

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEE COUNTY  
Common Pleas

Clifton Newman, Circuit Court Judge

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Case No. 2013-CP-31-00321

Laura Toney,

Appellant

v.

LaSalle Bank National Association as Trustee  
for the Registered Holder of Structured Asset  
Securities Corporation, Structured Asset  
Investment Loan Trust, Mortgage Pass-Through  
Certificates, Series 2004-11, Altisource Homes,  
Pro Capital Investors, Wayne Capell, Lee County  
Treasurer and Lee County Planning and Zoning,

Respondents

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SC Court of Appeals

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RESPONDENTS WAYNE CAPELL, LEE COUNTY TREASURER AND LEE  
COUNTY PLANNING AND ZONING'S FINAL BRIEF

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January 11, 2017



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## STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL JUDGE ERR IN ALLOWING THE ATTORNEY FOR RESPONDENTS TO CONTINUE REPRESENTATION AFTER THE COURT WAS NOTIFIED THAT THE ATTORNEY WAS REPRIMANDED BY THE COMMISSION ON LAWYER CONDUCT FOR CONFLICT OF INTEREST?

## STATEMENT OF FACTS

This matter has been ongoing between the Appellate, Laura Toney (“Appellate”) and Respondent, LaSalle Bank (“Respondent LaSalle”) since October 6, 2004 (R.pp.253-258). Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning (“Respondent County”) were not made parties until November 13, 2013 (R.p.33).

Appellate’s only allegation against the Respondent County is that her property at 729 Chatman Street, Bishopville, South Carolina had been incorrectly identified on County Tax Maps. Additionally the Respondent County allowed the property to be sold for delinquent 2013 property taxes (R.pp.36-37).

In response to Appellate’s Summons and Complaint, Respondent County filed a 12(b)(6) Motion on December 19, 2013 (R. pp. 62-63).

The Respondent County filed a Motion for Summary Judgment on December 17, 2014 which was granted by the Court (R.pp.816-817). The Respondent County based its Motion on the fact that Appellate had not perfected service on Respondent County by serving the Summons and Complaint upon the Chief Executive Officer or the Clerk of Respondent County (R. p. 986 lines 6-25).

At the Motion hearing on November 30, 2015, Appellate argued for the first time that attorney, Paul M. Fata, attorney for Respondent County should be disqualified. Appellate alleged that Attorney Fata and his office had represented her and her family in the past creating a conflict (R. pp. 86-87).

Appellate's motion was denied (R.pp.120-122).

Appellate only argues one issue regarding the Respondent County pursuant to the Appellate's Corrected Brief:

Did the trial judge err in allowing the attorney for Respondent County to continue representation after the Court was notified that the attorney was reprimanded by the Commission on Lawyer Conduct for conflict of interest?

## ARGUMENT

THE TRIAL JUDGE DID NOT ALLOW THE ATTORNEY FOR RESPONDENT COUNTY, TO CONTINUE REPRESENTATION AFTER BEING NOTIFIED THAT THE ATTORNEY WAS REPRIMANDED FOR CONFLICT OF INTEREST, AND, THUS, THE TRIAL COURT DID NOT ERR IN ALLOWING THE ATTORNEY TO CONTINUE TO REPRESENT THE RESPONDENT COUNTY

In Point III of the Corrected Appellant's Initial Brief, at pages 21 and 22, Appellant asserts, without referring to a factual basis in the record or elsewhere, that the attorney for the Respondent County, Paul M. Fata, had served as her attorney for several years on numerous occasions, that she had filed a complaint against Mr. Fata with the Commission on Lawyer Conduct, and that the Commission had reprimanded Mr. Fata, but he continued to represent the Respondent County in this litigation. In support of this argument, Appellant sets forth the text of Rule 1.7 of the SCRPC, Rule 407, SCACR, and nothing more. In her Statement of the Case at p. 10 of the Corrected Appellant's Initial Brief, Appellant asserts, again without reference to evidence:

Mr. Fata's Firm has represented me and my family in numerous legal manners [sic]. His firm deeded the original lot (14) to me from my husband, Milton Toney. His firm also wrote our Last Will and Testament and other real estate transactions which constitutes "Conflict of Interest."

The Commission on Lawyer Conduct has reprimanded Mr. Paul Fata for Conflict of Interest and he still continued to represent the Defendants in this case.

Appellant's recitation of the "facts" is inconsistent with the record in this matter. The transcript of the March 30, 2016 hearing confirms that Appellant had filed a motion to disqualify Mr. Fata based on a conflict of interest, that the court denied the motion, (R. pp. 86-87) and that there was no motion to disqualify pending

before the trial court on the date of the hearing (R. p. 1027 lines 1-8). At the hearing, Mr. Fata acknowledged that he and his partner had “done deeds, wills, various things of that nature, which have nothing to do with this property and would not have given us any undue advantage or would not have gained [sic] any information that would be used to the detriment of Ms. Toney in this matter” (R. p. 1027 lines 19-25). Mr. Fata also acknowledged that Appellant had filed a complaint with the ethics committee on the same matter (R. p. 1027 lines 9-10). On that same date, the trial court then granted the Respondent County motion for summary judgment based on their written submission (R. p. 1028 lines 3-6).

Appellant points to no evidence in the record to counter Mr. Fata’s description of legal work he and his partner previously did for Appellant.

Three months *after* the trial court granted the Respondent County’s motion for summary judgment, on June 20, 2016, the Supreme Court of South Carolina Commission on Lawyer Conduct issued a Letter of Caution to Mr. Fata based on the complaint of Appellant. The Letter of Caution specifically stated that “the imposition of a sanction was not warranted,” no charges would be filed against Mr. Fata, and “[t]he issuance of this letter of caution is not a sanction against you” (R. p. 1058). The letter reminded Mr. Fata to adhere to the requirements of the Rules of Professional Conduct, particularly Rules 1.9 [Duties to Former Clients] and 1.10 [Imputation of Conflicts of Interest: General Rule] (R. p. 1058).

The Letter of Caution was not a reprimand, as inaccurately reported by Appellant. “Public reprimand” is listed as one of several available sanctions in the Rules of Lawyer Disciplinary Enforcement. Rule 7(b), SCRLDE, Rule 413.7(b),

SCACR. In contrast, “Letter of Caution” is not listed in those rules as a sanction for attorney misconduct. “Public Reprimand” is defined by the Rules of Lawyer Disciplinary Enforcement as “a reprimand by the Supreme Court in the form of a written decision which shall be imposed in person or served upon the respondent by certified mail.” Rule 2(v), SCRLDE, S.C. App. Ct. R. RULE 413.2(v). On the other hand, a “Letter of Caution” is defined as:

*a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a sanction under these rules and does not constitute a finding of misconduct. The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the lawyer unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.*

Rule 2(r), SCRLDE, Rule 413.2(r), SCACR (emphasis added).

Clearly the Letter of Caution was *not* a reprimand. And even if it were, it was issued on June 20, 2016, almost three months after the trial court granted the Respondent County’s motion for summary judgment and released them from this lawsuit. At the time that the trial court granted the motion for summary judgment in March of 2016, the trial court already had denied Appellant’s motion to disqualify Mr. Fata, finding no conflict of interest (R. p. 1027). Therefore, as a factual matter, the trial court simply did *not* allow Mr. Fata to continue to represent the Respondent County after being notified of the Letter of Caution or, for that matter, a verifiable conflict of interest. Had the Letter of Caution been issued prior to the termination of the case against the Respondent County, the trial court would have been under no

obligation to disqualify Mr. Fata, since, as stated earlier, the Letter of Caution was not a sanction or a finding of misconduct. Furthermore, because the Letter of Caution did not set forth the facts the Commission considered in reviewing Appellant's ethics complaint, had it been issued prior to March 30, 2016, the letter could not have provided a factual basis for the trial court to revisit its conclusion that there was no conflict of interest disqualifying Mr. Fata from representing the Respondent County.

Appellant's assertion that Mr. Fata continued to represent the Respondent County in spite of being subject to professional discipline for a conflict of interest based on his prior representation of Appellant is simply not true. Even if Appellant's recitation of facts were accurate, she has made no effort to describe how she was prejudiced by Mr. Fata's continued representation. Rule 1.9(a) of the South Carolina Rules of Professional Conduct prohibits attorneys from "represent[ing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client," here, Appellant. Rule 1.9(a), SCRPC, Rule 407, SCACR. "The purpose behind . . . [this rule] is to prevent an attorney from using confidential information that he has obtained from a client against that client on behalf of another one." *In re Goss*, 492 B.R. 469, 472 (Bankr. D.S.C. 2013) (internal citation omitted). Appellant does not argue that she suffered harm because Mr. Fata used confidential information obtained in the attorney-client relationship against her. She simply objects to his representation of other clients with whom she has a dispute. "However, an attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment." *Madison v. Graffix Fabrix*,

*Inc.*, 304 S.C. 321, 325, 404 S.E.2d 37, 40 (Ct. App. 1991). In the absence of a showing of any harm from the use of confidential information, Appellant was not entitled to Mr. Fata's disqualification.

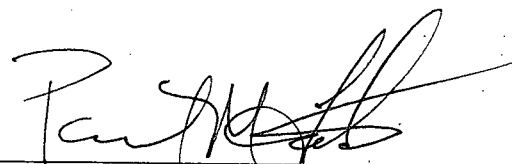
#### CONCLUSION

Appellant can point to no basis for Mr. Fata's disqualification, and she is not entitled to reversal of the trial court's decision based on a fictitious conflict of interest.

Respondent County

Bishopville, SC

January 11, 2017



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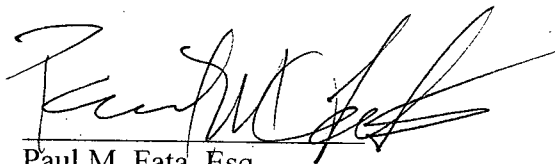
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CERTIFICATE OF COUNSEL

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The undersigned certified that Respondents Wayne Capell, Lee County  
Treasurer and Lee County Planning and Zoning's Final Brief complies with Rule  
211(b), SCACR.

January 11, 2018



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Appellate Case No. 2016-001989

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Investment Loan Trust, Mortgage Pass-  
Through Certificates, Series 2004-11, A/K/A  
Altisource Homes, Wayne Capell, Lee County  
Treasurer and Lee County Planning and Zoning,

Respondents.

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**PROOF OF SERVICE**

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I hereby certify that on this, the 16th day of January, 2018, a copy of Respondents Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning's Final Brief was served upon all interested Parties to the Appeal by mailing a copy of same with sufficient first class postage affixed thereto, addressed as follows:

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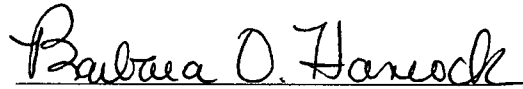
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(SIGNATURE ON FOLLOWING PAGE)

*Laura Toney v. LaSalle Bank National Association, et al.*

*Appellant Case No. 2016-001989*

**RESPONDENTS WAYNE CAPELL, LEE COUNTY TREASURER AND LEE COUNTY PLANNING  
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