

The State Of South Carolina  
In the Supreme Court

Appeal from Richland County Court of Common Pleas  
Joseph M. Strickland, Master in Equity for Richland County

L. Casey Manning, Circuit Judge  
Alison Renee Lee, Circuit Court Judge  
Civil Action No. 2012- CP – 40 – 07540 & 0674  
Appellate Case: 2015 – 000730

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S.C. SUPREME COURT

Opinion No. 2017-UP-300 S.C. Ct. App. filed July 19, 2017 (2017)

TD Bank, NA, successor by Merger )  
with Carolina First Bank ) Civil Action Nos. 2012 – CP 40 - 07540;  
Respondent ) 2012 – CP – 40 - 0674  
v. ) Court of Appeals Appellate Case:  
David H. Jacobs, ) 2015-000730  
Appellant )  
v. )  
TD Bank, NA, successor by Merger )  
with Carolina First Bank )  
Respondent, )  
v. )  
David H. Jacobs & James McFarland of whom )  
David H. Jacobs is the )  
Defendant / Appellant / Petitioner )

Petition for Writ of Certiorari of David H. Jacobs

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## Certificate of Counsel

The Court of Appeals heard this case on May 11, 2017 and filed its Unpublished Opinion No. 2017-UP-300 dated July 19, 2017. A Petition for Rehearing was timely filed and was denied by the Court of Appeals by Order dated August 18, 2017.

### Questions Presented for Review

#### **Troubled Asset Relief Program Evidence.**

I. In his defense of TD Bank's action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his evidence about TARP and the government bailout because it is relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.

#### **Heron Lake I Evidence**

II. In his defense of TD Bank's action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his documentary evidence and witness David Hilburn which would show TD Bank's more favorable treatment of another guarantor in the Heron Lakes I matter because it is relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.

#### **One Circuit Judge Overruling another Circuit Judge**

III. Judge Joseph Strickland had already heard and accepted the evidence and testimony in his hearing and denial of TD Bank's Motion for Summary Judgment on the issues of liability of TD Bank for breach of its duties and this should not have been overruled by Judge Manning on an eleventh-hour Motion in Limine just before trial. It eliminated from the trial evidence that was relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.

## Statement of the Proceedings of the Case

This case involves rare if not novel issues in which a bank establishes a fiduciary relationship with a developer client within which to engage in loan transactions and to engage in the client's developments.

The decision is also in conflict with other decisions of this Court and other decisions of the Court of Appeals.

The Court of Appeals fundamentally misapprehended the case and the issues it presented. Because the Court of Appeals left out entirely the overriding effect of a bank fiduciary duty, that led to an erroneous view about the relevance and probative value of the evidence the trial court improperly excluded.

The relevance and probative value of the evidence relate to exactly the bigger picture of the banks fiduciary duty and its breach.

TD Bank brought two actions on personal guaranties against David Jacobs from loans on his developments, Newberry Atrium Professional Center, LLC, and Atrium at Middle Sound Land, LLC.

Jacobs answered and sought to void the two guaranties because the bank breached its duty of good faith and fair dealing, and breached its fiduciary duty. The acts of the Bank caused the failures of the projects. Jacobs also sought to prove a breach of fiduciary duty because of the unfair and disparate treatment he received in comparison to another customer to whom the Bank sold other notes at discounted prices knowing the guarantors would be released from liability.

## **Jacobs Affidavit before Judge Strickland about the Banks' Actions**

TD Bank moved for summary judgment in both cases on the defenses Jacobs raised. Jacobs submitted an affidavit setting out the facts that created the fiduciary duty and the acts and omissions of the Bank that constituted a breach of fiduciary duties and failure to deal fairly and act in good faith. The affidavit contained the same factual evidence about the Troubled Asset Relief Program (The First Question Presented) and the Heron Lake I transaction (The Second Question Presented) that Jacobs intended to use as evidence at trial to prove the bank breached its duties.

There was no objection by the Bank to the evidentiary facts about the TARP program and its funds in the affidavit before Judge Strickland on summary judgement or reconsideration. Judge Strickland denied the Bank's Motions for Summary Judgment and Motions to Reconsider.

Judge Manning consolidated the cases for a date certain trial for Tuesday Aug.12, 2014. On Thursday, Aug.7, 2014 before trial on Tuesday, the Bank tried to change its position on allowing the fact finder to see that evidence. TD Bank filed a Motion in Limine to exclude the evidence that supported David Jacobs and that had successfully defeated the Bank's Motions for Summary Judgment.

This eleventh-hour move dislodged the trial. Judge Manning dismissed the jury and heard an extended proffer by David Jacobs.

Judge Manning denied TD Bank's motion to exclude Jacobs' defenses of breach of the duty of good faith and fair dealing and breach of fiduciary duty. However, Judge

Manning destroyed Jacobs' ability to prove these defenses by excluding all evidence, testimony, or reference to the Troubled Asset Relief Program ("TARP"), government bailouts, and the "Heron Lakes I note sale," a specific sale of a note at a discounted price. Judge Manning granted the Bank's motion to exclude witness David Hilburn who was proffered to provide testimony on the Heron Lakes I note sale.

David Jacobs believes the proffered evidence, which mirrored the evidence before Judge Strickland, was already law of the case, and, not subject to exclusion by Judge Manning.

David Jacobs also believes that rulings in Limine are only conditional and that the Judge trying the case has the final responsibility to rule on admissibility. However, when the trial was held before Judge Allison Lee, Judge Manning had determined that his ruling on the Motion In Limine would be binding on Judge Lee.

Under those evidence restrictions jury had no choice. The jury returned a verdict for the bank in both cases because the case was presented to the jury as nothing more than a debtor/creditor relationship.

Judge Lee denied David Jacobs Motion for New Trial by an Order dated Feb.27, 2015, filed Mar. 2, 2015, received Mar.6, 2015. The Notice of Appeal was timely filed on Apr. 3, 2015. The Court of Appeals issued its Unpublished Opinion No. 2017-UP-300 on July 19, 2017. A Petition for Rehearing was timely filed and was denied by the Court of Appeals on August 18, 2017.

## Argument Introduction

This case involves rare if not novel issues in which a bank establishes a fiduciary relationship with a developer client and commits to engaging in this special relationship through making loan transactions and engages directly with the bank client as a team member and partner in the client's developments. The Opinion of the Court of Appeals does not even mention that the loan was done within the boundaries of a fiduciary relationship. The most common relationship that of a lender and a borrower, however, in *Burwell v. SC National Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986) the Court noted that a fiduciary relationship can be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers.

The Opinion of the Court of Appeals conflicts with the *Burwell* case.

### The Fiduciary Relationship Between Carolina First Bank (subsequently acquired by TD Bank) and Developer David Jacobs

The defense that David Jacobs sought to prove was that he and the bank were in a long standing fiduciary relationship which surrounded and enveloped their loan transactions and which TD Bank breached. TD Bank's breach of its fiduciary duty should void the personal guaranty because the banks breach of its fiduciary duty is the very reason the two projects failed.

The Unpublished Opinion of the Court of Appeals does not even mention the fiduciary relationship or the duties of a fiduciary. There is no analysis of the facts that established the special relationship. There is no description of the duties of a bank when it is in a fiduciary relationship.

The Trial Court and the Court of Appeals simply looked at the loan documents and treated this as an exclusively debtor – creditor relationship. Ignoring the fiduciary relationship makes it easy to reach a result but it is an erroneous result and should be reversed.

David Jacobs is a real estate developer. R. p 568. He is a one-man operation with 30 years of experience who puts together a team of professionals. The team includes the land, the design team, the legal team, the lending source to build a development. R. 568-569.

Jacobs used all the big and small banks over many years until he was recruited by and became involved with Carolina First. He dealt with Carolina First for the last 15 years. R. p 569.

Carolina First Bank became one of the fastest growing banks in South Carolina by establishing fiduciary relationships with commercial borrowers. Carolina First's competitive advantage was to provide services far beyond that of a creditor. Carolina First would be a member of a developer client's team in all aspects of analyzing and developing projects. Carolina First's signature competitive advantage was to join the developers team and assist in every way to make a development successful. This would include site selection, feasibility, market conditions, loan structure and

adaptation and revisions to a loan structure to meet the evolving needs of the customer with whom the bank had such a special relationship. R. p. 570 – 571.

Establishing a non-traditional special relationship with a bank customer is what Carolina First used to attract banking customers away from competitors. R. p.569. It is exactly how Carolina First recruited David Jacobs as a customer. President Mac Whittle and other members of the executive team including, Justin Strickland, Larry Scotts and others would come down from Greenville to meet with David Jacobs.

Jacobs described it: R. p 571.

“They would look at everything that was going on in the project, from the initial part, they would go with me to take a look at a site. They’d discuss the site, siting of the project. They would get involved in looking at the tenant or the sponsor that was involved in the project, either the tenant or who was sponsoring them. They’d understand who they were. They’d ask me questions. They’d ask me different way that I could structure a loan. They suggest different ways. They really were hands on. I mean, they were a matter of we want to be a part of your team, we said it, and here’s the demonstration. They would guide me through all of the various aspects of developing a piece of property.” R. p. 571.

Carolina First fulfilled the fiduciary duties of a special relationship exactly as they said they would. R. p. 571.

This fiduciary relationship worked as promised and worked well for fifteen (15) years until Carolina First was acquired by the Toronto Dominion Bank using the name TD Bank. R. p. 571 – 572.

The loans made during this relationship were not a simple lender - borrower relationship prevalent in most banks. It was a fiduciary relationship with the purpose of successfully developing projects and protecting the development assets.

Loans and loan documents were only a portion of the actions and work of the bank and all loans from Carolina First to David Jacobs were done within the scope of their fiduciary relationship. It was successful for both Jacobs and the Bank and they worked together flexibly and creatively to engage in successful projects. Changes and adaptations to loans, design, legal needs, and land needs were the regular actions between Carolina First and Jacobs in developing projects.

(If a short but more detailed description of the participation is desirable, See the Record from R. p. 568 – 585.)

Carolina First did what it promised it would do. R. p. 570. From 2002 until Carolina First was acquired by TD Bank, the Bank advised and guided David Jacobs through his projects. R. p. 570-571. The Bank would look at everything that was going on in the project. The bank would become involved from the initial concept, go with him to look at the site and discuss the site with him. The bank would be involved in looking at the tenant or sponsor, the bank would ask him questions. R. p. 571.

The Bank would ask him different ways he could structure a loan and suggest different ways. R. p. 571. The Bank officers were hands on and guided him through all aspects of developing a project. R. p. 571.

The bank added value to him and he came to rely on their advice, guidance and comments to help keep him in a good conservative direction and to improve the quality of his projects. R. p. 571.

The relationship David Jacobs had with Carolina First was significantly different from his previous relationships with other banks. R. p. 572. In the past, other banks would basically say here is the money, tell us what you are going to do. R. p. 572.

All of the projects that Carolina First participated in were successful as long as the Bank officers from Carolina First were part of David Jacob's development team. R. p. 574.

### **Medical Office Building in Newberry, SC.**

The Newberry Medical Office building was hit by an economic perfect storm but Carolina First and David Jacobs were successfully working it out. Shortly after the building was completed, the Great Recession hit. Potential doctor tenant/owners were uneasy like everybody else. Adding to the doctor's uncertainty was the new Affordable Care Act. It was early and new and doctors did not know in the early days how they would be reimbursed. A few months later, the entire Executive Management of the Newberry hospital resigned. This delayed, but did not destroy, the viability of the Medical Office Building.

Carolina First and David Jacobs were working and adapting to make it successful. Jacobs and Carolina First had previously done the Irmo Medical Center. R. p. 573. The success of the Irmo Medical Office Building was the reason the hospital management in Newberry found and recruited David Jacobs for

their Medical Office Building development. When the Hospital decided it wanted an MRI, the adaptability and joint efforts of Carolina First and David Jacobs restructured the ownership.

The only way the Hospital could acquire the MRI was to own the space for it outright. Carolina First stepped up, understood the situation, and guided Jacobs through the needed adaptations and restructuring the ownership to make that happen. R. p. 577 – 578.

### **Middle Sound Project in Wilmington, NC.**

This was a nine - acre tract that was going to be developed into multiple tract to be sold. R. p.580. With the help of Carolina First he was able to pre-sell some of the parcels before even starting. Originally with Carolina First this started as a construction loan. When it became due, there were unavoidable issues. Carolina First understood and worked together with David Jacobs to solve the problem.

David Jacobs had built the water infrastructure for the project but could not hook up to the city because at the time, Wilmington had contaminated water. R. p. 580 – 581.

Larry Scott, Mike Phillips and others that Jacobs had been working with at Carolina First were working together to solve the problem.

### **TD Bank Personnel Take Over.**

TD Bank Acquired Carolina First but did not perform its fiduciary duties nor did it deal fairly and in good faith with Jacobs. TD Bank acquired Carolina First, forced the loans on both Newberry and Wilmington, and sued David Jacobs on the personal guaranty. Jacobs felt betrayed. R. p. 584.

During these two projects, the United States experienced the Great Recession. Although American banks are forbidden under Canadian law from acquiring Canadian banks; Canadian banks are allowed to acquire American banks. (Canadian banking attorney Robert Elliott, *Forbes* Article December 11, 2008, entitled *In Crisis*

*Canadian Bank Survive and Thrive.* Elliott explained how this was true. Under Canadian law the Canadian banks have a safe haven and are protected from being acquired by foreign banks. However, Canadian banks are free to expand into other countries so they can be a foreign acquiring bank in the United States.

Toronto Dominion Bank readily took advantage of the banking conditions brought on by the recession and acquired a number of American banks, including Carolina First.

The two projects had been agreed to between Jacobs and Carolina First. The acquiring bank, renamed TD Bank, breached the fiduciary duty it had with Jacobs, abandoned the efforts to keep the projects successful, demanded payment as if there were no fiduciary relationship, and sued Jacobs on his personal guaranty.

TD Bank knew that Jacobs had a very substantial net worth and that it was not liquid because it was in various real estate holdings. The bank knew that if it made a demand for an immediate full payment in cash with no extension of terms, Jacobs would not be able to instantly pay cash for the entire balance on the projects.

TD Bank also knew that if it forced the loan, that would trigger significantly elevated interest rates; the opportunity to foreclose on the development property, sell it under the burden of a foreclosure, and then seek a deficiency judgment. Hardly the actions of a fiduciary acting in the interest of its beneficiary.

Yes there was a note, mortgage, and guaranty. But it was accomplished within the fiduciary relationship with David Jacobs under which the bank had operated for fifteen years without a failure. The acquiring bank gets what it acquires, nothing

more. TD Bank acquired Carolina First, which had this special way of attracting business which had been successful for both David Jacobs and Carolina First.

It was a long-term fiduciary relationship, not a short-term game of "got you" at the first opportunity grab a short-term advantage at the expense of your client.

TD Bank ignored that long held agreement and behaved as a predator against the very beneficiary of the fiduciary relationship it had recruited. Here is how Jacobs described the shift in the bank behavior toward him: R. p. 580.

"Q How would you characterize the treatment that you received from Carolina First as opposed to TD Bank?

A Well, I can only represent that it was 180 degrees different. I mean, before, we used to have direct conversation. We would discuss the issues, talk about solutions, but it was always solution oriented. It was never -- as what I face now, it was never as -- it was difficult to deal with. I mean, the difficulty in dealing with the new regime at TD is completely different. I mean, there's no discussion about solving problems. It is, basically, a threat-oriented situation.

## Questions Presented

### **Troubled Asset Relief Program Evidence.**

**I. In his defense of TD Bank's action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his evidence about TARP and the government bailout because it is relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

The opinion fails to recognize that the exclusion of the evidence was not just a minor evidentiary ruling but a critical ruling which had the effect of knocking out David Jacobs' defense.

The opinion fails to distinguish what a bank may do in a simple debtor-creditor relationship on the one hand, and, what it may not do in a fiduciary relationship on the other hand. The opinion fails to recognize and give effect to the fact that the Bank destroyed the viability of the Newberry Medical Office Building and the Middle Sound projects by breaching its fiduciary duties to David Jacobs. But for the Banks actions, the projects would have succeeded.

The opinion fails to discuss or analyze the method of carrying out its fiduciary duties during the preceding approximately fifteen (15) years of business done by the Bank with David Jacobs.

The Court of Appeals erred when it stated:

“We find the trial court did not abuse its discretion when it excluded the TARP and government bailout evidence because there is no relevant link between the proffered testimony and the issue of whether Jacobs was legally responsible for paying his guaranty obligations.”

The Court of Appeals statement misses the point of the evidence.

David Jacobs never disputed any of the facts, dates, or payments under the loan documents. Jacobs was addressing the wrongful behavior of a bank fiduciary during a difficult time. Jacobs was offering evidence that the Bank received TARP funds and then acted not only against his interest but also in direct opposition to the Congressional purpose of the TARP program. It is relevant and probative of the fact that the Bank was not acting in good faith and was not acting as Jacobs' fiduciary.

As a result of the error in missing the point of the TARP evidence, the Court continued to err when it stated:

“Even if the testimony was relevant, its probative value was substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (“Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.”).”

The federal statute encouraging banks to lend as they had before the recession is absolutely relevant to the issue of whether the Bank acted in good faith or breached its fiduciary duty.

The Court should not have been weighing relevance to facts, dates, or payments under the loan documents. The Court should have been weighing the

probative value of the evidence to prove a breach of good faith and a breach of fiduciary duties against any perceived legal prejudicial effect.

There is nothing in the opinion that says what unfair prejudicial effect this evidence of the banks conduct may have had. There is nothing emotional about the evidence, there was no delay of time, there is nothing misleading about the evidence.

This evidence has very significant probative value in David Jacob's effort to prove his defense. It is not tangential. It discloses undisputed facts that show the Bank's actions were in violation of the policy of federal law and in violation of its fiduciary duties.

Letting the jury know of the Troubled Asset Relief Program, its purpose, that the Bank had benefitted, and how the Bank did not treat David Jacobs loan as it had before the recession, certainly shows bad behavior by the bank. Showing that Congress's policy under TARP to encourage a return to pre-recession lending was met by TD Bank's denial and refusal to follow federal policy or its own duties. It shows how the Bank failed to act fairly and in good faith and as a fiduciary should act. It contains no legal prejudice to weigh. It is straight up undisputed factual evidence that does not have some alternative meaning or other prejudicial effect. It is admissible and it is critical to the defense.

The evidence shows that not only did TD Bank act to the detriment of its fiduciary beneficiary, but it also enriched itself by raising the interest rate, owning the property at distressed foreclosure sale and seeking a deficiency with the continuing punitively high rates, all to the benefit of the Bank.

These transactions are within the boundaries of a fiduciary relationship and this case should be governed by the legal principles that apply to fiduciary relationships.

### **Heron Lake I Evidence**

**II. In his defense of TD Bank's action on a guaranty the defendant David Jacobs is entitled to a new trial because it was error to exclude his documentary evidence and witness David Hilburn which would show TD Bank's more favorable treatment of another guarantor in the Heron Lakes I matter because it is relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

The Court of Appeals cited a correct principle of law but misapplied it by failing to see the real factual issue to which the legal principles should have been applied.

Evidence of disparate treatment of a client by a bank fiduciary is relevant and strongly probative of a breach of fiduciary. It is also relevant to and probative of a breach of the implied contract duty to be fair and to act in good faith. The opinion fails to recognize the relevance of the documentary evidence and witness testimony about the sale of the Heron Lakes I note. The Heron Lakes I evidence shows how the Bank carried out that transaction more favorably to a different loan customer in comparison of how the Bank treated David Jacobs.

This evidence is both relevant and probative of the fact that TD Bank did not deal with David Jacobs in good faith and fair dealing, nor did it deal with David Jacobs as a fiduciary should deal with its beneficiary.

When David Jacobs learned that the bank had treated another customer more favorably than he had been treated, he thought the bank had done so because of a personal relationship between a bank employee and the other customer. As it turned out, there was not a personal relationship, but, that is not important to what David Jacobs sought to prove.

The Court of Appeals noted the lack of a personal relationship but missed the real point of this evidence of disparate treatment. The Court of Appeals said:

“Finally, Jacobs presented no evidence supporting his allegation of a personal relationship between a Bank officer and the guarantor involved in the Heron Lakes I transaction. Accordingly, the Heron Lakes I evidence does not make any matter at issue more or less probable. *See Judy v. Judy*, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009) (“Evidence meets the test of relevance if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears.”).”

The Opinion misses the central issue and defense of David Jacobs for which this evidence is relevant and probative.

When it turned out that there was no personal relationship between the bank and the Heron Lake borrower, it is a huge mistake to jump to the conclusion that the evidence is no longer relevant and probative.

To the contrary, the absence of a personal relationship makes the evidence more powerful and more probative of disparate treatment. The disparate treatment shows a lack of good faith and fair dealings and a breach of the fiduciary duty that the Bank owed Jacobs. If there is no personal relationship between the bank and the other customer then the disparate treatment is totally arbitrary without any reason.

David Jacobs was not trying to prove some friendship. He was trying to prove he was treated differently and that is exactly what the Heron I transaction reveals.

Why the bank gave more favorable treatment is not the key. The key is that the Bank discounted the price in the other transaction. Not that the Bank had business reasons instead of friendship reasons. No. The key is that the Bank sold the Heron Lakes I note at a discount. That is where the focus should be.

The key is that the bank did in fact give more favorable treatment to someone else. That is a very powerful piece of evidence relevant to and probative of the fact that the bank did not act toward Jacobs in good faith, and probative of the fact that the bank did not act in accordance with the fiduciary duty it owed to Jacobs.

Evidence of the sale of the Heron Lakes I note should have been admitted. That evidence is relevant to ability of the jury to see and evaluate the behavior and actions of the Bank in its fiduciary relationship with David Jacobs in comparison to how it treated other customers.

The opinion also is off the track with the statement:

“Further, that sale had nothing to do with the guaranties at issue in this case.”

Of course the Heron Lake I evidence had nothing to do with the guaranties in this case! From the beginning, Jacobs has not disputed the facts, dates, and amounts under the guaranties. He wasn't trying to refute the guaranties, he was trying to prove the Bank's behavior and was not allowed to do so.

The legal authority the Opinion cites is an accurate statement of the law but it is misapplied to the law in the facts of this case. The Heron Lakes I evidence very much does make a matter at issue more probable. *See Judy v. Judy*, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009) ("Evidence meets the test of relevance if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears.").

The evidence "showed Bank chose to sell the Heron Lakes I note at a discounted price" which is relevant and probative of the banks actions which were wrongful in more than one way and which breached more than one duty.

The evidence of what the bank did in Heron Lake I is particularly critical because it is the only example available to David Jacobs to show disparate treatment. Jacobs' counsel just happened to learn of the Heron Lake I transaction because of his work for another client.

Normally David Jacobs and his counsel would never know how the Bank treated others because the Bank requires others to sign confidentiality agreements so people cannot see if they are getting the same treatment as others. Heron Lake I shows the Bank gave less favorable treatment in its fiduciary capacity than it did in the Heron Lakes I loan. It makes more probable that the Banks treatment of David Jacobs was a breach of its fiduciary duty.

### **One Circuit Judge Overruling another Circuit Judge**

**III. Judge Joseph Strickland had already heard and accepted the evidence and testimony in his hearing and denial of TD Bank's Motion for Summary Judgment on the issues of liability of TD Bank for breach of its duties and this should not have been overruled by Judge Manning on an eleventh-hour Motion in Limine just before trial. It eliminated from the trial evidence that was relevant and critical to David Jacob's efforts to prove TD Bank breached its fiduciary duty and duties of good faith and fair dealings.**

The opinion makes a very strange statement:

“As to whether the trial court erred in effectively overruling issues previously decided by another judge during the summary judgment phase, we note Bank's motions for summary judgment did not specifically request exclusion of the TARP and Heron Lakes I evidence.”

Of course the Bank's Motion for summary judgment did not specifically request exclusion of the TARP and Heron Lakes I evidence and the order denying summary judgment did not include specific rulings concerning these issues.”

Nobody does that. The moving party does not know at the time of the motion what the opposing party may submit to defeat the motion for summary judgement. A party seeking Summary Judgement would never have a reason to specifically request exclusion of the opposing party's evidence. It is not yet time to object, and why would the moving party point out to the opposition what evidence it fears? The opposing party may not think to offer it.

If the moving party wants to object to evidence submitted by the opposing party, it makes its objection before the Court that hears the Motion. The Bank made no such objection before Judge Strickland.

That the Bank did not seek to exclude the evidence before Judge Strickland is exactly the point! So it came in and was considered by Judge Strickland. That was not only correct but that is the law of the case and is also waiver of any asserted objection before Judge Manning.

The Opinion of the Court of Appeals continues with another strange statement:

“Likewise, the order denying summary judgment did not include specific rulings concerning these issues. Accordingly, we find the trial court did not violate Rule 43(1), SCRCF, and this is not a situation where one judge has overruled another. *See* Rule 43(1), SCRCF (“If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.”); *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008) acknowledging the rule that one circuit judge may not overrule a prior decision or set aside the order of another circuit judge).

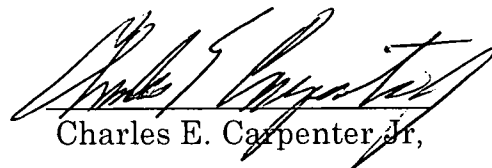
There is no requirement that a Circuit Judge address the admissibility of evidence that was not objected to. It would be unusual to do so unless there was an objection for the Judge to rule upon. Not specifically addressing the admissibility of evidence that comes in without objection is common place.

## Conclusion

If TD Bank's behavior was considered in a disciplinary proceeding against a CPA or an Attorney, it would easily be determined there was a fiduciary relationship, and, that it was breached. The same standard should apply to the Bank.

For any one of the three reasons set forth above, the Opinion of the Court of Appeals should be Reversed and Remanded to the Circuit Court with instruction to allow the excluded evidence to be admitted.

Respectfully Submitted,



Charles E. Carpenter Jr,

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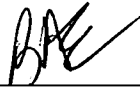
SEP 12 2017

Certificate of Service

S.C. SUPREME COURT

As paralegal and agent for Counsel for the Appellant Petitioner I certify that I have served the Petition for Writ of Certiorari by personally depositing a copy in a United States Postal Service mailbox, postage paid on September 11, 2017.

Jody A. Bedenbaugh, Esquire  
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