THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young

Case No. 2010-CP-26-03170

First National Bank of the South, Successor in interest to Carolina National Bank and Trust Company,
.....Respondent,

v.

James T. Callihan a/k/a James Callihan; Edward L. Williams; Frank J. Pennisi a/k/a Frank Pennisi; Dean J. Karavan a/k/a D.J. Karavan; Charles T. Walls, Jr. a/k/a Charles Walls; Robert S. Guyton; and Jeffrey H. Skelley, Defendants,

Of Whom Frank J. Pennisi and Charles T. Walls are
.....Appellants.

FINAL BRIEF OF RESPONDENT

Robert A. Kerr, Jr.
Amy Jowers Mikell
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000
Attorneys for Respondent

Other Counsel of Record:

Thomas C. Brittain, Esquire
The Brittain Law Firm
4614 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-8562

Attorney for Appellant Frank J. Pennisi

C. Scott Masel
Newby Sartip Masel & Casper, LLC
4593 Oleander Drive
Myrtle Beach, SC 29578
(843) 449-9417
Attorney for Appellant Charles T. Walls, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

SECONDARY SOURCES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY FIND THAT THE GUARANTIES APPLIED TO THE SECOND AND THIRD LOAN TRANSACTIONS?

II. DID THE TRIAL COURT PROPERLY FIND THAT THE BANKS' ACTIONS DID NOT RELEASE THE GUARANTORS?

III. DID THE TRIAL COURT PROPERLY FIND THAT THE CASE WAS PROSECUTED BY A PROPER PARTY?

STATEMENT OF THE CASE

This case is an action to collect payment of personal guaranty agreements signed by the Appellants and their co-defendants. On April 13, 2010, Respondent First National Bank of the South ("FNBS" or "Respondent") filed its Complaint seeking damages of $253,699.44, plus late fees, interest, and attorneys' fees. The Appellants answered, denying Respondent's claims and asserting numerous affirmative defenses. A non-jury trial was conducted on May 20, 2013 by Judge W. Jeffrey Young; and by Order filed June 29, 2013, the trial court ruled in favor of Respondent and entered judgment against Appellants and their co-defendants in the amount of $358,166.76.

FACTS[1]

Sand Dollar Cottage, LLC (the "Borrower") made, executed and delivered to Carolina National Bank and Trust Company ("Carolina National") a written promissory note dated November 8, 2006, as amended, modified and/or renewed by written instruments dated December 21, 2007 and April 30, 2008 (collectively hereinafter referred to as the "Note"). See R. p. 12, ¶ 9; pp. 210-15. Under the terms of the Note, the Borrower promised to pay to the Plaintiff the original principal sum of $400,000.00, together with interest on the outstanding principal balance payable upon the terms and conditions set forth in the Note. See R. p. 12, ¶ 9.

To secure repayment of the Note, each of the Defendants (the "Guarantors"), who are members of the Borrower, executed and delivered to Carolina National a separate Guaranty dated November 8, 2006 (each "Guaranty" and collectively, the "Guaranty

[1] Although Respondent does not counter every point made in Appellants' Statement of Facts, Respondent does not agree with many of Appellants' factual assertions and reserves the right to challenge such assertions.

Agreements"). See R. p. 12, ¶ 14; p. 13, ¶ 20; p. 14, ¶ 26; p. 15, ¶¶ 32, 38; p. 16, ¶ 44; p. 17, ¶ 50; pp. 216-29. The Guaranty Agreements were guaranties of payment and secured the repayment of the Note and any extensions, renewals or replacements thereof and also inured to the benefit of Carolina National and its participants, successors and assigns. See R. pp. 216-29.

The Borrower used the proceeds of the loan to purchase a waterfront house in the Commonwealth of the Bahamas. See R. p. 94, lines 10-15. The property was not pledged as collateral for the loan due to the complexities of securing real property in the Commonwealth of the Bahamas.

As part of a loan renewal process in 2008, the Borrower made a principal reduction payment in the amount of $100,000.00, thereby reducing the principal balance due and owing under the Note to $300,000.00. See R. p. 91, lines 6-7; p. 230. Appellants Pennisi and Walls funded the principal payment reduction by making a loan and separate capital contributions to the Borrower. See R. p. 89, line 25-p. 90, line 2; p. 168, line 25-p. 169, line 3. Thereafter, the Borrower defaulted on its obligations under the Note by failing to make timely payments of principal and interest. See R. p. 13, ¶ 16. The Guarantors were advised of the Borrower's default and they failed to remit the sums due under the Note, as required by the Guaranty Agreements. The entire balance of the Note became due and payable together with interest, attorneys' fees and costs of this action. See R. p. 13, ¶ 17. Although demand was made on the Guarantors for the amount due under the Note, they failed and refused to pay the same.

Prior to the commencement of this action, Carolina National merged with FNBS. See R. pp. 199-202. The merger was effective as of February 18, 2008, and FNBS

became the owner and holder of the Note and Guaranty Agreements and was owner and holder thereof when the Note was renewed on April 30, 2008. See R. p. 76, lines 15-21; p. 78, lines 17-20.

During the pendency of this action, the Office of the Comptroller of the Currency closed FNBS and the Federal Deposit Insurance Corporation ("FDIC") was appointed as its Receiver. See R. p. 79, lines 19-24. NAFH National Bank ("NAFH") purchased and assumed certain assets of FNBS and became the owner and holder of the Note and Mortgage by assignment. See R. p. 80, lines 1-2; p. 209. On June 30, 2011, NAFH merged with Capital Bank, N.A., with the resulting bank title of Capital Bank, N.A ("Capital Bank"). See R. pp. 203-204; see also R. p. 84, lines 4-17. The merger was effective as of June 30, 2011. See id. Accordingly, Capital Bank is the owner and holder of the Note and Guaranty Agreements.

STANDARD OF REVIEW

A guaranty is a contract and should be construed based on the language used by the parties to express their intention. See Peoples Fed. Sav. & Loan Ass'n. v. Myrtle Beach Retirement Group, Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 673 (1989). An action to construe a contract is an action at law. See Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct. App. 2008). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The trial court's findings in a law action are equivalent to a jury's findings."

Regions Bank v. Strawn, 399 S.C. 530, 537, 732 S.E.2d 230, 233 (Ct. App. 2012) (citing Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975)). "Questions regarding credibility and the weight of the evidence are exclusively for the trial court." Id. (citing Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)). The appellate court must construe the evidence presented to the trial court so as to support the trial court's decision wherever reasonably possible. See Sheek, 297 S.C. at 377, 377 S.E.2d at 133. The appellate court must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary. See id.

ARGUMENTS

I. THE TRIAL COURT PROPERLY FOUND THAT THE GUARANTIES APPLIED TO THE SECOND AND THIRD LOAN TRANSACTIONS.

A. The Second and Third Loan Transactions Were Renewals of the Original Note.

Appellants assert that the loan transactions dated December 21, 2007 and April 30, 2008 were not renewals of the original Note dated November 30, 2006 but, rather, were "brand new transactions," which had the effect of a novation extinguishing the prior transaction and Appellants' obligations under the unconditional and continuing personal Guaranty Agreements Appellants executed in favor of Carolina National. Appellants' Br. p. 6. This argument is contrary to the plain language of the subsequent renewal notes. "[T]hese documents [a modifying note] are to be construed like other contracts, and to ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (finding language appearing on the face of the "Modifying

Agreement" was clear and unambiguous and negated an intention for there to be a novation).

Beginning with the original Note dated November 30, 2006, each of the notes was executed on identical "Universal Note" forms. See R. pp. 210-15. Each of the notes contains a block in the upper right-hand corner of the first page in which to indicate the loan number, origination date, maturity date, loan amount, and whether or not the loan is a renewal of an existing loan. See id. The original Note provides information for all of these fields except for the loan renewal field. See R. pp. 210-11. The subsequent notes each provide information for all of the fields, including the loan renewal field, wherein the original loan number is provided to show that the transaction is a renewal of loan number 400378400 (the loan number assigned to the original Note). See R. pp. 212-15. The "Renewal Of" field of the Universal Note form is what allows a bank to use the same form document for each loan and yet identify when the loan is a renewal of an existing note rather than a brand new note.

In addition to identifying the subsequent notes as renewals of the original Note, the subsequent notes also assign the same loan number to the renewal loans, showing continuity of the loan through each renewal. See id. Further, each of the subsequent notes identifies as "Additional Charges" a "renewal fee," $100.00 for the December 21, 2007 renewal and $2,000.00 for the April 30, 2008 renewal. See id. "It has been held that a note may be a renewal note even if it involves a change in parties, an increase of security, or a change in interest rate." 10 C.J.S. *Bills and Notes* § 109 (1995); see also Livestock Nat'l Bank v. Minnehaha State Bank, 217 N.W. 180, (S.D. 1927) (holding the insertion of a new payee and the reduction of the principal amount of debt did not change

the character of a renewal note); Rebel v. Nat'l City Bank, 598 N.E.2d 1108, (Ind. Ct. App. 1992) (holding a renewal still occurred when accompanied by a change in interest rate); United Bank of Lakewood Nat'l Assoc. v. Jefferson Indus. Bank, 791 P.2d 1250 (Colo. Ct. App. 1990) ("Parties to a note secured by a mortgage may substitute a new note for the original without impairing the security, although the terms of the two notes are not identical, so long as the original secured debt remains unpaid and there is no increase in the debt."). The security for this loan was the Guaranty Agreements, and at the time of the renewal notes, the original debt remained unpaid by the borrower. The language of the subsequent notes clearly identifies the intention of the parties that the notes were to be renewals of the original Note. Such language is plain and capable of legal construction. See Superior Auto., 261 S.C. at 263, 199 S.E.2d at 722. For these reasons, the trial court's Order and Judgment should be affirmed.

B. There Was No Novation of the Original Note and Guaranty Agreements.

Appellants base their argument that each subsequent note was a brand new transaction, thereby terminating Appellants' obligations under the Guaranty Agreements, on the doctrine of novation. See Appellants' Br. pp. 6-7. "A novation is a mutual agreement between all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor." Superior Auto, 261 S.C. at 262, 199 S.E.2d at 722 (internal quotations omitted); see also Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990) ("A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation."). "The circumstances attending the transaction alleged to be a novation must show the intention

to substitute a new obligation in place of the existing one." Wellman, Inc. v. Square D Co., 366 S.C. 61, 620 S.E.2d 86, 92 (Ct. App. 2005). "[I]t is clear that there can be no novation unless this is the intent of both parties." Superior Auto, 261 S.C. at 262, 199 S.E.2d at 722. "In order to effectuate a novation by the substitution of a new obligation, both contracting parties must consent that the new agreement is to replace the old one and their consent must be apparent." Moore v. Weinberg, 373 S.C. 209, 218, 644 S.E.2d 740, 744 (Ct. App. 2007). "[A novation] is a mode of extinguishing one obligation by creating another; the substitution, *not of a new paper or note*, but of a new obligation in lieu of an old one, with the effect of paying, dissolving, or otherwise discharging it." Id. at 218, 644 S.E.2d at 745 (emphasis added). "The burden of proving novation is on the party asserting it." Wellman, 366 S.C. 61, 620 S.E.2d at 92.

Appellants have failed to present any evidence that Carolina National or Respondent intended for the note renewals to serve as a novation of the original Note or the Guaranty Agreements. In their brief, Appellants point to changes in the payment structure, maturity date, and loan amount as evidence that the subsequent notes were brand new notes, not renewals of the original Note. See Appellants' Br. pp. 7-8. However, as described in Part I.A. above, this defies the plain language of the notes identifying the transactions as loan renewals.

Moreover, Appellants' arguments that the renewals being executed after the maturity date somehow negates the possibility of a renewal are unavailing. In support of this argument, Appellants assert that the maturing notes expired upon maturity, as if the obligations under a note are somehow discharged if the note is not renewed prior to maturity. See Appellants' Br. pp. 7-8. Tellingly, Appellants have asserted no case law in

support of this argument or their argument that changes to the terms of the notes created a novation. Case law on novation is clear that there must be evidence supporting the intention of the lender to create a novation. See supra Part I.B; Wayne Dalton, 302 S.C. at 96, 394 S.E.2d at 7 (finding a novation of guaranties where the record contained evidence that the guarantor gave the lender separate consideration unrelated to the amount owed on the debt in order to be released from the guaranty, a letter confirming the new debt was to "supercede [sic] and replace any and all prior [debt]," the closing of the previous account and opening of a new account, and testimony from the creditor that the new note acted as a novation for the old account).

Furthermore, Appellants have offered no evidence that the subsequent notes were new obligations.[2] The obligation remained the same from the original Note through the last renewal note: the borrower accepted $400,000.00 from the bank to purchase a house in the Bahamas. See R. p. 138, lines 19-25. The sole collateral for the loan was the Guaranty Agreements of Appellants and their co-defendants. See generally Compl, R. pp. 11-18. The only repayment of any part of the $400,000.00 in principal owed to the bank occurred with the $100,000.00 pay down in conjunction with the April 30, 2008 renewal. See May 7, 2008 Sand Dollar Cottage, LLC Check and related General Ledger documents, R. p. 230. Thus, the same obligation remained owed to the bank throughout all of these transactions and was not discharged at any point in time. See Moore, 373 S.C. at 218, 644 S.E.2d at 745 ("[A novation] is a mode of extinguishing one obligation

[2] Even if the Court determines that the subsequent notes were new obligations and not renewals, "[i]t is well settled that a guarantor's liability is an independent contractual obligation." Transouth Fin. Corp. v. Cochran, 324 S.C. 290, 294-95, 478 S.E.2d 63, 65 (Ct. App. 1996) ("The general rule in South Carolina . . . is that a guaranty of payment is an obligation separate and distinct from the original note."). Thus, the analysis of whether Appellants' obligations under the Guaranty Agreements were discharged would depend on the construction of those agreements. See infra Part II.

by creating another; the substitution, *not of a new paper or note*, but of a new obligation in lieu of an old one, with the effect of paying, dissolving, or otherwise discharging it.") (emphasis added). As such, there was no novation of the Note or Guaranty Agreements, and the decision of the trial court should be affirmed.

II. THE TRIAL COURT PROPERLY FOUND THAT THE BANKS' ACTIONS DID NOT RELEASE THE GUARANTORS.

Appellants argue that the general laws of suretyship are applicable to this case as encompassed in the *Restatement of the Law, Third, Suretyship and Guaranty*, §§ 40, 41 (1996), although they admit that there is no South Carolina case law applying such rules to the facts of this case. See Appellants' Br. p. 9. Accepting Appellants' assertion regarding the applicability of this Restatement to the facts of this case as true for the purposes of argument[3], Appellants have failed to consider a key principle set forth in the Restatement: "Each rule in this Restatement stating the effect of suretyship status may be varied by contract between the parties subject to it." Restatement (Third) of Suretyship and Guaranty, § 6 (1996).

The plain language of the Guaranty Agreements provides for the survival of the guaranties through renewals, replacements, substitutions, extensions, and refinancing of the original Note, up and until the time a guarantor revokes his guaranty in a writing received by the bank, as stated in relevant part:

> • [T]he Undersigned guarantees to Lender the payment and performance of the debt, liability, or obligation of Borrower to Lender evidenced or arising out of the following: Note Number 400378400 dated 11/08/2006 *and any renewals or replacements* thereof [defined as] . . . the "Indebtedness." Guaranty Agreement p. 1, ¶ A (emphasis added).

[3] Respondent does not concede that this Restatement is binding or persuasive authority under South Carolina law but only accepts Appellants' assertion for the purposes of argument.

> • This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, *whether or not all Indebtedness is paid in full*, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to *any renewals, extensions and refinancings* thereof. Guaranty Agreement ¶ 2 (emphasis added).
>
> • The liability of the Undersigned hereunder shall be limited to a principal amount of $ UNLIMITED (if unlimited or no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount) . . . Indebtedness may be created *and continued* in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received . . . . *Such application of receipts shall not reduce, affect, or impair the liability of the Undersigned hereunder.* Guaranty Agreement ¶ 4 (emphasis added).
>
> • Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned. The liability of the Undersigned shall not be affected or impaired by any of the following acts or things:
>
> * * *
>
> (ii) any one or more *extensions or renewals* of Indebtedness (whether or not for longer than the original period) or any *modification* of the interest rates, maturities, or other contractual terms applicable to any Indebtedness;
>
> * * *
>
> (v) any discharge of any evidence of Indebtedness or the acceptance of any instrument in renewal thereof or *substitution* therefor. Guaranty Agreement ¶ 6 (emphasis added).

See generally R. pp. 216-29. Thus, by the principles of the Restatement, Appellants' arguments related to discharge of their guaranty obligations through extension of time and substituted contract are inapplicable to the present facts because the provisions of the Guaranty Agreements supersede such principles.

"A guaranty is a contract and should be construed based on the language used by the parties to express their intention." Transouth, 324 S.C. at 294, 478 S.E.2d at 65. "In

determining the nature of a guaranty the first consideration is the written language." Wayne Dalton, 302 S.C. at 95, 394 S.E.2d at 6 (citing Pee Dee State Bank v. Nat'l Fiber Corp., 287 S.C. 640, 340 S.E.2d 569 (Ct. App. 1986)). The Guaranty Agreements provide that they are binding upon the guarantors until they are revoked. See Guaranty Agreement ¶ 2, R. pp. 216-29. Respondent never received a revocation, and Appellants admit they never revoked their Guaranty Agreements. See R. p. 89, lines 19-22; p. 168, lines 19-24. As such, Appellants were not released from their Guaranties through either of the subsequent loan renewals, and the trial court's Order and Judgment on this point should be affirmed.

III. THE TRIAL COURT PROPERLY FOUND THAT THE CASE WAS PROSECUTED BY A PROPER PARTY.

A. The Record Contains Sufficient Evidence to Reasonably Support the Trial Court's Finding that Capital Bank Is the Owner of the Note and Guaranty Agreements.

Appellants argue that Respondent failed to prove Capital Bank is the owner of the Note and Guaranty Agreements. See Appellants' Br. p. 12. However, Appellants' position is belied by the trial testimony and exhibits. Carolina National originated the loan on November 30, 2006, resulting in the execution of the original Note in favor of Carolina National by Borrower and the Guaranty Agreements in favor of Carolina National by the Appellants and their co-defendants. See R. p. 12, ¶ 9; p. 14, ¶ 26; p. 15, ¶ 38. The first loan renewal occurred on December 21, 2007. See R. pp. 210-11. On February 18, 2008, Carolina National merged with FNBS. See R. pp. 199-202; see also R. p. 76, lines 15-21 (stating merger between Carolina National and FNBS occurred in early 2008); p. 78, lines 17-20 (stating that pursuant to the merger, FNBS was the owner and holder of Note and Guaranty Agreements).

On April 30, 2008, FNBS renewed the loan a second time. See R. pp. 214-15. FNBS filed the Complaint in this action on April 13, 2010, and in July 2010, FNBS was placed into FDIC receivership. See R. p. 79, lines 19-24. On the same day FNBS went into FDIC receivership, the FDIC sold the assets of FNBS to NAFH. See R. p. 80, lines 1-2. By that certain Assignment [of] Promissory Note and Guaranty Agreements effective July 16, 2010 (authorized by the Limited Power of Attorney given by the FDIC), the Note and Guaranty Agreements were assigned to NAFH by the FDIC.[4] See R. p. 209; R. pp. 205-208. On June 30, 2011, NAFH merged with Capital Bank. See R. pp. 203-204; see also R. p. 84, lines 4-17 (stating Capital Bank is the owner and holder of the Note and Guaranty Agreements).

The trial court's Order includes the above history of the loan in its Findings of Fact. See June 28, 2013 Order and Judgment ("Order") Findings of Fact, R. p. 3, ¶ 5; p. 3A, ¶¶ 9, 10. The trial court held that the Note and Guaranty Agreements are owned and held by Capital Bank, as a successor and assignee of Carolina National, FNBS, and NAFH. See Order, Conclusions of Law, R. p. 4, ¶ 1; p. 5, ¶¶ 2, 3. Additionally, the trial court notes that no forms of transfer were required for the property of the merged firm to vest in the surviving firm according to S.C. Code Ann. § 33-11-106 and 12 U.S.C. § 215(e) related to the mergers of corporations and banks. See id. ¶ 1, n.2. Moreover, based on the trial testimony and other evidence in the record, Appellants' argument that

[4] Plaintiff's Exhibit 4, R. p 209, is a valid and enforceable transfer of interest from the FDIC to NAFH despite Appellants' technical defense that the form of the Assignment is somehow defective. Under South Carolina law, a note can be transferred without endorsement where the assignment is proven. See Carolina Housing & Mortgage Corp. v. Orange Hill A.M.E. Church, 230 S.C. 498, 505, 97 S.E.2d 28, 31 (1957); Fed. Intermediate Credit Bank v. Carolina Petroleum Co., 154 S.C. 435, 443, 151 S.E. 738, 740-41 (1930); see also Margiewicz v. Terco Prop. of Miami Beach, Inc., 441 So.2d 1124, 1124-25 (Ct. App. Fla. 1993) ("Endorsement is a prerequisite to transfer by negotiation. However, it is also possible to transfer a note by assignment.").

Respondent failed to prove Capital Bank is the owner of the Note and Guaranty Agreements is unavailing, and the trial court should be affirmed on this issue.

B. Respondent Is the Proper Party Under Rule 25(c).

Appellants further argue that Respondent failed to prove it is the proper party to prosecute the case under Rule 25(c). See Appellants' Br. p. 13. A plain reading of Rule 25(c), SCRCP, reveals that the rule applies, "[i]n case of *any transfer of interest* . . . ." Rule 25(c), SCRCP (emphasis added). Appellants cite to Bryant v. Waste Management, Inc., where this Court stated that, "Rule 25(c) applies to the transfer of interest from one corporation to another with which the first merged." Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 164, 536 S.E.2d 380, 383 (Ct. App. 2000). Appellants misconstrue the court's interpretation of the rule. First, the rule on its face does not restrict its application to cases of merger; rather, it is to be applied to *any transfer of interest*. Second, there is no precedent that establishes that the rule applies exclusively to cases of merger. The facts in Bryant merely happened to include a corporate merger. In the present case, the fact that Respondent did not merge with NAFH or Capital Bank does not preclude the application of Rule 25(c) because, as detailed above, there was a *transfer of interest* from Respondent to NAFH (through the FDIC receivership), and NAFH later merged with Capital Bank. Rule 25(c) is applicable to the facts of this case, and Respondent is a proper party to prosecute this action.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's ruling in its entirety.

Respectfully submitted,

March 14, 2014

Robert A. Kerr, Jr.
Amy Jowers Mikell
MOORE & VAN ALLEN, P.L.L.C.
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young

Case No. 2010-CP-26-03170

First National Bank of the South, Successor in interest to Carolina National Bank and Trust Company,
.....Respondent,

v.

James T. Callihan a/k/a James Callihan; Edward L. Williams; Frank J. Pennisi a/k/a Frank Pennisi; Dean J. Karavan a/k/a D.J. Karavan; Charles T. Walls, Jr. a/k/a Charles Walls; Robert S. Guyton; and Jeffrey H. Skelley, Defendants,

Of Whom Frank J. Pennisi and Charles T. Walls are
.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Robert A. Kerr, Jr.
Amy Jowers Mikell
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000
Attorneys for Respondent

March 14, 2014