THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young,

Case No. 2006-CP-07-1655

First Citizens Bank and Trust Company, Inc.
f/k/a Community Resource Bank, N.A., Sumter Region, ...Respondent,

v.

Lance E. Jones, ...Appellant.

FINAL BRIEF OF RESPONDENT

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FACTS

This action arises from a loan in the principal amount of $65,000.00 that Community Resource Bank, N.A. made to Appellant Lance E. Jones ("Jones") in 2006. To secure the loan, Jones executed a mortgage (the "Mortgage") on certain land he owned in Sumter County, South Carolina (the "Mortgaged Property"). Community Resource Bank, N.A. later merged into Respondent First Citizens Bank and Trust Company, Inc. ("First Citizens"). (Affidavit of Mark A. Mossell, R. p 166, ¶¶1-3.)

Both Jones and First Citizens received a notice from the Sumter County Treasurer dated October 23, 2009, that the Mortgaged Property had been sold to pay the taxes for 2008 and that the taxes had to be paid by December 2, 2009, in order to redeem the property. First Citizens decided to pay the taxes and requested that a check in the amount of $5,461.61 be issued by the accounting department of First Citizens and mailed to the Sumter County Treasurer.

The deposition testimony of Joyce McKulka, an employee of First Citizens, establishes that the accounting department of First Citizens in fact issued a check in the amount of $5,461.61 to pay the taxes on the Mortgage Property and mailed the check to the Sumter County Treasurer. Whether the check was never delivered or was delivered but not processed by the Treasurer is not known. (R. pp. 139-65.)

In his second counterclaim, Jones alleged that First Citizens owed him a duty of care and that it negligently failed to pay the delinquent taxes on the Mortgaged Property. (Answer and Counterclaim, R. pp. 28-29.) First Citizens submits that the ruling of the trial court granting summary judgment to First Citizens on this counterclaim should be affirmed for the reasons that follow.

ARGUMENT

I. JONES WAS LEGALLY OBLIGATED TO PAY THE TAXES ON THE MORTGAGED PROPERTY.

As the owner of the Mortgaged Property, Jones was personally liable for the taxes on the property. S.C. Code § 12-37-610 ("Each person is liable to pay taxes and assessments on the real property that, as of December thirty-first of the year preceding the tax year, he owns in fee, for life, or as trustee . . . ."). In addition, Jones was contractually obligated to First Citizens to pay the taxes. Paragraph 7 of the Mortgage that Jones executed states, "Mortgagor [i.e., Jones] will pay all taxes . . . and other charges relating to the Property when due." (Affidavit of Mark A. Mossell, R. p. 167, ¶ 6, and p. 172, ¶ 7.)

II. FIRST CITIZENS HAD THE RIGHT, BUT NOT AN OBLIGATION, TO PAY THE TAXES ON THE MORTGAGED PROPERTY.

Paragraph 13 of the Mortgage that Jones executed provides as follows:

> If Mortgagor fails to perform any of Mortgagor's duties under this Mortgage, . . . Lender may, without notice, perform the duties or cause them to be performed. . . . Lender's right to perform for Mortgagor shall not create an obligation to perform . . . . Any amounts paid by Lender for insuring, preserving or otherwise protecting the Property and Lender's security interest will be due on demand and will bear interest from the date of the payment until paid in full at the interest rate in effect from time to time in accordance with the terms of the [Note].

(Affidavit of Mark A. Mossell, R. p. 167, ¶ 6, and p. 173, ¶ 13.)

In addition, First Citizens had the right, but not an obligation, under South Carolina law to pay delinquent taxes on the Mortgaged Property and to add the amount paid, with interest thereon, to the debt secured by the Mortgage. S.C. Code § 29-3-30

(entitled "Mortgagee may pay taxes"). First Citizens was exercising this right when it issued the check for $5,461.61 to pay the taxes for 2008 on the Mortgaged Property.

III. FIRST CITIZENS DID NOT UNDERTAKE A DUTY OF CARE TO PAY THE DELINQUENT TAXES ON THE MORTGAGED PROPERTY.

Jones argues that First Citizens "owed a duty to Jones to pay the property taxes due on his property and to exercise due care in the performance of this act." (Brief of Appellant p. 8.) South Carolina law does not support his argument.

As the trial court stated, whether First Citizens had a duty of care to Jones was an issue of law for the trial court to determine. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276-77 (2003). The trial court correctly concluded that First Citizens had no duty of care to Jones. That conclusion was fully supported by eight decisions of the South Carolina Supreme Court cited by the trial court.[1]

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[1] Those decisions are *McCullough v. Goodrich & Penning Mtg. Fund, Inc.*, 373 S.C. 43, 644 S.E.2d 43 (2007) (holding that South Carolina does not recognize a secured party's right to bring a claim against a third party for negligent impairment of the secured party's collateral); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 586 S.E.2d 586 (2003) (declining to recognize a general duty of care from an independent insurance adjuster or insurance adjusting company to the insured); *Huggins v. Citibank, N.A.*, 355 S.C. 329, 585 S.E.2d 275 (2003) (holding that a bank does not have a duty to exercise due care in issuing a credit card so as to prevent harm to the credit of an individual whose identity has been stolen and used to apply for a credit card); *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (2003) (holding that a school owes no duty of care to a student in giving advice concerning the courses he should take); *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997) (holding that the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them); *Citizens & S. Nat'l Bank of South Carolina v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994) (holding that a bank did not owe a duty to tell a guarantor that his liability was for the entire loan amount where that information was disclosed by the terms of the written guaranty); *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992) (holding that the South Carolina Public Service Authority had no duty to discover and warn of a latent hazardous condition on land that it leased to another); and *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 239 S.E.2d 726 (1977) (holding that a

To support his argument, Jones relies on the proposition that when an act is voluntarily undertaken, the actor assumes a duty to use due care. In this case, however, the acts of First Citizens on which Jones relies were not truly voluntary. "Voluntary" means, among other things, "gratuitous," which in turn means, among other things, "done unnecessarily." *Black's Law Dictionary* (9th ed. 2009). In this case, First Citizens had a significant financial interest to protect, and the right to protect that interest, by paying the delinquent taxes on the Mortgaged Property. Its decision to pay the taxes was thus not an act done unnecessarily or voluntarily but was instead compelled by the need to protect its financial interest in the Mortgaged Property.

None of the cases on which Jones relies permitted a party to shift onto another party the burden of a duty imposed on the first party by law. In this case, however, Jones seeks to shift onto First Citizens the duty to pay the taxes on his own real property, which was a duty imposed on Jones by both law and contract. The cases he cites do not support such a result. They are also distinguishable from this case on other grounds as will be explained in the discussion that follows.

Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997), states that when an act is voluntarily undertaken, the actor assumes the duty to use due care but held that under the facts of the case, the defendant had undertaken no act that imposed a duty of care upon him. Factually, *Carson* thus provides no support for Jones in this case.

Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997) (3-to-2 decision, two justices dissenting), involved claims for personal injury and wrongful death arising from the failure of a dam. No such claims are involved in this case. The Supreme Court

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lender who made a loan to finance the construction of a residence had no duty to supervise the contractor's work).

held that whether the evidence established that a defendant had volunteered to monitor the level of the lake behind the dam for the benefit of third parties or was simply facilitating its own arrangement with the city that owned the lake and the dam was an issue that should be resolved by a jury. *Id.* at 315, 494 S.E.2d at 815. No similar issue exists in this case.

Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997), involved a claim against a father who assisted his son in preparing construction plans for a house pursuant to an oral contract that the son had with the plaintiffs. After the house was constructed, the plaintiffs experienced many problems with it, and a consulting engineer determined that the weight of the house far exceeded the capacity of the foundation as designed and constructed. The trial court granted summary judgment to the father, holding that he owed no duty to the plaintiffs, but the Court of Appeals reversed, holding that a jury issue existed as to whether the father owed a duty to the plaintiffs.

Hurst is readily distinguishable from this case because it arose from assistance voluntarily provided to another in performing contractual duties that the other owed to the plaintiffs. In this case, the trial court ruled that First Citizens was not contractually obligated to Jones to pay the delinquent taxes on the Mortgaged Property (Order dated December 28, 2011, pp. 8-10), and Jones has not appealed from that ruling. The facts of this case are thus distinctly different from the facts of *Hurst*.

Cullum Mech. Constr., Inc. v. S.C. Baptist Hosp., 344 S.C. 426, 544 S.E.2d 838 (2001), involved a claim by a subcontractor on a construction project against the architect for the project. The subcontractor had not been paid by the general contractor and asserted that the architect failed to exercise reasonable care in administering contractual

provisions that were designed to ensure that the general contractor paid the subcontractors.

This case is distinctly different from *Cullum*. In *Cullum*, the architect failed to perform its contractual duties properly, and as a result, the subcontractor was not paid. In this case, as previously stated, First Citizens did not breach any contractual obligation, and unlike the architect in *Cullum*, First Citizens did not fail to administer properly the disbursement of funds to which Jones was entitled. *Cullum* thus has no application to this case.

Winburn v. Ins. Co. of No. America, 287 S.C. 435, 339 S.E.2d 142 (1985), involved a claim of negligence asserted by the owner of a boat against the insurer of the boat and an independent marine surveyor and adjuster engaged by the insurer. The owner of the boat alleged that the insurer and the adjuster had induced him to endorse a check issued by the insurer to pay for repairs to the boat by assuring him that they would see to it that the mechanic the adjuster had recommended would complete repairs to the boat. The mechanic never completed the repairs to the boat, and the Court of Appeals held that a jury question existed concerning whether the insurer and the adjuster had negligently failed to perform the duty they agreed to undertake, which was to make certain that the mechanic repaired the boat if the owner endorsed the insurer's check. *Id.* at 445, 339 S.E.2d at 148.

Winburn bears no similarity to this case. In *Winburn*, the plaintiff alleged that the defendants, the insurer and the adjuster, had assured him that they would do certain things to protect his interests if he would do something that they wanted him to do. In this case, Jones does not allege that First Citizens offered him any similar *quid pro quo* or

that he did anything at the request of First Citizens. Jones clearly did not refrain from paying the delinquent taxes himself in reliance on anything that Mark Mossell, the officer of First Citizens, told him because, as Jones admits, Jones did not himself have the funds to pay the taxes.

Caldwell v. Jim Walter Homes, Inc., 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987), involved a failure to pay taxes on real property, but the case is otherwise very different from this case. The plaintiffs, the Caldwells, entered into an installment sale contract to purchase a lot and a house from the defendant, Jim Walter Homes ("JWH"). JWH held title to the lot and had agreed to convey the lot to the Caldwells after they had made monthly payments for 12 years. The contract required the Caldwells to pay the property taxes on the lot, but the tax notices went to JWH as the owner, and JWH paid the taxes for the first seven years. In the eighth year, JWH decided not to pay the taxes because the Caldwells were delinquent in their monthly payments. JWH did not inform the Caldwells of this decision and also did not inform them of a series of delinquent tax notices that the tax collector sent to JWH. As a result, the property was sold for taxes, and the Caldwells lost their equity in the property. The Court of Appeals held that by course of dealing, JWH undertook a duty to inform the Caldwells that their property was in danger of being sold for taxes. Significantly, the Court of Appeals did *not* hold that JWH owed to duty to the Caldwells to pay the taxes for 2008 even though JWH was legally liable for those taxes.

This case and *Jim Walter Homes* are polar opposites. In this case, Jones, the party alleging negligence, held title to the property, bore the legal obligation to pay the taxes, received the tax notices, and knew that the taxes were delinquent. In *Jim Walter Homes*,

the roles of the parties were reversed. JWH, the party accused of negligence, held title to the property, received the tax notices, paid the taxes for seven consecutive years, and knew that the taxes were delinquent. In this case, both Jones and First Citizens knew that the taxes were delinquent. In *Jim Walter Homes*, only JWH knew that the taxes were delinquent, and it failed to disclose that information to the Caldwells, who were the parties most at risk. *Jim Walter Homes* thus has no application to this case.

Murray v. Bank of America, N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003), did not involve a failure to pay taxes on real property and is not otherwise similar to this case. The plaintiff, Murray, sued Bank of America for negligence because the Bank delayed closing a checking account in Murray's name after she informed the Bank that the account had been opened by an imposter. The Bank also failed to inform merchants to whom checks had been issued by the imposter that the account was fraudulent. As a result, Murray was arrested on bad-check charges and spent twelve hours in jail. At trial, an officer of the Bank admitted that the Bank had failed to follow its own procedures after Murray notified the Bank that the account was fraudulent. On these facts, the Court of Appeals held that there was sufficient evidence from which the jury could conclude that the Bank had breached a duty of care that arose when Murray went to the Bank to request that the account be closed.

Murray is clearly distinguishable from this case. In *Murray*, the Bank admittedly failed to follow its own procedures, and that failure had predictable adverse consequences for Murray. In this case, First Citizens had no duty to pay the taxes, and it followed its normal procedures in issuing a check and mailing it to the Sumter County Treasurer. *Murray* thus does not apply to this case.

IV. JONES HAS OFFERED NO EVIDENCE THAT FIRST CITIZENS WAS NEGLIGENT.

Even if First Citizens owed a duty of care to Jones, which First Citizens denies, that duty would be moot because Jones has failed to present any evidence that First Citizens was in fact negligent. As previously discussed, the deposition testimony of Joyce McKulka establishes that First Citizens followed its normal procedure in issuing and mailing a check to pay the delinquent taxes that Jones owed. (R. pp. 139-65.) Ms. McKulka' testimony stands un-impeached and un-rebutted.

Jones complains that First Citizens failed to ask him to deliver the check for the delinquent taxes to the Sumter County Treasurer, but that complaint is clearly just an afterthought. Jones does not claim that he offered to deliver the check, and he should not be allowed to hold First Citizens to a higher standard of conduct than he applies to himself.

Similarly, Jones complains that First Citizens failed to ensure that the check had been delivered to the Sumter County Treasurer, but he fails to point out that he could just as easily have made this determination himself. Again, he should not be allowed, especially after the fact, to hold First Citizens to a higher standard of conduct than he applies to himself.

CONCLUSION

For the foregoing reasons, the order of the trial court granting summary judgment to First Citizens should be affirmed.

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RESPONDENT'S CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

I, the undersigned attorney for Respondent, certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned attorney for Respondent, certify that I served the documents hereinafter specified on Appellant by causing true copies thereof to be mailed by first-class mail, postage prepaid addressed to Robert D. McKissick, Esquire, at Abbott & McKissick Law Firm, LLC, P.O. Box 148, Florence, SC 29505, on September 5, 2012.

Documents Served: 1. Final Brief of Respondent and
2. Respondents Certificate of Compliance with Rule 211(b), SCACR.

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