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The State of South Carolina
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

D Craig Brown, Circuit Court Judge

Case No 2010 CP 21 131

ORIGINAL

Mark Fountain,

Appellant,

v

First Reliance Bank, Thomas C Ewart, and
Ernest Pennell,

Defendants

Of whom First Reliance Bank and Thomas C Ewart
are,

Respondents

Record on Appeal

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STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2010-CP-21-131

Mark Fountain,

Plaintiff,

Vs

First Reliance Bank,
Thomas C Ewart, and
Ernest Pennell,

Defendants

**ORDER GRANTING
SUMMARY JUDGMENT
AS TO DEFAMATION CLAIMS
AND CLAIMS OF OUTRAGE**

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This matter is before the Court on Defendants' motions for summary judgment with regard to the Plaintiff's causes of action for defamation and intentional infliction of emotional distress. These motions came before the Court for hearing on March 10, 2011 (together with other motions addressed by separate orders). After consideration of all pleadings, including these motions, supporting memoranda, depositions and other evidentiary submissions, and the arguments of all counsel, the Court has concluded that Defendants' summary judgment motions should be granted. As required, the Court given such consideration in the evidentiary light most favorable to the Plaintiff, the moving party

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Linda Noel Spivey

BACKGROUND

This matter arises in the context of an effort by Plaintiff and Defendant Pennell to secure bank financing for the satisfaction of a \$1.2 M¹ delinquent convenience

¹ Defendant Pennell estimated the principal balance at \$1.2 M when the convenience store was refinanced by Carolina First Bank. Pennell Deposition page 13 lines 2-14

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store mortgage and for the desired buy out of his existing corporate partner in that store, Cromwell “Bud” Rawls² Although the nature of the relationship between Pennell and Plaintiff is disputed, it is undisputed that Pennell and Fountain were exploring a business opportunity together in this convenience store

At the time of Pennell’s proposed refinance of the convenience store, Rawls was still a 50% owner of the store and Pennell was still trying to convince Rawls to sell his interest Fountain Deposition, page 46 lines 1-9 Also at the time, the convenience store was under distress from mortgage holder Carolina First Bank and needed refinancing to stay open Fountain Deposition, page 43 line 17 – page 45 line 18³ Refinancing was also needed to pay off approximately \$200,000 in delinquent fuel supplies to the store Fountain Deposition, page 40 line 14 to page 42 line 7

First Reliance Bank (“First Reliance”) was one of two banks to which Pennell and Fountain made a request to borrow funds for this proposed convenience store re-finance and buy-out, both entities denied the loan request⁴ In this action, Plaintiff seeks damages for Defendant Ewart’s true⁵ statement (hereinafter “the Statment”) that his employer, Defendant First Reliance, “would not loan [Pennell] the money if [Plaintiff Fountain] was

² The convenience store involved was known at the time as the Hess Mart¹ and was located at the corner of Irby Street and Darlington Street in the City of Florence Pennell Deposition page 6 lines 10 14 and page 8 lines 14 18 The objective of the proposed new financing was confirmed by Pennell in his deposition examination by Plaintiff’s counsel Page 33 lines 15 22 See also Complaint ¶ 6

³ Defendant Pennell confirmed that ultimately a foreclosure action was begun by Carolina First Bank Pennell Deposition page 15 lines 4 9

⁴ The other bank approached was First Citizens Bank in Dillon Pennell Deposition page 28 line 23 – page 29 line 14 Fountain also testified about an apparently unsuccessful approach made to Upstate Mortgage for financing Fountain Deposition page 69 lines 9 15 page 78 line 22 to page 79 line 23

⁵ The truth of the Statment is discussed later in this order

involved in the business ”⁶ This one-time statement is the only alleged defamation by either Ewart or First Reliance ⁷

Once the Statment was made by Ewart at First Reliance, the Statment was repeated twice by Pennell The first time was alone to the alleged victim, Fountain, and it occurred almost as soon as Pennell left First Reliance Bank when Fountain called Pennell on the phone Pennell Deposition, Page 58, Lines 19-21, and Page 63, Line 23-Page 64, Line 8

After that telephone call, Fountain requested Pennell come to his attorney's office, Louis Nettles, to discuss the Statment There, only upon Fountain's request, Pennell repeated the Statment that was made by Mr Ewart declining the loan Pennell's Deposition, Page 65, Line 15-Page 67, Line 21 Again, the only persons present were Pennell, the speaker who had already heard the Statment, Fountain, the alleged victim defamed (not a third-party) who had also already heard the Statment, and Nettles, an attorney listening the matter at the request of his client Fountain

⁶ Fountain s Deposition Page 48 Lines 5 6 The Plaintiff's complaint alleges that the Defendant Ewart an employee of the Defendant First Reliance Bank defamed him when Ewart stated to Pennell ' that as long as the Plaintiff was involved in the transaction that First Reliance Bank would never make a loan to Pennell in order to refinance the Carolina First note and mortgage ' (the Statement") Complaint ¶ 9 The Court will consider Plaintiff's hearsay rendition of the Statment as the worst case given that all facts are to be viewed in the light most favorable to the non moving party [Plaintiff] Other recitations of the Statment are even more benign For example, Ernest Pennell (the only non speaker hearer of the banker s Statment) described Ewart's Statment regarding the loan denial along the lines that under the present status First Reliance could not make the loan Pennell s Deposition, Page 55, Lines 12 19 Admittedly, Pennell testified that reading between the lines he believed that the basis for the denial was Mr Fountain s involvement in the business management team Pennell s Deposition Page 55 Line 15 Page 56 Line 12 Under Rule 802 of the South Carolina Rules of Evidence Plaintiff's hearsay recitation may not even be admissible and thus, alone might not survive summary judgment See e.g. Moody v McLellan 367 S E d 449 452 53 (Ct App 1988) However, Defendant Ewart admitted privately advising Defendant Pennell that "if [Plaintiff] was going to be managing the operation we would not be making the loan " Ewart Deposition, page 6 lines 18 21 For purposes of this order however the Court has assumed that the Plaintiff's recitation of the Statment is both accurate and admissible This assumption is particularly reasonable in light of Ewart s admission of a similar statement (non hearsay under SCRE 801(d)(2))

⁷ This Statment and its publication is also the Plaintiff's alleged basis for his claim of intentional infliction of emotional distress Complaint ¶¶ 16 22

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SUMMARY JUDGMENT STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure provides “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law” Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law Osborne v Adams, 346 S C 4, 550 S E 2d 319 (2001), Baughman v American Telephone & Telegraph Co., 306 S C 101, 111, 410 S E 2d 537, 545 (1991)

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party Sauner v Pub Serv Auth of S C., 354 S C 397, 404, 581 S E 2d 161, 165 (2003) While the court must view the evidence in the light most favorable to the non-moving party, the Plaintiff cannot defeat summary judgment by relying on mere allegations in their Complaint Rule 56(e), SCRCF, Id , Shupe v Settle, 315 S C 510, 445 S E 2d 651 (Ct App 1994)

Instead, the Plaintiff must set forth specific facts showing there is a genuine issue of material fact Thomas v Waters, 315 S C 524, 445 S E 2d 659 (Ct App 1994) The trial judge is not required to single out some small piece of evidence and attach to it a great significance when that evidence is introduced solely to create an issue of fact that is not genuine Englert, Inc v Netherlands Ins Co., 315 S C 300, 302, 433 S E 2d 871, 873 (Ct App 1993) (quoting Main v Corley, 281 S C 525, 527, 316 S E 2d 406, 407 (1984)(Court is not “required to single out some one morsel of evidence to create an

issue of fact that is not genuine ") In other words, the Plaintiff must present more than a mere scintilla of evidence to overcome a Defendant's Motion for Summary Judgment Thomas v Waters, 315 S C 524, 445 S E 2d 659 (Ct App 1994)

Where a defendant establishes an entitlement to judgment as a matter of law, the court must grant summary judgment Humana Hospital-Bayside v Lightle, 305 S C 214, 216, 407 S E 2d 637, 638 (1991), Dyer v Moss, 284 S C 208, 211, 325 S E 2d 69, 70 (Ct App 1985) The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder George v Fabri, 345 S C 440, 452, 548 S E 2d 868, 874 (2001)

LAW OF DEFAMATION

In order to prevail on his defamation claim, the Plaintiff must prove, *inter alia*, that (1) the Statement was actually made and was false, (2) was made to an unprivileged third party, (3) the publisher of the Statement was at fault, and (4) either actionability of the Statement irrespective of special harm or the existence of special harm Fleming v Rose, 350 S C 488, 567 S E 2d 857 (2002), Murray v Holnam, Inc, 344 S C 129, 542 S E 2d 743 (Ct App 2001)

A statement is defamatory *per se* when the defamatory meaning is obvious on its face and is defamatory *per quod* when only the knowledge of additional facts by the hearer can make the statement defamatory McBride v School District of Greenville County, 389 S C 546, 698 S E 2d 845 (Ct App 2010) If a statement is actionable *per se*, malice on the part of the defendant is presumed and general damages are presumed If a statement is not actionable *per se*, the plaintiff must prove malice and special damages Id at 852 To prove malice, the plaintiff must show the defendant acted with ill will, or

with reckless or wanton disregard of the plaintiff's rights Padgett v Sun News, 278 S C 26, 32, 292 S E 2d 30, 34 (1982)

In a defamation case, the determinations of whether a statement is actionable *per se*, whether malice is present, and whether a statement has a defamatory meaning are questions of law for the trial court White v Wilkerson, 328 S C 179, 493 S E 2d 345 (1997), Erickson v Jones Street Publishers, LLC, 368 S C 444, 629 S E 2d 653 (Ct App 2006), Boone v Sunbelt Newspapers, Inc., 347 S C 571, 556 S E 2d 732 (Ct App 2001) Failure to present evidence of even one element of defamation is enough to support the trial court granting summary judgment Williams v Lancaster County School Dist., 369 S C 293, 631 S E 2d 286 (Ct App 2006)

OVERVIEW

The Plaintiff has presented no evidence to support any of these elements of the cause of action The Statement that First Reliance would not make a loan as long as the Plaintiff was involved is true First Reliance would not and did not make such a loan There is no obvious defamatory meaning included within the Statement that would classify the Statment as "defamatory *per se*" and the Plaintiff has offered no evidence of any malice, either actual or implied Thus, no actionable defamatory statement was made regarding the Plaintiff by the Defendants

The Statement in this case was not defamatory *per se* as any alleged defamatory meaning is not present on the face of the Statment Thus, the Statment is not actionable *per se* and both common law malice and special damages must be shown In the present case, no defamatory meaning has been proven and no evidence of malice has been presented Further, the only damages complained of are the loss of employment under an

alleged employment contract with Pennell and he has offered no evidence of any special damages caused by the alleged defamatory Statment For these reasons, the Defendants are entitled to summary judgment

THE TRUE STATEMENT WAS NOT DEFAMATORY

The Statment here did not directly defame Fountain, the Statment was about what First Reliance would or would not do The Statment was not “Mark Fountain is a poor manager ” The Statment was not “Mark Fountain is not trustworthy ” The Statment was simply that the bank would not make the loan – and in the light most favorable to Fountain – that the bank would not make the loan with Fountain involved In fact, the hearer, Defendant Pennell, expressly denied any elaboration by the bank as to why First Reliance would not want Fountain involved Pennell Deposition, page 56 lines 13-18 Plaintiff has offered no evidence to the contrary

Of course, the Statment is undeniably true on its face – it is uncontroverted that First Reliance would not⁸ and did not⁹ make any loan to Pennell for the proposed refinance involving Fountain Because the Statment is true on its face, it is not actionable as defamation As noted by Professors Hubbard and Felix in their treatise on South Carolina torts

Defamatory matter which is true is not actionable Unless the First Amendment is involved, defendant has the affirmative burden of proving that the matter is substantially true If this affirmative defense is established, the defendant cannot be held liable for the defamatory effect of the publication

⁸ Deposition of Defendant Ewart, page 10 lines 18 22

⁹ Deposition of Defendant Pennell, page 55 lines 12 19

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F P Hubbard & R L Felix, The South Carolina Law of Torts (2d ed 1997) pages 478-479 See Wesav Financial Corp v Lingefelt, 316 S C 442, 450 S E 2d 580 (1994)

While Plaintiff testified that the Statment was, in his opinion, “inappropriate”, Fountain Deposition, page 48 lines 16-18 and page 74 lines 13-18, the Plaintiff’s opinion obviously does not render the Statment defamatory Moreover, the Plaintiff admitted the appropriateness of a lender considering the business knowledge and company management of a potential borrower Fountain Deposition, page 71 lines 11-18

In an effort to render the bank’s reasonable business decision defamatory, the Plaintiff speculates that the Statment has an implied defamatory meaning Even the plaintiff, however, failed to articulate that implied defamatory meaning Fountain Deposition, page 139 lines 8-16

It is true that an insinuation may be actionable as defamatory “if it is false and malicious and the meaning is plain ” Tyler v Macks Stores of South Carolina, Inc, 275 S C 456, 458, 272 S E 2d 633, 634 (1980) However, if the plaintiff can only speculate as to an implied defamatory meaning, then the meaning is not “plain” and malice cannot be presumed As suggested by Tyler, truth remains a defense to alleged defamatory insinuation

Although not articulated, the logical implication of the Statment is that First Reliance lacked sufficient faith in Fountain’s management skills to make a loan to a Fountain-related enterprise Even this implication is focused on First Reliance, not Fountain The implication is that First Reliance lacks faith in Fountain Again, this arguable implication is clearly true – First Reliance *did* lack faith in Fountain’s

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management skills ¹⁰ Not only is the arguable implication true, it is a constitutionally protected opinion in this context ¹¹

The Court would have to speculate further to try and reach some non-expressed defamatory meaning Again, if the Court must speculate as to some defamatory meaning, there is no plain defamatory meaning sufficient to survive summary judgment Even if the Court were to speculate as to other remote implications or component parts of the bank's implied lack of faith in Fountain (again, based only on the limited expression of unwillingness to lend), those more remote implications or components are also defensible as truth and non actionable opinion

For example, perhaps a remote component implication is that Fountain had a bad credit rating, Fountain confirmed this was true Fountain Deposition, page 68 line 14 – page 69 line 6 Perhaps a remote component implication is that Fountain had a history of adverse legal judgments, true -- Fountain described these in his deposition Fountain Deposition, page 61 line 8 – page 67 line 24 Perhaps a remote component implication is that Fountain had a history of involvement with a failed Bojangles franchise which had debt with First Reliance, true again -- Fountain described this in his deposition Fountain Deposition, page 20 line 25 – page 31 line 20 Perhaps a remote component implication is Fountain's lack of specialized experience in distressed business turn-arounds, Fountain did not profess any such specialized skills but rather testified that he had learned from his

¹⁰ Specifically, Defendant Ewart testified that First Reliance had concerns because of Plaintiff's prior involvement with and management of other businesses that had difficulty repaying their loans Ewart deposition, page 14 line 15 – page 19 line 24, page 24 line 2 – page 25 line 20 page 31 line 5 – page 32 line 4

¹¹ See, e.g. Woodward v. Weiss 932 F. Supp. 723, 725 (D.S.C. 1996) (medical consultant's report, opining that Dr. Woodward's treatment was excessive was an obvious opinion and therefore constitutionally protected), Potomac Valve & Fitting, Inc. v. Crawford Fitting Company 829 F.2d 1280 (4th Cir. 1987) (competitor's statement in customer newsletter that company's test was poorly designed to "snow the customer" was constitutionally protected opinion)

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mistakes Fountain Deposition, page 40 line 14 – page 41 line 14 The speculation could go on and on, but it need not

Fountain might suggest that the Statment's plain meaning is that Fountain is "dishonest" or "unfit" to work at a convenience store – a meaning that might be defamatory *per se* if it were the clear, exclusive implication of the Statment, *it is not*. Indeed, the benign pronouncement here, which does not directly comment upon Fountain, is very distinguishable from those South Carolina cases recognizing defamation *per se* – cases where the litigated statement *directly* commented upon a person's fitness for a trade or profession. See, e g , *Boling v Clinton Cotton Mills*, 163 S C 13, 161 S E 195 (1932)(statement that minister "would not keep his word" was actionable *per se*), *Moshtaghi v The Citadel*, 314 S C 316, 443 S E 2d 915 (Ct App 1994)(statement that professor was "dishonorable" and engaged in "illegal" conduct was actionable *per se*)

Summing it up, as for First Reliance and Ewart, although a statement was published to Pennell, the Statment was true, First Reliance would not extend credit under the proposed circumstances. The most direct implications of the Statment are also true and represent a constitutionally protected expression of the Defendants' opinion. The Court will not resort to tortured speculation to find some hidden defamatory meaning which is not plain in the Statment itself. Absent a defamatory *per se* meaning, Plaintiff's defamation claim also fails for lack of evidence supporting malice or special damages.

THE PUBLICATION OF THE STATEMENT WAS PRIVILEGED

"The second major element of defamation is an *unprivileged* publication to a third party. The publication of defamatory matter is its communication, intentionally or by a negligent act, to a third party – someone other than the person defamed." Fleming v

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Rose, 338 S C 524, 526 S E 2d 732 (Ct App 2000)(emphasis added) In this case, the Plaintiff was allegedly defamed by Defendant Ewart (and his employer First Reliance) when the Statment was made by Ewart to Defendant Pennell Even if the Statment were defamatory, which this Court has concluded it is not, this Court also concludes that this communication was privileged

As stated by United States District Judge Michael Duffy in Woodward v Weiss, 932 F Supp 723 (D S C 1996), “[t]he essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits ” Id (citing Manley v Manley, 291 S C 325, 353 S E 2d 312, 315 (S C Ct App 1987) (quoting Conwell v Spur Oil of Western South Carolina, 240 S C 170, 125 S E 2d 270, 274-75 (1962))

Our Supreme Court has approved of the following definition of qualified privilege “A communication on a subject in which the person communicating has an interest is qualifiedly privileged if made in good faith, limited in its scope to the requirements of such interest or duty, and made to a person having a corresponding interest or duty ” Cullum v Dun & Bradstreet, 228 S C 384, 90 S E 2d 370 (1955) See also Conwell v Spur Oil Co of Wester South Carolina, 240 S C 170, 125 S E 2d 270 (quoting from 33 Am Jur , Libel and Slander §126, page 124)(also citing Fitchette et al v Sumter Hardwood Co , 145 S C 53, 142 S E 828, McClain v Anderson Free Press,

232 S C 448, 102 S E 2d 750) , F P Hubbard & R L Felix, The South Carolina Law of Torts (2d ed 1997) page 508

In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court Boone v Sunbelt Newspapers, Inc , 347 S C 571, 556 S E 2d 732 (Ct App 2001) While the potential abuse of a privilege is often one for the jury, Id at 582, 556 S E 2d at 736, it is for the Court to determine in the absence of a factual controversy Woodward v South Carolina Farm Bureau Ins Co , 277 S C 29, 32-33, 282 S E 2d 599, 601 (1981)

In this case, the evidence is uncontroverted that Pennell and Fountain were working together to secure refinancing for the convenience store Complaint ¶¶ 6-8 Although the exact classification of the relationship between Pennell and Fountain is in dispute, there is no question that they were together exploring a shared business opportunity in this convenience store and the financing needed for that purpose ¹² Turning the focus on the relationship between the potential lender, First Reliance, and the potential borrower, Pennell, there is a shared interest in the potential loan transaction

The Statment was made to Pennell who had a common business interest with Fountain in securing the financing, again, they had made the exploratory bank trips together The Statment was not made to anyone else and thus, not made to anyone who did not share that common business association with Plaintiff Consistent with his

¹² Fountain Deposition, page 40 line 14 – page 42 line 7 (Mr Pennell presented me as a as a partner that I was coming in ”), page 92 lines 10 24 (‘ Mr Pennell was still interested about me going in the partnership with him on that store And then he wanted me to he told me about some of the financial problems that were they were having And as far as a loan loan wise about if I would go to some places with him to see if he could help help him secure a loan ’) Accord Pennell Deposition, page 28 line 7 – page 29 line 8 page 46 line 7 – page 47 line 23 (describing joint Pennell/Fountain trips to potential lenders First Citizens Bank in Dillon and First Reliance)

association, Pennell loyally did not share the information except with Plaintiff or as directed by Plaintiff

Not only was the Statment by Ewart was made in the course and scope of the Pennell-Fountain shared endeavor, it was also within the course and scope of the lender-borrower shared endeavor The Statement was made in good faith and solely for the purpose of communicating the concern with the loan, and was only made to the customer seeking the loan The Statment was not published to persons uninvolved in these endeavors nor was it published in such a way that it was heard by any person other than one who had some type of relationship with Plaintiff ¹³

Under these circumstances, where the Statment was cautiously made in connection with a common business interest, the Court concludes it was privileged as a matter of law Moreover, there has been no evidence presented to suggest any abuse of that privilege Such communication is in accord with South Carolina cases which have applied the qualified privilege to other financial matters such as credit agency reporting and other banking concerns See, e g., Cullum v Dun & Bradstreet, 228 S C 384, 90 S E 2d 370 (1955)(“the defense of qualified privilege is available to a mercantile agency in respect to reports on the credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter ”) Of course, the Statment here was even more benign than a direct report on the credit of Plaintiff

¹³ In contrast the Defendant in Abofreka v Alston Tobacco Co , 288 S C 122 341 S E 2d 622 (1986), posted an employee memorandum about the Plaintiff in a location visible to third-parties thereby losing the qualified privilege The Defendant in Conwell v Spur Oil of Western South Carolina, 240 S C 170 125 S E 2d 270 (1962) however was entitled to a qualified privilege for an erroneous letter about the Defendant s debts that was only sent within corporation

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NO ACTIONABLE PUBLICATION BY PENNELL

There is no evidence that Pennell published the Statment to a true third party or to anyone without being asked to do so by Fountain himself. Fountain cannot claim malice or misconduct on Pennell's part by repeating the Statment to Fountain's fiduciary agent at Fountain's specific request. See, e.g., Watson v Wannamaker, 216 S C 295, 57 S E 2d 477 (1950) (dictation to private secretary is not actionable publication), Rodgers v Wise, 193 S C 5, 7 S C 2d 517 (1940) (attorney dictation to secretary is not actionable publication)

NO INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Defendants also move for summary judgment on the intentional infliction of emotional distress cause of action because there are no genuine issues of material fact as to any of the elements of the cause of action and the Defendants are entitled to judgment as a matter of law. To recover for intentional infliction of emotional distress, a plaintiff must establish (1) an intentional or reckless infliction of emotional distress by the defendant, (2) conduct so extreme and outrageous as to exceed all possible bounds of decency, which must be regarded as atrocious and utterly intolerable in a civilized society, (3) the defendant's actions caused the plaintiff's emotional distress, and (4) the emotional distress was so severe that no reasonable man could be expected to endure it. State Farm Fire & Cas Co v Barrett, 340 S C 1, 530 S E 2d 132 (Ct App 2000). A plaintiff must establish a *prima facie* case as to each element of the cause of action to avoid summary judgment, a genuine issue of material fact as to one element is not adequate to avoid summary judgment. Hansson v Scalise Builders of S C, 374 S C 352, 650 S E 2d 68 (2007).

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The plaintiff has a heightened burden of proof for the second and fourth elements Ford v Hutson, 276 S C 157, 276 S E 2d 776 (1981) Thus, the trial court plays a “significant gatekeeping role” upon motions for summary judgment in these cases Hansson v Scalise Builders of SC, 374 S C 352, 358, 650 S E 2d 68, 72 (2007) Accordingly, the Circuit Court must first determine “whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons might differ is the question one for the jury ” Strickland v Madden, 323 S C 63, 68, 448 S E 2d 581, 584 (Ct App 1994)

In AJG Holdings, LLC, et al v Dunn, 2011 WL 794855 (Op No 4779)(Ct App 2011), the Court of Appeals affirmed the Circuit Court’s conclusion that Plaintiff had failed to establish a *prima facie* case that his emotional distress was so “severe such that no reasonable man could be expected to endure it ” The Court found that Plaintiff’s personal testimonial claims of shot nerves, lost weight, digestive problems, and high blood pressure were inadequate to survive summary judgment

Reviewing Hansson v Scalise Builders of SC, 374 S C 352, 650 S E 2d 68 (2007), the AJG Holdings Court noted that the Supreme Court “found that the Plaintiff’s testimony he lost sleep and developed a habit of grinding his teeth was not sufficient to survive summary judgment To permit a Plaintiff to legitimately state a cause of action by simply alleging, ‘I suffered emotional distress’ would be irreconcilable with this Court’s development of the law in this area In the words of Justice Littlejohn, the Court must look for something ‘more’ -- in the form of third party witness testimony and other corroborating evidence -- in order to make a *prima facie* showing of ‘severe’ emotional distress ” (italics added)

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In the present case, the Ewart Statment is not outrageous, extreme, or atrocious
Loan rejections are an everyday occurrence in our business world Plaintiff was an
experienced businessman Any suggestion that Ewart's Statment is utterly intolerable in
a civilized society is not consistent with reality Indeed, the Plaintiff has never sought
medical treatment for the emotional distress alleged in the Complaint and there is no third
party support for this claimed condition Fountain Deposition, page 177, line 14 -- page
178, line 5 (" I never discussed this with Dr Steadman ")

The facts are uncontroverted A bank officer simply informed a customer of a
concern with a loan proposal With a shared interest in the possibility of such lending,
the bank shared this concern in a limited, professional manner with the potential borrower
who was represented to be sharing in the Plaintiff's proposed endeavor The loan
concern expressed was the true concern This was simply good banking practice

The Plaintiff cannot show any genuine issue of fact supporting a finding of
outrageous behavior The Defendants are entitled to summary judgment as to the
Plaintiff's intentional infliction of emotional distress claims

CONCLUSION

Not every disappointment in life is an actionable tort Plaintiff's complaint is
based upon a the true, private expression of a bank's concerns with a proposed loan to the
Plaintiff's business venture This private expression was made once in a private meeting
with the Plaintiff's business associate, who consistent with his association, loyally did not
share the information except with Plaintiff or as directed by Plaintiff

The Statment did not directly comment upon the Plaintiff, his character, his
history, or his skills While negative inferences of opinion can be drawn from the bank's

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stated concerns, such inferences do not render the expressed Statment actionable It is uncontroverted that the expressed Statment of concern was a true statement of concern Moreover, the possible adverse inferences from the Statment are also true statements of opinion about matters accepted by Plaintiff as relevant to a lender

The initial recitation of the Statment occurred in privileged circumstances with no evidence to support any claim to abuse of privilege Finally, the only other pre-litigation recitation of the alleged defamatory Statment was made at the Plaintiff's direction to his attorney who has a fiduciary duty to plaintiff

Under these circumstances, the Statment is not defamatory (both because it is true and because it has no plain defamatory meaning) and was reasonably made within the context of the business privilege Moreover, Pennell's only recitation of the Statment to anyone other than Plaintiff is not actionable as it was made at Plaintiff's direction Furthermore, there is no evidence to support consideration of malice or special damages

Under these circumstances, the Statment is not outrageous or beyond the bounds of decency Moreover, Plaintiff has failed to show that the emotional distress allegedly caused by the private Statment is so extreme that it is beyond what any reasonable person could endure Accordingly, this Court finds that the Plaintiff has failed, as a matter of law, to establish any claim for intentional infliction of emotional distress

WHEREFORE, IT IS ORDERED that

- 1 The Defendants', First Reliance Bank and Thomas C Ewart, Motions for Summary Judgment as to the First and Second Causes of Action is GRANTED, and

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2 The Defendant's, Ernest Pennell, Motion for Summary Judgment as to the
First and Second Causes of Action is GRANTED

AND IT IS SO ORDERED



Honorable D. Craig Brown
Circuit Court Judge

April 8, 2011
Florence, South Carolina

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PCB

FILED

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Mark Fountain,

Plaintiff,

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First Reliance Bank, Thomas C Ewart, and
Ernest Pennell,

Defendants

2011 JUN -9 PM 3 42
FLORENCE COUNTY, SC

THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

C/A # 2010-CP-21-131

**ORDER DENYING
MOTION FOR RECONSIDERATION**

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Cynthia R. Spain
CLERK OF COURT C P & G S
FLORENCE COUNTY, S C

Plaintiff has asked this court to reconsider granting the bank defendants (First Reliance & Ewart) summary judgment on the claim of defamation. In his motion, Plaintiff suggests that even a true statement may contain defamatory innuendo and therefore be actionable, and specifically suggest that the true statement made here does contain defamatory innuendo. Plaintiff also suggest that any qualified privilege may have been abused.

In support of his argument that the Court has misconstrued or misapplied the applicable law, the Plaintiff focuses on two decisions: Adams v. Daily Telegraph Printing Co., 292, S C 273, 356 S E 2d 118 (Ct App 1986) and Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334, S C 469, 514 S E 2d 126 (1999). Further considering these cases and the points raised by Plaintiff, the Court now concludes that these points were correctly addressed in the Court's prior Order.

While the Adams case was not addressed by this Court's previous Order, the possibility it represents – the possibility of defamation by implied meaning or innuendo – was considered and ruled out. Certainly, a true statement might be made in such a way that a defamatory meaning is possible – such as in Adams – but the circumstances of Adams are very different from those at bar.

DCB
6-10-11

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Adams involved two public television broadcasts – not a *private* business discussion. Adams also involved an implication of criminal conduct, historically recognized as actionable *per se*. This Court dealt with the Plaintiff's present suggestion of defamation *per se* on page 10 of its' previous Order where it distinguished those cases involving statements impugning that a Plaintiff is morally or ethically "unfit" for his or her profession. See, e.g., Boling v. Clinton Cotton Mills, 163 S C 13, 161 S E 195 (1932)(statement that minister "would not keep his word" was actionable *per se*), Moshtaghi v. The Citadel, 314 S C 316, 443 S E 2d 915 (Ct App 1994)(statement that professor was "dishonorable" and engaged in "illegal" conduct was actionable *per se*). Additionally, as the Defendants accurately point out in their response, managing a convenience store is not a profession with an ethical code, state approved licensure, or self-regulation – like the lawyer and teacher hypotheticals urged in Plaintiff's motion for reconsideration (or like the minister and professor in the cases above).

Another important distinction is that the remote defamatory implication in Adams was expressly invited by the publication ("the public is free to draw their own conclusion"). There was no such express invitation to imply immoral or illegal conduct made in the private conversation here. The uninvited implication here, if any, is that the bank lacked financial confidence in a Fountain-related business – not that Fountain had committed a crime and not that Fountain lacked moral fitness. And as this Court has noted, the implication *was also true* -- unlike Adams where there was no certainty as to the truth of the invited criminal implication.

Because the Court still concludes that the statement here, and any implication, is not defamatory as a matter of law, it need not reach the issue of a possible privilege attaching to such statement. Nevertheless, the Court addressed the issue in its initial Order and will address them again for clarity.

DCB
p. 274 2

The Court did not address Swinton Creek in its previous Order because it is deceptively similar to the case at hand, but not controlling because of the more subtle differences. The Court sought to avoid confusion. Swinton Creek did also involve alleged defamation by a lender caused by the lender's explanation accompanying a loan denial (statement that Plaintiff-seller was in "financial distress"). Thus, the Plaintiff here urges that it is controlling.

In Swinton Creek, however, the potentially defamatory explanation was not given to the party in "financial distress" or to that party's partner or affiliate. Thus, the alleged defamation was of an entity *outside of* the bank-borrower relationship. While the explanation was given to the prospective borrower as here, the explanation was not to a partner or affiliate of the entity allegedly defamed. Here, the explanation about the potential borrower's management was given to the potential borrower – and to a person openly represented as in privity with the proposed manager. Here, it is the borrower or the borrower's affiliate that is allegedly defamed – not some outside entity.

Plaintiff here has no evidence that the banking Defendants acted in bad faith or with malice when speaking privately with the person who shared a common interest with Plaintiff in the possible financing. A number of factors including lending history supported the bank's opinion of inadequate confidence in Plaintiff's management. See Order pages 9-10. This was not an opinion reached recklessly. And again, there is also no evidence that the bank communicated to anyone other than this person with Plaintiff's shared common interest.

Also unlike Swinton Creek, where a factual controversy *did exist* about whether the lender ever had a basis for his "financial duress" comment, there is no factual controversy here about Fountain's credit rating, his credit history, and his business management experience – all admitted by him in deposition and noted by this Court in its' previous Order. Order pages 9-10.

Deb P. 379
3

Furthermore, Fountain admitted the appropriateness of considering such factors in making lending determinations (see Order page 8 citing Deposition at page 71) – all while still asserting the bank's limited private comments to his business confidant were "inappropriate" Fountain Deposition, page 48 lines 16-18 and page 74 lines 13-18 Thus, there are no controverted facts to submit a question of privilege abuse to the jury As the Defendants note, the only controversy here is Fountain's opinion that what is appropriate for most lending determinations is not appropriate for him

Accordingly, the Plaintiff's Motion for Reconsideration is denied

AND IT IS SO ORDERED

June 9, 2011
Florence, South Carolina


Honorable D. Craig Brown
Circuit Court Judge

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C. J. Brown
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC
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FLORENCE COUNTY, SC

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STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

C/A # 2010-CP-21- 131

Mark Fountain,

Plaintiff,

Vs

First Reliance Bank, Thomas C Ewart,
and Ernest Pennell,

Defendants

COMPLAINT
(Jury Trial Requested)

The Plaintiff, complaining of the Defendants herein, alleges

- 1 That the Plaintiff is a citizen and resident of Florence County, South Carolina
- 2 That the Defendant, First Reliance Bank, is a South Carolina corporation with its principle place of business at 2170 West Palmetto Street in Florence, South Carolina
- 3 That the Defendant, Thomas C Ewart, is a resident and citizen of Florence County, South Carolina, and that at all times hereinafter mentioned was acting in his individual capacity or as the agent, servant and employee of the Defendant, First Reliance Bank
- 4 That the Defendant, Ernest Pennell, is a citizen and resident of Florence County, South Carolina

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Clerk of Court
FLORENCE COUNTY, SC

- 5 On December 22, 2008, the Plaintiff and the Defendant, Ernest Pennell, entered into a written employment agreement, a copy of which is attached as Exhibit "A" and incorporated herein by reference
- 6 Subsequent to December 22, 2008, the Defendant, Pennell, instructed the Plaintiff to contact various financial institutions in order to obtain information regarding the refinancing of a loan obligation with Carolina First Bank which was secured by a mortgage on a restaurant, gas station and car wash facility located at 247 North Liby Street, in Florence, South Carolina
- 7 That in accordance with the Defendant, Pennell's, instructions the Plaintiff along with the Defendant, Pennell, contacted Rick Saunders, an officer at First Reliance Bank, and discussed with him the prospects of obtaining refinancing of the existing Carolina First note and mortgage, upon meeting with Mr Saunders the Plaintiff and Defendant, Pennell, were referred to another bank employee, Dwayne Brockington, with whom the Plaintiff and the Defendant, Pennell, met and engaged in further discussions about the refinancing of the existing note and mortgage
- 8 During the aforementioned meeting with Dwayne Brockington, Mr Brockington advised that he was going to contact another bank employee, Thomas C Ewart, to further discuss the refinancing opportunities for the Defendant, Pennell

9 Shortly thereafter, the Defendant, Pennell, on information and belief, met with the Defendant, Ewart, that during this meeting the Plaintiff is informed and believes that the Defendant, Ewart, stated to Mr Pennell “that as long as the Plaintiff was involved in the transaction that First Reliance Bank would never make a loan to the Defendant, Pennell, in order to refinance the Carolina First note and mortgage” Thereafter, the Defendant, Pennell, contacted the Plaintiff and during the telephone conversation advised the Plaintiff to “tear up” the employment agreement because Tom Ewart had said some disturbing things about him

10 Thereafter, the Plaintiff met with the Defendant, Pennell, who then repeated the comments made to him by the Defendant, Ewart

**FOR A FIRST CAUSE OF ACTION
(Defamation As To All Defendants)**

11 That the Plaintiff re-alleges each and every material allegation set forth above as are fully set forth herein

12 That the Defendants published numerous false and defamatory statements about the Plaintiff That the Defendants’ statements were false, and Defendants made such oral statements or assisted in making or publishing such statements, knowing them to be false, with ill will, or with reckless disregard for the truth or falsity of such statements for the purpose of causing damage to Plaintiff’s business and reputation

13 Plaintiff is not a public figure and is not involved in any public controversy in
connection with his respective profession, trade, or business Defendants'
defamatory statements do not involve a matter of public concern

14 That the Defendants' defamatory statements constitute slander, *per se*

15 As a direct and proximate result of Defendants' slanderous statements,
Plaintiff has suffered damages in an amount to be determined by a jury, and is
entitled to recover such damages and any incidental, consequential, and special
damages incurred, as well as punitive damages

**FOR A SECOND CAUSE OF ACTION
(Intentional Infliction Of Emotional Distress As To All Defendants)**

16 Plaintiff re-alleges and incorporates by reference the allegations of the
preceding paragraphs

17 Defendants' statements impugned the integrity and character of the Plaintiff
and Defendants knowingly published, and continue to publish, these and other
baseless, false, and disparaging statements without making any reasonable
attempt to determine the truth or falsity of such statements prior to making
them

18 The Plaintiff has suffered severe emotional distress including, but not limited
to, depression, loss of sleep, anxiety, mental anguish, as well as physical
manifestations relating to the severe emotional distress

19 Defendants intentionally or recklessly inflicted the severe emotional distress
suffered by the Plaintiff, or knew that distress would probably result from their
conduct

20 The Defendants' conduct was and continues to be extreme and outrageous to
the point of exceeding all possible bounds of decency and was and is
furthermore atrocious and utterly intolerable in a civilized community

21 The distress suffered by the Plaintiff as a result of the Defendants' actions is
severe to the point that no reasonable person could be expected to endure it

22 As a result of the Defendants' improper conduct, the Plaintiff has suffered
damages in an amount to be determined by a jury and is entitled to recover
such damages as well as punitive damages

**FOR A THIRD CAUSE OF ACTION
(Breach Of Contract As To Defendant Pennell)**

23 That the Plaintiff re-alleges and incorporates by reference the allegations of the
proceeding
paragraphs

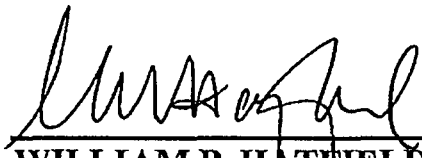
24 That the Defendant, Pennell, did breach the employment agreement dated
December 22, 2008, and as a direct and proximate result of said breach the
Plaintiff has suffered actual damages to include any incidental, consequential
and special damages

WHEREFORE, Plaintiff respectfully prays that the Court grant judgment against the Defendants, jointly and severally, as follows

- (a) For a trial by jury on all issues allowed by law,
- (b) For an injunction order against each Defendant and each Defendants' agents, principals, employees, representatives, or any other persons hired or retained by Defendants to refrain from making any further disparaging, false, or defamatory comments referring generally or collectively to the Plaintiff or that in any way concerns the Plaintiff,
- (c) For all actual, compensatory, consequential, incidental, and special damages incurred,
- (d) For punitive damages,
- (e) For the costs and disbursements of this action,
- (f) And for such other and further relief as the Court deems just and proper

Florence, SC

January 14, 2010


WILLIAM P. HATFIELD,
Attorney for Plaintiff
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THE HYMAN LAW FIRM, LLP
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503-1770
(843) 662-5000
wphatfield@hymanlawfirm.com

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT (the "Agreement"), executed December 22, 2008, to be effective dated December 22, 2008 (the "Effective Date"), is between ERNEST PENELL and MARK FOUNTAIN (the "Operator")

RECITALS

A Ernest Pennell desires to employ the Operator in the capacities and on the terms and conditions set out below, and

B Mark Fountain, the Operator, desires to accept such employment with Ernest Penell

NOW, THEREFORE, Ernest Penell and Mark Fountain, in consideration of the respective covenants set out below, hereby agree as follows

1 EMPLOYMENT.

(a) POSITIONS During the Term (defined below), Mark Fountain shall be employed as the Operator of the business owned by Ernest Penell. This business is located at 247 North Irby Street, Florence, South Carolina

(b) RESPONSIBILITIES The Operator's principal employment duties and responsibilities shall be those duties and responsibilities customary for the position of Convenience Store Manager including, but not limited to, hiring and firing of employees, ordering inventory, paying vendors, employees' payroll, and all other day to day operations of the Restaurant, Gas Station, and Car Wash.

2. TERM This Agreement shall become effective as of December 22, 2008 (the "Effective Date") and shall continue for a Term ending on December 22, 2010

3. SALARY The Company shall pay the Executive a Base Salary which shall be payable in periodic installments, less statutory deductions and withholdings, according to the Business' normal payroll practices Commencing as of the Effective Date, the Executive's annual base salary shall be SIXTY THREE THOUSAND DOLLARS (\$63,000.00) Ernest Pennell agrees to pay Operator his salary for the term of this Agreement (a period of 2 years from the date of execution of this agreement) If Operator becomes physically or mentally incapacitated during the term of this Agreement, Ernest Pennell agrees to pay Operator's salary to Mark Fountain or if he is unable to receive such funds, to his duly appointed legal representative If Operator dies during the term of this agreement, Ernest Pennell agrees to pay Operator's salary, for the term of this Agreement, to Operator's duly appointed legal representative

4 PROFIT SHARING Ernest Pennell agrees to pay Operator a monthly bonus during the term of this Agreement Said bonus shall be for THIRTY PERCENT (30%) of the business' net profit each month Ernest Pennell agrees to allow Operator all access to any and all financial records for the business located at 247 North Irby Street, Florence, South Carolina

5. BENEFITS Ernest Pennell agrees to provide full medical, dental, and vision insurance to the Operator and his family (Susanne Fountain, Tyndall Fountain, Taylor Rivers, and William Rivers) during the term of this Agreement Payment for such coverage shall be the sole responsibility of Ernest Pennell

6 OWNERSHIP INTEREST Ernest Pennell agrees to grant Operator a THIRTY PERCENT (30%) ownership interest in the land located at 247 North Irby Street, Florence, South Carolina, such ownership rights shall be granted upon

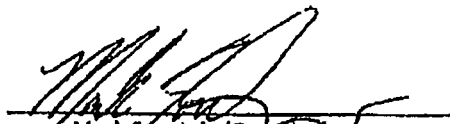
execution of this Agreement and Ernest Pennell agrees to make good faith efforts to execute all necessary legal documents, including, but not limited to placing Operator's name on the deed

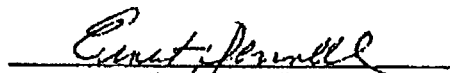
This ownership interest includes any and all ownership interest Ernest Pennell presently has at the date of the execution of this Agreement or which he may acquire during the term of this Agreement. However, any and all debts, liens, taxes, or assignments that have attached to the business located at 247 North Irby Street, Florence, South Carolina before the execution of this Agreement shall be the sole responsibility of Ernest Pennell. Operator assumes no responsibility for any debts incurred by the business located at 247 North Irby Street, Florence, South Carolina before the execution of this agreement.

7. ASSIGNS If Ernest Pennell becomes incapacitated (either by death or physical / mental impairment) during the term of this Agreement, this Agreement shall be binding upon Ernest Pennell's successors and inure to the benefit of the Operator's personal or legal representatives, executors, administrators, heirs, distributees, devisees and legatees. Any and all ownership interest which is granted to the Operator by the terms of this Agreement shall inure to the benefit of the Operator's personal or legal representatives, executors, administrators, heirs, distributees, devisees and legatees.

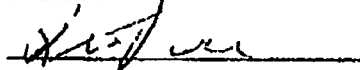
8. ENTIRE AGREEMENT This Agreement contains the entire understanding of the parties, supersedes all prior agreements and understandings, whether written or oral, relating to the subject matter hereof and may not be amended except by a written instrument hereafter signed by Ernest Pennell and the Operator.

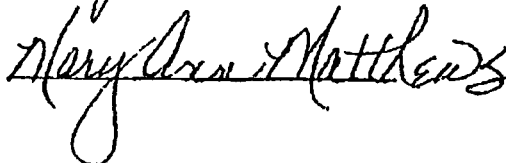
IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties hereto have caused this Agreement to be duly executed under seal as of the date first above written.


Mark Fountain (Operator)


Ernest Pennell

Witnesses





December 2, 2008

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Mark Fountain,

Plaintiff,

v

First Reliance Bank, Thomas C Ewart, and
Ernest Pennell,

Defendants

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2010-CP-21-131

ANSWER

First Reliance Bank ("First Reliance") hereby answers the Plaintiff's complaint as follows

FOR A FIRST DEFENSE

- 1 Each and every allegation not hereinafter specifically admitted is denied
- 2 First Reliance admits the allegations contained in paragraphs 1, 2, 3, and 4
- 3 First Reliance lacks sufficient information upon which to form a belief as to the allegations contained in paragraphs 5 and 6 and therefore denies same
- 4 Answering the allegations contained in paragraph 7, First Reliance admits that the Defendant Pennell contacted Rick Saunders and Dwayne Brockington to discuss the refinancing of the Carolina First Bank loan obligation All remaining allegations are denied
- 5 Answering the allegations contained in paragraph 8, First Reliance admits that Mr Brockington advised Defendant Pennell that Thomas C Ewart would be involved with any loan application for this type of loan All remaining allegations are denied

6 Answering the allegations contained in paragraph 9, First Reliance admits that Ernest Pennell met with Tom Ewart and others to discuss a loan application. All remaining allegations are denied.

7 First Reliance denies the allegations contained in paragraph 10.

8 Answering the reallegations contained in paragraph 11, First Reliance reasserts each and every answer previously provided herein.

9 First Reliance denies the allegations contained in paragraphs 12, 13, 14, and 15.

10 Answering the reallegations contained in paragraph 16, First Reliance reasserts each and every answer previously provided herein.

11 First Reliance denies the allegations contained in paragraphs 17, 18, 19, 20, 21, and 22.

12 Answering the reallegations contained in paragraph 23, First Reliance reasserts each and every answer previously provided herein.

13 First Reliance denies the allegations contained in paragraph 24.

FOR A SECOND DEFENSE

14 The Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against First Reliance and should be dismissed with prejudice.

FOR A THIRD DEFENSE

15 First Reliance affirmatively sets forth the defenses of failure to publish, opinion, truth, privilege, and fair comment privilege, and business interest privilege.

FOR A FOURTH DEFENSE

16 First Reliance pleads as an affirmative defense to the intentional infliction of emotional distress cause of action that it acted in a good faith and in a reasonable manner in its

discussions with Ernest Pennell First Reliance also pleads privilege as an affirmative defense to this cause of action

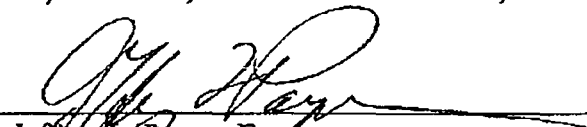
WHEREFORE, the Defendant First Reliance Bank having answered the Plaintiff's complaint, respectfully requests that the same be dismissed with prejudice, and that it be awarded its costs and disbursements in defending this frivolous action

Florence, South Carolina

February 9, 2010

TURNER, PADGET, GRAHAM & LANEY, P A

By


Jeffrey L. Payne, Esquire

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ATTORNEYS FOR THE DEFENDANT
FIRST RELIANCE BANK

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Mark Fountain,

Plaintiff,

v

First Reliance Bank, Thomas C Ewart, and
Ernest Pennell,

Defendants

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2010-CP-21-131

ANSWER

Thomas C Ewart ("Ewart") hereby answers the Plaintiff's complaint as follows

FOR A FIRST DEFENSE

- 1 Each and every allegation not hereinafter specifically admitted is denied
- 2 Ewart admits the allegations contained in paragraphs 1, 2, 3, and 4
- 3 Ewart lacks sufficient information upon which to form a belief as to the allegations
contained in paragraphs 5 and 6 and therefore denies same
- 4 Answering the allegations contained in paragraph 7, Ewart admits that the Defendant
Pennell contacted Rick Saunders and Dwayne Brockington to discuss the refinancing of
the Carolina First Bank loan obligation All remaining allegations are denied
- 5 Answering the allegations contained in paragraph 8, Ewart admits that Mr Brockington
advised Defendant Pennell that he would be involved with any loan application for this
type of loan All remaining allegations are denied
- 6 Answering the allegations contained in paragraph 9, Ewart admits that Ernest Pennell met
with himself and others to discuss a loan application All remaining allegations are
denied
- 7 Ewart denies the allegations contained in paragraph 10

8 Answering the reallegations contained in paragraph 11, Ewart reasserts each and every
answer previously provided herein

9 Ewart denies the allegations contained in paragraphs 12, 13, 14, and 15

10 Answering the reallegations contained in paragraph 16, Ewart reasserts each and every
answer previously provided herein

11 Ewart denies the allegations contained in paragraphs 17, 18, 19, 20, 21, and 22

12 Answering the reallegations contained in paragraph 23, Ewart reasserts each and every
answer previously provided herein

13 Ewart denies the allegations contained in paragraph 24

FOR A SECOND DEFENSE

14 The Plaintiff's complaint fails to state facts sufficient to constitute a cause of action
against Ewart and should be dismissed with prejudice

FOR A THIRD DEFENSE

15 Ewart affirmatively sets forth the defenses of failure to publish, opinion, truth, privilege,
and fair comment privilege, and business interest privilege

FOR A FOURTH DEFENSE

16 Ewart pleads as an affirmative defense to the intentional infliction of emotional distress
cause of action that he acted in a good faith and in a reasonable manner in his discussions
with Ernest Pennell. Ewart also pleads privilege as an affirmative defense to this cause of
action

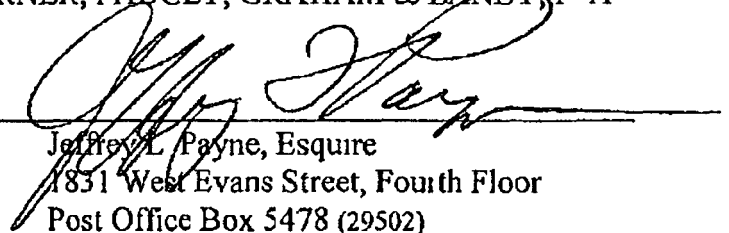
WHEREFORE, the Defendant Thomas C. Ewart having answered the Plaintiff's
complaint, respectfully requests that the same be dismissed with prejudice, and that he be
awarded his costs and disbursements in defending this frivolous action

Florence, South Carolina

February 10, 2010

TURNER, PADGET, GRAHAM & LANEY, P A

By



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ATTORNEYS FOR THE DEFENDANT
THOMAS C EWART

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Mark Fountam,

Plaintiff,

Vs

First Reliance Bank, Thomas C Ewart,
and Ernest Pennell,

Defendants.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2010-CP-21-131

ANSWER AND COUNTERCLAIMS

The Defendant, Ernest Pennell, responding to the Complaint of the Plaintiff would respectfully allege as follows

FOR A FIRST DEFENSE
(By Way of Affirmative Defenses)

- 1 The Defendant affirmatively set forth the defenses of accord and satisfaction, payment, contributory negligence, comparative negligence, fraud, injury by fellow servant, unconscionability, mutual mistake, failure to publish, truth, privilege, unclean hands, estoppel, consent, opinion, privilege as a result of common business interest, and any other matter constituting an avoidance or affirmative defense that may develop as discovery progresses

FOR A SECOND DEFENSE
(By Way of Answer)

- 2 Each and every relevant allegation of Plaintiff's complaint that is not hereinafter specifically admitted, modified, or explained is denied and strict proof is demanded thereof
- 3 The Defendant admits the allegations contained in paragraphs 1, 2, 3, and 4

- 4 In regard to the allegations contained in paragraph 5, the Defendant would admit that the attached agreement was executed by Defendant Pennell, but Defendant Pennell did not have the opportunity to review the contract as it was prepared by the Plaintiff and presented to him for immediate signature during the business time of his work week. The intent of the same is more fully discussed below.
- 5 The Defendant denies the allegations contained in paragraphs 6, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, and the allegations contained in the WHEREFORE clause.
- 6 In regard to the allegations contained in paragraph 7, 8, and 9, the Defendant would admit that the Plaintiff sought to obtain financing for the purchase and operation of the convenience store, that the Plaintiff contacted First Reliance Bank for purposes of obtaining financing, and further, that First Reliance refused to finance the loan request. The Defendant denies the remaining allegations of those paragraphs and would affirmatively assert that the only statement the Defendant recalls First Reliance Bank making was that they could not fund the agreement.
- 7 Upon information and belief, no response is required in regard to the allegations contained in paragraph 11, 16, and 23, but in the event a response is required, the allegations are denied.

FOR A THIRD DEFENSE
(By Way of First Counterclaim)
(Breach of Fiduciary Duty)

- 8 The Defendant realleges each and every relevant allegation set forth above as if fully repeated herein verbatim.

9 The Defendant and his partner had heretofore owned and operated a convenience store at
the corner of Libby Street and Darlington Street. The Defendant and his partner decided
because the store was not making sufficient profits, they would sell the property.
10 Therefore, the Defendant contacted the Plaintiff to list the property for sale. In
connection with that listing, the Defendant communicated private, confidential,
proprietary, and other information placing full trust and confidence in the Plaintiff to use
his best efforts to sale, market, lease, or otherwise, dispose of the property.
11 After months of having the property listed for sale, the Defendant and his partner
ultimately decided to wind the business down as they were not able to maintain their
mortgage payments and were facing foreclosure.
12 The Plaintiff, upon discovering this information, approached the Defendant and advised
that he could turn the success of operation around if he had a sufficient loan and monies.
13 The Plaintiff and Defendant had a gentlemen's agreement to enter into a partnership
regarding the operation of this store. Although, the Defendant wanted the Plaintiff to also
have money invested in this store, the Plaintiff represented he had poor credit and would
not be able to assist in getting a loan.
14 That notwithstanding, the Defendant still entertained the option of entering into a
partnership with the Plaintiff for purposes of operating in the store. The Plaintiff began
searching for financing and was denied at First Citizens. Thereafter, the Plaintiff tried to
obtain a loan at First Reliance Bank and was also denied.
15 Since the parties were not able to obtain a loan for their partnership venture, the
Defendant did not pursue any further interest of have any other business with the

Plaintiff However, the Defendant did, in fact, lose his property and store in connection with the foreclosure brought by the lender who had the security interest in the property

16 As the Defendant's real estate agent, the Plaintiff had a duty to act in good faith with undivided loyalty to the Defendant and exercise reasonable care and judgment in the handling of the Defendant's affairs

17 Upon information and belief, the Plaintiff breached its fiduciary duty to the Defendant as a result of his attempt to self-deal and failure to aggressively market and sale the property

18 The Defendant is informed and believes that the Plaintiff did not use his best efforts to sale and market the store or exercise good faith and fair dealing in his negotiation with Defendant to become partners

19 By virtue of the Plaintiffs' breach of fiduciary duty, the Defendant has been actually damaged

20 The Defendant is informed and believes the Plaintiff's conduct was willful, intentional, with malice towards the Defendant, and with a reckless disregard for the rights of the Defendant, concomitantly, the Defendant requests an award of punitive damages in an amount to be determined by the jury

FOR A FOURTH DEFENSE

(By Way of Second Counterclaim)

(Breach of Covenant of Good Faith and Fair Dealing)

21 The Defendant realleges each and every relevant allegation set forth above as if fully repeated herein verbatim

22 Based upon the contract and/or contractual relationships established herein, there existed an implied covenant of good faith and fair dealing among the parties

23 Based upon the conduct specified above, the Defendant is informed and believes that the
Plaintiff has breached the covenant of good faith and fair dealing

24 Based upon the Plaintiff's breach, the Defendant has been actually damaged

FOR A FIFTH DEFENSE
(By Way of Third Counterclaim)
(Fraud)

25 The Defendant realleges each and every relevant allegation set forth above as if fully
repeated herein verbatim

26 The Plaintiff made multiple representations to the Defendant that he would use his best
efforts to market and sale the property, that he would not self-deal, that he would
communicate truthful and accurate information to the Defendant, that he would deal
honestly and fairly with the Defendant in all of his affairs and activities, that he would
not seek to take advantage of the Defendant, that he would not cause the Defendant any
personal or financial harm as a result of their endeavors, that he was acting in good faith,
that their partnership was contingent upon obtaining financing, and that if the parties
could not obtain financing, they would not pursue that endeavor

27 The Plaintiff's representations were false

28 The representations were material to the Defendant's actions in this matter

29 The Plaintiff knew or should have known its representations were false and made with
reckless disregard of its truth or falsity

30 The Plaintiff intended for the Defendant to rely upon its representations

31 The Defendant had a right to rely upon the representations, and in fact, did rely upon said
representations to his detriment

32 The Defendant did not know said representations were false

33 As a direct and proximate result of the Plaintiff's fraudulent representations, the
Defendant has been actually damaged

34 The Defendant is informed and believes the Plaintiff's conduct was willful, intentional,
with malice towards the Defendant, and with a reckless disregard for the rights of the
Defendant, concomitantly, the Defendant seeks an award of punitive damages in an
amount to be determined by the jury

FOR A SIXTH DEFENSE
(Constructive Fraud)

35 The Defendant realleges each and every relevant allegation set forth above as if fully
repeated herein verbatim

36 The Plaintiff made multiple representations to the Defendant that he would use his best
efforts to market and sale the property, that he would not self-deal, that he would
communicate truthful and accurate information to the Defendant, that he would deal
honestly and fairly with the Defendant in all of his affairs and activities, that he would
not seek to take advantage of the Defendant, that he would not cause the Defendant any
personal or financial harm as a result of their endeavors, that he was acting in good faith,
that their partnership was contingent upon obtaining financing, and that if the parties
could not obtain financing, they would not pursue that endeavor

37 The Plaintiff's representations were false

38 The representations were material to the Defendant's actions in this matter

39 The Plaintiff knew or should have known its representations were false and made with
reckless disregard of its truth or falsity

40 The Defendant had a right to rely upon the representations, and in fact, did rely upon said
representations to his detriment

41 As a direct and proximate result of the Plaintiff's fraudulent representations, the
Defendant has been actually damaged

42 The Defendant is informed and believes the Plaintiff's conduct was willful, intentional,
with malice towards the Defendant, and with a reckless disregard for the rights of the
Defendant, concomitantly, the Defendant seeks an award of punitive damages in an
amount to be determined by the jury

FOR A SEVENTH DEFENSE
(Negligent Misrepresentation)

43 The Defendant realleges each and every relevant allegation set forth above as if fully
repeated herein verbatim

44 The Plaintiff made multiple representations to the Defendant that he would use his best
efforts to market and sale the property, that he would not self-deal, that he would
communicate truthful and accurate information to the Defendant, that he would deal
honestly and fairly with the Defendant in all of his affairs and activities, that he would
not seek to take advantage of the Defendant, that he would not cause the Defendant any
personal or financial harm as a result of their endeavors, that he was acting in good faith,
that their partnership was contingent upon obtaining financing, and that if the parties
could not obtain financing, they would not pursue that endeavor

45 The Plaintiff had a pecuniary interest in making these statements

46 By virtue of the special relationship between the parties and because of the trust and
confidence placed in the Plaintiff and the domination and influence by the Plaintiff, the
Plaintiff owed a duty of care to see that he communicated truthful information to the
Defendant

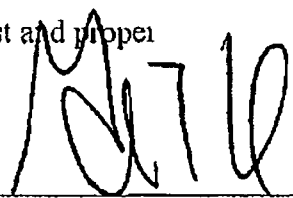
47 The Plaintiff breached that duty by failing to exercise due care

48 The Defendant justifiably relied on the representations
49 By virtue of the negligent misrepresentations by the Plaintiff, the Defendant has been
actually damaged
50 The Defendant is informed and believes the Plaintiff's representations were willful,
intentional, with malice towards the Defendant, and with a reckless disregard for the
rights of the Defendant, concomitantly, the Defendant seeks an award of punitive
damages in an amount to be determined by the jury

WHEREFORE, the Defendant respectfully requests the Court to deny the relief
requested by the Plaintiff, and further, award it damages consistent with his prayers for relief and
for such other and further relief as the Court deems just and proper

Florence, South Carolina

February 4, 2010



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STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Mark Fountain,

Plaintiff,

v

First Reliance Bank, Thomas C Ewart and
Ernest Pennell,

Defendants

IN THE COURT OF COMMON PLEAS
C/A # 2010-CP-21-131

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

TO WILLIAM P HATFIELD, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that ten days after service of this notice upon you or as soon thereafter as counsel may be heard, counsel for the Defendants First Reliance Bank and Thomas Ewart will move before the Court of Common Pleas for Florence County for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment in favor of the Defendants First Reliance Bank and Thomas Ewart. The grounds for this motion are as follows

- 1 **DEFAMATION** – The Defendants First Reliance Bank and Ewart (hereinafter “the First Reliance Defendants”) move for summary judgment on the grounds that there are no genuine issues of material fact as it relates to the alleged defamatory statement and the First Reliance Defendants are entitled to judgment in their favor as a matter of law. The Plaintiff has alleged in his complaint that the Defendant Ewart, an employee of the Defendant First Reliance Bank, defamed him when Ewart stated to Pennell “that as long as the Plaintiff was involved in the transaction that First Reliance Bank would never make a loan to Pennell in order to refinance the Carolina First note and mortgage” (“the Statement”). In order to prevail on its defamation claim, the Plaintiff must prove, *inter alia*, that the Statement has a defamatory meaning, that publication of the Statement was made with actual or implied

malice, and that the Statement was false. The Plaintiff has presented no evidence to support any of these elements of the cause of action. Failure to present evidence of even one element of defamation is enough to support the trial court granting summary judgment. Williams v. Lancaster County School Dist., 369 S.C. 293, 631 S.E.2d 286 (Ct. App. 2006). In a defamation case, the determinations of whether a statement is actionable per se, whether malice is present, and whether a statement has a defamatory meaning are questions of law for the trial court. White v. Wilkerson, 328 S.C. 179, 493 S.E.2d 345 (1997), Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 629 S.E.2d 653 (Ct. App. 2006), Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). The Statement that the First Reliance Defendants would not make a loan as long as the Plaintiff was involved is true. First Reliance would not and did not make such a loan. No defamation was included in the alleged statement and no malice, either actual or implied, has been shown. Thus, no defamatory statement, which meets the legal requirements, was made regarding the Plaintiff by the First Reliance Defendants.

Further, even if the Statement was defamatory per se, which the First Reliance Defendants deny, the Statement was afforded a qualified privilege. "A communication on a subject in which the person communicating has an interest is qualifiedly privileged if made in good faith, limited in its scope to the requirements of such interest or duty, and made to a person having a corresponding interest or duty." Cullum v. Dun & Bradstreet, 228 S.C. 384, 90 S.E.2d 370 (1955). The question of whether a qualified privilege arose is one of law for the trial court. Boone, 347 S.C. at 582, 556 S.E.2d at 783. This qualified privilege has been cited frequently in cases in South Carolina regarding financial matters, most often relating to credit agency reporting and other banking concerns. In the present case, the First Reliance Defendants had an interest in making the Statement because it was

their reason for denying a customer a loan. The Statement was made in good faith and solely for the purpose of communicating the reason for the loan denial, and was only made to the customer seeking the loan that was denied. For these reasons, the Statement was qualifiedly privileged, even if it could be considered defamatory, which the First Reliance Defendants deny.

2. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS – The First Reliance Defendants move for summary judgment on the intentional infliction of emotional distress cause of action because there are no genuine issues of material fact as to any of the elements of the cause of action and the First Reliance Defendants are entitled to judgment as a matter of law. To recover for intentional infliction of emotional distress, a plaintiff must establish (1) an intentional or reckless infliction of emotional distress by the defendant, (2) conduct so extreme and outrageous as to exceed all possible bounds of decency, which must be regarded as atrocious and utterly intolerable in a civilized society, (3) the defendant's actions caused the plaintiff's emotional distress, and (4) the emotional distress was so severe that no reasonable man could be expected to endure it. State Farm Fire & Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000). The plaintiff has a heightened burden of proof for the second and fourth elements. Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981). A plaintiff must establish a prima facie case as to each element of the cause of action to avoid summary judgment; a genuine issue of material fact as to one element is not adequate to avoid summary judgment. Hansson v. Scalise Builders of S.C., 374 S.C. 352, 650 S.E.2d 68 (2007).

In the present case, the alleged statement by the First Reliance Defendants can hardly be called outrageous, extreme, or atrocious. To suggest that it is utterly intolerable in a civilized society is not consistent with reality. All that occurred here was a bank officer

informing a customer as to the reason for the denial of a loan. This happens every day. The bank had a responsibility to its customer to explain why the loan was denied. The reason given was the true reason the loan was denied. To suggest that the bank should have taken any course other than the one it took in explaining its loan denial is not consistent with good banking practices. The Plaintiff cannot show any genuine issue of fact supporting a finding of outrageous behavior. Given the heightened standard on the Plaintiff with this cause of action, the Plaintiff's claims must fail. The First Reliance Defendants are entitled to summary judgment as to the Plaintiff's intentional infliction of emotional distress claims.

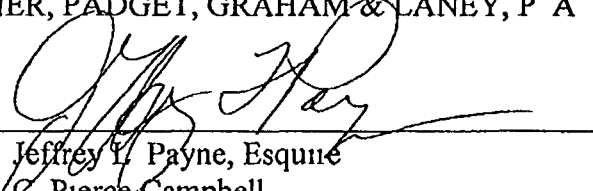
This motion is based upon the pleadings before the Court, the discovery conducted in this case, and any affidavits or memoranda which may be submitted to the court in advance of or at the time of the hearing of this matter, as well as the substantive and procedural law of the State of South Carolina.

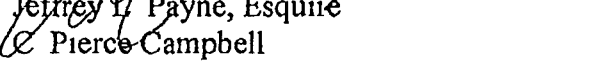
Florence, South Carolina

September 22, 2010

TURNER, PADGET, GRAHAM & LANEY, P. A.

By


Jeffrey T. Payne, Esquire

By  C. Pierce Campbell

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pcampbell@turnerpadget.com

ATTORNEYS FOR THE PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	C/A # 2010-CP-21-131
	)	
Mark Fountain,	)	
	)	
Plaintiff,	)	MOTION FOR SUMMARY JUDGMENT
	)	
Vs	)	
	)	
First Reliance Bank, Thomas C Ewart,	)	
and Ernest Pennell,	)	
	)	
Defendants	)	

YOU WILL PLEASE TAKE NOTICE that the undersigned as attorney for the Defendant, Ernest Pennell, will move before the presiding Judge on the tenth day of service or as soon thereafter as counsel may be heard for an Order pursuant to Rule 56, S C R C P , granting Summary Judgment in favor of this Defendant as to the Plaintiff's First Cause of Action (Defamation) and the Plaintiff's Second Cause of Action (Intentional Infliction of Emotional Stress) The grounds for the motion are that the Plaintiff has failed to prove that any defamatory statement was made, and to the extent any statements were made, they were privileged and truthful In regard to the Second Cause of Action, the Plaintiff has failed to produce even a scintilla of evidence of any intentional or reckless infliction of emotional distress by communicating truthful and otherwise privileged information which are commonplace in business as it relates to the application and evaluation of credit requests for business loans

The motion is based upon the pleadings, discovery, affidavits or memoranda, and applicable laws of the State of South Carolina

In compliance with Rule 11 of the South Carolina Rules of Civil Procedure, the undersigned certifies that he consulted with counsel for the Defendant in good faith effort to resolve this Motion, and the counsel could not agree

February 19, 2011
Florence, South Carolina



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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE)	
)	
Mark Fountain,)	C/A # 2010-CP-21-131
)	
Plaintiff,)	
)	Rule 59(e), SCRPC, Motion to
vs)	to Reconsider Order Granting
)	Summary Judgment on
First Reliance Bank,)	Defamation Claims
Thomas C Ewart, and)	
Ernest Pennell,)	
)	
Defendants)	
)	

2011-15-13

Adams v Daily Telegraph Printing Co, 292 S C 273, 356 S E 2d 118 (Ct App 1986)[Ex A], and *Swinton Creek Nursery v Edisto Farm Credit, ACA*, 334 S C 469, 514 S E 2d 126 (1999)[Ex B] show that the summary-judgment order should be reconsidered *Adams* shows that the order applies a wrong standard on whether a true statement is nevertheless capable of a defamatory innuendo *Swinton Creek* shows that the order likewise applied the wrong standard on when a qualified privilege is abused Fountain thus asks the Court to alter or amend its order taking these issues from the jury ¹

1 *Adams* shows that false innuendo is actionable

Ewart admittedly told Pennell that "if Fountain was going to be managing

CERTIFIED A TRUE COPY
Christie R. Spain
 CLERK OF COURT CP & GS
 FLORENCE COUNTY, SC

¹Fountain is not moving to reconsider summary judgment on the outrage claims or for Pennell on the defamation claim He understands, however, that these issues were raised and ruled on, and

the operation, we would not be making the loan ” Order, p 3 n 6 The Court concluded that this logically implies that the Bank lacked faith in Fountain’s management skills Order, p 8 A jury could further infer that Ewart and the Bank lacked faith in Fountain’s management skills because he is in fact unfit to be a manager And that is defamatory *per se*

To find otherwise, this Court asked if this defamatory meaning is the “clear, exclusive implication of the Statment [sic] ” Order, p 10 *Adams* shows that this is not the standard

Adams involved television broadcasts of statements made by a stepfather of two murdered youths The stepfather said - truthfully - that the father of one of the victims had hired an attorney and had refused to cooperate in the investigation The father sued for defamation, and the trial court granted the defendants summary judgment because the statements made were literally true

The Court of Appeals reversed the summary judgment because of the true statement’s further innuendo The Court emphasized that a defamation action lies “if the words *are capable* of the offensive meaning attributed to them ” *Id* at 279, 356 S E 2d at 122 (emphasis in original) From there, the Court concluded that the truthful statement about the father hiring a lawyer and refusing to cooperate was

thus remain preserved for appeal

susceptible of the inference that he was guilty of the murders or was withholding information about the crime. It was thus for the jury to decide if it had this defamatory meaning *Id*²

A jury could likewise find that “if Fountain was going to be managing the operation, we would not be making the loan,” meant that Fountain was unfit to manage the operation. Suppose, for example, that parents approach a local teacher about transferring their child to the teacher’s school. The teacher responds, “if Mr. X remains Principal, I would not put my child in the school.” Or an insurance adjuster calls a law firm and finds out that the firm is planning on bringing Lawyer Z in as a partner. The adjuster responds, “If Lawyer Z is going to be a partner, we will not use your firm.”

Now these statements may be literally true. But what if Principal X and Lawyer Z were fine members of their respective professions? Couldn’t a jury find that they were defamed *per se* by the false innuendo of unfitness? *Adams* shows that the answer is yes because - to get to a jury - words need only be capable of a defamatory meaning. And Ewart’s words are

2 *Swinton Creek* shows jury issues on the privilege’s abuse

The order further finds “no evidence” that a qualified privilege was abused

²See also *White v. Wilkerson*, 328 S. Ct. 179, 184, 493 S. E. 2d 345, 347 (1997) (“It is only

Order, p 13 But Ewart's admissions show that our case is eerily similar to *Swinton Creek*. In that case, a person wanted to purchase part of a business and approached Edisto Farm Credit for a loan. Edisto told the applicant that the loan was denied in part because the business "has been under financial distress." Edisto told no one else this, and the business had in the past twice defaulted on its Edisto loan. The business's owner sued Edisto for defamation. The trial court directed a verdict based on qualified privilege, reasoning that Edisto made the statement to protect its own interests and for the limited purpose of assisting the buyer to obtain a loan.

The Supreme Court reversed and held that "the question whether the privilege has been abused is one for the jury." *Swinton Creek*, 334 S.C. at 485-487, 514 S.E.2d at 134-135. The Court then noted that there are two ways to abuse a qualified privilege:

- statements made in good faith can go beyond the scope of what is reasonably necessary, or
- a statement can be made with ill will or with a reckless and conscious disregard for the plaintiff's rights. *Id.*

On the first prong, the Court reasoned that a jury could find that Edisto's

necessary that the words should be capable of the offensive meaning attributed to them.")

comment about the business's "financial distress" went beyond the scope of what was required to process the loan. The jury might thus conclude that the statement - even if made in good faith - abused the privilege by being unnecessarily defamatory. The Court likewise held that the jury could also find that Edisto acted in reckless disregard by disparaging the business's financial condition without adequately investigating its current finances. *Id*

Both holdings apply here. On the statement's scope, Ewart admittedly knew when he made his statement that Fountain was not going to have any ownership interest in Pennell's proposed business or any obligation on Pennell's proposed loan. Ewart Depo (filed March 10, 2011), p. 38 ll. 11-13, p. 50 l. 5 - p. 51 ll. 13. A jury could find from these admissions that Ewart had no legitimate reason to drag Fountain into a conversation with Pennell over whether Pennell would get the loan.

A jury could likewise find that Ewart interjected Fountain into the conversation in reckless disregard of Fountain's rights. Ewart denied the loan without looking at Pennell's loan application, Pennell's personal financial statement, the property's appraisal, or records showing the proposed business's profitability. Ewart Depo, p. 9 l. 25 - p. 10, l. 9, p. 39 ll. 5-23. There was also nothing about Pennell that would cause Ewart to deny the loan, and a glance at his financial statement would have revealed that Pennell's personal net worth was over

\$ 1 million and possibly over \$ 2 million Ewart's Depo , p 44 ll 2-5, Pennell's Depo (filed March 10, 2011), p 53 ll 11-22 Fountain's expert opines that these and other acts and omissions violated the bank's policies and existing bank regulations Seitz Affidavit (filed March 7, 2011)

Rather than consider the appropriate materials, Ewart denied the loan solely because Fountain was the proposed manager even though his knowledge about Fountain's managerial skills was five to six years old Ewart Depo , p 10 ll 14-22, p 18 ll 3-13, p 39 ll 5-23, p 61 ll 3-7 Ewart could not say that Fountain's management drove this earlier business into a loan default - and never bothered to ask Fountain to update his training and experiences over the intervening five to six years Ewart Depo , p 25 l 21 - p 27 l 14, p 43 ll 3-15, p 52 ll 1-6 He instead defamed Fountain as a manager based on information that did not involve a loan default and was obsolete

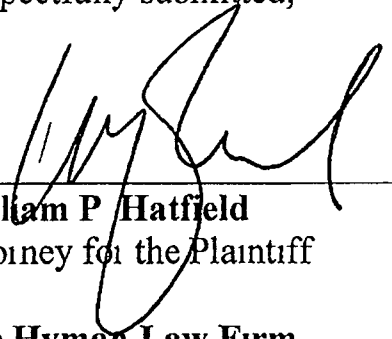
Conclusion

Adams and *Swinton Creek* show that a jury issues exist on whether Ewart and First Reliance defamed Fountain's fitness as a business manager, went beyond the scope of that necessary to process Pennell's loan application, and acted in reckless disregard for Fountain's rights This Court should reconsider its summary-judgment order for Ewart and First Reliance on the defamation claim

Florence, SC

April 15, 2011

Respectfully submitted,



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Attorney for the Plaintiff

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Westlaw.

356 S E 2d 118

292 S C 273, 356 S E 2d 118, 13 Media L Rep 2034

(Cite as 292 S C 273, 356 S E 2d 118)

Court of Appeals of South Carolina
William C ADAMS, Appellant,

v

DAILY TELEGRAPH PRINTING CO , d/
b/a WBTWTV 13, Eastern Carolinas
Broadcasting Co , Inc , d/b/a WPDE TV
15, Bobby L Hicks and Gwen Cooper
Hicks, Respondents

No 0829

Submitted Sept 24, 1986

Decided Dec 8, 1986

Father of murdered boy, who had allegedly refused to cooperate with police and undergo truth testing, sued television stations which broadcast this information for defamation. The Common Pleas Court, Florence County, Owens T Cobb, Jr, J, granted stations' motions for summary judgment, and father appealed. The Court of Appeals, Gardner, J, held that (1) whether television broadcast, indicating that father had hired attorney, refused to undergo truth testing and refused to cooperate with police, had slanderous and/or libelous innuendo was question for jury, (2) material question of fact whether broadcast sufficiently identified father as object of libel precluded entry of summary judgment for broadcaster, and (3) television broadcasts that took place over one year after murders were not "hot news" publications protected by First Amendment.

Reversed

West Headnotes

[1] Libel and Slander 237 ⚡123(3)

237 Libel and Slander
237IV Actions

237IV(E) Trial, Judgment, and Review

237k123 Questions for Jury

237k123(3) k Construction of
Language Imputing Crime Most Cited
Cases

Whether television broadcast, indicating that father of murdered boy had hired attorney, refused to undergo truth testing and refused to cooperate with police, had slanderous and/or libelous innuendo was question for jury, where broadcast specifically indicated that public was free to draw its own conclusions

[2] Judgment 228 ⚡185 3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 3 Evidence and Affidavits in Particular Cases

228k185 3(21) k Totals Most Cited Cases

Material question of fact whether alleged libelous broadcast sufficiently identified murdered boy's father as object of libel precluded entry of summary judgment for broadcaster, where father's attorney alleged in affidavit, with attached letter from manager of television station, that television transcript was incomplete and that person interviewed referred to father by name

[3] Libel and Slander 237 ⚡123(5)

237 Libel and Slander

237IV Actions

237IV(E) Trial, Judgment, and Review

237k123 Questions for Jury

237k123(5) k Person De-



famed Most Cited Cases

Whether alleged libelous broadcast sufficiently identified murdered boys' father as object of libel was question for jury, where broadcast identified murdered boy by name and indicated that male with same last name had hired attorney, refused to undergo truth testing and refused to cooperate with police

[4] Constitutional Law 92 ⚡2161

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2161 k In General Most

Cited Cases

(Formerly 92k90 1(5))

States are free to establish their own laws about libel and slander, where object of libel or slander is neither public person nor officeholder U S C A Const Amend 1

[5] Constitutional Law 92 ⚡1620

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(D) False Statements in General

92k1620 k In General Most

Cited Cases

(Formerly 92k90 1(5))

Television broadcasts that took place more than one year after murders, indicating that father of murdered boy had refused to undergo truth testing and refused to cooperate with police, were not "hot news" publications protected by First Amendment, where father was neither public person nor officeholder U S C A Const Amend 1

**119 *274 T Kenneth Summerford and Karl A Folkens, Florence, for appellant

D M McEachin, Jr , Florence, for Hicks

Reginald C Brown, Jr and Mary Layton Wells, Florence, for Daily Telegraph

John L Weaver, Florence, for Eastern Carolinas

GARDNER, Judge

William C Adams (Adams) instituted a defamation action against two individuals and Daily Telegraph Printing Co , d/b/a WBTW TV 13 (TV 13) and Eastern Carolinas Broadcasting Co , Inc , d/b/a WPDE TV 15 (TV 15) Summary judgment was by separate orders awarded TV 13 and TV 15 We reverse

*275 FACTS

Kent Hicks and Keith Adams, teenage stepbrothers, Kent being the son of respondent Bobby Hicks and Keith the son of respondent Gwen Cooper Hicks, born during her marriage to appellant Adams, were murdered on or about May 6, 1980 The murders were unsolved more than a year later on September 9, 1981, on or about that day TV 13 and TV 15 broadcasted a version of an affair described as a "news conference " Adams contends that the **120 broadcasts implied that Adams had murdered the two teenagers or by refusing to cooperate with the authorities in the investigation of the murders was guilty of a mispision of a felony

The trial judge had before him on motion for summary judgment an affidavit of Adams which, in effect, says that on September 9, 1981, he heard the following broadcast by TV 13

JIM GRIFFIN Two Florence youths,

Kent Hicks and Keith Adams were found shot to death on May 6, 1980. Since this time Law Enforcement officials have conducted an on-going investigation into that case. The families of the victims have offered a reward of more than \$30,000 for information leading to the conviction of the assailant or assailants. Today the Hicks Family members called a news conference, Carpenter King Reporter.

CARPENTER KING According to Mr. and Mrs. Bobby Hicks, each a parent of each of the murdered boys, the times since their deaths on May 6, 1980, have been almost unbearable.

GWEN HICKS Since the day when I walked up those stairs and called them boys that morning and they weren't in those beds, it has been a living nightmare. It really has and it has never ended. It just kept on and on.

CARPENTER KING The worst of the ordeal, they say, is not knowing what happened to their sons and in spite of a reward offered by the family, there has been no break-through in this case to this date. Mr. Hicks called a news conference this morning at 10:00 A.M. to announce that he and his wife and Harriett and Charlie Hanna, the Mother and Step-Father of Kent Hicks, have volunteered to undergo truth testing or any other interrogation*276 that the Sheriff's Department considers necessary about their part in the case, however, according to Hicks not all the involved parties are willing to undergo the investigation.

BOBBY HICKS However, we would like to announce that Mr. Adams employed an attorney approximately a year ago and both he and his Attorney, Mr.

Kenneth Summerford, have refused to cooperate. The public is free to draw their own conclusion. I don't believe when our forefathers placed the Fifth Amendment in our Constitution that they intended it as a technicality to hide behind in a matter as serious as this, when your own child has been murdered. I would like to stress that I am not asking anybody to do anything I am not willing to do myself.

CARPENTER KING We ask Florence County Sheriff Billy Barnes to comment on Mr. Hicks [sic] statement.

SHERIFF BILLY BARNES Of course, until we actually solve or complete this case everybody is still under suspicion.

TV 15, in support of its motion for summary judgment, filed an affidavit by Jerry Condia, General Manager of TV 15, in which he says he is personally aware of the facts and allegations surrounding this litigation and that their publication was limited to the following:

JAN PATE More than sixteen months have passed since the murders of Florence County Teenagers Kent Hicks and Keith Adams.

Police have found no motive for the killings, and have made no arrests in connection with the case.

Jeannie Griffin is here to fill us in on the latest development in the case.

JEANNIE GRIFFIN Bobby and Gwen Hicks have a nice home in the Huntington area. They have four daughters, one of whom lives with them. But until May 6th of last year, the couple spent much of their time with their two sons, Kent Hicks and Keith Adams. On that

date, the boys were found dead the victims of a brutal murder as of yet unsolved

The police and sheriff departments have looked into the *277 case so far no suspects and any leads into the case are a well kept secret But tension still exists, as does grief, in the families of these two boys Today, Bobby Hicks and his Wife told the news media they want no stone left unturned and they **121 have offered to be questioned by law enforcement authorities through hypnosis or truth serum to clear themselves and prove their innocence

BOBBY HICKS The public is free to draw their own conclusions I don't believe, when our forefathers placed the Fifth Amendment in our Constitution, that they intended it as a technicality to hide behind in a matter as serious as this, when your own child has been murdered I would like to stress that I am not asking anybody to do anything I'm not willing to do myself

JEANNIE GRIFFIN (Studio) I might also mention that the families of these boys offered a reward for information leading to arrests in the case That amount, Al, of Thirty Thousand Dollars, is still up for grabs and I'm sure the family and the authorities would welcome any clues to help solve these murders

TV 15 also filed an affidavit of its employee, Janet Morrow Pate, to the effect that the name of William C Adams was not mentioned on the broadcast

Opposing these affidavits, Adams filed, *inter alia*, affidavit of T Kenneth Summerford, his attorney, to the effect that on

September 20, 1981, Summerford wrote a letter to Mr Jerry Condra, Manager of TV 15, and that Condra replied to this letter stating that in addition to the script above set forth, the following statement by Mr Hicks was broadcasted

We requested that Sheriff Baines contact Mr William C (Billy) Adams, father of Keith Adams, and ask him if he wished to join us

However, we would like to announce that Mr Adams employed an attorney approximately a year ago and both he and his attorney, Mr Kenneth Summerford, have refused to cooperate

The public is free to draw their own conclusions

I don't believe, when our forefathers placed the Fifth *278 Amendment in our Constitution, that they intended it as a technicality to hide behind in a matter as serious as this, when your own child has been murdered I would like to stress that I am not asking anybody to do anything I'm not willing to do myself

The appealed order granting summary judgment to TV 13 disregarded the alleged innuendo and found that the facts stated in the TV 13 broadcast were true and held that truth was a complete defense As a further ground for granting summary judgment in favor of TV 13, the order held that TV 13 was protected by the First Amendment to the United States Constitution under the Hot News Doctrine as announced in the case of *Curtis Publishing Co v Butts*, 388 US 130, 87 S Ct 1975, 18 L Ed 2d 1094 (1967), and that in view of that doctrine, there was nothing to lead the court to believe that the reporter and TV 13 departed from any reasonable standard of invest-

igation and nothing to show that the broadcast was made on information furnished by an unreliable source without further verification

The order granting summary judgment in favor of TV 15 also disregarded the alleged innuendo and found that the facts stated in the TV 15 broadcast were true and that the truth was a complete defense. This order also found that the name of Adams was not mentioned in the broadcast and that TV 15 has in no way acted negligently or with malice or recklessness in making the broadcast.

The trial court disregarded the affidavit of T. Kenneth Sumnerford in making its decision, the order settling the case for appeal held that it was vague and biased. We later address this issue.

ISSUES AND DISCUSSION

The case hinges upon two basic questions. First, do the broadcasts have a defamatory effect as to Adams, i.e., can an inference be fairly drawn from them that Adams either murdered the teenagers or is withholding information about the commission of the crime? Second, are the defendants protected by a qualified privilege described by the trial judge as hot news?

*122 *279 I

[1] The trial judge held that the facts as broadcast, without ascribing any innuendo to them, were true. In so holding the trial judge missed the point of the case made by the pleadings. Adams alleged in paragraph three of his complaint that the broadcasts by TV 15 and TV 13 were made "intentionally and willfully with a wanton, reckless disregard for the truth of the statements or the innuendo arising therefrom." Innuendo, thus, is at the heart of the case and this appeal.

The general rule applicable to the issue before us is set forth in 53 C.J.S. *Libel and Slander* Section 223(a) (1983) as follows:

The defamatory character of the words complained of is for the jury if the language is susceptible of two meanings, one defamatory and the other innocent, but if the language is unambiguous the question is for the court. The court determines whether the language is capable of the meaning ascribed to it, and the jury determines whether the language had the meaning ascribed to it.

The South Carolina rule goes further and holds that a demurrer to a complaint (and inferentially a motion for summary judgment) "will only be sustained where the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory." Our courts also hold that any words which raise a *strong suspicion* of the plaintiff's guilt in the minds of the hearers are sufficient upon which to base a cause of action for slander or libel. And even stronger, our courts hold that if the words *are capable* of the offensive meaning attributed to them, then an action for libel or slander lies. *Flowers v. Price*, 192 S.C. 373, 6 S.E.2d 750 (1940).

We first hold that in this case the language broadcasted, to say the least, is susceptible of the inference that Adams was either guilty of the murders of the teenagers or was withholding information relative to the commission of the crimes. Indeed, the broadcasts would have had no newsworthiness but for the implication that (1) because Adams refused to be examined while under a truth serum, (2) because he was not cooperating with the police authorities, (3) *280 because he was hiding behind the Fifth Amendment and (4) because

he had employed an attorney, he, Adams, was guilty of either the murders or withholding information about them. That the Hickses intended that the public draw a conclusion from the broadcast other than the literal meaning was made manifest when they said "the public is free to draw their own conclusion." We therefore hold that whether the broadcasts were slanderous and/or libelous is a jury question.

II

We next address whether the broadcasts referred to appellant Adams and identified him as the object of the alleged slander and/or libel.

[2][3] The appealed order, for palpably untenable reasons, ruled that the Summerford affidavits were inadmissible. Adams appeals the order settling the case for appeal and included the Summerford affidavits in the addendum of the transcript of record. We reverse the order settling the case for appeal. The appealed order held that TV 15's broadcast could not be related to Adams, the Summerford affidavit with attached letter from Mr. Morgan of TV 15 explicitly naming William C. Adams creates an issue of fact as to whether Adams' name was used in the TV 15 broadcast. We therefore reverse the appealed orders holding that Adams was not identified, this is a jury question and we so hold. Similarly, we hold that whether the TV 13 broadcast sufficiently identified appellant Adams is a jury question. In the TV 13 broadcast the murder of Keith Adams and his stepbrother Kent Hicks was referred to, then it was made plain that Mr. Adams had hired a lawyer, et al., the implication that the Adams mentioned in the broadcast as hiring a lawyer, refusing to take the truth serum, etc., was William C. Adams, the ex-husband of Mrs. Hicks. It is sufficiently

clear to create a jury question as to whether the TV 13 broadcast was interpreted by one or more of the viewers as a reference to appellant Adams.

*123 And we hold it unnecessary in this case to review the law of qualified privilege. The reader is referred to Prosser and Keaton *On the Law of Torts* (5th ed 1984), Ch. 19, Section 115, this interesting treatise fully reviews the law of qualified privilege.

*281 [4] We further hold that the broadcasts were not protected by the First Amendment to the United States Constitution. Here we are not dealing with an office holder or public person as was the case in *Curtis Publishing Co. v. Butts*, *supra*, relied upon by the appealed order. Adams is neither a public person nor an office holder, in such a case the states are free to establish their own laws about libel and slander. This case is governed by *Stevens v. Sun Publishing Co.*, 270 S C 65, 240 S E 2d 812 (1978).

[5] Hot news is that news which will lose its newsworthiness if not promptly published. In the case before us, we hold the trial judge erred in considering as hot news the publications by the two TV stations more than a year after the murders, it was not and we so hold. TV 13 and TV 15 enjoyed no privilege in the publication nor were the publications within the purview of publications protected by the First Amendment to the U.S. Constitution, and we so hold.

For the reasons stated, the judgment below is reversed.

REVERSED

SHAW and LITTLEJOHN, JJ, concur.

ORDER

Petitions for Rehearing by both TV 13 and TV 15 are before us. We hold that no principle of law was overlooked in the opinion of this court filed December 8, 1986.

On rehearing, however, the opinion is modified to reflect that the Summerford affidavit had attached a letter from Dave Morgan, news director for TV 15, rather than Jerry Condia, manager of TV 15 to whom Summerford had written, Morgan, rather than Condia, answered Summerford's letter.

We find no merit to the petitioners' position that the letter is inadmissible, it is evidence of an admission on the part of TV 15 and therefore admissible in evidence when properly offered. The manner by which it is offered is a concern of the trial judge, not this court.

IT IS SO ORDERED

S C App, 1986
Adams v Daily Telegraph Printing Co
292 S C 273, 356 S E 2d 118, 13 Media L
Rep 2034

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Westlaw

514 S E 2d 126

334 S C 469, 514 S E 2d 126

(Cite as 334 S C 469, 514 S E 2d 126)



Supreme Court of South Carolina
SWINTON CREEK NURSERY and James
M Futch III, Petitioners,

v

EDISTO FARM CREDIT, ACA, E Law-
ton Huggins and Jerry S Bishop, Defend-
ants,

of whom Edisto Farm Credit, ACA, is Re-
spondent

No 24910

Heard Jan 7, 1999

Decided March 1, 1999

Borrower sued lender for invasion of privacy, libel, civil conspiracy, and breach of implied covenant of good faith, arising from lender disclosing borrower's financial information to third party who sought loan from lender in order to purchase borrower's nursery business, resulting in reduction of purchase price. The Circuit Court, Berkeley County, Marc H Westbrook, J, directed verdict for lender on theories of libel, civil conspiracy, and implied covenant of good faith, and jury returned verdict for borrower on claim of invasion of privacy. Both parties appealed. The Court of Appeals reversed trial court's failure to direct verdict on invasion of privacy claim, but affirmed directed verdicts on other claims, 326 S C 426, 483 S E 2d 789. Certiorari was granted. The Supreme Court, Toal, J, held that (1) there was insufficient "publicity" to support claim for invasion of privacy, (2) genuine issues of material fact precluded summary judgment for lender on libel claim, and (3) borrower's default on his note with lender precluded recovery for breach of implied covenant of good faith.

Court of Appeals' judgment affirmed in part and reversed in part.

West Headnotes

[1] Trial 388 ↪ 178

388 Trial

388VI Taking Case or Question from Jury

388VI(D) Direction of Verdict

388k178 k Hearing and Determination Most Cited Cases

In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party.

[2] Trial 388 ↪ 142

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in General

388k142 k Inferences from Evidence Most Cited Cases

When the evidence yields only one inference, a directed verdict in favor of the moving party is proper.

[3] Appeal and Error 30 ↪ 866(3)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict

30k866(3) k Appeal from Ruling on Motion to Direct Verdict Most Cited Cases

The trial court's ruling on a motion for directed verdict can only be reversed when

there is no evidence to support that ruling

[4] Torts 379 ⚡329

379 Torts

379IV Privacy and Publicity

379IV(A) In General

379k329 k Types of Invasions of
Wrongs Recognized Most Cited Cases
(Formerly 379k8 5(2))

There are three distinct causes of action for invasion of privacy (1) the unwarranted appropriation or exploitation of one's personality, (2) the publicizing of one's private affairs with which the public has no legitimate concern, or (3) the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities

[5] Torts 379 ⚡334

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)1 Privacy in General

379k334 k Public Interest,
Record, Figures Most Cited Cases
(Formerly 379k8 5(2))

Truth is not a defense to an action for invasion of privacy

[6] Torts 379 ⚡350

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Com-
munications in General

379k350 k In General Most
Cited Cases
(Formerly 379k8 5(5 1))

The elements of a cause of action for invasion of privacy based on the publicizing of one's private affairs include (1) publicizing,

(2) absent any waiver or privilege, (3) private matters in which the public has no legitimate concern, (4) so as to bring shame or humiliation to a person of ordinary sensibilities

[7] Torts 379 ⚡351

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Com-
munications in General

379k351 k Miscellaneous
Particular Cases Most Cited Cases
(Formerly 379k8 5(5 1))

Lender's disclosure of borrower's financial information to third party who sought loan from lender in order to purchase borrower's nursery business was not sufficient "publicity" to support borrower's claim against lender for "invasion of privacy", there was no evidence that lender disclosed such information to anyone else, and it was insufficient that such information was later communicated to other people Restatement (Second) of Torts § 652D comment

[8] Torts 379 ⚡350

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Com-
munications in General

379k350 k In General Most
Cited Cases
(Formerly 379k8 5(5 1))

Publicity is a necessary element in an action for invasion of privacy, even if there is a breach of contract, trust, or other confidential relationship

[9] Libel and Slander 237 ⚡1

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k1 k Nature and Elements of Defamation in General Most Cited Cases
The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff

[10] Libel and Slander 237 ⚡24

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k23 Publication

237k24 k Slander Most Cited Cases

Libel and Slander 237 ⚡25

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k23 Publication

237k25 k Libel Most Cited Cases

Slander is a spoken defamation, while libel is a written defamation or one accomplished by actions or conduct

[11] Libel and Slander 237 ⚡101(1)

237 Libel and Slander

237IV Actions

237IV(C) Evidence

237k101 Presumptions and Burden of Proof

237k101(1) k In General Most Cited Cases

If a communication is libelous, then the law presumes the defendant acted with common law malice

[12] Libel and Slander 237 ⚡45(1)

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k40 Qualified Privilege

237k45 Common Interest in Subject-Matter

237k45(1) k In General Most Cited Cases

In determining whether a communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties when one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion, such statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed Restatement (Second) of Torts § 593

[13] Libel and Slander 237 ⚡101(4)

237 Libel and Slander

237IV Actions

237IV(C) Evidence

237k101 Presumptions and Burden of Proof

237k101(4) k Privilege Most Cited Cases

Where the occasion upon which an allegedly libelous communication is published gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded Restatement (Second) of Torts, § 593

[14] Libel and Slander 237 ⚡4

237 Libel and Slander

237I Words and Acts Actionable, and
Liability Therefor

237k3 Malice

237k4 k In General Most Cited
Cases

To prove actual malice in a defamation case, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff, or that the statements in question were published with such recklessness as to show a conscious disregard for plaintiffs rights

[15] Judgment 228 ⚡181(17)

228 Judgment

228V On Motion or Summary Proceed-
ing

228k181 Grounds for Summary
Judgment

228k181(15) Particular Cases

228k181(17) k Banks, Cases
Involving Most Cited Cases

Genuine issues of material fact, precluding summary judgment for lender in libel action by borrower whose financial situation lender revealed to third party who sought loan from lender in order to purchase borrower's nursery business, existed as to whether occasion gave rise to conditional privilege, whether lender exceeded or abused any such privilege, and whether lender acted in reckless disregard of borrower's rights so as to constitute actual malice

[16] Banks and Banking 52 ⚡410

52 Banks and Banking

52IX Land Banks and Farm Credit

52k410 k Actions by or Against
Banks Most Cited Cases

Borrower's claim against lender for breach of implied covenant of good faith, arising from lender disclosing borrower's financial

information to third party who was in process of purchasing borrower's nursery business, was barred by fact that borrower was in default on his note with lender

**127*472 G Thomas Hill, of Hill, Hill & Hill, of Johns Island, for petitioners

Marvin C Jones and Jennifer E Duty, of Bogoslow & Jones, P A, of Walterboro, for respondent

**128 TOAL, Justice

In this case, we granted a petition for a writ of certiorari to review the Court of Appeals' opinion in *Swinton Creek Nursery v Edisto Farm Credit, ACA*, 326 S C 426, 483 S E 2d 789 (Ct App 1997) We affirm in part, reverse in part, and remand

FACTUAL/PROCEDURAL BACK- GROUND

In 1980, James M Futch, III, ("Owner") began a nursery business near the small town of Hollywood, South Carolina ^{FN1} As a result of his efforts, Owner created the Swinton Creek Nursery ("Swinton Creek") Swinton Creek was mainly a wholesale operation that sold azaleas to such stores as Wal-Mart and K-Mart

FN1 Owner's mother was also a partner in the nursery and helped with operating the business

*473 In an effort to expand the nursery, Owner borrowed \$30,000 from the South Atlantic Production Credit Association in November 1989 In April of 1991, South Atlantic Production Credit merged with several other credit associations to become the Edisto Farm Credit ("EFC") From April 1991 forward, Owner's loan was handled by EFC Owner obtained his initial

loan from EFC's Summerville branch, which was managed by Jerry Bishop. As a borrower, Owner also became a stockholder of EFC.^{FN2}

FN2 Owner's rights as a member of EFC included voting for the board of directors, sharing in the profits and earnings of the association, and applying for loans.

In July of 1989, Owner became delinquent on his note with EFC. Bishop requested that Owner pay the interest on the loan.^{FN3} Owner subsequently went to see Bishop at his office in Summerville to discuss the default. EFC ultimately agreed to renew the \$30,000 principal on Owner's note to be due May 1, 1991. However, in May, Owner again went into default. Owner agreed to make a payment of \$8,000 and work on a plan to liquidate the assets of the nursery to pay off his debt to EFC.

FN3 Owner eventually complied, paying \$2,404.10 for interest that had accrued through February 27, 1990.

In late May of 1991, Owner encountered Duwood Collins, Sr., in a convenience store on Edisto Island. Collins owned the pavilion at Edisto Beach and had known Owner since they were children. Owner told Collins that he was thinking of liquidating or down-sizing some of Swinton Creek. Collins told Owner that his son, Duwood Collins, Jr., ("Buyer") was graduating from college and was interested in the nursery business. Collins asked Owner if he was interested in selling all of Swinton Creek. Owner said no, but he would sell some of Swinton Creek's assets and equipment to Buyer.

During the summer of 1991, Buyer began

working for Owner at Swinton Creek to learn the nursery business.^{FN4} Buyer also began negotiations with Owner concerning the sale *474 of Swinton Creek's assets. Owner and Buyer agreed on a price of \$97,500.^{FN5}

FN4 Buyer now operates Milton Creek Nursery on Edisto Island.

FN5 This price included a truck which Owner agreed to sell for \$12,500.

In August of 1991, Buyer went with his father to EFC's Walterboro office seeking a loan for the acquisition of Swinton Creek's assets and equipment. E. Lawton Huggins was the senior loan officer at the Walterboro branch and handled Buyer's loan application for EFC. As part of the application process, Buyer provided Huggins with his financial statement, tax returns, and a projected income statement of his proposed nursery.

In early September of 1991, Huggins received an appraisal of Swinton Creek's equipment and nursery stock from William West, an EFC appraiser. Huggins subsequently visited Swinton Creek to look at the equipment and nursery stock and to re-check the serial numbers on West's appraisal. Huggins testified he had a "side bar conversation" with Owner while visiting Swinton Creek. Huggins stated that Owner inquired as to the time table for closing and indicated that time was of the essence because he had other pressing financial obligations, including a past due loan. Owner conceded Huggins visited Swinton Creek, but denied having the "side bar conversation" with him at the nursery.

**129 On September 10, 1991, Huggins wrote a letter to Buyer concerning Buyer's

loan application. The fourth paragraph of the letter stated:

I would like to address the weaknesses present due to your limited financial strength and questionable repayment capacity. Your limited asset base does not provide a tangible secondary source of repayment should the nursery fail to generate earnings as projected. In other words, you have no assets which may be converted in order to satisfy the obligation to my organization. *This is extremely important since the projected income for the nursery is not supported by a successful earnings trend. In fact, the operation you are purchasing has been under financial duress.* Your forecast for generating adequate earnings may materialize, however, there is adequate risk for concern on my part.

*475 Huggins testified that, in the letter, the "earning trend" comment was in reference to Buyer's projected income for the nursery. Huggins claimed he had no knowledge of Swinton Creek's earning trend and was only referring to Buyer's trend. However, Huggins admitted the "financial duress" comment was in reference to Swinton Creek. Huggins testified his comment was based solely on his observations during his visit at Swinton Creek and his conversation with Owner. Huggins further testified the letter was sent first class mail to Buyer and was not copied to anyone else.

After receiving the letter, Buyer went to see Owner and explained that he would be unable to purchase the assets of the nursery for the amount they had originally agreed on. Buyer showed Owner the letter from Huggins and told Owner that he did not believe he would be able to come up with the money. Buyer eventually obtained a loan

from EFC's Summeville branch ^{FN6} and purchased the Swinton Creek assets for \$77,500-\$20,000 less than originally agreed on ^{FN7}.

FN6 Buyer's loan application was transferred from EFC's Walterboro branch to the Summeville branch where it was handled by Lynn Danzler. The loan application was approved after Buyer's father co-signed the loan.

FN7 The closing date for the purchase was October 17, 1991. Owner testified he felt pressure to close the deal because he needed to buy insurance before November.

Owner sued EFC, Huggins, and Bishop, alleging libel, slander, invasion of privacy, interference with contract, interference with prospective economic advantage, intentional infliction of emotional distress, breach of implied covenant of good faith and fair dealing, and civil conspiracy. Before trial, the trial court granted EFC's motion for summary judgment on the intentional infliction of emotional distress claim. The other claims were preserved for trial.

At the close of plaintiff's case, the trial court directed a verdict for EFC on the theories of civil conspiracy, slander, and breach of implied covenant of good faith and fair dealing. In addition, the trial court, finding no evidence of tortious action by Bishop, dismissed Bishop as a defendant in the case. At the close of all the evidence, the trial court directed a verdict in favor of the remaining defendants on the libel claim. *476 Thus, only the claims of invasion of privacy, interference with contract, and interference with prospective economic advantage went to the jury.

The jury returned a verdict for defendants EFC and Huggins as to the claims of interference with contract and interference with prospective economic advantage, and for defendant Huggins on the claim of invasion of privacy, but found that EFC was liable to Owner for invasion of privacy in the amount of \$55,000. Both Owner and EFC appealed. EFC argued the trial court erred by not granting its directed verdict motion on the invasion of privacy claim. Owner, on the other hand, argued the trial court should not have granted directed verdicts on his claims for libel, civil conspiracy, and breach of implied covenant of good faith and fair dealing. The Court of Appeals ruled in favor of EFC on all arguments, the court reversed the trial court's failure to direct a verdict on the invasion of privacy claim and affirmed the directed verdicts on the other claims. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 326 S C 426, 483 S E 2d 789.

****130** We granted Owner's petition for a writ of certiorari to consider the following issues:

- (1) Did the Court of Appeals err in reversing the trial court's denial of EFC's motion for directed verdict on the invasion of privacy claim?
- (2) Did the Court of Appeals err in affirming the trial court's grant of EFC's motion for directed verdict on the libel claim?
- (3) Did the Court of Appeals err in affirming the trial court's grant of EFC's motion for directed verdict on the breach of implied covenant of good faith and fair dealing claim?

LAW/ANALYSIS

[1][2][3] In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Quesinberry v. Rouppasong*, 331 S C 589, 503 S E 2d 717 (1998); *Gamble v. International Paper Realty Corp.*, 323 S C 367, 474 S E 2d 438 (1996). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. *Id.* *477. The trial court can only be reversed by this Court when there is not evidence to support the ruling below. *Creech v. South Carolina Wildlife & Marine Resources Dep't*, 328 S C 24, 491 S E 2d 571 (1997).

A. INVASION OF PRIVACY

Owner argues that the Court of Appeals erred in reversing the trial court's denial of EFC's directed verdict motion on his invasion of privacy claim. We disagree.

The origins of the tort of invasion of privacy are found in the famous law review article written in 1890 by Samuel D. Warren and Louis D. Brandeis. See Warren & Brandeis, *The Right to Privacy*, 4 Harv L Rev 193 (1890).^{FN 8} In their article, Warren and Brandeis advocated an extension of common law privacy rights to protect individuals from what they saw as the advancing threat of a gossip-consuming, technological society. See Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 Tex L Rev 1395, 1405 (1987) ("Warren and Brandeis found the legal basis for the right to privacy by coupling common-law doctrines with the notion that technological advances and social changes had made it necessary to recognize the new right"). Warren and Brandeis warned of new mechanical devices which

“threaten[ed] to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops’ ” Warren & Brandeis, 4 Harv L Rev at 195. They therefore called for securing to the individual the right “to be let alone.” FN9 *Id*

FN8 For a critical discussion of the Warren-Brandeis formulation see Diane L Zimmerman, *Requiem For A Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L Rev 291 (1983).

FN9 In 1960, Dean Prosser expanded upon the Warren-Brandeis discourse by classifying invasion of privacy into four distinct causes of action. See Prosser, *Privacy*, 48 Cal L Rev 383 (1960). Prosser's classifications were incorporated into and elaborated upon in the Restatement

[4][5] In *Holloman v Life Insurance Co of Virginia*, 192 S C 454, 7 S E 2d 169 (1940), this Court for the first time recognized the tort of invasion of privacy, stating, “the right to privacy is correctly defined as the right to be let alone, *478 the right of a person to be free from unwarranted publicity.” *Holloman*, 192 S C at 458, 7 S E 2d at 171 (citation omitted). Later, in *Meetze v Associated Press*, 230 S C 330, 95 S E 2d 606 (1956), this Court specified three distinct causes of action for invasion of privacy:

[1] The unwarranted appropriation or exploitation of one's personality, [2] the publicizing of one's private affairs with which the public has no legitimate concern, or [3] the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of or-

dinary sensibilities.

Meetze, 230 S C at 335, 95 S E 2d at 608 (quoting 41 Am Jur *Privacy* § 2), see *Todd v South Carolina Farm Bureau Mut Ins*, 276 S C 284, 278 S E 2d 607 (1981). The Court in *Meetze* further noted that truth is not a defense to an action for invasion of privacy. *Id*

**131 [6] Owner concedes his claim falls under the second cause of action specified in *Meetze*. The elements of this tort include (1) publicizing, (2) absent any waiver or privilege, (3) private matters in which the public has no legitimate concern, (4) so as to bring shame or humiliation to a person of ordinary sensibilities. See *Meetze*, *supra*, *Tween v Equifax, Inc*, 571 F 2d 411 (8th Cir 1978). The Court of Appeals concluded the trial court should have granted EFC's directed verdict motion because Owner's private affairs had not been “publicized.” *Swinton Creek*, 326 S C at 435, 483 S E 2d at 795.

With regard to Owner's right of privacy claim, the two issues raised by this appeal are (a) whether the publicity element of this cause of action can be satisfied by mere publication, and (b) whether publicity must be shown if there is also a breach of confidential relationship.

1. Publicity

[7] Though never directly addressed by this Court, our Court of Appeals has consistently held that publicity, as opposed to mere publication, is what is required to give rise to a cause of action for this branch of invasion of privacy, *479 communication to a single individual or to a small group of people will not give rise to an invasion of privacy claim. FN10 See *Mc-*

Cormick v England, 328 S C 627, 494 S E 2d 431 (Ct App 1997), *Swinton Creek, supra*, *Snakenberg v Hartford Cas Ins Co, Inc*, 299 S C 164, 383 S E 2d 2 (Ct App 1989), *Wright v Sparrow*, 298 S C 469, 381 S E 2d 503 (Ct App 1989), *Rycroft v Gaddy*, 281 S C 119, 314 S E 2d 39 (Ct App 1984)^{FN11} By defining "publicity" in this manner, our Court of Appeals is in line with the majority of other jurisdictions.^{FN12} SEE ROBERT C post, *the SOCIAL FOUNDATIONS of Privacy Community and Self In The Common Law Tort*, 77 Cal L Rev 957 (1989) Many of these courts have borrowed *480 directly from the Restatement (Second) of Torts, which contains the following discussion of "publicity"

FN10 One commentator has suggested that this requirement ensures that public communications comply with minimum standards of civility, while liberating private communications from the threat of legal enforcement of such restraints Robert C Post, *The Social Foundations of Privacy Community and Self In The Common Law Tort*, 77 Cal L Rev 957 (1989)

FN11 In *Rycroft, supra*, the Court of Appeals borrowed this interpretation directly from the federal district court decision in *Harrison v Humble Oil*, 264 F Supp 89 (D S C 1967) In *Harrison*, the plaintiff alleged that defendant's communication to plaintiffs employer regarding a debt owed to defendant constituted an invasion of privacy The court, in finding no invasion of privacy, stated

It is an invasion of his rights to publish in a newspaper that the

plaintiff does not pay his debts, or to post a notice to that effect in a window on the public street, or to cry it aloud in the highway, but not to communicate the fact to the plaintiff's employer or to any other individual, or even a small group

Harrison, 264 F Supp at 92 (emphasis added) (quoting Prosser, *Law of Torts, Right of Privacy* § 112 at 835 (3d ed 1963))

FN12 *Eg, Tureen v Equifax, Inc*, 571 F 2d 411, 418 (8th Cir 1978) ("Except in cases of physical intrusion, it has been held that the tort must be founded upon publicity, in the sense of communication to the public in general or to a large number of persons, as distinguished from one individual or a few"), *Satterfield v Lockheed Missiles and Space Co, Inc*, 617 F Supp 1359, 1370 (D S C 1985) ("The disclosure of private facts must be a public disclosure, and not a private one, there must be, in other words, publicity"), *Beard v Akzona, Inc*, 517 F Supp 128, 133 (E D Tenn 1981) (" 'Publicity' means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge"), *Werner v Kiewit*, 238 Kan 289, 710 P 2d 1250, 1256 (1985) ("it is not an invasion of the right of privacy to communicate a [private fact] to a single person or even to a small group of persons")

The form of invasion of the right of privacy covered in this Section depends

upon publicity given to the private life of the individual "Publicity," as it is used in this Section, differs from "publication," as that term is used in sec 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of **132 communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

The Restatement (Second) of Torts, § 652D cmt a, at 383 (1977)

In the instant case, the trial court, in denying EFC's motion for a directed verdict, stated "The plaintiff testified that various people had confronted him about it, and again, obviously, there is a-I grant you, there is a strong question as to how it got

out to anybody but there is enough there, I think, that it would be a jury issue." At trial, William Geraty testified that the word on the street was that Owner was having problems with a bank. Owner also testified that numerous people had questioned him about the letter. As an *481 example, Owner stated that Nat Sanders, Bishop's cousin, asked him about it once. Sanders did not testify at trial.

In their article, *The Right to Privacy*, Warren and Brandeis were primarily concerned with new mechanical devices that would catapult once private gossip into the public domain. See Warren & Brandeis, 4 Harv L Rev at 196 ("When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.") They clearly did not advocate abolishing entirely *personal* correspondences, whether written or oral. As originally conceived by Warren and Brandeis, public disclosure of private facts requires disclosure akin to publications in mass-media. In the instant case, there is no evidence that EFC published the contents of the letter to anyone other than Buyer. The letter was sent only to Buyer in an attempt to address his loan application. We find no evidence to support a claim for public disclosure of private facts.

Owner nevertheless argues that EFC should be liable for "sparking the flame" of publicity. In other words, even if EFC published the statement to only one person, if the information eventually became public, EFC should be held accountable. However, such an approach would effectively eviscerate the requirement that the *defendant* be the one to have publicized the private information. If this approach were adopted,

almost any form of gossip would be actionable, regardless of the discretion taken in its initial communication. We therefore affirm the Court of Appeals on this issue.

2 Confidential Relationship

[8] In *Rycroft v Gaddy*, 281 S C 119, 314 S E 2d 39 (Ct App 1984), the Court of Appeals held, "Communication to a single individual or to a small group of people, *absent a breach of contract, trust or other confidential relationship*, will not give rise to liability." *Rycroft*, 281 S C at 124, 314 S E 2d at 43 (emphasis added). Based on this language, Owner argues that a plaintiff need not prove publicity in an invasion of privacy claim if there is a breach of contract, trust, or other confidential relationship. We disagree.

*482 Recently, in *McCormick v England*, 328 S C 627, 494 S E 2d 431 (Ct App 1997), our Court of Appeals held " 'A confidential relationship is breached if unauthorized disclosure is made to only one person not a party to the confidence, *but the right of privacy does not cover such a case* ' " *McCormick*, 328 S C at 641, 494 S E 2d at 438 (emphasis added) (quoting Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum L Rev 1426, 1442 (1982)). Under this view, breach of contract or confidentiality does *not* give rise to an exception to the "publicity" requirement for the tort of invasion of privacy.

**133 In the instant case, the Court of Appeals observed that the language in *Rycroft*, *supra* derived from the federal district court case of *Harrison v Humble Oil*, 264 F Supp 89 (D S C 1967). *Harrison*, in turn, quoted from Prosser's third edition of the Law of Torts. See Prosser, Law of

Torts, *Right of Privacy* § 112 at 835 (3d ed 1963). The court emphasized that *Harrison* and Prosser described "breach of contract, trust or other confidential relationship" as an "independent basis" of relief. In other words, though the facts of a case may give rise to a breach of contract or confidentiality claim, that does not excuse the requirement that the private information be "publicized" in order to maintain an invasion of privacy claim.

We agree with the Court of Appeals' interpretation on this point. In their article, Warren and Brandeis characterized the relationship between breach of contract or confidentiality and invasion of privacy in the following manner:

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special *483 confidence, but now that modern devices afford abundant opportunities for the preparation of such wrongs without any participation by the injured party, the protection granted by law must be placed upon a broader foundation [of invasion of privacy].

Warren & Brandeis, 4 Harv L Rev at 210-11

Although related in policy, breach of confidentiality and invasion of privacy are not so closely connected in law that the presence of the former obviates proof of "publicity" in the latter.^{FN13} Warren and Brandeis envisaged a privacy right that would occupy ground not already covered by contract and confidentiality theories. In this sense, if a plaintiff has a claim for breach of contract or confidentiality, there is no justification for reviving an otherwise invalid invasion of privacy claim.^{FN14} We therefore affirm the Court of Appeals on this issue.

FN13 See Joseph Glenn White, Note, *Physician's Liability for Breach of Confidentiality Beyond The Limitations of The Privacy Tort*, 49 S C L Rev 1271 (1998) (distinguishing between breach of confidentiality and invasion of privacy and arguing the former is better equipped to protect patients from the disclosure of personal facts by their doctors)

FN14 Additionally, breach of confidentiality and invasion of privacy are torts that encompass different doctrinal limitations. See Vickery, 82 Colum L Rev at 1440 ("Privacy's doctrinal limits are unnecessary in breach-of-confidence situations, and should not bar recovery to plaintiffs deserving of a remedy") For instance, "[d]isclosure in breach of confidence or other duty may cover greater ground than a pure privacy case, since the duty of confidence may include facts that are not 'private' in the ordinary sense and the disclosure may not be 'public'." Prosser & Keeton, Law of Torts,

Right of Privacy § 117, at 121, n 65 (Supp 1988) Moreover, unlike breach of confidentiality, the privacy standard focuses on the *content* of the publication, rather than its *source*. See *McCormick*, 328 S C 627, 494 S E 2d 431 Thus, it is irrelevant in a breach of confidentiality claim whether the disclosure of the information would bring shame to a person of ordinary sensibilities.

B DEFAMATION

Owner argues the trial court erred in granting EFC's motion for a directed verdict concerning his defamation claim. We agree.

*484 At trial, EFC moved for a directed verdict on Owner's defamation claim, arguing it was protected by a qualified privilege. The trial court granted the motion. The Court of Appeals affirmed the trial court's ruling.

[9][10][11] The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff. *Holtzschetter v Thomson Newspapers, Inc.*, 332 S C 502, 506 S E 2d 497 (1998). Defamatory communications take two forms: libel and slander. **134 Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct. *Id.* If a communication is libelous, then the law presumes the defendant acted with common law malice. *Id.*

[12][13] In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Under

this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. Restatement (Second) of Torts, § 593 (1977), see *Bell v Bank of Abbeville*, 208 S C 490, 38 S E 2d 641 (1946). In *Bell*, this Court held

In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

Bell, 208 S C at 493-94, 38 S E 2d at 643. Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded. *485 *Fulton v Atlantic Coast Line R Co*, 220 S C 287, 67 S E 2d 425 (1951), 53 C J S *Libel and Slander* § 79 (1987).

[14] To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff, or that the statements were published with such recklessness as to show a conscious disregard for plaintiff's rights. *Holtzscheiter*, *supra*. In addition, "the person making [the defamatory statement]

must be careful to go no further than his interests or his duties require. And the fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though the publisher acted in good faith." *Fulton*, 220 S C at 297, 67 S E 2d at 429, accord *Woodward v South Carolina Farm Bureau Ins Co*, 277 S C 29, 282 S E 2d 599 (1981).

In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. 50 Am Jur 2d *Libel and Slander* § 276 (1995). However, the question whether the privilege has been abused is one for the jury. *Id.* Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. *Id.*, see also Restatement (Second) of Torts §§ 599-610. In *Fulton*, this Court held that it was a question for the jury to determine if the publication went beyond what the occasion required and was unnecessarily defamatory. *Fulton*, 220 S C at 297, 67 S E 2d at 429, cf *Woodward*, 277 S C at 32-33, 282 S E 2d at 601 ("While abuse of privilege is ordinarily an issue for the jury, in the absence of a controversy as to the facts it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.")

[15] In the instant case, the defamatory communication took the form of libel. Thus, malice was presumed, and it was defendant's burden to establish that a privilege existed in order to rebut this presumption. When Huggins was asked *486 why he made the "financial duress" comment,

he stated "I felt like it was part of my responsibility to an inexperienced applicant, who obviously could not see the risk associated with enterprise in which he was beginning." In granting the directed verdict as to conditional privilege, the trial court made the following conclusions: first, there was no evidence that Huggins wrote the letter in bad faith, second, EFC was trying to protect its own interest in the letter, third, the letter was written for the limited purpose of assisting Buyer with obtaining a loan, and fourth, the comments **135 were made on the proper occasion and in the proper manner. The Court of Appeals affirmed the trial court's determination that, as a matter of law, the occasion gave rise to a conditional privilege and the privilege was not abused.

Assuming the occasion did give rise to a conditional privilege, we believe a question existed for the jury as to whether the privilege was exceeded or abused. First, the scope of the privilege extended only as far as EFC's interests and duties required. *See Fulton, supra*. It is questionable whether a specific comment about Swinton Creek's financial status was required to protect any interest or duty covered by the privilege. EFC contends it wrote the letter for the sole purpose of guiding Buyer into a successful loan application. Yet, Buyer was only seeking to buy some of Owner's assets, not the entire Swinton Creek operation. Moreover, if EFC wanted to convey to Buyer the difficulties of running a nursery in a small town, it could have simply made a general statement without specifically referring to Owner. Thus, even if EFC acted in good faith to assist Buyer, the jury might conclude that the "financial duress" comment was unnecessarily defamatory under these circumstances.

Additionally, there was evidence suggesting EFC acted in reckless disregard of Owner's rights so as to constitute actual malice. *See Holtzscheiter, supra*. Huggins testified that the financial duress comment was based solely on his observations of Swinton Creek and his "side bar conversation" with Owner. However, Owner denied having any conversation with Huggins at the nursery. Further, even if a conversation did take place, EFC had a banking relationship with Owner at the time *487 Huggins visited Swinton Creek. These are all factors relevant in determining whether there was actual malice.

We conclude the directed verdict should not have been granted and reverse the Court of Appeals on this issue.

C IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

[16] Owner argues the trial court erred in granting EFC's motion for directed verdict regarding the claim of breach of implied covenant of good faith and fair dealing. We disagree.

The Court of Appeals affirmed the trial court's determination that Owner could not proceed on his implied covenant of good faith and fair dealing claim because he was in default on the contract. *See Parks v Lyons*, 219 S C 40, 48, 64 S E 2d 123, 126 (1951) ("one who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it"). It is uncontested that in May of 1991, Owner went into default on his note with EFC. We conclude the Court of Appeals is correct on this point.

Owner nevertheless argues that he still has a claim under his contractual relationship with the bank as a stockholder. This argument is without merit because Owner's status as a stockholder is based upon his relationship with EFC as a borrower. And as a borrower, Owner clearly failed to fulfill his obligations under the contract. We therefore affirm the Court of Appeals on this issue.

CONCLUSION

Based on the foregoing, we **AFFIRM** the Court of Appeals on the issues of invasion of privacy and implied covenant of good faith and fair dealing, but **REVERSE** on the libel issue.

FINNEY, C J, MOORE, WALLER and
BURNETT, JJ, concur
S C, 1999
Swinton Creek Nursery v Edisto Farm
Credit, ACA
334 S C 469, 514 S E 2d 126

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Supreme Court of South Carolina
William Gary WHITE, III, and John T
McMillan, Appellants,

v

Avery B WILKERSON, Jr, individually
and in his official capacity as mayor of the
City of Cayce, E H Heustess, Jr, individu-
ally and in his official capacity as city
manager of the City of Cayce, and
Columbia Bible College Broadcasting Co,
Inc, d/b/a WMHK Radio Station, Re-
spondents

No 24711

Heard Feb 21, 1996

Decided Nov 10, 1997

Rehearing Denied Dec 5, 1997

Attorneys brought defamation action
against mayor and radio station based on
mayor's erroneous on-air statements that at-
torneys had received \$60,000 of a \$65,000
settlement of clients' civil rights actions
against city. The Circuit Court, Richland
County, L Henry McKellar, J, granted
summary judgment for defendants.
Plaintiffs appealed. The Supreme Court,
Waller, J, held that (1) statements in ques-
tion were susceptible of defamatory mean-
ing, even if they did not accuse plaintiffs
outright of unethical or unprofessional con-
duct, and (2) radio station was protected
from liability by "fair report" privilege.

Affirmed in part, reversed in part and
remanded.

West Headnotes

[1] Libel and Slander 237 ⚡9(3)

237 Libel and Slander

237I Words and Acts Actionable, and
Liability Therefor

237k9 Words Tending to Injure in
Profession or Business

237k9(3) k Attorneys at law
Most Cited Cases

Erroneous statements by mayor in radio
interviews that attorneys who had represen-
ted police officers in civil rights actions
against city had received \$60,000 of a
\$65,000 dollar settlement were susceptible
of having defamatory meaning, even if
mayor did not accuse attorneys outright of
unethical or unprofessional behavior.

[2] Libel and Slander 237 ⚡1

237 Libel and Slander

237I Words and Acts Actionable, and
Liability Therefor

237k1 k Nature and elements of de-
famation in general. Most Cited Cases

In order to succeed on defamation
claim, plaintiff must show that challenged
statement is both defamatory and action-
able.

[3] Libel and Slander 237 ⚡123(2)

237 Libel and Slander

237IV Actions

237IV(E) Trial, Judgment, and Re-
view

237k123 Questions for Jury

237k123(2) k Construction of
defamatory language in general. Most
Cited Cases

It is trial court's function in defamation
action to determine initially whether state-
ment in question is susceptible of having
defamatory meaning.

[4] Judgment 228 ⚡181(33)

228 Judgment

228V On Motion or Summary Proceed-
ing

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(33) k Tort cases in general Most Cited Cases

Motion for summary judgment for defendant in defamation action should be granted only if court determines the publication is incapable of any reasonable construction which will render the words defamatory

[5] Libel and Slander 237 ⚡6(1)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k6 Actionable Words in General

237k6(1) k In general Most Cited Cases

Statement at issue in defamation action is susceptible of having defamatory meaning if the words used to express the charge are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed the impression that plaintiff has done wrong

[6] Libel and Slander 237 ⚡19

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k19 k Construction of language used Most Cited Cases

All of the parts of publication containing allegedly defamatory statement must be considered in order to ascertain true meaning of statement, and the words are not to be given meaning other than that which context would show them to have

[7] Libel and Slander 237 ⚡9(3)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k9 Words Tending to Injure in Profession or Business

237k9(3) k Attorneys at law Most Cited Cases

Mayor's erroneous statements on radio talk shows that attorneys who had represented police officers in civil rights actions against city had received \$60,000 of a \$65,000 dollar settlement were not defamatory per se, but were defamatory per quod, defamatory meaning was not apparent from language itself, and statements could be innocently construed

[8] Libel and Slander 237 ⚡88

237 Libel and Slander

237IV Actions

237IV(B) Parties, Preliminary Proceedings, and Pleading

237k79 Declaration, Complaint, or Petition

237k88 k Damage in general Most Cited Cases

Allegation in defamation complaint, that mayor's statements accusing attorneys of receiving \$60,000 of a \$65,000 settlement of clients' civil rights actions against city constituted defamation per se, could be interpreted to mean that statements were actionable per se, i.e., that they could be presumed injurious without proof of malice or damages

[9] Libel and Slander 237 ⚡49

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k49 k Publication and discussion of news Most Cited Cases

Radio station was protected by "fair report" privilege from defamation liability for broadcast of mayor's statements that at-

torneys had received \$60,000 of a \$65,000 settlement in clients' civil rights actions against city

[10] Libel and Slander 237 ↪ 39

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k35 Absolute Privilege

237k39 k Official acts, reports, and records Most Cited Cases

"Fair report privilege" protects fair and accurate reports of judicial records and proceedings and other official acts, reports, and records from defamation liability

*346 *181 Lex A Rogerson, Jr, Lexington, for appellants

Susan P McWilliams and J Michelle Childs, of Nexsen Pruet Jacobs & Pollard, LLP, Columbia, for respondent Avery B Wilkerson, Jr

William L Pope and Roy F Laney, of Pope & Rogers, Columbia, for respondent Columbia Bible College Broadcasting Co, Inc, d/b/a WMHK Radio Station

WALLER, Justice

Appellants sued respondents alleging certain statements broadcast in a radio interview had defamed them. The trial court granted summary judgment for respondents, finding the statements complained of were incapable of having a defamatory *182 meaning and the radio station was qualifiedly privileged. Appellants have appealed.

FACTS

In 1990 Appellants, who are attorneys, represented two former police officers in a lawsuit alleging civil rights violations against the City of Cayce. The officers

claimed they were fired for exposing corruption in the police department. This lawsuit was settled in January 1991 for \$65,000. *The State* newspaper reported the settlement on January 24, 1991, naming appellants as the officers' attorneys. Beginning Sunday, February 10, 1991, *The State* published a week-long series of articles on the subject of alleged police brutality and official cover-ups of illegal activity involving the City of Cayce police department. In one, appellant White was quoted as saying, "It's like the 'Dukes of Hazzard' over there." The article stated White was an expert on the Cayce police's pattern of abuse, having brought nine of fifteen lawsuits in eight years against the city for police brutality, civil rights violations and false arrests. In that same article, Cayce Public Safety Director Lavern Jumper stated he blamed the number of brutality complaints on White, characterizing him as a "headline hungry lawyer."

In response to these articles, the City of Cayce issued a news release at a press conference held Thursday, February 14, 1991. While appellants were not specifically named in this release, several statements referred to an attorney who had brought a majority of lawsuits against the police department and "who attempts to garner whatever media coverage he can in an attempt to discredit our Police Department."

Subsequent to this press conference, respondent Wilkerson, the mayor of Cayce, appeared with other city officials on a radio show entitled "Vantage Point" aired by respondent Columbia Bible College Broadcasting Co, Inc d/b/a WMHK Radio Station ("WMHK"). In answering a question posed by the show's host, Wilkerson stated, "the last settlement that was made was a \$65,000 settlement back in January. Okay?"

That settlement itself was total court costs Okay? That was settled before the case actually got before the jury and that *183 \$65,000 [was] for court costs What's interesting about that \$65,000 is at least \$60,000 of that were attorney fees "

On March 6, 1991, Wilkerson appeared live on a WIS-TV news program called "The Carolina Report" When the show's host asked about Cayce's investigation into the facts surrounding the settled lawsuit, Wilkerson's reply was something to the effect that "approximately \$60,000 of that money was for legal costs only " Both statements made **347 by Wilkerson were false, the attorneys' fees from the settled lawsuit amounted to \$27,500

Appellants brought a defamation action against respondents for injury to their reputation caused by Wilkerson's statement that \$60,000 of the \$65,000 settlement was attorneys' fees The trial judge found this statement had no defamatory meaning and that WMHK had a qualified privilege to air it He thus granted summary judgment in favor of respondents

ISSUES

I Are the statements capable of having a defamatory meaning?

II Was WMHK privileged to air the statements?

DISCUSSION

I Defamatory Meaning

[1][2] In order to succeed on a defamation claim, the plaintiff must show that the challenged statement is both defamatory (tending to impeach the plaintiff's reputation) and actionable (injuring the plaintiff) *Austin v Torrington Co*, 810 F 2d 416 (4th Cir), *cert denied*, 484 U S 977, 108 S Ct 489, 98 L Ed 2d 487 (1987) The trial

judge's order focused on this first requirement in that he ruled Wilkerson's statements could not tend to impeach appellants' reputation We disagree

[3][4][5][6] It is the trial court's function to determine initially whether a statement is susceptible of having a defamatory meaning *Pierce v Northwestern Mut Life Ins Co*, 444 F Supp 1098 (D S C 1978) A motion for summary judgment should be granted only if the court determines the publication *184 is incapable of any reasonable construction which will render the words defamatory *Adams v Daily Telegraph Printing Co*, 292 S C 273, 356 S E 2d 118 (Ct App 1986), *aff'd as modified*, 295 S C 218, 367 S E 2d 702 (1988) It is enough "if the words used to express the charge are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed the impression that the plaintiff has [done wrong] It is only necessary that the words should be capable of the offensive meaning attributed to them" *Flowers v Price*, 192 S C 373, 377, 6 S E 2d 750, 751 (1940) (per curiam) "[A]ll of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have" *Jones v Garner*, 250 S C 479, 485, 158 S E 2d 909, 912 (1968) (citation omitted)

Appellants alleged Wilkerson's statements imputed unfitness in their profession When viewing the evidence and inferences in the light most favorable to the non-moving party, we agree that the statements could reasonably be construed in such a manner In making this determination, it is essential to keep in mind the profession involved *See Nash v Sharper*, 229

S C 451, 457, 93 S E 2d 457, 460 (1956) ("Words, not [defamatory] in the case of a common person, may become so, when spoken of another, in relation to the office he fills or the trade or profession which he carries on") (internal quotations omitted) When attorneys bring civil lawsuits on behalf of injured clients, it is well understood that the remedy sought is monetary damages To state that an attorney took all (or nearly all-ninety-two per cent) of a settlement award, and thus the clients, on whose behalf the lawsuit was brought, got nothing, could impute a derogation from the ethical responsibilities of that attorney Such a comment could tend to injure an attorney in his profession because it implies that his interests are more important than those of his client Moreover, it implies that the attorney did not do his job, which is to get compensatory relief for the client

This analysis is not altered merely because Wilkerson did not accuse appellants outright of unethical or unprofessional behavior In *Nash*, an attorney brought an action for libel based on statements made which he argued suggested he *185 dishonestly worded retractions released in the course of his representation of certain school districts The court stated, "While the defamatory language does not in express terms charge the plaintiff with a breach of his professional honor, yet, when aided by the innuendo [sic], operating within the scope of its legitimate functions, it does **348 impute conduct tending to injure him in his profession" *Id* at 458, 93 S E 2d at 460 (internal citations omitted)

The facts of *Handelman v Hustler Magazine, Inc*, 469 F Supp 1048 (S D N Y 1978), are very similar to the instant case There, the plaintiff was the attorney for the executor of an estate In an

article written in the defendant magazine regarding the estate, the following sentence appeared "Loeb [deceased's son] fought the will for about six years, letting high-priced New York lawyers eat up over \$800,000 [sic] before withdrawing his complaint, leaving his daughter to pay taxes on the rest" *Id* at 1049 (emphasis added) According to the plaintiff, \$800,000 represented eighty per cent of the estate The trial court found this statement could be read to imply that the plaintiff charged an excessive or exorbitant fee, imputing to plaintiff "conduct which is incompatible with the standards of an ethical lawyer" *Id* at 1051

At the summary judgment hearing, appellants presented the deposition of the Cayce resident who informed appellant White of the broadcast Regarding the contents of the broadcast, the resident stated, "Well, if I'm remembering correctly, it had something on the tape about the lawyer involved kept all of the money from one particular settlement And usually lawyers keep a portion, but they give some to the client"

[7][8] We find the trial judge erred in finding Wilkerson's statements incapable of having a defamatory meaning ^{FN1}

FN1 The state of defamation law in South Carolina is not entirely clear or settled The issues addressed in this footnote are based on the law as suggested by current cases

With that in mind, we do agree with the trial judge's finding that the statements were not defamatory *per se* A statement is defamatory *per se*, or on its face, if its defamatory meaning is apparent from the language itself It must

be susceptible of only one meaning, that being a defamatory one. If an innocent construction can fairly be made of the statement, it cannot be defamatory *per se*. *Renwick v News & Observer Pub Co*, 310 N C 312, 312 S E 2d 405, *cert denied*, 469 U S 858, 105 S Ct 187, 83 L Ed 2d 121 (1984). See also *Sandifer v Electionolux Corp*, 172 F 2d 548 (4th Cir 1949) (when words are clear and unambiguous, their character as defamatory is a question of law for the judge, however, when language is susceptible of two meanings, one slanderous and the other innocent, it must be left to the jury to determine from all of the circumstances attending the publication in what sense the defendant used them), *Wardlaw v Peck*, 282 S C 199, 318 S E 2d 270 (1984). Conversely, if it is necessary to refer to facts or circumstances beyond the language itself in order to make the defamatory meaning of the statement clear, it is defamatory *per quod*. We find that the statements at issue could be innocently construed and thus were defamatory *per quod*.

Finally, we disagree with respondents' arguments that the complaint only alleged the statements were defamatory on their face. While the complaint does use the term "defamation *per se*," appellants maintain they intended the phrase to allege the statements were actionable *per se* (meaning that if defamatory, the statements are presumed injurious without proof of malice or special dam-

ages). The significance of this is that if a statement is actionable *per se*, its defamatory meaning may be proven by the language itself or by reference to extrinsic facts (i.e. it may be defamatory *per se* or *per quod*). Noting the confusion in our case law regarding proper terminology in defamation cases, we accept appellants' contention and find they properly have alleged the statements are actionable *per se*. See S C Juris *Libel and Slander* § 3 (1993) (acknowledging that the phrase "defamation *per se*" has been used in two different ways in South Carolina case law: one to mean a statement defamatory on its face, the other to mean a statement actionable without proof of malice and damages). See also *Pierce v Northwestern Mut Life Ins Co*, 444 F Supp 1098 (D S C 1978) (allegedly slanderous statement, in order to be actionable *per se*, must impute (1) commission of crime of moral turpitude, (2) contraction of loathsome disease, (3) adultery, (4) unchastity, or (5) *unfitness in one's business or profession*).

*186 II Qualified Privilege

[9][10] Appellants argue the trial judge erred in finding WMHK was protected by a qualified privilege because WMHK exceeded any privilege it may have had. The "fair report" privilege protects fair and accurate reports of "judicial records and proceedings and other official acts, reports, and records." S C Jur *Libel and Slander* § 61 (1993) (footnote omitted). ^{FN2} See also *Jones v Garner*, 250 S C 479, 158 S E 2d 909 (1968). We **349 affirm this issue.

pursuant to Rule 220(b)(1), SCACR ^{FN3}

FN2 Appellants did not appeal the issue of whether Wilkerson's statements constitute an official act of the nature necessary to give rise to this privilege

FN3 Regarding WMHK's assertion it is entitled to other privileges under the First Amendment, and its argument concerning the issue of fault, we decline to address these because they were not ruled on by the trial court *Pamlico Bank and Trust Co v Prosser*, 259 S C 621, 193 S E 2d 539 (1972)

***187 AFFIRMED IN PART, REVERSED IN PART AND REMANDED**

FINNEY, C J , and TOAL, MOORE and BURNETT, JJ , concur

S C ,1997
White v Wilkerson
328 S C 179, 493 S E 2d 345, 26 Media L Rep 2051

END OF DOCUMENT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Mark Fountain,

Plaintiff,

v

First Reliance Bank, Thomas C Ewart, and
Ernest Pennell,

Defendants

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2010-CP-21-131

RESPONSE TO
MOTION FOR RECONSIDERATION

Seeking a second bite at the apple, plaintiff has asked this court to reconsider its ruling granting all defendants summary judgment on his claim of defamation. The motion for reconsideration is limited to the bank defendants (First Reliance & Ewart). In his motion, Plaintiff suggests that even a true statement may have defamatory innuendo and therefore be actionable. Plaintiff also suggests that any qualified privilege may have been abused. These points were expressly addressed in the Court's Order.

NO UNTRUTHFUL INNUENDO TO SUPPORT DEFAMATION

Relying on Adams v. Daily Telegraph Printing Co., 292, S.C. 273, 356 S.E. 2d 118 (Ct. App. 1986), the Plaintiff argues that any words remotely "capable" of offensive innuendo are actionable. Specifically, Plaintiff urges that under Adams, even facially true statements can have a defamatory implication. As the Court properly noted in its Order, true statements are not defamatory and generally can not be defamatory. Order at pp. 7-8. What Plaintiff urges here is a rare oddity theoretically possible under Adams – a remote defamatory meaning clearly implied by a true statement. The facts here, however, are different in multiple respects from the one of a kind circumstances seen in Adams.

In Adams, some members of the family of two murdered boys used a press conference to bait other members of the family to come forward and take "truth serum" or undergo "truth testing" regarding the boys' unsolved murders. The family at the press conference also announced that other family members had hired an attorney to advise them on these matters. The family at the press conference also invited the public to "draw their own conclusion" from the remaining family's alleged refusal to cooperate.

In Adams, the true statement apparently was that Mr. Adams had employed an attorney and was refusing to cooperate further with law enforcement (presumably refusal to voluntarily undergo interrogation).¹ In contrast, the defamatory innuendo expressly invited in Adams – criminal conduct by Mr. Adams – apparently was not true (or could not readily be proven).

Adams is very distinguishable from the case at hand. First, Adams involved two public television broadcasts – not a *private* business discussion. Second, Adams involved an implication of criminal conduct, historically recognized as actionable *per se*, where any implication here was one of inadequate lender confidence.² Thirdly, the remote defamatory implication was expressly invited by the publication ("the public is free to draw their own conclusion") in Adams; no such express invitation was made in the private conversation here.

Most importantly, in the case *sub judice*, unlike Adams, both the statement was true and the implication was true. The bank *was* refusing to lend to Pennell with Fountain managing the

¹ Actually, the Adams court does not confirm the engagement of counsel and the lack of cooperation as true. The counsel identified for Mr. Adams in the alleged broadcast, Kenneth Summerford, did represent Mr. Adams in the Court of Appeals reversal of the defamation summary judgment. Adams, 292 S.C. at 274, 356 S.E.2d at 119.

² The Court dealt with the Plaintiff's present suggestion of defamation *per se* on page 10 of its Order where it distinguished those cases involving statements impugning that a Plaintiff is morally or ethically "unfit" for his or her profession. See e.g., Boling v. Clinton Cotton Mills, 163 S.C. 13, 161 S.E. 195 (1932) (statement that minister would not keep his word was actionable *per se*); Moshirgho v. The Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994) (statement that professor was dishonorable and engaged in "illegal" conduct was actionable *per se*). Moreover, operating a convenience store is not a profession with an ethical code or state-approved licensure or self-regulation – like the lawyer and teacher hypotheticals urged in Plaintiff's motion for reconsideration.

business and the implication that the bank lacked financial confidence in a Fountain-related business *was also true*

Rather than deal with the truth of the Bank's actual lack of confidence in a Fountain related business, the Plaintiff wants the Court to transform this defamation case into a banking case. The Plaintiff wants to suggest that a more diligent bank review or compliance with certain bank policies and regulations would result in a different opinion, this speculation is not relevant. Again, the banking Defendants are not sued for their banking policies by the actual borrower – they are sued for defamation by the borrower's confidant. The bank's opinion implied by the bank's statement is true, the bank lacked confidence in a Fountain-related business, whether certain speculative factors might have changed this opinion does not change the truth of the opinion under existing circumstances. This is why opinions are constitutionally protected – every entity is entitled to opinions and they don't have to be based on what the Plaintiff subjectively wants or even what a jury objectively might impose.

NO FACTS TO SUPPORT ABUSE OF PRIVILEGE

Plaintiff also suggest the case of Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334, S.C. 469, 514 S.E. 2d 126 (1999), supports jury consideration of the possible abuse of privilege. As this Court noted in its Order on this point, the possibility of abuse of privilege is for the Court to determine in the absence of a factual controversy. Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 32-33, 282 S.E. 2d 599, 601 (1981).

Swinton Creek also involved alleged defamation by the explanation accompanying a loan denial (statement that Plaintiff-seller was in "financial distress"), but the explanation was not given to the party in "financial distress" or to a partner or affiliate of the Plaintiff-seller.

Here the explanation about the potential borrower's management was given to the potential borrower – and to a person openly represented as in privity with the proposed manager.

Plaintiff here has no evidence that the banking Defendants acted in bad faith or with malice when speaking privately with the person who shared a common interest with Plaintiff in the possible financing. A number of factors including lending history supported the bank's opinion of inadequate confidence in Plaintiff's management. See Order pages 9-10. This was not an opinion reached recklessly. And again, there is also no evidence that the bank communicated to anyone other than this person with Plaintiff's shared common interest.

Moreover, unlike Swinton Creek, where a factual controversy *did exist* about whether the lender ever had a discussion with the seller – a discussion which lender represented to be the basis of his 'financial duress' comment, there is no factual controversy here about Fountain's credit rating, his credit history, and his business management experience – all admitted by him in deposition and noted by this Court in its' Order. Order pages 9-10. Furthermore, Fountain admitted the appropriateness of considering such factors in making lending determinations (see Order page 8 citing Deposition at page 71) – all while still asserting the bank's limited private comments to his business confidant were "inappropriate."³ Fountain Deposition, page 48 lines 16-18 and page 74 lines 13-18. Thus, there are no controverted facts required by Woodward and Swinton Creek to submit a question of privilege abuse to the jury. The only controversy is Fountain's opinion that what is appropriate for most lending determinations is not appropriate for him.

Again forgetting his own admissions as well as lending reality, Plaintiff's present motion suggests that the banking Defendants had "no legitimate reason to drag Fountain into a conversation with Pennell over whether Pennell would get the loan. It was not the bank who dragged Fountain into the conversation; however, it was the Pennell Fountain venture that was represented to the bank as a reasonable lending risk – represented by Fountain himself in his own initial approach to these Defendants. Fountain Deposition, page 131 line 3 – page 132 line 14 ('I told him [bank president] that I was going to be running the store.')

CONCLUSION

This Court reached the proper conclusion in a well reasoned order. As the Court aptly noted, not every business disappointment can be manipulated into some legal theory of recovery. The liability urged by Plaintiff would chill legitimate private commercial communications needed in our free market economy. The communication here was limited, supported, in good faith, and truthful both on its' face and in its' implications. Accordingly, Plaintiff's motion for reconsideration should be denied.

Florence, South Carolina

April 25, 2011

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FIRST RELIANCE BANK AND
THOMAS C. EWART

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Mark Fountain,

Plaintiff,

v

First Reliance Bank, Thomas C Ewart, and
Ernest Pennell,

Defendants

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2010-CP-21-131

**SUPPLEMENTAL RESPONSE TO
MOTION FOR RECONSIDERATION**

Defendant Bank and Ewart submit this supplemental response based upon understandable time constraints at the argument hearing and questions raised by the Court to counsel at that hearing

QUESTIONS ABOUT SWINTON CREEK NEED NOT BE REACHED

During argument, the Court asked counsel questions regarding the case of Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334, S C 469, 514 S E 2d 126 (1999) – a case submitted by Plaintiff in support of jury consideration of an alleged abuse of privilege. The Court asked Counsel Payne: What about Swinton? Doesn't it create a jury question?

While counsel argued the distinctions of Swinton in both its initial response and at argument, counsel may have neglected to remind the Court that the question of privilege is only reached if the Court first determines that the statement could be defamatory. Thus, even if this Court were inclined to believe that the privilege question might be for the jury – *there is no legal need to consider privilege if the statement could not be defamatory as a matter of law* (as this Court properly concluded in its Order). Thus, the Court properly asked the next question of Plaintiff's counsel: Why shouldn't defamation be ruled out as a matter of law? (As the Court has already done)

DEFAMATION PROPERLY RULED OUT AS A MATTER OF LAW

The Plaintiff argues that even true words remotely “capable” of offensive innuendo are actionable. In the case of Adams v. Daily Telegraph Printing Co., 292, S C 273, 356 S E 2d 118 (Ct App 1986), however, the publicly invited implication of the true statements was that the Plaintiff Adams had engaged in criminal conduct. Adams openly invited an implication of criminal character, this is very different from the private statement made in the case at bar which arguably carried with it a well-supported commercial opinion of credit worthiness. As well understood and distinguished by the Court in its initial Order, this matter is very unlike those of defamation *per se* where a person’s character is called into question. This is no Citadel professor accused of illegal conduct and this is no minister accused of dishonesty.¹ This Court was correct in its Order – there is nothing for a jury to consider as defamatory here.

SWINTON CREEK SIMILARITIES ARE DECEPTIVE

If the Court does reach the issue of privilege, which it need not, these Defendants urge the Court not to be deceived by any uncontrolling similarities with the Swinton Creek case. While Plaintiff again urged at argument that the facts of Swinton Creek are “eerily similar” to the case at bar, those similarities confuse and mask the important difference – possibly obfuscated during argument. Sure both cases involve banking defendants speaking to potential borrowers in a commercial lending context, thus, Plaintiff would have the Court assume every banking comment to a borrower creates a question of fact regarding privilege. But this misses the real basis for the privilege in the case at bar – and the lack of real controversy.

¹ Boling v. Clinton Cotton Mills, 163 S C 13, 161 S E 195 (1932)(statement that minister ‘ would not keep his word ‘ was actionable per se), Moshtaghi v. The Citadel, 314 S C 316, 443 S E 2d 915 (Ct App 1994)(statement that professor was ‘dishonorable ‘ and engaged in ‘illegal’ conduct was actionable per se)

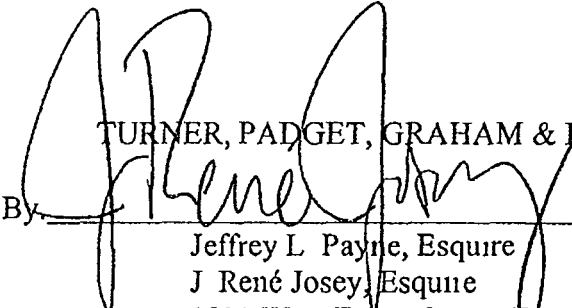
In Swinton Creek, the lender's alleged defamatory statement ("financial woes") about the Swinton Creek nursery was made to someone *other than* Swinton Creek nursery – it was made to Durwood Collins, Jr. In the case at bar, the lender's alleged defamatory statement about project management was made to a partner/agent of that project manager – someone with the same commercial interests, it is the Pennell-Fountain relationship that is important. Swinton Creek nursery was in an arms-length transaction with Durwood Collins, Jr., they were not partners or joint venturers with aligned interests and duties. Of course, another distinction is the factual basis for the "financial woes" comment was disputed in Swinton Creek whereas the factual history of Plaintiff's business management is not in dispute.²

CONCLUSION

This Court reached the proper conclusion in a well reasoned order. Plaintiff's motion for reconsideration should be denied.

Florence, South Carolina

May 23, 2011

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FIRST RELIANCE BANK AND
THOMAS C. EWART

² Again, Plaintiff wants to suggest a controversy is created based upon banking standards – which have nothing to do with defamation law. Plaintiff would have this Court presume that a lender is required to do business with any person and make them sizeable loans unless certain banking standards allow the declination of a loan. While the bank, like anyone, owes a duty not to defame, it owes no duty to lend money to persons in whom it lacks confidence – no matter how rational or irrational. No presumptive right to a loan exists.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2010-CP-21-131
	)	
	)	
Mark Fountain	)	)
	)	
vs	)	TRANSCRIPT OF RECORD
	)	
First Reliance Bank, et al	)	)
<u>DEFENDANTS</u>	)	March 10, 2011
		Florence, South Carolina

B E F O R E

THE HONORABLE D CRAIG BROWN, JUDGE

A P P E A R A N C E S

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KESHIA REED
Official Court Reporter

1 him to, at least, explain the reasoning as to why they
2 weren't interested in looking at this loan Same thing,
3 they wanted over a million dollars, plus a little bit to
4 pay out Mr Rawls

5 Mr Pennell comes over and meets with Tom Ewart
6 And during that meeting, he tells him that First Reliance
7 will not be making the loan if Mark Fountain is going to
8 be managing the operation Now, Mr Pennell goes and
9 tells Mark something very similar to that statement
10 There's only one little difference He said First
11 Reliance Bank would not make the loan if Mark Fountain was
12 involved with the business Okay That's what we're here
13 about, is that statement First Reliance Bank will not be
14 making the loan if Mark Fountain is going to be managing
15 the operation or words to that effect We have been
16 litigating this thing for over a year now I've got boxes
17 of stuff all over that one statement, Your Honor And
18 that's what Mr Fountain says that statement, when Mr
19 Pennell came back and told him that, that somehow defamed
20 him

21 As Your Honor, truth -- it can't be defamatory
22 if it's the truth And that statement was the truth, Your
23 Honor First Reliance Bank was not going to loan over a
24 million dollars to Mr Pennell with Mark Fountain being
25 the manager They just weren't going to do it And

1 that's the truth Mr Fountain's feelings got hurt
2 We're sorry about that But that is an absolute truthful
3 statement Mr Ewart told Mr Pennell if you presented
4 some other options to us, such as another oil company
5 coming in there and leasing it, we would consider it But
6 we're not going to loan you money with the current
7 management structure in place

8 Now, these weren't just some baseless statements
9 that Mr Ewart was basing it on They had had several
10 loans that Mark Fountain was involved in where they went
11 into default, they were nonperforming loans and they
12 didn't pay back as they had agreed This was -- one of
13 the loans involved the Bojangles restaurants here in town
14 Mark was the manager of them He, along with some other
15 people, owned those restaurants The loans didn't
16 perform, the businesses lost money And based on those
17 experiences with that loan and another loan where Mr
18 Fountain was managing a trailer park for his family, they
19 had problems repaying that loan as well, they were not
20 comfortable with him being the manager, and, therefore,
21 they weren't going to make the loan

22 Now, First Reliance, as I mentioned, was not the
23 only one not interested First Citizens Bank wasn't
24 interested After the meeting between Mr Pennell and Mr
25 Ewart, they even tried to get some money from a company

1 called Upstate Mortgage Upstate Mortgage did not loan
2 Mr Pennell the money to buy -- or to refinance the store
3 Carolina First, ultimately, foreclosed They got the
4 property back in May of 2009 And the store never -- he
5 was never able to get it refinanced Mr Pennell didn't
6 try anymore He tried at three different places He
7 couldn't get the money

8 Now, for defamation, Your Honor, I've given you
9 some briefs up there First of all, it's got to be a
10 false statement And as I just stated, this statement is
11 not false We were not loaning him the money as long as
12 he's involved -- or he was the manager of the business
13 So that's the first one It's got to be false It's got
14 to be defamatory The statement must be unprivileged and
15 made to a third party And then there's some other
16 different elements that come into play Besides not being
17 false, it's a truthful statement, we've alleged here, Your
18 Honor, that we're entitled to a privilege, qualified
19 privilege

20 Business people, Your Honor, as you can imagine,
21 in certain context -- this is assuming you think it's a
22 false statement We're allowed to communicate on a
23 subject and it can even be defamatory if the person
24 communicating it has an interest in it, if he made the
25 statement in good faith and the statement was limited to

1 the requirements of that particular interest Hubbard and
2 Felix lays it out a little bit better They said the
3 statement's got to be in good faith, there has to be an
4 interest to be protected, the statement was limited for
5 its sole purpose, the statement was in a proper occasion
6 and the publication was in a proper manner at the proper
7 parties

8 He, Your Honor, we have two business people We
9 have a client of ours We didn't want to lie to him We
10 told him the absolute truth for why we were not interested
11 in even processing the loan We didn't even get an
12 application here They brought some materials over We
13 were not even bringing it to that level But we have a
14 qualified privilege to make those kind of statements in
15 this context to protect our business interest, our
16 interest with our borrower and we wanted to tell him the
17 truth

18 Now, the other cause of action is intentional
19 infliction of emotional distress You know all the
20 elements, I can rehash them here in a little But the
21 ones that -- the conduct to be infliction of emotional
22 distress, Your Honor, it has to be so extreme and
23 outrageous as to exceed all possible bounds of decency
24 which must be regarded as atrocious, utterly intolerable
25 in a civilized society And the distress was so serve

1 that it's -- that no reasonable man could be expected to
2 endure it

3 Your Honor, there is a heightened burden on the
4 Plaintiff in this situation as to those two elements of
5 the intentional infliction cause of action This
6 statement that we made in a business context, one on one
7 with our potential borrower was not outrageous It was
8 made simply to tell him the truth This is just not the
9 type of case that warrants such a demanding cause of
10 action, Your Honor For these things, we would ask the
11 Court to grant our summary judgment and dismiss this as to
12 the first two causes of action as to this complaint
13 Thank you

14 THE COURT All right

15 Mr Hatfield

16 MR HATFIELD Thank you As I understand the
17 Defendant, Yuart, and First Reliance's position, they're
18 seeking summary judgment claiming there's no genuine issue
19 of material fact on the issue of truth In other words,
20 the statement they made was true, and that they are
21 entitled to summary judgment as a matter law on the issue
22 of qualified privilege I think that's their positions
23 And, of course, we've heard the argument about the cause
24 of action for potential infliction of emotional distress
25 A statement can be defamatory if, by innuendo,

1 it is false or untrue In this case, it's undisputed that
2 Mr Ewart, as the chief banking officer for First
3 Reliance, made the statement, We are not going to loan
4 money to Mr Pennell as long as Mark Fountain is involved
5 in the management of this Hess Mart The innuendo from
6 this is that Mark Fountain was a bad business man and he
7 was incapable of managing a convenience store

8 As a result of that publication by Mr Ewart to
9 Mr Pennell, Mr Pennell then had a conversation with Mark
10 Yuart And according to -- excuse me, had a conversation
11 with Mark Fountain And according to Mr Fountain, he was
12 instructed to tear up the contract, because there was a
13 two-year employment contract that had been entered into
14 just prior to this meeting with First Reliance And as a
15 result of that statement made by Mr Pennell, and Mr
16 Pennell understood it to mean that Mark Fountain was not a
17 good businessman, he tore up the contract, basically And
18 Mr Pennell admitted that he did not comply with the terms
19 of the agreement, that he never paid anything to Mark in
20 accordance with the terms of that agreement

21 So the question of truth or untruth, of falsity
22 or not, defamation or not is clearly a question of fact is
23 raised by the testimony of Mr Pennell and Mr Fountain,
24 couples with -- and these are just -- I'm going to read
25 you a summary from Mr Ewart's deposition I'm going to

1 hand up the original depositions of Mr Ewart and Mr
2 Pennell And I would ask that Mr Fountain's original
3 deposition be handed up as well by Mr Payne because he
4 was the party who took the deposition

5 Number one, at page 10, Mr Ewart admits that
6 his decision to reject Panell's loan application -- and,
7 in fact, there was a loan application according to the
8 testimony in this case, contrary to what Counsel just
9 stated -- was based on Mark Fountain's involvement in the
10 management of Hess Mart That was the only reason he
11 rejected Now, this was based on information that was, at
12 least, five years old Because the history in this case
13 is this, some five years ago, April of '03 is when Mr
14 Ewart, who was a banking officer with Carolina First,
15 decided to leave Carolina First and come to First
16 Reliance Shortly after he left First Reliance, Dwayne
17 Brockington, another banking officer with Carolina First,
18 followed him And, in fact, it was Mr Brockington who
19 referred Mr Pennell to Mr Ewart for consideration of
20 this loan And I'll get back to that in a moment

21 While Mr Ewart was a banking officer with
22 Carolina First, that bank loaned money to an LLC, BoJo
23 Tim, which owned a Bojangles franchise There were four
24 owners or principals in the LLC Hugh Wilcox, Jr , the
25 attorney, his son, Walker, I think the lady's name is Mary

1 Altman, I'm not sure, and then Mr Fountain Mr Ewart
2 stated that it was because of how that operation was
3 managed by Mark Fountain is the reason why they would not
4 make this loan to Mr Pennell Now, in his deposition,
5 though -- because there has to be some factual basis for
6 that claim to make this statement about we didn't make the
7 loan because of the management There has to be some
8 proof, some evidence from Mr Ewart that the statement
9 about the management team, his concern was true In other
10 words, that Mark Fountain was not a good business manager

11 Well, what Mr Ewart told us in his deposition
12 is that when he left Carolina First in 2003, now, that's
13 five years before this event, he had no knowledge that the
14 BoJo Tim loan was in default or had ever been in default
15 So there's no evidence from that that Mark Fountain
16 somehow was responsible for the mismanagement if there was
17 of the BoJo Tim

18 Mr Ewart, at page 30 of his deposition, he
19 never asked -- this is while he was at Carolina First He
20 never asked Hugh Wilcox, Jr or BoJo Tim to restructure
21 its management or replace Mark Fountain Mr Ewart, at
22 page 35 of his deposition, was unable to name any
23 commercial loan applicant who was denied a loan because of
24 the question about the management team At page 37, he
25 was unable to identify any commercial loan applicants who

1 were turned down because of management while at First
2 Reliance

3 So, basically, what we have here, Your Honor, is
4 Tom Ewart, who, apparently, is claiming to rely on
5 knowledge that Mark Fountain is a poor manager that's some
6 five or six years old, even if there was some evidence of
7 that, that there's no basis, in fact, at the time he made
8 the statement to Mr Pennell that that statement was true,
9 that Mark Fountain was a poor manager or a bad business
10 person In fact, what the examination of Mr Ewart in his
11 deposition establishes -- and we provided an affidavit of
12 a banking expert, Peter Sikes, from First Bank Corp in
13 North Carolina, that the bank totally ignored its
14 underwriting loan guidelines and even considering this
15 loan and rejecting it out of hand

16 At his deposition, again, we wanted to find the
17 basis why did you do this If it's because Mark Fountain
18 was a poor manager or bad businessman, please point to us
19 in your underwriting loan guidelines, which are set by the
20 bank, which support this determination Because if they
21 are there, then maybe you do have a legitimate interest in
22 declining this loan But if they're not there, then maybe
23 your statement is motivated by something else Maybe,
24 it's because of maybe some problems you had back at
25 Carolina First that were created by this BoJo Tim loan,

1 which you suddenly left in April of '03 and jumped over to
2 First Reliance

3 So we ask him in his deposition at page 47, we
4 handed him the general loan underwriting guidelines,
5 referred to at section C-47, page 3, which bait stamped
6 FBR00310 And after looking at that document, he read
7 this statement -- and out of a hundred or so pages of loan
8 guidelines, this is the statement that Mr Ewart, on
9 behalf of the bank, relied upon in support of his claim
10 that management consideration was appropriate in denying
11 this application He read this, "Management usually
12 critical in small, closely-held companies where management
13 consist of one or just a few senior officers Age of the
14 top officers might also indicate the need for discussion
15 of succession of management" That's the section he
16 relied upon I think we can all agree that has no bearing
17 on his claim that it was the management team at Hess Mart,
18 i e Mark Fountain, as the basis for declining the loan

19 THE COURT Let me ask this, Mr Hatfield, what
20 basis or what standing does Mr Fountain have to make
21 about whether or not the loan was made? I mean, the
22 application -- if, in fact, there was an application
23 There's some dispute about whether an application was
24 made You said it was, Mr Payne said it was not If, in
25 fact, an application was made, Mr Pennell made the

1 application, what standing does Mr Fountain have to
2 complain about the fact that the loan wasn't made?

3 MR HATFIELD Very simply --

4 THE COURT I mean, we're talking -- I'm sorry
5 Go ahead

6 MR HATFIELD I apologize It goes to their
7 claim of qualified privilege That they relied on good
8 business judgment in making the decision and, therefore,
9 they're immune Now, of course, the issue of qualified
10 privilege is first determined by the Court is their
11 privilege, but then whether that privilege was abused is a
12 factual issue for a jury to decide And so the point of
13 our questioning about what guidelines did you rely upon
14 goes to the issue of their business judgment defense
15 Because in this circumstance, him stating that -- about
16 management of closely-held corporations consist of just a
17 few senior officers, age of the top officers might also
18 indicate the need for discussion of succession Well, he
19 admitted at page 50 that Mark Fountain was not an equity
20 owner or shareholder and had no interest in the business
21 There would be no issue about who was going to succeed
22 Earnest Pennell And it made no difference who was going
23 to succeed Mark Fountain because he had no interest in the
24 business So that, basically, guts their claim that they
25 had a qualified business privilege in this particular case

1 because they didn't even consider their own underwriting
2 guidelines In fact, what he said -- he admitted at page
3 48, I didn't look at the general loan considerations
4 because I looked at management as the key Well, the
5 management key is what I just read to you a moment ago

6 So here's, basically, the bottom line on this,
7 Your Honor, at page 39 Now, this all goes back in time
8 to Mr Ewart's time at Carolina First when there were some
9 problems with the BoJo Tim loan, even though it was never
10 technically in default, there was never a lawsuit brought
11 to foreclose the loan There were issues about prompt
12 payment But he's blaming it all on Mark Fountain

13 The problem is this, Mr Brockington admitted in
14 his deposition at page 39, When Brockington told him --
15 now, this is Dwayne Brockington, who was his subordinate
16 at Carolina First, When Brockington told him Fountain was
17 involved in the management, that's when he made his
18 decision to deny the loan He did not look at the loan
19 application or Mr Panell's personal financial statement
20 or the property appraisal Ewart had it in for Mark
21 Fountain and so did Dwayne Brockington Those are the
22 inferences that a jury can reasonably infer from how First
23 Reliance and its chief banking officer handled this loan
24 application They saw an opportunity, we're going to get
25 this little Mark Fountain because he fowled up the BoJo

1 Tim Although, we don't have any evidence that he did,
2 we're going to queer this deal with Thomas Pennell and
3 Fountain is out of his employment agreement And that's
4 what happened in this case Even though -- keep this in
5 mind, Your Honor Again, Yuart's deposition -- they
6 didn't begin with Tom Ewart -- I'm talking about Mr
7 Pennell and Mr Fountain They did not begin with Ewart
8 as the decision-maker They first met with Rick Saunders,
9 the CEO of the bank And in Mr Ewart's deposition, he
10 stated -- wait a minute, I want to be accurate when I give
11 you a quote Here we go, at page 53 of Mr Ewart's
12 deposition, he admitted that Rick Saunders would have as
13 much knowledge or perhaps, more knowledge than Ewart about
14 the criteria of making a commercial loan

15 Saunders was made aware of the transaction in
16 his initial meeting with Mr Pennell and Mr Fountain In
17 other words, he knew that Mark Fountain was the management
18 team, quote, and that Mr Pennell was the equity owner
19 And in that meeting, he didn't just say deal's off
20 There's no way we can make this deal go because of Mark
21 Fountain or because of your management team He was made
22 aware of everything And upon knowing that, he sends him
23 to Dwayne Brockington And then Dwayne Brockington having
24 been made aware of the circumstances of this transaction
25 Panell's the owner He's the money man He's the man

1 that guarantees the loans He's the man with the net
2 worth between one and two million dollars He's the man
3 that owns the Hess Mart with an appraised value of 2 5
4 million dollars It's not Mark Fountain who's going to be
5 signing the check and responsible for payment Mark
6 Fountain is just going to be the manager of the Hess Mart,
7 that's all Mark's going to do So Saunders knew it,
8 circumstances, but didn't tell them to go their way
9 Dwayne Brockington knew the same thing that Saunders knew
10 He didn't send them along the way He sent them directly
11 to the chief banking officer, Mr Ewart And Mr Ewart is
12 the one who had the responsibility for the loan
13 transaction back at Carolina First that didn't go quite so
14 well

15 So again, the inference, the argument we make in
16 this case is that Tom Ewart, on behalf of the bank,
17 completely ignored the general commercial underwriting
18 loan guidelines that were in place Never looked at the
19 application Never looked at anything As soon as he
20 heard Mark Fountain's name, the light bulb goes off and he
21 says ah, ha, this is my opportunity, this is my
22 opportunity And that's precisely what we think happened
23 in this case And that clearly creates a question of fact
24 about their argument

25 But not only that, Your Honor, we move for

1 summary judgment as well The basis for our motion is
2 this, the bank has a responsibility if they're going to
3 exercise good business judgment and be responsible and
4 publish only truthful statements, they've got to follow
5 their own internal guidelines By his own admission, Mr
6 Ewart, in his deposition didn't even consider the
7 guidelines of the bank He didn't look at them He never
8 looked at the loan application And according to Mr
9 Pennell, there was a loan application He never
10 considered Mr Pennell's financial worth, his net worth
11 statements, personal financial statements that were
12 provided to the bank He didn't consider the real estate
13 appraisal that had been done on the subject property of
14 2 5 million dollars For his personal animus, his
15 personal dislike because of what happened at the Carolina
16 First with the BoJo' Tim loan, Mr Ewart took it upon
17 himself, ignoring what Rick Saunders -- ignoring that Rick
18 Saunders' referral certainly suggested that it was a loan
19 worthy of consideration as was Dwayne Brockington's
20 referral worthy of loan consideration But rather than
21 looking at what the bank's practices and policies required
22 him to do -- and this is outlined in Peter Sikes'
23 affidavit, he took it upon himself no, I'm the chief
24 banking officer I'm the decision-maker and as soon as I
25 heard Mark Fountain's name, the deal was dead The deal

1 was dead

2 And for that reason, we believe we are entitled
3 to summary judgment Because he doesn't dispute that, he
4 doesn't claim that there's any other reason for his
5 decision to deny the loan He says very clearly, very
6 clearly -- again, at page 10, early on in the deposition,
7 Mr Ewart's decision to reject Pennell's loan application
8 was based on Mark Fountain's involvement in the management
9 of Hess Mart He had no factual basis to determine what
10 Mark Fountain's skill level was in management He
11 admitted he never asked or interviewed Mark Fountain about
12 his business experience in the last five years prior to
13 the BoJo Tim involvement He never did any of that He
14 saw an opportunity to get Mark Fountain He took
15 advantage of that opportunity And as result of that,
16 Mr Pennell, who up until this point in time in his
17 deposition told us that he had a good relationship with
18 Mark He had no complaints about Mark, the manner in
19 which he was managing the property, et cetera He said,
20 Tear up the agreement, the deal's off And as a result of
21 that, Fountain has been damaged

22 THE COURT Anything further, Mr Hatfield?

23 MR HATFIELD No, sir

24 THE COURT Mr Payne, anything in response?

25 MR PAYNE Just a few things, Your Honor This

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FLORENCE) C/A NO 2010-CP-21-131

Mark Fountain,	)	
	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	DEPOSITION OF
	)	
First Reliance Bank,	)	JON MARK FOUNTAIN
Thomas C Ewart, and	)	
Ernest Pennell,	)	
	)	
	)	
Defendants	)	
	)	

Deposition of JON MARK FOUNTAIN taken before
Laura W Little, Verbatim Reporter and Notary Public in
and for the State of South Carolina, at the law offices
of The Hyman Law Firm, 170 Courthouse Square, Florence,
South Carolina, commencing at 10 05 a m on the 15th of
September, 2010

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Darlington, South Carolina 29540
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act4court@bellsouth.net

Mr Payne

10

1 real estate and I worked in real estate, I guess you
2 could say for close to ten years, real estate licensed
3 ten to fifteen years I received a real estate license
4 and got involved with, when Hugh
5 Lloyd was alive, got involved with Hugh Lloyd He
6 helped me get involved with subdivision development and
7 I guess you could say he took me under his wing so to
8 speak and I started getting involved with subdivisions
9 and, you know, just went on from there in the real
10 estate aspect of things and I sold real estate as well
11 And after the real estate, you know, just right
12 recently things sort of died down in real estate, I did
13 some other retail business and then I got involved with
14 the Boy Scouts and worked with the Boy Scouts until I
15 became ill I had to have some surgeries and after the
16 surgeries I had to take some time off because of my
17 recovery time and now I'm presently the town
18 administrator, the new town administrator, in
19 Timmons ville

20 Q All right And I'm trying to get a time
21 line --

22 A Sure

23 Q -- to get a handle on some things With the
24 real estate, you said ten to fifteen years after high
25 school?

1 couple of spec houses we did Actually, I didn't build
2 any in Live Oak I built a couple in West Pointe

3 Q And were you doing that as part of C&F
4 Developers or did you have another company that you
5 were building houses through?

6 A Well, that was the L&F that I mentioned
7 earlier

8 Q So L&F, you and Mr Lloyd were building some
9 houses?

10 A It was Mr Lloyd's son, Max Lloyd

11 Q And were you an owner of L&F?

12 A I was a partner in that

13 Q It's a partnership? It's not a LLC or a
14 corporation or?

15 A I thought it was a partnership, but I mean,
16 it could have been a LLC

17 Q And on the house, on those houses -- well,
18 who did you borrow the money from to build those
19 houses?

20 A It might have been Mutual Savings Bank

21 Q And did the banks all get repaid for the
22 houses in West Pointe?

23 A As I stated earlier, any of the houses that
24 we built they were, they were paid for

25 Q All right So after you were building houses

1 and working in subdivisions, what was your next job
2 after that?

3 A After the real estate, I went into Bojangles
4 In other words, there were several partners in
5 Bojangles I had met with someone in Charlotte, one of
6 the presidents, his name was Glenn Gullledge, and I had
7 inquired about the Bojangles chicken franchise and we
8 decided to make a run after those, after that
9 franchise And the first one we built was in
10 Timmonsville We did a Bojangles as well as a Citgo
11 gas station in Timmonsville

12 Q And who -- you said we, who is we? We made a
13 run on it?

14 A Well, there were several people involved
15 There was Mary Fuller, Hugh Willcox, myself, Walker
16 Willcox, and Steve McLaurin

17 Q And you were an owner in that?

18 A I was

19 Q And what was the name of the entity that
20 owned it?

21 A It was Bojo Tim, LLC

22 Q What percentage did you own in that?

23 A I think we all had equal, equal interest in
24 that

25 Q So Bojo Tim acquired the Bojangles franchise

1 and did it build a convenience store?

2 A Well, we built -- it was, I guess you would
3 say a C store is the term that you use It was a
4 Bojangles and gas station

5 Q Combined in one?

6 A Combo Correct

7 Q Okay And did it acquire any other
8 franchises?

9 A Not any other franchises, no, it didn't

10 Q It didn't have any other location, Bojangles
11 locations?

12 A When you said franchises, I thought you meant
13 did we -- everything was kept in the Bojo Tim We did,
14 we did one on Irby Street and we did one in
15 Hartsville

16 Q Now, did Bojo Tim own the real estate on the
17 Timmons ville lot?

18 A On the Timmons ville it did

19 Q And who loaned the money for that?

20 A On the -- I'm trying to think who we started
21 off with first because we changed it around I think
22 Bank of America originally did the loan I think it was
23 Bank of America but I think to give you a better answer
24 it would be probably better for you to check the loan
25 papers

1 Q And did -- how about the Irby Street, did
2 Bojo Tim own that real estate?

3 A We leased that

4 Q Okay And who was the owner that you leased
5 it from?

6 A I believe it was an oil company and I can't
7 recall the -- it was a family that owned the oil
8 company I can't give you the --

9 Q And Bojo, does Bojo Tim still lease the
10 Bojangles?

11 A I believe to my knowledge now that we might
12 have -- the new person that came in might have taken
13 those leases over with

14 Q I mean, are you involved with any of them
15 now?

16 A I'm not because we, we don't run those We
17 don't operate them anymore

18 Q Is Bojo Tim still in existence?

19 A Well, Bojo Tim still has some bills that
20 we're paying off

21 Q Well, is Mr Willcox and them still running
22 some Bojangles and you're not involved with it?

23 A He's not running Bojangles I think he
24 actually took the building in Timmons ville He took
25 that loan personally himself

1 Q And that's Hugh Willcox?

2 A That's Hugh Willcox, the attorney

3 Q How about your Bojangles in Hartsville, did
4 Bojo Tim own the land for that one?

5 A No, they didn't They -- we leased it from -
6 - it was Charles Howard's family if that, if I'm saying
7 that right You know, they were in the --

8 Q Chase Oil?

9 A That's right

10 Q Now, were you working full-time for Bojo Tim?

11 A I was working in those restaurants as well as
12 we were doing subdivisions at the same time I had
13 West Pointe going on and Celebration Center was kicking
14 off as well as Live Oak was moving along

15 Q But with Bojo Tim you were the manager
16 responsible for the day-to-day operations?

17 A No, I was not We had managers for those
18 One for the convenience side and one for the restaurant
19 side

20 Q Well, what was your role with Bojo Tim? What
21 were you doing?

22 A I was a partner I was a partner like Mary
23 Fuller, Hugh Willcox, Walker Willcox and Steve
24 McLaurin

25 Q But you weren't overseeing day-to-day

1 operations or helping them out with day-to-day

2 operations?

3 A I mean, I was in there as well as Walker was
4 in there and Mary Fuller was in there I mean, we
5 would all come in there at different times I mean, I
6 would check on the store every day but there were -- we
7 all had managers in there

8 Q What was Walker's role?

9 A Walker did, he would do work in the store as
10 well as I would I would come in there sometimes
11 during lunch and help out with lunch or, you know,
12 heavy traffic times And then Walker left because he
13 went on to law school, you know, towards --

14 Q But you were -- were you a salaried employee
15 for Bojo Tim?

16 A I mean, we would receive money from time to
17 time, yes

18 Q You were getting a paycheck?

19 A I was getting a paycheck

20 Q And for that paycheck what was the assigned
21 responsibilities for you?

22 A I mean, I would go in there and I would make
23 sure about the managers, you know, that we had proper
24 managers in the stores Like I said, I did work in the
25 stores

1 Q And it's something you did on a daily basis?

2 A Yes, I did

3 Q And was Walker working there daily?

4 A Yes, he was From the beginning he was
5 before he left for law school

6 Q And Hugh Willcox was not in there frying
7 chicken, was he?

8 A Not to my knowledge

9 MR HATFIELD He was probably eating the
10 chicken

11 Q I can see him in there

12 A But I spent a lot of time in the stores,
13 though

14 Q Now, the franchise, we talked about one loan
15 with B of A possibly on the Timmonsville store Was
16 there some other lending involved with the other
17 locations?

18 A We did We had, we had to borrow some money
19 from First Reliance on some restaurant equipment for
20 the Irby Street store We also borrowed money to do
21 the Hartsville store

22 Q Who -- what other banks were involved?

23 A I think at the time it was Mutual Savings
24 Bank

25 Q Now, how do you know or don't you have a

1 relationship or have you known of Tom Ewart from
2 different bankings? Different banks he's worked for?

3 A Carolina First Yes

4 Q Okay And didn't Carolina First have a loan
5 on some of the Bojo Tim assets?

6 A That's when I said the restaurant equipment,
7 I mentioned while ago that we had a restaurant
8 equipment loan from there

9 Q And he was at Carolina Bank?

10 A Carolina First

11 Q Carolina First, I mean Okay Now, they had
12 a loan on, where was the restaurant equipment, at
13 Carolina First?

14 A It was someone from out of town that Tom had
15 contacted

16 Q But the loan, I mean the proceeds from that
17 loan, were used for restaurant equipment? The Carolina
18 First loan?

19 A Are you referring to the loan that we're
20 talking about for the, that we have with Carolina
21 First?

22 Q Yes

23 A I thought it was, I thought we had a
24 restaurant, an equipment loan with them, but it could
25 have been the gentleman that Tom had referred us to

1 And it might have been the man that, and I'm sorry I
2 don't know this name, but Tom had referred us to
3 someone about restaurant equipment, but we did
4 probably, we did, we did have a loan, some type of loan
5 with Tom I think it was a line of credit or something
6 like that with Carolina First

7 Q Do you remember how much y'all borrowed from
8 them?

9 A It could've been a hundred thousand

10 Q And how about First Reliance, how much did
11 Bojo Tim borrow from them?

12 A I mean, to the best of my recollection, it
13 could have been twenty thousand, twenty-five thousand

14 Q Now, with Bojo Tim, and you said you would
15 meet with the managers there and I think you said you
16 would meet with them pretty much on a daily basis?

17 A Making sure that the bank deposits were taken
18 and trying to watch some of the food costs that we --
19 but you know, you know Mary Fuller and Walker and
20 I, we all took somewhat of a part in that

21 Q And the managers were, that you're meeting
22 with, are for the gas station side in Timmons ville as
23 well as the Bojangles franchise?

24 A Correct

25 Q Okay When you borrowed the money from First

1 Reliance who did you contact there to borrow that
2 money?

3 A I think it was, think it was Rick, because I
4 know Rick and Hugh might have spoken on some occasions
5 as well

6 Q And the Carolina First loan, the contact was
7 made with Tom Ewart?

8 A Correct

9 Q And had you ever borrowed money from Tom
10 before on different?

11 A With our mobile home park, yes, Spring
12 Branch

13 Q So you had a relationship with, banking
14 relationship, with Tom?

15 A I did

16 Q Okay And with Rick would Rick be the person
17 that you would call whenever you dealt with First
18 Reliance to borrow money? The initial call?

19 A Rick or Hugh would, I would call or either
20 Hugh would call

21 Q And anybody else at First Reliance that you'd
22 ever sort of had as a loan officer? '

23 A I know when his wife or before they, I guess
24 they were married, Tiffany Saunders, well it was
25 Tiffany, Tiffany Saunders, I would talk to her on some

1 occasions before I, you know, had to speak with Rick

2 Q Okay So with Tom you remember the mobile
3 home park maybe borrowing some money?

4 A We had our mobile home park loan there

5 Q At Carolina First?

6 A That's right

7 Q And then Bojo Tim borrowed some money from
8 Carolina First and did Bojo Tim have a problem repaying
9 the loan to Carolina First?

10 A I think when we ran into some problems I
11 think that that might, that loan might still be, still
12 might be being paid, some money back there

13 Q And you had personally guaranteed it?

14 A Well, it was several of us on the loan

15 Q All the owners of --

16 A Correct

17 Q -- Bojo Tim had guaranteed it?

18 A Correct

19 Q And the business just wasn't doing well
20 enough to make the loan payments?

21 A Well, I mean I guess to answer your question,
22 no No, Bojangles, we started off well and then we
23 started having problems and it was not one of my better
24 ventures, I can just go ahead and tell you that

25 Q And you ended up getting sued on several

1 things that you guaranteed as a result of the Bojo,
2 Bojangles venture?

3 A Well, yes, I had judgments brought against
4 me Yes

5 Q And did it ever make any money?

6 A The Bojangles?

7 Q The Bojo Tim?

8 A I mean, like I said, it started off good
9 But I think we had some problems with other, with theft
10 and I think there was, I guess the old saying there was
11 more going out the back door than the front door

12 Q You said you think it ever did, you think it
13 did make some money at some point?

14 A Well, I mean there was, there was cash flow
15 there, but I mean, I think we took a lot of losses as
16 far as -- let me rephrase that No, it did not make us
17 wealthy by any means and it, and eventually we had to
18 lease those stores out and sell what we had to get out
19 of it So I guess to give you another answer, no, it
20 did not or we would've still been in it

21 Q And who did you lease or who did Bojo Tim
22 lease Timmonsville to?

23 A Well, I know Hugh Willcox had a couple of
24 different restaurants in there on that side I think
25 there was a gentleman who had the House of Ribs who

1 passed away, he had a BBQ place in there Then
2 Church's Chicken went in there and they didn't succeed

3 Q But those are Hugh, at this point he's doing
4 this not as part of Bojo Tim?

5 A Well, he didn't do that as a -- you know, he
6 did that But before now, I do want to say this, but
7 let me back up just a minute here Before we let
8 Bojangles go, in other words, Bojangles came in and
9 they took, we let that store go back to corporate They
10 took that store as well as other stores and that was
11 David Maisel but Bojangles itself couldn't keep it
12 open So that's when they closed it up and that's
13 when, you know, later on Hugh brought in some of them
14 from the, like I said, from the House of Ribs and then
15 Church's Chicken went in

16 Q Did Bo --

17 A And that was after we were already out

18 Q All right But did Bojo Tim, does it still
19 own the land and property?

20 A I don't know if Hugh has that still in Bojo
21 Tim or not I mean, you would have to ask him

22 Q So what happened with Bojo Tim after the
23 business had closed down?

24 A Well, we still had some of the debts but then
25 Hugh spoke with us and Hugh took that building He

1 assumed the loan himself for that location

2 Q What about the other loans, are you still
3 having to pay on those?

4 A Well, my name is still on those notes as well
5 as other partners

6 Q Are you paying anything on those notes?

7 A Me, personally?

8 Q Yes

9 A No, I'm not

10 Q Who is servicing them?

11 A Hugh Willcox and some of the other partners
12 Now, I guess to answer that question a little bit more,
13 our mobile home park had to eat a lot of it because
14 I had some of that Bojangles in with our mobile home
15 park, and our mobile home park was paying some of those
16 loans towards Bojangles, so --

17 Q Now, you -- I'm sorry Go ahead

18 A No, you go head

19 Q My mobile home park or the mobile home park
20 had some of those but what does that mean, had some of
21 those Bojangles?

22 A When we did Bojangles, Spring Branch secured
23 some of those notes itself

24 Q And is Spring Branch off the hook to the
25 various banks?

1 A Well, to my knowledge I thought those loans
2 were paid, I mean, from --

3 Q And the mortgage, was there a mortgage put on
4 Spring Branch?

5 A There was There was

6 Q And that's been satisfied?

7 A To my knowledge

8 Q And have Hugh or any of the other members of
9 Bojo Tim come back to you asking you to put in more
10 money or pay more money since they've had to pay this
11 money to the banks?

12 A Well, they knew what I was paying and they
13 have asked me on occasions if I had it, if I could give
14 it, and right recently I have not had it because due to
15 being sick

16 Q And how much do they think that your share
17 should be? How much do you owe?

18 A I mean, I can't, I can't give you an answer
19 to that because I don't know

20 Q Has he formally sent you out any kind of
21 capital call for Bojo Tim?

22 A No No

23 Q Just, and the last time you talked to him,
24 how much did they say they needed from you to help make
25 a payment or two?

1 A Well, he asked me if I could come up with
2 something, he'd appreciate it

3 Q And how much was something?

4 A A thousand, somewhere in that ballpark I
5 mean, I can't give you an exact figure but he --

6 Q And this is Hugh Willcox

7 A That's right

8 Q -- calling you?

9 A But Hugh knows that I have been, Hugh knows
10 that I've been sick and I've had some financial
11 problems due to being sick so he's been very
12 understanding

13 Q Now, how long were you out of work because
14 you were sick?

15 A Off and on now for -- I had, when I was with
16 the Boy Scouts in '08, I had a biopsy done and then I
17 had to have a hernia surgery on my right side done and
18 I had an allergic reaction to that hernia and I missed,
19 I missed maybe close to six months, and then I had to
20 have that surgery done again because
21 I had a allergic reaction to some mesh they put in me
22 and I had it done the right side again done and
23 couldn't fix the problem So I had it done a third
24 time and it didn't, it wasn't fixed, so I'm having to
25 have it done again for a fourth time this next

1 Thursday for more of a serious type operations
2 These weren't -- when I say hernias that there was a
3 lot more extensive than just fixing a hernia So off
4 and on from 2008 to this point, I guess you could say
5 I've been, I've been pretty sick And I think the
6 doctor's notes and that sort of thing will support me
7 in what I'm trying to say

8 Q And so you haven't worked full time since
9 that illness?

10 A Well, actually I've started working, you
11 know, I guess the beginning of this year of '10 I was
12 asked to come to Timmons ville to try to help them get
13 out of their problem

14 Q Oh, that's right I'm sorry

15 A Yeah, as a town administrator But up to
16 that point, no, I was not because of these different
17 surgeries and illnesses I have not been, you know

18 Q When did you start with Timmons ville?

19 A It was probably, it was actually in March of
20 '10

21 Q '10 And the first time you were having the
22 hernia -- when was the first hernia surgery? You said
23 you were with the Boy Scouts?

24 A Yeah, so it would have had to been in '08

25 Q In '08 And it just didn't go well and since

1 A Well, that's correct

2 Q But you thought that with some good
3 management that there was a possibility that the store
4 could be profitable?

5 A Well, I thought it could be with good
6 management to answer that question Yes, sir

7 Q Okay And good management is important for
8 business to succeed, is that right?

9 A Well, certainly

10 Q Okay And without good management it's
11 difficult for a business to succeed You agree with
12 that?

13 A I do agree with that

14 Q But what did you think you could do
15 differently to make the business profitable?

16 A Well, I want to back up here a minute Now,
17 when Mr Pennell was calling me he had a, he had a
18 friend to come see me, what brought this on, I guess
19 he, his name was Leo He came to my house and he told
20 me that Mr Pennell was trying to contact me and that
21 Mr Pennell wanted to discuss that, the gas station
22 with me He came to my house and we -- you know, and
23 then I called Mr Pennell And that's when Mr Pennell
24 was -- you know, we talked and I did, I did tell Mr
25 Pennell that basically Bojangles was not very

1 successful but I told him I'd like to think that you
2 learn by your mistakes and I made a few phone calls to
3 him in reference to, I made a few phone calls in
4 reference to try and help get something going in the
5 gas station because the Hardee's was vacant at the time
6 and they were not bringing in the revenue that they
7 should have been bringing in on that And Mr
8 Pennell also took me to Bishopville with him, picked me
9 up, and we met with Green Deschamps And they were
10 offering their assistance because Mr Pennell presented
11 me as a, as a partner, that I was coming in, and they
12 offered their assistance in helping us get that gas
13 station back where it should be So they did offer
14 their assistance as well Green Deschamps

15 Q What -- to do what?

16 A You know, restock the store, kind of get it
17 straight, because at the time Green Deschamps said that
18 Mr Pennell, they owed him about a two hundred thousand
19 dollar gas bill and just trying to figure out some ways
20 to get the store generating revenue again

21 Q And I mean, they were going to loan
22 additional money to restock the store?

23 A Well, actually Green Deschamps was going to
24 work with Mr Pennell and myself on some of the debt
25 that was owed on the store, I mean with them I'm

1 sorry You know, work with some of the debt that they
2 had, they had accrued, accumulated with Mr
3 Deschamps

4 Q And what, how was Green and his company going
5 to get repaid?

6 A Well, we were going to go back out and try to
7 refinance this loan for this gas station

8 Q And what about putting something in where the
9 Hardee's was? Was that, what was the plan there?

10 A Well, from my understanding from Mr Pennell,
11 he was having a hard time making a payment and they
12 lowered his payment They had a lease with him and
13 I looked through the lease and, you know, Mr
14 Pennell said that he would allow I think it was
15 Bishopville Oil to pay a lower price there for a while
16 and then I think he was supposed to go back paying what
17 he originally was supposed to pay for the term of the
18 lease and I don't think that ever happened, and you
19 know, the restaurant was fully stocked, as far as when
20 I say fully stocked with restaurant equipment, and
21 just, you know, that was revenue that could've been
22 being brought in

23 Q But Bishopville Petroleum was going to put
24 something in where the Hardee's was?

25 A Now, you'll have to look at the lease I

1 thought it was Bishopville that -- let me rephrase that
2 again You'll probably have to look at the lease and
3 look at the person who had that because --

4 Q Who, who had the Hardee's?

5 A They had, they had a Hardee's One of these
6 oil companies had a Hardee's in there

7 Q It wasn't Bishopville Petroleum?

8 A Well, go back and look

9 Q Okay All right

10 A Go back and look, because, like I said, it
11 was in the lease who had the, who had the Hardee's

12 Q And when y'all you actually went over to
13 Bishopville and met with Green?

14 A Green Deschamps I did

15 Q Had you -- did you know Green?

16 A No, I did not Not personally I have not

17 Q And with whatever was discussed, I guess one
18 of the most important parts was the ability to
19 refinance the loan, is that right? To make this work
20 for y'all, somebody had to refinance that loan?

21 A Well, Green, I mentioned in that conversation
22 that he had already been in touch with Carolina First
23 who had the loan, and he said that he thought that
24 Carolina First would work with Mr Pennell and actually
25 if Mr Pennell would come up with some money that he

1 thought that they could keep it going from going into
2 foreclosure

3 Q All right And do you remember, and this is
4 December of '08, when was this meeting with Green
5 Deschamps?

6 A It was sometime either at, towards the end of
7 '08 or the first of '09 I just, I just can't remember
8 that exact date

9 Q Is it Carolina First or Carolina Bank that's
10 got --

11 A I think it's Carolina First I think
12 Carolina Bank is, isn't that the Beasley Bank?

13 Q Yeah

14 A Well, then it was Carolina First

15 Q Carolina First How much money -- well, let
16 me, let me back up But you knew that without a
17 refinance with Carolina First that he's going to have
18 to shut this company down?

19 A Well, we knew that we were going to some
20 other banks as well and talking to some other banks

21 Q Right Either you refinance it or Carolina,
22 somebody has got, if we don't get this thing refinanced
23 or if Carolina First doesn't refinance it, this
24 business is done?

25 A Well, what was, what I was told was if he

1 came up with some money that Carolina First would work
2 with him

3 Q And how much money?

4 A I don't know if it was two hundred thousand
5 but I was told this by Mr Pennell

6 Q But you weren't able to loan him any, right?

7 A No, I actually was not going to be on the
8 loan

9 Q Okay But without either of those things the
10 business is going to, if he didn't want to put the two
11 hundred thousand and y'all don't refinance it or
12 somebody else doesn't loan him some money, the business
13 is done, right?

14 A Well, I think that just goes to say with
15 anything you do

16 Q Yeah Because he couldn't pay, he couldn't
17 make the payments, right?

18 A Well, that's right

19 MR HATFIELD Can we take about a ten minute
20 break?

21 MR PAYNE Sure

22 MR HATFIELD We've been going about an
23 hour

24 (OFF-THE-RECORD BREAK)

25 DIRECT EXAMINATION BY MR PAYNE CONTINUES

1 Q Let's see, Mr Fountain, at the time that you
2 and Mr Pennell entered into the agreement that you've
3 attached to your Complaint, you were aware that Bud
4 Rawls was a 50 percent owner of that property, of the
5 convenience store, is that right

6 A Well Mr Pennell was trying -- yes, I was

7 Q Okay And Mr Pennell was trying to buy out
8 Bud at that time, is that right?

9 A Correct

10 Q And you knew going forward the only way this
11 thing was going to work is if Bud was out of the way,
12 he was no longer a partner or an owner of this
13 business?

14 A Bud told -- dropped his keys off to Mr
15 Pennell and told him that he no longer wanted to be a
16 partner and that's what Mr Pennell told me

17 Q And did -- was Mr Pennell going to have to
18 pay Bud anything for his interest in it?

19 A I don't know anything about that

20 Q Were you able to show the property when you
21 were the listing agent?

22 A I did I did show it on different occasions

23 Q To whom?

24 A I mean, I carried people by there As far as
25 there was a, there was a gentleman that was interested

1 in the property that owned a BP station and I told him
2 where the property was and to go in the property and
3 just walk around and look at it because Mr
4 Pennell was having problems with Bud Rawls at that
5 time

6 Q And Bud wasn't letting you show it, the
7 inside like you wanted to, was he?

8 A Well, Bud had some conversations with me

9 Q And Bud really wasn't interested in selling
10 it, was he?

11 A I don't know You'd have to ask Bud that

12 Q But he was asking, do you remember what Bud
13 was wanting to sell it for versus what you told him?

14 A No, I don't

15 Q Okay You don't remember what the listing
16 was, the listing price?

17 A I don't know what Bud was asking, what he
18 wanted out of the property

19 Q What was the listing price?

20 A I'd have to look at the listing agreement

21 Q All right Tell me what Ernest told you that
22 Tom Ewart said that has supposedly defamed you?

23 A Ernest called me and said he had a meeting
24 with Tom and Tom had some not so favorable things to
25 say about me and I asked Mr Pennell what they were

1 He didn't go into detail and I asked him would he go
2 and meet me at Louis Nettles' office And Louis
3 Nettles met with both Mr Pennell and I, and Mr
4 Pennell told Louis that Tom had made the comment that,
5 that he would not loan him the money if I was involved
6 in the, in the business and that's his comment to Louis
7 Nettles

8 Q And what's wrong with that statement?

9 A I don't have a reply to that

10 Q Well, you're suing him saying he's defamed
11 you What is wrong when somebody says no, I'm not going
12 to loan you money if Mark Fountain is involved with
13 that business? What's wrong with that?

14 A Well, I mean, I just wouldn't, I wouldn't say
15 it being a banker

16 Q But you just, I mean, what's -- why wouldn't
17 you say it?

18 A I just don't think it was appropriate

19 Q And do you know the basis for why he might
20 have said, I'm not saying that he said that, but
21 assuming that he said what you're saying, what the
22 basis for that was?

23 A Well, I wasn't on the loan I wasn't going
24 to be on the loan document So, I mean, no, I don't

25 Q And you're sure he didn't say as long as Mark

1 A Well, they have but I didn't like the way
2 that comment was made by a banker that I thought I had
3 a decent relationship with

4 Q Do you know if Mr Ewart or anybody at First
5 Reliance knew that the property was in foreclosure on
6 the date you, or the day that Mr Pennell came to talk
7 them?

8 A Well, I was with Mr Pennell No

9 Q Did y'all tell them the loan was in
10 foreclosure?

11 A No, we didn't tell them it was in
12 foreclosure We told them that, to my knowledge, Mr
13 Pennell told them that he was having problems with that
14 and he was trying to, he was trying to get the loan
15 refinanced

16 Q And who did you meet with over at First
17 Reliance?

18 A Rick Saunders That was the initial
19 conversation

20 Q And are you aware of a loan application ever
21 being filled out by anybody to refinance that Carolina
22 Bank loan?

23 A No

24 Q Or Carolina First loan?

25 A No

1 Q And you never, in that meeting you never told
2 them that it was in default and that it was in
3 foreclosure?

4 MR HATFIELD Objection Objection That's
5 been asked and answered and your question assumes

6 Q All right Well, let me, let me back up
7 When you met with Mr Saunders, did you tell Mr
8 Saunders that the bank loan with Carolina Bank was in
9 default?

10 A I didn't say it was in foreclosure

11 Q Okay All right, and I changed the word
12 All right You didn't say foreclosure and that was the
13 next question, but I said default Did y'all tell him
14 that it was in default?

15 A I said Mr Pennell told me he was having a
16 hard time making payments on that loan

17 Q All right But did you tell him, making -- a
18 hard time making the payments is different than not
19 making them or not making them timely Did y'all, did
20 you hear the word default ever made in that
21 conversation?

22 A I can't, I can't recall I heard the word
23 default

24 Q Okay

25 A But I heard there was problems with the loan

1 I can't recall I heard the word default

2 Q All right And foreclosure, you didn't tell
3 Mr Saunders that the property was in foreclosure?

4 A No, because I didn't know it was

5 Q Okay And did Mr Pennell tell Mr Saunders?

6 A I can't recall that

7 Q Okay Now, did you know that Ernest went
8 back and met with Mr Ewart at some point before you
9 learned about the comments? Did you know he was going
10 over there I guess would be the better way to say that?

11 A He called me and told me he was, that Mr
12 Ewart had called him and he was going to meet with him

13 Q And is that, that's all he said?

14 A That's all he said

15 Q Who did the -- on Bojo Tim, who did they
16 lease that gas station to out there in Timmonsville?

17 A I think his name is Tim Hunt, Tim Huntley

18 Q And when Bojo Tim leased the gas station, did
19 it continue to operate the Bojangles while Mr Huntley
20 was running the gas station?

21 A I can't recall

22 Q And Bojo Tim leased the gas station because
23 it was having problems making money with the gas
24 station side of that business, didn't it?

25 A I think that would be fair to say

1 Q Have they threatened to file them?

2 A No, I mean I haven't, not to my knowledge
3 that I have any threats

4 Q Okay Now there's a number of judgments that
5 have been obtained against you Do you know some of
6 those that are against you?

7 A I do

8 Q All right Tell me the judgments that are
9 against you?

10 A I think in the past there was First Reliance,
11 Carolina Bank

12 Q Well, let me start with First Reliance What
13 was that judgment for? What kind of loan did you --

14 A I think that was, that was actually on a
15 tractor and a, and a motorcycle

16 Q And you were unable to pay them, is that
17 right?

18 A I was unable to pay them

19 Q And they sued you and got a judgment?

20 A They did

21 Q Now did you --

22 A And to my knowledge, I think that judgment is
23 satisfied

24 Q Okay, I think it is And when you took out
25 the loan with First Reliance Bank did you promise to

1 repay them what you were borrowing from them?

2 A Well, I'm -- yes I mean, yes

3 Q And did you break that promise?

4 A Well, yes

5 Q Because you failed to make the payments,
6 right?

7 A Yes

8 Q Now, who else has judgments against you?

9 A At one time I think it was Carolina Bank

10 Q What was that loan for?

11 A It was a boat

12 Q A boat loan?

13 A Yes

14 Q And you failed to pay them?

15 A Yes

16 Q Do you remember how much the judgment was
17 for?

18 A I can't recall

19 Q It's still out there to your knowledge?

20 A I thought it was satisfied as well

21 Q Okay I didn't -- it's, on one of the lists
22 I looked at it's still showing but just FYI How about
23 anybody else that you had, that's got, ever had a
24 judgment against you?

25 A First Federal

1 Q And what was that for? What kind of a loan
2 was that?

3 A That was a line of credit loan and to my
4 knowledge it's working to be satisfied as well

5 Q What did, what type of credit loan was that?

6 A It was just an open line of credit

7 Q A business loan or was it a --

8 A Business loan

9 Q And what were you using that money for when
10 you were taking it out?

11 A For different, for different things as
12 pertaining to business I can't recall

13 Q How much do you still owe First Federal?

14 A I can't recall

15 Q But you -- are you making payments to them?

16 A I'm not making payments, no

17 Q When is the last time you ever made them a
18 payment?

19 A I haven't personally made them any payments

20 Q Who has been on your behalf?

21 A That was in with our mobile home park, as far
22 as securing that debt

23 Q And it had on the record I was looking at a
24 hundred ninety-four thousand dollars?

25 A Is that --

1 Q Does that sound about right?

2 A I mean, that sounds about right

3 Q And what happened? Why couldn't y'all repay
4 that loan?

5 A As I said earlier, I had financial problems
6 with family members

7 Q And what would those be? Somebody else is
8 supposed to be making the payment or you? I mean, I --

9 A Well, they were, they were taking care of the
10 payment I mean, as far as seeing that debt, the debt
11 was being taken care

12 Q With the monies generated in the mobile home
13 park?

14 A Correct

15 Q And then at some point nobody made the
16 payments?

17 A Well, actually my brothers were working to
18 get that debt taken care of

19 Q Were you a guarantor on that loan?

20 A Yes

21 Q At First Federal?

22 A Yes

23 Q Did they sue your brothers too?

24 A No, they sued me

25 Q All right Any, anybody else got a judgment

1 against you?

2 A Maybe a credit card

3 Q And who would that be with?

4 A I can't recall that credit card because that
5 was when my mother was alive as well

6 Q I see one for BB&T, is that the credit card?

7 A That was a credit card when my mother was
8 alive

9 Q Now what does your mother being alive have to
10 do with a credit card?

11 A Well, we used that credit card sometimes
12 together so

13 Q And you didn't pay them, pay BB&T for the use
14 of that credit card?

15 A No, I did not I could not make payments,
16 no

17 Q And they had it listed on here for thirty-
18 four hundred dollars Does that sound about right?

19 A If that's what you have

20 Q Okay Is it still outstanding or are you
21 paying that one?

22 A I can't recall but that might have been
23 satisfied as well

24 Q And then I saw one for Tokyo Leasing They
25 sued you?

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1 A That's right

2 Q Has that one been taken care of?

3 A To my knowledge it has

4 Q What did -- what was failed to pay for with
5 Tokyo Leasing?

6 A That was a debit card machine that I signed
7 for on behalf, on behalf of Bojo Tim

8 Q Did Tokyo Leasing sue any of the other
9 members of Bojo Tim?

10 A No, because my signature was on the sheet of
11 paper

12 Q All right

13 A And the, and the reason I had that on there
14 because I think that company filed bankruptcy that
15 originally had that debit card machine and so another
16 company took over and we never received payment, in
17 other words, for what we, the transactions we made As
18 I said, my signature was on that document

19 Q But the bankrupt company was somebody who,
20 I'm missing you there Is that --

21 A It was someone out of California from my
22 understanding

23 Q That, from whom you, y'all bought --

24 A The machine

25 Q -- the credit machine or --

1 A The machine
2 Q -- leased it?
3 A That's right
4 Q Okay And then it wasn't paid for and then
5 you got sued --
6 A Well, in other words --
7 Q -- by Tokyo Leasing but are you saying the
8 company that was on the contract became Tokyo Leasing
9 later on?
10 A Well, that's what I'm trying to say, that
11 that company went out of business because we didn't
12 know where to send payments or get paid for, for
13 transactions that were being made, but my signature was
14 on the document
15 Q And then they sued you and got a judgment
16 against you?
17 A That's correct
18 Q Did you challenge it?
19 A I've spoke to Hugh Willcox about it
20 Q What about any other judgments against you?
21 A I mean, not without looking
22 Q Okay I don't see any but I hadn't, I didn't
23 know if you knew of any?
24 A I mean, not without looking
25 Q Now, I notice that at some point there was an

1 issue with Workers' Comp and Bojo Tim, do you remember
2 that issue?

3 A I can't I can't recall

4 Q Do you remember y'all not having Workers'
5 Comp insurance?

6 A I don't recall

7 Q Don't remember that?

8 A No

9 Q Okay Did you ever volunteer to help Mr
10 Pennell to refinance the loan with Carolina First Bank?

11 A I mean, he asked me for help in trying to
12 help him find someone that would be interested in
13 lending him money

14 Q Did you tell him that you had poor credit?

15 A I told him that I had prior, previous credit
16 problems in the past due to, due to Bojangles and the
17 gas station

18 Q And, I mean, the boat loan and things like
19 that, that's a Bojangles problem or is that a Mark
20 Fountain problem?

21 A Well, that's a Mark Fountain problem

22 Q And so what was the reason you couldn't pay
23 your bills to the credit card companies and some of
24 those other people?

25 A I ran into problems, a family problem, that

1 was a lack of my not receiving the income that I was
2 used to receiving

3 Q And that's caused your credit to be poor?

4 A You could say that, yes

5 Q Is your credit still poor?

6 A Yes

7 Q Have you looked at your credit score lately?

8 A No

9 Q Were you aware of any other loans that Mr
10 Pennell, or any other banks that Mr Pennell went to
11 talk to about refinancing that Carolina First loan that
12 was on his convenience store?

13 A I know that he saw someone in and I went with
14 him in Dillon and he spoke with Nancy Schurlknight with
15 Upstate Mortgage here in town

16 Q How about -- was that before or after y'all
17 went to First Reliance Bank?

18 A I can't recall how that --

19 Q And what's Nancy's --

20 A The steps

21 Q I'm sorry What's Nancy's name?

22 A Schurlknight

23 Q Schurlknight?

24 A Schurlknight

25 Q And that's in Dillon?

1 Q Yeah

2 A Sure

3 Q Okay And did you ever tell them no you
4 weren't loaning it to them?

5 A Yes

6 Q And you had the right to tell them no?

7 A Yes

8 Q You think a bank has a right to tell people
9 no I don't want to loan you money?

10 A Yes

11 Q And do you think that management of a company
12 would be important as to whether a bank would loan
13 someone money?

14 A Yes

15 Q And what else would be important as to decide
16 whether you're going to loan a business some money or a
17 person some money in a business?

18 A I mean, just business knowledge, I mean

19 Q Now, you have alleged in your Complaint that
20 you've suffered severe emotional distress, and I think
21 we went through your doctors, have you been to seen any
22 of these doctors for severe emotional distress that
23 you've been experiencing?

24 A I have, I have talked to, you know, as far as
25 doctor wise, I know I took some medicine a while back

1 get fired from those?

2 A I did from the Boy Scouts

3 Q They actually fired you?

4 A Due to having, because of surgery not being
5 able to return to work

6 Q Any others that you ever had?

7 A No No, but the Boy Scouts did tell me that
8 I was rehirable

9 Q Did the Bojo Tim folks ever fire you?

10 A No

11 Q Take you off the payroll?

12 A No

13 Q I don't know I'm just asking Now, what
14 damages are you claiming that you've incurred as a
15 result of this one statement that Tom Ewart allegedly
16 made?

17 A Well, as I said, I think it was
18 inappropriate

19 Q And what, what harm has it caused you?

20 A I mean, it's caused me grief and it's caused
21 me stress but I think I've said that to you several
22 times

23 Q Okay Have you lost any money as a result of
24 it?

25 A Well, that was potential income that I could

1 Q Okay Now in the Complaint, this is what the
2 quote is, "That as long as the Plaintiff was involved
3 in the transaction that First Reliance Bank would never
4 make a loan to the Defendant Pennell in order to
5 refinance the Carolina First note and mortgage " Now
6 it's in quotes, is that, is that the quote that
7 Mr Pennell told you about what Tom Ewart said?

8 A Mr Pennell told me that the bank would not
9 loan him the money if I was involved

10 Q Not would never make a loan if you were
11 involved?

12 A He said that they would not make a loan if I
13 was involved

14 Q Okay Why didn't First Citizens refinance
15 the loan?

16 A I can't, I can't, I can't answer that

17 Q Mr Pennell never told you why?

18 A They normally didn't do gas stations from my
19 understanding I mean, that's something, but as far as
20 why, you know, he didn't go into a lot of detail with
21 me about that

22 Q How about this Upstate Mortgage, what was the
23 reason they weren't going to refinance the Carolina
24 First loan?

25 A Well, they were actually working on the loan

Mr Kinklea

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1 but I think the problem was there Mr Pennell didn't
2 get back with Nancy Schurlknight

3 Q If he'd gotten back with her you think that
4 they would have made the loan?

5 A I can't answer that because I don't, I don't
6 have Mr Pennell, I don't know his financial

7 Q Who told you that, that if he would have
8 gotten back to them they might have made the loan at
9 Upstate Mortgage?

10 A Well, I just said, I don't know if they would
11 have made him the loan

12 Q But who told you that?

13 A Nancy Schurlknight said that he did not get
14 back with her and that's all I know

15 Q And you called her up and asked her or did
16 she call you?

17 A Well, I think she was trying to get in touch
18 with Mr Pennell and told me that Mr Pennell had not
19 gotten back with her and that's all I, that's all I
20 know

21 Q Did she say anything else about the odds or
22 likelihood of a new loan or anything like that?

23 A No, I didn't ask her that

24 Q Okay Gary, that's all I have Thank you

25 CROSS EXAMINATION BY MR FINKLEA

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1 restaurant?

2 A As I said to Mr Payne, I couldn't understand
3 why they didn't hold the person they had, that had
4 leased it out but he had moved out, why they weren't
5 you know going after, you know as far as full
6 potential

7 Q After that what steps did you take in
8 furtherance of a potential relationship?

9 A After the steps?

10 Q After going to the store and looking at it
11 again?

12 A Mr Pennell was still interested about me
13 going in the partnership with him on that store And
14 then he wanted me to, he told me about some of the
15 financial problems that were, they were having And as
16 far as a loan, loan wise, about if I would go to some
17 places with him to see if he could help, help him
18 secure a loan And I met with, he was, they were
19 having a lot of problems getting gas, because the store
20 was running out of gas or didn't have gas, and he asked
21 me to go with him to meet Green Deschamps And, you
22 know, I went with him and we had discussed about going
23 in together and working together to turn the store
24 around

25 Q Was the conversation or meeting with Green

1 A No, sir, not at any time

2 Q Okay And did he receive a copy of the
3 agreement?

4 A I can't recall if he did or not

5 Q Okay All right After the agreement was
6 signed December 22, 2008, maybe after he had a time to
7 reflect over a few days, did he ever call you back and
8 say, Mark, I'm sorry, I didn't realize what I was
9 doing, let's tear this thing up?

10 A To answer that question, no, he did not, but
11 after he spoke to Carolina First he wanted me to tear
12 it up

13 Q When you say Carolina First you mean First
14 Reliance?

15 A I mean First Reliance I'm sorry

16 Q Okay So it started after Tom Ewart called
17 him or they had this conversation about you that he
18 called you up and said?

19 A He wanted me to discard it, the agreement

20 Q Tear up the agreement? I mean, I think the,
21 I'm getting a little ahead of myself, but the Complaint
22 says thereafter, this is paragraph 9, "Thereafter the
23 Defendant Pennell contacted the Plaintiff and during
24 the telephone conversation advised the
25 Plaintiff to 'tear up close' the employment agreement

1 because Tom Ewart had said some disturbing things about
2 him " Is that accurate?

3 A Yes, sir

4 Q Now earlier in the, in the questioning by Mr
5 Payne, there was a little bit of confusion about what
6 Mr Ewart said, his syntax, grammar We've quoted in
7 the Complaint "That as long as the Plaintiff was
8 involved in the transaction that First Reliance Bank
9 would never make a loan to the Defendant Pennell in
10 order to refinance the Carolina First note and
11 mortgage " To the best of your recollection sitting
12 here today, is that what was said?

13 A That is

14 Q Okay

15 A And Louis Nettles witnessed that comment

16 Q So that was a comment that was made in the
17 presence of Louis Nettles?

18 A Correct

19 Q Now, it was not until after the December 22nd
20 employment agreement was entered into that you met with
21 these banks to try to help in the refinance of the
22 Carolina First note and mortgage, is that correct?

23 A I recall I think that's correct Yes

24 Q Okay Well, isn't it true that at least me
25 know --

1 agreement? Did he ever say that?

2 A No, he did not

3 Q Now when you go to Rick Saunders at First
4 Reliance, and I think there's an e-mail from the bank
5 that's like maybe December 30th or somewhere around
6 there that's been produced in discovery, was he the
7 first person you talked to about doing a refinance of
8 this Carolina First note and mortgage?

9 A At that bank he was the first person I spoke

10 Q He was the first person? All right And
11 when you -- did you meet with him in person or was this
12 a phone conversation?

13 A I met, I met with him in person with Mr
14 Pennell

15 Q And Mr Pennell was in the office, too?

16 A Yes

17 Q This was in Mr was this in Mr Saunders'
18 office?

19 A Upstairs office, yes

20 Q Upstairs? At what, is that on Palmetto
21 Street? Is that where his office is?

22 A Yes, sir The large bank building

23 Q Okay Who else was present in that meeting?

24 A Mr Pennell and I

25 Q So just the three of you?

1 A Yes, sir

2 Q And is it fair to say that Mr Saunders was
3 aware that the purpose of the meeting was to see if
4 First Reliance could offer some terms that were more
5 favorable to Mr Pennell?

6 A Yes

7 Q On the financing, correct?

8 A Yes

9 Q Now in that meeting, did Mr Saunders ever
10 ask you or did he ever ask Mr Pennell who's going to
11 be running the store on the day-to-day operations?
12 Did he ever ask that?

13 A I told him I was going to be running the
14 store

15 Q Okay And did he object to that?

16 A Not at all

17 Q And you had dealt with him before?

18 A I always thought I had a good relationship
19 with him

20 Q Even though there was some prior transactions
21 involving a tractor and a motorcycle where First
22 Reliance sued you?

23 A Correct I've always thought I had a good
24 relationship with him

25 Q All right So, and I assume Mr Saunders,

1 he's been the president of that bank from day one?

2 A Yes, sir

3 Q So is it fair to say that he would know about
4 those prior transactions?

5 A Yes, sir

6 Q Where you got sued by the bank?

7 A Yes, sir

8 Q And so when you're sitting there talking to
9 Mr Saunders and Mr Pennell is there about doing a
10 refinance or whatever, he knows that you're going to be
11 sort of the day to day guy He never says anything to
12 you about, wait a minute, you're not qualified, you're
13 not going to meet our underwriting guidelines for
14 getting a loan because of these prior deals that went
15 south?

16 A No, he did not

17 Q Never did? He didn't boot you out of his
18 office, did he?

19 A No, he did not

20 Q In fact, he booted you to Dwight, Mr
21 Brockington?

22 A Dwayne Brockington

23 Q Dwayne Brockington, that's right And I
24 would -- is it a fair statement that when you left Mr
25 -- when you and Mr Pennell left Mr Saunders' office,

1 that you were encouraged that there might be a deal to
2 be done?

3 A Oh, most definitely

4 Q And Mr Saunders knew, did he not, that you
5 were not going to be obligated on the note, were you?

6 A I made that clear

7 Q Okay This was a, this was a deal between
8 Mr Pennell and First Reliance, correct?

9 A Strictly Yes

10 Q And was it clear to you at that initial
11 meeting that if First Reliance was able to do a deal
12 that was satisfactory to Mr Pennell and to the bank
13 that it would be a collateralized loan In other
14 words, there would be security given for the payment?

15 A Yes, sir

16 Q And it would be the mortgage, it would be a
17 mortgage on the real estate and the building, correct?

18 A Correct

19 Q And this was a building that had been
20 appraised at 1 6 or 1 8 million dollars?

21 A Somewhere if not more than that Probably
22 closer to 1 8

23 Q All right And at no time did Mr Saunders
24 ask about your credit worthiness or your history of
25 running the, what was it called, the Bojo?

1 A Bojo Tim
2 Q The Bojo Tim?
3 A No, sir Not at all
4 Q He never asked about that?
5 A No, he did not
6 Q Okay Did he ask about BB&T credit card of
7 thirty-four hundred dollars?
8 A No, he did not
9 Q Or Tokyo Leasing?
10 A No, he did not
11 Q He never asked anything about your credit
12 history at all, did he?
13 A Not one time
14 Q And neither did Mr Brockington?
15 A No, he did not
16 Q And Mr Brockington, you told him and Mr
17 Pennell told him the same thing that you told Mr
18 Saunders?
19 A That's right
20 Q And how did Mr Brockington react to this?
21 Did he kick you out of the office and say there's no
22 way in you know what that we're going to loan money to
23 Mr Pennell, get out of here?
24 A No, he was very receptive
25 Q And where did you go then?

1 going to manage the property?

2 A Yes, sir

3 Q And Brockington knew that, correct?

4 A Yes, sir

5 Q Do you believe that this e-mail refers to
6 you?

7 A I most certainly do

8 Q All right And when somebody, when a
9 business, when a banker says that they've got concerns
10 with the management team what does that imply to you?

11 A That implies everything I just told Mr Payne
12 the way I felt about this I have not seen that I'm
13 -- it speaks for itself

14 Q Well --

15 A I mean, it, I mean, it upsets me by just you
16 reading that comment again I'm, I'm --

17 Q Now, did you do anything at all in your
18 discussions with Mr Saunders or with Mr Brockington
19 to suggest in any way that you were going to be legally
20 responsible for any obligation with First Reliance to
21 refinance that property?

22 A They clearly knew that I was not going to be
23 on any document

24 Q Were you given any loan applications to sign?

25 A No, sir

1 it and he was going to be basically the business owner
2 and would be responsible for repayment of any debt or
3 anything like that?

4 A Yes, sir I made that perfectly clear

5 Q In other words, that you were not going to be
6 on any loan document?

7 A That's right

8 Q All right

9 A And I did that as well with Nancy
10 Schurlknight as well

11 Q All right Did either Ms Schurlknight or
12 the First Citizens representative that you all talked
13 with ask about your business experience?

14 A You know, I told them that I had business,
15 you know, some background but not into detail, not at
16 all

17 Q All right Did either -- have you ever
18 learned that the reason they did not do a deal with Mr
19 Pennell was because of you?

20 A No No, sir

21 Q All right Now your relationship with Tom
22 Ewart goes back to his days at Carolina First, is that
23 right?

24 A That's correct

25 Q And you've answered candidly that you had

1 some financial downturns, etcetera, family issues,
2 disputes with your brother, your mom had died and all
3 of that, and that was the time that Ewart was at
4 Carolina First?

5 A That's right

6 Q Okay And Mr Ewart was the one that was
7 calling you about making payments and things of that
8 nature?

9 A That's correct

10 Q Okay Did they actually file a lawsuit
11 against you? Do you recall?

12 A No, sir I know, I know that, not Tom Ewart
13 himself, no

14 Q When I say, not Tom Ewart, I mean Carolina
15 First, did they actually bring a lawsuit against you or
16 the mobile home park?

17 A They brought a lawsuit after my mother died
18 and that's when Tom Ewart had already left First
19 Reliance, I mean excuse me, Carolina First, but we took
20 care of that My brothers took care of that

21 Q Okay All right And between your --
22 between Tom Ewart leaving Carolina First, I mean to you
23 your knowledge, did he go directly to First Reliance or
24 where did he go?

25 A I thought he went directly to First Reliance

1 tell you the exact banks

2 Q Do they owe any money to First Reliance? Do
3 you know?

4 A I'm -- to my knowledge, I'm not sure

5 Q Do you owe any money to First Reliance?

6 A I thought my judgments had been taken care
7 of

8 Q In the handling of the Bojo day-to-day
9 business operations, did Hugh Willcox ever express to
10 you any dismay or disdain or disappointment in the
11 manner in which you were running the business or trying
12 to run the business?

13 A Oh, no, never

14 Q Did you ever get accused of stealing from
15 that business?

16 A Oh no, sir

17 Q Any double dealing?

18 A No, sir

19 Q Breach of any fiduciary duties or
20 responsibilities?

21 A No, sir

22 Q Did the five principles in Bojo Tim, LLC did
23 they all sign personal guarantees for whatever money
24 was borrowed by that business?

25 A We all did

1 Q Okay And you never had any personal
2 dealings with Tom Ewart, had you?

3 A Not at, not at First

4 Q In other words, he loaned you money
5 personally and you didn't pay him?

6 A Not at First Reliance

7 Q Or at Carolina First?

8 A When we were dealing with our mobile home
9 park

10 Q That's the only time?

11 A That's right

12 Q No personal loans?

13 A Not to my knowledge

14 Q Okay And the transactions, these past
15 dealings, when did all of this take place with the
16 mobile home park while Tom Ewart was there?

17 A Well, at that time, at the time when my
18 mother was sick, we were having some hard times making
19 payments to the mobile home park

20 Q All right Let me ask, let me ask the
21 question again When, when were these past dealings,
22 in other words time frame year, were these past
23 dealings with Mr Ewart at Carolina First? What year?

24 A Year, I can't give you an exact year but long
25 before I mean

1 Q How long before December 2008?

2 A Gosh, at least three, four years, five years

3 I mean, I just --

4 Q Can you think of any reason why First
5 Reliance would not make a loan to Mr Pennell because
6 of past dealings you had with Tom Ewart at another bank
7 which occurred maybe three years ago? Three years
8 before this transaction?

9 A No, I cannot

10 Q Does that make any sense at all?

11 A No

12 Q Does that sound like a good business practice
13 to you?

14 MR PAYNE And I object to the form

15 Q Does it?

16 A No, it doesn't

17 Q Do you think that would be relevant to any
18 decision to loan money to Mr Pennell some dealings
19 that you had some three years ago with another bank?

20 A No Especially when I'm not going to be even
21 on the loan

22 Q And it goes on to say, "However, because of
23 Mr Pennell's status as a customer of the bank, Mr
24 Ewart asked Mr Brockington to schedule a meeting with
25 Mr Pennell to explain his reasoning for the denial of

State of South Carolina
County of Florence

In Common Pleas Court

Mark Fountain,

plaintiff,

V

10-cp-21-131

First Reliance Bank, Thomas
C Ewart, and Ernest Pennell,

defendants

Deposition of Ernest Pennell

Location 1831 West Evans Street, Fourth Floor
Florence, South Carolina

Date Wednesday, February 2, 2011

Time 2 17 p m - 4 33 p m

Court Reporter Mark W Hagood

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina Rules of Civil Procedure

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ina

y Mr Hatfield

6

1 A No, sir

2 Q And what is the nature of that
3 business?

4 A We retail furniture

5 Q Okay Other than your work with
6 Carolina Furniture Mart, you've had other business
7 endeavors or business ventures over your adult
8 life Is that correct?

9 A Yes, sir

10 Q At one point in time, I believe you
11 had an interest in a -- a convenience store, gas
12 station called Hess Mart on Darlington Street
13 extension at the intersection with Irby Street?

14 A Yes, sir

15 Q And who were your partners or
16 colleagues in that business?

17 A Normwell Rawls He goes by the name
18 of Bud Rawls That's R-A-W-L-S

19 Q Anyone else?

20 A Well, no, sir

21 Q All right And I believe that was an
22 LLC?

23 A I think that's correct I'm not sure

24 Q Who set that up for you?

25 A I'm not sure

1 A I -- I'm not sure of any money ever
2 being made in it

3 Q Okay So is it your testimony that --
4 that any tax returns that you filed from 1995
5 through the time that business was sold, you would
6 not have reported any income from this business?

7 A I -- I'm not sure Seems like we
8 always had a loss

9 Q Did you have a good accountant?

10 A Yes Well, Mr Falco (ph) was our
11 accountant

12 Q Dale Falco (ph) was your accountant?

13 A Yes, sir

14 Q Okay Other than Carolina Furniture
15 Mart, the Hess Mart -- what did you call it, by
16 the way? What was the name of that convenience
17 store? Did it have a name?

18 A I think it was Hess Mart

19 Q Hess Mart Okay Other than Hess
20 Mart, Carolina Furniture Mart, what other business
21 ventures have you been involved in in your adult
22 life?

23 A Well, at one time or another, I had
24 had a business in Indianapolis, Indiana This was
25 back in -- in the early--- early eighties We

1 A I don't remember the lady's name It
2 was a lady on Pamplico highway I don't remember
3 her name

4 Q Okay But at some point in time,
5 Carolina First did in fact file a lawsuit against
6 you and Mr Rawls to foreclose its mortgage and
7 collect what was owed on the note Is that a fair
8 statement?

9 A Yes, sir

10 Q And at that point in time, what do you
11 recall the loan balance to be?

12 A It was still close to that one million
13 to one-million-three

14 Q Okay And the -- the property had
15 been appraised I assume several times in order to
16 get these loans from either RBC Centura or the
17 refinance with Carolina First Correct?

18 A I'm pretty sure that's correct Yes,
19 sir

20 Q All right And the appraised value of
21 the real estate, the buildings, et cetera was --
22 was more than the amount that was being loaned by
23 the banks Is that correct?

24 A Yes, sir

25 Q What do you recall the highest

1 checking accounts

2 Q Oh, checking accounts?

3 A Business accounts

4 Q Okay Where you would just make
5 deposits and have --

6 A That's right

7 Q -- the benefit of that? Okay Now,
8 at -- at some point before December of '08, did
9 you talk with Mr Fountain about having him
10 arrange another refinancing of the mortgage on the
11 Hess Mart property?

12 A That was a suggestion from Mark
13 Fountain Yes, sir We tried to -- he
14 suggested -- this was when it was before it went
15 into foreclosure

16 Q Okay

17 A But we were to -- I was trying to
18 determine what my options was as far as my partner
19 was concerned And of course the only figure I
20 ever got was a half a million dollars, which was
21 relatively ridiculous in it -- the condition it
22 was in

23 Q And then --

24 A But Mark did suggest -- and Mark and
25 myself rode to Dillon He said he knew somebody

1 over there that would finance that thing We rode
2 to Dillon He rode with me He suggested he ride
3 with me Within a couple of days, he wanted me to
4 call back over there and see if they approved it
5 Of course they denied it I suggested going to
6 First Reliance

7 Q Okay

8 A And I did

9 Q All right Now, with reference to
10 the -- the attempt to -- to get new financing with
11 First Citizens, I take it both you and Mark met
12 with some bank officer?

13 A Yes, sir He was a branch -- officer
14 of the bank at First Citizens in Dillon

15 Q All right And can you tell me what
16 information -- did you actually make a loan
17 application there?

18 A Yes, sir I carried my statements and
19 stuff over there

20 Q All right

21 A Financial statements

22 Q All right And how much -- you were
23 seeking to borrow enough to pay off Carolina
24 First?

25 A Well, we didn't know how much -- I

1 think that's the amount -- we were trying to get a
2 little more money because we didn't -- I didn't
3 know what Mr Rawls was going to take for his part
4 of the business

5 Q Okay So you --

6 A It seemed like it was probably 300,000
7 or 400 more possibly than --

8 Q Okay

9 A Than was owed to Carolina First

10 Q Okay So as I understand it, you and
11 Mr Fountain go to First Citizens in Dillon You
12 meet with a loan officer there You provide them
13 with your personal financial information
14 Correct?

15 A Yes, sir

16 Q All right You filled out a loan
17 application?

18 A Yes, sir

19 Q And mister -- Mr Fountain was not
20 involved in the transaction except as a
21 facilitator He wasn't going to be on the note
22 He wasn't going to be liable for anything?

23 A No, sir

24 Q Correct?

25 A Correct

1 Q Okay He had no interest -- legal
2 interest in Hess Mart He was not an owner or
3 shareholder or partner?

4 A Yes

5 Q Okay And all of that information was
6 made available to First Citizens -- you made it
7 clear that you were the man --

8 A Yes, sir

9 Q -- and not Mr Fountain And they
10 never asked you about is Mark Fountain going to
11 run the business or who's going to manage it
12 They wanted to know is the property worth it and
13 are you personally able to -- to guarantee it Is
14 that right?

15 A Rephrase that to me again

16 Q Yes, sir When -- when you were
17 attempting to get refinancing with First Citizens
18 in Dillon, you made it clear that you were the
19 only obligor or the only borrower with the bank
20 Correct?

21 A Yes, sir

22 Q And the bank never asked you, well, is
23 Mark Fountain going to manage this, does he have
24 any interest in it? The bank only wanted to know
25 if the real estate was worth what they were going

1 Q Okay And nobody's ever asked you
2 about that, have they?

3 A I don't remember Not to my
4 knowledge

5 Q Okay Now --

6 Mr Finklea And Bill, I don't want
7 to break your chain of thought, but I want to
8 interpose a late objection to the form You used
9 the word refinance, and I don't think that would
10 be the proper form because it was the corporation,
11 of course, and Mr Rawls I think had to be bought
12 out of that So technically it wouldn't be a
13 refinance It would have to be a brand new loan
14 BY Mr Hatfield

15 Q Okay And you understood when I
16 asked, I'm talking about you were trying to get
17 new money from First Citizens to pay off Carolina
18 First Correct?

19 A Yes

20 Q And then to pay off Mr Rawls and get
21 him out of your hair

22 A Yes, sir

23 Q Okay And so -- the bank, First
24 Citizen, didn't approve it Did they give you a
25 reason why?

1 don't -- I just don't go word for word

2 Q You mean, that -- that a -- a banker,
3 say Mr Ewart, could say sign this, Mr Pennell,
4 and you would sign it without reading it?

5 A Well, I would go over it because he
6 would probably go over it with me, yes, sir

7 Q Okay Now, so the agreement is signed
8 with Mr Fountain Then you go -- you and he go
9 to First Reliance bank and have a sit down with
10 Rick Saunders Correct?

11 A Yes, sir

12 Q And you basically tell Mr Saunders
13 that -- that you wanted some new money so that you
14 can pay off Carolina First and buy out Mr Rawls
15 Correct?

16 A Yes, sir

17 Q And that you will be the borrower
18 Correct?

19 A Yes, sir

20 Q Not Mr Fountain?

21 A Yes, sir

22 Q And mister -- Mr Saunders was --
23 showed some interest Correct?

24 A He referred to us -- to another
25 associate of his --

1 Q Okay

2 A -- in the bank

3 Q In other words, Mr Saunders didn't
4 say that's the most cockemany idea I've ever
5 heard, get out of my office? He never did that,
6 did he?

7 A No, sir

8 Q And Mr Saunders never said, well, who
9 is your management team, did he?

10 A I think Mark had mentioned the fact
11 that -- to him that he was going to be in
12 management

13 Q Okay

14 A At that meeting

15 Q All right And so Mr Saunders was
16 aware of that and -- and still sent you down to
17 see Mr Brockington Correct?

18 A Brockington That's his name

19 Q All right So -- so Mr Saunders then
20 at the time was aware that Mark was going to have
21 some interest -- management in this convenience
22 store Correct?

23 A Yes, sir

24 Q And Mr Saunders then was the
25 president and CEO of First Reliance Right?

1 A Right I think that's correct I'm
2 not --

3 Q I mean, he -- he was the big dog?

4 A Yes, sir

5 Q And you would -- you would agree that
6 if he's the president of the bank, that he would
7 know that if Mark Fountain had had two prior bad
8 loans, consumer loans and that Mr Fountain was
9 going to be part of your management team on
10 this -- this venture, that he would have said
11 then, no, we don't want Mark Fountain to have
12 anything to do with this, we're not going to talk
13 to you?

14 Mr Finklea Object to form Go
15 ahead and answer
16 BY Mr Hatfield

17 Q You would think that's something that
18 Mr Saunders would say as the president? Wouldn't
19 you agree with that?

20 A Well, I guess possibly he wanted to
21 show us the courtesy to -- to -- to do an
22 application That's why he referred us to
23 Mr Brockington

24 Q Did he ever say just as a courtesy,
25 I'm going to let you fill out an application and

1 my team will go do all this paperwork and go
2 through these transactions and all these meetings
3 and -- and maybe appraisals and looking at your
4 financials just as a courtesy? He never said
5 that, did he?

6 A He just sent us to see Mr
7 Brockington

8 Q All right So the answer is he never
9 said he was doing this just as a courtesy, did he?

10 A No, sir

11 Q And you didn't understand it to be a
12 courtesy You were -- you believed that
13 Mr Saunders had expressed a real interest in
14 doing this transaction Isn't that right?

15 A I didn't know

16 Q Well, you knew that Mr Saunders
17 didn't tell you to leave the bank Right?

18 A No, he didn't tell me to leave the
19 bank No, sir

20 Q In fact, he sent you to
21 Mr Brockington to take the next step in -- in
22 doing the loan So that was something that was
23 positive, wasn't it, that the bank had an interest
24 in this?

25 A It's po---

1 Q Would you agree with that?

2 A I don't know if it's positive, but it
3 sounds positive

4 Q Okay And you took it that way?

5 A I don't know

6 Q Okay So then did you have -- you and
7 Mr Fountain, did you meet with Mr Brockington?

8 A Yes

9 Q All right And was it on the same day
10 or did you come back?

11 A I'm not sure

12 Q Okay But at some point, you had a
13 meeting with Mr Brockington And was it just the
14 three of you in the room?

15 A I am not sure, sir

16 Q All right And at that point in time,
17 did Mr Brockington basically -- did you tell him
18 what you had told Mr Saunders about what you
19 wanted from First Reliance?

20 A Yes, sir

21 Q And Mr Brockington never said, well,
22 who's your management team, did he?

23 A Mr Fountain told him that

24 Q All right So -- and Mr Brockington,
25 when he was aware of that, never said, well, we're

1 not going to do -- we're not going to go another
2 step further because Mark Fountain, as long as
3 he's involved in this project, we're not going to
4 deal with you He never said that, did he?

5 A Not at that time He took my papers
6 and my financial stuff and -- and -- and we left

7 Q And -- and just like when you talked
8 to Mr Saunders, when you were talking to
9 Mr Brockington, Mr Brockington knew clearly that
10 Mark Fountain was not going to be obligated in any
11 way on any financial obligation you entered into
12 with First Reliance Correct?

13 A I'm sure he was aware of that

14 Q All right Mister -- Mr Brockington,
15 in his conversations with you, he wanted to know
16 your personal financial condition Right?

17 A Yes, sir

18 Q And you gave him a financial
19 statement Correct?

20 A Yes, sir

21 Q He wanted to know the -- the nature of
22 the business that -- that they were going to
23 finance Correct?

24 A Yes, sir

25 Q He wanted to know its value Correct?

1 A Yes, sir

2 Q And he wanted to know how much y'all
3 needed to pay off Carolina First and Mr Rawls?

4 A Yes, sir

5 Q That's what he wanted from you
6 Correct?

7 A Well, we didn't know what we had to
8 have to pay off Mr Rawls

9 Q I understand that I understand But
10 those -- that was the criteria That's what he
11 was looking for to make a decision whether to yea
12 or nay a loan for you Right?

13 A Yes, sir

14 Q Okay So now you've had two meetings
15 You filled out a loan application Right?

16 A Yes, sir Yes, sir, I did

17 Q And you gave them your personal
18 financial information

19 A Yes, sir

20 Q You were an existing customer with the
21 bank Correct?

22 A Yes, sir

23 Q Did --

24 A No, sir I might have answered that
25 wrong

1 Q You may not have go---

2 A I might -- I might not have had an
3 account there at that time

4 Q Okay

5 A I'm not positive

6 Q All right But you had had a prior
7 business transaction with them and -- and you had
8 paid your loan, and when you bought your boat, you
9 were never in default, et cetera

10 A Yes, sir

11 Q Okay What do you recall your net
12 worth being on that financial statement? And you
13 can give me a range

14 A That's been some time ago I don't
15 remember

16 Q Was it more than a million dollars?

17 A Yes, sir

18 Q Was it more than two million dollars?

19 A I'm not sure

20 Q Is it more likely than not that it was
21 more than two million dollars?

22 A Possibly

23 Q Okay Was it in the range of two to
24 five million dollars?

25 A I don't remember

1 to call him -- I don't like to bug bankers But
2 he told me to call them and see what the status
3 was And I called them and talked to Mr Ewart
4 and he made me an appointment to come down there
5 and I did go down there and talk with him

6 Q And at this meeting with Mr Ewart,
7 did Mr Ewart say that as long as -- as
8 Mr Fountain is involved in the transaction, that
9 First Reliance would never make a loan to you?

10 A I don't remember the name Fountain
11 mentioned

12 Q What did he say?

13 A He said as long -- under the -- under
14 the present status and mana--- present status, he
15 could not make me the loan Now, he didn't
16 mention the name, but I sort of read between the
17 lines I sort of felt like that was the -- but I
18 don't remember him mentioning Mr Fountain's name
19 at all He could have, but I don't remember

20 Q But it was clear from what he said
21 that he was referring to Mark Fountain?

22 A It was pretty --

23 Q You didn't have any doubt, did you?

24 A No, sir

25 Q Now, is that the first thing that

1 Mr Ewart said when you walked into the meeting
2 with him?

3 A We sat down and we discussed a few
4 things, and then that's -- he just told me he
5 couldn't do it, they would not be able to make the
6 loan under those conditions

7 Q So based on Mr Ewart's statement to
8 you, it was your impression that as long as Mark
9 Fountain was involved with you in the operation of
10 the Hess Mart that First Reliance would not make a
11 loan?

12 A That's the impression I got, yes, sir

13 Q All right And did -- did Mr Ewart
14 tell you the reason why --

15 A No, sir

16 Q -- the bank didn't want Mark Fountain
17 involved in this transaction?

18 A No, sir

19 Q Did you ask him?

20 A No, sir

21 Q Why not?

22 A Well, it's none of my business

23 Q Well, you're trying to get money from
24 First Reliance Why didn't -- didn't you say,
25 wait a minute, this property has been appraised at

1 Q Do you know if -- if Mr Ewart knew
2 anything at all about Mark Fountain?

3 A I didn't -- I don't know

4 Q Did -- to your knowledge, did -- did
5 either Mr Saunders or Mr Brockington or
6 Mr Ewart or anyone else from First Reliance ever
7 ask you any questions about Mark Fountain?

8 A No, sir

9 Q They never did?

10 A No, sir

11 Q And -- and you were certain when --
12 when you were dealing with Mr Ewart that he knew
13 that the loan was to you and not to Mark Fountain?

14 A I'm sure of that

15 Q Isn't that right?

16 A Yes, sir

17 Q Now, did you then have a conversation
18 at some point after that with Mark Fountain?

19 A Mark called me as soon as I got out
20 from up there and he wanted me to meet him down at
21 another attorney's office, which I did

22 Q And that was Louis Nettles?

23 A Louis Nettles Yes, sir

24 Q All right Now, be--- before you had
25 this meeting with Mr Fountain at Louis Nettles'

1 Q What papers are you referring to?

2 A Well, it might not be the papers The
3 agreement that they -- that -- the agreement that
4 was -- the way it was written and what -- he
5 was -- who was going to run the business, it was
6 my understanding they wouldn't do it under those
7 conditions

8 Q What agreement are you referring to?
9 Is it the agreement that you had with Mark
10 Fountain?

11 A I don't recall I was told by the
12 bank that under -- under the -- under the way it
13 was set up -- and I'm sure that possibly it might
14 have had something -- you know, I took that to
15 have something to do with it -- that he could not
16 make the loan But names weren't discussed

17 Q All right

18 A But I took it to be what it is

19 Q Okay So Mark Fountain calls you
20 shortly after your meeting with Tom Ewart
21 Correct?

22 A Yes, sir

23 Q And what did you tell him about the --
24 the bank's decision on the loan application?

25 A I told him the same thing I just told

1 you, that they couldn't do it

2 Q All right Is that all you said, they
3 just couldn't do it, or did you tell them why?

4 A Well, as long as --

5 Q -- he was involved in it, they weren't
6 going to do it?

7 A I took it to be, yeah, but it -- like
8 I say, they didn't discuss names

9 Q All right

10 A To my knowledge

11 Q All right

12 A As I remember

13 Q Well, if I wanted to say something
14 about Mr Finklea, and I don't use his name, but I
15 said this fellow over here, you would know who I'm
16 talking about, wouldn't you? Isn't that right?
17 Is that right?

18 A I would think so

19 Q You don't have to necessarily have
20 somebody's name to know what somebody's referring
21 to or who somebody's referring to Isn't that
22 right?

23 A Yes, sir

24 Q Okay Now, the -- how did -- how did
25 Mr Fountain react when you said they are not

1 going to do the loan because you're part of the
2 management team? What did he -- what did he say?
3 What did he do?

4 A It's embarrassing, but it's I'll sue
5 them, I'll sue them

6 Q Okay

7 A That's the --

8 Q Was he angry?

9 A Well --

10 Q Was he angry?

11 A Yeah He showed a little bit of
12 anger

13 Q Okay

14 A And I was --

15 Q Was this a telephone conversation?

16 A No, that was in person

17 Q And where did that take place?

18 A Down at mister -- what's his name's
19 office, the lawyer?

20 Q Mr Nettles' office?

21 A Nettles' office

22 Q Well, how soon after your conversation
23 with -- and meeting with Tom Ewart did you have
24 this meeting with Mr Nettles?

25 A Oh, this was when I met Mark I -- I

1 wouldn't know Mr Nettles other than very vaguely

2 Q Okay

3 A Just that evening It was right after
4 I left the bank

5 Q So it's the same day?

6 A Yes, sir

7 Q All right So you go to -- you meet
8 Mr Fountain at Mr Nettles' office?

9 A To his suggestion Mark called me
10 and I went

11 Q All right

12 A And he wanted me to call him when I
13 got out of the bank's office, which I did, and he
14 wanted me to meet him over there And I didn't
15 even know where Nettles' office was

16 Q All right

17 A And I met him over there

18 Q And -- and tell me what happened at
19 that meeting

20 A I told him exactly what the bank told
21 me, that they -- the management or whatever, that
22 they was not interested in making it But they --
23 you know, there might have been another reason,
24 but that's the understanding I got

25 Q Okay Now, this meeting at

1 Mr Nettles' office, how long did it last?

2 A Ten minutes

3 Q All right Did Mr Nettles ask if he
4 could record the statement you gave?

5 A He did

6 Q And you declined to do that?

7 A Yes, sir

8 Q Why?

9 A Well, I didn't -- this was 6.30 in the
10 afternoon and I'm on my way home from work

11 Q Would you agree that -- that a
12 recording of what you said would be really the
13 most accurate way to -- to -- to see what you said
14 as opposed to what your recollection is?

15 A Well, I remember what I said, so I
16 didn't need a recorder But I made the remark if
17 he wanted to record -- if he wanted to record it,
18 I wasn't -- was not interested

19 Q All right And was that the end of
20 the meeting?

21 A Yes, sir

22 Q Did you have any further dealings with
23 Mark Fountain after that meeting?

24 A I don't think so

25 Q Did you have anymore conversations

State of South Carolina

In Common Pleas Court

County of Florence

Mark Fountain,

plaintiff,

v

10-cp-21-131

First Reliance Bank, Thomas
C Ewart, and Ernest Pennell,

defendants

Video Deposition of Thomas C Ewart

Location 1831 West Evans Street, Fourth Floor
Florence, South Carolina

Date Wednesday, February 2, 2011

Time 4 43 p m - 5 49 p m

Court Reporter Mark W Hagood

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina Rules of Civil Procedure

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Examination

4

Mr Hatfield

1 hereinafter certified, testified as follows

2 E X A M I N A T I O N

3 BY MR HATFIELD

4 Q Mr Ewart, tell us your full name and
5 with whom you're employed

6 A Thomas Cain Ewart with First Reliance
7 Bank

8 Q And you've been working there since
9 about April of '03?

10 A Eight years

11 Q Eight years Okay And what is
12 your -- your -- your job title and description?

13 A I'm the chief banking officer

14 Q And how long have you held that
15 position?

16 A For five years

17 Q And I -- as I understand it, pretty
18 much your adult life you've been in banking,
19 correct?

20 A That is correct

21 Q What other banks have you worked for?

22 A I worked for the National Bank of
23 South Carolina, for South Carolina National Bank
24 and Wachovia bank and First National South, Anchor
25 Bank, Carolina First and First Reliance Bank

Record 197

1 Q All right And so you came from
2 Carolina First to First Reliance Bank Is that
3 correct?

4 A That is correct

5 Q Okay Now, you were present during
6 the deposition of Mr Pennell Correct?

7 A Yes, sir

8 Q You heard all of his testimony?

9 A Yes

10 Q Correct? And you -- I take it you've
11 had an opportunity to read Mr Fountain's
12 deposition that was given a month or so ago

13 A Yes, I did

14 Q And you've read it Correct?

15 A Yes, sir

16 Q Okay Before today, have you given a
17 deposition in any case?

18 A Yes, sir

19 Q All right Was it relating --
20 relating to your work in the banking industry?

21 A Yes, sir

22 Q On behalf of First Reliance?

23 A No, sir

24 Q Prior?

25 A Prior Yes, sir

1 Q Okay As I explained to Mr Pennell,
2 I'll explain to you, I'm here to ask you
3 questions You're a named party to this lawsuit
4 And in the presence of Mr Payne and our court
5 reporter and videographer, I'm going to ask you
6 some questions If I ask you something that you
7 don't understand that's unclear or confuses you,
8 it's your responsibility to let me know and ask me
9 to rephrase or restate a question so you do
10 understand it Will you do that?

11 A Yes

12 Q All right Mr Ewart, did -- did you
13 make a statement to Ernest Pennell that as long as
14 Mr Fountain was involved in the transaction, that
15 First Reliance Bank would never make a loan to
16 Mr Pennell in order to refinance the Carolina
17 First note and mortgage?

18 A I did not make that exact statement
19 The statement that I said was that if Mark was
20 going to be managing the operation, we would not
21 be making the loan

22 Q All right And when you made that
23 statement, you were aware that Mr Fountain was
24 not to -- was not an obligor or he was not the
25 loan applicant Correct?

1 A Yes

2 Q All right And you knew that -- that
3 Mr Pennell really had the financial ability to
4 guarantee the loan Isn't that correct?

5 A No, sir

6 Q You didn't know that? Did you have
7 his personal financial statement?

8 A Not in front of me, no

9 Q Well, did -- was that part of the loan
10 process, to obtain that document or that
11 documentation?

12 A That would have been part of the
13 process, yes

14 Q All right You were aware that --
15 that if the loan transaction had gone through,
16 that whatever amount of money that was loaned, it
17 would be secured by a first mortgage on the Hess
18 Mart property?

19 A The application didn't -- it wasn't an
20 application They had come by to inquire about a
21 loan, to the bank

22 Q Okay So is it your testimony that
23 Mr Pennell never made a loan application to First
24 Reliance?

25 A The way it was brought to me was that

1 he -- he had inquired about a loan to the bank

2 Q So that -- I'm going to ask the
3 question and make sure I get a straight answer
4 Did Mr Pennell complete a loan application to
5 First Reliance Bank?

6 A Not to my knowledge

7 Q Did Mr Pennell provide First Reliance
8 Bank with his personal financial statement?

9 A It was not shared with me

10 Q That wasn't my question Did
11 Mr Pennell provide First Reliance Bank with his
12 personal financial statement?

13 A I don't know

14 Q Okay Did Mr Pennell provide you
15 with any of the profit and loss statements or
16 other business documents relating to the operation
17 of the Hess Mart store?

18 A He did not provide them to me

19 Q Did he -- did he provide them to First
20 Reliance Bank?

21 A I do not know

22 Q All right Have you ever -- have you
23 made an inquiry before today whether Mr Pennell
24 completed a loan application or provided a
25 personal -- a personal net worth statement or

1 provided you any documentation regarding the
2 profitability of the Hess Mart?

3 A If he provided it, he did not provide
4 it to me

5 Q Have you ever asked anyone at
6 First Na--- at First Reliance before today if any
7 of that information had been provided?

8 A Yes, I did

9 Q Who did you ask?

10 A Dwayne Brockington

11 Q All right And what did
12 Mr Brockington tell you?

13 A He said that he had a package

14 Q He had a package?

15 A At one time Yes, sir

16 Q All right So is it your
17 understanding, then, based on what Mr Brockington
18 told you, that Mr Pennell in fact did complete a
19 loan application, or do you know?

20 A I don't know

21 Q Who at First Reliance Bank can answer
22 that question?

23 A Dwayne could ask--- answer the
24 question

25 Q Okay Have you ever seen a loan

1 application completed by Mr Pennell for this
2 proposed transaction?

3 A No, I have not

4 Q Or his personal financial statement?

5 A Not for this transaction, no

6 Q All right Or for any of the -- any
7 records that would show the profitability of the
8 Hess Mart?

9 A No, sir

10 Q Okay So is it -- is it a fair
11 statement, then, that your decision on behalf of
12 the bank not to make this loan was solely because
13 of Mark Fountain's involvement with Hess Mart?

14 A No, my -- my decision was based on the
15 proposal that was made that there would be a
16 manager for the operation and the manager would be
17 Mark Fountain

18 Q Okay So that the reason the bank did
19 not make the loan was because Mark Fountain was to
20 be the manager of the operation Is that correct?

21 A That was the reason for my decision,
22 yes, sir

23 Q All right Wasn't yours the final
24 decision?

25 A Mine was the decision at that point

1 that -- whether it would go further, the process

2 Q Well, what -- tell me what about the
3 process could have gone further if you're the
4 chief banking officer and you say if Mark Fountain
5 is the manager, we're not going to make the loan,
6 what else could have been done?

7 A Nothing else

8 Q All right So then, your decision
9 really was the final decision Correct?

10 A At that point, yes, sir

11 Q Well, was there any other point that
12 it wouldn't have been final?

13 A When the -- when he had a conversation
14 with a lending officer

15 Q When who had a conversation with the
16 lending officer?

17 A When Ernest had a conversation with
18 the lending officer

19 Q All right And what officer are we
20 speaking of?

21 A Dwayne Brockington

22 Q Okay Were you present during that
23 conversation?

24 A No, sir, I was not

25 Q Okay So as I understand the scenario

1 here, Mr Pennell comes to First Reliance along
2 with Mark Fountain and they have a meeting with
3 Rick Saunders Correct?

4 A That's the way it was explained to me
5 Yes, sir

6 Q All right And then Mr Saunders, who
7 then and now is the bank president, the CEO --
8 correct?

9 A Yes

10 Q Refers them to Dwayne Brockington
11 Correct?

12 A Yes Yes

13 Q And at the time, December of '08,
14 January of '09, what was Mr Brockington's role
15 with the bank?

16 A He's a business banker

17 Q Business banker?

18 A Which is a lending officer

19 Q All right In the hierarchy at the
20 bank, would you rank higher than Mr Brockington?

21 A Yes, sir

22 Q Okay You report to whom?

23 A Mr Saunders

24 Q Okay So there's no intermediary
25 between you and Mr Saunders Is that right?

1 A No -- no, sir

2 Q Okay. So Mr Brockington, who is a
3 commercial loan officer, a commercial lender --

4 A Yes

5 Q -- business lender --

6 A Yes

7 Q -- ob--- obtains information from
8 Mr Pennell, and then he refers them to you for a
9 decision on the loan Correct?

10 A He did not refer them to me

11 Q What did he do?

12 A He called me

13 Q Okay

14 A And said that there had been a -- a
15 meeting with Ernest and Mark and that they were
16 looking to refinance the Hess Mart and pay out
17 Carolina First

18 Q Okay And actually, it wouldn't have
19 been technically a refinance, would it?

20 A I don't know whether it was a
21 refinance or if they were going to purchase it out
22 right or -- or not But it was -- it was a loan

23 Q Okay And -- and the loan proceeds
24 would have gone to pay off Carolina First, and
25 then if the loan had gone through, it would have

1 been a secured loan Correct?

2 A Yes, sir

3 Q Okay So what did Mr Brockington
4 tell you about his meeting with Mr Pennell and
5 Mr Fountain?

6 A He called me and said that there was
7 a -- that they had made a request for a loan and
8 that Mark would be managing the operation and that
9 he wanted me to be aware of that And when he
10 told me that, I explained to him that at that
11 point I probably would not be comfortable with
12 the -- with the loan and that he needed to set up
13 an appointment with Ernest Pennell and that he and
14 I should meet with Ernest

15 Q Okay And when -- when
16 Mr Brockington said Mark will be involved in the
17 management of the business, was that as a matter
18 of fact statement or did he say that to you with
19 some -- some concern?

20 A He just was making me aware of it

21 Q Okay So it wasn't something that
22 apparently concerned Mr Brockington?

23 A No

24 Q He was just passing along information
25 Right?

1 A No, I would it would -- it would have
2 been a concern of Dwayne

3 Q Why?

4 A Because of his past dealings with
5 Mark

6 Q Well, what were his past dealings with
7 Mark?

8 A He had been involved with Mark at
9 Carolina First and Anchor Bank

10 Q All right And tell me what those
11 transactions were

12 A It would have been loans that he had
13 with some fast food restaurants he was involved
14 with And he was also involved in the convenience
15 store business He was involved with mobile home
16 park, several -- several different ventures

17 Q Okay And -- and tell me what
18 specifically about Mr Fountain's involvement in
19 those businesses would have concerned
20 Mr Brockington?

21 A We had some difficulty in getting
22 those loans repaid

23 Q Okay Was -- was Mr Fountain the
24 only obligor on those loans?

25 A No, sir

1 Q He was not Uh-huh And I guess the
2 two loans you're talking about is the BoJo Tim
3 Correct?

4 A It was the --

5 Q The Bojangle's?

6 A -- Bojangle's Yes

7 Q Uh-huh And is it the -- the
8 Springhill or Spring Valley Mobile Home Park?

9 A It's a mobile home park I don't
10 recall the exact name

11 Q All right Okay And -- and both of
12 those loans were secured Correct?

13 A Yes, sir

14 Q And were they with -- were either of
15 those loans with First Reliance?

16 A No, sir

17 Q Okay Were either of those loans in
18 default when Dwight (sic) Brockington made that
19 statement to you?

20 A I don't know if they were or not at
21 that point

22 Q You made no inquiry?

23 A No, sir

24 Q Okay And so we're clear, the --

25 Mr Brockington's concerns were based on dealings

1 that he had with -- on the transactions of the
2 BoJo Tim and the mobile home park Correct?

3 A Those were dealings that the bank had

4 Q That's Carolina First?

5 A Carolina First and Anchor Bank It
6 was right there -- Anchor Bank was acquired by
7 Carolina First And it was an 18-month period in
8 there, and I'm not sure if Anchor Bank was
9 involved in the initial loans and Carolina First
10 through the acquisition took over those loans
11 It's been several years back

12 Q All right So it's a fair statement
13 that -- that whatever -- strike that
14 Mr Brockington worked at Carolina First with you?

15 A Yes, sir

16 Q And I believe he followed you to First
17 Reliance?

18 A Yes, sir

19 Q Did you both come over at the same
20 time?

21 A No, sir, I came over first

22 Q And then how soon after did he come?

23 A Probably two month

24 Q All right So the first part of '03,
25 both you and Mr Brockington are at First Reliance

1 Bank Correct?

2 A That's correct

3 Q So Mr Brockington's concern about

4 BoJo Tim and the mobile home park would only

5 relate to his time -- his timeframe at Carolina

6 First Correct?

7 A That's correct

8 Q So you're talking about information

9 that was probably about five or six years old? Is

10 that right?

11 A Would have been -- yes, sir

12 Q Okay

13 A Would have been

14 Q And it's a fair statement that in your

15 conversation with Mr Brockington, he never said,

16 well, you know, I've updated my knowledge base

17 about Mark Fountain regarding BoJo Tim and the

18 mobile home park He never told you that, did he?

19 A No, sir

20 Q Because he didn't do that, did he?

21 A No, sir

22 Q His concern was based solely on

23 information that was about five years old

24 involving transactions at another bank Correct?

25 A Other transactions that took place at

1 another bank

2 Q At another bank that had nothing at
3 all to do with First Reliance Correct?

4 A That's correct Yes, sir

5 Q All right And so then Dwight (sic)
6 Brockington gives you that information and then
7 you decide, well, I need to have a meeting with
8 Ernest Pennell to tell him that we're not going to
9 do this loan as long as Mark Fountain is involved
10 in management Correct?

11 A I said as long as the management
12 structure that was in place was -- was going to
13 happen and also that it was relayed to me that
14 Mark was going to be the manager of the operation

15 Q Well, what was the management
16 structure?

17 A Management structure was that -- the
18 way it was explained to me, that Mark was going to
19 manage the day-to-day operations of the new
20 venture

21 Q Anything else about the management
22 structure that concerned you?

23 A That was the main thing that concerned
24 me

25 Q Was there anything else that concerned

1 A No, sir

2 Q Did you ever write Mr Pennell a
3 letter and say, Mr Pennell, you've done business
4 with us in the past, we know your reputation as a
5 businessman with Carolina Furniture Mart, let's
6 see if we can restructure this deal as long as you
7 get Mark Fountain out of the picture?

8 A No

9 Q Did you ever do that?

10 A No, sir, I did not

11 Q Why not?

12 A I didn't feel like it was necessary to
13 do so

14 Q Well, isn't part of your job to -- to
15 make loans so that the -- that the bank can make
16 money? Isn't that part of your job?

17 A It's part of my job to make loans
18 Yes, sir

19 Q Well, if -- if you had that second
20 proposal from Mr Pennell, why didn't you follow
21 up on it?

22 A I just told him that I told him that
23 we would look at it that way I didn't need to
24 follow up

25 Q It's not your practice to follow up

1 in -- in transactions to see if you can make the
2 sale or close the deal?

3 A I left it open to him

4 Q And you never followed up with a phone
5 call or a letter or an e-mail or anything?

6 A I did not follow up

7 Q So the -- so the answer to my question
8 is you did not follow up in any manner, way, shape
9 or form?

10 A No, sir, I did not

11 Q Okay You personally have never had
12 any business dealings with Mark Fountain, have
13 you?

14 A No, sir

15 Q He's never come to you and asked for a
16 loan?

17 A Oh, yes, he has

18 Q And when did he do this?

19 A He did that at Carolina First or
20 Anchor Bank, whichever one it was

21 Q Well, again, my question was, have you
22 ever had any dealings with -- with Mark Fountain
23 And -- and a moment ago, I thought you said you
24 hadn't

25 A No, I did at -- Carolina First I did

1 not at First Reliance Bank

2 Q All right So you had business
3 dealings with Mark Fountain while you were at
4 Carolina First Correct?

5 A Yes, sir

6 Q And was it the BoJo Tim and also the
7 mobile home?

8 A I had a number of lending officers
9 that worked for me and our operation in Florence
10 had loans to the entities that Mark was involved
11 with I dealt with him on some occasions on an
12 indirect basis with my other lenders I was the
13 regional president for that -- for the bank and I
14 had lenders working for me and they would interact
15 with Mark

16 Q All right Did you ever interact with
17 Mark?

18 A I did with bri--- in joint venture --
19 with -- in joint -- in conjunction with other
20 lenders, yes, sir

21 Q I -- what does that mean?

22 A Well, he may have been dealing with a
23 couple of my lenders and I would have sat in on
24 the conversation

25 Q All right And -- and so we're

1 talking about lenders, you're talking about
2 employees of Carolina First --

3 A Yes

4 Q -- that were dealing with Mark, et
5 cetera?

6 A That's correct

7 Q Okay Now, the -- sitting here today,
8 do you have a present recollection of ever having
9 a conversation with Mark Fountain face to face
10 about his experience with BoJo Tim?

11 A When he was involved with BoJo Tim

12 Q Yes

13 A I did

14 Q Tell me about that conversation

15 A That was -- it's been years ago, so it
16 would have been general, but I asked him about the
17 management of what was going on there and why it
18 wasn't paying the loans back on time

19 Q All right

20 A The loans were past due

21 Q All right So it's your testimony
22 that the BoJo Tim loans, while you were at
23 Carolina First, had gone into default?

24 A We had some challenges with them
25 It's been so far back, I can't remember exactly

1 what they were

2 Q Well, I didn't ask about challenges
3 I asked about default

4 A Well, I --

5 Q What do you understand default to mean
6 in the banking business?

7 A Complete lack of repayment

8 Q If -- if -- if BoJo Tim was obligated
9 to make monthly payments on its loan obligation
10 with Carolina First and if it misses one payment,
11 technically, it's in default, isn't it?

12 A Could be

13 Q Okay Well, it could be If you
14 decided to call the loan, you could do that under
15 your -- your loan agreements Correct? Correct?

16 A Yes

17 Q Now, while you were at -- at Carolina
18 First, was the loan transaction between BoJo Tim
19 and Carolina First ever declared to be in default?

20 A Not that I know of We had to rework
21 the loans

22 Q So the answer is no, it was not in
23 default Correct?

24 A Not that I recall

25 Q All right Well, you were the

1 regional vice-president Correct?

2 A Correct

3 Q Would anybody have more knowledge
4 about it than you?

5 A Probably not

6 Q All right So when you left Carolina
7 First in '03, the BoJo Tim loan was not in
8 default Correct?

9 A I don't recall I would have to look
10 at the documents to see

11 Q You have no present recollection
12 sitting here today that the BoJo Tim loan was
13 defaulted Correct?

14 A I do not know that

15 Q All right And you know that -- that
16 when you left Carolina First in April of '03 or
17 thereabouts, that Carolina First had not filed any
18 kind of a lawsuit or proceeding against BoJo Tim
19 to collect any money it owed Isn't that true?

20 A Rephrase that

21 Q Sure You were aware at the time you
22 left Carolina First that the BoJo Tim loan, number
23 one, was not in default Correct?

24 A I don't know if it was in default at
25 that time It's too far back to know I just

1 management?

2 A I don't recall that

3 Q Did you ever tell them get rid of Mark
4 Fountain, he doesn't know what he's doing?

5 A No, sir I never said that

6 Q And you never believed that at the
7 time either, did you?

8 A Yes, I did

9 Q But you never told Hugh Willcox that?

10 A I did not

11 Q Well, what facts led you to believe
12 that Mark Fountain had no business in the BoJo Tim
13 operation?

14 A What -- what?

15 Q You said that you had concerns about
16 Mark Fountain --

17 A Yeah

18 Q -- in the BoJo Tim while you were at
19 Carolina First

20 A Right

21 Q Why did you have concerns about Mark
22 Fountain?

23 A Because of the -- that the -- the
24 loans were not being paid on a timely basis

25 Q Well, why did you -- did you single

1 out Mark Fountain and say it was Mark Fountain's
2 fault?

3 A No, sir I thought that it was all of
4 the operators' fault, but he was included in it

5 Q All right Well, what about Mark
6 Fountain's relationship to BoJo Tim caused the
7 loan not to be paid as you wanted it to be paid?

8 A He was managing the -- or overseeing
9 the managers and also managing the operations

10 Q All right And how do you know that?

11 A Because that's what he was doing

12 Q Well, how do you know that? How --

13 A I went out -- I went out to see the
14 facilities and saw them operating

15 Q And when did you do that?

16 A I did it when I was at Carolina First

17 Q How many times?

18 A Several times

19 Q Well, and -- and during this period of
20 time, tell me what you observed What did you
21 observe when you went out there that caused you
22 concern about Mark Fountain?

23 A Well, when I would go, there would be
24 other people there and Mark wasn't there And
25 when I would go, he would -- he might be in the --

1 in the back and wasn't working the whole floor
2 And so I -- I looked at it from that standpoint
3 that he needed to be in there on a -- on a
4 constant basis in a fast food operation

5 Q And tell me what experience you've had
6 in a fast food operation in order to make that
7 judgment Any?

8 A I was involved in the convenience
9 store business and that's -- that has to do with
10 management controls

11 Q Well, I'm not talking about a
12 convenience store I'm talking about fast food
13 business Tell me what experience you've had in
14 the management of a fast food business that will
15 allow you to formulate some judgment or opinion
16 about Mark Fountain's ability to manage or run
17 a -- a Bojangle's Tell me

18 A I've been lending to franchises for a
19 long time

20 Q That's not what I asked you You tell
21 me what experience you've had in a fast food
22 business, not as a lender, but somebody who has
23 been there hands-on running a fast food operation

24 A I grew up in the restaurant business

25 Q Okay

1 Mr Hatfield Tell me --

2 Mr Payne -- loans for business --

3 BY Mr Hatfield

4 Q Tell me the name of any commercial
5 loan applicant whose loan you declined because of
6 the manager

7 A Oh, there's been a number of them

8 Q Tell me one

9 A I can't tell you one right off the top
10 of my head, but there have been a number

11 Q While you were with Carolina First
12 or --

13 A With -- with every bank I've ever been
14 with

15 Q All right How about First Reliance?

16 A Yes, sir

17 Q Can you go through all of the --
18 your -- your commercial loan applications and tell
19 us how many loans were declined solely because of
20 who was going to manage the operation?

21 A No, I could not

22 Q Can -- can you -- do you know if any
23 of the commercial loan applications that you took
24 while you were at Carolina First you could go back
25 and say produce all of the loan applications that

1 going to manage Is that right?

2 A Yeah It is

3 Q Okay And that's even if the manager
4 is not even an obligor on the loan Is that
5 right?

6 A That's correct

7 Q Okay How many transactions at First
8 Reliance involving commercial loans that you have
9 denied or declined to make a loan on where the
10 property was of sufficient value to secure the
11 loan, the actual borrower had a sufficient net
12 worth to guarantee the loan, but you didn't make
13 the loan because the manager was in--- inadequate
14 or insufficient and that manager was not an
15 obligor on the loan?

16 A I don't know how many there could be

17 Q Well, we know Mark Fountain is one
18 Correct? Isn't that right?

19 A He had made a proposal

20 Q Okay Well, he didn't make a
21 proposal, did he?

22 A Right Ernest made the proposal

23 Q Mr Pennell made the proposal

24 A That's right

25 Q And just so we're crystal clear, so

1 the jury understands that your decision not to
2 make the loan had nothing to do with the value of
3 the property, the appraised value of the property,
4 Mr Pennell's ability to pay back the loan
5 personally, it only had to do with Mark Fountain
6 Is that right?

7 A It had to do with the management
8 structure

9 Q Okay Which means Mark Fountain?

10 A In that proposal, it was Mark Yes

11 Q And you knew that Mark Fountain was
12 not obligated to pay anything to First Reliance
13 Correct?

14 A Yes, sir

15 Q And had there been any other similar
16 transactions that you've been involved with at
17 First Reliance where you declined to make a loan?

18 A I'm sure there were I just can't
19 recall them

20 Q How about at Carolina First?

21 A I'm sure there were, but I can't
22 recall them

23 Q And at all of the other banks you've
24 worked at --

25 A Yes, sir

1 Q -- same answer?

2 A Yes, sir

3 Q Sure there were, but you can't recall?

4 A Yes, sir

5 Q Okay When -- when you made the
6 decision once Dwight (sic) Brockington calls you
7 and tells you that Mark Fountain is involved in
8 this, you pretty much had made your decision right
9 then, correct, that you weren't going to make the
10 loan?

11 A Yes, sir

12 Q Okay You didn't look at any loan
13 application, did you?

14 A No, sir

15 Q You didn't look at Mr Pennell's
16 personal financial statement, did you?

17 A No, sir

18 Q You didn't look at any property
19 appraisal, did you?

20 A No, sir

21 Q You didn't look at anything else, did
22 you?

23 A No, sir

24 Q And it took you just a couple of
25 minutes or less to make the decision based on what

1 management capabilities I look at personal a
2 different way

3 Q Uh-huh Did -- did you ever consider
4 bringing Mark in and saying, Mark, I've got some
5 concerns about what occurred back five or six
6 years ago while you were with BoJo Tim with Hugh
7 Willcox, Junior and Walker Willcox and -- and
8 whoever else was involved in that And I would
9 kind of find out -- I would like to find out what
10 your experience has been since then?

11 A No, sir, I did not

12 Q Why not?

13 A Didn't feel like I needed to

14 Q Why not?

15 A Why should I?

16 Q Had Mr Pennell been a business --
17 excuse me -- been a customer of First Reliance --

18 A Yes

19 Q -- before he presented this loan
20 application?

21 A Yes

22 Q And was he held in good stead by the
23 bank? I mean, he was a respected businessman?

24 A Yes, sir

25 Q Had money on deposit?

1 A Yes, sir

2 Q There was nothing negative about
3 Mr Pennell that caused you any concern about
4 making the loan?

5 A No, sir

6 Q Okay And again, nothing negative
7 about the value of the property being able to --
8 to secure payment of the loan Correct?

9 A Didn't get that far

10 Q Okay You had no reason to believe
11 that there was anything wrong with the value of
12 the property if Carolina First had loaned money on
13 it

14 A I -- I didn't know because I -- I
15 didn't look at the values

16 Q Okay Is -- is this still how you do
17 business for First Reliance? Is this still how
18 you make your -- your commercial loan decisions?
19 In other words, that if -- if somebody gives you
20 one negative bit of information about the
21 management team, that -- that you immediately end
22 your decision-making process and -- and decline to
23 make loans?

24 A Yes

25 Q That's it?

1 A That's it

2 Q You don't consider any other factors?

3 A That's -- that's one factor I just --
4 if I can't get comfortable with that, I don't go
5 any further

6 Q Okay And so if -- if I hand to you
7 the general loan underwriting guidelines of First
8 Reliance Bank, could you pick out the section that
9 says that, that management is the most -- single
10 most important criteria in making a decision on a
11 commercial loan that's secured by real estate and
12 guaranteed by an individual who has a net worth
13 sufficient to repay the loan? If I hand that to
14 you, could you do it?

15 A Management?

16 Q Yeah That it's the single most
17 important factor And I am going to hand to
18 you --

19 A It's one of the factors

20 Q No, sir I'm going by your testimony
21 You said -- and if you want to change your
22 testimony, you go ahead But you said, once I
23 have concerns about the management, I don't go any
24 further Isn't that what you just said?

25 A That's what I do

1 Q Well, that's what you do on behalf of
2 First Reliance Correct?

3 A I do it on behalf of First Reliance
4 Bank

5 Q All right And that's in keeping with
6 the written loan underwriting guidelines that you
7 are required to go by Isn't that right?

8 A Part of it is evaluation of
9 management

10 Q All right And in these loan
11 underwriting guidelines that have been produced to
12 us in this lawsuit, I want you -- and I'm going to
13 hand them to you and I want you to tell me where
14 it says that once you make a determination that
15 you're uncomfortable with the management situation
16 that you don't consider anything else Can you do
17 that? And this begins right here, the general
18 loan policy, and it's Bates stamp FRB026 And it
19 goes all the way to FRB356 And you take all the
20 time you want I want you to point to me in these
21 260 -- almost a hundred pages of documents where
22 the primary criteria in denying a commercial loan
23 under circumstances which exist in this case would
24 have been the management team

25 A Under -- basically under other

1 critical issues

2 Q What page is that?

3 The Deponent C47, page 3

4 Mr Hatfield Okay And --

5 Mr Payne See if it's got -- say

6 this number down here, if you would

7 The Deponent F--- FRB00310

8 BY Mr Hatfield

9 Q Okay And it says other critical
10 issues Well, read what's under there

11 A It says, management usually critical
12 in small, closely-held companies where management
13 consists of one or just a few senior officers
14 Age of the top officers might also indicate the
15 need for discussion of succession of management
16 And in industry, often industry will be an
17 important issue, particularly in cyclical,
18 seasonal businesses Competition, aggregate
19 demand, suppliers in technology business cycles
20 may be the topic of discussion

21 Q So that's the provision you relied on?

22 A I rely on management

23 Q Well, I just asked for the provision
24 Is that the provision you relied on?

25 A I didn't necessarily rely on the

1 general loan policy This is very general and
2 it's just -- that's considerations that you take
3 into -- into consideration on any credit

4 Q So you didn't even --

5 A That --

6 Q -- look at the general loan
7 considerations, did you, when you made this
8 decision?

9 A No, I didn't look at the general loan
10 considerations because I -- I look at management
11 as the key

12 Q Okay

13 A Every banking school I've been to,
14 anyone that I've ever studied in, and if you go to
15 Robert Morris Associates, any of the journals, one
16 of the key things about capacity and capabilities
17 of repaying the loan is the evaluation of
18 management And if you look at the management and
19 you can't get comfortable with that, you don't
20 even go -- go into this

21 Q All right So there's some pre-loan
22 policy that exists --

23 A Not pre-loan policy It's -- it's
24 basic lending

25 Q Well, I mean, basic lending means

1 you've got written underwriting guidelines

2 Correct? Is there something other than what's
3 before you that you relied on in making your
4 decision?

5 A You look at my years of experience in
6 lending

7 Q I'm talking about in the documents
8 here Is there some other document at First
9 Reliance Bank that you consulted or could have
10 consulted before you made a decision?

11 A You could have consulted this loan
12 policy, sure

13 Q Is that the only thing -- only other
14 thing you would have consulted was the loan
15 policy?

16 A No, sir You could have -- you could
17 have looked up other commercial lending journals,
18 commercial lending books You know, they all talk
19 about management, management succession,
20 capabilities of management You --

21 Q Management succession That means if
22 you've got a CEO who may die, you want to find out
23 who's going to take over?

24 A That could be it

25 Q But that's not what it was in this

1 case because this was -- this was a one-man
2 operation This was Ernest Pennell's business,
3 wasn't it?

4 A That's correct

5 Q Mark Fountain was not an equity owner
6 He was not a shareholder He had no interest in
7 the business, did he?

8 A He was going to manage it

9 Q He had no legal interest in the
10 business He did not own the business, did he?

11 A The way it was presented to me, no, he
12 did not

13 Q All right So there would be no issue
14 about who was going to succeed Ernest Pennell
15 Correct?

16 A No, sir

17 Q All right So -- and -- and it made
18 no difference who was going to succeed Mark
19 Fountain, did it, because he wasn't -- again, he
20 wasn't a shareholder, was he?

21 A No, he wasn't going to be

22 Q And he wasn't an officer, was he?

23 A No, he was not

24 Q The decision maker was Ernest Pennell,
25 wasn't he?

1 A No, sir The decision maker was he
2 came to us for -- for a loan

3 Q Excuse me The decision maker in the
4 operation of that business was Ernest Pennell He
5 was the owner Correct?

6 A He owned the business -- was one of
7 the owners of the business that was applying for
8 the loan

9 Q Well, who were the other owners of the
10 business who were applying for the loan?

11 A Well, he was going to be -- let me
12 rephrase it He was going to be the only owner of
13 the business, the way it was presented to me

14 Q Okay Again, Mark Fountain was not an
15 owner You didn't care about Mark Fountain's
16 ability to pay He was not a personal guarantor,
17 nothing

18 A He had a key role as a manager of the
19 operation on day to day whether that loan would be
20 paid back

21 Q And that's what you told
22 Mr Pennell -- Pennell, correct?

23 A I told him that -- I was told him that
24 I was not comfortable with the structure of the
25 loan with management in place the way it was

1 Q Okay And -- and so we're clear, you
2 never -- you called Mark Fountain to give him an
3 opportunity to update you on his -- his employment
4 history and -- and business dealings since 2003
5 Right?

6 A No, sir

7 Q Never did that And
8 Mr Brockington -- Mr Brockington didn't have
9 any -- just didn't have any role in -- in your
10 decision to decline the loan, did he? What
11 Mr Brockington said was irrelevant
12 Mr Brockington didn't make the decision You
13 did

14 A That's correct

15 Q Okay Did you talk to Rick Saunders?

16 A I talked to him

17 Q Beforehand?

18 A No, sir

19 Q Did -- did Rick Saunders ever talk
20 with you afterwards when you found out that the
21 loan had not been approved and expressed to you
22 his concern that you should have done more than
23 what you did to get the deal done?

24 A No, sir

25 Q Would you agree that between you and

1 Rick Saunders, that Rick Saunders would have as
2 much or maybe more knowledge about the banking
3 industry and what criteria are utilized in making
4 commercial loans?

5 A Say that again --

6 Q Sure

7 A -- please

8 Q Would you agree that -- that -- that
9 Rick Saunders would have as much knowledge or
10 perhaps more knowledge than you about the criteria
11 that -- that is considered in making a commercial
12 loan?

13 A Yes

14 Q Okay And if -- if Mark -- excuse me,
15 Mr Pennell and Mr Fountain had both testified
16 that when they had the initial meeting with Rick
17 Saunders that Mr Saunders was aware of the
18 parameters of this transaction, that Mark Fountain
19 was going to be involved in the management, why
20 would Mr Saunders then send them to Dwayne
21 Brockington?

22 A It's typically the -- the process He
23 would send them to a commercial lender for
24 somebody that was making a proposal, looking to
25 make a proposal at the bank

1 the same circumstances and facts that you were,
2 that Rick Saunders would have done the same thing?

3 A Yes

4 Q Okay You have no doubt about that?

5 A I have no doubt

6 Q Other than your responses earlier
7 about your -- your dealings with -- with Mark
8 Fountain, any other reason -- any other complaint,
9 any other concern about Mark Fountain that drove
10 your decision not to make this loan to
11 Mr Pennell? Anything else?

12 A No, sir Just the management

13 Q Okay And you will agree that -- that
14 the comment you made about the decision not to
15 make the loan were in fact directed to
16 Mr Pennell Correct? I mean, you published
17 those statements to Mr Pennell You told him
18 that?

19 A Yeah, I told him that

20 Q Right? Okay Was there a reason why
21 you didn't just tell Mr Pennell this loan just
22 doesn't meet our underwriting guidelines?

23 A No, sir I just told him that the way
24 that it -- the loan was presented as far as the
25 management structure that we would not be making

1 A That I had an opinion?

2 Q That's what this says?

3 A I have an opinion on the management
4 capability of -- of Mark Fountain in this venture

5 Q Okay Do you -- do you assert that
6 Mark Fountain did not have the management
7 capabilities to run or manage the convenience
8 store?

9 A Yes, sir

10 Q Okay And tell me the -- the factual
11 basis for that statement

12 A Factual basis is on the experience
13 that I had in -- in dealing with Mark in other
14 ventures --

15 Q And you're talking about --

16 A The Bo---

17 Q -- the BoJo Tim?

18 A The convenience store operation he had
19 in Timmonsville

20 Q Okay

21 A The mobile home park he's got out --
22 out -- out there in Timmonsville also

23 Q Okay And the convenience store
24 operation in -- in Timmonsville is the BoJo Tim,
25 isn't it? Because there were two locations

1 A That was both -- that was a Bo--- BoJo
2 Tim connected to a convenience store

3 Q Or a Bojangle's

4 A There was a Bojangle's connected to
5 it, but he was involved in the -- the very onset
6 of that convenience store operation

7 Q And that's the -- the -- again, the
8 business transaction between Carolina First and
9 Hugh Willcox, Junior --

10 A That was part of it --

11 Q Prior -- prior --

12 A I don't remember who -- there were
13 some other lenders involved in that venture

14 Q All right And what about his
15 involvement in the mobile home park caused you
16 concern?

17 A He was involved in the mobile home
18 park, basically working with his -- with his
19 mother on that And he had to refinance the
20 mobile home park a couple of times in order to
21 clear up some of the credit issues he had -- he
22 had had in the past

23 Q While -- while you were at Carolina
24 First?

25 A Yes, sir

1 Q And it -- this mobile home park, was
2 it owned individually by Mark or --

3 A No, it was owned by his mother

4 Q Okay So Mark was not obligated on
5 that obligation?

6 A He was obligated on that loan with his
7 mother

8 Q But he was not an owner of the
9 property?

10 A I'm not sure how the structure was,
11 Bill, if he was part owner He -- he had some
12 siblings involved in it too But his father
13 actually started the park, I think is how it
14 worked

15 Q Well, what -- what about in particular
16 Mark Fountain's involvement with the mobile home
17 park are you aware of that caused problems
18 with the -- with --

19 A I said he -- he was involved with that
20 transaction I didn't say the mobile home park
21 had problems The mobile home park was -- had --
22 had made its payments over -- over the years It
23 had rents that serviced the -- the debt on the
24 park It was the other ventures that he was
25 involved with

1 Q The BoJo Tim?

2 A The BoJo Tim

3 Q All right So nothing about the
4 mobile home park was the basis for your concern
5 about Mark's management capabilities Correct?

6 A No, sir It was the BoJo Tim and the
7 operation at the convenience store

8 Q All right And again, those were the
9 transactions where he was involved in it with
10 Walker Willcox and some lady -- I can't remember
11 her name -- and Hugh Willcox, Junior Is that
12 right?

13 A He had some other partners and I know
14 Hugh was involved in one of -- one of them I
15 don't know wh--- how many he was involved in I
16 don't know if he was involved in the BoJo Tim or
17 not

18 Q Let me ask you this question I mean,
19 you're familiar with -- with Mr Willcox and his
20 financial wherewithal I mean, he's known to be a
21 fairly wealthy individual, isn't he?

22 A That --

23 Q You would know that from your
24 experience at Carolina First Right?

25 A I would have dealt with them at

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Mark Fountain,

Plaintiff,

Vs

First Reliance Bank, Thomas C Ewart,
and Ernest Pennell,

Defendants

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2010-CP-21-131

AFFIDAVIT OF
PETER A SEITZ

FILED
CLERK OF COURT
FLORENCE COUNTY, SC
JAN 11 2011
P41 52

PERSONALLY APPEARED before me Peter A Seitz who, being duly sworn, deposes and says

- 1 That I am Peter A Seitz and reside in Troy, North Carolina and am presently employed as the Vice President and Regulatory Compliance Officer for First Bancorp, Inc
- 2 That I have experience as an officer for banks with accountability for the regulatory compliance and credit administration and loan operations of each bank
- 3 That heretofore I was engaged by The Hyman Law Firm to review evaluate the policies and practices of First Reliance Bank as it relates to issues in this case and to determine whether or not First Reliance Bank's actions in declining the loan to Ernest Pennell complied with its loan practices and guidelines and any applicable law or regulation

CERTIFIED: A TRUE COPY
Linda J. Spivey
CLERK OF COURT C.A. & GS
FLORENCE COUNTY, SC

4 That in connection with my evaluation I have been provided with the following documents

- (a) Plaintiff's Summons for Relief,
- (b) The Answer of Defendants, First Reliance Bank and Ernest Pennell,
- (c) The responses of Defendants, First Reliance Bank and Thomas Ewart to Plaintiff's First and Second Set of Interrogatories and Plaintiff's First, Second and Third Request for Production of Documents,
- (d) Depositions of Jon Mark Fountain, Ernest Pennell, and Thomas Ewart,
- (e) Personnel file of Thomas Ewart,
- (f) First Reliance Bank Loan Policy,
- (g) First Reliance Bank Loan File #980020328, Loan File #980035333 and Loan File #980023785

5 That the information provided to me is that which I would normally rely upon in formulating the opinions I have been asked to render in this case

6 Based upon my review of the records and documents set forth above in addition to my experience in the banking industry, I am able to offer the following opinions within a reasonable degree of professional certainty

- (a) With respect to the loan application submitted by Ernest Pennell to finance the operation of a Hess convenience store in Florence, the conduct of lending of personnel of First Reliance Bank did not comply

with its loan policy. In particular, the Board-approved loan policy of First Reliance directs management

- i To encourage all potential applicants to submit a credit request,
- ii To seek out and assist potential borrowers,
- iii With respect to denials of small business credit, to notify the customer properly in writing with details of the reason for the denial,
- iv To book desirable loans, including loans to small or middle market businesses, especially when located in the bank's primary trade area defined as Florence County

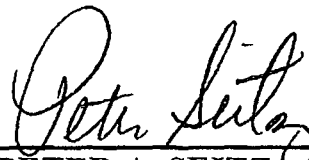
(b) First Reliance did not comply with the provisions of the Equal Credit Opportunity Act and its implementing regulation, commonly known as Regulation B. In particular, the bank did not

- i Obtain the financial information for the business entity applying for credit necessary to ascertain the appropriate adverse action notice required under Regulation B,
- ii Retain the loan application and supporting documentation submitted by Mr. Pennell as required by Regulation B

(c) At the time of Mr. Pennell's application on behalf of his business entity, Mr. Ewart's incentive plan specifically directed him to seek out

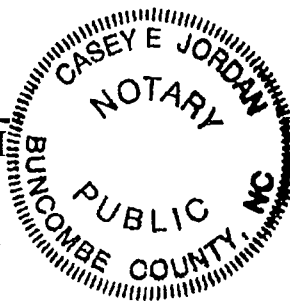
means to reduce the bank's commercial real estate concentration. Similarly, federal bank examiners were also encouraging their banks to reduce their commercial real estate concentrations. Funding the loan sought by Mr. Pennell's entity would have reduced the bank's commercial real estate concentration.

- 7 For the reasons cited above, the actions and conduct of First Reliance Bank and Thomas Ewart in accepting, considering and declining the loan application of Ernest Pennell's entity is inconsistent with the bank's policy and existing bank regulations and as such may not constitute a safe and sound banking practice.


PETER A. SEITZ

SWORN TO before me this
3 day of March, 2011


NOTARY PUBLIC FOR NORTH
CAROLINA
My Commission Expires 5/23/14



The State of South Carolina
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

D Craig Brown, Circuit Court Judge

Case No 2010 CP 21 131

Mark Fountain,

Appellant,

v

First Reliance Bank, Thomas C Ewart, and
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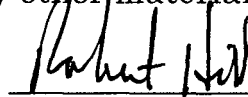
Defendants

Of whom First Reliance Bank and Thomas C Ewart
are,

Respondents

Rule 210(g), SCACR, Certification

I certify that the Record on Appeal contains all material proposed to be
included by any of the parties and not any other material



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The State of South Carolina
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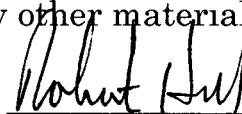
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JAN 04 2012

SC Court of Appeals



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Counsel for the Appellant

The State of South Carolina
In the Court of Appeals

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DEC 01 2011

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Mark Fountain,

Appellant,

v

First Reliance Bank, Thomas C Ewart, and
Ernest Pennell,

Defendants

Of whom First Reliance Bank and Thomas C Ewart
are,

Respondents

Certificate of Service

I certify that I am co counsel for the Appellant Mark Fountain
and that I on November 30, 2011 served the Record on Appeal by first
class mail, sufficient postage pre paid, to

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Attorney for the Respondents
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