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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Beaufort County

Court of Common Pleas

Marvin H. Dukes, III
Special Circuit Court Judge

Case No.: 2011-CP-07-01778

Appellate Case No. 2014-002712

Opinion No. 5538

Benjamin Gecy..... Appellant,

v.

South Carolina National Bank, Jaime Hamner and
Deborah Hamner ..... Respondents.

APPELLANT'S PETITION FOR REHEARING

The Appellant, Benjamin Gecy, pursuant to Rule 221, SCACR, hereby petitions the South Carolina Court of Appeals (herein after "the Court" or "this Court") for a rehearing of the opinion in the case captioned above (herein "the Opinion") upon the grounds that the Court overlooked or misapprehended the following matters:

1. The Court, on page 4 of the Opinion, has either misunderstood or mischaracterized the Appellant's argument when it stated: "Gecy primarily argues that § 552 of the Restatement (Second) of Torts [herein after "the Restatement" or "Restatement"] validates his negligent misrepresentation cause of action—and *Kerr* is inapplicable—because Gecy was a Bank

customer with open lines of credit." Although the Appellant did make that argument, it was done to distinguish his own status from that of the shareholders, officers and directors in the *Kerr* case, who the supreme court deemed to be disqualified from pursuing negligent misrepresentation claims against the bank in *Kerr* due to their not being customers of the bank. The paramount (and thus primary) argument made by the Appellant, as set forth on page 29 of the Appellant's Brief, was that he was precisely described in the exact language of Restatement § 552, both as an intended third party beneficiary of SCB&T's agreement to loan money to the Hamners under § 552(2)(a), and as a person who SCB&T knew would rely upon information about the loan in not one but two transactions (the sale and the construction contracts) that the bank "intend[ed] [its] information to influence" under § 552(2)(b). Thus, the Appellant argued:

Restatement § 552, under the heading "Information Negligently Supplied for the Guidance of Others," provides as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information

> extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Beyond the shadow of a doubt, the representations made to the Plaintiff by Defendant SCB&T are actionable under Subsection (1), as well as under Subsections (2)(a) and (b) of the *Restatement.* The Plaintiff, who was the seller and the contractor under the two contracts, surely was "one of a limited group of persons for whose benefit and guidance [SCB&T] intend[ed] to supply the information or [knew] that the recipient [Mr. and Mrs. Hamner] intend[ed] to supply it." *Restatement* § 552(2)(a).

In addition, "through reliance upon [the information] in a transaction that [SCB&T] intend[ed] the information to influence, or knew that the recipient so intend[ed] . . . ," the Plaintiff sustained damages. *Restatement* § 552(2)(b).

Please note that, though the trial court seemed to believe that a fiduciary duty between the parties was required for reliance on a negligent misrepresentation to be justifiable, Order of September 18, at 10, no such requirement exists in *Restatement* § 552." *See* Appellant's Brief at 27-29.

2. This Court completely overlooked the Appellants' argument, as set forth in paragraph 1 of this Petition, and it failed to engage in any meaningful analysis of how § 552 of the Restatement may have applied to the facts proved by the Appellant in the proceedings below as the result of Gecy's Affidavit and the extensive deposition testimony upon which the Appellant relied.

3. Absolutely nothing on the face of § 552 of the Restatement indicates that its scope or reach were intended by the American Law Institute to be limited "to non-contracting third parties

only in the accounting and consulting contexts," as is intimated at page 7 of the Opinion. Instead, the liability imposed by the provision was meant to apply to every person

> who, ***in the course of his business, profession or employment or in any other transaction in which he has a pecuniary inter***est, ***supplies false information for the guidance of others in their business transaction[s],*** is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information. Restatement § 552(1) (emphasis added).

4. In addition, the notion that § 552 is intended, or best suited, for "professional situations," as opposed to conventional business transactions, as is contended by the Court at page 7 of the Opinion, is a vagary at best and a preference at worst, which, in any event, is wholly unsupported by the language of the Restatement provision itself. Even if the Court's conclusion had some ring of plausibility, is not a banker every bit as much of "a professional" as is "a consultant," if not an accountant? The answer is self-evident, and the limitation sought to be imposed by the Court is simply false.

5. With respect to the application of Restatement § 552 to the facts in this case, the following conclusion in the Opinion (at pages 7 and 8 thereof) is simply beyond the pale of sensible interpretation in view of the uncontested facts in this case:

> Conversely, such language [meaning "false information for the guidance of others in their business transactions"] neither envisions nor applies to transactions like the Hamner contract [*sic*] for which Bank provided information about its own financing requirements to a third party ***in a real estate transaction***. Opinion at 7-8 (emphasis added).

One is constrained to ask, may not a real estate transaction also be a business transaction? In view of the proven facts in the Record, the answer surely should be "yes" because SCB&T is in the business of making loans to finance both the purchase of real estate and the construction of houses on real estate. And Mr. Gecy is in the business of selling real estate, as well as building homes on it. And Mr. Gecy had ***two contracts*** with Mr. and Mrs. Hamner that envisioned his

doing both. And Mr. Gecy is the intended third party beneficiary of SCB&T's agreement to loan money to the Hamners to enable them to perform under their two contracts with Mr. Gecy. And, most important of all, Mr. Gecy is the person seeking to invoke the protection afforded by § 552 of the Restatement. In short, the Court's analysis is wholly inconsistent with the obvious facts.

5. Absolutely nothing on the face of the South Carolina Supreme Court's decision in *ML-Lee Acquisition Fund L.P. v. Deloitte & Touche, Inc.*, 327 S.C. 238, 489 S.E.2d 470 (1997)(herein after referred to as "*ML-Lee II* to distinguish it from its predecessor which was decided by the court of appeals) indicates that the court intended that the scope or reach of that decision was to be limited "to non-contracting third parties only in the accounting and consulting contexts," as is intimated at page 7 of the Opinion. In *ML-Lee II,* the supreme court adopted § 552 verbatim as the law of this state. *ML-Lee II,* 327 S.C. at 241, 489 S.E.2d at 471 n.3. Not a single word in that decision states or even intimates that the law adopted was not intended to apply generally, but, instead be limited only to accountants.

6. Indeed, the *Booz-Allen* case, which held that consultants who were not in privity with the plaintiff could nevertheless be sued for negligent misstatements made about the plaintiff, had been decided years 11 before. There is no mention by the supreme court of § 552 in that opinion. *South Carolina State Ports Auth. v. Booz-Allen & Hamilton*, 289 S.C. 373, 346 S.E.2d 324 (1986)(herein *Booz-Allen*). Therefore, for this Court to insist that, by deciding the only two cases thus far in this context to have held for a plaintiff, the supreme court was mounting an effort to create a cohesive body of law on the subject, which was meant to apply only to "accountants" and "consultants" (or even to "professionals") is simply untenable.

7. This Court appears to be attempting to tip toe around an issue that it has already addressed exhaustively. Without a doubt, both *Booz-Allen and ML-Lee II* stand squarely for the

proposition that a person committing a negligent misrepresentation in a business transaction can be sued--certainly under Restatement § 552—by the person injured by that misrepresentation, ***regardless of whether the two are in privity of contract.*** The supreme court made that clear in *ML-Lee II* when it insisted that the court of appeals had erred below in deciding that the investor had been the client of the accountant "for purposes of the 1990 investment." *ML-Lee II*, 327 S.C. at 241, 489 S.E.2d at 471.

8. In addition, the supreme court fully endorsed the court of appeals' decision to reject the privity of contract approach when defining the reach of a cause of action for negligent misrepresentation, as well as the foreseeability approach, which goes well beyond the liability contemplated by Restatement § 552. Indeed, Chief Judge Howell, for this Court, has previously engaged in an extensive analysis of just this subject in *ML Lee I. ML-Lee Acquisition Fund, L.P. v. Delouitte & Touche,* 320 S.C. 123, 463 S.E.2d 618, 625-27 (Ct. App. 1995)(herein *ML-Lee I*). In that analysis, Judge Howell rejected outright the privity of contract limitation implanted into the law of negligent representation by *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441, 446 (1931), even as that approach had been subsequently leavened by the relaxed or "near privity" standard later adopted in New York, as exemplified by *Credit Alliance Corp. v. Arthur Anderson & Co.*, 65 N.Y.2d 536, 493 N.Y.S.2d435, 483 N.E.2d110 (N.Y.1985). *See ML-Lee I,* 463 S.E.2d at 625. He also rejected the foreseeability approach that prevailed in New Jersey and Mississippi. *Id.* Instead, this Court embraced the majority view, that is, the view that Restatement § 552 should control negligent misrepresentation. *Id.*[1] That decision, in turn, aligned the law of South Carolina with that also adopted previously in both Georgia and in North

[1] Judge Howell's excellent exegesis of the theories of negligent representation in *ML-Lee I* was developed almost entirely in the context of decisions involving accountants. That may be why this Court believes that § 552 should be applied exclusively to them. Nothing in *ML-Lee II*, however, requires or even implies such a limitation or qualification on the reach of the Restatement provision.

Carolina. *See Badische Corp.v.* Caylor, 257 Ga 131, 366 S.E.2d 198 (1987); *Raritan River Steel v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609, 617 (1988).

9. In short, notions of privity of contract in South Carolina, at least in the context of negligent misrepresentation, were buried long ago by this Court in *ML-Lee I,* and the efficacy and finality of that funeral were confirmed by the supreme court in *ML-Lee II.* It is submitted that, if any effort is made to exhume those notions at this late date, it should be undertaken not by this Court but by the General Assembly. An industry as powerful as banking, which, despite its abuses having caused an historical collapse in the national economy as recently as 2008, had enough influence to obtain its own, private Statute of Frauds from the legislature, probably can obtain some "relief" on the privity issue if it is a matter of real concern. Accordingly, all statements in the Opinion (except those related to the *Kerr* case) appearing to endorse a privity requirement for negligent misrepresentation.should be removed from the Opinion under well accepted principles of *stare decicis.*

10. However, real concern may well be in order if the Opinion is this case remains unchanged. Every day hundreds of sales and construction contracts are submitted to banks in South Carolina for financing. The Opinion filed on February 21, 2018, left unmodified, will embolden banks to deal fast and loose with both the sellers of real property and the builders of commercial and residential units on real property unless the standard set forth in Restatement § 552 is fully embraced in this case.

11. With respect to *Kerr v. Branch Banking & Trust Co.,* 408 S.C. 328,759 S.E.2d 724 (2014)(herein "*Kerr*"), though it appears to embrace privity, at least when a bank is concerned, it is submitted that *Kerr* should have no bearing on the case at bar because § 552 of the Restatement was addressed nowhere therein. The writer knows lawyers on both sides of the

argument in *Kerr,* and he has been informed that no mention of § 552 was made by any party during either the trial or appellate proceedings. The writer so advised the Court at oral argument in this case, and the statement could readily be confirmed by reading all of the briefs in *Kerr.* In addition there are numerous, material distinctions between this case and *Kerr,* as has been demonstrated at pages 25 and 26 of the Appellant's Brief. Therefore, it is beyond fanciful for this Court to believe that *Kerr*, which is an outlier in South Carolina, with no precedent or pedigree at all, was somehow meant by implication to overrule the settled law applicable to negligent representation as evidenced by the *ML-Lee* decisions. If such an outcome were considered desirable by this Court, at the very least a showdown between competing principles should occur. The Opinion in this case, however, appears simply "to whistle past that cemetery."

12. In conclusion on the question of negligent misrepresentation, the Opinion insists, on the next to last page, that, with respect to Mr. and Mrs. Hamner, "Gecy has failed to produce evidence of a negligently made false statement." That is clearly not the case. Both Doug Jacobs and Mr. Hamner represented to Mr. Gecy that the latter had applied for a V.A.loan. That was false. Mr. Hamner told Mr. Gecy that his loan was for a fixed rate. That was also false. When those falsehoods began to unravel, Mr. Jacobs claimed that the loan, while admittedly conventional, was rolling into a V.A. loan. However, the two loan applications produced in discovery established that there was only one loan, that it was conventional, that it carried an adjustable rate and that there was ***no*** provision allowing the conversion of the construction loan into a V.A. loan. *See* Appellant's Brief at 15-16, including citations to the Record for each of the foregoing representations. In other words, every statement about the loan if not proven to be false, had at least been called into question under the *Hancock* scintilla standard applicable to this case. In addition, Mr. Hamner, on March 27, 2010, stated that he would close, and he then

made himself inaccessible until after the closing date, at which time he contended that he was not required perform under either contract. That representation too is actionable, assuming that it falls within the exception to the rule about preexisting facts announced in *Sauner v. Public Service Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 188 (2003), as discussed on page 31 of the Appellant's Brief. 13.

13 The Court may well have misapprehended these misrepresentations, as well those made by SCB&T, because nowhere in the Opinion are they set forth except in vague, general terms.

14. The same statement can be made about SCB&T's "moving target" when the Road Maintenance Agreement (herein "the RMA") was concerned. First, the imposition of the requirement was questionable, especially when no V.A. loan was being sought. Then, however, it ostensibly became a loan requirement dictated by the Bank's internal policy. Then Doug Jacobs insisted that all owners whose land adjoined the road must sign the RMA. When it became clear that the Appellant had obtained the signature of even the most intransigent adjoining owner, Mr. Ferguson, the Appellant requested that those two who had not signed be allowed to sign at the closing. However, SCB&T refused to deliver the closing package to the closing attorney, despite repeated requests, supposedly because, like the Appellant and the closing attorney, the Bank's officials could not reach the Hamners, who had made themselves scarce. Indeed, on the date set for closing, April 5, 2010, in response to yet another request by the closing attorney and Mr. Gecy, at 3:20 p.m., Mr. Jacobs not only refused to deliver closing package, so that the loan documents could be completed, but he also demanded additional items ancillary to the RMA, namely, (a) a copy of the survey of the entire neighborhood, (b) an aerial photo of the area adjoining Meredith Lane, and (c) tax records for all owners whose property adjoined Meredith Lane. In short, though all of these facts were well documented in the Record

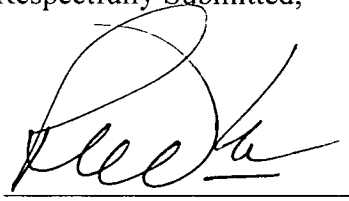
and described in detail in the Appellant's Brief, virtually none of them appear in the Opinion. If they had been, it is submitted that, under the scintilla standard, there was more than enough evidence to overcome a motion for summary judgment, with respect to both the Appellant's interference with contract and breach of contract claims.

15. Regarding the trial judge's refusal to grant the Appellant's motions to compel and for a continuance, it should suffice to direct the Court's attention to the Appellant's Brief, and, specifically, to pages 33 and 34. The writer agrees that it is not incumbent on the bank to have any policy on RMA's. However, if you do have one, which is what Doug Jacobs stated under oath, the Bank should be required to produce it in response to a discovery request. An answer that such a request sought "***private and confidential information that is privileged and not otherwise discoverable***" should have been presumed to have been made in bad faith on such a critical question. Appellant's Brief at 34. Yet the Court skirts that issue by saying that there is no requirement that, if a bank has a policy, it must be in writing. The writer also agrees with that assertion. However, if that is the case, the correct answer to a question about the policy is not to assert an imaginary privilege. Instead, it is to say, "We have a policy, but it is not in writing." In other words, SCB&T's failure to answer forthrightly should have induced the granting of both motions. And this can be seen most clearly with respect to allowing the Appellant to obtain the testimony of Robert Walters, Jr. Mr. Jacobs had testified that SCB&T always required RMA's to be filed in advance of or at closing of its loans, and the Bank had "never deviated" from its policy of requiring all adjoining land owners to sign its borrower' RMA's. Appellant's Brief at 19; R. p. 368, lines 4-12. Yet Mr. Walters' RMA was filed months after his loan closed, and it had only been signed by him, not by any other adjoining land holder. That should have been sufficient to raise a material issue of fact, but the Court says not in the Opinion because the two

RMA's were "unrelated." If, as one must assume, the Court is correct, the way to have tied them together, in view of Mr. Gecy's offer of proof (namely, that Mr. Walters would testify (a) that Doug Jacobs the loan officer at SCB&T, (b) that Mr. Jacobs actually prepared the RMA that he signed, (c) that Mr. Jacobs never required any other adjoining land owner to sign and (d) that none did) would have been to permit the taking of the Walters' deposition. His testimony, provided it matched the offer of proof, would have established that Mr. Jacobs was not truthful about "never deviating" from the Bank's policy on the question of RMA's. That, in turn, would have raised one or more factual issues under the scintilla standard. Thus, the failure to grant the Appellant's motions amounted to legal prejudice and an abuse of discretion by the trial judge.

WHEREFORE, the Appellant requests that the Court withdraw its Opinion and rehear the case on the issues raised herein above.

Respectfully Submitted,

By: 

Robert V. Mathison, Jr.
S.C. Bar No. 3685
Attorney for Appellant
Benjamin Gecy

MATHISON & MATHISON
Post Office Box 5271
Hilton Head Island, SC 29938
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

March 7, 2018

Hilton Head Island, South Carolina.

MATHHISON & MATHISON
Post Office Box 5271
Hilton Head Island, SC 29938
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

March 8, 2018
Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Benjamin Gecy v. South Carolina Bank & Trust, et al.
Case No. 2011-CP-07-01778
Appellate Case No. 2014-002712
Opinion No. 5538

Dear Ms. Kitchings:

Enclosed for filing please find the following:

(a) Original and six copies of the Appellant's Petition for Rehearing;

(b) The original of the Proof of Service; and

(c) My check in the amount of $25.00 to pay the filing fee.

With kind regards, I am

Sincerely,

Robert V. Mathison, Jr.
S.C Bar No. 3685

RVM:bh
Enclosures
cc: Thomas A. Holloway, Esquire
James J. Wegmann, Esquire
Mr. Benjamin C. Gecy (via email only)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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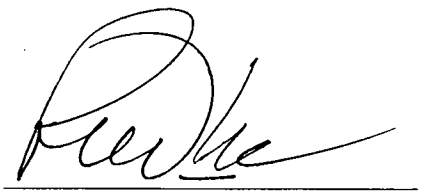
PROOF OF SERVICE

I, Robert V. Mathison, Jr., hereby certify that on March 8, 2018, I filed and served by hand delivery the original and copies of the Appellant's Petition for Rehearing dated March 7, 2018, by delivering to the Clerk of the Soth Carolina Court of Appeals and to counsel at the addresses which follow:

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Thomas A. Holloway, Esquire
Harvey & Battey, P.A.
1001 Craven Street
Beaufort, South Carolina 29902

James J. Wegmann, Esquire
Weidner, Wegmann & Harper, LLC
6 Professional Village Circle
Beaufort, South Carolina 29907



Robert V. Mathison, Jr.
S.C. Bar No. 3685
Attorney for the Appellant
Benjamin Gecy

MATHISON & MATHISON
Post Office Box 5271
Hilton Head Island, SC 29938
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

March 8, 2018.