THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

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Appellate Case No. 2017-001953

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

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

v.

Ameris Bank, Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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The petition for writ of certiorari should be denied. The court of appeals correctly decided this case and there is no need for further review. This case does not present novel issues of law nor does it fall within the categories of cases for which certiorari is granted. For these reasons, the petition for writ of certiorari should be denied.

**BACKGROUND**

This case arises out of a foreclosure action in which the borrower, Heritage Seven LLC, and the guarantor, Linda Gibson, (together, "Petitioners") walked away from a failed real estate venture and a $2.8 million loan obligation. On November 2, 2007, Heritage Seven LLC

("Heritage Seven"), an entity formed and managed by Linda Gibson ("Gibson"), borrowed $2.8 million from Respondent Ameris Bank ("Ameris") to purchase and renovate a 48-unit apartment complex in North Charleston, South Carolina. (R. pp. 1095-110, 1120-22.) Gibson guaranteed the loan in her individual capacity and as Trustee of the Paul William Gibson Family Trust. (R. pp. 1089-94.)

Heritage Seven defaulted on the note, and on June 14, 2010, Ameris initiated foreclosure proceedings. (R. pp. 66-76.) The foreclosure action settled on December 1, 2010. (R. pp. 1662-84.) As part of the settlement, Heritage Seven LLC executed deeds in lieu conveying the apartment complex and other real property that served as collateral for the loan to the bank that acquired the debt. (R. pp. 1663, 1668-75.) In exchange, the notes were deemed satisfied, the loan documents canceled, and all litigation pending against Petitioners was dismissed. (R. 1663.) Ameris lost approximately $1.8 million on the transaction. (R. p. 721.)

As part of the foreclosure, Petitioners asserted counterclaims against Ameris for breach of fiduciary duty, negligent misrepresentation, and aiding and abetting breach of fiduciary duty. (R. pp. 92-99.) Petitioners alleged Ameris and loan officer Karl Zerbst ("Zerbst"), who did not become an employee of the bank until January 11, 2008, owed a fiduciary duty to Petitioners. (R. p. 1151.) Petitioners further alleged that in October 2007, when Petitioners were preparing to submit the loan application, Zerbst told Gibson the apartments were a good deal and the rents would cover the debt, when neither of those statements were true. *Id.* Petitioners also alleged Ameris aided and abetted Gibson's real estate agent and trusted advisor, Rolando Villavicencio ("Villavicencio"), in breaching fiduciary duties. *Id.*

Although the foreclosure action settled, the counterclaims remained and were tried before a master-in-equity in Berkeley County on May 22, 23, and August 14, 2012. On August 8, 2013,

the master entered judgment in favor of Petitioners on all three causes of action and awarded actual damages of $1,153,625.00 and punitive damages of $3,551,232.00. (Order.) The master reduced the award by 20%, finding Gibson comparatively at fault for the harm alleged. *Id.* Additionally, the master applied an $850,000 set-off for the amount Petitioners received in the settlement of a separate case Gibson brought against Villavicencio for the same injury. *Id.* The final judgment was for $2,913.886.00. *Id.*

On appeal, the court of appeals reversed the master-in-equity's decision on the ground that Ameris could not be liable as a matter of law because Zerbst was not Ameris's agent at the time of the alleged conduct. (Opinion.) Zerbst was unemployed at the time he allegedly told Gibson the apartment complex was a good deal. Ameris did not have the right to control Zerbst's conduct at this time, and the record did not contain any evidence that Ameris ever represented to Petitioners that Zerbst was its agent. *Id.*

Petitioners petitioned for rehearing, and the petition was denied.

## ARGUMENT

The petition for writ of certiorari should be denied. The court of appeals correctly decided that Ameris could not be liable as a matter of law because Karl Zerbst was not Ameris's agent at the time of the alleged conduct. The master's finding that Zerbst was Ameris's agent is without support and was properly reversed.

Additionally, reasons do not exist for granting review. This case does not present any special circumstances and does not fall within the categories of cases that warrant review on certiorari. Ameris did not do anything to harm Petitioners. The harm Petitioners suffered, if any, was the result of Petitioners' own conduct, the incompetency of Villavicencio, and market

forces, none of which are the responsibility of Ameris. Banks are not guarantors of success of the projects for which they lend money. It is time for this litigation to end.

For these reasons, and those set forth more fully below, the petition should be denied.

**1. The issue of whether Karl Zerbst was Ameris's agent was preserved for review.**

Contrary to what Petitioners contend, the issue of whether Karl Zerbst was Ameris's agent during the relevant time period was preserved for review and the court of appeals properly addressed the issue.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *E.g.*, *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

Here, the issue of whether Zerbst was Ameris's agent during the relevant time period was raised to and ruled upon by the trial court. The issue has been part of this case since its inception. Ameris asserted lack of agency as an affirmative defense in its answer to the complaint. (R. p. 105.) Ameris argued at trial that Zerbst was not its agent. (R. pp. 159, 169, 243-48, 401-02.) The master addressed the issue over the course of ten pages in his final order. (R. pp. 9-19.) Ameris raised the issue again in the motion to alter or amend the judgment, which Petitioners acknowledge, and the motion was denied. (Pet. p. 5; R. pp. 111, 120, 126-27.)

Because the issue of whether Zerbst was Ameris's agent during the relevant time period was raised to and ruled upon by the trial court, the issue was preserved for appellate review. As

evidenced by the final order in this case, the master had a full and fair opportunity to consider and rule on the issue.

In addition to being preserved for review, the agency issue was before the court of appeals and the court of appeals properly considered it. Ameris argued the issue throughout its written briefs and oral argument. Although not set forth as a standalone issue on appeal, the agency issue was part of Ameris's argument in the first three issues on appeal.[1] If Zerbst was not Ameris's agent during the relevant time period, Ameris could not be liable to Gibson as a matter of law.

"Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. But "[w]hen an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from an appellant's arguments." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642; *see also* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 75 (3d ed. 2016) (same); *Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) (finding the statement of issue,

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[1] The issues on appeal were as follows:

I. 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?

II. Did the master-in-equity err in concluding that the bank was liable for negligent misrepresentation for telling the borrower that the transaction was a "good deal" and that the "rents would cover the debt"?

III. Did the master-in-equity err in concluding that the bank knowingly aided and abetted the borrower's real estate agent in breaching a fiduciary duty?

IV. Did the master-in-equity err in awarding actual and punitive damages, and is the punitive damages award so excessive that it violates the due process clause of the United States and South Carolina Constitutions?

when read in conjunction with the argument, sufficiently raised the issue to the court); *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) (finding that although neither party specifically argued the issue, the court of appeals was at liberty to rule on the issue because it "was reasonably clear from the State's brief").

Here, it was more than reasonably clear from Ameris's arguments on appeal that Ameris raised the issue of whether Karl Zerbst was its agent. Ameris argued throughout the briefs that Zerbst was not its agent. On page 7 of its opening brief, Ameris stated as follows:

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

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

Additionally, Ameris argued as follows in its opening and reply briefs:

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

- "Zerbst was not even employed at the time [he made statements to Gibson regarding the viability of the project]." (Br. of App. p. 22.)

- "As noted above, Zerbst did not join Ameris Bank until January 8, 2011, and Ameris maintains that Zerbst was not acting as an agent for Ameris Bank when the conversation with Gibson took place." (Br. of App. p. 22 n.12.)

- "[Petitioners] cannot show that Karl Zerbst was acting as an agent of Ameris Bank prior to the loan closing. . . . Zerbst did not become an employee of Ameris Bank until January 11, 2008. There is no evidence in the record showing that Ameris Bank did anything prior to the loan closing to represent to Gibson that Zerbst was its agent." (Reply Br. of App. p. 3) (citations omitted).

- "[Petitioners] cannot show that Karl Zerbst was acting as an agent of Ameris Bank prior to the loan closing. During the entire period of time that Gibson says she met with or talked to Zerbst about whether she should purchase the apartments, Zerbst either worked for First Reliance Bank or he was unemployed. (R. pp. 230, 249, 250.) Zerbst did not become an employee of Ameris Bank until January 11, 2008. (R. pp. 422-23, 1151-1217.) There is no evidence in the record showing that Ameris Bank did anything prior to the loan closing to represent to Gibson that Zerbst was its agent." (Reply Br. of App. p. 3.)

- "As a matter of law, an agency relationship cannot be created by the conduct of the agent alone. *See Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005) ("An agency relationship may not be established solely by the declarations and conduct of an alleged agent."); *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 641-44, 598 S.E.2d 717, 721-22 (Ct. App. 2004) (holding that there is no relationship as a matter of law when the principal has not made any representations to a third party concerning whether someone is an agent). This is fatal to [Petitioners'] argument that Ameris Bank is liable for statements made by Zerbst prior to the loan closing." (Reply Br. of App. pp. 3-4.)

- "Third, even Zerbst (*who was not Ameris Bank's agent at the time*) did not know the apartment complex was not a sound investment." (Reply Br. of App. p. 12.) (emphasis added).

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

> [W]e strongly deny that [Zerbst] was our agent at the time. He didn't even begin working for the bank until January, . . . and as a matter of law, unless there's evidence that the principal, which in this case would be the bank, made a representation to the borrower, to Mrs. Gibson, that he was the bank's agent, there can be no agency relationship as a matter of law, so that is an error.

(Audiotape of oral argument held Feb. 17, 2017, beginning at 13:30, on file with the court of appeals).

Later, when addressing a question about Zerbst giving the loan application documents from First Reliance to Villavicencio, who turned around and gave them to Benji Lanier, a loan officer at Ameris, counsel for Ameris argued as follows:

> [A]s a matter of law, that doesn't create an agency relationship. [Zerbst] can go out and do whatever he wants to try to curry favor with a bank that he thinks may be his potential employer one day. Maybe he wants to show the bank that he's able to bring in business. Who knows? But there's no evidence that the bank authorized him to do that.
>
> . . .
>
> [By giving the loan applications to Lanier through Villavicencio] Mr. Zerbst was trying to avoid his non-compete and thought he was being clever, but again that doesn't put the bank on the hook for this project.

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

Given the numerous references in the briefs and the statements made during oral argument, the issue of whether Zerbst was Ameris's agent was before the court of appeals. Ameris has maintained throughout this case that Zerbst was not its agent, and that Ameris did not have control over him until he began working for the bank in January 2008.

Contrary to what Petitioners contend, the fact that Ameris framed the issues on appeal through the lens of the causes of action in the complaint does not mean that Ameris abandoned the agency issue. A review of the briefs and the oral argument show that Ameris did not abandon the issue, and in fact continued to argue it. Ameris's overall argument that there was no evidence to support the master's finding that Ameris was liable for the harm alleged necessarily included the argument that Zerbst was not an agent for the bank during the relevant time period.

Petitioners acknowledge "[t]he issue set forth and argued on appeal focused on whether Ameris itself owed Gibson a fiduciary duty," but then Petitioners go on to say the issue "has nothing to do with agency of Zerbst or Lanier." (Pet. p. 6.) As a bank, Ameris can only act through its agents. By arguing that the bank did not owe a fiduciary duty to Gibson, Ameris was also arguing that its employees and agents likewise did not owe a fiduciary duty. As for Zerbst, Ameris argued both: The bank did not owe a fiduciary duty to Gibson because (1) Zerbst was not its agent and (2) neither he nor the bank owed a fiduciary duty to Gibson as a matter of law.

By addressing the agency issue, the court of appeals did not run afoul of *Herron v. Century BMW*, as Petitioners suggest. The court of appeals addressed an issue that was preserved for review and that was evident from Ameris's arguments on appeal.

Because the issue of whether Karl Zerbst was Ameris's agent during the relevant time period was preserved for review and was reasonably clear from the arguments made on appeal, the court of appeals properly addressed the issue.

**2. The court of appeals correctly applied the standard of review.**

In addressing the agency issue, the court of appeals correctly applied the standard of review.

"An action in tort for damages is an action at law." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *S.C. Dep't of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). An appellate court "will not disturb the trial court's factual findings unless they are without evidence reasonably supporting those findings." *Id.*

Petitioners agree this is the proper standard of review, and agree that the court appeals properly recited the standard in the court's opinion. (Pet. p. 7.) Petitioners contend, however,

that 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." *Id.* This is incorrect. The court of appeals did not disagree with any of the factual findings of the master, but instead concluded that the facts as found by the master did not reasonably support the conclusion that Zerbst was Ameris's agent.

As a matter of law, the actions of Zerbst cannot create an agency relationship between Zerbst and Ameris. As the court of appeals correctly noted, "an agency relationship may not be established solely by the declarations and conduct of the alleged agent." *Frasier v. Palmetto Homes of Florence*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996). Agency must be established through "representations made by the *principal* to the third party and reliance by the third party on those representations." *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 499 (2007) (emphasis added). When the principal has not made any representations to a third party concerning whether someone is an agent, there is no agency relationship as a matter of law. *See Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 641-44, 598 S.E.2d 717, 721-22 (Ct. App. 2004) (affirming summary judgment and finding there is no relationship as a matter of law when the principal has not made any representations to a third party concerning whether someone is an agent).

Here, because the facts relied upon by the master relate to the conduct of Zerbst rather than the conduct of Ameris, the master erred as a matter of law in concluding that Zerbst was Ameris's agent. Zerbst's conduct alone cannot create the agency relationship. The record is devoid of any evidence showing Ameris did anything to control Zerbst or to hold him out as its agent during the relevant time period. Accordingly, the court of appeals correctly determined

that the master's finding of an agency relationship was in error. In doing so, the court of appeals did not reject the master's factual findings. Instead, the court of appeals found the evidence relied upon by the master did not as a matter of law create an agency relationship.

The portions of the master's order cited on page 8 of the petition illustrate this point. The fact that Zerbst (1) structured the loan for Gibson while he worked at another bank (First Reliance); (2) began talking with Ameris about employment before he left First Reliance; (3) spoke to an attorney about his covenant not to compete and tried to negotiate a resolution to the problem; and (4) was actively corresponding with Ameris during this time do not establish an agency relationship between Zerbst and Ameris. None of this conduct shows Ameris holding Zerbst out as its agent or controlling Zerbst. Without evidence that the principal, Ameris, represented to Petitioners or acted in a manner that would indicate to Petitioners, that it had given Zerbst authority to act on behalf of the bank, an agency relationship cannot exist as a matter of law.

Moreover, the evidence in the record about Zerbst maintaining an office at Ameris and making calls and checking emails during the non-compete period took place after Ameris hired Zerbst. (R. p. 763.) Ameris does not dispute that Zerbst became its agent as of January 11, 2008, the date he became an employee of the bank. The question presented in this case was whether Ameris did anything to hold out Zerbst as its agent prior to that time.

Similarly, the court of appeals correctly pointed out that Zerbst's "lost calendar," which the master found would likely contain further evidence that Zerbst was acting as Ameris's agent before he was formally employed by Ameris, would not have contained any such evidence. Evidence that Zerbst met with Ameris to discuss employment does not demonstrate that Ameris represented to Gibson that Zerbst was its agent.

Accordingly, the court of appeals correctly determined there was not any evidence in the record to support the conclusion that Zerbst was Ameris's agent prior to the date he was hired. In doing so, the court of appeals did not reject the facts as found by the master but instead found that those facts, as a matter of law, did not establish an agency relationship because they did not show that Ameris controlled Zerbst's behavior or that Ameris held Zerbst out as its agent.

Because the court of appeals correctly applied the standard of review, the petition for writ of certiorari should be denied.

**3. No other reasons exist for granting certiorari.**

In addition to the fact that the court of appeals correctly decided this case, the petition for writ of certiorari should be denied because this case does not present any novel issues or fall within the categories of cases in which certiorari is granted.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 226(b), SCACR. The Court has full and complete discretion in determining whether to issue a writ of certiorari and is guided by the following considerations: (1) whether there are novel questions of law; (2) whether there is a dissent in the court of appeals' decision; (3) whether the court of appeals' decision is in conflict with a prior decision of the supreme court; (4) whether substantial constitutional issues are directly involved; and (5) whether a federal question is included and the decision of the court of appeals conflicts with a decision of the United States Supreme Court. Id. The case at hand does not fall within any of these categories.

First, this case does not involve novel questions of law. Petitioners asserted causes of action for breach of fiduciary duty, negligent misrepresentation, and aiding and abetting breach of fiduciary duty. The law is well-established in these areas and the facts of this case do not raise

novel questions. For example, it is well established that lenders do not owe borrowers a fiduciary duty. *See, e.g., Burwell v. S.C. Nat'l Bank,* 288 S.C. 34, 340 S.E.2d 786 (1986); *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Brown v. C&S Real Estate Servs., Inc.*, 314 S.C. 463, 445 S.E.2d 463 (Ct. App. 1994); *Rush v. S.C. Nat'l Bank*, 288 S.C. 560, 343 S.E.2d 667 (Ct. App. 1986). The relationship between a lender and a borrower is inherently not fiduciary. The parties' relationship is governed by the loan documents they sign, which gives the lender the right to foreclose upon the borrower in the event of default. *Cf. Trotter v. First Fed. Sav. & Loan Ass'n*, 298 S.C. 85, 89, 378 S.E.2d 267, 269 (Ct. App. 1989) ("The relationship is usually defined by the contractual agreement between the depositor and the bank.").

Second, the court of appeals's decision was unanimous. The court decided 3-0 that the judgment should be reversed. Judge Konduros concurred in result only, and no judge dissented.

Third, the court of appeals's decision does not conflict with a prior decision of this Court. As explained above, the court of appeals correctly decided this case and the issue upon which the decision was based was preserved for review.

Fourth, this case does not involve substantial constitutional issues. This case arises out of a foreclosure action and involves causes of action rooted in state law.

Fifth, this case does not involve a federal question and the decision of the court of appeals does not conflict with a decision of the United States Supreme Court.

Finally, special and important reasons do not exist for granting certiorari. There are no matters of public importance that need to be addressed here. This case involves an ordinary commercial lending transaction in which the borrower defaulted. It does not raise issues that impact anyone other than the parties to this case.

The court of appeals reviewed the record and correctly decided that Ameris is not liable as a matter of law. Because no special or important reason exists for granting this petition, the petition for writ of certiorari should be denied.

**4. Petitioners' version of the facts is not supported by the record.**

Although not directly relevant to the question of whether this Court should grant certiorari, Petitioners' version of the facts is not supported by the record and requires a response.

At the time of the loan transaction, Linda Gibson was not "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 the picking." (Pet. p. 1.) Petitioners do not support this statement with a reference to the record because no such evidence exists. Indeed, the record establishes to the contrary.

To begin, the purchase and renovation of a 48-unit apartment complex was not Gibson's first commercial venture. In 2005, Gibson, through her entity Heritage Seven LLC, purchased a $2.4 million commercial shopping center in Moncks Corner. (R. pp. 271-72, 1694-96.) She did so by executing a 1031 tax exchange with proceeds she received from the sale of one of the two beach houses she owned at Isle of Palms to defer paying capital gains taxes. (R. pp. 185-86, 273-74, 747-48.) Although the shopping center was initially managed by Villavicencio and ReMax, Gibson later assumed all management responsibilities for the shopping center, collecting rents, paying bills, arranging for maintenance, and renewing leases as necessary. (R. pp. 283-84.)

Gibson was not a "complete novice" in financial matters. (Pet. p. 2.) Gibson is a person of significant wealth and financial savvy. Gibson has formed and been a member of multiple

LLCs. (R. pp. 1688-703.) She has served as Trustee of the Paul William Gibson Family Trust since 2003, and has successfully managed the affairs of the trust since that time. (R. p. 278.)

After Gibson terminated Villavicencio as the project manager on the apartment complex, she took charge of the project herself (with assistance from her daughter). (R. pp. 286-89.) Gibson hired a new contractor, oversaw the construction, and collected rents. (R. pp. 284, 289.) She negotiated with contractors and subcontractors. (R. p. 288.) She obtained draws from the bank and disbursed in excess of $200,000 to contractors and others. (R. pp. 287-88.) She made decisions about how to pay the money and what documentation to require. (R. p. 288.) She maintained detailed handwritten notes about the work that had been done and that needed to be done. (R. pp. 1425-1510.)

Gibson was not "elderly," as Petitioners contend. At the time of the loan transaction, Gibson was 59 years old. (R. pp. 180-181.) She was fully capable of protecting herself.

The record does not contain any evidence showing that Ameris stood to gain "a lot of money" from this transaction. (Pet. p. 4.) This was an ordinary commercial loan transaction in which Ameris stood to gain the ordinary interest rates that applied. Instead of making money on this transaction, Ameris lost $1.8 million. The notion that this was a bank taking advantage of a poor widow for financial gain is not supported by the record and is simply not true.

Nor does the record support the contention that Ameris "preyed" upon Gibson. This argument has never made sense. The notion that a bank would orchestrate and implement a customer's financial downfall while at the same time lending that customer $2.8 million does not make sense. It was in Ameris's best interest for the apartment complex project to succeed and for the loan to be repaid. It was not in the bank's best interest to make a loan on a project that it knew was overpriced and destined to fail, or to suffer a $1.8 million loss, which is what occurred

in this case when Gibson walked away from the project and her obligations as the guarantor of the loan.

Finally, there is no evidence that the transaction caused Gibson "financial ruin." (Pet. p. 4.) As of October 5, 2009, two years after purchasing the apartment complex, Gibson had a net worth of $18,341,915, with $24,121,275 in assets. (R. pp. 282, 1651.) Gibson's assets are primarily income-producing real estate. (R. pp. 868-70, 894-96, 1036-38.) She purchased two multimillion-dollar commercial properties within a two-year period. She controlled multiple business entities and owned real property generating $478,775 in rental income in 2009. (R. pp. 280, 1651.) Gibson testified at trial that she had a 50-year lease on 40 acres of land for which she receives $15,000 per month. (R. pp. 200-01.)

Gibson walked away from the foreclosure without any damages whatsoever. As part of the settlement of the foreclosure action, Petitioners executed deeds in lieu of foreclosure conveying the apartment complex and other real property that served as collateral for the loan to the bank that acquired the debt. (R. pp. 1663, 1668-75.) In exchange, the notes were deemed satisfied, the loan documents canceled, and all litigation pending between Petitioners and Ameris's successor in interest was dismissed. (R. p. 1663.) Neither Ameris nor its successor in interest ever collected any additional money from Gibson as a result of the personal guarantee she signed in support of the loan.

Ameris did not plot Gibson's financial downfall, nor did a financial downfall or ruin occur. Gibson invested in a real estate venture that failed for a variety of reasons unrelated to anything Ameris did or failed to do. At the end of the day, it was Ameris, rather than Gibson, who bore the brunt of the financial loss for this failed real estate venture.

## CONCLUSION

The petition for a writ of certiorari should be denied. The court of appeals correctly decided this case and reasons do not exist for granting further review.

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October 19, 2017

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**PROOF OF SERVICE**

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The undersigned certify they have caused the Return to Petition for Writ of Certiorari to be served on Petitioners by Email on October 20, 2017 addressed to their attorneys of record, Desa Ballard and Harvey W. Watson, III, of Ballard & Watson, at desab@desaballard.com and harvey@desaballard.com.

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