

THE STATE OF SOUTH CAROLINA
In The Supreme Court _____

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

RECEIVED

OCT 11 2017

Case No. 2012-CP-40-6074; Appellate Case No. 2017-001858

S.C. SUPREME COURT

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

v.

David H. Jacobs, Petitioner.

_____ 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 Petitioner.

_____ **TD BANK’S RETURN TO DAVID H. JACOBS’ PETITION FOR CERTIORARI** _____

This Court should deny Petitioner David H. Jacob’s (“Petitioner”) Petition for Certiorari. None of the factors in Rule 242(b) of the South Carolina Appellate Court Rules are present in this matter. Petitioner seeks certiorari of an unpublished, Rule 220 Court of Appeals decision which is not citable authority under the South Carolina Appellate Court Rules. *See TD Bank, N.A., successor by merger with Carolina First Bank v. David H. Jacobs and D Bank, N.A., successor by merger with Carolina First Bank v. David H. Jacobs and James A. McFarland*, Op. No. 2017-UP-300 (S.C. Ct. App. filed July 19, 2017) (the “Opinion”).

There is no novel question of law, no dissenting opinion at the Court of Appeals, no conflict with this Court's precedent, no substantial constitutional issues, and no conflict with the United States Supreme Court on any question of federal law. In an attempt to make this matter appear to be worthy of certiorari, Petitioner incorrectly argues the Opinion presents novel questions of law and is in conflict with this Court's precedent. (Pet. for Cert. at 2–3.) This is not accurate. Among other reasons to deny certiorari, Petitioner did not appeal the jury's finding that TD Bank did not owe Petitioner a fiduciary duty—the very issue that he now claims is a novel issue of law. Moreover, Petitioner does not cite anything from this Court which he contends the Court of Appeals misconstrued.

As explained below, the Court of Appeals correctly applied well-established precedent of this Court to the issues actually raised in Petitioner's appeal. Certiorari is not warranted in connection with this unpublished decision.

Counter-Statement of the Reasons Certiorari Should be Denied

1. Whether a bank owes a fiduciary duty to a customer is a not novel issue of law and Petitioner's failure to challenge the jury's finding on this issue precludes review.
2. The Court of Appeals properly affirmed the trial court's exclusion of evidence regarding TARP and the government bailout of certain financial institutions.
3. The Court of Appeals properly affirmed the trial court's exclusion of evidence regarding TD Bank's sale of an unrelated note in a separate business dealing that Petitioner had no involvement with.
4. The Court of Appeals properly held the Order on TD Bank's Motion in Limine did not overrule another Circuit Court Judge and denial of summary judgment cannot establish law of the case.

Counter-Statement of the Case

On February 20, 2007, Newberry Atrium Professional Center, LLC ("Newberry Atrium") executed a Promissory Note in the principal amount of \$7,141,000 in favor of TD Bank N.A.'s

("TD Bank") predecessor, Carolina First Bank ("Carolina First"),¹ which was secured by a mortgage on certain real property owned by Newberry Atrium. (R. pp. 1038–41, Newberry Atrium Note, Pl.'s Ex. 1.)² The Newberry Atrium loan was a loan to fund a two-story medical office building in Newberry. (R. p. 671, lines 9–11, Trial Tr. 57:9–11.) In consideration of the Promissory Note, Petitioner executed an Unconditional Guaranty in favor of Carolina First on February 20, 2007 ("Newberry Guaranty"). (R. pp. 1042–48, Unconditional Guaranty of David Jacobs, Pl.'s Ex. 2.) The Promissory Note initially matured on February 28, 2009, however, Carolina First and TD Bank agreed to a total of eight extensions and renewals. (R. p. 679, lines 19–23, Trial Tr. 65: 19–23; R. pp. 1049–72, Pl.'s Ex. 3.) Ultimately, the Newberry Atrium loan matured on August 8, 2012, at which time Newberry Atrium and Petitioner failed to pay the balance due and defaulted on the loan. (R. p. 686, line 19–p. 687, line 3, Trial Tr. 72:19–73:3.)

On April 4, 2011, Atrium at Middle Sound Land, LLC ("Atrium at Middle Sound") executed a Promissory Note in the principal amount of \$1,310,495.33 in favor of TD Bank, which was a renewal note and secured by a mortgage on certain real property owned by Atrium at Middle Sound. (R. pp. 1074–77, Atrium at Middle Sound Note, Pl.'s Ex. 5.) The Atrium at Middle Sound loan was made to fund the purchase and development of vacant real property. (R. p. 692, lines 6–9, Trial Tr. 78:6–9.) In consideration for the Promissory Note to Atrium at Middle Sound,

¹ TD Bank acquired the Newberry Atrium loan and the Atrium at Middle Sound loan when it merged with Carolina First in 2010. (R. p. 671, lines 2–7, Trial Tr. 57:2–7; R. pp. 1198–1208, Articles of Merger, Def.'s Ex. 1.)

² The Appendix filed by Petitioner does not comply with the requirements of Rule 242(e) of the South Carolina Appellate Court Rules. The Appendix only contains the Court of Appeals' Opinion, the Petition for Rehearing, and the Return in Opposition, but does not contain the remaining items delineated in Rule 242(e). Petitioner did refile the Record on Appeal with the Court. TD Bank's citations, therefore, are to the Record on Appeal.

Petitioner and Defendant James McFarland³ executed Guarantees in favor of Carolina First on April 4, 2011. (R. pp. 1078–81, Guaranty of David Jacobs, Pl.’s Ex. 6; R. pp. 1082–85, Guaranty of James McFarland, Pl.’s Ex. 7.) Like the Newberry Atrium loan, Carolina First and TD Bank agreed to eight extensions of the original maturity date. (R. p. 696, lines 14–22, Trial Tr. 82:14–22; R. pp. 1086–1118, Pl.’s Ex. 8.) The Atrium at Middle Sound loan eventually matured on July 4, 2012; Atrium at Middle Sound, Petitioner, and Mr. McFarland failed to pay the balance due and defaulted on the loan. (R. p. 700, line 3, p. 86, line 23–p. 87, line 6, Trial Tr. 86:3, 86:23–87:6.)

Under the terms of the at-issue Guarantees, as well as the Newberry Atrium Promissory Note, TD Bank was not required to seek recovery of any collateral before filing suit on the Guarantees—the bank could proceed directly against any borrower or guarantor. (See R. p. 1040, Promissory Note at p. 3, Pl.’s Ex. 1; R. pp. 1042–43, Unconditional Guaranty of David Jacobs at ¶ 1, Pl.’s Ex. 2; R. p. 1078, Guaranty of David Jacobs at ¶ 4, Pl.’s Ex. 6.) Therefore, on September 7, 2012, TD Bank filed Civil Action No. 2012-CP-40-6074 against Petitioner to collect on the Newberry Guaranty. In his Answer, Petitioner admitted signing the note on behalf of Newberry Atrium, that he signed an unconditional guaranty, that the maturity date on the note was August 8, 2012, and that the balance due on the loan had not been paid. (R. p. 97, Answer ¶¶ 1–3.)

On November 7, 2012, TD Bank filed Civil Action No. 2012-CP-40-7540 against Petitioner and Mr. McFarland to collect on the Guarantees for the Atrium at Middle Sound loan. In his Answer, Petitioner admitted signing the note on behalf of Atrium at Middle Sound and admitted that he signed an unconditional guaranty, that the maturity date on the note was April 4, 2012, and that the balance due on the loan had not been paid. (R. p. 93, Answer ¶¶ 1–4.)

³ Defendant McFarland is not a party to this appeal.

In both actions, Petitioner also asserted in his answer and supplemental answers that TD Bank breached the duty of good faith and fair dealing in two ways: (1) by suing him solely on the guaranty and not foreclosing the mortgage, and (2) that TD Bank has sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with the officers of TD Bank, will be released from liability. (R. p. 95, Answer ¶¶ 17 & 20; R. pp. 99–100, Answer ¶¶ 16, 18, 21; R. p. 101, Supp. Answer ¶ 30; R. p. 106, Supp. Answer ¶ 27.) Based on these allegations, Petitioner sought to void the guarantees. (R. p. 96, Answer ¶ 24; R. pp. 99–100, Answer ¶¶ 19 & 24.)

I. Procedural Background

A. Summary Judgment Motion

On May 24, 2013, TD Bank filed a motion for summary judgment in both cases. In response, Petitioner filed an affidavit in opposition to TD Bank’s motions for summary judgment against him in both cases. In his affidavit, Petitioner admitted that when “he made the Newberry Atrium and Middle Sound loans, [he] fully understood that [he] was liable to the bank, if either project was unsuccessful for any loss that the bank incurred.” (R. p. 326, Jacobs’ Aff. ¶ 41.) A year later, Judge Strickland entered a Form-4 order denying the motions for summary judgment. (R. pp. 1–2, Order Denying Summary Judgment.) TD Bank then filed a motion to reconsider, which was denied by short form order that did not include any explanation or discussion for the denial. (R. p. 3, Order Denying Motion to Reconsider.)

B. Pre-Trial Motions

Following the denial of summary judgment, Petitioner identified five additional witnesses, Tom Wingard, David Hilburn, Joe Hawk, John Hilton, and Andrew Syrett. (R. pp. 374–75, Letters from Petitioner to TD Bank.) TD Bank filed a motion in limine in both cases seeking to exclude

the following testimony and evidence: (1) any reference or evidence regarding an alleged breach by TD Bank of the implied duty of good faith and fair dealing or alleged breach of fiduciary duty; (2) any reference or evidence on the government's bailout to the banking industry and the Troubled Asset Relief Program ("TARP"); (3) any reference or evidence regarding any unrelated note sales by TD Bank, including but not limited to the sale of a note from Heron Lakes I, LLC ("Heron Lakes I") to Sea Ducks, LLC; and (4) any testimony or other evidence from Tom Wingard, Joe Hawk, John Hilton, and Andrew Syrett, which were not properly or timely disclosed through discovery. (R. pp. 299–300, Motion in Limine.)

The trial court then gave Petitioner the opportunity to proffer all of the challenged evidence, ordering any challenged evidence not proffered would be excluded. (R. p. 10, Order dated October 3, 2014 (hereinafter, "Order on Motion in Limine,") at 7.) Petitioner proffered various testimony and evidence, but did not proffer Joe Hawk, John Hilton, or Andrew Syrett's testimony. (R. pp. 478–614, Tr. of Aug. 12, 2014 Hearing.)

The trial court granted in part and denied in part TD Bank's motion in limine. The trial court denied TD Bank's motion in limine regarding exclusion of Petitioner's breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses, finding that the issue may be revisited again on directed verdict. (R. p. 11, Order on Motion in Limine at 8.) The trial court granted the motion with respect to exclusion of all evidence, testimony, or reference to TARP and government bailouts and the Heron Lakes I note sale. (R. p. 11–13, Order on Motion in Limine at 8–10.) The trial court further denied TD Bank's motion in limine to exclude Petitioner's appraiser, Tom Wingard, but granted TD Bank's motion in limine to exclude witnesses John Hilton, Joe Hawk, and Andrew Syrett (who were not proffered), and David Hilburn (who was

proffered to provide testimony on the Heron Lakes I note sale). (R. pp. 4–17, Order on Motion at Limine.)

II. Evidence at Trial

In October, 2014, the consolidated cases were tried before a jury. TD Bank's workout officer, Roper Jenkins, testified about the decision to sue Petitioner on the guarantees rather than first foreclosing the mortgages.⁴ The main reason identified by Mr. Jenkins was the fact that the guarantors were high net worth individuals and had sufficient assets to satisfy the debt owed. (R. p. 703, line 24–p. 704, line 24, Trial Tr. 89:24–90:24; R. p. 551, line 15–p. 552, line 3, Tr. of Aug. 12, 2014 Hearing 74:15–75:3.) An additional factor in the decision to wait before proceeding with foreclosure of Newberry Atrium was the fact that the property was a medical office building with confidential records and did not appear to be generating enough income to pay its expenses. (R. p. 704, lines 3–8, lines 20–24, p. 705, line 18–p. 706, line 14, Trial Tr. 90:3–8, 90:20–24, 91:18–92:14.) TD Bank also believed allowing Petitioner and Mr. McFarland additional time to sell the properties themselves was beneficial to them. (R. p. 704, line 25–p. 705, line 17, Trial Tr. 90:25–91:17; R. p. 553, lines 10–22, Tr. of Aug. 12, 2014 Hearing 76:10–22.) Furthermore, Newberry Atrium delayed the foreclosure of its property by filing for protection under the Bankruptcy Code. (R. p. 706, lines 15–20, Trial Tr. 92:15–20.)

Mr. Jenkins testified another reason TD Bank elected to proceed with suit was that Petitioner did not provide financial information that was requested by TD Bank. (R. p. 726, lines 2–16, Trial Tr. 114:2–16; R. p. 549, line 21–p. 550, line 18, Tr. of Aug. 12, 2014 Hearing 72:21–73:18.) Petitioner's financial statements were entered into evidence at trial and demonstrated his

⁴ By the time of trial, TD Bank foreclosed on the mortgage securing the Newberry Atrium Loan. (R. p. 709, lines 15–18, Trial Tr. 95:15–18.)

net worth was decreasing. (R. pp. 1148–97, Pl.’s Exs. 12–16; R. p. 1148, Pl.’s Ex. 12; R. p. 1159, Pl.’s Ex. 13.) The decrease in Petitioner’s net worth was a cause for concern to TD Bank. (R. p. 727, line 16–p. 728, line 1, Trial Tr. 113:16–114:1.) This led TD Bank to request additional financial information from Petitioner, which he refused to provide and, again, was one reason TD Bank proceeded with suit. (R. p. 728, lines 2–16, Trial Tr. 114:2–16.) As Mr. Jenkins testified, the refusal to provide financial information was a concern because it indicates a borrower may be hiding something. (R. p. 728, lines 8–16, Trial Tr. 114:8–16.)

TD Bank’s concern was justified, as it later learned that Petitioner had transferred property to family members “in the millions of dollars.” (R. p. 728, lines 17–25, Trial Tr. 114:17–25.) His financial statements show transfers of ownership interests in various entities, with the transferred interests having a total value of over \$5 million. (R. p. 729, line 2–p. 733, line 3, Trial Tr. 115:2–119:3.) Petitioner did not deny transferring millions of dollars to his wife and family. (R. p. 814, line 14–p. 816, line 2, p. 816, line 3–p. 817, line 24, Trial Tr. 200:14–202:2, 202:3–203:24.)

Following the close of TD Bank’s case in chief, TD Bank moved for a directed verdict on its claims, seeking to have Petitioner’s defenses dismissed as a matter of law. The trial court denied TD Bank’s motion in part, but granted the motion on the narrow issue of whether TD Bank could sue Petitioner on the guarantees without first foreclosing on the property securing the notes, which the Court determined TD Bank could do under South Carolina law and the terms of the parties’ loan documents. (R. p. 851, lines 6–16, Trial Tr. 237:6–16.)

Following the close of all evidence, the trial court submitted the case to the jury, including Petitioner’s defenses. (R. p. 933, lines 8–17, Trial Tr. 319:8–17.) The jury then returned verdicts in TD Bank’s favor in the amounts alleged to be due under the guarantees. (R. pp. 20–21, Jury Verdicts.) In finding for TD Bank on its causes of action against the Defendants, the jury rejected

Petitioner's breach of fiduciary duty and breach of implied covenant of good faith and fair dealing defenses.

III. Post-Trial

On October 17, 2014, Petitioner filed a motion for new trial seeking a new trial on the following grounds: (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 Order on Motion in Limine overruled the prior ruling denying summary judgment (R. pp. 461–68, Motion for New Trial.) Petitioner did not file a directed verdict motion or a motion for judgment notwithstanding the verdict.

By Order entered on March 2, 2015, the trial court addressed the new trial motion and denied Petitioner's motion for a new trial. (R. pp. 22–26, Order entered Mar. 2, 2015.) Petitioner appealed the Order denying his motion for a new trial.

IV. Appeal

Petitioner filed a notice of appeal on April 3, 2015. Thereafter, the Court of Appeals heard oral arguments in this matter in May, 2017, and issued an unpublished opinion affirming the trial court. *TD Bank, N.A., successor by merger with Carolina First Bank v. David H. Jacobs and D Bank, N.A., successor by merger with Carolina First Bank v. David H. Jacobs and James A. McFarland*, Op. No. 2017-UP-300 (S.C. Ct. App. filed July 19, 2017) [hereinafter Opinion]. The Court of Appeals denied rehearing on August 18, 2017. This Petition for Certiorari followed.

LAW/ANALYSIS

I. Petitioner fails to support 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 finds arguments with no citation to legal authority to be abandoned. *E.g.*, *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (“Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.”).

Petitioner only cites two cases: once in the introduction to his argument and again in his argument that certain evidence should have been admitted.⁵ (Pet. for Cert. at pp. 7, 21.) The citations are not accompanied by a discussion of the law and how it may apply to this case. (*Id.*) Rather, the citations are followed by conclusory statements devoid of any analysis. (*Id.*) Accordingly, the Court should find that Petitioner has abandoned all issues in this appeal. *See First Sav. Bank*, 314 S.C. at 363, 444 S.E.2d at 514. Certiorari should be denied.

II. The Court of Appeals’ unpublished opinion does not address a novel issue of law.

Petitioner argues a grant of certiorari is appropriate because this appeal concerns whether a bank owes a fiduciary duty to a customer, which Petitioner summarily argues is a novel issue of law. The issue of whether a bank can owe a fiduciary duty to a customer, however, is not a novel issue of law. Indeed, in one of the two citations to legal authority contained in the petition for certiorari, Petitioner acknowledges this Court has addressed this very issue. (Pet. for Cert. at p. 7); *see also Burwell v. S.C. Nat. Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (stating the “normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one.”). As this Court has already addressed this issue, it is not a novel question of law and certiorari should be denied.

⁵ The other three case citations are contained in quotes from the Court of Appeals’ Opinion.

III. Petitioner did not appeal the issue of whether TD Bank owes Petitioner a fiduciary duty and it is, therefore, the law of the case.

Petitioner did not appeal a ruling on whether TD Bank owes Petitioner a fiduciary duty as a matter of law. Rather, Petitioner 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) those two rulings effectively overruled decisions made by another judge during summary judgment. (R. pp. 465–66, 468, Motion for New Trial, ¶¶ 10–12, 25.)

The issue of whether TD Bank owed and/or breached a fiduciary duty to Petitioner was submitted to the jury and the jury found for TD Bank, rejecting Petitioner’s breach of fiduciary duty and breach of implied covenant of good faith and fair dealing defenses. (R. pp. 20–21, Jury Verdicts.) Petitioner did not contest the trial court’s rulings on directed verdict, the jury instructions, or the jury’s verdict. Petitioner’s failure to contest and appeal these decisions makes these rulings the law of the case. *See, e.g., Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (“An unappealed ruling is the law of the case and requires affirmance.”); *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 266, 442 S.E.2d 611, 616 (1994) (jury charges without objection were law of the case). Accordingly, the jury’s findings are now the law of the case. An additional consequence of Petitioner’s failure to appeal these rulings is that the issue of whether TD Bank breached a fiduciary duty is 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.” (citations omitted)). As the issue of

whether TD Bank owed Petitioner an alleged fiduciary duty is not preserved and it is the law of the case, this Court should deny certiorari.⁶

IV. The Court of Appeals correctly held that evidence pertaining to TARP and the government bailout were inadmissible.

Petitioner's argument that he is entitled to a new trial because the TARP and Government bailout evidence are relevant is incorrect. The Court of Appeals correctly held that the trial court did not abuse its discretion in excluding the TARP and government bailout evidence because it was not relevant and, even if it was relevant, the probative value was substantially outweighed by the danger of unfair prejudice. Opinion at *2.

Under Rule 401 of the South Carolina Rules of Evidence, in order for evidence to be relevant, it must have a "tendency to make any fact that is of consequence to the determination of the action more probable or less probable." Rule 401, SCRE. Even when relevant, evidence will be inadmissible if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. "The admission or exclusion of evidence is left to the sound discretion of the trial judge." *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (citations omitted). Consequently, "[a] court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." *Id.* (citations omitted). An abuse of discretion "occurs when the trial court's ruling is based on an error of law

⁶ In order to appeal this issue, Petitioner needed to make a directed verdict motion on his defense that TD Bank breached a fiduciary duty as a matter of law after the close of all evidence and a motion for judgment notwithstanding the verdict on the same issue after trial. See *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170-71 (2012) ("[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion . . . [because a] motion for a JNOV is merely a renewal of the directed verdict motion."). Petitioner, however, failed to make either motion. Rather, he specifically stated the issue was for the jury to decide. (R. p. 922, lines 7-17, Trial Tr. 310:7-17.)

or, when grounded in factual conclusions, is without evidentiary support.” *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

The Court of Appeals correctly held the trial court did not abuse its discretion in excluding evidence of TARP and the government bailout and that the evidence was not relevant. Tellingly, Petitioner does not cite to the proffered evidence regarding TARP, or to the record at all, in his argument that the TARP and government bailout evidence were impermissibly excluded. (Pet. for Cert. at pp. 15–18.) Rather, he makes general, unsupported statements regarding TARP and its goals. (*Id.*) The sole evidence proffered at trial by Petitioner relating to TARP was a single exhibit, a page from TD Bank’s website describing the terms of the merger, which stated, among other things, that the United States Department of Treasury was selling its \$347 million of preferred stock in Carolina First’s parent company to TD Bank as part of the merger for cash consideration totaling \$130.6 million. (R. p. 503, line 10–p. 504, line 14, Tr. of Aug. 12, 2014 Hearing 26:10–27:14 (discussing Def.’s Ex. 2 at proffer hearing).) Petitioner did not proffer any evidence showing a relationship between TARP and the at-issue loans or any of TD Bank’s alleged actions in these cases. The Court of Appeals correctly held “there is no relevant link between the proffered testimony and the issue of whether Jacobs was legally responsible for paying his guaranty obligations.” Opinion at *2.

Petitioner does not identify a single legal authority that demonstrates TARP or the government bailout are relevant to a suit between a lender and a borrower. Conversely, in *Masters Group Int’l, Inc. v. Comerica Bank*, the Supreme Court of Montana found that TARP evidence was irrelevant and a trial court abused its discretion in admitting it. 352 P.3d 1101, 1123 (Mont. 2015). Unlike the instant case, the plaintiff-borrower in *Masters Group* offered evidence that the

defendant-lender made inaccurate statements to the borrower about the availability of TARP funds. *Id.* at 1222. Even with those alleged statements, the court found that “TARP evidence does not bear on the existence” of any facts of consequence to the borrower’s claims for breach of contract and implied covenant of good faith and fair dealing claims (*i.e.*, whether there was a contract to forbear or the lender breached that contract). *Id.*

Even if the proffered TARP evidence was somehow relevant, the Court of Appeals correctly held “its probative value was substantially outweighed by the danger of unfair prejudice.” Opinion at *2. In order for a trial court’s evidentiary ruling to be reversed on appeal, there must be a legal error which results in prejudice to the appealing party. *See Adams*, 354 S.C. at 377, 580 S.E.2d at 793; *see also* Rule 103, SCRE (stating that an error may not be predicated upon a ruling admitting or excluding evidence unless it affects a “substantial right” of the party). Petitioner argues that letting the jury know about TARP and its purpose helps show TD Bank failed to act as a fiduciary and in good faith. This argument, however, ignores the fact that Petitioner did not proffer any evidence on these issues or demonstrate any prejudice by the exclusion of the evidence. Accordingly, certiorari should be denied.

V. The Court of Appeals correctly held it was not an abuse of discretion to preclude evidence of an unrelated note sale.

The Court of Appeals correctly applied the law in holding “the Heron Lakes I evidence does not make any matter at issue more or less probable.” Opinion at *3. Petitioner was not involved in the business dealings that comprised the Heron Lakes I matter.

In his briefing to the Court of Appeals, Petitioner asserted that TD Bank sold the Heron Lakes I note at a discount with knowledge that the guarantors of the Heron Lakes I note would be released from liability because of a personal relationship between the guarantor and the loan officer. (App. Brief at pp. 30–33.) Petitioner argued to the Court of Appeals that this demonstrated

bad faith and a breach of a fiduciary duty. (*Id.*) In the Petition for Certiorari, Petitioner completely changes his argument as to how the sale of the Heron Lakes I note proves TD Bank acted in bad faith and breached an alleged fiduciary duty to Petitioner. Petitioner now recognizes “there was no personal relationship,” however, he asserts this fact actually strengthens his argument of bad faith and breach of fiduciary duty. (Petition for Cert. at p. 19.) Putting aside the fact that a party cannot argue a ground for reversal on appeal that he did not argue below, *see Rosamond Enterprises, Inc. v. McGranahan*, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983), it was not error for the Court of Appeals to exclude the testimony of David Hilburn.⁷

Again, rather than make a single citation to the record, Petitioner makes general allegations about what this purported evidence shows which are inconsistent with the actual proffered testimony. David Hilburn testified that he has no knowledge regarding TD Bank’s decision making process related to the Heron Lakes I note sale:

Q: You don’t know anything about TD Bank’s decision-making related to the Heron Lakes One note sale?

A: Not at all.

(R. p. 612, lines 8–16, Tr. of Aug. 12, 2014 Hearing 135:8–16.) Without personal knowledge, Mr. Hilburn was not even competent to testify about the reasons behind TD Bank’s decision to sell the Heron Lakes I note. *See* Rule 602, SCRE.

Mr. Jenkins, TD Bank’s workout officer, testified to legitimate business reasons for the decision to sell the Heron Lakes I note at a discount while not selling the notes at issue in this case for a discount. Specifically, he testified to a critical difference between the Heron Lakes I loan

⁷ The only proffered evidence relating to the Heron Lakes I note sale which Petitioner argues should be admitted in his Petition for Certiorari is the testimony of David Hilburn. (Pet. for Cert. at pp. 18–21.)

and the loans at-issue in this case: Petitioner had a \$20 million net worth, while the guarantors in the Heron Lakes I loan demonstrated that they did not have the ability to pay. (R. p. 518, lines 1–12, Tr. of Aug. 12, 2014 Hearing 41:1–12 (further testifying that of the two guarantors for the Heron Lakes I loan, one was deceased and his estate was valued at negative \$14 million, while the other guarantor was borrowing funds from his mother for living expenses).)⁸

The Court of Appeals, therefore, correctly held that the evidence shows TD Bank “chose to sell the Heron Lakes I note at a discounted price for business reasons.” Opinion at *2. Since there were legitimate business reasons for the discounted sale, it was also proper to hold the Heron Lakes I evidence did not make any issue in this case more or less probable because it does not relate to the at-issue loans. Thus, the Court of Appeals did not misapply any precedent. *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.”).

Moreover, Petitioner cannot show he was prejudiced by the exclusion of this evidence because it does not support his defenses. Petitioner contends that the evidence of the Heron Lakes I note sale is important to show a breach of a fiduciary duty or covenant of good faith and fair dealing because it “show[s] disparate treatment.” (Pet. for Cert. at p. 21.) However, the trial court during the proffer and the jury at trial heard substantial, uncontested evidence regarding Petitioner’s large net worth, the eight extensions previously granted to him, and his transfers of millions of dollars to family members during the terms of the extensions. (R. pp. 551–52, Tr. of

⁸ He also testified to the fact that no personal relationship existed between the Heron Lakes I guarantor and the loan officer, (R. p. 521, line 18–p. 522, line 20, p. 511, line 23–p. 512, line 1, Tr. of Aug. 12, 2014 Hearing 44:18–45:20, 34:23–35:1), a fact which Petitioner now concedes is true.

Aug. 12, 2014 Hearing 74:15–75:3; R. pp. 679, 696, 703–04, 729–33, 814–17, Trial Tr. 65:19–23, 82:14–22, 89:24–90:24, 115:2–119:3, 200:14–202:2, 202:3–203:24; R. pp. 1049–72, Pl.’s Ex. 3, R. pp. 1086–1118, Pl.’s Ex. 8, R. pp. 1148–97, Pl.’s Exs. 12–16.) Consequently, even if the Heron Lakes I evidence was admitted, there was more than sufficient evidence for the jury to conclude that Petitioner’s circumstances were vastly different from the Heron Lakes I parties.

Accordingly, the Court of Appeals’ decision was not in contravention of this Court’s precedent; rather, it correctly upheld the trial court’s ruling to exclude the testimony of David Hilburn and other evidence relating to the Heron Lakes I note sale. Further, this is not a novel issue of law. This Court, therefore, should not grant certiorari.

VI. The Court of Appeals correctly held the Order on Motion in Limine did not overrule issues previously decided by another judge and the denial of a summary judgment motion cannot establish the law of the case.

The Order on the Motion in Limine did not improperly overrule the Order Denying Summary Judgment. The trial court denied TD Bank’s motion for summary judgment via a Form 4. (R. pp. 1–2, Order Denying Summary Judgment.) The motion to reconsider was denied by short form order and did not include any explanation or discussion for the denial. (R. p. 3, Order Denying Motion to Reconsider.) The trial court, therefore, did not make any rulings on the evidentiary issues that the Order on the Motion in Limine later decided.

Furthermore, after the denial of summary judgment, Petitioner identified five new witnesses and filed his supplemental answers on July 11, 2014 which identified an additional ground for the breach of good faith and fair dealing defense. (R. pp. 374–75, Letters from Petitioner to TD Bank; R. pp. 97–107, Supplemental Answers.) The motion for summary judgment could not have sought to exclude witnesses that Petitioner had yet to identify. Thus, the Order Denying Summary Judgment could not have made a ruling about the admissibility of this

yet to be identified evidence. The Court of Appeals, therefore, correctly held “the trial court did not violate Rule 43(1), SCRCP, and this is not a situation where one judge has overruled another.” Opinion at *3.

Moreover, “[t]he denial of summary judgment does not establish the law of the case[.]” *Ballenger v. Bowen*, 313 S.C. 476, 478, 443 S.E.2d 379, 380 (1994) (emphasis added). The issues raised in a motion for summary judgment that is denied may be raised again. *Id.*

Because the Court of Appeals’ ruling is not in contravention of this Court’s precedent and does not present a novel issue of law, this Court should deny certiorari.

Conclusion

This Court should deny the Petition for Certiorari. The Court of Appeals’ opinion involves no novel questions of law and is consistent with existing law.

Respectfully submitted,

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October 11, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2017-001858

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

v.

David H. Jacobs, Petitioner,

and

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, Petitioner.

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):

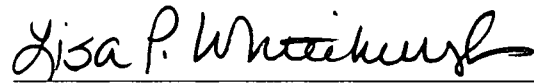
Pleadings:

Respondent's Return to Petition for Certiorari

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October 11, 2017