

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

April 23, 2012

Robert Norris Hill, Esquire  
Law Offices of Robert Hill  
P O Box 51  
Newberry, SC 29108

William P. Hatfield, Esquire  
Hyman Law Firm  
P O Box 1770  
Florence, SC 29503

Jeffrey L. Payne, Esquire  
J. Rene Jose, Esquire  
Turner, Padgett, Graham & Laney, P A  
P O Box 5478  
Florence, SC 29502

Re Fountain, Mark v First Reliance Bank

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

|           |            |
|-----------|------------|
| Appellant | 10 minutes |
|-----------|------------|

|            |            |
|------------|------------|
| Respondent | 10 minutes |
|------------|------------|

|                    |           |
|--------------------|-----------|
| Appellant in Reply | 5 minutes |
|--------------------|-----------|

This case is scheduled for hearing on Thursday, May 3, 2012 at 9:30 a.m.

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M. Shearouse  
Administrative Assistant

DES/dmh

## Hopkins, Debbie

---

**From** Baker Margaret E  
**Sent** Monday April 23 2012 1 57 PM  
**To** Hopkins Debbie  
**Subject** RE Mark Fountain v First Reliance Bank

10 10 5

In this case Fountain appeals the circuit court's grant of summary judgment on his claim of defamation in favor of First Reliance Bank and Thomas C Ewert

---

**From** Hopkins, Debbie  
**Sent** Monday, April 23, 2012 1 54 PM  
**To** Baker, Margaret E  
**Subject** RE Mark Fountain v First Reliance Bank

Do you have the oral argument times and case summary?

---

**From** Baker, Margaret E  
**Sent** Monday, April 23, 2012 1 52 PM  
**To** Hopkins, Debbie  
**Subject** RE Mark Fountain v First Reliance Bank

I do

---

**From** Hopkins, Debbie  
**Sent** Monday, April 23, 2012 1 51 PM  
**To** Baker, Margaret E , Humphrey, R Walker  
**Subject** Mark Fountain v First Reliance Bank

Good afternoon Meggie and Walker,

Which one of you has this case?

*Debbie M Hopkins*  
*South Carolina Supreme Court*  
*P O. Box 11330*  
*Columbia, South Carolina 29211*  
*(803) 734-1080*

# TURNER PADGET

TURNER PADGET GRAHAM & LANEY PA

CHARLESTON  
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J RENE JOSEY

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E MAIL RJOSEY@TURNERPADGET.COM  
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WRITER S DIRECT FAX (843) 413 5818

March 26, 2012

Honorable Daniel E Shearhouse  
Clerk of Court  
The South Carolina Supreme Court  
P O Box 11330  
Columbia, SC 29211

Re Fountain v First Reliance Bank  
TPGL File No 5400 276

Dear Mr Shearhouse

We are in receipt of your notice that this matter appears on a preliminary list of cases for oral argument in May In reviewing the dates identified for argument, I can advise that I have no scheduling conflict at present with any of the scheduled dates We look forward to hearing from you once this matter is scheduled

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P A

J Rene Josey

JRJ vlb

**RECEIVED**

MAR 27 2012

**S.C. SUPREME COURT**

BUSINESS LITIGATION SOLUTIONS

319 S Irby Street (29501) PO Box 5478 Florence SC 29502  
Phone (843) 662 9008 Fax (843) 667 0828 turnerpadget.com



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Jeffrey L. Payne Esquire  
J. Rene Jose Esquire  
From Daniel E. Shearouse  
Date March 21, 2012  
RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of May 1, 2, 3, 22, and 23. Please notify this office in writing prior to March 28, 2012, as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Fountain, Mark v. First Reliance Bank



# The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

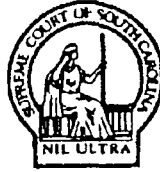
P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Robert Norris Hill Esquire  
From Daniel E. Shearouse  
Date March 21, 2012  
RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Fountain, Mark v. First Reliance Bank



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To William P. Hatfield Esquire  
From Daniel E. Shearouse  
Date March 21, 2012  
RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of May 1, 2, 3, 22, and 23. Please notify this office in writing prior to March 28, 2012, as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Fountain, Mark v. First Reliance Bank

# The Supreme Court of South Carolina

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

The Honorable D Craig Brown  
Florence County  
Trial Court Case No 2010-CP-21-00131

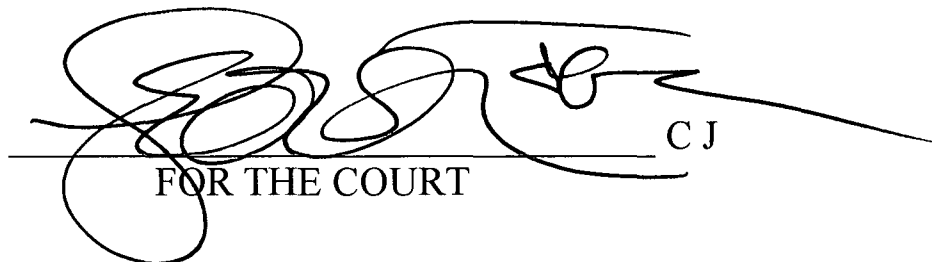
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## ORDER

---

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules,  
this appeal is hereby certified for review by the South Carolina Supreme  
Court Upon receipt of this order, the Court of Appeals is hereby directed to  
forward the case file, all records and briefs and any exhibits on file to this  
Court

IT IS SO ORDERED

  
CJ  
FOR THE COURT

Columbia, South Carolina

March 20, 2012

cc Robert Norris Hill, Esquire  
William P Hatfield, Esquire  
Jeffrey L Payne, Esquire  
J Rene Jose, Esquire  
The Honorable Tanya Gee

# TURNER PADGET

TURNER PADGET GRAHAM & LANEY PA

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**J RENE JOSEY**

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E MAIL RJOSEY@TURNERPADGET.COM  
WRITER S DIRECT DIAL (843) 656 4451  
WRITER S DIRECT FAX (843) 413 5818

January 10, 2012

Ms Tanya A Gee, Clerk  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

Re Mark Fountain v First Reliance Bank, et al  
Civil Action No 2010-CP-21-131  
Tracking Number 2011193546  
TPGL File No 5400 276

**RECEIVED**

JAN 12 2012

**SC Court of Appeals**

Dear Ms Gee

Pursuant to your letter of January 9, 2012, enclosed please find the Certificate of Counsel according to Rule 211 of the SCACR. We apologize for its omission from our final brief filing package. I am enclosing one additional copy of this Certificate and would ask that you return one clocked copy of each to me in the self-addressed stamped envelope provided. By copy of this letter to other counsel of record, I am serving them with their copy of this Certificate.

Thank you for your assistance and please contact me if you have any questions.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P A

J Rene Josey

JRJ vlb

cc William P Hatfield, Esquire (w/enclosure)  
Gary I Finklea Esquire (w/enclosure)  
Robert N Hill, Esq (w/enclosure)

BUSINESS LITIGATION SOLUTIONS

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TPGL 4231146v1



## The South Carolina Court of Appeals

TANYA A GEE  
CLERK

V CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11679  
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1015 SUMTER STREET  
COLUMBIA SOUTH CAROLINA 29701  
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January 9, 2012

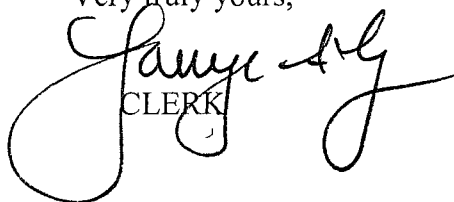
Jeffrey L Payne, Esquire  
J Rene Jose, Esquire  
Turner, Padgett, Graham & Laney, P A  
P O Box 5478  
Florence, SC 29502

Re Fountain, Mark v First Reliance Bank  
**2011193546**

Dear Counsel

We have received the Respondents' Final Brief in the above case. However, you must provide a Certificate of Counsel according to Rule 211 of the SCACR. Please provide the certificate within ten days of the date of this letter.

Very truly yours,

  
CLERK

TAG/laf

cc Robert Norris Hill, Esquire  
William P Hatfield, Esquire

**J RENE JOSEY**

REPLY TO FLORENCE OFFICE  
E MAIL RJOSEY@TURNERPADGET.COM  
WRITER S DIRECT DIAL (843) 656 4451  
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December 20, 2011

Ms Tanya A Gee, Clerk  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

Re Mark Fountain v First Reliance Bank, et al  
Civil Action No 2010-CP-21-131  
Tracking Number 2011193546  
TPGL File No 5400 276

Dear Ms Gee

Please find enclosed the following documents with regard to the above-referenced matter for filing

- 1 The unbound original and fifteen bound copies of Respondents' Final Brief,
- 2 The unbound original and fifteen bound copies of the Rule 212 Appendix (with its own attached Proof of Service),
- 3 The original and one copy of the Proof of Service for the Final Brief

Please file the original documents and return one clocked copy of each to me in the self-addressed stamped envelope provided By copy of this letter to other counsel of record, I am serving them with their copies of these documents as indicated in the Proof of Service

Thank you for your assistance and please contact me if you have any questions

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P A

J Rene Josey

JRJ vlb

cc Jeremy Groom (w/enclosures)  
William P Hatfield, Esquire (w/enclosures)  
Gary I Finklea Esquire (w/enclosures)  
Robert N Hill, Esq (w/enclosures)

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TPGL 4202176v1

LAW OFFICES OF ROBERT HILL

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ROBERT N HILL  
ATTORNEY AT LAW

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FACSIMILE  
803-276-4181

EMAIL  
attorneyhill@att.net

December 7 2011

Tanya Gee  
Clerk of Court for the  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

**RECEIVED**

DEC 08 2011

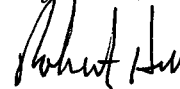
**SC Court of Appeals**

Re Fountain, Mark v First Reliance Bank  
Case Tracking # 2011193546

Dear Ms Gee,

Please find enclosed for filing an unbound original and 15 bound copies of the Appellant's Final Brief, an unbound original and 15 copies of the Appellant's Final Reply Brief, a certificate of compliance and a certificate of service

My best,



Robert Hill

cc William P Hatfield, Esq  
Jeffrey L Payne, Esq



## The South Carolina Court of Appeals

TANYA A GEE  
CLERK

V CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
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December 28, 2011

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1819 McHardy St  
P O Box 51  
Newberry, SC 29108

William P Hatfield, Esquire  
Hyman Law Firm  
P O Box 1770  
Florence, SC 29503

Re Fountain, Mark v First Reliance Bank  
**2011193546**

Dear Counsel

We have received the Record on Appeal in the above case. However, the Certificate of Counsel appears to be a copy.

Furthermore, our records indicate that J Rene Jose and Jeffrey L Payne of Turner Padgett are counsel of record for the respondent.

Within ten days of the date of this letter, please provide an original Certificate of Counsel and make arrangements for a representative from your office to come to the Court of Appeals filing desk on the 1st floor of the Edgar A Brown Building to make the required corrections. We request that you notify this office when someone will be arriving to make the corrections so the documents will be available without delay.

Very truly yours,

*✓ Claire Allen, Deputy*  
CLERK

TAG/laf

cc Jeffrey L Payne, Esquire  
J Rene Jose, Esquire

# TURNER PADGET

TURNER PADGET GRAHAM & LANEY PA

CHARLESTON  
COLUMBIA  
FLORENCE  
GREENVILLE  
MYRTLE BEACH

J RENE JOSEY

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WRITER S DIRECT DIAL (843) 656-4451  
WRITER S DIRECT FAX (843) 413 5818

December 15, 2011

Robert N Hill, Esquire  
LAW OFFICE OF ROBERT HILL  
P O Box 51  
Newberry, SC 29108

Re *Mark Fountain v First Reliance Bank Thomas C Ewart and Ernest Pennell*  
Court of Appeals Tracking No 2011193546  
TPGL File No 5400 276

Dear Robert

Pursuant to our exchange of e-mails, I am writing to formally confirm your consent to my submission of a supplemental record to the Court of Appeals pursuant to Rule 212(b) of the South Carolina Appellate Court Rules

As I have indicated, this Appendix would include only two pages of material, these two pages were inadvertently left out of my designation, although cited in my initial Briefs. These two pages would be the Pennell deposition, page 13, and Ewart deposition, page 33

Because I am advised that the Court of Appeals would like our original signatures on a writing confirming this agreement, I have prepared a line for your original signature to be added below indicating your consent to the submission of the Appendix, as described. I am enclosing an envelope addressed to the Court of Appeals with prepaid postage so that you may forward this letter to the Court of Appeals after adding your signature. Thank you for your cooperation in this regard.

Sincerely

TURNER, PADGET, GRAHAM & LANEY, P A

J Rene Josey

JRJ mjs  
Enclosure

I hereby consent to the submission of a Rule 212 Appendix by the Respondent as described

12-16-11

Date

Robert N Hill  
Robert N Hill, Esquire

RECEIVED  
DEC 19 2011  
SC Court of Appeals

BUSINESS LITIGATION SOLUTIONS

319 S Irby Street (29501) PO Box 5478 Florence SC 29502  
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**ROBERT N HILL  
ATTORNEY AT LAW**

**TELEPHONE  
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**FACSIMILE  
803-276-4181**

**EMAIL  
attorneyhill@att.net**

November 30, 2011

Tanya Gee  
Clerk of Court for the  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

**RECEIVED**

NOV 30 2011

**SC Court of Appeals**

Re Fountain, Mark v First Reliance Bank  
Case Tracking # **2011193546**

Dear Ms Gee,

Please find enclosed for filing an unbound original and 15 bound copies of the Record on Appeal

My best



Robert Hill

cc William P Hatfield Esq  
Jeffrey L Payne, Esq

# The South Carolina Court of Appeals

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

The Honorable D Craig Brown  
Florence County  
Trial Court Case No 2010-CP-21-00131

---

## ORDER

---

For good cause having been shown, the time for the Record on Appeal to be served on the opposing party and proof of service filed with the Court in the above entitled matter is hereby extended until December 9, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE  
For the Court

BY V. Claire Allen, Deputy  
CLERK

Columbia, South Carolina  
cc Robert Norris Hill, Esquire  
William P Hatfield, Esquire  
Jeffrey L Payne, Esquire  
J Rene Jose, Esquire

**FILED**

11/29/11

JA

LAW OFFICES OF ROBERT HILL

1819 MCHARDY STREET  
P O BOX 51  
NEWBERRY SOUTH CAROLINA 29108

ROBERT N HILL  
ATTORNEY AT LAW

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FACSIMILE  
803-276-4181

E MAIL  
attorneyhill@att.net

November 10, 2011

Tanya Gee  
Clerk of Court for the  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

**RECEIVED**  
NOV 15 2011  
SC Court of Appeals

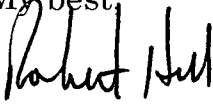
Re Fountain, Mark v First Reliance Bank  
Case Tracking # 2011193546

Dear Ms Gee,

Please grant me a 21 day extension of time to file and serve the Record on Appeal. The Record is now due Monday November 14, 2011. With the extension, the Record will be due December 5, 2011.

A \$ 25.00 filing fee is enclosed.

My best,

  
Robert Hill

cc William P. Hatfield, Esq.  
Jeffrey L. Payne, Esq.  
Gary I. Finklea, Esq.

11/14/11

12/5/11

1st

# TURNER PADGET

TURNER PADGET GRAHAM & LANEY PA

CHARLESTON  
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FLORENCE  
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MYRTLE BEACH

**J RENE JOSEY**

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WRITER S DIRECT FAX (843) 413 5818

September 28, 2011

V Claire Allen, Deputy Clerk  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

**RECEIVED**

SEP 29 2011

**SC Court of Appeals**

Re Mark Fountain v First Reliance Bank, et al  
Civil Action No 2010-CP-21-131  
Tracking Number 2011193546  
TPGL File No 5400 276

Dear Ms Allen

Pursuant to your letter dated September 27, 2011, enclosed please find the original and one copy of the amended cover for the Respondent's Initial Brief. Please return a filed stamped copy to me in the self-addressed stamped envelope which is enclosed. I appreciate your assistance in this matter.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P A

J Rene Josey

JRJ vlb  
Enclosures

cc Jeremy Groom (w/enclosure)  
William P Hatfield, Esquire (w/enclosure)  
Gary I Finklea Esquire (w/enclosure)

BUSINESS LITIGATION SOLUTIONS

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TPGL 4056635v1

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 Ernest Pennell,

Defendants

Of whom First Reliance Bank and Thomas C Ewart are,

Respondents

---

**INITIAL BRIEF OF RESPONDENT**

---

**RECEIVED**  
SEP 29 2011  
**SC Court of Appeals**

J Rene Josey, Esquire  
TURNER, PADGET, GRAHAM & LANEY, P A  
Post Office Box 5478 (29502)  
Florence, South Carolina 29501  
(843) 662-9008  
(843) 667-0828 fax  
rjosey@TurnerPadget.com (Email)

ATTORNEYS FOR RESPONDENT



# The South Carolina Court of Appeals

TANYA A. GEE  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

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1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
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October 21, 2011

Robert Norris Hill, Esquire  
Law Offices of Robert Hill  
P O Box 51  
Newberry, SC 29108

William P. Hatfield, Esquire  
Hyman Law Firm  
P O Box 1770  
Florence, SC 29503

Jeffrey L. Payne, Esquire  
J. Rene Jose, Esquire  
Turner, Padgett, Graham & Laney, P.A.  
P O Box 5478  
Florence, SC 29502

Re: Fountain Mark v. First Reliance Bank  
Case Tracking # 2011193546

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

*V. Claire Allen, Deputy*  
CLERK

TAG/laf

The State of South Carolina  
In the Court of Appeals

---

**RECEIVED**

OCT 14 2011

Appeal from Florence County  
Court of Common Pleas

**SC Court of Appeals**

D Craig Brown, Circuit Court Judge

---

Case No 2010 CP 21 131

---

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

---

**Appellant's Initial Reply Brief**

---

Robert N Hill  
Law Offices of Robert Hill  
P O Box 51  
Newberry, SC 29108  
803 405 1629

William P Hatfield  
The Hyman Law Firm, LLP  
P O Box 1770  
Florence, SC 29503 1770  
843 662 5000

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## Table of Authorities

### Decisions

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| <i>Hancock v Mid South Management Co</i> , 381 S C 326, 673 S E 2d 801 (2009)               | 1       |
| <i>Murray v Holnam, Inc</i> , 344 S C 129, 542 S E 2d 743 (Ct App 2001)                     | 1       |
| <i>Parrish v Allison</i> , 376 S C 308, 656 S E 2d 382 (Ct App 2007)                        | 1       |
| <i>Richardson v State Record Co , Inc</i> , 330 S C 562, 499 S E 2d 822 (Ct App 1998)       | 6       |
| <i>Swinton Creek Nursery v Edisto Farm Credit, ACA</i> , 334 S C 469, 514 S E 2d 126 (1999) | 11      |
| <i>Tyler v Mack's Stores of South Carolina, Inc</i> , 275 S C 456, 272 S E 2d 633 (1980)    | 4, 5    |

## Argument

The Bank's brief dwells on evidence favorable only to it, offers its view of what is reasonable and plain, draws inferences in its favor, and dismisses Fountain's expert evidence as nonsensical.<sup>1</sup> But this appeal is from a summary judgment order.

To defeat summary judgment, Fountain need only muster a scintilla of evidence on issues where he carries the burden of proof.<sup>2</sup> And he has no burden of proving the defamation's falsity; rather, the Bank must prove that the defamatory meaning is true.<sup>3</sup> Conclusions and inferences from the evidence must also be construed most strongly in Fountain's favor, and when there is no dispute as to evidentiary facts but only as to the conclusions or inferences to be drawn from them, summary judgment must be denied. *Murray v. Holnam, Inc.*, 344 S. Ct. 129, 137-138, 542 S. E. 2d 743, 747 (Ct. App. 2001).

The summary judgment order must be reversed because there is

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<sup>1</sup>Fountain will refer to both the Bank and Ewart as the Bank.

<sup>2</sup>*Hancock v. Mid South Management Co.*, 381 S. Ct. 326, 673 S. E. 2d 801 (2009) (scintilla standard applies where the plaintiff's burden of proof is by the preponderance of the evidence), *Pairish v. Allison*, 376 S. Ct. 308, 320, 656 S. E. 2d 382, 388 (Ct. App. 2007) (defamation elements must be proved by the preponderance of the evidence).

<sup>3</sup>*Pairish*, 376 S. Ct. at 326, 656 S. E. 2d at 391-392 (truth is an affirmative defense if the statements are a matter of private concern).

at least a scintilla of evidence that Ewart needlessly or recklessly defamed Fountain as a manager

**I The trial court applied the wrong standard in ruling that Ewart's statement is not defamatory as a matter of law**

Ewart implied that Fountain was unfit to manage Pennell's store when he told Pennell, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan " <sup>4</sup> To argue otherwise, the Bank criticizes *Adams v Daily Telegraph Printing Co* , 292 S C 273, 356 S E 2d 118 (Ct App 1986), and dismisses its standard as "only dicta " It then argues that the defamatory implication is not plain, that the statement does not implicate Fountain's character, and that the statement's other implications that are not at issue are true

This confuses the role of the trial judge and the jury, and ignores the test for whether one is defamed in their profession

**A The *Adams* standard governs**

Like Fountain, the plaintiff in *Adams* sued for a literally truthful statement's defamatory innuendo In resolving whether summary judgment was properly granted, this Court concluded that summary

---

<sup>4</sup>This is Ewart's version of his statement Ewart Depo , p 6 ll 18 21, p 56 ll 13 19, R p \_\_\_\_

judgment on a statement's meaning must be denied unless the trial judge can affirmatively say that the statement is incapable of a defamatory meaning. If the language is capable of a defamatory meaning, it is up to the jury to decide if the statement had that defamatory meaning. The Court applied this standard to reverse summary judgment because the statements made were "susceptible of the inference" of defamation. *Id.* at 279, 356 S.E.2d at 122.

The Bank dismisses this as "only dicta addressing a one of a kind case in a very preliminary posture," and argues that *Adams* "admittedly and needlessly borrowed dated language from [a] 1940 decision." Respondent's Initial Brief at 14 and n. 30. This is triply wrong.

The procedural posture of the two cases is identical. As here, the trial judge in *Adams* granted summary judgment because the statements were literally true. As here, the plaintiff did not contest the statements' literal truthfulness but rather the innuendo. This Court reversed the summary judgment order because the truthful statements' innuendo was susceptible of a defamatory inference. *Id.* at 278-279, 356 S.E.2d at 121-122. That is precisely what Fountain asks here.

The Bank is next wrong in dismissing the standard as dicta. The standard that the Court applied in reviewing the summary judgment

order is an integral part of its holding that summary judgment was improperly granted *Id* at 279, 356 S E 2d at 122 It seems axiomatic that part of a holding is the test applied to reach the holding

The Bank is lastly wrong because the *Adams* standard is not limited to that one case The Court instead looked to the 1940 decision to distinguish between the differing roles that a judge and a jury play in determining if a statement is defamatory The judge determines if the language is capable of the defamatory meaning ascribed to it If it is, the jury determines if the language had that meaning *Id* This standard is not unique the Court cited a similar “general rule” from a legal encyclopedia *Id*

The trial court in this case strayed from this governing *Adams* standard The summary judgment order must thus be reversed

**B Ewart’s implication that Fountain was unfit to manage Pennell’s store is plain**

The Bank tries to salvage the trial judge’s failure to apply the *Adams* standard by arguing that the implication of Fountain’s unfitness to manage Pennell’s store is not “plain ” It plucks this adjective out of *Tyler v Mack’s Stores of South Carolina, Inc* , 275 S C 456, 272 S E 2d 633 (1980), and then dwells on the term’s dictionary definitions The

Supreme Court, however, was not drafting a statute. It was deciding the case before it, and its holding refutes the Bank's view.

In *Tyler*, the Court held that a "defamation need not be accomplished in a direct manner" and allowed a claim to go forward where there were no statement or writing at all. *Tyler*, 275 S. C. at 458, 272 S. E. 2d at 634. Rather, the alleged defamation was implied from the employee's discharge even though he could have been fired for a multitude of legitimate reasons.

Here, Ewart told Pennell, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan." The defamatory implication that Fountain was unfit to manage Pennell's store is at least as plain as the *Tyler* insinuation.

**C. Ewart's implication that Fountain was unfit to manage Pennell's store is incompatible with Fountain's trade or profession.**

The Bank next wrongly contends that Ewart's statement is not defamatory per se because it does not implicate Fountain's character. It is at most, the Bank argues, a "more general reflection" on his qualities. Respondents' Initial Brief, p. 17. In advocating this point, the Bank tries to factually distinguish various decisions without coming to grips with the South Carolina test.

In South Carolina, the test for whether one is defamed in their trade or profession is whether the statement imputes “conduct or characteristics incompatible with a person’s office, trade, or profession ” *Capps v Watts*, 271 S C 276, 286, 246 S E 2d 606, 612 (1978) Here, Ewart went far beyond a general reflection Ewart implied to Pennell that Fountain was unfit to manage Pennell’s store This imputes conduct or characteristics incompatible with Fountain’s specific ability to do the job that Pennell hired him to do After all, Pennell, after hearing from Ewart, asked Fountain to tear up their management agreement Fountain Depo, p 128 l 5 p 129 l 3, R p \_\_\_\_

**D A jury could find that the Bank failed to meet its burden of proving the truth of Ewart’s implication that Fountain was unfit to manage Pennell’s store**

The Bank lastly argues that Ewart’s statement is not defamatory because it and its reasonable implications are in fact true On this score, it bears the burden of proving that the defamatory implication of Ewart’s statement is true and not just the statement’s literal truthfulness <sup>5</sup> It has not met this burden

---

<sup>5</sup>See *Richardson v State Record Co , Inc* , 330 S C 562, 566 567, 499 S E 2d 822, 824 825 (Ct App 1998)(reversing summary judgment where the defendant failed to demonstrate the absence of a genuine issue of material fact over the truthful statements’ allegedly false insinuation)

The Bank, for example, tellingly limits its arguments about truthfulness to the statement's literal truthfulness and implications about Fountain's creditworthiness or the Bank's lack of faith in Fountain. This, however, is not the defamatory meaning that Fountain ascribes to Ewart's statement. The defamatory meaning ascribed is the insinuation that Fountain was in fact unfit to manage Pennell's store. Whether Fountain was in fact unfit to manage Pennell's store is an objective fact—not a constitutionally protected opinion—and is disputed.<sup>6</sup>

The record reflects that Pennell thought that Fountain was fit enough to manage his store in that he hired Fountain to manage it even after Fountain told him about his credit problems from the BoJo Tim endeavor. Pennell did not ask Fountain to tear their management agreement up until after hearing from Ewart. Fountain Depo, p. 68 ll. 14-17, p. 128 ll. 5-6, p. 129 ll. 3-4, R. p. \_\_\_\_.

Ewart, in turn, testified that his concern about Fountain as a manager came from the BoJo Tim operation. Ewart Depo, p. 58 ll. 5-6, p. 61 ll. 7-8, R. p. \_\_\_\_.

Fountain testified, however, that he was not a day to day manager at BoJo Tim but was one of five LLC members who had others

---

<sup>6</sup>The Bank limits its claim of constitutional protection to its opinion on Fountain's creditworthiness. Respondents' Initial Brief at 19. That is not the defamation at issue.

manage it for them Fountain Depo, p 24 l 15 p 25 l 7, R p \_\_\_\_ Ewart also never asked Bojo Tim to replace Fountain, and the other members of the LLC likewise never fired Fountain or took him off of the payroll A leading member of the LLC likewise never expressed disappointment in Fountain's role in the LLC Fountain Depo , p 74 ll 9 12, p 148 ll 8 13, R p \_\_\_\_, Ewart Depo, p 30 ll 3 5, R p \_\_\_\_ There is also no evidence none that Fountain contributed to Bojo Tim's financial problems

Lastly, Fountain was a good enough manager to later be hired as Timmons ville's Town Administrator Fountain Depo, p 10 ll 17 19, p 36 ll 10 15, R p \_\_\_\_

There is thus at least a scintilla of evidence from which a jury could find that Fountain would have made Pennell a fine store manager and that Ewart thus defamed him when Ewart insinuated otherwise

## **II A jury could find that the qualified privilege was abused**

At the summary judgment hearing, Fountain recounted the record evidence that he relied on to show that the qualified privilege's abuse Hearing Tr , p 12 l 5 p 21 l 23, R p \_\_\_\_ He then again cited some of this record evidence in his motion to reconsider Motion to Reconsider, pp 5 6, R p \_\_\_\_ While the Bank takes Fountain to task for saying that the trial court "failed to address" this evidence, neither the summary

judgment order nor the order on reconsideration cites this evidence or explains why it does not create a jury issue on the privilege's abuse. The Bank is thus left offering explanations for the orders that may or may not reflect the trial court's actual reasoning.

Part of the Bank's explanation is that Fountain's expert affidavit is nonsense. Respondents' Initial Brief, p. 10. While perhaps appropriate on an appeal from a jury verdict, dismissing evidence as nonsense is misplaced in an appeal from a summary judgment. On an appeal from summary judgment, the conclusions and inferences from the evidence must be construed most strongly in Fountain's favor. The Bank should have thus moved to strike the expert's affidavit if it did not want this Court to take the expert's opinions as true on appeal.

This expert affidavit was introduced to show that Ewart's statement to Pennell about Fountain was reckless. Other evidence of Ewart's abuse of privilege includes

- Ewart dragged Fountain into the conversation with Pennell even though Ewart knew that Fountain would not be on Pennell's proposed loan and would have no ownership interest in Pennell's

business Ewart Depo , p 38 ll 11 14, p 50 ll 5 12, R p \_\_\_\_<sup>7</sup>

- Ewart could not name any other commercial loan that had ever been denied solely because of the choice of management Ewart Depo , p 35 ll 17 21, p 37 ll 7 16, R p \_\_\_\_

Ewart's view of Fountain came from the BoJo Tim operation in which Fountain was an owner who hired others as managers

Ewart Depo, p 58 l 5 p 61 l 7, R p \_\_\_\_, Fountain Depo, p 24 l 15 p 25 l 7, R p \_\_\_\_

- Ewart's information about Fountain when he spoke to Pennell was five to six years old Ewart Depo , p 18 ll 3 13, p 43 ll 3 15, p 52 ll 1 6, R p \_\_\_\_

Ewart's boss, the Bank's President and CEO, did not object to Fountain's management of Pennell's store even though he knew at least as much as Ewart about making commercial loans Ewart Depo, p 53 ll 8 25, R p \_\_\_\_, Fountain Depo, p 132 ll 2 24, p 134 l 23 p 135 l 5, R p \_\_\_\_, Pennell Depo , p 47 ll 8 23, R p \_\_\_\_

In recounting this evidence, Fountain does not suggest that he is 'entitled to a summary judgment that the Bank abused its privilege The

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<sup>7</sup>The Bank devotes a good part of its brief to Fountain's lack of creditworthiness without explaining its relevance The Bank does not dispute that everyone knew that Fountain was not going to be obligated on Pennell's proposed loan

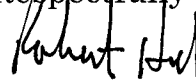
factual conclusions and inferences to be drawn from this evidence is very much in dispute, and the Bank does a good job in bringing out other facts and in drawing conclusions and inferences in its favor

But these factual controversies create a jury issue over whether the privilege was abused Whether privilege was abused is ordinarily one for the jury *Swinton Creek Nursery v Edisto Farm Credit, ACA*, 334 S C 469, 485, 514 S E 2d 126, 134 (1999) So too here

### Conclusion

The summary judgment order must be reversed because at least a scintilla of evidence exists that Ewart needlessly or recklessly defamed Fountain in his trade or profession

Respectfully submitted,



---

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The State of South Carolina  
In the Court of Appeals

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OCT 14 2011

Appeal from Florence County  
Court of Common Pleas

**SC Court of Appeals**

D Craig Brown, Circuit Court Judge

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Case No 2010 CP 21 131

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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 October 13, 2011, served the Appellant's Initial Reply by  
first class mail, sufficient postage pre paid, to

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October 13, 2011

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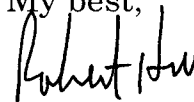
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**SC Court of Appeals**

Re Fountain, Mark v First Reliance Bank  
Case Tracking # 2011193546

Dear Ms Gee,

Enclosed for filing is the Appellant's Initial Reply Brief and Certificate of Service

My best,



Robert Hill

cc William P Hatfield, Esq  
Jeffrey L Payne, Esq  
Gary I Finklea, Esq

# The South Carolina Court of Appeals

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

The Honorable D Craig Brown  
Florence County  
Trial Court Case No 2010-CP-21-00131

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## ORDER

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For good cause having been shown, the time for the Appellant's Initial Reply Brief to be served and filed in the above entitled matter is hereby extended until October 13, 2011

IT IS SO ORDERED

V. Claude Allen, Deputy CLERK  
For the Court

Columbia, South Carolina

cc Robert Norris Hill, Esquire  
William P Hatfield, Esquire  
Jeffrey L Payne, Esquire  
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10/3/11 **FILED**

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September 29, 2011

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Columbia, SC 29211

**RECEIVED**  
SEP 30 2011  
**SC Court of Appeals**

Re Fountain, Mark v First Reliance Bank  
Case Tracking # 2011193546

Dear Ms Gee,

Please grant me a 10 day extension of time to file and serve the Appellant's Initial Reply Brief and Additional Designation of Matter With the extension, the brief and designations will be due October 13, 2010

Respondent's counsel graciously consented the request

A \$ 25 00 filing fee is enclosed

My best,

  
Robert Hill

cc William P Hatfield, Esq  
Jeffrey L Payne, Esq  
Gary I Finklea, Esq

10/3/11

10/13/11

18



## The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN  
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Re: Fountain, Mark v. First Reliance Bank  
**2011193546**

Dear Counsel:

We have received the Respondent's Initial Brief and Designation of Matter in the above case. However, according to Rule 267 of the South Carolina Appellate Court Rules, the name, address, and phone number of the counsel submitting the document must be included on the cover of the brief.

Please provide an amended cover for the Respondent's Initial Brief within ten days of the date of this letter.

Very truly yours,

*V. Claire Allen, Deputy*  
CLERK

TAG/laf

cc: Robert Norris Hill, Esquire  
William P. Hatfield, Esquire

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

---

**RECEIVED**  
SEP 26 2011  
**SC Court of Appeals**

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

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**DESIGNATION OF MATTER TO BE INCLUDED  
IN THE RECORD ON APPEAL**

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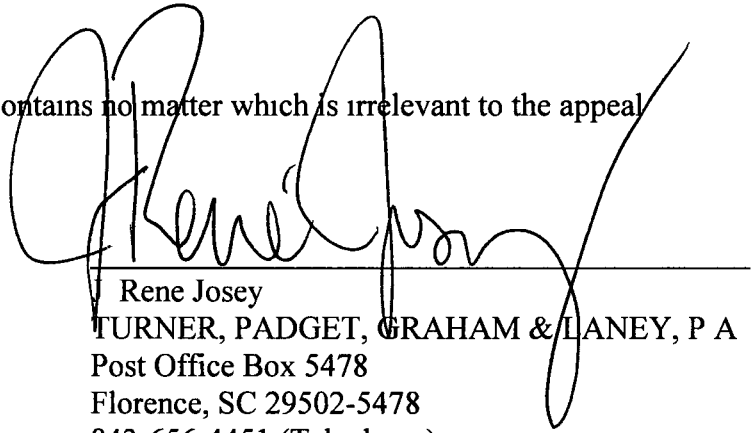
Respondents propose the following to be included in the Record on Appeal

- 1 Summary Judgment Order dated April 8, 2011,
- 2 Order Denying Reconsideration dated June 9, 2011,
- 3 Deposition of Appellant Mark Fountain, pages 20 to 31, 34 to 36, 40 to 46, 48, 55 to 57, 61 to 69, 71, 74, 78, 79, 92, 131, 132, 139, 141, 142, 154, 155,
- 4 Deposition of Ernest Pennell, pages 6, 8, 15, 28, 29, 33, 46, 47, 52, 53, 55, 56, 58, 63 to 67,
- 5 Deposition of Tom Ewart, pages 4 to 8, 10, 14 to 19, 24, 25, 31, 32, 44 to 51,
- 6 Seitz Affidavit,
- 7 Respondent's Memorandum in Opposition to Reconsideration,
- 8 Respondent's Supplemental Memorandum in Opposition to Reconsideration,

9 Appellant's Complaint,

10 Respondent's Answer

I certify that this designation contains no matter which is irrelevant to the appeal

A large, stylized handwritten signature in black ink, appearing to read 'Rene Josey', is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

D Craig Brown , Circuit Court Judge

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Case No 2010-CP-21-131

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SEP 26 2011

SC Court of Appeals

Mark Fountain,

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Of whom First Reliance Bank and Thomas C Ewart are,

Respondents

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**PROOF OF SERVICE**

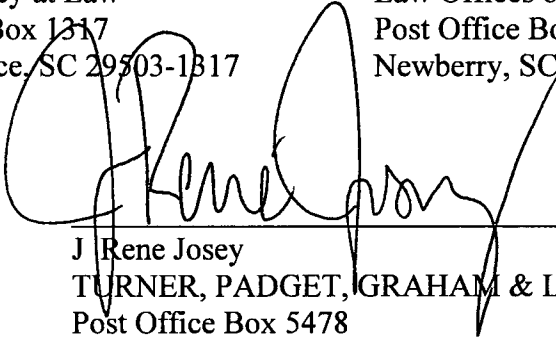
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I certify that I have served Respondents' Initial Brief and Designation of Matter to Be Included in the Record on Appeal , by depositing copies of the same in the United States mail, postage prepaid, on September 23, 2011, to all counsel of record at the following addresses

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September 23, 2011

Ms Tanya A Gee, Clerk  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

Re Mark Fountain v First Reliance Bank, et al  
Civil Action No 2010-CP-21-131  
Tracking Number 2011193546  
TPGL File No 5400 276

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SEP 26 2011  
SC COURT OF APPEALS

Dear Ms Gee

Please find enclosed the following documents with regard to the above-referenced matter for filing

- 1 The original and one copy of Respondents' Initial Brief and Designation of Matter to Be Included in the Record on Appeal, and
- 2 The original and one copy of the Proof of Service for these documents

Please file the original documents and return clocked copies to me in the self-addressed stamped envelope provided Thank you for your assistance and please contact me if you have any questions

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P A

J Rene Josey

JRJ vlb

cc Jeremy Groom (w/enclosures)  
William P Hatfield, Esquire (w/enclosures)  
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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

D Craig Brown , Circuit Court Judge

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Case No 2010-CP-21-131

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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

---

**INITIAL BRIEF OF RESPONDENT**

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**SC Court of Appeals**

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| <u>Goodwin v Kennedy</u> , 347 S C 30, 552 S E 2d 319 (Ct App 2001)                                      | 19     |
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| <u>Manley v Manley</u> , 291 S C 325, 353 S E 2d 312, 315 (S C Ct App 1987)                              | 23     |
| <u>McBride v School District of Greenville County</u> , 389 S C 546, 698 S E 2d 845 (Ct App 2010)        | 18     |
| <u>Moshtaghı v The Citadel</u> , 314 S C 316, 443 S E 2d 915 (Ct App 1994)                               | 18     |
| <u>Parish v Allison</u> , 376 S C 308, 656 S E 2d 382 (Ct App 2007)                                      | 18     |
| <u>Richardson v State-Record Co., Inc.</u> , 330 S C 562, 499 S E 2d 822 (Ct App 1998)(driving homicide) | 18     |
| <u>Swinton Creek Nursery v Edisto Farm Credit, ACA</u> , 334 S C 469, 514 S E 2d 126 (1999)              | 25     |

|                                                                                                     |        |
|-----------------------------------------------------------------------------------------------------|--------|
| <u>Swinton Creek Nursery v Edisto Farm Credit, ACA</u> , 334, S C 469, 514 S E 2d 126 (1999)        | 26     |
| <u>Swinton Creek</u> , 334 S C at 485, 514 S E 2d at 134                                            | 27     |
| <u>Tyler v Macks Stores of South Carolina, Inc.</u> , 275 S C 456, 458, 272 S E 2d 633, 634 (1980)  | 14, 20 |
| <u>Wesav Financial Corp v Lingefelt</u> , 316 S C 442, 450 S E 2d 580 (1994)                        | 13     |
| <u>Woodward v South Carolina Farm Bureau Ins Co</u> , 277 S C 29, 32-33, 282 S E 2d 599, 601 (1981) | 23, 25 |
| <u>Woodward v Weiss</u> , 932 F Supp 723 (D S C 1996)                                               | 22     |
| OTHER AUTHORITIES                                                                                   |        |
| Prosser and Keeton, Treatises on Torts (5 <sup>th</sup> Ed 1984)                                    | 18     |

## **STATEMENT OF ISSUES ON APPEAL**

I Is A True Statement Reasonably Capable Of A Defamatory Meaning When One Must Speculate As To A Tertiary Level Implication Because It Is Not The Clear, Plain Or Ordinary Meaning Of The Statement Itself In Context?

II Where the Reasonable Implication Of A True Statement Is Also True, Can That Statement Be Defamatory?

III Where The Tertiary Level Implication Of A True Statement Suggested By The Appellant Is Only A General Reflection Lacking Specificity And Not A Direct Claim Of Unfitness Of Character Or Emotional/Psychological Instability, Can That Statement Be Defamatory?

IV Should The Question Of Abuse Of The Qualified Privilege Be Submitted To The Jury Where All Evidence Suggest The Statement Was Made In Good Faith, In A Private Setting, And With Very Limited Scope And There Is No Evidence That The Statement Was Made With Personal Ill Will, Or With Reckless And Conscious Disregard For The Appellant's Rights?

## STATEMENT OF THE CASE

While Appellant's Statement of the Case accurately reports the procedural stages that have occurred in this matter,<sup>1</sup> Respondents do not agree with the incomplete, generalized characterizations given to the summary judgment arguments (Appellant's Brief at pp 2-3), the Court's Order of summary judgment (Appellant's Brief at pp 3-4), the arguments for reconsideration (Appellant's Brief at p 4), or the Court's Order denying reconsideration (Appellant's Brief at p 5). Moreover, the Appellant's characterizations introduce contested matters into the Statement of the Case – prohibited by SCACR 208(b)(1)(C).

As an example of such a contested matter, with regard to the Order of Summary Judgment, it is stated that "The Court did not address the record evidence that Fountain relied on at the hearing to show abuse" (Appellant's Brief at p 4). Similarly, with regard to the Order Denying Reconsideration, it is stated that "The court *yet again* failed to address the record evidence that Fountain relied on to show an abuse" (Appellant's Brief at p 5)(emphasis added). The Respondents disagree with these characterizations.

The Summary Judgment Order devotes over 3 pages to the issue of privilege (Summary Judgment Order, pp 10-13) and devotes additional analysis to the facts and circumstances surrounding the alleged defamatory statement. Summary Judgment Order at pp 2-3. Likewise, after considerable analysis, the Order Denying Reconsideration clearly concludes "there are no controverted facts to submit a question of privilege abuse to the jury." Order Denying Reconsideration, p 4.

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<sup>1</sup> Most importantly, this matter is before the Court on an appeal from the trial court's decision to grant summary judgment on the claim of Appellant Fountain that he was defamed by Respondents Ewart and First Reliance. That Order of summary judgment was the subject of a motion to reconsider which was briefed, heard, and denied.

The Respondents should not be bound, as contemplated by SCACR 208(b)(2), by the Appellant's characterizations of arguments and Orders which are fully available for this Court's review. Thus, for Respondents' Statement of the Case, the Respondents crave reference to the actual arguments made and Orders issued.

## **FACTS**

### **1 The Statement And It's Context**

In this case, the Appellant Mark Fountain, together with Ernest Pennell, sought a loan from Respondent First Reliance Bank for the debt reorganization and operation of a combination convenience store – restaurant. At the time (approximately December 2008), the store was actually owned by Pennell and his existing 50% corporate partner in that store, Cromwell “Bud” Rawls.<sup>2</sup> Fountain Deposition, page 46 lines 1-9. Pennell and Fountain were together exploring this store business opportunity with a plan for Fountain to manage the reorganized store. Fountain had previously failed as a manager of such a store and this was well known to First Reliance (discussed in part 2 of the Facts below).

Also at the time, the Pennell-Rawls store was under financial distress from first-mortgage holder Carolina First Bank. Fountain Deposition, page 43 line 17 – page 45 line 18.<sup>3</sup> Pennell estimated the principal balance of this first mortgage at \$1.2 M. Pennell Deposition, page 13 lines 2- 14. In order for their proposed business opportunity to achieve fruition, Fountain and Pennell needed to secure refinancing of this first mortgage. They also needed to secure sufficient financing to fund the desired buy out of Mr. Rawls. Additionally, refinancing was needed to pay off approximately \$200,000 in delinquent charges for fuel previously supplied to the store.

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<sup>2</sup> The convenience store – restaurant involved was known at the time as the “Hess Mart.” It is 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 Appellant’s counsel. Page 33 lines 15-22. See also Complaint ¶ 6.

<sup>3</sup> Pennell confirmed that ultimately a foreclosure action was begun by Carolina First Bank. Pennell Deposition, page 15 lines 4- 9.

Fountain Deposition, page 40 line 14 to page 42 line 7 At the time of their approach to First Reliance Bank, one other lender had already turned down the Fountain-Pennell request <sup>4</sup>

In this action, Fountain seeks damages for Respondent Ewart's<sup>5</sup> true statement (hereinafter "the Statement") that Ewart's employer, Respondent First Reliance, "would not loan [Pennell] the money if [Appellant Fountain] was involved in the business "<sup>6</sup> Fountain's Deposition, Page 48, Lines 5-6 <sup>7</sup> This statement was privately made only to Pennell This one-time statement is the only alleged defamation by either Ewart or First Reliance Once the Statement was made, the Statement was repeated by Pennell to Fountain alone, this occurred

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<sup>4</sup> 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

<sup>5</sup> Ewart was an experienced bank loan officer – one who had been involved with convenience stores and had lent to franchises and fast food stores "a long time " Ewart Deposition, p 32 line 5- p 33 line 17, see also p 4 line 4 – p 5 line 4 (8 years at First Reliance and previous experience at other banks)

<sup>6</sup> The truth of the Statement is not denied by Appellant's Brief (at pages 14-15) which instead seeks to impose liability based upon some suggested tertiary level of innuendo which will be addressed in this Brief's argument

<sup>7</sup> A similar version of the statement is found in the Appellant's complaint Complaint ¶ 9 Ewart admitted privately advising Pennell that "if [Fountain] was going to be managing the operation, we would not be making the loan " Ewart Deposition, page 6 lines 18-21 Interestingly, Pennell's recitation of the Statement is even more benign Pennell described Ewart's Statement regarding the loan denial as "under the present status, First Reliance could not make the loan " Pennell's Deposition, Page 55, Lines 12-19 Pennell did testify 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

when Fountain called Pennell on the phone -- almost as soon as Pennell left First Reliance Bank<sup>8</sup> Pennell Deposition, Page 58, Lines 19-21, and Page 63, Line 23-Page 64, Line 8

## **2 Appellant's Management History And Credit History**

Within a short span of years proceeding the alleged defamation in this case, Fountain had defaulted on a tractor and motorcycle loan,<sup>9</sup> defaulted on a line of credit for business,<sup>10</sup> defaulted on a boat loan,<sup>11</sup> and defaulted on credit card debt<sup>12</sup> In total, this debt neared or exceeded \$200,000 Respondent Ewart dealt first hand with issues related to Fountain's personal debt while Ewart was employed at Carolina First Bank<sup>13</sup>

In addition to this personal debt, Fountain was a participant in a limited liability company which operated a Bojangles chicken franchise in three locations including a Timmonsville Bojangles – Citgo store combination (similar to the Pennell store which had been a Hardees – Hess combination) Fountain worked at the Timmonsville location on a daily basis, drawing a paycheck, and assisting with store management Fountain Deposition, p 20 line 25 - p 26 line 13, p 28 lines 14-24 This Bojangles franchise incurred debt from Bank of America<sup>14</sup>, *the*

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<sup>8</sup> Inexplicably, the Appellant had previously asserted a defamation claim against Pennell for repeating the statement, at the Appellant's request, to the Appellant's attorney at the time Pennell's Deposition, Page 65, Line 15-Page 67, Line 21 Following summary judgment with regard to defamation claims, the Appellant has abandoned the defamation claim against Pennell Appellant's Brief at p 3, footnote 1

<sup>9</sup> Fountain Deposition, p 61 line 8- p 62 line 7 (First Reliance)

<sup>10</sup> Fountain Deposition, p 62 line 22-- p 64 line 2 (First Federal, \$194,000 00)

<sup>11</sup> Fountain Deposition, p 62 line 8- p 62 line 15 (Carolina Bank)

<sup>12</sup> Fountain Deposition, p 64 line 25- p 65 line 19 (BB&T, \$3,400)

<sup>13</sup> Fountain Deposition, p 141 line 21 -- p 142 line 9

<sup>14</sup> Fountain Deposition, p 22 lines 16-25

*Respondent First Reliance Bank* (\$20,000 to 25,000)<sup>15</sup>, *Mutual Savings Bank*<sup>16</sup>, and *Carolina First Bank* (\$100,000)<sup>17</sup> Respondent Ewart was employed at Carolina First Bank at the time (before First Reliance) and was involved with the Bojangles' loan from Carolina First Bank Fountain Deposition, p 26 line 25 – p 28 line 9

As one of the Bojangles franchise owners, the Appellant was also a personal guarantor of this limited liability company's debt Fountain Deposition p 30 lines 7-16 The Bojangles franchise also incurred debt from contractual obligations with vendors – some of which were also personally guaranteed by Fountain Fountain Deposition, p 65 line 24 - p 67 line 17 (Toyko Leasing)

No more than 5 years before the alleged defamation,<sup>18</sup> the Bojangles limited liability company failed to be profitable and resulted in additional judgments against Fountain Fountain Deposition p 30 line 19 – p 31 line 20 Fountain could not give an accounting for his share of the company debt and had not contributed to satisfaction of the company debt since sometime in 2008 (or earlier) when he became unemployed for over a year with health issues Fountain Deposition p 34 line 8 – p 36 line 7 As a result, the Appellant conceded the obvious -- that his credit worthiness was "poor" Fountain Deposition, p 69 lines 3-6

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<sup>15</sup> Fountain Deposition, p 28 lines 10-13

<sup>16</sup> Fountain Deposition, p 26 lines 22-24

<sup>17</sup> Fountain Deposition, p 28 lines 7-9

<sup>18</sup> Appellant testified that the Ewart related events surrounding the Bojangles' failure occurred 3-5 years prior to the December 2008 alleged defamation Fountain Deposition, p 154 line 20 - p 155 line 3

### **3 The Facts Demonstrate A Legitimate Decision To Decline This Proposed Loan**

Despite this backdrop of financial failure, Fountain apparently imagines himself with a clean financial slate and portrays himself in his Brief as a recently trained and successful manager Appellant's Brief at 26 Fountain's Brief further implies that he and his wealthy financial partner are entitled to a private commercial loan for their new business opportunity<sup>19</sup> In reality at the time, Fountain was a failed manager and risky borrower well known as such to the Respondent Ewart (from his Carolina First Bank experience) and his employer First Reliance Bank (from its own Bojangles' loan experience)

#### **A Appellant's Failures Were A Relevant Consideration**

Much of Fountain's Brief is devoted to distancing himself from his financial failures of the past including minimizing his management role with the Bojangles' franchise<sup>20</sup> Regardless of what kind or level of management Fountain was supposed to provide at Bojangles, he was some kind of paid daily manager for a failed commercial enterprise Fountain himself testified that management information is relevant to a lender's risk assessment in making a lending decision (Fountain Deposition, page 71 lines 11-18), Fountain's Brief implies, however, such information was irrelevant and therefore it would necessarily be malicious to consider such information Appellant's Brief at pp 24-26 (suggesting loan refusal was reckless, not reasonable)

#### **B Nothing In The Record Supports Existence of Disregarded Skills or Experience**

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<sup>19</sup> Appellant's Brief at p 8 and p 25 (Pennell was "worth over \$1 million and possibly over \$2 million ") Of course, the potential security of Pennell's wealth isn't as significant when the needed financing was also over \$1 million and possibly \$2 million (including mortgage refinance, vendor debts, and partner buy-out)

<sup>20</sup> Appellant's Brief at p 6, p 12, and p 25

Repeatedly the Appellant's Brief seeks to demonize Respondent Ewart for his actual knowledge of Fountain's financial failures by implying that the Fountain had some new training and experience that made this new convenience store-restaurant risk very different from his previous convenience store-restaurant experience (only 5 years earlier) Appellant's Brief at p 26 (Ewart's knowledge was old, never bothered to update, obsolete)

In his deposition, Fountain had plenty of opportunity to detail any newly acquired training or relevant experience, yet *Fountain's deposition reveals he worked less than a year as the director of a largely volunteer organization (Boy Scouts) he had been out of work over a year, and he had no additional experience or training in running a convenience store or a restaurant* Fountain did advise that he felt he had "learned from his mistakes" Fountain Deposition, page 40 line 14 – page 41 line 14 Fountain's highly touted position as Timmons ville town administrator<sup>21</sup> did not begin until 2010<sup>22</sup> and thus is of no relevance to the events of 2008 Moreover, Fountain points to no specific education, training, or experience now used as town administrator that was present in December 2008 and relevant to running a convenience store – restaurant

### **C Proffered Bank Expert's Opinion Is A Red Herring**

The implication of loan entitlement is also made, in part, by Fountain's assertion that the loan denial "violated the bank's policies and existing bank regulations " Appellant's Brief at 10 and 26 (citing the affidavit of Fountain's proffered banking expert) Referring to the proffered expert's affidavit, however, the record reveals that ther alleged banking violations did not effect

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<sup>21</sup> Appellant's Brief at p 12 ("Fountain was a *good enough* manager to later be hired as Timmons ville's Twon Administrator ")(emphasis added), p 17 ("now a Town Administrator"), and p 26 ("his qualities that prompted his hire as a Town Administrator ")

<sup>22</sup> Fountain Deposition, p 36 lines 8 - 20

the lending decision made in this case. For example, one regulation allegedly violated is the failure to retain the loan application. Seitz Affidavit ¶ 6(b)(11). Not only was Fountain unaware if an application was ever completed<sup>23</sup> (Ewart testified it was not<sup>24</sup>), the failure to retain any such paperwork *after* the loan decision is not relevant to the decision itself. Another proffered violation is the alleged failure to obtain the applicant's financial information (Seitz Affidavit ¶ 6(b)(1)) – this despite the Fountain's testimony that the lender was told of the financial distress behind the need for debt restructure<sup>25</sup>.

Additionally, the expert's affidavit is non-sensical on its face. The affidavit notes that both Mr. Ewart's incentive plan and generic "federal bank examiners" were both encouraging a reduction in the bank's commercial real estate concentration, then the affidavit declares that a decision to fund "the loan sought by Mr. Pennell's entity would have reduced the bank's commercial real estate concentration." Seitz Affidavit ¶ 6(c). Obviously, the Pennell-Fountain proposed mortgage restructure would be a commercial loan secured by commercial real estate. Notably, the proffered expert works in compliance and not in actual lending. Seitz Affidavit ¶ 1 and 2. In contrast to this nonsense, Respondent Ewart testified as to specific lending criteria and guidelines applicable and considered in meeting with Fountain-Pennell. Ewart Deposition, p. 44 line 16 – p. 51 line 25.

Finally, the bank "policies" allegedly violated were general directives from the Bank Board of Directors to "seek out" borrowers and "book desirable loans." Seitz Affidavit ¶ 6(a) (1-iv). The Bank didn't need to seek out this risky proposal, Fountain and Pennell sought out the

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<sup>23</sup> Fountain Deposition, page 55 lines 20-25

<sup>24</sup> Ewart Deposition, page 7 line 22 – page 8 line 6

<sup>25</sup> Fountain Deposition, p. 55 line 4 - p. 57 line 1

Bank -- and it hardly was a desirable loan. Indeed, in light of the obvious risk, the factors recited by Ewart, and the general concern of bank regulators with commercial real estate lending, the bank officers would have been negligent to consider a loan like the Fountain-Pennell proposal.

## ARGUMENT

### **I The True Statement Was Not Defamatory**

#### **A The Statement Is Literally True**

The Statement here did not defame Fountain. Simply put, the Statement was about what First Reliance actually would or would not do. The Statement *was not* “Mark Fountain is not trustworthy.” The Statement *was not even* that “Mark Fountain is a poor manager.”

The Statement 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, Pennell expressly denied any elaboration as to why First Reliance would not want Fountain involved. Pennell Deposition, page 56 lines 13-18. The record contains no evidence of any elaboration beyond this limited, guarded, private Statement.

Of course, the Statement is undeniably true on its face – it is uncontroverted that First Reliance would not<sup>26</sup> and did not<sup>27</sup> make any loan to Pennell for the proposed business opportunity involving Fountain. This literal truth is not denied by Appellant’s Brief. Appellant’s Brief at 14-15. A Statement that is true 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.

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).

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<sup>26</sup> Ewart Deposition, page 10 lines 18-22.

<sup>27</sup> Pennell Deposition, page 55 lines 12-19.

While Fountain complained that the Statement was “inappropriate”, Fountain Deposition, page 48 lines 16-18 and page 74 lines 13-18, Fountain’s opinion of a banker’s true, blunt, and private comment does not control South Carolina defamation law *Tellingly, at the same time he complained of inappropriateness he admitted the appropriateness of a lender considering the management knowledge and management experience for a potential borrower*<sup>28</sup> Fountain Deposition, page 71 lines 11-18 Fountain can’t have it both ways As the trial court so appropriately concluded, “Not every disappointment in life is an actionable tort ” Summary Judgment Order, p 16

## **B There Is No Reasonable Defamatory Implication**

### **1 There Is No “Plain” Insinuation**

In an effort to render the bank’s reasonable business decision defamatory, the Plaintiff speculates that the Statement has an implied defamatory meaning 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)(emphasis added) The first five definitions listed in the Encarta on-line dictionary for the word “plain” are clearly visible, easily understood, simple and ordinary, candid, and pure Thus if an implication or innuendo is to be relied upon to raise a defamatory meaning, *that implication or innuendo still must be clearly visible easily understood simple and ordinary, candid, and pure*<sup>29</sup>

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<sup>28</sup> In addition, Fountain’s proffered expert suggest it might violate bank policy not to offer some explanation for the bank’s position Seitz Affidavit ¶ 6(a)(iii)

<sup>29</sup> Consistent with Tyler and the definition of “plain”, the trial court allowed that if the Statement had a defamatory *per se* implication that was “the clear, exclusive implication” (such as Fountain was “dishonest” or had an “unfit” character), then the matter would be appropriate for jury consideration Summary Judgment Order, p 10 Seizing on the use of “clear” and

In this case, however, *even the Appellant failed to articulate a plain implied defamatory meaning* Fountain Deposition, page 139 lines 8-16 ( “ it speaks for itself it upsets me ”) The trial court found it would have to speculate to try and reach some non-expressed defamatory meaning Summary Judgment Order, p 8-9 If a jury would have to speculate as to some defamatory meaning, there is no “plain” defamatory meaning sufficient to survive summary judgment

Relying on Adams v Daily Telegraph Printing Co , 292, S C 273, 356 S E 2d 118 (Ct App 1986), Fountain argues that any true words remotely “capable” of offensive innuendo are actionable as defamation While the *dicta* of the Adams opinion is broad, it is only *dicta* addressing a one-of-a-kind case in a very preliminary procedural posture<sup>30</sup> Despite this broad

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“exclusive”, the Appellant’s Brief falsely accuses the trial court of requiring actionable implied defamation to satisfy a tripartite requirement of being “clear, exclusive, and direct” (Appellant’s Brief at pp 11-14) -- a requirement Appellant suggests is inconsistent with the legal standard found in Tyler and Adams v Daily Telegraph Printing Co , 292 S C 273, 356 S E 2d 118 (Ct App 1986) The trial court never said that a defamatory meaning had to be “clear, exclusive, and direct ” But consistent with Tyler and Adams, the trial court did refuse to submit a speculative meaning that was not direct, was not clear, and certainly was not exclusive Tyler and Adams will be discussed in greater detail in section B(2) of this Brief

<sup>30</sup> The Adams court admittedly and needlessly borrowed dated language from the 1940 opinion of Flowers v Price, 192 S C 373, 6 S E 2d 750 (1940) The Adams opinion expressly acknowledges that the language is from a case addressing “*a demurrer to a complaint*” – a procedural challenge to the sufficiency of the pleading alone prior to the adoption of the South Carolina Rules of Civil Procedure 292 S C at 279, 356 S E 2d at 122 (emphasis added)

In Flowers, the Supreme Court understandably reversed the trial court which had inexplicably sustained the demurrer to the complaint holding that the defendant’s *plainly rhetorical* public question to the plaintiff (“how do we know that you did not take his tobacco and put it on yours and carry it over to the other warehouse?”) did not necessarily imply larceny – even though it immediately followed a public declaration that “someone stole thirty pounds of another man’s tobacco back here in the warehouse ” The Supreme Court used broad language

*dicta*, Adams does not allow that any speculative or unreasonable interpretation of an otherwise benign statement can be parlayed into a tort-based lottery ticket. The Adams court *clearly* requires that the alleged defamatory construction or implication of the statement must be “reasonable” in order to survive. Id., 292 S.C. at 279, 356 S.E.2d at 122 (demurrer question is whether publication is capable of “any *reasonable* construction that renders the words defamatory.”)(emphasis added)

Moreover, as the trial court here noted (Order Denying Reconsideration at 1-2), it is important to put the Adams opinion in its unique factual context. Adams involved two publicly broadcast statements that *were designed* to invite a broad public inference of criminal conduct – indeed murder.<sup>31</sup> The implication of criminal conduct has historically and consistently been recognized as actionable *per se* in our courts. In this case, there was a *private* business discussion, not two public television broadcasts. Here there was no elaboration at all, much less an express invitation to draw a conclusion of criminal conduct. Here there is no implication of criminal conduct or any other type of *per se* defamation – such as innuendo about character. The exceptional facts of Adams open no door to the opportunist Fountain unable to articulate his defamation.

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to analyze the pleadings at this understandably forgiving stage of the matter but the Court still subjected the pleadings to an objective review noting that the defamatory meaning must be understood in the “natural sense” “when all the alleged facts and circumstances are considered.”

<sup>31</sup> In Adams, the family members 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 those 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, apparently it was true that Mr. Adams had employed an attorney and was refusing to cooperate further with law enforcement. The defamatory innuendo expressly invited in Adams – criminal conduct by Mr. Adams – apparently was not true (or could not readily be proven).

## 2 There Is No Comment Upon Character Here

Seeking to fit into the narrow liability window of Tyler and Adams, where a remote defamatory meaning may be clearly implied by a true statement, Appellant's Brief uses a form of the word "unfit" 23 times, this is 23 times more than that word is found in Ewart's Statement. This term's repeated usage is a not so subtle, but erroneous, suggestion that the Statement's possible meaning is that Fountain is "dishonest" or has a character "unfit" to work at a convenience store.

As noted by the trial court, most of the decisions addressing the character-type of *per se* defamation have involved licensed or regulated professionals. Summary Judgment Order, p. 10, Rule 59(e) Order, p. 2. Those cases have involved statements that *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*).

Appellant suggests that the "unfitness" category of slander *per se* is not limited to licensed or regulated professions. In support of this suggestion, the Appellant cites to Tyler and Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987). While these cases may not involve licensed or regulated professionals, each of these cases does involve implications of wrongful or criminal conduct – not some general unsuitability for an occupation.<sup>32</sup> Thus, they are also distinguishable from the facts at bar where no criminal conduct was implied.

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<sup>32</sup> Tyler involved a store employee terminated immediately after the termination of the manager and the administration of a polygraph to employee, Tyler argued that the timing of these events insinuated wrongdoing. The court found the complaint's allegations sufficient to survive demurrer, it was not ruling on summary judgment.

Appellant also cites to Prosser & Keeton, On the Law of Torts §112 for the argument that this unfitness category of slander *per se* applies to all forms of business including blacksmiths and tenant farmers. Not only are none of the annotated cases from South Carolina, the text of the treatise further provides that a “more general reflection” upon the plaintiff’s “qualities” lacks the “special significance” to be actionable. Prosser & Keeton §112, (citing Restatement of Torts §573 and Bruno v. Schukart, 12 Misc. 2d 383, 177 N.Y.S. 2d 51(1958) (where even calling plaintiff a “liar” and “crook” was not actionable absent some showing of business impact)). Even inferring the statement here meant that Appellant was a poor manager, this is nothing more than a “general reflection” – supported by historical performance.

Appellant also cites the cases of Capps v. Watts, 271 S.C. 276, 246 S.E.2d 606 (1978), and Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001), in his effort to expand the scope of this *per se* category of defamation to any type or degree of alleged “unfitness” – even statements or implications that don’t include crimes or moral failings. These cases, however, involve very public and very direct statements that reasonably could impugn the personal character of their targeted persons. Capps involved not only inactionable “words of abuse and scurrility”, it also involved a comment that “cast doubt upon [Plaintiff’s] mental competence.” 271 S.C. at 282 and 286, 276, 246 S.E.2d at 609 and 611-12. Goodwin involved

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Eubanks involved the implication of criminal conduct by City employees. Eubanks also involved press releases, not private conversations, in which the continuing investigation of the employees is described as looking for “criminal wrong doing” and “violations of the law.” Eubanks also involved a speaker who knew that his insinuations of wrong doing were false as the city employees were actually the whistle-blowers in the matter.

Other cases cited by Appellant involve similar suggestions of criminal conduct. See McBride v. School District of Greenville County, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010)(stolen school property), Parish v. Allison, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007)(“conned” elderly woman could imply crime of moral turpitude), Richardson v. State-Record Co., Inc., 330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998)(driving homicide), Mains v. Kmart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988)(shoplifting).

the used of a specific historical racial epithet, once rhetorically used by Malcom X, that “assailed [Plaintiff’s] integrity and decision-making” and attributed “racism and bias” to the Plaintiff in the performance of his work duties. Again, Ewart’s Statement here is not one that impugns the personal character of Fountain<sup>33</sup>

### **3 Any Implications Are True**

The truth is also a defense to alleged defamatory insinuation. Accord Tyler v Macks Stores of South Carolina, Inc., 275 S C 456, 458, 272 S E 2d 633, 634 (1980)(noting that actionable insinuation must be false). Although not articulated, the logical implication of the Statement 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. Again, this arguable implication is clearly true – First Reliance *did* lack faith in Fountain’s management skills<sup>34</sup>. In addition, as noted by the trial court, even other remote implications or component parts of the bank’s implied lack of faith in Fountain are also either true<sup>35</sup> or non-actionable opinion.

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<sup>33</sup> Appellant also cites Anderson v The Augusta Chronicle, 365 S C 589, 619 S E 2d 428 (2005), which affirmed the Court of Appeals decision, 355 S C 461, 585 S E 2d 506 (2003), which reversed the trial court’s directed verdict in a public figure defamation where that figure was accused of lying about his National Guard service. There is no such character accusation in this case.

<sup>34</sup> 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.

<sup>35</sup> As stated by the trial court,

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

#### **4 Any Implications Are Protected General Opinions of Creditworthiness**

The trial court also held that to the extent that Ewart's Statement implied opinions of Fountain's creditworthiness, these were constitutionally protected opinions. Summary Judgment Order at 9 footnote 11. Appellant's Brief suggest that the constitutional protection afforded opinion is not applicable because the Statement implies fact, not opinion. Appellant's Brief at 20-21. Again, Respondent asserts, and the trial court found, that all reasonable assertions of fact found in the Statement are true. This should be affirmed because there is no evidence to the contrary, only speculation. The Court's footnote was perhaps unnecessary dicta, but to the extent that creditworthiness is "opinion" it should be constitutionally protected or at least inactionable. This is consistent with the "general reflection" language referenced in Prosser & Keeton and is consistent with the cases addressing the reporting of credit scores.<sup>36</sup> Of course, the Statement here was even more benign than a direct report on the credit of Plaintiff.

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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 mistakes. Fountain Deposition, page 40 line 14 – page 41 line 14.

Summary Judgment Order, p. 9-10

<sup>36</sup> South Carolina has applied the qualified privilege to 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.")

## II The Publication Of The Statement Was Privileged <sup>37</sup>

### A Privileged Publications Defined

“The second major element of defamation is an *unprivileged* publication to a third party ” Fleming v Rose, 338 S C 524, 526 S E 2d 732 (Ct App 2000)(emphasis added) Our Supreme Court has held, “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) <sup>38</sup> “The 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 ” Woodward v Weiss, 932 F Supp 723 (D S C 1996), (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))

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 a question for the

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<sup>37</sup> Obviously, the question of privilege need only reached if the Court first determines that the statement could reasonably be defamatory

<sup>38</sup> 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

jury, Id., 347 S C 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)

**B Facts Support Privilege Here And This Is Unchallenged**

Although the exact nature of the relationship between Pennell and Fountain may be disputed, there is no question that they were together exploring a shared business opportunity in a convenience store and were together exploring the financing needed for that purpose. Complaint ¶¶ 6-8 Pennell and Fountain had made exploratory bank trips together. See, e.g., Fountain Deposition, page 131 line 3 – page 132 line 14 (“I told him [bank president] that I was going to be running the store.”)

The Statement was made only to Pennell. The Statement was not made to anyone else and thus, not made to anyone who did not share that common business association with Fountain. Consistent with this association, Pennell loyally did not share the information except with Fountain or as directed by Fountain.

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 Statement 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 Fountain.<sup>39</sup>

Under the circumstances, where the Statement was cautiously made in connection with a common business interest, the trial court properly held the Statement was privileged as a matter

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<sup>39</sup> 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 Plaintiff’s debts that was only sent within corporation

of law Appellant's Brief concedes that a qualified privilege existed in this case ("*We are not, however, arguing about the privilege's existence*") and implicitly concedes that the necessary shared interests were therefore present Appellant's Brief at 23 -24 (emphasis added)

### **C The Record Contains No Facts To Support Abuse Of Privilege**

Given that a privilege is not contested in this case, the issue is whether there is any evidence to warrant the possible abuse of privilege being submitted to the jury There is not To allow such submission would be to allow the jury to speculate The trial court correctly refused to allow it

As noted in the Appellant's Brief, pages 22-23, our Supreme Court's fact-specific analysis in Swinton Creek Nursery v Edisto Farm Credit, ACA, 334 S C 469, 514 S E 2d 126 (1999), recognized two means by which a qualified privilege could be abused These include making a statement in good faith that goes beyond the scope of what is reasonable under the duties and interests involved, and making a statement that is in reckless disregard of the purported victim's rights 334 S C at 486-487, 514 S E 2d at 135

In its analysis, the Swinton Creek Court quoted with approval from Woodward v South Carolina Farm Bureau Ins Co, 277 S C 29, 32-33, 282 S E 2d 599, 601 (1981), which provides that – in the absence of controverted facts -- "*it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.*" In that Woodward gate-keeping role, the trial court here determined that there was no evidence (or controverted facts) to support a finding of abuse and thus no need to have a jury speculate This gate-keeping call was a sound decision and deserving of deference

### **1 No Evidence of The Statement Exceeding A Resonable Scope**

The Appellant has conceded the existence of shared interests by not challenging the existence of the privilege here. Accordingly the question is whether the scope of those shared interests has been exceeded by the Statement. There is no evidence to suggest that the scope of the privilege has been exceeded.

The nature of the multiple shared interests in this case is undisputed. Both Pennell and Fountain had the same shared interest in the proposed loan for their joint business opportunity in the store. First Reliance and Ewart shared an interest with customers in establishing and maintaining positive banking relationships including sound lending relationships.<sup>40</sup> Moreover, First Reliance and Pennell also had a shared interest in a pre-existing bank-customer relationship.<sup>41</sup> Accordingly, the issue presented in this case is whether, *in the context of these shared interests and relationships*, there any evidence that the Statement was unreasonably made somewhere or to someone outside the scope of these shared relationships. There is none.

Fountain presented no evidence that Ewart and First Reliance communicated to anyone other than a person with interests aligned with Fountain in this business opportunity. This single limited communication was also limited to someone with an interest in a continued banking relationship – not a stranger.

Fountain's Brief argues that the outcome here should be the same as in the similar case of Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334, S.C. 469, 514 S.E. 2d 126 (1999). While Appellant suggest the case is "spot on", Brief at 22, the trial court accurately discussed

---

<sup>40</sup> The Bank's general interest in customer relationships is even noted in the proffered expert's recitation of the Bank board's proactive guidelines to positive customer relationships including good loans. Seitz Affidavit, ¶ 6(a).

<sup>41</sup> Pennell Deposition, p 52 line 20 – p 53 line 10

how the similarities were not the dispositive features of the case    Order Denying Reconsideration at 3-4

Swinton Creek also involved alleged defamation by a lender's explanation accompanying a loan denial – a statement to the borrower (Durwood Collins, Jr ) that the Plaintiff-seller (Nursery) was in “financial distress ” Unlike the case at bar, the Swinton Creek borrower did not have aligned interests the the allegedly defamed party (the Nursery) Collins and the Nursery were not joint venturers, confidants, or partners – they were involved in an arms-length transaction , Collins and the Nursery had not jointly pitched a common financing proposal to the bank Here, the Statement was made to a potential borrower represented to the lender as aligned in privity with the proposed manager <sup>42</sup>

While the lender in Swinton Creek testified that he wrote<sup>43</sup> the statement to essentially warn an inexperienced borrower of the enterprise risk, the Court noted that the comment arguably went too far – in that the borrower was not planning to buy the “enterprise” but only

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<sup>42</sup> The Fountain-Pennell relationship was essentially represented to the bank as a pre-existing fiduciary one 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)

<sup>43</sup> Yet another distinction from the case at bar, written defamatory statements, unlike verbal comments, are presumed to be malicious -- shifting the burden to the writer to rebut this presumption Swinton Creek, 334 S C at 485, 514 S E 2d at 134 The oral statement here is not presumed to be malicious and it was Appellant's burden to prove malice in this record The absence of any such proof is discussed more thoroughly in section C(2) below

some of its assets<sup>44</sup> Moreover, the Court found that this warning could have been provided without referring to the Nursery at all Swinton Creek recognized that the scope of the privilege would encompass an effort to guide the borrower into a successful loan application, but again, the Court suggests that perhaps this could have been done without the “financial duress” comment

Fountain’s Brief suggest that Ewart could have likewise warned Pennell of the store loan risk without mentioning Fountain at all<sup>45</sup> Brief at 24 But unlike Swinton Creek where the lender commented directly about the Nursery’s “financial duress”, Ewart did not say anything directly about Fountain’s outstanding judgments, or financial and management failures of the past – things that Fountain claims to have fully predisclosed to Pennell anyway<sup>46</sup> And unlike Swinton Creek, where the limited asset-purchase scope of the loan made the “financial duress” of the seller unnecessary to the loan risk assessment, the management of the store was essential to the risk assessment of the Pennell-Fountain proposal – *even Fountain says so*<sup>47</sup> So even if the

---

<sup>44</sup> Thus, implicit in the Supreme Court’s opinion is the concept that a plan to purchase the entire enterprise would have expanded the scope of privileged commentary to allow for the discussion of the enterprise’s financial condition Here a discussion of store management is reasonable and expected where the loan purpose was to reorganize and allow for continued store operations

<sup>45</sup> Of course, that is exactly how Pennell recounted the Statement Pennell’s Deposition, Page 55, Lines 12-19 (“under the present status, First Reliance could not make the loan ”)

<sup>46</sup> Fountain Deposition at p 40 line 14-p 41 line 14 While Fountain asserts that he was damaged by the Statement because Pennell subsequently declared Fountain’s store management contract null and void, Pennell contends that the proposed store refinancing and Rawl’s buy-out were necessary conditions precedent to the contract’s validity Given that Fountain himself claims to have made full disclosure of his credit history and management failings of the past to Pennell, then Ewart’s statement allegedly implying the same adverse facts could not be the cause of any damages Of course, this issue was not and need not be reached since the statement was not defamatory and was properly made in a privileged setting

<sup>47</sup> Fountain Deposition, p 71 lines 11-18

Statement implied management concerns with Fountain, those carefully and privately stated concerns would have to be expressed to provide the loan guidance recognized by Swinton Creek as within the privilege

Of course, another distinction is that the “financial duress” condition was disputed and the factual basis for the “financial duress” comment was also disputed in Swinton Creek whereas the factual history of Fountain’s business and management failures is not in dispute – it comes from his own testimony. Because the Nursery denied sharing “financial duress” information with the lender during a “side bar conversation”, the jury could have also found that such information was inappropriately derived and shared from the Nursery’s existing banking relationship with the same lender -- the Nursery actually prevailed against the lender in the original trial on its invasion of privacy claim) Id , 334 S C at 476, 514 S E 2d at 129

Here 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 the trial court. Summary Judgment Order pages 9-10. Furthermore, Fountain admitted the appropriateness of considering such factors in making lending determinations – all while still asserting the bank’s limited private comments to his business confidant were “inappropriate”<sup>48</sup>. Fountain Deposition, page 48 lines 16-18 and page 74 lines 13-18. Thus, there are no controverted facts required by Woodward to submit a question of privilege abuse to the jury.

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<sup>48</sup> As the Respondents noted in their Response to the Rule 59(e) motion, “It was not the bank who drug 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 ”*)

While Fountain seeks an activist Court to expose commercial speakers to “exceeding the scope” liability for anything other than a mere “yes” or “no”, the trial court wisely recognized that the defamation law of this State *should not* and *does not* so gag necessary business communications. As the trial court stated, “The liability urged by [Fountain] would chill legitimate private commercial communications needed in our free market economy.” Indeed, strict liability exposure as urged by the Appellant is not consistent with existing context-based jurisprudence and would stifle economic development.

## **2 No Evidence The Statement Was In Reckless Disregard Of Rights**

The ignored<sup>49</sup> evidence that Fountain suggests supports the alleged reckless nature of the Statement is not about the Statement at all. It is about the loan decision. Appellant’s Brief, at 24-26. No evidence is offered that suggests actual ill will by Ewart or malice by Ewart. So, Fountain seeks to focus on the loan decision. As Respondents noted in the trial court, “Fountain wants the Court to transform this defamation case into a banking case.” Response to Motion for Reconsideration, p. 3. Of course, there is no evidence to suggest that this was anything other than a neutral, objective, and sound business decision by Ewart and First Reliance.

Fountain suggests that recklessness of the Statement could reasonably be implied by a jury because *perhaps* a more diligent bank review of his management training and experience, or *perhaps* perfect compliance with certain bank policies and regulations would result in a different assessment.<sup>50</sup> This speculative approach to looking for recklessness is not even supported by

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<sup>49</sup> See Appellant’s Brief, pp. 4-5 and 24-25.

<sup>50</sup> Again, Respondent suggests a question of fact is created based upon banking standards – which have nothing to do with defamation law. Fountain would have this Court presume that a lender is required to do business with any person and make them sizeable loans. While the bank, like anyone, owes a duty not to defame, it owes no duty to lend money to persons in whom it

Fountain's own expert That expert's affidavit does *not* say and does not even imply that *but for* Ewart's reckless loan analysis, this risky loan should have been positively considered or made  
Seitz Affidavit

Of course, there is no evidence that the loan decision was reckless As outlined in the Facts above, Fountain was a proven risky borrower and a management failure His 2010 employment by the small town of Timmons ville adds nothing to the loan analysis made in 2008, moreover, he could point to nothing that objectively improved his store management skills from a few years earlier other than he "had learned from [his] mistakes " The financial net worth of his proposed associate, Mr Pennell, was essentially no more than the amount of financing needed and again, even his expert offered no opinion that this financial backing rendered the loan declination reckless <sup>51</sup> See Seitz Affidavit

### **CONCLUSION**

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

Thus, Appellant's complaint is based upon a the true, private expression to the Appellant's business associate of a bank's concerns with a proposed loan to the Appellant's business venture The Statment did not directly comment upon the Appellant, his character, his

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lacks confidence, indeed, Bank officers would breach duties owed to shareholders and regulators to make negligent loans

<sup>51</sup> Appellant's Brief tries to pit Ewart's judgment in declining the loan against the initial politeness of the Bank President and other officers Obviously this is a false conflict and constitutes no evidence of maliciousness as Appellant seeks to imply

history, or his skills. There is no clearly visible defamatory meaning included within the Statement that would classify the Statement as “defamatory *per se*” and the Plaintiff has offered no evidence of any malice, either actual or implied.

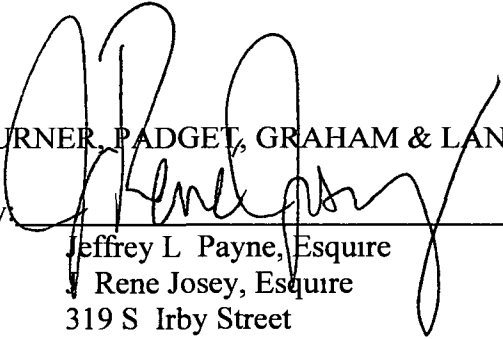
In the case at bar, there is no public statement, there is no targeted victim, there is no direct comment, and there is no character implication. The communication here was limited, supported, in good faith, and truthful both on its face and in its implications. The initial recitation of the Statement occurred in privileged circumstances with no evidence to support any claim to abuse of privilege.

The Courts of this state has ever been so active as to expose a legitimate private business conversation to potential liability without these factors. The trial court reached the proper conclusion in two well reasoned orders. As the Court aptly noted, “not every business disappointment can be manipulated into some legal theory of recovery.” Accordingly, the trial court orders should be affirmed.

Florence, South Carolina

September 23<sup>rd</sup>, 2011

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

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August 4, 2011

Tanya Gee  
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Re Fountain, Mark v First Reliance Bank  
case Tracking # 201193546

Dear Ms Gee,

On July 27, 2011, the Appellant received the last of the two needed transcripts. I calculate that the Appellant's Initial Brief and Record Designations are thus due on or before August 26, 2011.

My best,



Robert Hill

cc William P Hatfield, Esq  
Jeffrey L Payne, Esq  
Gary I Finklea, Esq

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AUG 05 2011

**SC Court of Appeals**

The State of South Carolina  
In the Court of Appeals

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Appeal from Florence County  
Court of Common Pleas

D Craig Brown, Circuit Court Judge

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Case No 2010 CP 21 131

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**RECEIVED**  
AUG 26 2011  
**SC Court of Appeals**

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

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**Designation of Matter to be Included in the  
Record on Appeal**

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The Appellant Mark Fountain designates that the following  
materials be included in the Record on Appeal

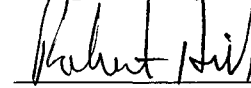
1 Order granting summary judgment as to defamation claims  
and outrage claims, entered April 11, 2011

2 Order denying reconsideration, entered June 9, 2011

- 3 Complaint
- 4 Answer by First Reliance Bank
- 5 Answer by Thomas C Ewart
- 6 Answer by Ernest Pennell
- 7 Motion for summary judgment by First Reliance and Ewart  
on the defamation and outrage claims
- 8 Motion for summary judgment by Pennell on the  
defamation and outrage claims
- 9 Hearing transcript from March 10, 2011, pp 6 21
- 10 Fountain's motion to reconsider
- 11 Fountain deposition transcript, pp 10, 21 22, 24 27, 29 33,  
36, 40 41, 45, 48, 68, 74, 128 129, 132 135, 139, 141, 148,  
155
- 12 Ewart deposition transcript, pp 4, 6, 9 14, 18, 22 23, 26 27,  
30, 35, 37 39, 43 44, 50 53, 56, 58 61
- 13 Pennell deposition transcript, pp 30 31, 47 51, 53
- 14 Seitz Affidavit
- 15 Employment agreement between Pennell and Fountain

I certify that this designation contains no matter which is  
irrelevant to the appeal

Respectfully submitted,



---

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The State of South Carolina  
In the Court of Appeals

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are,

Respondents

---

**Certificate of Service**

---

I certify that I am co counsel for the Appellant Mark Fountain  
and that I on August 24, 2011, served the Appellant's Initial Opening  
Brief and Designation of Matter to be Included in the Record on Appeal  
by first class mail, sufficient postage pre paid, to

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August 24, 2011

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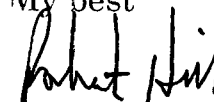
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**SC Court of Appeals**

Re Fountain, Mark v First Reliance Bank  
Case Tracking # 2011193546

Dear Ms Gee,

Enclosed for filing is the Appellant's Initial Brief, Designation of Matter, and Certificate of Service

My best

  
Robert Hill

cc William P Hatfield, Esq  
Jeffrey L Payne, Esq  
Gary I Finklea Esq

The State of South Carolina  
In the Court of Appeals

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Of whom First Reliance Bank and Thomas C Ewart  
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Respondents

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**Appellant's Initial Opening Brief**

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|---------------------------------------------------------------------------------------------------|------------------------|
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| <i>Mains v Kmart Corp</i> , 297 S C 142, 375 S E 2d 311 (Ct App 1988)                             | 18                     |
| <i>McBride v School District of Greenville County</i> , 389 S C 546, 698 S E 2d 845 (Ct App 2010) | 18                     |
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*Tyler v Mack's Stores of South Carolina, Inc* , 275 S C 456,  
272 S E 2d 633 (1980) 13, 19

**Treatises**

Prosser and Keeton, *On the Law of Torts* (5<sup>th</sup> Ed 1984) 19

## **Statement of the Issues**

1 A jury determines if words are defamatory if the words are capable of a defamatory meaning In denying a loan, a banker named Ewart tells a business owner named Pennell, “If Mark [Fountain] was going to be managing the operation, we would not be making the loan ” Can a jury infer from this that Fountain is unfit to manage Pennell’s operation?

2 Opinions lack special constitutional protection and are actionable if they imply an assertion of objective fact Ewart implied that Fountain is unfit to do the job that Pennell hired him to do Can a jury find that this asserts an objective fact?

3 A jury determines if qualified privilege is abused upon proof that the defamation was unnecessary or made recklessly Ewart violated bank policy and banking regulations by denying Pennell a loan based solely on obsolete information about his manager Can a jury find that the privilege was abused?

## **Statement of the Case**

On January 14, 2010, Mark Fountain brought suit against First Reliance Bank, its Chief Banking Officer Thomas C Ewart, and Ernest

C Pennell Fountain claims that the three defamed him by implying that he was unfit to manage Pennell's convenience store, that this intentionally inflicted emotional distress upon him, and that Pennell breached his contract to employ Fountain to manage the store Complaint, R p \_\_\_\_ The three answered with general denials Bank Answer, R p \_\_\_\_, Ewart Answer, R p \_\_\_\_, Pennell Answer, R p \_\_\_\_ The Bank and Ewart further alleged truth, opinion, and the business interest privilege as affirmative defenses to the defamation claim Bank Answer, ¶ 15, R p \_\_\_\_, Ewart Answer, ¶ 15, R p \_\_\_\_

The defendants then moved for summary judgment on the defamation and emotional distress claims Bank and Ewart's Motion for Summary Judgment, R p \_\_\_\_, Pennell's Motion for Summary Judgment, R p \_\_\_\_

At the motions' hearing, the Bank and Ewart admitted that Ewart told Pennell that the Bank would not make Pennell a loan if Fountain was managing the operation Hearing Tr , p 6 ll 5 8, R p \_\_\_\_ They argued that the statement was truthful and privileged Hearing Tr , p 6 l 21 p 9 l 7, R p \_\_\_\_ Fountain responded that the innuendo from Ewart's statement and the meaning that Pennell gave it is that Fountain is a bad business man incapable of fulfilling his contract to

manage Pennell's convenience store Hearing Tr , p 11 ll 1 20, R p \_\_\_\_  
He further argued that the jury had to determine if the qualified  
privilege was abused and recounted evidence on file that he relied on  
to show an abuse Hearing Tr , p 12 l 5 p 21 l 23, R p \_\_\_\_

The court granted the Bank and Ewart summary judgment on  
the defamation claim for three reasons <sup>1</sup> The court first recognized that  
Ewart implied that he and the Bank lacked faith in Fountain's  
management skills, yet described as "tortured speculation" the further  
implication that Fountain was an unfit manager The court ruled that  
the statement was not defamatory because it was literally true and  
because the implication of unfitness was not a clear, exclusive, or direct  
comment on one's fitness for a trade or profession Order Granting  
Summary Judgment, pp 8 10, R p \_\_\_\_

The court next held that Ewart's and the Bank's lack of faith in  
Fountain's management skills was constitutionally protected opinion  
Order Granting Summary Judgment, pp 8 9 and n 13, R p \_\_\_\_

The court lastly held that the statement was privileged and that  
there was no evidence that the privilege was abused Order Granting

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<sup>1</sup>This appeal is limited to granting the Bank and Ewart summary judgment  
on the defamation claim Fountain is not appealing the summary judgment  
to Pennell or the summary judgment on the outrage claims

Summary Judgment, p 13, R p \_\_\_\_ The court did not address the record evidence that Fountain relied on at the hearing to show abuse Hearing Tr , p 1215 p 21123, R p \_\_\_\_

On reconsideration, Fountain cited *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) Motion to Reconsider, p 1, R p \_\_\_\_

Fountain cited *Adams* to show that the test is not whether an implication is clear, exclusive, and direct The test is instead whether the words “are capable” of the offensive meaning attributable to them To sustain a summary judgment, a court must be able to say that the words are incapable any reasonable construction which will render them defamatory *Adams*, 292 S C at 279, 356 S E 2d at 122

Fountain cited *Swinton Creek* to show that the Supreme Court held that a jury had to decide if a lender abused its qualified privilege when explaining the denial of a loan to a potential borrower The Court held that the jury could find that the lender abused its privilege by making the statement unnecessarily or recklessly Fountain then again cited some of the record evidence that he relied on to establish the privilege’s abuse here Motion to Reconsider, pp 5 6, R p \_\_\_\_

The court denied reconsideration. In doing so, the trial court did not rule that Ewart's statement is incapable of defaming Fountain as an unfit manager. The trial court instead ruled that the statement's implication is not defamatory because it was made in a private business discussion and did not charge Fountain with illegal, immoral, or unethical behavior within a licensed or regulated profession. Order Denying Reconsideration, pp. 1-2, R p. \_\_\_\_

On privilege, the court found that *Swinton Creek* was "deceptively similar" but not controlling because of "subtle differences." *Id.* at p. 3, R p. \_\_\_\_ The court concluded that the privilege was not abused because Pennell and Fountain shared common interests, because the Bank was not reckless, and because there is no factual controversy over Fountain's management experience. Order Denying Reconsideration, p. 3, R p. \_\_\_\_ The court yet again failed to address the record evidence that Fountain relied on to show an abuse.

Fountain timely appealed the grant of summary judgment to the Bank and Ewart on the defamation claims.

### **Statement of Facts**

Fountain is currently Timmonsville's Town Administrator. Fountain Depo., p. 10 ll. 17-19, p. 36 ll. 10-15, R p. \_\_\_\_ Prior to 2010,

when the Town chose Fountain as its Administrator, Fountain, Attorney Hugh Willcox, and three others formed Bojo Tim, LLC as equal owners Fountain Depo, p 21 ll 3 24, R p \_\_\_\_ This LLC was formed to build and own a combination Bojangles/gas station Fountain Depo, p 21 l 25 p 22 l 15, R p \_\_\_\_ Fountain was not a day to day manager in this operation While he checked on the store daily, he and the other owners within the LLC hired separate managers for the operation Fountain Depo, p 24 l 10 p 26 l 2, R p \_\_\_\_

Bojo Tim was financed in part from a loan from Carolina First Fountain Depo, p 27 ll 4 22, p 29 ll 6 8, R p \_\_\_\_ Bojo Tim had problems paying its Carolina First note, and Attorney Willcox and some of the other partners ultimately assumed the loan Fountain Depo , p 30 l 7 p 31 l 20, p 32 l 22 p 33 l 11, R p \_\_\_\_ At the time, Thomas Ewart was at Carolina First and was Bojo Tim's contact there Ewart could not recall that Bojo Tim ever went into default before he left to go to First Reliance in 2003 Ewart Depo , p 26 l 21 p 27 l 16, R p \_\_\_\_

Ewart also never asked Bojo Tim to replace Fountain Ewart Depo, p 30 ll 3 5, R p \_\_\_\_ The other members of the LLC likewise never fired Fountain or took him off of the payroll, and Attorney Willcox never expressed disappointment in Fountain's role in the LLC

Fountain Depo , p 74 ll 9 12, p 148 ll 8 13, R p \_\_\_\_

Years after Ewart left Carolina First for First Reliance, in 2008 Ernest Pennell approached Fountain for help in obtaining a loan on a Hess Mart convenience store that he and another man owned in Florence Fountain Depo , p 40 l 16 p 41 l 7, R p \_\_\_\_, Order Granting Summary Judgment, pp 1 2 and n 2, R p \_\_\_\_ Fountain warned Pennell that he had previous credit problems from the Bojangles/gas station operation Fountain, p 68 ll 14 17, R p \_\_\_\_ Ewart nonetheless contracted to employ Fountain as his Hess Mart manager Employment Agreement, R p \_\_\_\_

The two never intended that Fountain would be on the new loan Pennell Depo , p 30 ll 19 25, R p \_\_\_\_, Fountain Depo , p 45 ll 6 8, p 48 ll 23 24, p 141 ll 5 7, R p \_\_\_\_ This agreement also did not give Fountain any ownership interest in Pennell's business Employment Agreement, R p \_\_\_\_, Pennell Depo , p 30 l 19 p 31 ll 1 4, R p \_\_\_\_

Ewart and Fountain approached Rick Saunders, the President and CEO of First Reliance, about a loan Fountain Depo , p 132 l 25 p 133 l 19, R p \_\_\_\_, Pennell Depo , p 47 l 24 p 48 l 4, R p \_\_\_\_ Saunders knew that Fountain was not going to be on the proposed loan and had at least as much if not more knowledge of the criteria for making

commercial loans than does Ewart. Saunders never objected to Fountain managing the Hess Mart and never brought up the Bojo Tim operation. Fountain Depo, p. 132 ll. 2-24, p. 134 l. 23, p. 135 l. 5, p. 139 ll. 17-23, R p. \_\_\_, Pennell Depo, p. 47 ll. 8-23, R p. \_\_\_, Ewart Depo, p. 53 ll. 8-25, R p. \_\_\_

Saunders instead referred the two to Dwayne Brockington, the Bank's commercial lending officer. Pennell Depo, p. 48 l. 17, p. 49 l. 7, R p. \_\_\_, Ewart Depo, p. 11 l. 17 – p. 12 l. 18, R p. \_\_\_. Brockington also knew that Fountain would be managing the store but would not be on the loan. Fountain Depo, p. 139 ll. 17-23, R p. \_\_\_, Pennell Depo, p. 50 l. 16, p. 51 l. 13, R p. \_\_\_. Pennell gave Brockington a financial statement revealing that he was worth over \$ 1 million and possibly over \$ 2 million. Pennell Depo, p. 51 ll. 18-20, p. 53 ll. 11-22, R p. \_\_\_

After this meeting, Brockington telephoned Ewart, who was then his supervisor and First Reliance's Chief Banking Officer. Ewart Depo, p. 4 ll. 11-13, p. 12 l. 13, p. 13 l. 12, R p. \_\_\_. Brockington told Ewart that Fountain would be managing Pennell's store. Ewart Depo, p. 14 ll. 3-14, R p. \_\_\_. Ewart met with Pennell and told him, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan." Ewart Depo, p. 6 ll. 18-21, p. 56 ll. 13-19, R p. \_\_\_

When he made this statement, Ewart knew that Fountain would not be obligated on the proposed loan and that he would have no ownership interest in the business Ewart Depo , p 38 ll 11 14, p 50 ll 5 12, R p \_\_\_\_ Ewart also denied the loan without looking at Pennell's loan application, his personal financial statement, the property appraisal, or the records showing the proposed business's profitability Ewart Depo , p 39 ll 12 23, R p \_\_\_\_

Ewart instead denied the loan solely because Fountain was Pennell's store manager Ewart Depo, p 37 l 25 p 38 l 10, p 56 ll 6 12, p 58 l 5 p 61 l 7, R p \_\_\_\_ At that point, Ewart's knowledge of Fountain's management skills had ended in 2003 during Ewart's days at Carolina First Fountain Depo , p 155 ll 1 16, R p \_\_\_\_, Ewart Depo ,p 18 ll 3 13, R p \_\_\_\_ Neither he nor Brockington asked Fountain to update his management training or experience over the intervening five to six years Ewart Depo , p 18 ll 14 21, p 43 ll 3 15, p 52 ll 1 7, R p \_\_\_\_ Ewart further failed to offer Pennell a loan if Pennell took Fountain out of the picture Ewart Depo, p 22 l 2 p 23 l 10, R p \_\_\_\_

Ewart could not name any other commercial loan that had ever been denied solely because of the choice of management Ewart Depo , p 35 ll 17 21, p 37 ll 7 16, R p \_\_\_\_ Fountain's expert avers that the

denial violated the bank's policies and existing bank regulations Seitz Affidavit, R p \_\_\_\_

After hearing Ewart say, "If Mark was going to be managing the operation, we would not be making the loan," Pennell asked Fountain to tear up their management contract Fountain Depo , p 128 l 5 p 129 l 3, R p \_\_\_\_ Timmons ville later hired Fountain as its Town Administrator Fountain Depo , p 10 ll 17 19, p 36 ll 10 15, R p \_\_\_\_

### **Standard of Review**

Appellate courts review a grant of summary judgment under the same standards that the trial courts apply Under these standards, all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party And even when there is no dispute as to evidentiary facts, but only has to the conclusions or inferences to be drawn from them, summary judgment must be denied *Murray v Holnam, Inc* , 344 S C 129, 137 138, 542 S E 2d 743, 747 (Ct App 2001)

### **Argument**

A reasonable jury could infer that from Ewart's statement that Fountain is unfit to do the job that Pennell hired him to do This

implication is not constitutionally protected because it falsely implies an objective fact Fountain's purported unfitness to manage Pennell's store And a jury could also find that the privilege was abused because Ewart falsely insinuated this unnecessarily or recklessly

This case thus presents issues for a jury to resolve The grant of summary judgment to Ewart and the Bank must be reversed and the case remanded for a jury trial against them for slander per se

**I The trial court applied the wrong standard in ruling that Ewart's statement is not defamatory as a matter of law**

The trial court strayed from the *Adams* standard for granting summary judgment Under that standard, summary judgment must be denied unless the trial court can affirmatively say that a statement is incapable of a defamatory meaning If not, the jury decides if the meaning was defamatory *Adams*, 292 S C at 279, 356 S E 2d at 122

**A The statement is capable of a defamatory meaning**

Factual issues exist over whether Fountain is unfit to manage Pennell's store While the trial court said that there is no factual controversy over Fountain's management experience, Ewart testified that his concern about Fountain came from the BoJo Tim operation

Ewart Depo, p 58 l 5 p 61 l 7, R p \_\_\_\_ But Fountain was not a day to day manager during the BoJo Tim operation he was one of five LLC members who had others manage it Fountain Depo, p 24 l 15 p 25 l 7, R p \_\_\_\_ There is also no evidence none that Fountain contributed to Bojo Tim's financial problems Fountain was lastly a good enough manager to later be hired as Timmonsville's Town Administrator Fountain Depo, p 10 ll 17 19, p 36 ll 10 15, R p \_\_\_\_ A jury could thus conclude that Fountain would have made a fine store manager and that Ewart defamed him when he insinuated otherwise

The Court reasoned, however, that Ewart did not flat out say, "Mark Fountain is a poor manager" Order Granting Summary Judgment, p 7, R p \_\_\_\_ But a jury could find that this was what Ewart meant when he said, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan" Ewart Depo , p 6 ll 18 21, R p \_\_\_\_ The proof of this pudding is in the eating Pennell knew Fountain had credit problems from the Bojo Tim endeavor when he hired Fountain as his manager but then after hearing from Ewart asked Fountain to tear up their management contract Fountain Depo, p 68 ll 14 17, p 128 l 5 p 129 l 3, R p \_\_\_\_ A jury could conclude from this that Ewart implied and Pennell inferred that Fountain was unfit

to perform the management contract

Illustrations may be helpful. Say parents approach a local teacher about transferring a 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 was 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." Or a widget retailer discovers that its wholesaler hired Mrs. Y as its manager. The retailer says, "If Mrs. Y is your manager, we will get our widgets elsewhere."

Now these statements may be literally true. All may further truthfully imply that a lack of faith in Mr. X as a Principal, Lawyer Z as a lawyer, and Mrs. Y as a manager. But what if all are fine and capable members of their respective professions? Isn't the insinuation that they are not? And couldn't a reasonable jury find that this was what you meant? *Adams* shows that the answer is yes because the test is whether the words are capable of a defamatory meaning. And Ewart's words are

The Supreme Court has also allowed a defamation case to go forward where the implication was less clear. In *Tyler v. Mack's Stores of South Carolina, Inc.*, 275 S. C. 456, 458-459, 272 S. E. 2d 633, 634

(1980), an employee was discharged after he took a polygraph test and his manager was fired. He alleged that the mere act of discharging him defamed him by insinuating that he had done something wrong. While he could have been fired for a multitude of legitimate reasons, the Supreme Court held that he presented a trial issue on the claim. So too here. While Ewart's statement may have truthful meanings, Fountain is entitled to have a jury decide if Ewart meant the defamatory one.

## **B The trial court's distinctions do not hold**

The trial court offered several reasons why it nevertheless believes that Ewart did not defame Fountain as a matter of law. The court found that the statement is literally true, was made in a private business conversation, and that its implication is not a clear, exclusive, and direct comment that Fountain is a criminal or is unfit morally or ethically for a licensed or regulated profession. Order Granting Summary Judgment, pp. 7-10, R.p. \_\_\_, Order Denying Reconsideration, pp. 1-2, R.p. \_\_\_. None of these distinctions persuade

### **1 A true statement may convey a defamatory insinuation**

The trial court initially focused on whether Ewart's statement was literally true in that the bank would in fact not make the loan if

Fountain managed the convenience store. The court also twice found that the statement implied that the bank lacked confidence in Fountain's management skills, and that this was true too. Order Granting Summary Judgment, pp. 8-9, Order Denying Reconsideration, p. 2, R p. \_\_\_\_ But the implications do not stop there. Again, a reasonable jury could also infer that Fountain is in fact unfit to manage Pennell's convenience store. That is not true.

At least three decisions deal with true statements that have defamatory insinuations. In *Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987), a City Manager suspended some city employees during an investigation into licensing electricians and plumbers. During the suspension, the City Manager issued press releases that implied that the employees were guilty of some undisclosed misconduct. The Supreme Court affirmed a verdict against the City Manager for the defamation. While the City Manager argued that his statements were substantially true, the Supreme Court held that a defamation "need not be accomplished in a direct manner" and affirmed because the insinuation was false. *Id.* at 62-63, 354 S.E.2d at 901.

In *Adams*, the trial court granted a television station summary judgment based on a broadcast's literal truthfulness. On appeal, this

Court concluded that the literally truthful broadcast was susceptible of the inference that the plaintiff had murdered two teenagers or was withholding information about the crimes. The Court thus reversed summary judgment because the broadcast was capable of this further innuendo. *Adams*, 292 S. C. at 279-280, 356 S. E. 2d at 122. In this case, Ewart's statement likewise carries the false innuendo that Fountain is unfit to do the job that Pennell hired him to do.

In *Richardson v. State Record Co., Inc.*, 330 S. C. 562, 499 S. E. 2d 822 (Ct. App. 1998), the trial court granted a newspaper summary judgment because its accounts of an automobile accident were literally true. The driver claimed that the article was still defamatory because it falsely implied that she contributed to the victim's subsequent death. On appeal, this Court held that the truth of each sentence of the articles, viewed separately, is irrelevant. This Court thus reversed summary judgment because the newspaper failed to demonstrate the absence of a genuine issue of material fact on the insinuation that the driver caused the death. *Id.* at 566-567, 499 S. E. 2d at 824-825.

Ewart and the Bank likewise failed to show the absence of a genuine issue of material fact on the insinuation that Fountain was unfit to be Pennell's manager. This omission is highlighted in that the

statements in *Richardson* touched on a matter of public concern thus requiring the plaintiff to prove falsity *Id* at 566 n 2, 499 S E 2d at 824 n 2 The defamation here is a matter of private concern It is thus up to Ewart and the Bank to prove the implication's truthfulness *See Parrish v Allison*, 376 S C 308, 326, 656 S E 2d 382, 391 392 (Ct App 2007)(holding that truth is an affirmative defense if the statements are a matter of private concern) And they did not prove the absence of a genuine issue of material fact that Fountain now a Town Administrator was unfit to manage a convenience store

## **2 Defamation may occur within a private business conversation**

To further distinguish *Adams*, the trial court noted that this case involves a private business conversation Order Denying Reconsideration, p 2, R p \_\_\_\_ Yet the court also discussed *Swinton Creek* In that case, the Supreme Court reversed a directed verdict on striking similar facts As here, a lender allegedly defamed a man while explaining to a loan applicant why his loan was denied The only hearer was the loan applicant The Court held that the defamation claim could go forward even though the statement lacked the publicity necessary to maintain an invasion of privacy claim *Swinton Creek*, 334 S C at 484

487, 514 S E 2d at 133 135

This Court has likewise held that defamation will lie where employees acting within their employment slander someone to only one other person *See McBride v School District of Greenville County*, 389 S C 546, 561 562, 698 S E 2d 845, 852 853 (Ct App 2010) (reversing a directed verdict on a defamation claim where a school Principal allegedly defamed a teacher to a teacher's aide), *Mains v Kmart Corp*, 297 S C 142, 148, 375 S E 2d 311, 314 (Ct App 1988)(affirming a verdict for the plaintiff where a store employee defamed him to his wife)

### **3 The defamatory meaning need not be the exclusive meaning**

*Adams* further shows that the trial court also erred by requiring that the defamatory implication of Fountain's unfitness be the exclusive implication. Again, summary judgment is improper unless the trial court can say that the words are incapable of any defamatory meaning. If the words can defame, the jury decides if they did defame *Adams*, 292 S C at 279, 356 S E 2d at 122. The trial court here did not rule that Ewart's statement was incapable of meaning that Fountain was unfit to fulfil his and Pennell's management contract.

#### **4 Defamation need not be direct**

The insinuation need also not be as direct as the trial court suggests. The Supreme Court held years ago that a “defamation need not be accomplished in a direct manner.” *Tyler*, 275 S C at 458, 272 S E 2d at 634. Again, the Court there allowed a defamation claim to go forward where there were no statements at all. The alleged defamation was implied from the employee’s discharge.

#### **5 Slander per se is not limited to regulated professions**

The *Tyler* and *Eubanks* decisions further show that slander per se is not limited to unfitness within a licensed or regulated profession. The plaintiff in *Tyler* was a store employee. *Tyler*, 275 S C at 457-458, 272 S E 2d at 633. The plaintiffs in *Eubanks* were City employees. *Eubanks*, 292 S C at 59, 354 S E 2d at 899. Slander per se generally applies to anyone engaged in a business—be they masons, blacksmiths, or tenant farmers. See Prosser and Keeton, *On the Law of Torts* § 112, p. 791 n. 71 (5<sup>th</sup> Ed. 1984) (citing cases).

#### **6 Slander per se is not limited to crimes or moral unfitness**

Slander per se is lastly not limited to charges that one has committed a crime or is unfit morally or ethically.

In *Capps v Watts*, 271 S C 276, 246 S E 2d 606 (1978), the defendant called the plaintiff a “paranoid sonofabitch ” The Supreme Court held that proof of special damages were not required because the statement imputed “conduct or characteristics incompatible with a person’s office, trade, or profession ” *Id* at 286, 246 S E 2d at 612

In *Goodwin v Kennedy*, 347 S C 30, 36 39, 552 S E 2d 319, 322 324 (Ct App 2001), this Court likewise affirmed a verdict for slander per se where an African American assistant principal was called a “house n\_\_\_\_\_ ” The Court reasoned that the statement charged unfitness within in his profession by impugning his impartiality and decision making as an assistant principal

Neither *Capps* nor *Goodwin* involved crimes or moral failings The test is instead whether the one is charged with characteristics that are incompatible with a person’s trade Falsely implying that Fountain was unfit to do the job that Pennell hired him to do qualifies

## **II Ewart’s implication lacks special constitutional protection**

Applying the wrong standard in determining if a statement can be defamatory is not the trial court’s only error It likewise wrongly suggested that Ewart’s statement is a constitutionally protected opinion Order Granting Summary Judgment, pp 8 9 and n 11, R p

\_\_\_ But the opinion that the court was referring to was the Bank's lack of faith in Fountain's management skills *Id*

That is not the insinuation that Fountain is suing on The insinuation that Fountain is suing is that he is in fact unfit to manage Pennell's store This assertion may be proved either true or false It is thus not a constitutionally protected opinion

In *Goodwin*, the Court upheld the trial court's refusal to charge that the mere expression of opinion is not slander Citing *Milkovich v Lorain Journal Co* , 497 U S 1, 18 19 (1990), this Court noted that expressions of "opinion" are actionable if they imply an assertion of objective fact *Goodwin*, 347 S C at 39 41, 552 S E 2d at 324 325 This Court more recently affirmed that "the same constitutional analysis applies to statements of opinion that imply an assertion of fact, unless, of course, the statement is not capable of being proved either true or false " *Anderson v The Augusta Chronicle*, 355 S C 461, 487 n 11, 585 S E 2d 506, 520 n 11 (Ct App 2003)

As in those cases, Ewart's statement is actionable because it implies an objective fact Fountain's unfitness to manage Pennell's convenience store

### III A jury could find that the qualified privilege was abused

Lastly, the trial court had to find subtle differences between this case and *Swinton Creek* to be able to grant the Bank summary judgment on its qualified privilege defense. While the trial court described the case as “deceptively similar,” it is in fact spot on

In *Swinton Creek*, a potential borrower approached Edisto Farm Credit about borrowing money to buy some of a business’s assets. The business had in fact twice defaulted on a loan it had with Edisto, and Edisto told the potential borrower that the business had been under financial distress. Edisto told this to no one other than the potential borrower. The business owner sued Edisto for defamation. The trial court directed a verdict based on qualified privilege, reasoning like the court here that Edisto made the statement to protect its own interests and for the limited purpose of assisting the potential borrower.

While this Court affirmed, 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, 514 S. E. 2d at 134. 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* at 485-487, 514 S E 2d at 134-135. The Court then concluded that a jury could find either or both abuses of the privilege.

In this case, the trial court tried to distinguish *Swinton Creek* by saying that Pennell and Fountain shared common interests that were lacking between the potential borrower and business owner in *Swinton Creek*; the Bank was not reckless, and there is no factual controversy over Fountain's management experience. Order Denying Reconsideration, pp. 3-4, R p. \_\_\_\_ These distinctions also do not hold.

#### **A The privilege initially requires shared interests**

The court's first distinction seems to suggest that *Swinton Creek* would have turned out differently had the potential borrower and the business owner already had a contract for sale when the lender allegedly defamed the owner. Nothing within the decision suggests this distinction, however, and the point confuses the cart with the horse.

The qualified privilege that the Bank asserts here – and that Edisto asserted in *Swinton Creek* – requires shared interests before the privilege is ever triggered. *Swinton Creek*, 334 S C at 484, 514 S E 2d at 134. No shared interests equals no privilege.

We are not, however, arguing about the privilege's existence. We are beyond that point. The issue is whether the privilege was abused. And nothing within *Swinton Creek* suggests that the privilege's abuse turns on the relationship between the one defamed and the one who heard the defamation. It instead turns on whether the defamation was reasonably necessary or made recklessly. This is normally a jury issue. *Swinton Creek*, 334 S.C. at 485, 514 S.E.2d at 134. So too here.

**B. A jury could find that Ewart went beyond the reasonably necessary**

Ewart knew when he made his statement that Fountain was not going to have any obligation on Pennell's proposed loan or any ownership interest in Pennell's proposed business. Ewart Depo, p. 38 ll 11-14, p. 50 l 5, p. 51 l 13, R p. \_\_\_\_ He further failed to follow up and offer Pennell a loan if Pennell took Fountain out of the picture. Ewart Depo, p. 22 l 2, p. 23 l 10, R p. \_\_\_\_ A jury could find from this that Ewart had no legitimate reason to drag Fountain into a conversation with Pennell over whether Pennell would get the loan.

**C. A jury could find that Ewart was reckless**

A jury could likewise find that Ewart interjected Fountain into the conversation in reckless disregard of Fountain's rights. While the

trial court said that the statement was not reckless, it did not address any of the evidence that Fountain relied on during the hearing or again on reconsideration

Ewart denied the loan without looking at the loan application, Pennell's financial statement, the property's appraisal, or records showing the proposed business's profitability Ewart Depo , p 9 l 25 p 10 l 10, p 39 ll 5 23, R p \_\_\_\_ 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, R p \_\_\_\_, Pennell's Depo , p 53 ll 11 22, R p \_\_\_\_

Rather than consider these materials, Ewart denied the loan solely because Fountain was the proposed manager and his experience with Fountain during the Bojo Tim operation Ewart Depo, p 10 ll 10 22, p 39 ll 5 23, p 58 l 5 p 61 l 7, R p \_\_\_\_ But Ewart could not say that Fountain contributed to Bojo Tim's financial woes or that those woes ever drove Bojo Tim into default

Saunders, the Bank's President and CEO, also did not object to Fountain's management of the Hess Mart even though he knew at least as much about making commercial loans Ewart Depo, p 53 ll 8 25, R p

\_\_\_\_, Fountain Depo, p 132 ll 2 24, p 134 l 23 p 135 l 5, R p \_\_\_\_\_,  
Pennell Depo , p 47 ll 8 23, R p \_\_\_\_\_ Ewart likewise could not name  
any commercial loan that had ever been denied solely because of the  
choice of management Ewart Depo , p 35 ll 17 21, p 37 ll 7 16, R p \_\_\_\_\_

Lastly, Ewart's knowledge about Fountain's skills was five to six  
years old Ewart Depo , p 18 ll 3 13, R p \_\_\_\_\_ He never bothered to ask  
Fountain to update his training and experience over the intervening  
years Ewart Depo , p 43 ll 3 15, p 52 ll 1 6, R p \_\_\_\_\_ He instead  
defamed Fountain based on information that was years obsolete Had  
Ewart instead asked Fountain, Fountain could have shared his  
qualities that prompted his hire as a Town Administrator Fountain  
Depo , p 10 ll 17 19, p 36 ll 10 15, R p \_\_\_\_\_ But Ewart did not ask

Fountain's expert opines that these and other acts and omissions  
violated the bank's policies and existing bank regulations Seitz  
Affidavit, R p \_\_\_\_\_ A jury could likewise find that they were reckless

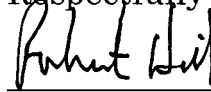
### **Conclusion**

A bank has the right to decide to whom it will and will not loan  
money But *Swinton Creek* shows that it does not have the right to  
needlessly or recklessly slander someone in the process A jury could

find that Ewart needlessly or recklessly slandered Fountain by falsely insinuating that he was unfit to do the job that Pennell hired him to do

Summary judgement must thus be reversed and the case remanded for a jury to determine if Ewart and the Bank defamed Fountain and abused their privilege

Respectfully submitted,



---

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Attorneys for the Appellant  
Mark Fountain



# The South Carolina Court of Appeals

TANYA A GEE  
CLERK

V CLAIRE ALLEN  
DEPUTY CLERK

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June 17, 2011

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William P Hatfield, Esquire  
Hyman Law Firm  
P O Box 1770  
Florence, SC 29503

Re Fountain, Mark v First Reliance Bank  
**2011193546**

Dear Counsel

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Upon review, the caption should read as follows

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

Any future filings by any party to this appeal must feature the above caption

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201

Thank you for your attention to this Failure to file in the proper court may result in the dismissal of your appeal

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR also, please advise the Court in writing upon receipt of the transcript

**NOTE** If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,

*V. Cleve Allen, Deputy*  
Tanya A. Gee  
CLERK

TAG/laf

cc Jeffrey L. Payne, Esquire  
The Honorable Connie Reel-Shearin



## The South Carolina Court of Appeals

TANYA A GEE  
CLERK

V CLAIRE ALLEN  
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William P Hatfield, Esquire  
Hyman Law Firm  
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Florence, SC 29503

Re Fountain, Mark v First Reliance Bank  
**2011193546**

Dear Counsel

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

*V. Claire Allen, Deputy*  
CLERK

TAG/laf

cc Jeffrey L Payne, Esquire

# The Supreme Court of South Carolina

## RE Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

### ORDER

Under the Federal Constitution, our State Constitution and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness Ex parte Capital U-Drive-It, Inc., 369 S C 1 630 S E 2d 464 (2006) Davis v Jennings 304 S C 502 405 S E 2d 601 (1991) Therefore, with some few exceptions,<sup>1</sup> documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future The ready availability of these documents raises significant privacy concerns While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts

Parties shall not include or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court <sup>2</sup>

1 Social Security Numbers If a social security number must be included only the last four digits of that number should be used

2 Names of Minor Children If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used In all other cases, only the minor's first name and first initial of the last name (i e John S ) should be used

3 Financial Account Numbers If financial account numbers are relevant only the last four digits of these numbers should be used

4 Home Addresses If a home address must be included only the city and state should be used

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed " No order of the appellate court will be required to file this sealed Appendix The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents

If the caption of the case contains any of the personal data identifiers listed above the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile).

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed, the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED

s/Jean H. Toal C J

s/James E. Moore J

s/John H. Waller, Jr. J

s/E. C. Burnett, III J

s/Costa M. Pleicones J

Columbia, South Carolina

August 13, 2007

---

<sup>1</sup> See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 SCACR, Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR, Rule 402(n), SCACR, and Rule 403(l), SCACR.

<sup>2</sup> This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

# THE HYMAN LAW FIRM, LLP

LAWYERS SERVING THE PEOPLE SINCE 1953

**WILLIAM P HATFIELD†\***  
**E HOOD TEMPLE**

PETER D HYMAN (1927 1999)  
REGINALD C BROWN JR (1940 2010)  
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June 10, 2011

Ms Frances A Bakis-Ray  
RPR  
555 Jeffries Lane  
Florence, SC 29505

Re Mark Fountain vs First Reliance  
Bank, Thomas C Ewart, and Ernest  
Pennell  
C/A # 2010-CP-21-131  
Our File # 2009290 J

Dear Ms Bakis-Ray

On May 23, 2011, the case above referenced was tried before the Honorable D Craig Brown, in Florence County. My records indicate that you were the court reporter for this case.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record.

I agree to pay the per page charge for this transcript, as provided by Rule 508, SCACR.

Sincerely,



WILLIAM P HATFIELD

WPH:jll  
cc Jeffrey L Payne  
Gary I Finklea  
Honorable D Craig Brown  
Ms Desiree R Allen, Court Services Manager  
Mr Mark Fountain

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June 10, 2011

Ms Keshia Reed  
Post Office Box 12190  
Florence, SC 29504-2190

Re Mark Fountain vs First Reliance  
Bank, Thomas C Ewart, and Ernest  
Pennell  
C/A # 2010-CP-21-131  
Our File # 2009290 J

Dear Ms Reed

On March 10, 2011, the case above reference was tried before the Honorable D Craig Brown, in Florence County My records indicate that you were the court reporter for this case

I request that you provide me with a transcript of the proceedings Please transcribe the entire record

I agree to pay the per page charge for this transcript, as provided by Rule 508, SCACR

Sincerely,



WILLIAM P HATFIELD

WPH jll

cc Jeffrey L Payne  
Gary I Finklea  
Honorable D Craig Brown  
Ms Desiree R Allen, Court Services Manager  
Mr Mark Fountain

pm 6-13-11  
POS 6-13-11

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

---

**RECEIVED**  
JUN 15 2011  
SC Court of Appeals

Mark Fountain,

Appellant,

v

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

First Reliance Bank and Thomas C Ewart are the Respondents

---

**Notice of Appeal**

---

Mark Fountain appeals the summary judgment order of the Honorable D Craig Brown entered April 11, 2011 and Judge Brown's order denying the motion to alter or amend that was entered June 9, 2011. Fountain received written notice of the entry of the order denying the motion to alter or amend on June 9, 2011.

June 13, 2011



---

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attorneyhill@att net

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Other Counsel of Record

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Attorney for Ernest Pennell

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

---

**RECEIVED**  
JUN 15 2011  
SC Court of Appeals

Mark Fountain,

Appellant,

v

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

First Reliance Bank and Thomas C Ewart are the Respondents

---

**Certificate of Service**

---

I certify that I on June 13, 2011 served Mark Fountain's Notice of  
Appeal by first class mail, sufficient postage prepaid, addressed to

William P Hatfield  
The Hyman Law Firm, LLP  
P O Box 1770  
Florence, SC 29503 1770

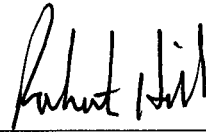
Co counsel for the Appellant Mark Fountain

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P O Box 5478  
Florence, SC 29502

Attorney for the Respondents First Reliance Bank  
and Thomas C Ewart

Gary I Finklea  
Finklea Law Firm  
P O Box 1317  
Florence, SC 29503 1317

Attorney for Ernest Pennell

A handwritten signature in black ink, appearing to read "Robert N Hill", written over a horizontal line.

Robert N Hill

Law Offices of Robert Hill  
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803 405 1629

Co counsel for the Appellant  
Mark Fountain

LAW OFFICES OF ROBERT HILL

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June 13, 2011

Tanya Gee  
Clerk of Court for the  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

**RECEIVED**  
JUN 15 2011  
SC Court of Appeals

Re Mark Fountain v First Reliance Bank, Thomas C Ewart, and  
Ernest Pennell, 2010 CP 21 131 (Florence Cty )

Dear Ms Gee,

Please find enclosed for filing Mark Fountain's Notice of Appeal, Certificate of Service, the orders being appealed, and the \$ 100 00 filing fee

A copy of the letters ordering the transcripts from the relevant two hearings are also enclosed

My best,



Robert Hill

cc William P Hatfield, Esq  
Jeffrey L Payne, Esq  
Gary I Finklea, Esq

**FIRST CLASS**



1000



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**LAW OFFICES OF ROBERT HILL  
P O BOX 51  
NEWBERRY, SC 29108**

---

To The Honorable Tanya Gee  
Clerk of Court for the  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

FILED

STATE OF SOUTH CAROLINA

2011 JUN -9 PM 3:42

THE COURT OF COMMON PLEAS  
TWELFTH JUDICIAL CIRCUIT

COUNTY OF FLORENCE

C/A # 2010-CP-21-131

Mark Fountain,

FLORENCE COUNTY SC

Plaintiff,

v

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

Defendants

**ORDER DENYING  
MOTION FOR RECONSIDERATION**

CERTIFIED A TRUE COPY  
*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*  
*6-14-11*

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. 2 of 4 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

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**



Honorable D. Craig Brown  
Circuit Court Judge

June 9, 2011  
Florence, South Carolina

CERTIFIED A TRUE COPY  
Clerk of Court  
FLORENCE COUNTY SC  
2011 JUN -9 PM 3 42  
FILED  
FLORENCE COUNTY SC

DCB  
P-40/4

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**

11/11/11  
SHEARIN  
STERN  
LITV SC

D

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.

CERTIFIED A TRUE COPY  
Clerk of Court  
Clerk of Court C.P. & G.S.  
FLORENCE COUNTY, S.C.

**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 M<sup>1</sup> delinquent convenience

<sup>1</sup> 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.

10/18  
DCB

store mortgage and for the desired buy out of his existing corporate partner in that store, Cromwell "Bud" Rawls<sup>2</sup> 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 18<sup>3</sup> 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 request<sup>4</sup> In this action, Plaintiff seeks damages for Defendant Ewart's true<sup>5</sup> statement (hereinafter 'the Statment') that his employer, Defendant First Reliance, "would not loan [Pennell] the money if [Plaintiff Fountain] was

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<sup>2</sup> The convenience store involved was known at the time as the 'Hess Mart' 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

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

<sup>4</sup> 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

<sup>5</sup> The truth of the Statment is discussed later in this order

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

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

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<sup>6</sup> 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))

<sup>7</sup> 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), SCRPC, 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

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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

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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 not<sup>8</sup> and did not<sup>9</sup> 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

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<sup>8</sup> Deposition of Defendant Ewart page 10 lines 18 22

<sup>9</sup> Deposition of Defendant Pennell page 55 lines 12 19

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<sup>10</sup> Not only is the arguable implication true, it is a constitutionally protected opinion in this context<sup>11</sup>

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

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<sup>10</sup> 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

<sup>11</sup> 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 (4<sup>th</sup> Cir 1987)(competitor's statement in customer newsletter that company's test was poorly designed to snow the customer was constitutionally protected opinion)

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,

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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<sup>12</sup> 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

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<sup>12</sup> 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)

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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<sup>13</sup>

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.

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<sup>13</sup> 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.

### **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 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

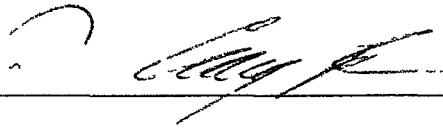
**WHEREFORE, IT IS ORDERED** that

- 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**

A handwritten signature in dark ink, appearing to read "D. Craig Brown", is written over a horizontal line.

**Honorable D. Craig Brown**  
Circuit Court Judge

April 8, 2011  
Florence, South Carolina

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STATE OF SOUTH CAROLINA  
COUNTY OF FLORENCE

Mark Fountam,

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

CERTIFICATE OF SERVICE

The undersigned, a Legal Secretary for Turner, Padget, Graham & Laney, P A , attorneys for the Defendants First Reliance Bank and Thomas C Ewart, does hereby certify that she deposited in the United States Mail a copy of the **Order Granting Summary Judgment as to Defamation Claims and Claims of Outrage** dated April 8, 2011, the same being addressed to those persons whose names and addresses appear below, this being done on April 11, 2011, and that sufficient postage was affixed thereto

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CERTIFIED A TRUE COPY  
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FLORENCE COUNTY, S.C.

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CCP & GS  
FLORENCE COUNTY SC