

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Robert E. Watson, Master-in-Equity

Opinion No. 5488 (S.C. Ct. App. filed May 24, 2017)

Linda Gibson, formerly known as Linda Ann Avinger
Individually and as Trustee of the Paul William Gibson
Family Trust, and Heritage Seven, LLC,Petitioner,

v.

Ameris Bank,Respondent.

REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI

The petition for writ of certiorari should be granted for the reasons set forth in the initial petition, as well as the arguments set forth below, offered in reply to the Respondent’s Return to that petition:

- 1. Zerbst was a bank agent, and there was insufficient raising of any contention to the contrary before the Court of Appeals.**

In its return to the petition for certiorari, Ameris states that “Because the issue of whether Zerbst was Ameris’ agent during the relevant time period was raised to and ruled upon by the trial court, the issue was preserved for appellate review.” It would be more accurate to say, however, that consideration by the trial court merely left the issue *capable* of review on appeal. Once the

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issue was raised to and ruled on by the trial court, it was still required of Ameris that the issue affirmatively and fairly be raised upon appeal for consideration by the Court of Appeals, since “Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.” Rule 208(b)(1)(B), SCACR.

In the return to the petition, Ameris acknowledges the matter of agency was “not set forth as a standalone issue on appeal” but cites authority for the proposition that “[w]hen an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from an appellant’s arguments.” *Herron v Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). The agency issue was supposedly “reasonably clear” because “the agency issue was part of Ameris’ argument in the first three issues on appeal.” (Return, p. 5).

Those three issues, however, do not fairly and reasonably raise any contention that the agency of Zerbst was directly challenged at the appellate level. They were, verbatim, as follows:

- I. Did the master-in-equity err in concluding that the bank owed the borrower (a limited liability company) a fiduciary duty in a \$2.8 million-dollar commercial loan transaction for a real estate venture that ultimately failed?
- II. Did the master-in-equity err in concluding that the bank was liable for negligent misrepresentation for telling the borrower that the transaction was a “good deal” and that the “rents would cover the debt”?
- III. Did the master-in-equity err in concluding that the bank knowingly aided and abetted the borrower’s real estate agent in breaching a fiduciary duty?

Ameris’ Issue I was thus solely focused on whether the bank *directly* owed any fiduciary duty, as confirmed by Ameris’ argument in its brief, which noted the absence of any commercial

lender ever being treated as a fiduciary by South Carolina courts.¹ The argument in the appellant's brief for that issue also had a subheading stating, "The statements made by the bank did not..." which again focused on the bank directly. The trial court's order concluded that both Ameris and Zerbst made statements that created a fiduciary duty to Gibson; with Ameris adopting and ratifying Zerbst's individual statements by affirming his representations and making the loan based on his delivery of Gibson for a loan based on the terms² he had worked out with Lanier.

Ameris' Issue II, tellingly, references quotes directly attributed to Zerbst. Surely, if those were the words of someone that supposedly did not speak on behalf of Ameris, that would have been the focus (or at least threshold argument) made by Ameris as part of its brief regarding this issue. That was not the case, however, as the overarching premise of Ameris' argument as to Issue II in its brief was that despite Zerbst's statements being statements attributable to the bank, they were nevertheless not actionable for various reasons. The quotes of Zerbst were thus defended by Ameris as *quotes of the bank*, not separated or distinguished from anything that should have been categorized as a "bank statement" for any purpose, as Ameris only now claims.

Ameris' Issue III in its brief focused on the bank distancing itself from the actions not of Zerbst, but Rolando Villavicencio. Again, taking the opportunity to distance itself from one person connected to the transaction, Ameris did not undertake any substantive effort to disclaim a relationship with Zerbst.

¹ This argument presented by Ameris to the Court of Appeals weighs in favor of a grant of certiorari, as it confirms the involvement of novel questions of law in this matter. See Rule 242(b)(1) and discussion *infra*.

² The loan application, despite not having been reviewed or signed by the new customer applicant and requesting \$2.8 million, was approved within 24 hours of its submission by the state president of Ameris. (App. pp. 507-508). Why the quick turnaround? According to Mr. Lanier, "Given the circumstances of the package, everything was already in place." *Id.* In other words, given the involvement of Zerbst and nature of relationship with Ameris (agent despite not yet formally employee), such a turnaround could occur.

In the Return to the Petition for Certiorari, Ameris states “If Zerbst was not Ameris’ agent during the relevant time period, Ameris could not be liable to Gibson as a matter of law” (although there is no citation of law for this argument). The arguments actually presented upon appeal³ by Ameris fully embraced the second clause in that sentence, but wholly failed to include the beginning clause, and as such they failed to preserve *and raise* that issue before the Court of Appeals.

2. This case presents an opportunity for clarification of an area of law by this Court.

Certiorari may be granted when “there are novel questions of law.” Rule 242(b)(1), SCACR. Ameris points out that there is no decision (yet) in South Carolina that has found a fiduciary relationship in the context of a lender and borrower, and thus no novel issues are presented under these unusual circumstances. (Return p. 13). However, Ameris cannot cite to any opinion that has *precluded* the formation in the context of a bank and its customer. That is because the exact boundaries of fiduciary relationships have never been defined, intentionally left elastic to address new or peculiar situations. “Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring.” *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599; 358 S.E.2d 150, 152 (Ct.App.1987).

Furthermore, this Court has recognized that while the “normal” relationship between a bank and its depositor is a creditor-debtor relationship rather than a fiduciary one, it has

³ Not only is it not in their initial brief’s statement of issues presented, it was not even addressed within the substantive body of the argument presented, as the portions of Appellant’s initial brief quoted in the Return to the Petition regarding agency largely references mere footnote material from that brief. Further, the transcript of oral argument quotations consists of a few seconds of passing reference from a hearing lasting approximately 45 minutes

nevertheless expressly stated and recognized that in certain “limited circumstances” such a “fiduciary relationship may be created between a bank and a customer.” *Burwell v S.C. Nat’l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). The exact requirements or attributes attendant to such a circumstance has not subsequently been explored by this Court. Just because those circumstances have not yet been confirmed in an appellate opinion does not preclude a proper finding of such a relationship, as was made in this matter at the trial court level. The opinion by the Court of Appeals below indicates to the contrary, which is inconsistent with *Burwell*, and thus represents an additional ground upon which this Court may grant certiorari. See Rule 242(b)(3), SCACR (“Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.”)

3. Petitioner had limited business experience, and was entitled to relief regardless of her personal wealth or lack thereof.

Respondent again attempts to portray Petitioner as some sort of real estate tycoon,⁴ despite clear findings to the contrary as part of the trial court’s order deciding the relevant context in which to view Petitioner. The trial court should know best, given that before making findings of fact regarding liability of the defendant in his order, he noted:

During the course of this trial, I very carefully observed the demeanor and manner in which each witness testified. I noticed such things as their tone of voice, gestures, hesitation or readiness to answer questions, their sincerity, and other mannerisms, all of which assisted in my evaluation of their credibility. After a thorough review of the legal briefs and applicable law, the pleadings and considering the evidence presented, including three days of trial testimony, approximately 200 exhibits, and

⁴ At one point, Gibson saved money as best she could by at one point living in the office at the apartments that only had a half bath, surviving off canned tuna, peanut butter, and protein bars because she had given a tenant her refrigerator. (App. p. 227, line 16 – p. 228 line 9)

deposition testimony of several witnesses, and carefully listening to arguments from all Counsel...

(App. p. 7).

Part of that testimony established that Gibson worked to raise her two daughters and care for her mother after she developed breast and lung cancer, beginning in 1980 until 2008. (App. p. 188, line 18 - p. 189, line 1). In her words, she had relied upon her husband to handle all the “business and financial aspects of things” until his death after 27 years of marriage around Christmas 2003, only becoming passingly familiar with the term “1031” and that it was “some sort of tax devi[c]e” that could be used after the sale of property. (App. p. 187, lines 9-23; App. p. 189, lines 14-24; App. p. 191, line 20 – p. 192, line 5). She did not know the meaning of terms such as “cash-out” or “refinance” and relied on others to know about such matters. (App. p. 321, lines 8-12). The assets she controlled were primarily in real estate, and inherited from her father and later her husband. (App. pp. 205-207, 874, 886, 900, 1042). Following her inheritance of these assets, she was still primarily focused on her family, not her assets. (App. p. 190, lines 9-14).

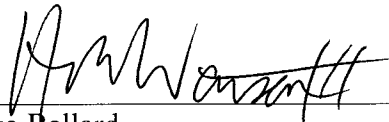
Given that information, plus exposure to the full depth and breadth of context, it was determined by the trial court that Petitioner could be appropriately assessed in summary fashion as “a 63 year old widow with a high school education and limited business experience who inherited several properties from her parents and late husband.” (App. p. 8). In other words, someone fully worthy of legal protections upended by the Court of Appeals, necessitating this petition for certiorari.

CONCLUSION

Gibson respectfully requests the issuance of a writ of certiorari to review the decision of the Court of Appeals. The existing opinion of the Court of Appeals is inconsistent with the prior

precedent of this Court as to the scope of review and the Court of Appeals' application of the scope of review to the detailed factual findings by the trial judge. Additionally, those facts present novel issues of law that justify discussion and clarification by this Court, both with respect to the treatment of fiduciary duties of lenders, as well as the duty to preserve and raise all issues to the Court of Appeals.

Respectfully submitted by



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October 30, 2017

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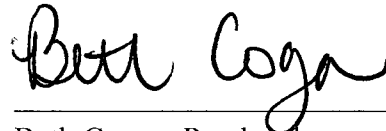
PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on October 30, 2017, I served a copy of the **Reply to Return to Petition for Writ of Certiorari** in the above-captioned case on the following individual by electronic mail and by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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A handwritten signature in black ink that reads "Beth Cogan". The signature is written in a cursive style with a horizontal line underneath it.

Beth Cogan, Paralegal

October 30, 2017