THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

L. Casey Manning, Presiding Judge

C.A. No: 2012-CP-40-0249

BRANCH BANKING AND TRUST COMPANY..................................Respondent,

v.

GRAPHIC EXPRESS, LLC, LANNY R. GUNTER, II
and HARRY B. BENENHALEY...Appellants.

FINAL BRIEF OF RESPONDENT

Laura Simons Greaver
J. Ronald Jones, Jr.
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492
(843) 577-2026

Attorneys for Respondent

RECEIVED
OCT 21 2013
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES...ii

STATEMENT OF ISSUES ON APPEAL...iii

STATEMENT OF THE CASE...1

STATEMENT OF FACTS...2

ARGUMENT...6

CONCLUSION...16

TABLE OF AUTHORITIES

Cases

Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (S.C. Ct. App. 1997)..................9, 13

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 722 (S.C. 2004).......................7

Forner v. Butler, 319 S.C. 275, 460 S.E.2d 425 (S.C. Ct. App. 1995)..........................12

Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (S.C. 1974)..................................15

Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (S.C. Ct. App. 1986)....................12, 13

Grant v. Mount Vernon Mills, 370 S.C. 138, 634 S.E.2d 15 (S.C. Ct. App. 2006).........15

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (S.C. 2000)......8, 10

Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (S.C. 1910)..7

Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (S.C. 1984)..................................15

Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (S.C. 2009)....................................8

Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (S.C. 1991).................................8

Pittman v. Grand Strand Entm't, Inc., 611 S.E.2d 922, 925 (S.C. 2005)....................15

Roche v. S.C. Alcoholic Beverage Control Com'n, 263 S.C. 451,
211 S.E.2d 243 (S.C. 1975)...7

Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (S.C. Ct. App. 1992).........8, 11

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (S.C. 1998)............................7

Procedural Rules

Rule 56, SCRCP...15

Rule 59(e), SCRCP...1, 6, 8

Rule 60, SCRCP...1, 6

Rule 208, SCACR...14

Rule 209, SCACR...2, 11

STATEMENT OF ISSUES ON APPEAL

I. HAS ANY OF THE ISSUES OR ARGUMENTS RAISED BY APPELLANTS BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW?

II. ARE THERE ANY FACTS IN THE RECORD ON APPEAL UPON WHICH APPELLANTS COULD RELY IN SUPPORT OF THEIR ARGUMENTS?

III. DID THE TRIAL COURT ERR IN GRANTING BB&T'S MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

This appeal arises from an action for collection of a debt. Specifically, Respondent Branch Banking and Trust Company ("BB&T") filed a Verified Complaint against Graphic Express, LLC, Lanny R. Gunter II and Harry B. Benenhaley (collectively "Appellants") on January 13, 2012, setting forth causes of action for Suit on Note against Appellant Graphic Express, LLC and for Suit on Guaranty against Appellants Gunter and Benenhaley. In response, counsel for Appellants submitted an Answer in which they summarily denied every allegation of the Verified Complaint in one sentence: "The material allegations of the Complaint are denied." Appellants neither raised a single affirmative defense nor made any counterclaims against BB&T.

BB&T moved for summary judgment on May 18, 2012 and subsequently filed a Memorandum in Support of its motion. The hearing on the Motion for Summary Judgment was held before the Honorable L. Casey Manning on September 4, 2012. Appellants did not, at any time prior to or during the hearing, submit to counsel for BB&T or to the Court any memorandum, affidavit, document, or any other material in opposition to the motion or to otherwise show the existence of any material issue of fact. On September 10, 2012, Judge Manning issued a Judgment granting BB&T's Motion for Summary Judgment in which he held that no genuine issues of fact existed and that BB&T was entitled to receive from Appellants the total amount of indebtedness of $50,263.06, plus specified interest and costs. Appellants did not file a motion for reconsideration or a motion to alter or amend the judgment pursuant to Rules 59(e) or 60, SCRCP; rather, they appealed the matter directly to this Court on October 9, 2012.

On appeal, Appellants submitted an Initial Brief and proposed Designation of Matter on February 11, 2013. All of the "facts" upon which Appellants relied in their brief purportedly came from the transcript of a deposition, which was taken pursuant to an entirely separate action involving different parties, that was never placed in whole or in part before the trial court. BB&T thus filed a Motion to Dismiss or, Alternatively, Motion to Exclude Matter pursuant to Rule 209 (c) and (h), SCACR.

This Court issued an Order on July 2, 2013 granting BB&T's Motion to Strike the proffered deposition testimony from the Record on Appeal and requiring that Appellants "file an amended initial brief and designation of matter, *which excludes all references to the deposition*." In spite of this Court's Order that Appellants eliminate all references to the transcript, Appellants' "Amended" Initial Brief is a *verbatim* restatement of their original brief, such that they continue to rely exclusively upon "facts" and issues which are not supported by the Record on Appeal and which have, in fact, been excluded by this Court from its consideration. Thus, the entirety of this appeal is based upon information that this Court already held it will not consider.[1]

FACTS

This is a particularly vexatious appeal. A review of the matter proposed by Appellants to be included in the Record on Appeal conclusively shows that they placed no material issue of fact before the trial court. It is for this reason that they continue to rely exclusively upon matter which this Court has ordered it will not consider on appeal. Appellants submitted a one-sentence Answer without raising a single affirmative defense; they did not, when compelled to answer discovery, identify a single fact in dispute or

[1] For these reasons, BB&T incorporates herewith its Motion to Dismiss or, Alternatively, Motion to Exclude Matter in its entirety and hereby renews its Motion to Dismiss the Appeal.

provide or identify a single document upon which the claim was disputed; they failed to engage in any written or oral discovery of their own; they offered no documentation in response to BB&T's Motion for Summary Judgment; and they did not raise to, or obtain a ruling from, the trial court on any single issue now raised on appeal. They continue to base the entirety of their present appeal upon "issues of fact" purportedly found within a deposition transcript that this Court has already ruled was to be stricken and not included for its consideration. In addition to the fact that their continued inclusion of such "facts" is in direct violation of this Court's Order, such factual allegations, raised for the first time on appeal, are patently false.[2]

The underlying case is an action for collection of a debt for which Appellants are liable for payment. Specifically, BB&T provided credit on October 19, 2009 to Graphic Express, LLC pursuant to a promissory note, wherein it promised to repay the loan of $82,000.00, plus interest. (R. p. 8, ¶ 5). Appellants Gunter and Benenhaley personally guaranteed payment to BB&T of the full amount of the loan. (R. p. 9, ¶¶ 10-14). Appellants failed to make monthly payments when due and were thus in default pursuant to the terms of the note. (R. pp. 8-9, ¶¶ 6-14). When Appellants failed to cure the default upon demand, BB&T filed suit on January 13, 2012.

---

[2] Virtually every sentence that appears in the "Statement of Facts" portion of Appellants' Amended Brief is based upon the deposition transcript—previously excluded by this Court—of Lanny Gunter, taken on July 17, 2012 in C.A. No. 2011-CP-40-3246. That action was filed against Mr. Gunter and Bob's Novelties, LLC by BB&T Financial, FSB f/k/a BB&T Bankcard Corporation, an entity not involved in the present suit, for unpaid credit card debt. In that action, which was filed approximately eight months prior to the present suit, Gunter *did* raise affirmative defenses and counterclaims. Specifically, Gunter alleged that equipment and inventory belonging to *Bob's Novelties* had been negligently seized and sold *by that plaintiff*, a banking or lending institution which Gunter admits is not the same entity as the plaintiff in the present suit. If Mr. Gunter believed his defenses and counterclaims raised with respect to this entirely separate loan transaction and entirely separate banking entity to be equally applicable in the present case, it is inexplicable that he did not simply state such facts, defenses or claims in his Answer, in his discovery responses, by way of affidavit, or by any other method whatsoever prior to this appeal. Appellants have no factual or legal basis upon which to dispute the debt in this case, and their efforts to drag in arguments and testimony related to an entirely separate transaction involving entirely separate and distinct entities is a transparent attempt to give the impression of an issue of fact where there simply is not one.

BB&T filed the Verified Complaint against Appellants, setting forth causes of action with respect to both the note and personal guarantees. (R. pp. 8-10). Attached as exhibits were an Affidavit of Account and copies of both the note and the personal guaranty agreements executed by Gunter and Benenhaley. (R. pp. 11-14, 27-34). In response, counsel for Appellants submitted a one-sentence Answer summarily denying every allegation of the Verified Complaint: "The material allegations of the Complaint are denied." (R. p. 36). Appellants neither raised a single affirmative defense nor made any counterclaims against BB&T.

In an attempt to ascertain any unresolved issues and to determine upon what facts, if any, Appellants would rely in their defense, BB&T submitted discovery requests in which it asked for any and all facts, witnesses and/or documents which would support Appellants' position or constitute a defense to the stated claims. (R. pp. 38-46). Following BB&T's filing of a Motion to Compel discovery responses from Appellants, Appellants submitted answers with virtually no responsive information and they failed to identify or to produce a single document to substantiate their general denial. (R. pp. 47-52). Likewise, and in contravention of the good faith requirement set forth in Rule 36 SCRCP, Appellants submitted only a general denial of each of BB&T's eleven Requests for Admissions. (R. p. 53). Appellants even denied BB&T's innocuous request that Appellants admit they received copies of exhibits to the Verified Complaint, and further denied that they executed the personal guarantees, though they now admit all such facts in their Amended Initial Brief. (R. p. 53).

Though the action had been pending against Appellants for six and one-half months, they failed at any time to offer any information or evidence whatsoever to raise

or support any legal defense, failed to request any written discovery, failed to take any depositions, and failed to meaningfully respond to BB&T's discovery requests. Because Appellants presented absolutely no evidence or information to even suggest the existence of any issue of material fact in this case, BB&T moved for summary judgment on May 18, 2012. (R. pp. 55-57). BB&T subsequently filed with the trial court a Memorandum of Law in Support of its Motion for Summary Judgment. (R. pp. 58-71). Appellants submitted no memorandum, affidavit, or any other material in opposition to the motion.

The hearing on BB&T's Motion for Summary Judgment was held on September 4, 2012. During the hearing, counsel for BB&T argued that pursuant to controlling South Carolina case law, a defendant's responsive pleadings that simply deny allegations supporting a valid cause of action are not sufficient to raise issues of fact or to defeat summary judgment, and summary judgment in this matter was thus required. (R. p. 77, line 7-p. 78, line 16). In response, counsel for Appellants for the first time suggested that a deposition transcript of one of the debtors, Gunter, which was taken forty-nine days prior pursuant to a separate action involving a default on an entirely unrelated line of credit issued by a different lending entity to a different limited liability company, "would basically explain why we believe this debt really isn't owed." (R. p. 78, line 18-p. 79, line 1). Counsel for Appellants asked that the court consider issues and testimony which he claimed were reflected within the subject deposition, and suggested that he would later direct the court to some unspecified UCC provisions. (R. p. 79, lines 13-22). Appellants did not at any time—whether before, during, or following the hearing before Judge Manning—submit to the court any documentation or cite to a single legal authority. In

fact, Appellants put forth no information or documentation whatsoever before the trial court beyond their one-sentence Answer.

Judge Manning took the matter under advisement and on September 10, 2012, issued Judgment in favor of BB&T, conclusively ending the matter. (R. pp. 1-3). The order made no reference to the alleged "facts" counsel said would be reflected in the deposition transcript. Appellants did not file a motion for reconsideration or a motion to alter or amend the judgment pursuant to Rules 59(e) or 60, SCRCP; rather, they appealed the matter directly to this Court raising defenses, arguments and "facts" which were never placed before the trial court. The entirety of this appeal is based upon Appellants' theory that the trial court "overlook[ed] questions of law and fact," when, in reality, they have improperly raised such issues for the very first time on appeal. Moreover, in support of their claims, Appellants rely exclusively upon portions of alleged deposition testimony of Appellant Gunter, which this Court excluded from its consideration by Order of July 2, 2013.

ARGUMENT

I. None of Appellants' Issues or Arguments is Preserved for Appellate Review and the Appeal is Thus Procedurally Barred.

A. South Carolina Law Mandates that All Issues Be Raised to and Ruled Upon by the Trial Court to Be Considered on Appeal.

Appellants did not place a single issue before the trial court. Their current claims are not preserved for this Court's review because they were neither presented to nor ruled upon by the trial court and because no motion for reconsideration was filed. Their arguments, raised for the first time on appeal, are procedurally barred.

South Carolina has long held that it is "axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (S.C. 1998). Indeed, the South Carolina Supreme Court in 1910 regarded this as a rule which was "too well settled to require citation" of case law. Long v. Dunlap, 87 S.C. 8, 18, 68 S.E. 801, 804 (S.C. 1910). "[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for consideration." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 22, 602 S.E.2d 722, 780 (S.C. 2004). Further, when an issue or argument has been raised, but not ruled upon, a party "*must*" file a motion for reconsideration in order to preserve the issue for appellate review. Id. (emphasis in original). A trial judge "will not be reversed for failing to act on a matter that was not submitted to him." Roche v. S.C. Alcoholic Beverage Control Com'n, 263 S.C. 451, 211 S.E.2d 243 (S.C. 1975).

In 2000, the South Carolina Supreme Court highlighted the importance of this principle and the reasoning behind its application:

> [D]ifferent preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. . . .
>
> If the losing party has raised an issue to the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve it for appellate review.
>
> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all

> relevant facts, law, and arguments. . . [W]hen appellant's contentions are not presented [to] or passed on by the trial judge, such contentions will not be considered on appeal[]. The requirement also serves as a keen incentive for a party to properly prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (S.C. 2000) (internal citations omitted).

In this regard, South Carolina courts have repeatedly held that even where an appellant raises a particular argument during a summary judgment or other dispositive motion hearing, where the matter is not explicitly ruled upon by the court, the party *must* file a motion for reconsideration or his argument is thereafter "procedurally barred" and cannot be addressed on appeal. Metts v. Mims, 384 S.C. 491, 499, 682 S.E.2d 813, 817-18 (S.C. 2009); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (S.C. 1991) (where the record reflected no "explicit" ruling on appellant's argument and appellant failed to show it made a Rule 59(e) motion, the issue was not properly before the Court of Appeals and should not have been addressed by it). Moreover, this Court has unequivocally declared its unwillingness to consider a matter which has not been properly and fully preserved: "We take this opportunity to remind the Bar that both this Court and our Supreme Court have repeatedly and explicitly held that [a Rule 59(e) motion] is required" in circumstances where a matter is not ruled upon by the lower court. Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (S.C. Ct. App. 1992).

B. Pursuant to this Well Settled South Carolina Law, Appellants' Claims are Not Preserved for Review because they were Neither Raised to Nor Ruled Upon by the Trial Court.

Appellants have offered two issues on appeal, neither of which is properly before this Court: (1) the court's order gives BB&T an "improper windfall" and (2) the trial court "overlooked" questions of law and fact as to whether BB&T "exceeded its security interest." (App. Amd. Initial Brief, "Statement of Issues on Appeal").

The first of Appellants' two proffered issues on appeal, that a ruling in favor of BB&T gives it an improper windfall, was never raised or even alluded to by Appellants prior to the submission of their Initial Brief and unquestionably has been raised for the first time on appeal. In accordance with South Carolina case law set forth herein above, it is axiomatic that an issue cannot be raised for the first time on appeal. This issue is thus procedurally barred from consideration by this Court.

The second of Appellants' two proffered issues, that the trial court "overlooked" whether BB&T "exceeded its security interest," similarly was neither raised to nor ruled upon by the trial court and is thus not preserved for this Court's review. This issue loosely appears to be the theory espoused for the first time by Appellants' counsel at the summary judgment hearing when he suggested that deposition testimony of Appellant Gunter, which this Court has Ordered will not be considered in the present appeal, may show the existence of an issue of fact in this case. (R. p. 79, lines 13-22). Counsel's unsupported argument at the summary judgment hearing does not equate to having "raised" the issue to the trial court, however, as in South Carolina, "a representation of fact by counsel . . . made during oral argument[] may not be considered by the court where it is unsupported by the record." Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (S.C. Ct. App. 1997). Because Appellants' counsel did not place this transcript or any other supporting document, fact or legal theory whatsoever in the record, the claims

raised by Appellants' counsel during the summary judgment hearing were properly disregarded by Judge Manning and are similarly not fit for this Court's review on appeal.

However, even if this Court were to disregard its Cobb holding and regard such claim as having been "raised to" the lower court, this proffered issue on appeal still is not preserved for review because it was not "ruled upon" by the lower court. Judge Manning's order did not explicitly address this issue, the deposition testimony, or any UCC provision. Appellants were then required, pursuant to procedural and common law mandates, to "first try to convince the lower court that it ruled wrongly" and only then, if that effort failed, could they appeal to this Court for review. Appellants did not file a motion for reconsideration so as to place these "overlooked" issues before the trial court to obtain a ruling, and their failure to do so here is fatal to their appeal.

Appellants have violated South Carolina's deep-rooted issue-preservation requirements which were established to protect against the precise circumstances with which this Court and Respondent are now confronted. These preservation requirements are meant to "serve as a keen incentive for a party to prepare a case thoroughly" and to "prevent[] a party from keeping an ace card up his sleeve . . . in the hope that an appellate court will accept that ace card and . . . give him another opportunity to prove his case." I'On, 338 S.C. at 421-22, 526 S.E.2d at 724. Appellants never put a single fact, argument, or legal theory in the record before the trial court. The "facts" set forth in their Amended Initial Brief, the arguments they raise, and the case and statutory law upon which they rely are all being raised for the first time on appeal. To allow them to rely upon such matter now would condone their "keeping an ace card up [their] sleeve" for

use for the first time on appeal, which is precisely what this state's preservation rules were designed to prevent. Their failure to preserve any issue is fatal to their appeal.

II. Because there is No Matter in the Record to Support a Single Argument or Salient Factual Assertion Raised by Appellants, None of it is Appropriate for this Court's Consideration on Appeal.

In addition to the fact that none of Appellants' proffered issues on appeal is preserved for this Court's review, there likewise is no supporting matter in the Record on Appeal for this Court to consider, even if it were to evaluate the merits of their proposed issues. All arguments and issues set forth in Appellants' Brief are essentially based upon a single allegation—that Respondent BB&T seized property belonging to Appellants to offset their debt in this matter. Irrespective of the fact that this is an absolute untruth, (see fn. 2, *supra*), there further is no material in the Record to support this factual assertion. As set forth below, this Court has repeatedly held that it will not consider any fact, or any argument based upon such fact, for which there is no support in the Record.

South Carolina Appellate Court Rules provide that this Court "*will not consider any fact* which does not appear in the Record on Appeal." Rule 209(h), SCACR (emphasis added). It is the appellant who "has the burden of presenting a sufficient record for review. There is a presumption in favor of correctness of an order, and the appellant must overcome that presumption" with proper presentation of facts which support his arguments on appeal. Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (S.C. Ct. App. 1992) (internal citations omitted). This Court has emphasized the importance of compliance with appellate procedural rules with respect to the record on appeal and has criticized parties for doing precisely that which Appellants attempt to do in the instant case—improperly insert numerous "facts" for the first time in their Brief

without ever having placed matter in the record to support such assertions. Forner v. Butler, 319 S.C. 275, 460 S.E.2d 425 (S.C. Ct. App. 1995). Though not prompted to do so by any motion to strike or exclude, this Court independently and resolutely proclaimed its unwillingness and inability to consider such material on appeal:

> We also note the parties make numerous factual assertions in their briefs which have no basis in the record on appeal. . . . **If the parties in this case considered a fact relevant and worthy of mention in the brief, the parties should have included matter in the record to support that factual assertion**. . . As the Supreme Court advised the bar in *Henning v. Kaye*, 307 S.C 436, 415 S.E.2d 794 (S.C. 1992), **the Appellate Court Rules "are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review."**

Id. at n.2 (emphasis added).

Further, this Court holds that arguments of counsel made at hearing do not qualify as matter within the record upon which an appeal can be based. In the on-point case of Gilmore v. Ivey, counsel for Gilmore presented an oral argument in opposition to Ivey's motion for summary judgment during which he "merely referred to testimony purportedly given by [the parties] and certain unnamed doctors in their respective depositions," though "he did not publish any deposition either in whole or in part." 290 S.C. 53, 348 S.E.2d 180 (S.C. Ct. App. 1986). This Court held that such deposition testimony was not properly before the trial court and any claims or representations made by counsel as to its content were properly disregarded by the lower court:

> While statements of fact can constitute an "admission on file" and thus be entitled to consideration by the court in determining whether a genuine issue of material fact exists, factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be so considered.

> In determining whether a genuine issue of material fact exists, a court must consider *everything* in the record—pleadings, depositions, interrogatories, admissions on file, affidavits, etc. . . .
>
> Here, because the depositions relied upon by Gilmore either had not been filed as the rule required or had not been published and therefore were not in the record, the hearing judge properly disregarded the testimony that Gilmore's counsel, during his argument, claimed was reflected by those depositions.

Id. at 56-57, 182-83 (internal citations omitted). Thus, deposition testimony which was discussed or paraphrased by counsel during summary judgment oral arguments but was not published to or filed with the court was properly disregarded by the trial judge, and similarly was not fit for consideration on appeal.

Additionally, this Court subsequently relied upon its Gilmore opinion in again affirming that material referenced and discussed by counsel at a hearing does not then become a part of the record for purposes of appeal. Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (S.C. Ct. App. 1997). In Cobb, counsel for Auto-Owners Insurance discussed relevant provisions of an applicable insurance policy during oral argument before the trial judge. Id. at 581, 593. Counsel did not place a copy of the policy before the court. On appeal of the trial court's unfavorable ruling, counsel for Auto-Owners designated the policy to be included in the record on appeal and attempted to rely upon it at the appellate stage. This Court held that as the appellant, Auto-Owners had the burden of presenting a sufficient record for review. Id. It had simply failed to do so here. Though counsel for Auto-Owners depicted the relevant language of the policy at the trial court stage, this Court held that "a representation of fact by counsel in written briefs, memoranda or made during oral argument[] may not be considered by the court where it is unsupported by the record." Id. For this reason, the policy was excluded. Significantly, this Court thus

refused to address issues raised on appeal that would have required the Court's review of the policy. Id.

In their Brief, Appellants set forth lengthy and detailed factual allegations for which there is not a shred of support in the Record on Appeal. With each such assertion, Appellants either make no reference or citation to the Record on Appeal at all, in violation of Rule 208(b)(4), SCACR ("the brief shall contain references to the [matter] properly in the Record on Appeal to support the salient facts alleged"), or otherwise merely cite to the transcript of their counsel's argument at the summary judgment hearing. In one particularly noteworthy instance, they claim that the "uncontroverted evidence in the record" shows that BB&T seized all of Appellants' equipment and assets, for which they cite only to the summary judgment hearing transcript. (Amd. Initial Brief, p. 6). In spite of Appellants' claim that unsupported and unsubstantiated statements made by their counsel at a hearing constitute "uncontroverted *evidence* in the record," as set forth above, such is not the law of this State, where it is specifically held that statements of counsel at a summary judgment hearing do not constitute "evidence."

There is no single fact in the record upon which Appellants could rely to support the accusations in their Brief. Because this Court *will not consider any fact* which does not appear in the Record on Appeal and will not, then, consider arguments which exclusively rely upon such facts, there simply is nothing fit for this Court's consideration with respect to Appellants' current position on appeal. Such failure is not to be regarded as a "mere technicality," but rather is similarly fatal to their present appeal.

III. The Trial Court Correctly Granted Summary Judgment in Favor of BB&T.

No genuine issue of material fact was placed before the trial court and Judge Manning properly granted summary judgment in favor of BB&T. "[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 611 S.E.2d 922, 925 (S.C. 2005); Rule 56, SCRCP. Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings. Grant v. Mount Vernon Mills, 634 S.E.2d 15, 17 (S.C. Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 17-18. Responsive pleadings that simply deny allegations supporting a valid cause of action are not sufficient to raise plain, palpable and disputable facts which may otherwise defeat summary judgment. Garrett v. Reese, 204 S.E.2d 432 (S.C. 1974). Further, unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 316 S.E.2d 406 (S.C. 1984).

At the trial stage, Appellants offered only a vague, one-sentence, sweeping denial of all allegations raised against them in BB&T's Verified Complaint. (R. p. 36). They failed to raise a single affirmative defense and did not put before the court any facts or evidence, whether by affidavit, citation of controlling law or otherwise, in support of their denial of liability. Appellants were not permitted, in accordance with well established precedent, to rest on a general denial but instead were required to set forth specific facts showing there was a genuine issue for trial. They unequivocally failed to do so in the

underlying case. Summary judgment in favor of BB&T was required as a matter of law and was appropriately granted by Judge Manning.

CONCLUSION

For the foregoing reasons and based upon the controlling authority set forth herein, Respondent Branch Banking and Trust Company respectfully requests that this Court affirm the trial court's grant of summary judgment in favor of BB&T.

Laura Simons Greaver
J. Ronald Jones, Jr.
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492
(843) 577-2026

Attorneys for Respondent

October 18, 2013
Charleston, South Carolina