took the package and dutifully used it as a guide for the loan application and the rental cash flow analysis at Ameris, continuing to work under the directive of Zerbst despite no formal employment of Zerbst. Lanier admitted that the loan application he put together at Ameris was very similar to the one structured by Zerbst at Reliance. [R. p. 501, lines 15-17]. Lanier is indisputably Ameris' agent.

8. Ameris acted so decisively in manifest reliance upon its agent Zerbst (and its agent Lanier) that the $2.8 million dollar loan committee application dated October 22, 2007 was approved the very next day by John Hipp, state president for Ameris. [R. p. 501, lines 1-2; 8-13].

9. Ameris therefore had employees taking instruction from Zerbst and Lanier, and was rubber-stamping multi-million dollar loan applications from Zerbst, via Lanier, ample

evidence from which it could be concluded that they had endorsed and ratified his actions to the extent necessary to establish Zerbst as its agent.

10. As noted by the trial court, Zerbst had a non-compete agreement with Reliance that prevented his immediate formal transition to Ameris after his termination from Reliance, which he sought to negotiate away in exchange for his promises not to solicit existing customers of Reliance at any other banking institution. [R. p. 811].

11. During this time of negotiations with Reliance, Zerbst's email production shows he was actively corresponding with Mr. Bogan of Ameris who was keeping the bank's attorney informed. [R. p. 814]. Zerbst used Gibson as the carrot to dangle before Ameris to hire him, and to work with him, despite pretending that the non-compete was being honored.

12. Ameris' employee Lanier testified that Zerbst maintained an office in the Ameris building on Archdale Street and made calls and checked emails during the non-compete period. [R. p. 763, lines 3-13]. Ameris actively assisted Zerbst in procuring Gibson as a borrower at Ameris.

13. Reliance ultimately ended up engaged in litigation with Zerbst and Ameris regarding alleged violation of the non-compete agreement. [R. p. 431, lines 1-7].

14. A very reasonable inference made just on the existence of that litigation alone, even without the further evidence regarding coordination by and between Zerbst and Ameris presented in this action, would be that just such solicitation (including Gibson) occurred at the direction of Zerbst in coordination with Ameris' willing and purposeful ratification and encouragement.

HWW

15. Just because Ameris never exerted directional control over Zerbst does not mean it did not have such control, even without formal employment, as Zerbst acknowledged that bringing new business in would be advantageous for someone looking for employment in the banking industry. [R. p. 430, lines 22-25]. Zerbst therefore surely would have followed the will of Ameris, with whom he was already acting in concert to the extent he was allowed by his non-compete (and likely beyond).

16. By negotiating to hire Zerbst while Zerbst (with Lanier's active assistance) actively offered up Gibson as a representative customer that Zerbst ostensibly would continue to produce to Ameris, Ameris ratified the actions of Zerbst when it foisted the loan upon Gibson.

Thus, Respondents respectfully submit that the determination that "We find no evidence to support the master's finding that Zerbst was Ameris' agent prior to January 11, 2008" was based on a misapprehension of the relevant record available for the Court's review.

III. EVIDENCE EXISTS TO ESTABLISH THAT AMERIS DID KNOWINGLY PARTICIPATE IN THE BREACH OF FIDUCIARY DUTY.

Respondent further submits that the determination that the record lacks "any evidence" of knowing participation in the breach of fiduciary duty, an element of Respondents claim for aiding and abetting a breach of fiduciary duty, was also the product of evidence being overlooked and misapplication of the law.

First, the cited authority requires "knowing participation" in the breach for an actionable claim, but Opinion No. 5488 repeated refers to the supposed absence of any "actual knowledge" on the part of Ameris employees. It is respectfully submitted that "actual knowledge" is a narrower category of "knowing" than that which could sustain a viable cause of action. Limitation to

"actual" precludes the possibility of "imputed" or "constructive" knowledge, neither of which are deemed insufficient in the cited authority listed in the opinion.

Given the reckless manner in which Ameris and its employees conducted themselves before, during and after the transaction at issue, there is ample evidence upon which the trial court appropriately used to justify imputed knowledge. Ameris should not be rewarded for the willful blinders employed, and incompetence displayed, by its employees from low level credit analyst all the way up to a president to defeat any claim on the basis of lack of knowledge.

Secondly, even if limited to "actual knowledge," there still exists evidence within the record that is sufficient to sustain the trial court's finding that Ameris should be found liable for aiding and abetting a breach of fiduciary duty by knowingly participating in the same. To wit:

1. Lanier, an undisputed direct agent of Ameris, visited the apartment several times during Gibson's time away for health reasons and spoke with Gibson about those visits. [R. p. 219, lines 9-25; p. 532, line 22 – p. 533, line 5].

2. When the unsophisticated Gibson was first able to view the progress of the work, even she immediately realized that everything was completely *opposite* to what she had been told, and therefore at odds with duties owed to her by all involved. [R. p. 219, lines 20-25].

3. Ameris made advances without notice to, let alone approval by, Gibson. [R. pp. 797, 798, 799].

4. Ameris failed to inspect the project to ensure the improvements and draw requests were consistent with the project costs. [R. p. 799; R. pp. 478-491].

5. Ameris never verified the contractor on the project and did not require a contract or AIA document or any other information in support of work being completed. [R. p. 799; R. p. 510, lines 1-8].

6. There are no disbursement requests in the Ameris file as required by the loan agreement. Ameris' own records reflect that it paid $290,000 in construction draws that are not supported by invoices. [R. p. 799; R. p. 510].

7. Ameris' records do include a memorandum from May 2009 placing Lanier on probation for "lack of judgment" for his actions in relation to handling of the renovations. [R. p. 799].

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully ask this Court to grant this Petition for Rehearing and issue a substituted opinion affirming the judgment in favor of Respondents by the trial court below.

Respectfully submitted,

Desa Ballard
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June 7, 2017

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

I, Mara Ballard, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on June 8, 2017, I served a copy of the **Petition for Rehearing** in the above-captioned case on the following individual by electronic mail and by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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June 8, 2017

Via Hand-Delivery
Honorable Jenny Abbott Kitchings
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RECEIVED
JUN 08 2017
SC Court of Appeals

Re: *Linda Gibson v. Ameris Bank*
Appellate Case No: 2014-001487

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of the **Petition for Rehearing and Certificate of Service** in the above-referenced matter. Also enclosed is our check for the filing fee. After both pleadings have been filed, please return a set of clocked copies to our office by the courier.

By copy of this letter to opposing counsel, I am notifying them of my communication with the Court and serving a copy of the enclosures as evidenced by the Proof of Service. Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Harvey M. Watson III
harvey@desaballard.com

Enclosures

cc: *Via U.S. Mail and Email*
Robert E. Stepp, Esquire
Tina Cundari, Esquire
Benjamin R. Gooding, Esquire