

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-6074; Appellate Case No. 2015-000730

TD Bank, N.A., successor by merger with Carolina First Bank, Respondent,

v.

David H. Jacobs, Appellant.

Case No. 2012-CP-40-7540

TD Bank, N.A., successor by merger with Carolina First Bank, Respondent,

v.

David H. Jacobs and James A. McFarland, Defendants,
Of Whom David H. Jacobs is Appellant.

**RESPONDENT’S RETURN TO THE PETITION
FOR REHEARING**

Pursuant to Rule 240(e), SCACR, Respondent TD Bank, N.A., successor by merger with Carolina First Bank (“TD Bank”) files this Return to Appellant David Jacobs’ (“Appellant”) Petition for Rehearing. Rehearing is not warranted because the Court correctly held in its opinion filed July 19, 2017 (the “Opinion”) that Appellant’s arguments on appeal are legally incorrect, and the thirty-one arguments in the petition are unavailing because the Court did not overlook or misapprehend any points of law or fact. The Court correctly affirmed the decision below.

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I. The petition should be denied because Appellant merely rehashes arguments previously presented to the Court.

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Thus, in order to prevail on a petition for rehearing, a petitioner must demonstrate the Court overlooked or misapprehended his argument. Rule 221(b), SCACR.

Appellant presents thirty-one grounds in the petition. The grounds can be fairly grouped into five categories, each of which advances the same arguments presented in Appellant’s prior briefing:¹

1. Appellant’s grounds numbered 1–9, 11, 13–14, 16–17, 21, 23–27, and 31:² Appellant presented this same argument regarding fiduciary duty to the Court in his prior briefing. *See* (App. Br. pp. 14–22; Reply Br. pp. 5–7).

2. Appellant’s grounds numbered 12–14, and 23–24: Appellant presented this same argument regarding evidence related to the Troubled Asset Relief Program (“TARP”) to the Court in his prior briefing. *See* (App. Br. pp. 25–28; Reply Br. pp. 6–7).

3. Appellant’s grounds numbered 15–17, and 25: Appellant presented this same argument regarding evidence and testimony related to the sale of the Heron Lakes I note to the Court in his prior briefing. *See* (App. Br. pp. 29–33; Reply Br. pp. 8–9).

¹ Some of the grounds asserted by Appellant combine previous arguments made to the Court and, therefore, correspond to multiple arguments previously made by Appellant.

² Ground number thirty-one is not directly addressed in Appellant’s prior briefing. The argument that this Court should not have issued an opinion in this matter pursuant to Rule 220(b), however, is not a ground for rehearing. Moreover, the reasoning utilized by Appellant to support his argument is that TD Bank has a fiduciary duty to Appellant. The Court, therefore, considered and rejected the logic behind Appellant’s thirty-first ground.

4. Appellant's grounds numbered 18–22, and 28–30: Appellant presented this same argument regarding one judge improperly overruling decisions made by another judge to the Court in his prior briefing. *See* (App. Br. pp. 34–36; Reply Br. p. 9).

5. Appellant's ground number 10: Appellant presented this same argument regarding the evidentiary decisions adversely affecting his affirmative defenses to the Court in his prior briefing. *See* (App. Br. pp. 30, 35–37).

Thus, the Court did not overlook the grounds advanced by Appellant in the petition because the Court previously reviewed, weighed, and rejected the merits of each of Appellant's arguments. Accordingly, these grounds cannot constitute a basis for rehearing because they were previously presented to the Court. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322. The petition for rehearing should be denied for this reason.

Moreover, the Court did not misapprehend any of the grounds set forth in the petition. While many of the grounds identified by Appellant relate to an argument not specifically addressed in the Opinion—that TD Bank owed a fiduciary duty, as a matter of law, to appellant—Appellant did not appeal a ruling on whether TD Bank owed Appellant a fiduciary duty as a matter of law. Rather, Appellant appealed the denial of his motion for a new trial, which raised the following three errors: (1) improper exclusion of evidence related to TARP and government bailouts, (2) improper exclusion of evidence related to the Heron Lakes I note sale, and (3) the circuit court's rulings on those issues effectively overruled decisions made by another judge during summary judgment.³ (R. pp. 465–66, 468, Motion for New Trial, ¶¶ 10–12, 25; *see also* App. Br. p. 1). The issue of whether TD Bank owed or breached a fiduciary duty to Appellant was submitted to the

³ The Court specifically addressed and rejected these three issues in the Opinion. (Opinion at *2-3). Additionally, the Court did specifically address—and reject—the argument that the excluded evidence relates to the defense of bad faith. (*Id.*).

jury and the jury found for TD Bank, rejecting Appellant's breach of fiduciary duty and breach of implied covenant of good faith and fair dealing defenses. (R. pp. 20–21, Jury Verdicts). Appellant did not contest the trial court's rulings on directed verdict, the jury instructions, or the jury's verdict. The issue of whether TD Bank breached a fiduciary duty is, therefore, not preserved for appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("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."). Accordingly, the Court did not need to address the issue of an alleged fiduciary duty and Appellant cannot utilize his petition to re-litigate an issue he failed to appeal. *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 (2001) (denying petition for rehearing where petition was based on an argument not preserved for appeal); *see also* Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

Furthermore, the Court correctly affirmed the circuit court's ruling for the reasons set forth in TD Bank's Respondent's Brief. For the sake of brevity, TD Bank incorporates that brief in opposition to the grounds advanced in the petition. As shown therein, the Court did not misapprehend the issues on appeal, and the petition for rehearing should be denied.

II. Appellant fails to support any of his arguments with citations to legal authority and has, therefore, abandoned those arguments.

"South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). This Court routinely holds appellate arguments with no citation to legal authority are abandoned. *E.g., Mead v. Beaufort Cty. Assessor*, 419 S.C. 125, 139, 796 S.E.2d 165, 173 (Ct. App. 2016)

(“The Assessor provided no case law on the issue, particularly no case law or other authority on public policy and what constitutes a violation of it. Accordingly, this issue is abandoned.”).

Appellant does not cite to a single legal authority to support any of the thirty-one grounds for rehearing.⁴ Rather, Appellant argues thirty-one issues of law or fact were overlooked or decided incorrectly purely because the Court’s decision was adverse to Appellant. Accordingly, Appellant has abandoned these issues and this Court should deny Appellant’s petition for rehearing. *See Mead*, 419 S.C. at 139, 796 S.E.2d at 173.

CONCLUSION

This Court correctly affirmed the circuit court’s ruling. This Court’s ruling did not overlook or misapprehend any points of fact or law and, therefore, there is no basis upon which to grant rehearing.

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⁴ The only time legal citations appear in Appellant’s petition is when Appellant quotes the Opinion. Appellant also fails to cite to the Record on Appeal in any of his thirty-one grounds for rehearing.

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Columbia, South Carolina
August 7, 2017

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PROOF OF SERVICE

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

Pleadings:

Respondent's Return to the Petition for Rehearing

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August 7, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
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RE: TD Bank v. David H. Jacobs
Appellate Case No. 2015-000730
Our File No. 04387/01815

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondent's Return to the Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this return.

Very truly yours,



A. Mattison Bogan

AMB:lpw
Enclosures

cc: Gerald D. Jowers, Esquire
Charles E. Carpenter, Jr., Esquire

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