

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**RECEIVED**

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

JUN 19 2017

**SC Court of Appeals**

Robert E. Watson, Master-in-Equity

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Appellate Case No. 2014-001487

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

Respondents,

v.

Ameris Bank,

Appellant.

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**RETURN TO PETITION FOR REHEARING**

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Robert E. Stepp (S.C. Bar #5335)  
Tina Cundari (S.C. Bar #71951)  
Benjamin R. Gooding (S.C. Bar #100620)  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
803-929-1400  
[rstepp@sowellgray.com](mailto:rstepp@sowellgray.com)  
[tcundari@sowellgray.com](mailto:tcundari@sowellgray.com)  
[bgooding@sowellgray.com](mailto:bgooding@sowellgray.com)

*Attorneys for Appellant*

## ARGUMENT

The petition for rehearing should be denied. The Court did not misapprehend or overlook any law or evidence when it reversed the master's order. The Court correctly found that Karl Zerbst was not Ameris Bank's agent in October 2007 and therefore Ameris Bank could not be liable as a matter of law for breach of fiduciary duty and negligent misrepresentation. The Court was also correct in finding that there was no evidence in the record that Ameris Bank knowingly participated in a breach of fiduciary duty by Rolando Villavicencio.

Accordingly, the Court correctly reversed the master's order, and the petition for rehearing should be denied.

**1. The Court correctly considered the issue of whether Zerbst was Ameris's agent.**

Contrary to what Respondents' contend, the issue of whether Karl Zerbst was Ameris's agent during the relevant time period was preserved for review and the Court properly addressed it. Ameris Bank has argued throughout this case, including on appeal, that Zerbst was not its agent in October 2007 when the loan was made to Respondents. The issue was raised to and ruled upon by the trial court, and was argued before this Court. Accordingly, the Court had full authority to consider the issue and properly reversed the master's decision on the breach of fiduciary duty and negligent misrepresentation causes of action based on the lack of agency.

**a. The issue was preserved for review.**

To begin, the issue of whether Karl Zerbst was Ameris's agent in October 2007 was preserved for review.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *E.g.*, *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Issue preservation rules

are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011); *see also I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.”).

Here, the issue of whether Zerbst was Ameris’s agent in October 2007 was raised and ruled upon by the trial court. The issue has been part of this case since its inception. In the answer to the complaint, Ameris asserted lack of agency as an affirmative defense. (R. p. 105.) At trial, Ameris argued throughout that Zerbst was not its agent. (R. pp. 159, 169, 243-48, 401-02.) In the final order, the master spent ten pages addressing and deciding the issue. (R. pp. 9-19.) Ameris raised the issue again in the motion to reconsider, which the master denied. (R. pp. 111, 120, 126-27.)

Because the issue of whether Zerbst was Ameris’s agent during the relevant time period was raised to and ruled upon by the trial court, the issue was preserved for appellate review. As evidenced by the final judgment in this case, the master had a full and fair opportunity to consider and rule on the issue. Accordingly, the Court properly considered the issue on appeal.

**b. The issue was before the Court.**

In addition to being preserved for review, the agency issue was before the Court, and the Court properly considered it.

“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.” Rule 208(b)(1)(B), SCACR. However, “[w]hen an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it

is reasonably clear from an appellant's arguments." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011); see also Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 75 (3d ed. 2016) (same); *Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) (finding the statement of issue, when read in conjunction with the argument, sufficiently raised the issue to the court); *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) (finding that while neither party specifically argued that a motion was untimely, the "timeliness issue was reasonably clear from the State's brief before the court of appeals, [and] the court of appeals was at liberty to rule on the objection").

Here, Ameris argued throughout the briefs filed with this Court that Karl Zerbst was not Ameris's agent in October 2007. To begin, on page 7 of its opening brief, Ameris stated as follows:

Ameris Bank has maintained throughout this case that Zerbst was not an agent of the bank in October 2007; that the bank did nothing to represent to Gibson that Zerbst was authorized to act on the bank's behalf; and that as a matter of law, Zerbst cannot create an agency relationship through his conduct alone. See *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005) ("An agency relationship may not be established solely by the declarations and conduct of an alleged agent."). See also *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 641-44, 598 S.E.2d 717, 721-22 (Ct. App. 2004) (holding that there is no relationship as a matter of law when the principal has not made any representations to a third party concerning whether someone is an agent). The master's finding to the contrary is incorrect as a matter of law.

(Br. of App. p. 7 n.7.)

Additionally, Ameris made the following arguments in its opening and reply briefs:

- "Zerbst was not employed by Ameris Bank or any bank at this time. Although Zerbst had spoken to Ameris Bank about working there, he did not become an employee of the bank until January 11, 2008." (Br. of App. p. 6 n.6.)

- “Zerbst was not even employed at the time [he made statements to Gibson regarding the viability of the project].” (Br. of App. p. 22.)
- “As noted above, Zerbst did not join Ameris Bank until January 8, 2011, and Ameris maintains that Zerbst was not acting as an agent for Ameris Bank when the conversation with Gibson took place.” (Br. of App. p. 22 n.12.)
- “Respondents cannot show that Karl Zerbst was acting as an agent of Ameris Bank prior to the loan closing. . . . Zerbst did not become an employee of Ameris Bank until January 11, 2008. There is no evidence in the record showing that Ameris Bank did anything prior to the loan closing to represent to Gibson that Zerbst was its agent.” (Reply Br. of App. p. 3) (citations omitted).
- “Respondents cannot show that Karl Zerbst was acting as an agent of Ameris Bank prior to the loan closing. During the entire period of time that Gibson says she met with or talked to Zerbst about whether she should purchase the apartments, Zerbst either worked for First Reliance Bank or he was unemployed. (R. pp. 230, 249, 250.) Zerbst did not become an employee of Ameris Bank until January 11, 2008. (R. pp. 422-23, 1151-1217.) There is no evidence in the record showing that Ameris Bank did anything prior to the loan closing to represent to Gibson that Zerbst was its agent.” (Reply Br. of App. p. 3.)
- “As a matter of law, an agency relationship cannot be created by the conduct of the agent alone. *See Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005) (“An agency relationship may not be established solely by the declarations and conduct of an alleged agent.”); *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 641-44, 598 S.E.2d 717, 721-22 (Ct. App. 2004) (holding that there is no relationship as a matter of law when the principal has not made any representations to a third party concerning whether someone is an agent). This is fatal to Respondents’ argument that Ameris Bank is liable for statements made by Zerbst prior to the loan closing.” (Reply Br. of App. pp. 3-4.)
- “Third, even Zerbst (*who was not Ameris Bank’s agent at the time*) did not know the apartment complex was not a sound investment.” (Reply Br. of App. p. 12.) (emphasis added).

Further, during the oral argument, counsel for Ameris Bank argued at the outset, in response to the second question from the Court, as follows:

[W]e strongly deny that [Zerbst] was our agent at the time. He didn’t even begin working for the bank until January, . . . and as a matter of law, unless there’s evidence that the principal, which in this case would be the bank, made a representation to the borrower,

to Mrs. Gibson, that he was the bank's agent, there can be no agency relationship as a matter of law, so that is an error.

Audiotape: Oral Argument held Feb. 17, 2017, beginning at 13:30 (on file with the Court).

Later, when addressing a question about the transfer of the loan application documents from Karl Zerbst to Ameris through Rolando Villavicencio, in the parking lot of the apartment complex, counsel for Ameris argued as follows:

[A]s a matter of law, that doesn't create an agency relationship. [Zerbst] can go out and do whatever he wants to try to curry favor with a bank that he thinks may be his potential employer one day. Maybe he wants to show the bank that he's able to bring in business. Who knows? But there's no evidence that the bank authorized him to do that.

...

Mr. Zerbst was trying to avoid his non-compete and thought he was being clever, but again that doesn't put the bank on the hook for this project.

*Id.* beginning at 17:00 and 43:25.

Given the numerous references to the agency issue in the briefs, and the argument made by counsel during oral argument, the issue of whether Zerbst was Ameris's agent was before the Court.<sup>1</sup> Ameris has consistently maintained throughout this case that Zerbst was not its agent, that Ameris did not have control over him until he began working for the bank in January 2008, and that the master erred on this issue.

Contrary to what Respondents contend, the fact that Ameris chose to frame the issues on appeal through the lens of the three causes of action alleged in the complaint does not mean that Ameris abandoned the agency issue. Ameris's argument that Zerbst was not its agent was

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<sup>1</sup> In footnote 2 on page 5 of the Court's opinion, the Court states, "Appellants asserted during oral argument that there were no factual issues presented to this court for our review." But according to the audio recording of the oral argument, counsel for *Respondents* made this assertion.

present throughout the briefs, and was specifically embedded within the analysis of the first two issues on appeal. In other words, Ameris's argument that the master erred in concluding that Ameris was liable for breach of fiduciary and negligent misrepresentation necessarily included the argument that Zerbst's actions could not be attributed to the bank because he was not an agent for the bank at the time the actions took place. If Zerbst was not Ameris's agent during the relevant time period, then the first two causes of action failed as a matter of law due to the lack of actionable conduct by the bank or its employees.

Because Ameris contested the master's finding that Zerbst was Ameris's agent in October 2007, and this argument appeared throughout the briefs filed with this Court, the Court properly considered and decided the issue.

**2. The Court correctly determined Zerbst was not Ameris's agent in October 2007.**

In addition to properly addressing the agency issue, the Court correctly decided the issue.

To establish an agency relationship, the relying party must show "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). "The test to determine agency is whether or not the purported principal has the *right to control* the conduct of his alleged agent." *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982).

"An agency may not be established solely by the declarations and conduct of an alleged agent." *Cowburn*, 366 S.C. at 39, 619 S.E.2d at 448. Agency must be established through "representations made by the *principal* to the third party and reliance by the third party on those representations." *Young v. S.C. Dept. of Disabilities & Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 499 (2007) (emphasis added); *see also Frasier v. Palmetto Homes of Florence*, 323

S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996) (explaining that the relying party must show that “he reasonably relied on the indicia of authority *originated by the principal* and such reliance must have effected a change of position by the third party”). When the principal has not made any representations to a third party concerning whether someone is an agent, there is no agency relationship as a matter of law. See *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 641-44, 598 S.E.2d 717, 721-22 (Ct. App. 2004) (affirming summary judgment and finding there is no relationship as a matter of law when the principal has not made any representations to a third party concerning whether someone is an agent).

Here, none of the evidence identified by Respondents in the petition for rehearing gives rise to an agency relationship between Zerbst and Ameris in October 2007. Respondents have failed to point to any conduct or statements made by Ameris to Linda Gibson during this time period concerning whether Zerbst was its agent. All conduct referenced in the petition relates to the conduct of Zerbst, and not the conduct of or representations made by Ameris.

For example, the evidence about Gibson’s purchase of the shopping center predates Ameris’s relationship with Gibson. Gibson purchased the shopping center in 2005, two years before Gibson obtained the loan from Ameris. At the time, Zerbst worked for a different bank, First Reliance.

Next, the fact that Zerbst took steps to send Gibson’s loan application to Ameris in October 2007 fails to establish an agency relationship with Ameris. Zerbst did these things on his own and for his own benefit in seeking employment with Ameris. There is no evidence in the record that Ameris asked Zerbst to undertake these efforts, or that Ameris represented to

Gibson that Zerbst was acting on its behalf, or that Ameris had any control over Zerbst while he engaged in this conduct.

Respondents also argue Benji Lanier's employment with the bank somehow establishes that Zerbst was an agent for the bank. It is undisputed that Lanier worked for Ameris in October 2007 and was the bank's agent during that time. But there is no evidence in the record that Lanier represented to Gibson that Zerbst was working on the bank's behalf. The evidence is to the contrary. Zerbst delivered the loan documents to Lanier through Gibson's agent and trusted advisor, Rolando Villavicencio, precisely because he (Zerbst) did *not* work for Ameris at the time, and was trying to avoid litigation over the non-compete agreement he had with First Reliance.

Further, the fact that Ameris acted quickly in approving the loan does not support a finding that Zerbst was Ameris's agent. There is no evidence—nor have Respondents provided any citation to the record—establishing that any Ameris employees took any direction from or gave any direction to Zerbst. Ameris's approval of a commercial loan application does not ratify any conduct by Zerbst, nor does it indicate Zerbst had any authority to act on behalf of Ameris.

Finally, the fact that Zerbst actively sought employment at Ameris, communicated with Ameris about the status of his non-compete agreement, and ultimately became involved in litigation with First Reliance over that agreement does not change the fact that Zerbst was not Ameris's agent until he began working for Ameris in January 2008. It was not until Zerbst began working for Ameris that Ameris had the ability to control Zerbst's conduct, as this Court correctly found.

Without evidence that the principal, Ameris Bank, represented to Respondents or acted in a manner that would indicate to Respondents, that it had given Zerbst authority to act on behalf of the bank, an agency relationship cannot exist as a matter of law.

Accordingly, the Court did not overlook or misapprehend the evidence, and correctly held that Zerbst was not Ameris's agent in October 2007.

**3. The Court correctly determined Ameris did not knowingly aid and abet a breach of fiduciary duty.**

The Court did not overlook or misapprehend any evidence when it determined Ameris did not knowingly participate in a breach of fiduciary duty by Gibson's trusted real estate agent and financial advisor, Rolando Villavicencio.

"The elements for the cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." *Vortex Sports & Entm't, Inc. v. Ware's*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Id.* South Carolina appellate courts have "interpreted 'knowing participation' as more than just mere tangential involvement, but actual encouragement or active procurement of the breach of fiduciary duty." *Simmons v. Danhauer & Assocs., LLC*, 2010 WL 4238856, at \*4 (D.S.C. Oct. 21, 2010), *aff'd*, 477 F. App'x 53 (4th Cir. 2012).

Here, the Court properly found that aiding and abetting a breach of fiduciary duty requires *actual knowledge* of the third party's breach. Respondents have failed to point to any South Carolina cases to support their argument that this cause of action to be established through "imputed" or "constructive" knowledge. Instead, South Carolina courts have repeatedly used *actual knowledge* as the threshold element of the cause of action. *See Future Grp., II v.*

*Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) (noting that there was “no evidence in the record . . . that Bank had actual knowledge” of the breach); *Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008) (noting that the cause of action required “actual knowledge” of the breach); *Gordon v. Busbee*, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (Ct. App. 2012) (finding “no evidence [that the defendant] had actual knowledge” of the breaching conduct). The Fourth Circuit is in accord, specifically holding that actual knowledge is required under South Carolina law. *See Simmons v. Danhauer & Assocs., LLC*, 477 F. App’x 53, 56 (4th Cir. 2012) (“Presumed knowledge of the law, with no accompanying evidence of actual knowledge, is insufficient under South Carolina law to establish actual notice or knowledge.”).

Here, none of the evidence cited by Respondents in the petition for rehearing establishes that Ameris had actual knowledge of Villavicencio’s breach or actively participated in facilitating the breach. Lanier’s visits to the apartment complex do not establish that he or anyone else at Ameris knew of any misconduct by Villavicencio. The fact that the renovations of the apartment complex were not progressing as Gibson anticipated does not establish a breach of fiduciary duty by Villavicencio or aiding and abetting by Ameris.

Further, Ameris’s alleged failure to inspect the project to ensure improvements is not evidence of actual knowledge of a breach. Likewise, the manner in which loan advances were made does not establish knowing violation of a breach, particularly when there is no evidence in the record that the money disbursed was not put into the project.

Finally, the internal bank memo criticizing Lanier for disbursing funds at Villavicencio’s request does not indicate that Lanier or anyone else at Ameris knew that Villavicencio was doing anything improper. Villavicencio was Gibson’s trusted advisor and general contractor, and she

had specifically authorized Ameris to deal with him. (R. pp. 510, 531-32, 799-800, 1052-56, 1059-61, 1074-77, 1083-87.)

Given the absence of evidence that Ameris had actual knowledge or knowingly participated in Villavicencio's tortious conduct, this Court properly held that the master erred in finding Ameris knowingly participated in Villavicencio's breach.

### CONCLUSION

Because Respondents have not cited any evidence that this Court overlooked or misapprehended, and because the issue of agency was before the Court, the petition for rehearing should be denied.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC

By: \_\_\_\_\_



Robert E. Stepp (S.C. Bar #5335)  
Tina Cundari (S.C. Bar #71951)  
Benjamin R. Gooding (S.C. Bar #100620)  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
803-929-1400  
[rstepp@sowellgray.com](mailto:rstepp@sowellgray.com)  
[tcundari@sowellgray.com](mailto:tcundari@sowellgray.com)  
[bgooding@sowellgray.com](mailto:bgooding@sowellgray.com)

Attorneys for Appellant

Columbia, South Carolina  
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THE STATE OF SOUTH CAROLINA  
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**PROOF OF SERVICE**

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The undersigned certify they have caused the Return to Petition for Rehearing to be served on Respondents by Email on June 19, 2017 addressed to their attorneys of record, Desa Ballard and Harvey W. Watson, III, of Ballard & Watson, at [desab@desaballard.com](mailto:desab@desaballard.com) and [harvey@desaballard.com](mailto:harvey@desaballard.com).



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Robert E. Stepp (S.C. Bar #5335)  
Tina Cundari (S.C. Bar #71951)  
Benjamin R. Gooding (S.C. Bar #100620)  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
803-929-1400  
[rstepp@sowellgray.com](mailto:rstepp@sowellgray.com)  
[tcundari@sowellgray.com](mailto:tcundari@sowellgray.com)  
[bgooding@sowellgray.com](mailto:bgooding@sowellgray.com)

*Attorneys for Appellant*



**SOWELL GRAY  
ROBINSON**

Litigation + Business

TINA M. CUNDARI

DIRECT 803 231.7834 DIRECT FAX 803 231.7863

tcundari@sowellgray.com

June 19, 2017

**RECEIVED**  
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SC Court of Appeals

**By Hand Delivery**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: Linda A. Gibson et al., Respondents v. Ameris Bank, Appellant  
Appellate Case No. 2014-001487  
SGR File No. 6285/1500

Dear Ms. Kitchings:

Enclosed are the original and seven (7) copies of the Return to Petition for Rehearing and Proof of Service. Please file the originals and return file-stamped copies to my office by our courier.

By copy of this letter and as evidenced by the Proof of Service, I am serving the Return on counsel for Respondents.

Sincerely,

Tina M. Cundari

TMC:rhs

Enclosures

cc: By Electronic Mail  
Desa Ballard, Esq.  
Harvey M. Watson, III, Esq.