

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case No. 2017-002472

RECEIVED

SEP 17 2018

SC Court of Appeals

Community First Bank,..... Appellant,

v.

John M. Powell, Frederick D. Shepherd, Jr., James E. McCoy,
MPS Golf Course, Inc., and MPS Development, Inc.,
Of whom, Frederick D. Shepherd, Jr., is.....Respondent.

MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION TO RECONSIDER

INTRODUCTION/ FACTS

This appeal comes before the South Carolina Court of Appeals on the Honorable R. Lawton McIntosh's Order sanctioning the Appellant, Community First Bank (Bank), for its discovery abuse. The Sanctions Order details the parties' discovery dispute, involving the Bank's refusal to produce certain documents or even acknowledge their existence (privilege log). (R. at 12-28.) Only after Respondent Frederick D. Shepherd, Jr.'s persistence were the documents discovered and produced. (R. at 21-27.) The Honorable R. Lawton McIntosh found that these documents were relevant to the lawsuit and discoverable. (R. at 20, 34.)

In an attempt to avoid sanctions, the Bank argued the withheld and hidden documents were privileged and protected by FDIC regulations, despite the fact that most were internal Bank

records. (R. at 33-35.) The trial court's Order found that the privileges for Confidential Supervisory Information (CIS) and Suspicious Activity Reporting (SAR) and FDIC Regulations did not justify the Bank's actions. *Id.* As such, he sanctioned the Bank for discovery abuse.

After the ruling, the Bank filed a Motion to Seal the Sanctions Order in the trial court, which is almost identical to the current Motion before this Honorable Court. (*compare Attachment 1 with* Sept. 11 2018 Motion.) The Bank subsequently withdrew that motion before the trial court had an opportunity to rule. *Id.*

Even though that motion was withdrawn at trial, on appeal, the Bank again filed a *Motion to Seal* on June 13, 2018. The Bank did not withdraw that motion, and this Court denied relief on July 26, 2018.

Presently, the Bank seeks a "another bite at the apple," filing a *Motion to Reconsider*¹ this Court's decision denying the Bank's *Motion to Seal* the Record on Appeal. This Court should respectfully deny the Bank's *Motion to Reconsider*, and be wary of attempts to further argue the merits of the appeal.

ARGUMENT

The South Carolina Court of Appeals has the inherent power to controls is records, including placing records under seal. *See Ex Parte Capital U-Drive It, Inc.* 369 S.C. 1, 12, 630 S.E.2d 464, 470 (2006). Sealing records is largely governed by RULE 41.1(b) of the SOUTH CAROLINA RULES OF CIVIL PROCEDURE, which expressly states that "South Carolina has a long history of maintaining open court proceedings and records..."

Furthermore, RULE 41.1(b) informs a party seeking to seal records of certain factors it must address. A party seeking to seal records has the burden of illustrating how these factors

¹ Although styled as a "Renewed Motion", the respondent makes it clear this is a *Motion to Reconsider* in Footnote 1 of its Memorandum in Support at page 4.

weigh in favor of hiding documents from public view. *See* RULE 41.1(b).

Unfortunately, the trial court never had occasion to rule on these factors, as the Bank withdrew an almost identical motion in the lower court, seeking the same relief it now asks this Court to grant. (**Attachment 1**). The Sanctions Order explains why neither the trial court *Motion to Seal* nor this *Motion to Reconsider* have merit. (R. at 33-35) (finding the Bank's assertion of privileges unsupported by record and federal regulations not followed). Further, the factors weigh in favor of keeping the *Record on Appeal* public, as records of sanctionable conduct can be a deterrence to future litigants.

Importantly, since the Bank withdrew efforts to seal documents in the trial court, one may question the Bank's present motives? The Bank's memorandum may illustrate the answer. While loosely addressing the factors of RULE 41.1(b), the Bank asserts, among others, the following arguments:

"Under Federal law and regulations, Community First provided each and every one of the Documents containing CSI to Shepherd as soon as it possibly could..." (Bank Memo in Supp. Of Motion to Seal, Sept. 11, 2018, at pg. 4.)

"Pursuant to federal law and regulations and in full compliance with the orders of the trial court, Community First could not (and lawfully did not) provide the Documents to anyone without first receiving express authorization from the FDIC to do so." *Id.* at 5-6.

These arguments clearly do not relate to the need to seal documents and are obviously related to the Banks defense of the sanctions Order. In essence, the Bank seeks to seal documents as part of its defense to its discovery abuse and have this Court issue a blanket endorsement of its conduct. In the Sanctions Order that is the subject of this appeal, however, the Judge previously found these arguments meritless and unsupported by the record. (R. 33-35.)

CONCLUSION

In sum, this Court should respectfully deny the Appellant Bank's *Motion to Reconsider*.

South Carolina has a strong policy in favor of public court records and the balance of interests in this case weigh in favor of keeping documents public.

Furthermore, this Court should respectfully reject any attempt by the Bank to use this Motion as a defense to its sanctioned discovery conduct. The issues in the appeal have been fully briefed by the parties, and the Court should lend no credence to arguments outside of the appellate briefing.

Respectfully submitted:

By:  _____

Austin F Watts, SC Bar#78848

Douglas F. Patrick, PA

211 Pettigru St

Greenville, South Carolina 29601

864.242.9000

Attorney for Respondent

September 14, 2018
Greenville, SC

EXHIBIT

1

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE)	
)	2015-CP-37-0635
Community First Bank, Inc.)	
)	
Plaintiff,)	MOTION TO SEAL ORDER ON
)	SHEPHERD’S MOTION FOR
)	SANCTIONS
)	
v.)	
)	
John M. Powell, Frederick D. Shepherd, Jr.,)	
James E. McCoy, MPS Golf Course, Inc., and)	
MPS Development, Inc.)	
)	
Defendants.)	

Plaintiff Community First Bank, Inc. (“Community First” or “Bank”) moves the Court, pursuant to Rule 41.1 of the South Carolina Rules of Civil Procedure, for the Court to place its November 13, 2017 Order on Frederick D. Shepherd’s Motion for Sanctions (“Order”) under seal and prohibit the parties from disseminating the Order or the contents thereof to the public or any other party not expressly authorized to review the same by the Court or the Federal Deposit Insurance Corporation (“FDIC”). This motion is based upon the following grounds:

1. Defendant Frederick D. Shepherd, Jr. (“Shepherd”) requested documents from Community First that contained confidential supervisory and other information that belongs to the FDIC and with regard to which disclosure by the Bank to third-parties, such as Shepherd, is prohibited without the express authorization of the FDIC (“CSI”).

2. After its receipt of Shepherd’s document requests, the Bank requested the permission of the FDIC to provide the CSI to Shepherd.

3. On or about August 24, 2016, the FDIC authorized Community First to disclose certain of the CSI to Shepherd. The FDIC expressly provided, however, that this authorization

was subject to the Confidentiality Order the Court previously entered in the lawsuit. Further, the FDIC required that the documents containing CSI be marked “confidential” and that any disclosure of the CSI be strictly limited to only the parties mentioned in the Confidentiality Order. Moreover, the FDIC expressly stated that any further disclosure of CSI was not authorized without the prior approval of the FDIC and warned that unauthorized revelation of certain CSI may violate federal law, such as 31 U.S.C. §§ 5318(g), 5321, and 5322.

4. Also on or about August 24, 2016, the FDIC sent a private letter to the Court regarding documents Shepherd requested from Community First that contain CSI. The substance of the letter was provided to the Court on a confidential basis – it was not shared with the parties. However, upon information and belief, through the letter the FDIC informed the Court on the FDIC’s position on the topic and expressed concerns regarding the handling of CSI.

5. On September 15, 2016, the Court sent an email to all of the parties, acknowledging its receipt of the FDIC’s letter to it.

6. Subsequently, Community First provided documents containing CSI to Shepherd, in strict accordance with the authorization provided to the Bank by the FDIC.

7. On November 10, 2017, having reviewed a draft proposed order on Shepherd’s Motion for Sanctions, by letter Community First requested to the Court that any forthcoming order by the Court on Shepherd’s Motion for Sanctions be filed under seal.

8. On November 13, 2017, the Court published the Order, which both contains CSI and is available to the public. CSI contained in the Order includes, but is not limited to, the contents and substance of a 2012 FDIC report on and to the Bank. (*See* Order at 8.)

9. Pursuant to the authorization of the FDIC and federal law, however, the CSI should not be made available to the public or any non-parties to the lawsuit.

WHEREFORE Plaintiff pray the Court for an Order (1) placing its November 13, 2017 Order on Frederick D. Shepherd's Motion for Sanctions under seal and (2) prohibiting the parties from disseminating the Order or the contents thereof to the public or any other party not expressly authorized to review the same by the Court or the Federal Deposit Insurance Corporation.

This the 17th day of November, 2017.

s/W. Andrew Arnold
W. Andrew Arnold (S.C. Bar # 5947)
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Attorneys for Plaintiff and Third-Party Defendant

Austin Watts

From: McIntosh, Lawton Law Clerk (Clair Hollingsworth) <lmcintoshlc@sccourts.org>
Sent: Tuesday, December 12, 2017 8:59 AM
To: Justin N. Outling; Andy Arnold; Austin Watts; James C. Adams, II; Paul Landis; Beth McMillan; McIntosh, Lawton Secretary (Tammy Jennings); Doug Patrick; Lee Plumblee; Sherri Garrett; Amanda Watkins
Subject: RE: Community First Bank v. John Powell, et al; 2015-CP-37-0635

Thank you for getting back to us. The hearing tomorrow morning is cancelled.

Best,

Clair M. Hollingsworth
Law Clerk to the Honorable R. Lawton McIntosh
Tenth Judicial Circuit
P.O. Box 8002
Anderson, SC 29622
(864) 260-4009

From: Justin N. Outling [mailto:JOUTLING@brookspierce.com]
Sent: Monday, December 11, 2017 4:29 PM
To: McIntosh, Lawton Law Clerk (Clair Hollingsworth) <lmcintoshlc@sccourts.org>; Andy Arnold <aarnold@hortonlawfirm.net>; Austin Watts <awatts@covpatlaw.com>; James C. Adams, II <JADAMS@brookspierce.com>; Paul Landis <paul@fayssouxlaw.com>; Beth McMillan <beth.mcmillan@mgclaw.com>; McIntosh, Lawton Secretary (Tammy Jennings) <lmcintoshsc@sccourts.org>; Doug Patrick <dpatrick@covpatlaw.com>; Lee Plumblee <lplumblee@eppesandplumblee.com>; Sherri Garrett <sgarrett@covpatlaw.com>; Amanda Watkins <awatkins@oconeesc.com>
Subject: RE: Community First Bank v. John Powell, et al; 2015-CP-37-0635

Ms. Hollingsworth:

I hope that you had a nice weekend.

Community First Bank wishes to withdraw its pending Motion to Seal, obviating the need for a hearing on Wednesday, December 13th in Oconee. Shepherd consents to the withdrawal and cancellation of the hearing.

In this connection, will you please advise the Court of the withdrawal? Confirm the cancellation of Wednesday's hearing?

Thank you,

Justin Outling

Justin N. Outling



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From: McIntosh, Lawton Law Clerk (Clair Hollingsworth) [<mailto:lmcintoshlc@sccourts.org>]

Sent: Thursday, November 30, 2017 2:46 PM

To: Andy Arnold <aarnold@hortonlawfirm.net>; Austin Watts <awatts@covpatlaw.com>; James C. Adams, II <JADAMS@brookspierce.com>; Justin N. Outling <JOUTLING@brookspierce.com>; Paul Landis <paul@fayssouxlaw.com>; Beth McMillan <beth.mcmillan@mgclaw.com>; McIntosh, Lawton Secretary (Tammy Jennings) <lmcintoshsc@sccourts.org>; Doug Patrick <dpatrick@covpatlaw.com>; Lee Plumblee <lplumblee@eppesandplumblee.com>; Sherri Garrett <sgarrett@covpatlaw.com>; Amanda Watkins <awatkins@oconeesc.com>

Subject: RE: Community First Bank v. John Powell, et al; 2015-CP-37-0635

I believe that that is fine. We'll see those available Wednesday, December 13th in Oconee.

Please bring copies of all motions and case law you plan to argue for the court to review.

Thank you,

Clair M. Hollingsworth
Law Clerk to the Honorable R. Lawton McIntosh
Tenth Judicial Circuit
P.O. Box 8002
Anderson, SC 29622
(864) 260-4009

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MPS Golf Course, Inc., and MPS Development, Inc.,
Of whom, Frederick D. Shepherd, Jr., is.....Respondent.

PROOF OF SERVICE

This is to certify that the undersigned attorney for the Respondent Frederick D. Shepherd, Jr., did cause his *memorandum in Opposition to Motion to Reconsider* to be served upon the attorneys for the Appellant, by emailing a copy, on the 14th day of September, 2018, which will serve all attorneys of record, including the below:

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Moore Taylor Law Firm, P.A.
1700 Sunset Blvd.
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By: /s/ Sherri Garrett
Douglas F. Patrick, P.A.
Sherri Garrett

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September 14, 2018

Certified Mail
Return Receipt Requested

Attn: Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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RE: Community First Bank v. John Powell, et al.
Appellate Case 2017-2472

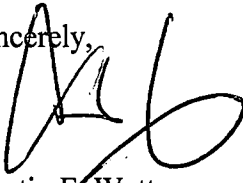
Dear Sir or Madam:

Please find enclosed the original and seven copies of the Respondent's *Memorandum in Opposition to Appellant's Motion to Reconsider* and *Proof of Service* for filing in the above-referenced matter. Please return the stamped copies to us. A self-addressed envelope is provided for your convenience.

By copy of this letter, I am serving the Appellant's counsel.

If the Clerk of Court's office needs anything, please also feel free to contact me.

Sincerely,



Austin F. Watts
Attorney for Respondent, Fredrick D. Shepherd, Jr.

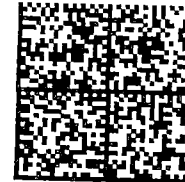
AWF/skg
Enclosures

cc: Douglas Patrick, Esq. (*Via E-mail*)
W. Andrew Arnold, Esq. (*Via E-mail*)
James C. Adams, II, Esq. (*Via E-mail*)
Justin N. Outling, Esq. (*Via E-mail*)
Elizabeth McMillan, Esq. (*Via E-mail*)

CERTIFIED MAIL



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Priority Mail

Mailed From 29601

09/14/2018

032A 0061802672

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