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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Master in Equity
The Honorable Joseph M. Strickland, Master in Equity

NOV 20 2017

SC Court of Appeals

Case No. 2014-CP-40-3950

Appellate Case No. 2016-001895

First Citizens Bank and Trust Company, Inc., Successor by merger to Community Resource Bank, N. A.Respondent,

v.

SOH Properties LLC, Ivan A. Roldan, and Eugene G. McDonald a/k/a Eugene G. McDonald, III,
Defendants,

Of whom Eugene G. McDonald a/k/a Eugene G. McDonald, III is the Appellant.

FINAL BRIEF OF THE APPELLANT

Eugene G. McDonald
4533 Ivy Hall Dr
Columbia, South Carolina 29206

Pro se Appellant

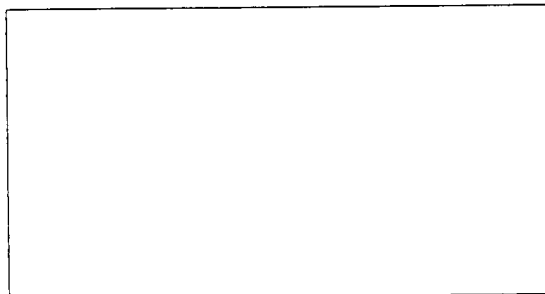


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I. STATEMENT OF THE ISSUES ON APPEAL

- I. The Court erred by denying the Defendant from amending his complaint thereby abusing his discretion pursuant to Rule 15 (a) of the South Carolina Rules of Civil Procedure, and denying the Appellant due process and equal protection under the South Carolina and United States Constitution.
- II. The Trial Court, the Master in Equity, erred in failing to apply the theory of promissory estoppel to the Respondent's promise to renew and modify the terms of an existing note and mortgage which was the subject matter of the foreclosure action in this case.
- III. The Master in Equity erred in proceeding with foreclosure and granting a deficiency judgment against the Appellant due to his failure to recognize clear and convincing evidence that the Respondent failed to conduct itself with "Clean Hands" in dealing with the Appellant.
- IV. The Court abused its discretion by summarily granting unreasonably high attorney's fees in this case by summarily accepting the affidavit of the Respondent and glossing over the ability of the pro se Defendant in reviewing the affidavit and having the ability to make an objection to the amount.

II. STATEMENT OF THE CASE

This matter is an appeal from a decision by the Court of Master in Equity and the Circuit Court. The Appellant, Eugene G. McDonald a/k/a Eugene G. McDonald, III, filed, with the Circuit Court, a Motion For Leave To Amend Answer of Eugene G. McDonald III and SOH Properties, LLC. The motion was heard before Judge Barber on February 11, 2015 at which time SOH Properties-LLC was denied Leave but Appellant McDonald was granted 15 days to re file the motion, individually, along with the proposed Amended Answer, Counterclaim and Cross-claim. The amended motion was filed with the Clerk of Court within the timeframe that was granted. The Respondent filed a Memorandum in Opposition and a Motion for Order of Reference to the Master in Equity. This was heard before the Honorable Casey Manning on July 29, 2015 and without consideration of the Appellant's original answer and cross-claim to the Summons and Complaint and the Appellant's Proposed Amended Answer, Counterclaim and Cross-claim, was denied and the Respondents' Motion For Order of Reference was granted. This was later testified in Judge Strickland's court that the Appellants original answer was viable (R.p103, line 2-5).

From that order, a Contested Foreclosure hearing was held 29 June 2016 in front of The Honorable Joseph M. Strickland, Master in Equity. The case was presented and arguments were made that as to where no "written agreement" existed, financial information was provided by the Appellant to the Respondents' on numerous occasions based off of the verbal promises that a renew was forthcoming. At the conclusion of the hearing, Judge Strickland ruled in favor of the Respondents, setting a date for the foreclosure sale and agreeing to an order for Deficiency Judgment. An Order was signed on 20 July 2016 and filed on 2 August 2016. The Respondent's counsel was awarded \$17,500.00 in attorney's fees for the action.

III. STATEMENT OF THE FACTS

This is an appeal involves the foreclosure action of a first and second mortgage on a piece of real estate at 52 Hutto Dr in Columbia SC, further identified by Tax Map number R14107-04-25. The property was acquired thru a mortgage provided by Community Resource Bank of Orangeburg SC on 17 September 2004. The deed was titled to SOH Properties LLC, a Limited Liability Company filed with the South Carolina Secretary of State on 13 August 2004. SOH Properties LLC was in the business of buying distressed and below market value real estate, renovation and remarketing the property. During a period of time, SOH had purchased, renovated and sold approximately 14 pieces of real estate with two properties still in inventory. The subject property was renovated and subsequently occupied by a tenant/buyer with a Bond for Title with a rental agreement. During the same period of time, SOH was in the process of completing a renovation of a piece of real estate that was completed using an unsecured loan from Community Resource Bank. That property was retained as a rental property.

Around 2008, First Citizen Bank acquired Community Resource Bank along with the secured loan for 52 Hutto

Ct and the unsecured loan that was used to renovate the other dwelling. The terms of the original mortgage with Community Resource Bank, secured by 52 Hutto Ct, was for 5 years. The note came due in 2009 and the loan renewal process began with First Citizens. The loan had been current and in good standing and was renewed for an additional 5 year term, as most commercial loans of this type. This was only done with the agreement that SOH would allow First Citizens to attach the unsecured loan that was used to renovate a piece of property in which First Citizens had no interest. Due to the existing situation with the lending industry, SOH and their guarantors felt they had little option but to accept First Citizens offer and allow the attachment of the unsecured second. At this time the mortgage that was secured by 52 Hutto Ct and the unsecured loan was renewed with 52 Hutto Ct being the collateral for both loans.

During the period from this renewal to 2012, payments were being made on both loans. Defendant Roldan was in control of the receivables of this piece of this asset and was also responsible for making payments for maintaining the debt requirements. Sometime between 2011 and 2012, defendant Roldan caused First Citizen to file for a foreclosure action. At this time, the Appellant brought suit against Roldan to force him to cure the default. Negotiations began with First Citizens thru their representative Mr. Dave Davies, who represented himself as an officer of the bank. Working with Mr. Davies, the loan was modified and payments, under the Appellants control were made.

As the loan term was ending, discussions to renewing the loan were commenced with Mr. Davies and the Appellant. At the same time, a Summons and Complaint were filed to bring forth a foreclosure action of the two mortgages. An Answer and Cross Claim on behalf of SOH Properties LLC and the Appellant were filed. During this time, Mr. Davies requested certain financial information on various dates from the Appellant, which was to be used to renew the mortgage. All requested information of the Appellant was provided in a timely manner and each time of submission, Mr. Davies assured the Appellant that the loan was going to be renewed.(R.p133, line 4-6; R.p.142, line 3-4; R.p144, line 22-23, R.p.145, line 16-25, R.p146, line 5-8, R.p.146, line 15-17). After the submission of the Appellant's debt schedule, the lines of communication with Mr. Davies ceased. The Appellant, at this time, reached out to the Respondent's attorney, Mr. Stanley McGuffin, to inquire as to the status of the renewal. He responded by arranging a meeting in his office to take place between Mr. Davies of First Citizens, Mr. Roldan and the Appellant in his office to discuss the loan. All parties met on 31 July 2015. At the end of the meeting, the Appellant left with the understanding that the renewal process was moving forward. (R.p.136, line21-25). After the meeting, Mr. Davies contacted the Appellant via email to request a debt schedule. (R.p.137, line 1-6). This was further discussed with Mr. Davies via a phone conversation at which time the Appellant was again told a renewal would be forthcoming.

At this point, the correspondence from Mr. Davies ceased. Any further communications were with the Respondents' attorney, Mrs. Caskey. A motion hearing was held and both parties presented their argument. During this time period, a hearing was also held with the Honorable Judge Lee in regards to the Appellant's cross-claim

against defendant Roldan. At this hearing, Judge Lee ruled that defendant Roldan was in default and the Appellant was awarded a deficiency judgment. A damages hearing has been delayed until the outcome of this Appeal. Subsequently, the Appellant acting Pro se filed a Motion to Amend Answer, Cross-claim and Counterclaim for SOH Properties LLC and the Appellant. This was heard in front of Judge Barber in which the ruling was that the Appellant acting Pro se could not answer for the LLC but was granted 15 days to amend his motion along with the proposed counterclaim, individually. The filing was made in a timely manner and was subsequently heard before the Honorable Casey Manning on July 29, 2015 and without consideration of the Appellant's original answer and cross-claim to the Summons and Complaint and the Appellant's Proposed Amended Answer, Counterclaim and Cross-claim, was denied and the Respondents' Motion for Order of Reference was granted.

From that order, a Contested Foreclosure hearing was held 29 June 2016 in front of The Honorable Joseph M. Strickland, Master in Equity. The facts of the case were presented by the Respondents' and the Appellant to Judge Strickland. At the request of the Respondent, Mr. David Walker is requested to testify of the validity of the loan documents to include the notes and mortgages. He states he is Senior Vice President. He further states his specialty is real estate. (R.p.107, line 7-9) Thru further testimony, Mr. Walker states that he has access to electronic loan documents and at the appropriate time. (R.p.107, line 16-24). Further, he states that he has reviewed the guaranties.(R.p.108, line 7) but during his cross examination by the Appellant, Mr. Walker, after agreeing that he has reviewed the load documents and testified to the validity of the accounting, admits that he overlooked a simple acknowledgement of an initial during his review on a page of a loan document. (R.p.121 line 23 – R.p.122 line 1).

The Appellant called Mr. Dave Davies as a witness. The Appellant states that on many occasions that the Respondent's Representative Mr. Davis promised and led the Appellant to believe that the loan would be renewed as he had before. The Appellant relied on the past history of their relationship as Mr. Davies being officer of the bank and dealing with a prior situation like the foreclosure action that is the subject of this appeal. In Mr. Davies' testimony, when questioned about his emails leading to a renewal would be forthcoming in the following week, he states, "Well Yea" (R.p.158 line 4-7). When Mr. Davies is further questioned about the renewal, that, as an officer of the Respondent, he informed the Appellant that the note will be renewed. (R.p.161, line 3-8).

The council of the respondent has made claims that the Appellant never brought a plan with terms, conditions and payments. It has been the Appellants experience that when approaching a lending institution to obtain financing, usually the Leander is the one who offers the term and conditions it will accept. The Appellant has never been a position to tell a lender "these are the terms of which you will lend me funds." For the Respondents' argument to be that the Appellant never presented an acceptable and equitable solution seems to be an unarguable point. They only offer to a plan to avoid foreclosure, besides the acceleration of the notes by the Respondent, was presented by the Appellant, which was never responded to. As attested to by the counsel of the Respondent, it appears the Respondent knew there was a loan to value issue involved, (R.p.101 line 11) but was never discussed (R.p.102 line 14-15). This could show that the Respondent knew but concealed the fact they caused the loan to value

of the property to be unfavorable. Once the Respondent had obtained the information from the Appellant through numerous promises of a forthcoming renewal by one of their officers, they realized that they could have a source to recover a deficiency judgment. Relying on the same Officer of the Respondent as before, Appellant was forthcoming and cooperative in reaching an equitable solution.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. The Court erred by denying the Defendant from amending his complaint thereby abusing his discretion pursuant to Rule 15 (a) of the South Carolina Rules of Civil Procedure and denying the Appellant due process and equal protection under the South Carolina and United States Constitution.

After the Plaintiff filed its foreclosure action and the Defendant filed and answer and a cross-claim against a co-defendant, the Defendant, Appellant felt it was necessary to amend his complaint to include some counterclaims against the Plaintiff due to what he felt was wrongdoing on the part of the Plaintiff, Respondent. The first motion was heard before Judge Barber on February 11, 2015 at which time he gave the Defendant/Appellant 15 days to file his amended complaint individually, but he denied the Corporation, SOH Properties, LLC, the right to amend due to the Defendant/Appellant being pro se thereby precluding him from representing the corporation since he is not an attorney.

Subsequently, the Plaintiff/Appellant filed his Amended Complaint within the time set out in Judge Barber's Order. The Plaintiff/Respondent made a motion to deny the Defendant/Appellant the right to amend the complaint. That matter was heard before the Honorable Casey Manning on July 29, 2015 at which time he denied the Defendant/Appellant the right to amend his complaint. (The wrong case number was transposed on the Form 4 C which apparently was a clerical error by the Clerk of Court for Richland County) The reasoning behind the holding by Judge Manning was that the counterclaims asserted by the Defendant/Appellant were futile since in his opinion they could not survive.

The Appellant asserts that Judge Manning erred in ruling on a matter already ruled on by Judge Barber. Judge Barber gave the Appellant the right to amend his complaint. Pursuant to South Carolina Civil Procedure Rule Number 15 (a), the Court has liberal authority to allow a party to amend his pleading after the 30 days given as a matter of right if justice requires it and it does not prejudice the other party.

The Appellant felt he was wronged by the Respondent's actions and made it clear in his counterclaims filed with his amended answer. Certainly, if a wrong has been committed emanating from the same

transaction or occurrence then justice would require a fair hearing of the Appellants complaints. Further, based on the time element, the final hearing in this case did not occur until over a year after the denial of Judge Manning. There would be no prejudice to the Respondent for the counterclaims to be prepared for and litigated.

Further Judge Manning ruled that according to case law, the counterclaims of the Appellant would be futile therefore he felt compelled to over-rule Judge Barber's previous ruling and in essence pronounce summary judgment on the counterclaims of the Appellant prior to hearing any evidence or argument in connection with the counterclaims.

The Appellant asserts that the trial judge could have just as easily ruled the futility of the counterclaims of the Appellant, after he had heard the evidence in the case, if it so warranted. But in denying the Appellant's amended answer with inclusion of counterclaims denied the Appellant due process and equal protection under the Constitution of South Carolina and the United States of America.

B. The Trial Court, the Master in Equity, erred in failing to apply the theory of promissory estoppel to the Respondent's promise to renew and modify the terms of an existing note and mortgage which was the subject matter of the foreclosure action in this case.

The Defendant had foreclosed on the Appellant one time prior to the subject of this subject action of foreclosure. Resulting from that foreclosure, an agreement was entered into by the Appellant and the Respondent which ended the foreclosure and promulgated a new agreement. Prior to the agreement being signed, the Appellant was promised that a renewal and another agreement would be made between the Appellant and the Respondent. Appellant asserts that was a promise. The subsequent note and mortgage that resulted from that promise was a contract and security interest on property that was legally a separate and apart legal action that was taken pursuant to the previous promise that was made to the Appellant.

In this case, the property came under foreclosure once again due to circumstances that were out of the control of the Appellant. He made that known to the Respondent and entered into negotiations with the Respondent concerning renewing the note and mortgage. A close reading of the testimony from the parties actually involved in the negotiations clearly showed that the Respondent's agent, Mr. Davies, gave the Appellant the promise that a renewal was forthcoming. A meeting was held in the office of the Respondent's counsel to discuss that subject. Documents requested by the Respondent from the Appellant were provided not one but even two different times. The Appellant complied, and in subsequent conversations and emails presented at trial showed that the Respondent's agent clearly indicated to the Appellant that a renewal was forthcoming.

According to *Craft vs. S.C. Commission for the Blind*, Court of Appeals Opinion No. 4628 filed on November 3, 2009, the elements for the common law promissory estoppels are (1) a promise that is unambiguous in its terms; (2) reasonable reliance on the promise; (3) the reliance was expected and foreseeable; and (4) injury in reliance on the promise.

Regarding element (1), the promise was to renew the note and that it was forthcoming. The Respondent argued at trial that the terms weren't clear when the promise was made so that made it ambiguous. The promise was that the note and mortgage would be renewed period. There is nothing ambiguous about that in light of the numerous conversations, emails, and cooperation given to Respondent by the Appellant with really no leverage to dictate terms, rather a simple acceptance in light of the circumstances he was in.

Regarding (2), the Appellant had a right to reasonably rely on the Respondent's promise based on the past practice of this same agent for the Respondent doing exactly the same thing in a prior instance. The Appellant could rely on the promise because it was given to him in the form of a promise. He had a right to rely on that promise based on past practices of the Respondent through its agent.

Regarding (3), the reliance was expected and foreseeable because the past practice of the Respondent was to work with the Appellant and resolve the issue as it had in the past. The Appellant had always enjoyed good relations with the Respondent and Mr. Davies, agent for the Respondent, was offering assurances as he had in the past, that the renewable was forthcoming. At trial, Mr. Davies, a prior employee of the Respondent, denied he was discharged due to his business practices, and though having dealt with the Appellant on numerous occasions was unable to remember too much about the transaction other than there was no execution of a four-cornered document. The Respondent argued that unless a note and mortgage is produced and executed by both parties there is no liability on their behalf and that nothing outside the four corners of the document mean anything. The Respondent claimed they were settlement negotiations. Appellant asserts that negotiations are starkly different that a promise to renew a note period.

Regarding (4), the Respondent simply quit communicating with the Appellant after receiving all kinds of personal information requested from him and preceded to foreclosure. The Appellant asserts that after the banking crisis where the Federal Government bailed out the banks to keep them solvent, the banks started requesting information from foreclosure victims indicating a willingness to modify, forebear, or renew the notes and mortgages, simply as a fishing expedition to ascertain true assets of the borrower so that a determination could be made as to whether to seek a deficiency judgment from the borrower. In this case, the Respondent decided to pursue deficiency against the appellant resulting in approximately 100 thousand dollar

The Appellant asserts that this type of behavior should be estopped and that the Respondent should be equitably estopped from seeking a deficiency judgment against the Appellant.

C. The Master in Equity erred in proceeding with foreclosure and granting a deficiency judgment against the Appellant due to his failure to recognize clear and convincing evidence that the Respondent failed to conduct itself with “Clean Hands” in dealing with the Appellant.

Throughout the testimony of the case, the agent for the Respondent based his denial of relief for the Appellant on the fact that there was not an executed document between the Appellant and the Respondent reflecting a promissory note and mortgage. The Respondent’s case, and apparently the view taken by Judge Manning in denying the Appellant to counterclaim in this action after he was already given that approval in a previous order, was simply if there is no note or mortgage, then there is no case. Nothing outside the four corners of a document matters. The Appellant conducted his trial of the case with the assumption that the Master in Equity’s Court was a court of equity. “Fairness” being the operative idea, the Court should apply the appropriate theories of law and equity. The Appellant asserts this case was adjudicated strictly on a legal basis without regard to the equitable elements infused into the case by the evidence presented.

The Appellant had dealt with the same individual, Mr. Davies, an agent of the Respondent in the past, and was given a promise, without specific terms, to renew a note and mortgage on the property involved in this same action. The process was the same as in the present action. Mr. Davies gave the Appellant a promise to renew the note and mortgage. There is no ambiguity in that promise. In the past it resulted in a new note and mortgage. The evidence in this case showed that Mr. Davies made numerous overtures and assurances that the note and mortgage that is the subject of this appeal would be renewed. In the process, the Respondent gathered, on two different requests, as much information as could be possibly had by the Appellant concerning his financial condition. That information was used in suddenly cutting off communication with the Appellant and proceeding with the foreclosure seeking a deficiency judgment. The Respondent attempted to categorize all of the communications between the Appellant and the Respondent’ agent as settlement negotiations, making them not admissible in the action. But the evidence was admitted, and it clearly showed that the Respondent deliberately deceived the Appellant into believing he was going to be treated in the same manner he had been in the past by the same agent. The Appellant was led to believe his renewal was forthcoming causing him to take no alternate actions in resolving the problem which ultimately resulted in a 100 thousand dollar deficiency personal judgment against him.

The Appellant asserts that the Respondent conducted itself with “unclean hands” in its misrepresentation to the Appellant that a renewal was forthcoming. In *Straight vs. Goss et al v. third party defendant Eagle*

Nest Homes, Inc., S.C. Court of Appeals Opinion 4532 decided on April 15, 2009, the Court explained the theory of unclean hands being asserted in a court of equity. This case cites: ‘When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give.’ Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E. 2d 750, 755 (Ct.App.2005). It further cites: ‘The doctrine of unclean hands precludes a plaintiff from recovering in equity if acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.’ First Union Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E. 2d 372, 379 (Ct.App. 207*207 1998). The Court further cites: ‘He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter which he seeks relief’ Emery v. Smith, 361 S.C. 207, 220, 603 S.E. 2d 598, 605 (Ct.App.2004) (quoting Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L. Ed. 1381 (1945). Also, ‘The decision to grant equitable relief is in the discretion of the trial judge.’ Soden, 333 S.C. 568, 511 S.E. 2d at 379.

As sound precedential guidance, a review of the transcript clearly shows the conduct of the Respondent by its agent, Mr. Davies, misled, misrepresented, deceived, and placed the Appellant in a prejudiced and vulnerable position in his reliance on the statements made to him by the Respondent’s agent, is sound equitable and legal authority to consider the Respondent as having conducted itself with “unclean hands” and that the matter should either be remanded for a new trial or for the sake of judicial economy and fairness to both sides, the deficiency judgment be removed from the judgment obtained by the Respondent.

D. The Court abused its discretion by summarily granting unreasonably high attorney’s fees in this case by summarily accepting the affidavit of the Respondent and glossing over the ability of the pro se Defendant in reviewing the affidavit and having the ability to make an objection to the amount.

During the trial of this foreclosure, the Respondent’s attorney handed up a document, supposed an affidavit of attorney’s fees for its work in the case, with the Court glossing over the submission and not ensuring that the pro se understood what was being entered and giving him an opportunity to review it prior to summarily accepting it and adding it to the already unfair judgment issued by the Court.

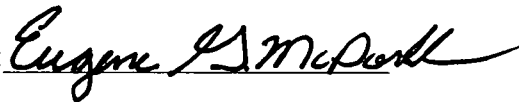
The work performed by the Respondent’s attorney was the filing of a rudimentary Summons and Complaint in a foreclosure action, making two rudimentary motions for the denial of the Appellant amending his complaint, and the participation in a very short trial of the case. The amount approved was \$17,500.00.

The Appellant asserts that this amount is excessive. Further he was not given even the smallest of explanation from the Court the import of the document or affidavit, and there was little or no consideration as to the fairness of the amount of the fees. The Appellant asserts that the Court simply rubber-stamped the amount of attorney's fees claimed failing to take into consideration the rudimentary pleadings and motions made by the Respondent's counsel. In light of the amount owed on the original note, along with the second mortgage that was appended to the property from a note that had been previously been unsecured, in order for the Appellant to renew the last note and mortgage, the amount of the attorney's fees was excessive and should be reduced upon review of the Court's file and consideration of the amount of rote reproduction of pleadings and motions performed by the Respondent's counsel.

V. CONCLUSION

Based on the foregoing arguments and citation of authority, the Appellant, Eugene G. McDonald a/k/a Eugene G. McDonald, III, respectfully request this Court of Appeals to reverse the decision of the Circuit Court and the Court of Master in Equity in all respects.

Respectfully submitted,

By: 

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Appellant

19 November, 2017

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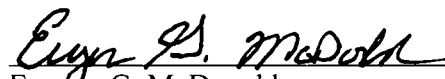
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SOH Properties LLC, Ivan A. Roldan, and Eugene G. McDonald a/k/a Eugene G. McDonald, III, Defendants,

Of whom Eugene G. McDonald a/k/a Eugene G. McDonald, III is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b).



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Pro se Appellant

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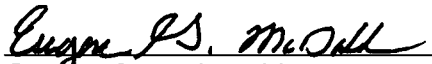
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Of whom Eugene G. McDonald a/k/a Eugene G. McDonald, III is the Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of the Appeal, Appellate Case No. 2016-001895 of Appeal on First Citizens Bank and Trust Company, Inc., Successor by merger to Community Resource Bank, N. A by hand delivery at their office located at 1701 Main St, Columbia SC 29201, on November 20, 2017, addressed to the attorneys of record, Mary M. Caskey and Stanley H McGuffin, Haynsworth Sinkler Boyd P. A., P. O. Box 11889.

November 20, 2017


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