

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Opinion No. 5488 (S.C. Ct. App. filed May 24, 2017)

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SC Court of Appeals

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

v.

Ameris Bank, Respondent.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Petitioner Linda Gibson; individually and as Trustee of the Paul William Gibson Family Trust, and Heritage Seven, LLC (hereafter referred to collectively as "Gibson") seeks an order of this Court issuing a writ of certiorari to review the decision of the South Carolina Court of Appeals in the instant matter. The decision of the Court of Appeals was issued on May 24, 2017, and withdrawn, substituted and refiled on August 23, 2017. The refiled opinion did not change anything of substance in the decision of the Court of Appeals.

Gibson was awarded judgment in the amount of \$2,913.886.00 against respondent Ameris Bank by the master-in-equity for Berkeley County following a three (3) day trial. (App. pp. 7-61). The underlying dispute related to a commercial transaction in which Ameris loaned Gibson money to purchase and refurbish an apartment complex. At the time, Gibson was a recently-widowed housewife and mother who had never engaged in any commercial ventures, but who had just inherited substantial assets which were ripe for picking. The Court of Appeals reversed the trial court's decision.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing on the merits issue was made and finally ruled on by the Court of Appeals on August 23, 2017.

QUESTIONS PRESENTED

- I. The Court of Appeals erred in reversing the decision of the trial judge on an issue that was not preserved by Appellant for review.
- II. The Court of Appeals erred in finding facts in accordance with its own view of the evidence, and substituting its factual findings for those of the trial court, on the issue of agency. The trial court's ruling was fully supported by the trial court record.

STATEMENT OF THE CASE

The Court of Appeals issued its opinion reversing the decision of the trial court on May 24, 2017. *Gibson v. Ameris Bank*, Op. No. 5488 (filed May 24, 2017). (App. p. 1942). Gibson filed a Petition for Rehearing on June 7, 2016, raising three issues. (App. p. 1951). The Court of Appeals denied the Petition for Rehearing by order filed August 23, 2017; the same order withdrew the earlier opinion and issued an amended opinion which corrected a typographical error in a footnote. (App. p. 1962; App. p. 1964). This Petition follows.

SUMMARY OF FACTS

At the time Gibson was victimized by Ameris Bank, she was an unsophisticated, elderly widow, having lost her husband of twenty-seven years near Christmas, 2003. (App. p. 187, lines 9-23) She is a high school graduate who did take some liberal arts courses briefly in college. From the time of the birth of her first child in 1980 until 2008, she worked to raise her two daughters and care for her mother after her mother developed breast and lung cancer. (App. p. 188, line 18-p. 189, line 1) Gibson had always relied upon her husband to handle all the “business and financial aspects of things” until his death, and was only passingly familiar with items related to a commercial real estate transaction. (App. p. 189, lines 14-24; App. p. 191, line 20-p. 192, line 5) She did not know the meaning of terms such as “cash-out” or “refinance” and relied on others to know about such matters. (App. p. 321, lines 8-12).

Ameris argued on appeal that “Gibson is a multi-millionaire” which is true. (App. p. 1812, Appellant’s final Brief p. 2). However, her assets were inherited from her husband and her father, and she was a complete novice in financial matters at the time she began to be victimized by

multiple persons, culminating in Ameris Bank's financial abuse of Gibson¹. The details of the case are lurid and complex, far more than can be summarized in this Petition. Gibson calls the Court's attention to the detailed facts set forth in the trial judge's order, which appears at App. pp. 7-61.

The assets Gibson controlled were primarily in real estate, and inherited from her father and later her husband. (App. pp. 205-207; App. p. 874; App. p. 880; App. p. 900; App. p. 1042). Following her inheritance of these assets, Gibson was still primarily focused on her family, not her assets. (App. p. 190, lines 9-14)

A member of Gibson's church suggested that Gibson invest in a shopping center. (App. pp. 859-864; App. p. 191, lines 10-19; App. p. 278, lines 12-20). Financing for that purchase was done with First Reliance Bank (Reliance) in Charleston. Karl H. Zerbst, Jr. (hereafter "Zerbst") had been employed in the banking business for 26 years. (App. p. 474, line 6). Zerbst worked on the shopping center transaction along with Benjamin R. Lanier (hereafter "Lanier"), a credit analyst at Reliance. Based on the trial court's determination, which was not challenged or disturbed on appeal, Zerbst assumed a fiduciary duty to Gibson during that first project and Gibson continued to rely upon him as a fiduciary as he led her to a second commercial venture with Ameris, who was to be his new employer.

Zerbst left First Reliance Bank in Charleston with a non-compete that prevented him from being immediately hired by Ameris Bank. As a result, when Zerbst brought Gibson to Ameris, he did so by leading her to Lanier, who had also left Reliance but immediately became employed at Ameris Bank. Lanier, indisputably acting as an agent of Ameris Bank, Lanier structured the

¹ Ameris' description in its appellate brief of Gibson's wealth portrays exactly the type of victim who is preyed upon by unsavory characters. (App. p. 1812). That's what Ameris saw when she was presented to them on a silver platter, a customer whose wealth could be and was used to enrich everyone except Gibson herself.

financing for the second real estate project, dealing primarily with Zerbst. There is absolutely no dispute that Lanier was acting as an agent of Ameris when he implemented Gibson's loan from Ameris for the doomed real estate venture.

Ameris Bank opened its Charleston branch promoting Gibson as its star acquisition, hoping for a big splash in the Charleston market. (App. p. 436, lines 19-21). By bringing Gibson to Ameris, Zerbst marketed himself to Ameris by showing Ameris what a large fish he could deliver with Gibson. (App. p 243, line 25- p. 245, line 11).

Zerbst and Ameris worked together to engineer the mechanics of Gibson's downfall, while at the same time making a lot of money for themselves. Their joint venture to fund Gibson's second project meant \$\$\$ for Ameris and for Zerbst. Ameris hired Zerbst to reward Zerbst for reeling Gibson in. Ameris ratified and approved all of the actions that Zerbst and Lanier had undertaken to land the second commercial loan by Gibson from Ameris. Gibson was the carrot that Zerbst held in front of Ameris to convince Ameris to employ him, and they did.

Unfortunately, the project funded by Ameris was mishandled by Ameris and Zerbst from the beginning and ultimately failed, leading Gibson to a foreclosure and financial ruin. The trial court properly concluded that Zerbst (as well as Lanier) were agents of Ameris, and that Ameris was therefore liable for the breach of fiduciary duty to Gibson effected by Zerbst and Lanier which led to Gibson's ruin.

The Court of Appeals turned a blind eye to the undisputed evidence that Ameris hired Zerbst as a prize for bringing Gibson to them to make the commercial loan which precipitated her financial disaster. Both Zerbst and Ameris were furthering their own interests in making the loan to Gibson, each feeding off one another from Gibson's vulnerability and wealth. It is undisputed that Gibson would not have borrowed money from Ameris if Zerbst had not handed her up, and

Ameris rewarded Zerbst for his acquisition for them of Gibson, a big fish for their new Charleston enterprise, by hiring him.

Issue One

The trial court concluded that Gibson presented sufficient evidence to establish that, even though he was not directly employed by Ameris when he served Gibson up to Ameris, he was acting as Ameris agent to lure Gibson to Ameris. It did not matter that Zerbst was also seeking to benefit himself by making himself an attractive employee to Ameris. Zerbst handed Gibson to Ameris for Ameris' benefit and Ameris accepted it.

Following the trial court's award in favor of Gibson, Ameris filed a Motion to Alter or Amend Judgment, which raised 129 alleged errors to the trial court. (App. p. 1951). Of the 129 alleged errors made by the trial court, only issues #76 - #80 raised the issue that Zerbst's actions could not be imputed to Ameris because he was not on their payroll at the time he plopped Gibson in Ameris' lap..

79. The Court erred . . . relied exclusively on evidence regarding Zerbst's conduct to conclude an agency relationship with Ameris existed.

80. The Court erred . . . ratification may not be used to authorized unauthorized acts of an agent, but may not be used to create an agency relationship itself.

(App. pp. 132-133 ¶¶ 79-80).

Ameris did not raise either of these issues on appeal to the Court of Appeals. The issues upon which the Court of Appeals reversed was supposedly contained in Issue I in Ameris' appellant's brief, which raised only one issue:

Did the master-in-equity err in concluding that the bank owed the borrower (a limited liability company) a fiduciary duty in a \$2.8 million-dollar commercial loan transaction for a real estate venture that ultimately failed?

(App. p. 1810; App. pp. 1968-1969 footnote 2).

While the argument in the brief included references to whether or not Zerbst was an agent of Ameris, and whether Ameris became liable by ratifying Zerbst's acts by hiring him, the issue of agency was not argued as an independent issue for appeal. The issue set forth and argued on appeal focused on whether Ameris itself owed Gibson a fiduciary duty. The question presented, and upon which the Court relied to reverse the judgment, has nothing to do with agency of Zerbst or Lanier.

Retired Chief Justice Sanders of the Court of Appeals famously coined the phrase "[a]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). This Court relied upon Judge Sanders' wisdom most recently in *Herron v. Century BMW*, 395 S.C. 461, 464, 719 S.E.2d 640 (2011), in recognizing the strict requirements of preservation of issues for appeal:

Issue preservation rules are designed to . . . provide [an appellate court] with a platform meaningful appellate review. . . . At a minimum, issue preservation requires that an issue raised to and ruled upon by the trial judge. . . . Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.

Id. 395 S.C. 461, 464, 467.

The issue Ameris raised on appeal in its statement of the issues related to whether Ameris itself owed a fiduciary duty to Gibson. It is a far, far stretch to say that Ameris raised the issue of the agency of Zerbst merely because the issue regarding Ameris' own duty discussed the agency of Zerbst.

Gibson respectfully requests that this Court issue a writ of certiorari to address the Court of Appeal's decision, which conflicts with a prior decision of this Court in *Herron v. Century BMW*, 395 S.C. 461, 464, 719 S.E.2d 640 (2011).

ISSUE TWO

In its statement of the standard of review on appeal, Ameris properly recognized that this case was “an action at law.” (App. p. 1824, Appellant’s Brief p. 14). It also correctly stated that “[i]n an action at law tried without a jury, an appellate court’s scope of review extends merely to the correction of errors of law.” *Id.* (internal citations omitted). “An appellate court ‘will not disturb the trial court’s factual findings unless they are without evidence reasonably supporting those findings.’” *Id.* Gibson agreed with Ameris’ statement regarding the standard of review, and offered no argument in opposition. (App. p. 1892)² In its decision (and amended decision), the Court of Appeals recited the scope of review which had been agreed to by the parties. The Court of Appeals added:

In an action at law, [this court] will affirm the master’s factual findings if there is any evidence in the record which reasonably supports them. (citations omitted).

Gibson v. Ameris, Op. No. 5488, filed May 24, 2017, withdrawn, amended and refiled August 23, 2017.

Instead of applying the noted and properly applicable standard of review, the Court of Appeals independently reviewed the facts and issued a decision based on its own view of the evidence, notwithstanding the existence of evidence in the record which supported the trial court’s factual findings. The Court of Appeals actually rejected the factual findings of the trial court.

² Under South Carolina law, appellate briefs are not required to include a statement asserting what the appellant believe to be the appropriate standard of review. Rule 208(b)(1), SCACR. However, since Ameris elected to include in its appellate brief a statement regarding its belief as to the applicable standard of review, Gibson elected not to counter, since she agreed with the scope of review articulated by Ameris. *See* Rule 208(b)(2) (“If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant’s statement of the case.”).

The trial court's 55-page order included the first eight (8) pages of the summary of the case and the facts, but it then included specific findings of fact, followed by a recitation of the evidence upon which the Court relied to support the factual finding. (App. pp. 7-15). With reference to the independent factual findings by the Court of Appeals, the trial judge's factual finding number one (1) is determinative of this issue:

1. Zerbst was an agent of Ameris when Gibson purchased and financed the apartment complex.

(App. pp.15-16 ¶ 1). That factual finding is followed by four and one-half pages describing the applicable law of agency and the specific evidence relied upon by the trial judge in support of his factual finding that Zerbst was an agent of Ameris at the relevant time. *Id.* (App. pp. 16-20).

The trial judge's analysis of the evidence supporting his factual finding includes references to the actual exhibits and/or pages and line of the transcript portion(s) upon which each piece of evidence appeared in support of the factual finding. The evidentiary analysis is detailed and compelling. For example:

Zerbst structured the loan for Gibson at Reliance... (App. p. 838)... Zerbst began talking with... Ameris about employment before he left... Reliance... When ones takes into consideration the facts surrounding these contacts and other things Zerbst and Ameris were doing during this time frame, together with the entire hiring process of Zerbst by Ameris, these communications are significant and consequential. Prior to leaving Reliance, Zerbst spoke with an attorney about a covenant not to compete that he had given to Reliance. He tried to negotiate a resolution of the problem. (App. p. 429-432, App. p. 817). During this time... Zerbst's email... shows he was actively corresponding with... Ameris, who was keeping the bank's attorney informed. (App. p. 820-822). Ameris' employee Lanier testified that Zerbst maintained an office in the Ameris building... and made calls and checked emails during the non-compete period. (App. pp. 767-769).

While the Court of Appeals recited the appropriate standard of review of factual findings by a trial judge in an action at law, it did not employ such a review, and instead allowed itself to engage in its own independent view of the facts, actually rejecting the evidence cited by the trial judge.

The appropriate standard of review in this appeal was whether there was “any evidence” to support the trial judge’s findings of fact. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). Here, when applying the “any evidence” standard in reviewing the trial judge’s findings, it is overwhelmingly apparent that the Court of Appeals, *albeit* acting in good faith, simply looked at the case *de novo* and elected to decide the case differently, which is not appropriate on appellate review of this matter.

Had this been an equitable action, the appellate court would have been permitted to find facts in accordance with its own view of the evidence. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 680 S.E.2d 289 (2009). Even then, however, the appellate court may “not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility.” *Id.* at 290, *citing Tiger Inc v. Fisher Agro Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

“Appellate courts [under the applicable scope of review] must affirm if there is any evidence to support the trial court’s ruling.” *State v. Moore*, 415 S.C. 245, 252, 781 S.E.2d 897 (2016), *citing State v. Pichardo*, 367 S.C. 84, 101, 623 S.E.,2d 840, 849 (Ct. App. 2005). The Court of Appeals committed error when it reversed the decision of the trial court simply because “it would have decided the case differently.” *Id.* at 251.

Gibson asserts that this case presents an appropriate circumstance in which this Court should exercise is “sound judicial discretion” to grant certiorari because “the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.” Rule 242(b)(3), SCACR. If left undisturbed, the Court of Appeals’ decision in this case skews the application of the long-standing standard of review in cases at law tried by a trial judge.

CONCLUSION

Gibson respectfully requests the issuance of a writ of certiorari to review the decision of the Court of Appeals. The existing opinion of the Court of Appeals is inconsistent with the prior precedent of this Court as to the scope of review and the Court of Appeals' application of the scope of review to the detailed factual findings by the trial judge. Among the first questions asked by a panel of the Court of Appeals at any oral argument is "what is the scope of review?" That truly is the crux of this case.

Obscured by the procedural flaws in the Court of Appeal's opinion is the equally flawed analysis of the applicable standard of care, an inherently elevated standard for fiduciaries when someone relies upon the special relationship while securing advice and counsel. In addition to deviating from existing decisions of this Court, the Court of Appeals' decision avoided any discussion of the novel nature of the question presented by these facts, that is, whether a fiduciary relationship can exist in the context of a lender and borrower. (App. p. 1910).

Perhaps that is an issue that can be examined in another case, somewhere in the future. However, it is difficult to imagine a more perfect set of facts for the issue to be decided or, at a minimum, discussed by this Court.

Respectfully submitted by



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September 22, 2017

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on September 22, 2017, I served a copy of the **Petition for Writ of Certiorari** 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:

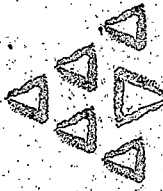
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September 22, 2017

Via Hand-Delivery

Honorable Daniel E. Shearouse
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

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

Dear Mr. Shearouse:

Please find enclosed an original and seven copies of the Petition for a Writ of Certiorari. Also enclosed, please find one original and one copy of the Appendix. Please stamp the extra copy "filed" and return it via our courier. Please do not hesitate to contact me with any questions. We greatly appreciate your assistance in this matter.

With warm personal regards, I am,

Sincerely yours,

Harvey M. Watson III
harvey@desaballard.com

cc. *Petition only, via U.S. mail and Email*
Robert Stepp, Esquire
Tina Cundari, Esquire
Benjamin Gooding, Esquire
Honorable Jenny Abbott Kitchings, Court of Appeals
Linda Gibson (via email)

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