THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2014-CP-37-00526
Appellate Case No. 2019-000614

Debi Baker Brookshire,

Appellant,

v.

Community First Bank and
Benjamin Hiott,

Defendants,

Of Which, Community First
Bank is

Respondent.

FINAL REPLY BRIEF OF APPELLANT

Warren Blair Giese
SC Bar No. 2219
Kelly L. Giese
SC Bar No. 100089
THE GIESE LAW FIRM, LLC
1315 Blanding Street
Columbia, SC 29201

Jonathan D. Waller
SC Bar No. 76290
Waller Law Group
1116 Blanding Street, Suite 2B
Columbia, South Carolina 29201

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

Appellant's primary brief challenged numerous errors of law that occurred during the granting of summary judgment in favor of Respondent. The Respondent's brief, filed Novmber 4, 2019, does little to dispel these concerns or justify the errors committed by the court. This reply brief rebuts the Respondent's arguments and clarifies the legal issues, factual issues, and governing authorities.

ARGUMENTS

The trial court erroneously granted Summary Judgment in favor of Respondent for both its defense of Appellant's claims as well as Respondent's counterclaims against Appellant. The Order conflicts with existing precedent on both issues and in the analyses undertaken, creates novel issues for which no precedent exists. On each issue, the trial court's analysis is deeply flawed, and this Court after review of the issues should reverse.

I. **Appellant properly raised and preserved her arguments.**

a. Appellant provided a copy of its Rule 59(e), SCRCP motion to the trial judge three (3) days beyond the deadline proscribed in Rule 59(g), SCRCP. The trial judge had the discretion to deny Appellant's motion based on the missed deadline solely, or it had the discretion to rule on the merits of the motion; the choice it made. Given the approximately fifteen (15) months between the service of the motion on the judge and the court's ruling, clearly the court did not find that Respondent was prejudiced by the three day delay. Had the court denied Appellant's motion solely on 59(g) grounds, the issues raised would not have been preserved for appeal. As the court exercised its discretion and issued a ruling on the merits, those arguments are indeed preserved for appellate review. S*mith v. Fedor, 809 S.E.2d 612, 422 S.C. 118 (S.C. App., 2017), Smith v. Fedor, 809 S.E.2d 612, 422 S.C. 118 (S.C. App.,*

2017), reh'g denied Feb. 26, 2018, citing Gallagher v. Evert , 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002). It is concerning that Respondent would make such an argument without acknowledging established caselaw to the contrary. Further, the court clearly did not rule that the arguments made in the 59(e) motion were first made in the motion as its Order rules on the merits of the motion and makes no mention that any arguments had not been previously raised.

b. Appellant's claims regarding the stock purchases and transfers are not in the complaint. The stock transfer records were produced by Respondent in discovery and argued in Appellant's memorandum in opposition to summary judgment. (R. pp. 836 – 837).There is no prejudice to Respondent at this stage. While Respondent did not consent to the issue being "tried," the standard is different at the summary judgment stage as opposed to trial. Further, Rule 15(b), SCRCP allows "the amendment of the pleadings to conform with the proof where the opposing party is not prejudiced." *National Time Share v. Maritime Ltd., 297 S.C. 43, 47, 374 S.E.2d 678, 680 (1988).* While the stock transfers are not specified in the complaint, their inclusion does not change or prejudice Respondent's defense of the issues, only clarifies specifically what Appellant alleges was taken from her. Rule 15(b) "permits the presentation of evidence within the issues made by the pleadings...**Nevertheless,** any variance between the pleadings and the proof offered to sustain them will not be deemed material if the adverse party is not surprised or misled to prejudice in maintaining a defense on the merits." *Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 275, 363 S.E.2d 891, 896-97 (1987)(emphasis added).* Respondent in paragraph A.1. quotes Appellant's counsel out of context by contending that Appellant intimated that the the only "fraud" committed against Appellant was related to stock transfers. Counsel was addressing the stock transfers specificially and in that portion that Respondent cites to,

counsel clarifies that the stock transfers were the "last bit of fraud" committed by Respondent against Appellant.

c. Appellant argued in the original memo in opposition for SJ that Hiott's position allowed him to conceal and manipulate the origin and purpose of the transfers, making "legitimate transfers to BB&T and other bills look exactly like the illegitimate transfers." (R. p. 828). Appellant has consistently maintained that because of the POA, not in spite of it as Respondent contends, that Hiott's position with the bank allowed him to perpetrate his scheme against Appellant and the Respondent itself. Hiott was able to sit in his office and generate transactions with no enforced oversight. (R. p. 1062, line 10 – p. 1064, line 23).

d. Appellant has consistently maintained, since its discovery during the discovery phase of the underlying proceeding, that the transfer of stock is part of her cause of action for conversion. Unbeknownst to Appellant, Defendant Hiott purchased 16,518 shares of Respondent Corporation stock, which he was certainly authorized to do under the POA. After Appellant's account with Respondent was closed and the POA had been revoked, Defendant Hiott, acting in his postion as an agent and senior vice president of Respondent bank and with no authority under a POA transferred all of the shares of stock to a third party, without Appellant's authorization or knowledge. (R. p. 1042; p. 1289, line 15 – p. 1290, line 11; pp. 836 – 837). Respondent's own expert further opines that the purchase and transfer of stock, under these circumstances, represent a violation of banking rules and regulations as well as a violation of IRS code requirements. (R. pp. 888 – 910, p. 1045, lines 1 – 23).

e. Respondent has repeatedly and erroneously argued that Appellant claimed her cause of action for breach of contract accompanied by a fraudulent act stemmed from the POA. Appellant has never argued that Respondent bank was a party to the POA or had any duties

to Appellant that emanated from the actual provisions of the POA. On the contrary, Appellant only entered into one (1) contract in which Respondent was a party, the trust account agreement. Such agreement was Exhibit A of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

II. The trial court incorrectly determined that no trust or fiduciary relationship existed between Appellant and Respondent.

a. Respondent contends that there is NO evidence that Appellant and Respondent entered into any sort of trust agreement. The documentation for the account and the reports of the experts in this case is evidence that a trust relationship was created. (R. pp. 888 – 910; 1047 – 1048). Appellant previously was involved in the creation of one (1) trust with BB&T. Creation of one (1) trust hardly rises to the level of expert on the matter. Given the documents as well as Appellant's deposition testimony, it is a question of fact for the jury to determine whether a trust relationship existed. Further, Respondent's argument against a trust relationship seems to focus solely on its allegation that a trust wasn't created because Respondent wasn't acting as trustee.

III. The trial court incorrectly granted summary judgment to Respondent for its claim for offset and counterclaims.

a. Respondent in it's motion for summary judgment and subsequent arguments, has requested three (3) different amounts for its offset and counterclaim. Even at this stage, after a judgment has been entered in its favor, Respondent argues that it is owed a different amount than was awarded by the trial court. (P. 11, Respondent's Initial Brief.) Such discrepancy on its own raises a question of fact for a jury to make a determination of a "correct" amount and represents an abuse of discretion by the trial court in the granting of summary judgment.

b. Respondent contends that because it didn't discover Hiott's activities until 2013, its Statute of Limitations does not begin to run until then. However, the Respondent, either inadvertently or disingenuously, fails to acknowledge the remaining language of the "discovery rule." The Statute of Limitations begins to run when a party knew or **should have known** of a cause of action. *City of Newberry v. Newberry Electric Coop. Inc.*, 387 S.C. 254, 692 S.E.2d 510, 513 (2010). Is it reasonable to think that a federally regulated bank should not have had systems and internal checks in place in order to catch fraud occurring from within its walls? Hiott began his scheme, for which he was convicted and went to federal prison, in 2004. For a bank to claim that they should not have been able to discover such fraud for approximately 9 years is ridiculous. Even if the bank did not directly catch on to Hiott's scheme, the trial court still inconsistently applied analysis of the SOL. Respondent contends that funds were removed from its own accounts and placed in to Appellant's account. (R. pp. 1019 – 1040; 1071 – 1072). Respondent argues that in 2010 Appellant raised concerns to the Respondent about Hiott's actions. If Respondent can claim that Appellant was on notice at such time, the same reasoning that Respondent would have been made aware of the suspected issues in her account which would include transers from Respondent's accounts to Appellant. The report of Respondent's external auditor and expert represents that "[a]ccording to CEO Shepard, he became aware of Brookshire's dissatisfaction with, and attorney contact regarding, BLH's (Hiott) handling of the Brookshire account at CFB in the **latter months of 2010 or early 2011**. The CEO informed PCS that he retained the services of attorney Jim Williams and directed BLH to work with Williams to resolve Brookshire's concerns." (R. pp. 888 – 910). Mr. Williams had communication with counsel for Appellant no later than December 6, 2010 asking for details of transactions from Appellant's account. (R. p. 959). Those records would have

shown Respondent that its own funds went into the account of Appellant. Further, at the very least there remains a question of material fact whether a bank whose audit committee didn't meet for an entire year should have known that a cause of action exists. (R. p. 1095, lines 6 – 8). Given the same reasoning it attempts to apply to Appellant, should the Respondent not have a duty to review the records from its own account and take action on what were clearly "unauthorized" transfers. The account was closed in February of 2011, closed with funds directly transferred from Respondent to Appellant. If anyone "slept on their rights" it is Respondent.

IV. The trial court incorrectly found that equitable tolling or equitable estoppel do not apply to Appellant's claims.

a. When Hiott is conducting his business under the POA with lawyers and others, it is impossible to separate and determine whether he is acting pursuant to the POA or in his capacity as agent and senior vice president of Respondent. Had he taken steps to act as a complete third party when acting under the POA the Respondent may have an argument that it has no liability. However, such actions would have most assuredly led to discovery of Hiott's scheme as other members of the bank would have become aware of his actions. Instead, he acted in both capacities simultaneously, serving two masters (R. pp. 1047 – 1048), in a situation against normal banking practice (R. pp. 1047 – 1048; p. 1062, line 10 – p. 1064, line 23) but conducted in this instance with the knowledge and consent of the president of the bank. (R. p. 1101). Additionally, because of his position with Respondent, he was able to take advantage of the POA in a manner not available to other holders of a POA. (R. p. 1062, line 10 – p. 1064, line 23). Even within single transactions, such as when funds from Appellant's account were directly used to make loan payments of debtors to the bank (R. pp. 1103 – 1114). Hiott was acting as agent of both Appellant and

Respondent and such actions led to the direct benefit of Respondent. Respondent is correct that under a completely above-board transaction involving the holder of a POA it would have no duty to further investigate the authority granted under the POA. However, in a situation such as this, Respondent cannot hide behind the POA to excuse its own actions. The simple fact remains that Hiott perpetrated his scheme using his position at the bank, with the use of bank resources, and while exploiting the severe lack of normal banking practies by Respondent. (R. p. 1062, line 10 – p. 1064, line 23). Additionally, Respondent's contention that Appellant conceded that the POA authorized *all* dispersements from the account again mischaracterizes the facts and arguments. Respondent's Initial Brief, 15 (emphasis in original). Appellant has maintained that, under the POA, Hiott was authorized to make dispersements pursuant to the powers granted to him by the POA. While the distinction may be subtle, it is important to note that the Respondent again mischaracterizes the positions of the parties.

b. The Respondent argues that Appellant "slept on her rights" and because of such, should be barred from pursuing any claims. Respondent argues that a fully formed theory of recovery does not need to exist for a statute of limitations to begin to run, only the thought that wrongdoing may have occurred. In the instant case, $500,000 dollars was removed from Appellant's account mere days after being deposited with Respondent. The only notation that would provide any guidance as to the destination or purpose of those funds was listed as "miscellaneous debit" on a statement Appellant testified she did not receive at the time. Again, had Hiott been acting as a third party holder of a POA, he would have been authorized to dispurse those funds, but he would not be the one creating the notation of the purpose. Further, Appellant's inquiry into the ultimate destination of those specific funds began in 2010 when she hired Kathleen McDaniel to locate the destination. Both

Hiott and later other agents of Respondent represented to Appellant, through her representatives, that the funds were first used to purchase annuities for her children. (R. p. 945; p. 957; pp. 991 – 997; p. 1116; p. 1118). Until July of 2013 Appellant was told by agents of Respondent that $500,000 was transferred from her account to purchase an annuity. Given those undisputed facts, Appellant would have no cause of action against Respondent or Hiott or any other potential defendant.

V. The trial court erred by finding that Appellant's claims were both barred by the statute of repose contained in the UCC as well as a three-year statute of limitations.

a. Respondent consistently argues out of both sides of its mouth. At times it acknowledges that "Brookshire has conceded, all of Hiott's disbursements from the account were authorized by the POA." And then on the very same page of its Initial Brief argues that the statute of repose contained in the UCC controls because Appellant in her deposition stated that a $500,000 transfer would have not been authorized by her. (Respondent's Initial Brief at 21-22.)

VI. Respondent mischaracterizes certain arguments and facts.

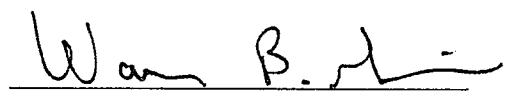
a. The Respondent alleges that no evidence supports the claims that Respondent lacked internal controls or failed to utilize accepted banking practices, only "imporoper speculation." In fact, Respondent's own expert, as well as Appellant's expert opine that Hiott's actions were made possible because of the lack of these controls and practices. (R. p. 1045, lines 1 – 23; pp. 1047 – 1048; p. 1062, line 10 – p. 1064, line 23; p. 1101, lines 6 – 25). As it relates to the stock purchases, Respondent's contention that because Hiott was authorized by Respondent to purchase stock absolves Respondent from liability is without merit and represents a mischaracterization of the evidence that Hiott effected such stock transfers utilizing his position and resources of Respondent. (R. p. 1045, lines 1 – 23; pp.

1047 – 1048; p. 1062, line 10 – p. 1064, line 23; p. 1101, lines 6 – 25).

b. Respondent argues that Respondent never represented to Appellant that the documentation supplied to counsel was a complete set. The numerous letters from multiple counsel to Respondent asking for documents and following up with the request for complete sets of documents are in fact evidence to the contrary. It further is concerning that Respondent now seems to be alleging that it didn't provide a complete set of records to Appellant; only that it never represented that the incomplete records were in fact, complete. (Respondent's Initial Brief at 47). Essentially, it seems that Respondent admits to acting in a manner contrary to good faith, but claims that such actions cannot be held against it. Appellant would point out that Respondent has not previously made such an argument and as such, using Respondent's own arguments, are untimely.

CONCLUSION

The findings and conclusions by the trial court should be reviewed by this Court. On all issues presented, the trial deviated from binding precedent and created novel issues and analyses. The Appellant therefore respectfully requests that this Court grant the relief sought herein, inquire further into these matters, and reverse the trial court.



Warren Blair Giese
SC Bar No. 2219
THE GIESE LAW FIRM, LLC
1315 Blanding Street
Columbia, SC 29201
(803) 708-6767
(803) 708-6769 (facsimile)
barneygiese@gmail.com

ATTORNEY FOR APPELLANT

January 22, 2020
Columbia, S.C.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2014-CP-37-00526
Appellate Case No. 2019-000614

Debi Baker Brookshire,

Appellant,

v.

Community First Bank and
Benjamin Hiott,

Defendants,

Of Which, Community First
Bank is

Respondent.

CERTIFICATE OF COUNSEL

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

January 22, 2020

Warren Blair Giese
SC Bar No. 2219
THE GIESE LAW FIRM, LLC
1315 Blanding Street
Columbia, SC 29201
(803) 708-6767
(803) 708-6769 (facsimile)
barneygiese@gmail.com

ATTORNEY FOR APPELLANT