

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas  
Thomas A. Russo, Circuit Court Judge

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Case No. 2014-CP-21-00916

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Beneficial Financial I Inc., successor by merger to  
Beneficial Mortgage Co. of South Carolina, Appellant

v.

Jon Windham, a/k/a Jon D. Windham; Frances Windham, a/k/a  
Frances C. Windham; and Jerry Coker, a/k/a Jerry L. Coker;  
Carolina Bank & Trust Co.; The United States of America, by and  
through its agency, the Internal Revenue Service; and  
The Citizens Bank, Defendants,

Of Whom Jon Windham a/k/a Jon D. Windham is the Respondent

Appellate Case No. 2017-001954

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APPELLANT'S INITIAL REPLY BRIEF

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## ARGUMENT

Without restating arguments that were thoroughly set forth in the Appellant's opening brief, the Appellant offers the following points in Reply to the Respondent:

**I. The matters before this Court were preserved for appeal.**

The Borrower alleges that the Lender did not preserve for appeal the issue that the Borrower utterly failed to support its motion for summary judgment. This argument fails for two reasons. First, the Lender was not required to defend the Borrower's sham summary judgment motion in any way, but even if it were, the Borrower's entitlement to summary judgment was preserved for appeal because the trial court gave the Borrower the specific relief it sought and argued.

**1. The Borrower's summary judgment was unsupported, and thus the Lender was not required to make its own evidentiary showing.**

As set forth in the Lender's brief, the Borrower was not entitled to summary judgment because he utterly failed to support entire claims in his summary judgment motion to the point of showing the issue is a sham. *Title Ins. Co. v. Christian*, 267 S.C. 71, 266 S.E.2d 240 (1976) ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary matter is presented.") (finding that summary judgment was inappropriate where the movant made no effort to clarify disputed issues of fact in their affidavits, even when the non-moving party did not submit affidavits); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990); *Yarborough v. Rogers*, 306 S.C. 260, 411 S.E.2d 424 (1991). Indeed, the party opposing summary judgment need not come forward **in any way** if the moving party has not supported its motion to the point of showing the issue is a sham. *Title Ins. Co.*, 267 S.C. 71, 266 S.E.2d 240 (1976). This rule is consistent with long-settled South Carolina

authority that requires a non-moving party to put on evidence opposing summary judgment only after the moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, *Carolina All. For Fair Emp't v. S.C. Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999), and the moving party is actually entitled to judgment as a matter of law. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601 (2001) (finding an abuse of discretion when the trial court's order is based on factual conclusions without evidentiary support).

Here, as set forth in the Lender's opening brief, the Borrower's 10-paragraph affidavit was so scant that it did not even attempt to address many of the elements of his counterclaims. As but one example, although the Borrower asserted multiple claims based upon misrepresentation that require the Borrower to prove that he relied upon representations, the Borrower did not even allege that he so relied. The Borrower's summary judgment motion was thus a sham that was not supported by any evidence, and the Lender was not required to come forward in any way. *Title Ins. Co.*, 267 S.C. 71, 266 S.E.2d 240 (1976). As a practical matter, the Borrower's argument that the Lender did not preserve issues for appeal by failing to submit evidence in opposition to the Borrower's affidavit cannot coexist with South Carolina's rule that a non-moving party need not come forward to oppose a sham summary judgment motion. The Borrower is thus incorrect, and the issues before this Court were properly preserved for appeal.

**2. This Court's review of the trial court's summary judgment order is preserved.**

This Court also can review the trial court's summary judgment order because the trial court entered judgment on the precise grounds that the Borrower sought ruling and the Lender challenges—that there was no genuine issue of material fact, and the Borrower was entitled to judgment as a matter of law. *See, e.g., Plantation A.D. LLC v. Gerald Builders of Conway, Inc.*,

386 S.C. 198, 207 (2009) (distinguishing between a legal argument and an argument that genuine issues precluded summary judgment, the latter of which was preserved on a motion for summary judgment); *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (holding issue was preserved when “the trial judge’s order granted respondent’s motion for summary judgment on *precisely* the grounds argued by respondents at the summary judgment hearing”); *Townsend v. City of Dillon*, 326 S.C. 244, 486 S.E.2d 95 (1997) (issues that the trial judge ruled upon were preserved); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (finding that an issue was not preserved when the trial court did not explicitly rule upon it). Because the Lender asks this Court to review the precise grounds upon which the Borrower sought summary judgment, the issue is preserved for appeal.

**II. The Borrower admits that it did not put forth evidence for its claims.**


In its brief, the Lender points out that the Borrower neglected entire elements of its claims. Specifically, the Borrower **did not even attempt** to prove—through his own affidavit of otherwise: (i) that the Lender committed similar acts capable of repetition for his UTPA claim; (ii) that he suffered emotional or physical distress to support an intentional infliction of emotional distress claim; (iii) a single element of his claims for negligent or reckless hiring, supervision, and training claims; (iv) four elements of his fraud claim, including any specific representations that the Lender made to him, that the Borrower was unaware of the truth or falsity of those representations, that the Borrower relied on any such representations, or his consequent and proximate injury; (v) three elements of his negligence claim, *i.e.*, any specific representations upon which he relied, that he actually relied on any such representations to his detriment, and that such reliance was reasonable. In his brief, the Borrower argues that he did in fact provide proof of these elements, but notably does not cite at all to his affidavit, which is utterly devoid of each of the elements set forth above. The Borrower thus tacitly admits that he

did not prove the elements of his claims, and the trial court erred in granting summary judgment in his favor.

**III. Conclusion**

The Borrower's motion for summary judgment, submitted in the midst of settlement negotiations, was supported by such scant evidence that grant of summary judgment was inappropriate, even if Lender did not present contradicting affidavits. Indeed, the Borrower's affidavits ignored several claims in their entirety, and did not contain sufficient detail for the Lender to even identify which representations were purportedly negligent or fraudulent. As a result, and especially in light of the fact that the Court must liberally construe the record in the Lender's favor, the Lender respectfully requests that this Court reverse the trial court's grant of summary judgment for the Borrower.

Respectfully Submitted,



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March 19, 2018

Charlotte, NC

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
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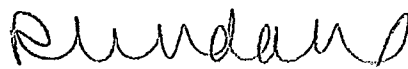
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PROOF OF SERVICE

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I certify that I have served the foregoing Initial Brief of Appellant on the Respondent Jon Windham, a/k/a Jon D. Windham, by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2018, addressed to his attorney of record:

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March 19, 2018

Via U.S. Mail

Ms. Jenny Abbott Kitchings  
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through its agency, the Internal Revenue Service; and  
The Citizens Bank, Defendants,**

**Of Whom Jon Windham a/k/a Jon D. Windham is the Respondent**

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Dear Ms. Kitchings:

Enclosed please find Appellant's Initial Reply Brief and Designation of Matter to be Included in the Record on Appeal. A copy of the enclosed has been served on counsel for the Respondent via U.S. Mail.

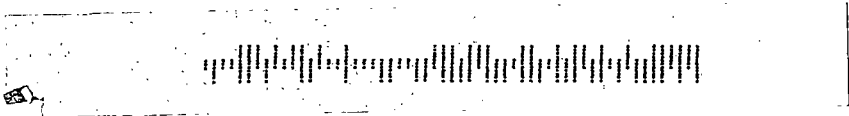
Sincerely,



Sara K. Brown,  
Paralegal

SKB:  
Enclosure

cc: Penny Hays Cauley



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**TO**

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