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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from South Carolina
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2013-CP-10-1686

APPELLATE CASE 2015-001848

OPINION No. 2018-UP-030 (January 17, 2018)

Church of God and Church of God of South Carolina, ...Petitioners ~~Appellants~~,

v.

Mark Estes, Patricia Estes, Michael Timothy Brooks, Individually and as Trustee for Church of God at North Charleston Trust, Adam Boyer, Individually and as Trustee for Church of God at North Charleston, Rolando River Osorio As Trustee For Church Of God At North Charleston Trust and North Palm Ministries, Inc., North Palm Community Church and Crescom Bank, Successor by Merger to Community First Bank and its Successor Crescom Bank, Defendants.

Of Whom Crescom Bank is the .....Respondent.

v.

Thomas Propes and Marc Campbell, Third Party Defendants.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 22, 2018.

QUESTIONS PRESENTED

I. **SHOULD THE COURT OF APPEALS HAVE CONSIDERED THE CHURCH OF GOD'S LACK OF FULL KNOWLEDGE OF THE FACTS TO CONCLUDE THAT ITS CLAIMS ARE NOT BARRED BY THE VOLUNTARY PAYMENT DOCTRINE.**

II. **IN A CASE OF FIRST IMPRESSION, DID THE COURT OF APPEALS IMPROPERLY IMPOSE A TWO-YEAR STATUTE OF LIMITATIONS ON PETITIONERS' SLANDER OF TITLE CAUSE OF ACTION?**

III. **DID THE COURT OF APPEALS IMPROPERLY AFFIRM THE DISMISSAL OF PETITIONER'S AIDING AND ABETTING CAUSE OF ACTION WHERE THERE IS SUBSTANTIAL EVIDENCE THAT THE BANK HAD KNOWLEDGE OF AND PARTICIPATED IN THE OTHER DEFENDANTS' BREACHES OF FIDUCIARY DUTIES?**

IV. **DID THE COURT OF APPEALS IMPROPERLY ATTRIBUTE THE KNOWLEDGE AND ACTS OF ROGUE AGENTS TO PETITIONERS WHERE THOSE AGENTS WERE ACTING FOR THEIR OWN PURPOSES OUTSIDE THE SCOPE OF THEIR AUTHORITY?**

STATEMENT OF THE CASE

This action arises because Respondent, Crescom Bank (successor to Community First Bank), loaned money to one church (North Palm Ministries) and secured it with a mortgage on another church (Church of God) without authority. (Complaint with attachments).

The Church of God is a not for profit, charitable corporation, organized under the laws of Tennessee. The Church of God conducts business in South Carolina through its ecclesiastical association with Church of God in South Carolina, (collectively referred to as the Church hereafter). In 1985, the Church acquired title to properly located at 5505

North Rhett Avenue, North Charleston, South Carolina.[1] The deed contained an important restriction that limited the authority of the Local Board of Trustees to transfer of mortgage the property. Under the express terms of the deed, the Local Board of Trustees could not mortgage the property except as authorized by the "Minutes of the 49th General Assembly of the Church of God held at the Ellis Auditorium Memphis Tennessee August 14-16 1962". (Exhibit 1 to Complaint R pp 40-114). The Minutes of the 49th General Assembly of the Church of God (Exhibit 1 to Complaint R pp 103), required that any proposal to mortgage or sell the property be approved by a conference presided over by the State Territorial Overseer of the Church in relevant part as follows:

> The said Local Board of Trustees shall have full right, power and authority to buy property for the use or benefit of the local congregation; to sell, hypothecate, exchange, transfer, and convey any of the local property for the repayment of the same; and to execute all necessary deeds, conveyances, and so forth, provided that each of the following conditions is met: (1) the proposition shall first be presented to a regular or called conference of the local church; (2) presided over by the state overseer, or one whom he may appoint; (3) approved by a two thirds majority vote; **and (4) provided further that the board have a certification, in writing, from the state overseer, or one whom he may appoint that the proposition is not adverse to the interest of the Church of God."** (emphasis added).

(Exhibit 1 to Complaint, R p 103).

Between 2005 and 2010, Respondents Mark Estes, Patricia Estes, Michael Timothy Brooks, Rolando River Osorio and Adam Boyer (hereinafter the Rogue Directors) are alleged to have been Officers or Directors of the Church of God at North Charleston. (Second Amended Complaint R pp 0152-0167). Sometime before October 11, 2005, these Rogue Directors became dissatisfied with the philosophy and direction of Petitioners'

[1] See ROA (Exhibit 2 to Complaint), Deed from Lillian Buckner to the Board of Trustees of the Church of God of North Charleston dated October 09, 1985. "The said Local Board of Trustees shall hold title to, manage and control the said real estate for the general use and benefit of the Church of God..."

national church and decided to form a new church. (March 12, 2010 letter – R pp 0254-0257). On October 11, 2005, Defendant Mark Estes incorporated a new church, North Palm Ministries, Inc., with the Secretary of State for the State of South Carolina. (R p 214). He took this action without notice or approval from the Church of God as required by its Minutes. (Campbell Deposition R pp 0332-0334).

On October 15, 2007, the Rogue Directors refinanced the loan on Petitioners' church properly located at 5505 North Rhett Avenue and borrowed a total of $700,000, in the name of the new church, North Palm Ministries, Inc. (October 15, 2007 Note from N Palm secured by mortgage of New Covenant Property and October 15, 2016 mortgage from New Covenant for N Palm Loan, R pp 220-235). The note for such loan was signed by the Rogue Directors as Trustees for the new church, North Palm Ministries. (R pp 220-235).

Unbeknownst to Petitioners, the Rogue Directors took the equity received from the refinance, which amounted to approximately $300,000 (October 15, 2007 HUD Statement at R pp 215 - 218) and used it to purchase land in the name of the new church on Bryhawk Lane again without Petitioners' knowledge or consent. (Campbell Deposition R pp 328-330).

The result was that Crescom placed a mortgage on the property located at 5505 North Rhett Avenue which was owned by Petitioners, without Petitioners' knowledge, as security for the loan made to North Palm Ministries. The mortgage was signed by the Rogue Directors, ostensibly as Trustees for the Church of God at North Charleston, but without authority to do so. (R pp 220-235).

For its part, Crescom knew that the Church of God was giving a mortgage to secure a loan for North Palm Ministries.: "This note is secured with a First Mortgage on 5505

North Rhett Avenue, North Charleston, SC 29406 pledged by Church of God at North Charleston in the amount of $700,000.00." (Exhibit 6 to Respondent Crescom's Summary Judgment memorandum R pp 0220-235) Respondent's representative Robert Warrick confirmed this fact at deposition:

> Q... So does this mean that the bank at the time it created this document knew that North Charleston Church of God was giving the property to secure the North Palm Ministries loans?
> A. This is what we assumed. And so we sent the closing package and had it verified.

(Warrick deposition R p 347).

Crescom had made loans to corporate entities in the past and was aware that an agent purporting to act on behalf of a corporation could not bind that corporation without authority from the corporation, typically in the form of a corporate resolution (Warrick deposition R 0340-0343). Crescom was aware of specific limitations on the authority of the Rogue Directors, not only because those limitations were on public record (Deed, R pp 0112-0116), but because Crescom had a copy of the Minutes containing those limitations in its file (Warrick Deposition R pp 0351-0353 and 364).

Not only was it aware of the need for a corporate resolution, Crescom undertook to obtain the corporate resolution authorizing the Rogue Directors to mortgage property owned by the Church of God (Warrick deposition R pp 0348-0354; 0357-0358; and 0360-0363). However, it **never obtained the needed authorization for the mortgage** from the Church of God and blamed this failure on the attorney:

> Q. Okay. How did the bank verify that the trustees have any authority to pledge the property of 5505 North Rhett?
> A. They didn't. It's -- the attorney's job is to verify that. As all those closing packages would go to the attorney. He would verify, and they would make sure and offer title

> insurance and write detailed instructions to the bank to verify that they have the ability to borrow and decide. It's not the bank's job to do that.

(Warrick deposition page R pp 0348).

The Rogue Defendants failed to make the payments for the refinanced mortgage and the bank called a default. (Crescom's Memorandum in Support of Motion for Summary Judgment R p 177). Petitioners were called upon to pay the mortgage default. (Crescom's Memorandum in Support of Motion for Summary Judgment R p 178). As a consequence, on July 15, 2010, Petitioners who were not aware that the refinance had been used to purchase a new church not affiliated with its denomination, were required to sell the property at below fair market value and forced to satisfy the full outstanding unauthorized mortgage (Crescom's Memorandum in Support of Motion for Summary Judgment R p 177and Campbell Deposition R p 320).

When Petitioners discovered the loan money had been used to purchase a new church, they brought suit against Crescom and the Rogue Defendants for slander of title, conversion, breach of fiduciary duty and aiding and abetting the breach of fiduciary duty filing suit on March 20, 2013. Respondent Bank answered asserting various defenses, and later, on January 30, 2015, moved for summary judgment on all causes of action.

After a hearing on April 2, 2015, (Hearing Transcript R pp 0302-0316) the trial court granted Respondent's Motion for Summary Judgment. (May 5, 2015 Order R p 0001-0015). Petitioners received notice of the Order on May 16 and timely filed and served its Rule 59(e) Motion to Alter or Amend Judgment on April 20, 2015 and provided a copy of the Motion to Judge Dennis on the same date. Additionally, Plaintiff filed the Depositions of Marc Campbell and Robert Warrick in opposition to Defendant's Motion for Summary

Judgment. Plaintiff renewed its Motion on May 22, 2015, after the written Order was entered Judge Dennis affirming his grant of summary judgment without a hearing. (July 29, 2015 Order R p 0016.) The matter was appealed to the South Carolina Court of Appeals. Its Order was filed January 17, 2018, (R pp 432-436) and Petitioners timely moved for Rehearing on January 31, 2018. The Court of Appeals denied the Petition for Rehearing on March 22, 2018. This Petition for a Writ of Certiorari follows.

ARGUMENT

Petitioners are before the Court requesting a Writ of Certiorari to the Court of Appels pursuant to SCACR 241 (b)(1) and (b)(3) because the Court of Appeals failed to apply existing Supreme Court precedent correctly to the facts of this case and because the Court of Appeals erroneously imposed a far shorter statute of limitations on Petitioner's slander of title and breach of fiduciary duty claims than this Court would have imposed.

I. THE COURT OF APPEALS SHOULD HAVE CONSIDERED THE CHURCH OF GOD'S LACK OF FULL KNOWLEDGE OF THE FACTS TO CONCLUDE THAT ITS CLAIMS ARE NOT BARRED BY THE VOLUNTARY PAYMENT DOCTRINE.

The Court of Appeals erroneously applied the voluntary payment doctrine to affirm the dismissal of the Church of God's claims where there was substantial evidence the Church made its payment ***without*** full knowledge of the true facts and circumstances regarding the use of the loan proceeds. The Court of Appeal's opinion at pgs. 1 -2 failed to address whether the Church of God made payment to Crescom Bank with full knowledge of all the facts. The Court's opinions failed to consider or discuss the effect of the fact that the Church paid the mortgage to Crescom Bank without knowledge that its former pastor had taken the money for his own use, and not that of the Church. While the Church knew

its former pastor had mortgaged the property without permission, it believed there had been no loss, since the money had used for repairs to the Church property. Clearly, the Church cannot be charged with **full knowledge of all facts** such that the payment was voluntary when it did not know that the funds were embezzled by the rogue defendants. The Court's reliance on *Hardaway v. S. Ry. Co.*, 90 S.C. 475, 73 S.E. 1020 and *Moody v. Stem*, 214 S.C. 45, 60, 51 S.E.2d 163, 169 (1948) is in error, because the Court failed to consider the material evidence as to Petitioner's lack of full knowledge of the fact.

As held by this Court as recently as 2015, where a person or entity pays without "full knowledge of all the facts," the voluntary payment doctrine does not apply. *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 382–83, 778 S.E.2d 902, 912–13 (2015) (*citing Hardaway v. S. Ry. Co.*, 90 S.C. 475, 488-89, 73 S.E. 1020, 1025 (1912) ("It is an elementary principle that no action will lie to recover money voluntarily paid with full knowledge of all the facts" and "without any fraud, duress, or extortion" to make such payment.").

In *Freeman*, this Court refused to allow the application of the voluntary payment doctrine where the payor knew about the fee at the time she paid it but lacked full knowledge of what comprised the fee. Moreover, there, the Court found that even if the payor had inquired about the fee, no employee of that defendant could have explained how it had arrived at this amount.

Similarly, here, while the Church was aware of the mortgage debt and that the mortgages may have been obtained without authorization, it had no knowledge of what had been done with the proceeds of the loan (conversion of the funds to purchase property for an entity not related to Church of God.) Moreover, the Church had no reason to question

the exact usage of the mortgage proceeds because it was deliberately given the impression that the funds were used to repair Church property.

The simple fact of the matter is that the Church of God did not know the money had been stolen.

Mark Campbell, the District Overseer for the Church of God, testified that the church paid off the mortgage believing the funds had been used to make repairs to the Church's North Rhett Property.

> "Q. Yeah. When you were meeting with them, did they say, we took the money out and bought this property?
> A. No.
> Q. Did you at any time ask them where the 700,000 dollars went or what they used it for?
> A. No, because I was given the impression that it went to repair the building on North Rhett."

(Campbell Deposition R p 330). The Church of God did not know that the money had been stolen and used to purchase property for another church until much later (Exhibit 11 to Campbell Deposition Memo dated 9/3/10 R pp 0335-0338).

All payments made by the Church were made with the belief that all funds obtained from Crescom were used to improve the Church's property located at North Rhett. The Church relied on the Estes' misrepresentations that the funds obtained from Crescom were used to better the North Rhett property.

> A. In hindsight looking back everything looks better but at the time I thought I was dealing with friends. I didn't know that I was being deceived.
> Q. Okay. And how were you being deceived?
> A. At that meeting?
> Q. Yes, sir.
> A. I asked what are the obligations. They produced a first mortgage, they produced a promissory note to Chang, another one to Mr. Carson, never mentioned that there's a

> second mortgage on the property, never mentioned to me that they have an obligation to pay those but they don't and they try to make me pay, us as the Church of God pay things that we are not obligated to pay.

(Campbell Deposition R p 328). Specifically, the Church did not know that the proceeds of the loan had been misappropriated and used to acquire property for an unrelated Church.

While the Church admits it may have had knowledge that the mortgage was unauthorized, it did not have *full knowledge* of *all the facts*. Indeed, had the Rogue Directors in fact reinvested the proceeds from the refinance into the Church building, the Church would hardly have had a right to bring an action as there would have been no damage. The Church had no knowledge that it suffered any damages until it learned that the funds from the mortgage had been used to purchase property for an entity not related to Church of God.

In light of the uncontradicted testimony of Mr. Campbell that Church lacked full knowledge of all the facts, the Court of Appeals should have reversed the trial court's decision to apply the voluntary payment doctrine just as the trial judge in *Freeman* did. *Accord Moody v. Stem*, 214 S.C. 45, 60-61, 51 S.E.2d 163, 169 (1948) (Oxner, J. concurring) ("If the plaintiff in the case at bar was induced to pay this overcharge by fraud or deception, there can be no doubt of his right to recover . . . .").

Assuming *arguendo* that the voluntary payment doctrine might apply to these facts, the Court of Appeals also erred in failing to reverse the trial court's grant of summary judgment because the question of whether the Church paid "with full knowledge of the facts" is a question of fact for the jury. As with all cases where the issue is what a party knew when, those questions are all factual and must be resolved by the trier of fact. "At the summary judgment stage of litigation, 'the judge does not weigh conflicting evidence

with respect to a disputed material fact . . . Nor does the judge make credibility determinations with respect to statements made in affidavits, . . . or depositions.'" *L & W Wholesale v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991) (*citing T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Here, the testimony of Mr. Campbell, viewed in the light most favorable to the Church, creates an issue of fact as to whether the Church paid "with full knowledge of the facts." Thus, this Court should reverse the Court of Appeal's decision to allow the application of the voluntary payment doctrine to justify the grant of summary judgement to stand.

II. IN A CASE OF FIRST IMPRESSION THE COURT OF APPEALS IMPROPERLY IMPOSED A TWO-YEAR STATUTE OF LIMITATIONS ON PETITIONERS' SLANDER OF TITLE CAUSE OF ACTION AND SHOULD BE REVERSED.

The Court of Appeals improperly imposed the statute of limitation for defamation, libel, and slander claims to bar the Church's slander of title cause action. While South Carolina has long recognized a cause of action for slander of title, *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995), no South Carolina case has explicitly ruled on which statute of limitations applies to that cause of action and the Court of Appeals allowed the trial court's mistaken application the two-year statute of limitations for libel, slander, or false imprisonment appearing in Article 5 of Title 15, "ACTIONS OTHER THAN FOR RECOVERY OF REAL PROPERTY" found at S.C. Code § 15-3-550 to stand without any consideration or discussion of the nature of the cause of action.

The Court failed to appreciate that an action for slander of title is a claim "founded upon a title to real property" and should be governed by the 10-year statute of limitations contained

in Article 3, "ACTIONS FOR RECOVERY OF REAL PROPERTY" S.C. Code § 15-3-350 and titled "ACTION FOUNDED ON TITLE OR FOR RENTS OR SERVICES".

The Court erred in determining that an action for slander of title was governed by Article 5 of Title 15, "ACTIONS OTHER THAN FOR RECOVERY OF REAL PROPERTY" found at S.C. Code § 15-3-550, which provided for a two-year statute of limitations similar to defamation and false imprisonment.

The Court of Appeals mistakenly relied on *Hosey v. Cent. Bank of Birmingham, Inc.*, 528 So. 2d 843, 844 (Ala. 1988) in making its determination because in *Hosey* the Court there limited its ruling to cases "in the absence of a statute expressly made applicable to such actions." The Court here ignored the fact that South Carolina ***does*** have a statute, more specifically S.C. Code § 15-3-350 that governs actions founded on title, such as slander of title, and the statute of limitations is ten years.

The Court of Appeals should have actually considered what statute of limitations should be applied to Slander of Title causes of action and should have applied the statute of limitations found in Article 3, "ACTIONS FOR RECOVERY OF REAL PROPERTY" found at S.C. Code § 15-3-350 and titled "ACTION FOUNDED ON TITLE OR FOR RENTS OR SERVICES," which provides:

> **No cause of action** or defense to an action **founded upon a title to real property** or to rents or services out of the same shall be effectual unless it appear that the person prosecuting the action or making the defense or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question **within ten years** before the committing of the act in respect to which such action is prosecuted or defense made.

(emphasis added). Both the Court of Appeals and the trial court improperly focused on the word, "slander" rather than the word, "title," and ignored entirely the fact that the nature of claim being asserted against the Respondent Bank is founded on an issue of title.

While Petitioner's concede some courts outside of South Carolina have applied the personal libel and slander statute of limitations to slander of title claims, this Court should take up this important question itself and not allow the cursory, unpublished opinion of the Court of Appeals to stand without discussion or comment.

South Carolina should adopt the reasoning of its sister court in North Carolina to hold that slander of title claims are more properly analyzed as "trespass against real property claims" subject to the longer statute of limitations rather than as personal torts like libel and slander which carry a far shorter statute of limitations.

In *Selby v. Taylor*, 57 N.C. App. 119, 120, 290 S.E.2d 767, 768 (1982), *disc. review denied*, 306 N.C. 387, 294 S.E.2d 212 (1982), the North Carolina Supreme Court held:

> [T]he real nature of the action and the better reasoned cases from other jurisdictions lead us to the conclusion that the one-year statute of limitation for personal slander and libel has no application. **The thrust of the tort action of slander of title is the interference with a prospect of sale of real property or interference with a proprietary right.**

(emphasis added). In its lengthy analysis in *Shelby*, North Carolina rejected the law from various jurisdictions as recounted in 53 C.J.S., Libel and Slander § 278 and instead focused on the nature of a slander of title action rather than the mere words contained in the name of the cause of action. It cited numerous cases from around the country which have explained that nature of the harm inflicted in a slander of title cause of action is the invasion of real property right. The *Shelby* Court then explicitly rejected the statute of limitations argument advanced here by Respondents and adopted by the Court of Appeals holding:

> This is a position which we reject. **We are of the opinion that the real nature of the action prohibits the application of the law of personal slander and requires that the applicable statute of limitations** is G.S. 1-52(3) which provides for a limitation of three years **for trespass upon real property**.

Id. at 123-4 (emphasis added).

South Carolina should adopt North Carolina's reasoning to apply S.C. Code § 15-3-350 which pertains actions **founded upon a title to real property** to slander of title actions rather than the limitations period applicable to personal torts found in S.C. Code § 15-3-550. To so hold would be consistent with South Carolina long-standing preference to focus on content over form. *C.f., State v. Burkhart*, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002) ("It is the substance of the law and not the "particular verbiage" of a charge that determine whether the charge is adequate . . . ."); *Burroughs v. Worsham*, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002)("The substance of the law is what must be instructed to the jury, not any particular verbiage."); SCRCP Rule 8 ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required. . . . All pleadings shall be so construed as to do substantial justice to all parties.").

There is no dispute here that the Respondent's actions interfered with the Church's property rights and the marketability of the property and given that South Carolina has a statute specifically addressing actions founded on title, the statute of limitations is ten years. This Court should reverse the Court of Appeal's imposition of a two-year statute of limitations on the slander of title cause of action.

III. THE COURT OF APPEALS IMPROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S AIDING AND ABETTING CAUSE OF ACTION WHERE THERE IS SUBSTANTIAL EVIDENCE THAT THE BANK HAD KNOWLEDGE OF AND PARTICIPATED IN THE OTHER DEFENDANTS' BREACHES OF FIDUCIARY DUTIES.

The Court ruled that "[t]he gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." but failed to address whether Crescom Bank knowingly participated in Estes breach of fiduciary duty. However, the record was clear that Crescom Bank was aware Estes had no authority to put a mortgage on property owned by the Church of God (R. pp 0343-344, 0359) but yet the Court of Appeals failed to rule on whether making a mortgage with this knowledge rose to the level of aiding and abetting Estes breach of fiduciary duty.

In so ruling, the Court of Appeals compounded the error of the lower count by ignoring the evidence and the interferences that could reasonable drawn therefrom. Under *Vortex Sports & Entm't, Inc. v. Ware*, 662 S.E.2d 444, 448 (2008), to state a claim for aiding and abetting breach of fiduciary duty, a plaintiff must show "(1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." *Vortex Sports & Enter., Inc.*, 378 S.C. 197, 203, 662 S.E.2d 444, 448 (Ct. App. 2008) (*citing Future Group. II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996)). An aiding and abetting breach of fiduciary cause of action will lie when a defendant has actual knowledge of the breach. *Gordon v. Busbee*, 397 S.C. 119, 133-34, 723 S.E.2d 822, 830 (Ct. App. 2012). Here, Respondent Bank mortgaged real property ignoring the special consent requirements noted ***on the face of*** the deed. Respondent is charged with the knowledge that the property being mortgaged was church property subject to special fiduciary rules and consent requirements which they promptly ignored.

The Rogue Directors presented the Respondent Bank with a resolution that purported to authorize a mortgage on property owned by The Church of God that was clearly deficient. The resolution lacked the approval of the State Overseer, a requirement disclosed on the face of the deed. Without such approval, Respondent Bank had actual knowledge that the Rogue Directors lacked lawful authority to mortgage the property.

To make matters worse, the Rogue Directors disclosed on the face of their loan application their intent to use the proceeds from the mortgage loan to purchase property for a new church. The upshot is that the Respondent Bank allowed the Rogue Directors to mortgage another's property (without authority) and to use the proceeds for their own purposes! Thus, Respondent Bank had actual knowledge of the requirements for consent and cannot rely on their bald denial of knowledge to support claim for judgement as a matter of law. This Court of Appeals should have at least considered the evidence submitted by Petitioner's and this Court should grant their Petition for a Writ of Certiorari to correct the error as to the aiding and abetting cause of action.

IV. THE COURT OF APPEALS IMPROPERLY ATTRIBUTED THE KNOWLEDGE AND ACTS OF ROGUE AGENTS TO PETITIONERS WHERE THOSE AGENTS WERE ACTING FOR THEIR OWN PURPOSES OUTSIDE THE SCOPE OF THEIR AUTHORITY.

The Court of Appeals allowed the dismiss of the Church's claims to stand on the theory that the Church was bound by the acts of its agents (including the Rogue Directions and the attorney who closed Respondent Bank's loan), and, that all knowledge its purported agents possessed was attributable to it. Estes put a mortgage on Church property without authority and used the money for his private purposes. Crescom Bank knew Estes lacked

the authority, but nevertheless permitted the attorney hired by Estes, to close the loan. Crescom had a copy of the Minutes containing those limitations in its file (Warrick Deposition pgs. 29 - 31 - R pp 0351 - 0353) and (Exhibit 5 Minutes - R p. 0364); (also Exhibit 1 to Complaint - R pp 0037 - 0111). The Bank admitted it knew the Rogue defendants did not own the property they were using to obtain the mortgage, yet without further inquiry, it moved on with the closing of the mortgage.

> "Q ... So does this mean that the bank at the time it created this
> document knew that North Charleston Church of God was giving
> the property to secure the North Palm Ministries loans?
> A. This is what we assumed. And so we sent the closing package
> and had it verified."

(Warrick deposition page 23 - R pp. 0347)

On one hand, the Respondent Bank takes the position that it relied upon the attorney to properly perform the title search and obtain the authorizations. On the other hand, the bank asserts that the attorney was not their agent and thus his knowledge could not be imputed to the Bank but should be imputed to the Church. This position is not only inconsistent, but in adopting this position the Court of Appeals failed to appreciate the fact that the attorney did not work for the Church, but for the pastor who stole from the Church. The attorney who closed the loan for the pastor who stole from the Church without authority cannot possibly be said to be the agent of the Church.

The Court of Appeal's opinion on this point recites the general law of agency but fails entirely to consider the well-settled law applicable when agents are operating outside the scope of their authority or are acting "adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person."

Mauldin Furniture Galleries, Inc. v. Branch Banking & Trust Co., 2012 U.S. Dist. LEXIS 121140, 2012 WL 3680426 (D.S.C. Aug. 27, 2012) (*citing Crystal Ice Co. v. First Colonial*, 273 S.C. 306, 257 S.E.2d 496 (1979) ("An equally well-recognized exception to this general rule exists in situations where the agent is acting fraudulently against his principal or for any other reason has an interest in concealing his acquired knowledge from his principal."), and, *White v. FDIC*, 122 F.2d 770, 776 (4th Cir. 1941) ("[T]he personal interest of a director adverse to that of the corporation will prevent notice to him being deemed notice to the corporation . . . ."); *Charleston Library Soc. v. Citizens & S. Nat'l Bank*, 201 S.C. 447, 472, 23 S.E.2d 362, 372 (1942) ("The rule established by the cases above cited as applicable to attorneys at law representing other interests, in which case no knowledge is imputed, is further borne out by a long line of cases relating to agents in general, in which a similar exception to the general rule that notice to an agent is notice to the principal, is well recognized."); *Citizens' Bank v. Heyward*, 135 S.C. 190, 205, 133 S.E. 709, 714 (1925).

As explained by Judge Cain in *Mauldin*, "[f]or purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know ***is not imputed to the principal if the agent acts adversely to the principal*** in a transaction or matter, intending to act solely for the agent's own purposes or those of another person." *Id.* (*citing* Restatement (Third) of Agency § 5.04 (emphasis added); *see also White v. FDIC*, 122 F.2d 770, 776 (4th Cir. 1941) ("[T]he personal interest of a director adverse to that of the corporation will prevent notice to him being deemed notice to the corporation . . . ."); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000) ("Under the exception, management misconduct will not be imputed to the corporation if

the officer acted entirely in his own interests and adversely to the interests of the corporation . . . . The theory is that 'where an agent, though ostensibly acting in the business of the principal, is really committing a fraud for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it.'") (citations omitted); *First Nat'l Bank of Sikeston v. Transamerica Ins. Co.*, 514 F.2d 981, 986 (8th Cir. 1975) ("When the employer, officer or director's interest is adverse to the corporation, his knowledge is not imputed to it.")).

Here, Petitioners have made serious allegations of fraudulent activity against the Rogue Directors. As in *Mauldin*, whether they were acting on behalf of Petitioners — and by implication, whether their knowledge of the activity should be attributable to Petitioners — is ultimately a genuine issue of material fact for the jury and should not have been decided at the summary judgment stage. *Id. citing Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 367-68 (1991) ("In determining whether summary judgment is appropriate, a court must not try issues of fact, but must discern whether genuine issues of fact exist to be tried . . . . Summary judgment is not appropriate where further inquiry into the facts is desirable . . . .") This Court should grant the Petition for Certiorari because it is a question of fact whether the purported agents were acting within the scope of their employment or purely for their own benefit and the Court of Appeals failed to apply the correct law to the question.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Petitioners ask the Court to grant the Petition for a Writ of Certiorari to the Court of Appeals.

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April 20, 2018

RECEIVED

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from South Carolina
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2013-CP-10-1686

APPELLATE CASE 2015-001848

OPINION No. 2018-UP-030 (January 17, 2018)

Church of God and Church of God of South Carolina, ... ~~Appellants,~~ Petitioners

v.

Mark Estes, Patricia Estes, Michael Timothy Brooks, Individually and as Trustee for Church of God at North Charleston Trust, Adam Boyer, Individually and as Trustee for Church of God at North Charleston, Rolando River Osorio As Trustee For Church Of God At North Charleston Trust and North Palm Ministries, Inc., North Palm Community Church and Crescom Bank, Successor by Merger to Community First Bank and its Successor Crescom Bank, Defendants.

Of Whom Crescom Bank is the ..... Respondent,

v.

Thomas Propes and Marc Campbell, Third Party Defendants.

PROOF OF SERVICE

I certify that I have served copies of the forgoing Appellant's Petition for Writ of Certiorari on Respondents' counsel of record by depositing true and correct copies in the United States Mail and by electronic mail, postage prepaid, on April 20, 2018 addressed to the following:

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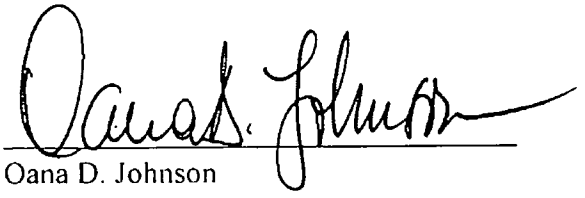

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