

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2017-002472

RECEIVED
SEP 26 2018
SC Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-37-635

Community First Bank, Inc.,.....Appellant,

v.

Frederick D. Shepherd, Jr., Respondent.

**REPLY MEMORANDUM IN SUPPORT OF APPELLANT'S RENEWED
MOTION TO SEAL**

INTRODUCTION

In support of his opposition to Community First's Renewed Motion to Seal ("Motion to Seal" or "Motion"), Shepherd argues that the Motion should be denied because: (1) Community First previously filed a separate motion to seal with the trial court, but withdrew the motion before the trial court ruled upon it; and (2) certain of the laws cited by Community First in connection with both of the matters now before *this* Court (Community First's Renewed Motion to Seal and its appeal of the trial court's Sanctions Order) are the same. These arguments, however, have no merit. Community First's Motion should be granted.

ARGUMENT

I. Shepherd's Arguments are Without a Factual Basis and Wholly Irrelevant.

Shepherd's argument that Community First's instant Motion to Seal should be denied because the Bank filed a motion to seal with the trial court "which is almost identical to the current motion before this Honorable Court" has no factual basis.

The subjects of Community First's motions (the motion to seal to the trial court, on the one hand, and the instant Motion before this Court, on the other hand) are *completely different*. Community First moved for the trial court to place the trial court's *Sanctions Order* under seal. (Trial Ct. Motion to Seal Sanctions Order, Ex. A (moving the trial court to issue 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.")). The Sanctions Order only referred to various protected documents; it did not include them as attachments to the Order. Upon consultation with the FDIC and further review of the Order, Community First withdrew the motion. By sharp contrast, through the instant Motion to Seal before *this* Court, Community First asks this Court to place *certain Documents* that belong to the FDIC and contain confidential supervisory information ("CSI") under seal pursuant to federal laws and regulations, as well as the express instructions of the FDIC. (Renewed Mot. to Seal, Ex. B (asking this "Court for an Order (1) placing the *certain portions of the ROA* under seal and (2) prohibiting the parties from disseminating those portions of the ROA to the public or any other party not expressly authorized to review the same by the Court or the Federal Deposit Insurance Corporation."))

(Emphasis added)). Community First has not and does not ask this Court to place the trial court's Sanctions Order under seal. Accordingly, Shepherd's argument is not based in fact. The motion to seal which Community First filed (and withdrew) with the trial court has no relevance to the instant Motion. Shepherd's argument should be rejected.

II. Community First's Renewed Motion is Completely Proper.

The Court should also reject Shepherd's argument that because certain of the laws cited by Community First in connection with the matters now before this Court (Community First's Renewed Motion to Seal and its appeal of the trial court's Sanctions Order) are the same that Community First's Renewed Motion before this Court should be denied.

Examination reports and other documents prepared in connection with the examination process of a federally insured bank constitute CSI, 12 C.F.R. § 261.2(b), and, as such, are the property of the Federal Reserve and FDIC. *Id.* § 261.11(g). Supervised financial institutions, such as Community First, cannot disclose CSI, even in response to legal process or in connection with legal proceedings, without the express permission of the General Counsel of the Federal Reserve or the FDIC. *See id.* § 261.14.

On or about August 24, 2016, and then again on December 14, 2016, the FDIC authorized Community First to disclose certain of its Documents to Shepherd. The FDIC expressly provided, however, that this authorization was subject to the Confidentiality Order the trial court previously entered in the lawsuit. Moreover, 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. Additionally, 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.

Accordingly, the laws, regulations and FDIC instructions impose upon Community First the obligation to now ask this Court to seal the FDIC Documents containing CSI. The actions by Community First, including the filing of the instant Motion and stating of the clear legal bases on which the Motion should be granted) are proper in every regard. Shepherd's argument should be rejected.

CONCLUSION

For the foregoing reasons, the Documents, which contain CSI, should be sealed. Community First's Renewed Motion to Seal should be granted.

Respectfully Submitted,



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West Columbia, South Carolina
September 24, 2018

THE STATE OF SOUTH CAROLINA
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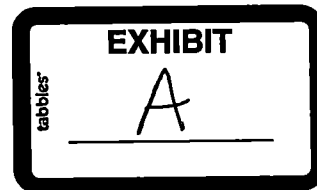
SEP 17 2018

RENEWED MOTION TO SEAL RECORD ON APPEAL

SC Court of Appeals

Appellant Community First Bank, Inc. ("Community First" or "Bank") moves the Court for the Court to place certain portions of the Record on Appeal ("ROA") under seal and prohibit the parties from disseminating those portions of the ROA 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 trial court in this matter regarding documents Shepherd requested from Community First that contain CSI. The substance of the letter was provided to the trial court on a confidential basis – it was not shared with the parties. However, upon information and belief, through the letter the FDIC informed the trial 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, on December 6, 2016, the FDIC authorized Community First to disclose certain other of the CSI to Shepherd. Like with the August authorization, the FDIC expressly provided that this authorization was subject to the Confidentiality Order the Court previously entered in the lawsuit, required that the documents containing CSI be marked “confidential,” required that any disclosure of the CSI be strictly limited to only the parties mentioned in the Confidentiality Order, and stated that any further disclosure of

CSI was not authorized without the prior approval of the FDIC, with unauthorized revelation of certain CSI potentially violating federal law.

7. Community First provided documents containing CSI to Shepherd, in strict accordance with the authorizations provided to the Bank by the FDIC. Certain of the documents and information therein, including, but not limited to, the contents and substance of a 2012 FDIC Report on the Bank, is contained throughout in the ROA.

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

9. On or about June 13, 2018, Appellant filed a Motion to Seal the ROA. An unredacted, non-public version of the ROA was attached as Exhibit A to the motion.

10. On July 26, 2018, this Court denied Appellant's Motion to Seal "at this time" because Appellant "failed to address the factors enumerated in Rule 41.1, SCRCPC, and *Ex parte Capital*."

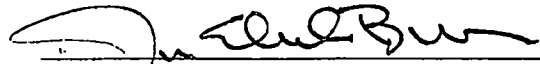
11. Appellant's Renewed Motion to Seal (and the memorandum in support thereof filed contemporaneously herewith and incorporated herein by reference) respectfully asks the Court to (1) reconsider its decision under Rule 41.1, SCRCPC, and *Ex parte Capital* and (2) place the portions of the ROA that contain CSI under seal.

12. A public version of the ROA, redacting only the portions of the ROA Appellant respectfully asks the Court to maintain under seal, is attached hereto as Exhibit A.

WHEREFORE, Plaintiff prays the Court for an Order (1) placing the certain portions of the ROA under seal and (2) prohibiting the parties from disseminating those

portions of the ROA 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 11th day of September, 2018.



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Attorneys for Appellant

EXHIBIT

A

**(Submitted with computer disk
containing redacted
Record on Appeal)**

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REDACTED RECORD ON APPEAL

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**REDACTED Attachment O (ROA000427-28)- 10/21/99 Redacted
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**REDACTED Exhibit R (ROA000741-56)- 05/25/12 Redacted
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OTHER MATERIAL AND DOCUMENTS

Affidavit of Dr. Larry S. Bowman with Exs. A-C dated 10/30/2017 (*filed 11/01/2017 in Support of Opposition to Defendant Shepherd's Motion for Summary Judgment*) 1697

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REDACTED Exhibit C (ROA001711-12)- 04/19/12 Redacted CFB Board of Directors Minutes

Affidavit of William M. Brown with Exs. A-C dated 10/30/2017 (*filed 11/01/2017 in Support of Opposition to Defendant Shepherd's Motion for Summary Judgment*) 1713

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Affidavit of John R. Hamrick with Exs. A-C dated 10/30/2017 (*filed 11/01/2017 in Support of Opposition to Defendant Shepherd's Motion for Summary Judgment*) 1739

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REDACTED Exhibit C (ROA001752-53)- 04/19/12 Redacted CFB Board of Directors Minutes

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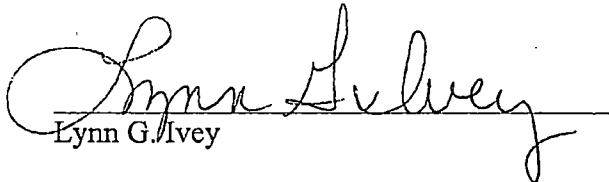
v.

Frederick D. Shepherd, Jr., Respondent.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, P.A., certify that I have served the Renewed Motion to Seal Record on Appeal on Respondent Frederick D. Shepherd, Jr., by depositing a copy of same in the United States Mail, postage prepaid, addressed to his attorneys of record as follows:

Douglas F. Patrick, Esq.
Austin F. Watts, Esq.
Covington Patrick Hagins Stern & Lewis
P.O. Box 2343
Greenville, SC 29602


Lynn G. Ivey

West Columbia, South Carolina

September 11, 2018

September 11, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: Community First Bank, Inc., v. Frederick D. Shepherd, Jr.
C/A No. 2017-002472

S. Jahue Moore†
J. Mark Taylor*
C. Vance Stricklin, Jr.
James Edward Bradley†
Sheila McNair Robinson
Christian G. Spradley
C. David Sawyer, Jr.
William H. Edwards
Stanley L. Myers
Jane H. Downey*
S. Jahue Moore, Jr.
John C. Bradley, Jr.
Melissa K. Moore
William B. Fortino
Ralph Nichols Riley, Jr.
Amber Cary Fulmer
Justin Thomas Williams

Robert D. Hazel
RETIRED
Billy C. Coleman
RETIRED

Dear Ms. Kitchings:

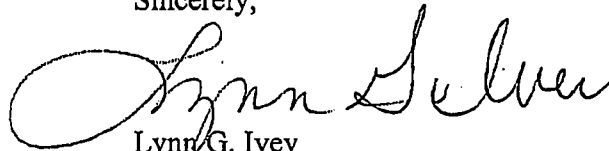
Enclosed for filing with your office are the original and seven copies of Appellant Community First Bank, Inc.'s Renewed Motion to Seal Record on Appeal and Proof of Service in this matter. As discussed with Shelby of your office, a redacted copy of the Record on Appeal at issue is an included exhibit to this motion. Due to the size of the Record, this is being provided by way of a computer disk. Should the Court wish a paper copy instead, we will be pleased to provide this. Our check for \$25.00 is also enclosed to cover the filing fee.

In addition, the original and seven copies of the Memorandum in Support of Appellant's Renewed Motion to Seal is included. Please have the extra copies clocked in and returned to us. A self-addressed stamped envelope is provided for your convenience.

By copy of this letter, I am serving Respondent's counsel with the Renewed Motion, computer disk and Memorandum.

Thank you for your assistance with these filings.

Sincerely,



Lynn G. Ivey
Assistant to James Edward Bradley

Enclosures

cc: Douglas F. Patrick, Esq.
Austin F. Watts, Esq.
W. Andrew Arnold, Esq. (via email w/o disk)
James C. Adams, II, Esq. (via email w/o disk)
Elizabeth McMillan, Esq. (via email w/o disk)

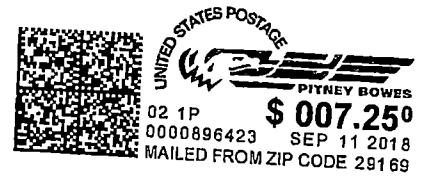
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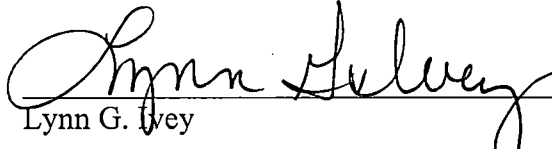
Frederick D. Shepherd, Jr., Respondent.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, P.A., certify that I have served the Reply Memorandum in Support of Appellant's Renewed Motion to Seal on Respondent Frederick D. Shepherd, Jr., by depositing a copy of same in the United States Mail, postage prepaid, addressed to his attorneys of record as follows:

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Lynn G. Ivey

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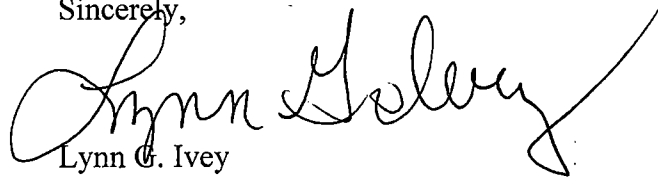
Dear Ms. Kitchings:

Enclosed for filing with your office are the original and seven copies of Appellant Community First Bank, Inc.'s Reply Memorandum in Support of Appellant's Renewed Motion to Seal and Proof of Service in this matter. Please return the clocked copies via the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving Respondent's counsel with the Reply Memorandum as well.

Thank you for your assistance with these filings.

Sincerely,



Lynn G. Ivey
Assistant to James Edward Bradley

Enclosures

cc: Douglas F. Patrick, Esq.
Austin F. Watts, Esq.
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