THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable 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, Inc. and
Benjamin Hiott,

Defendants,

Of Which, Community First
Bank, Inc. is

Respondent.

BRIEF OF RESPONDENT

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III. Whether the trial court correctly granted summary judgment to Respondent Community First Bank, Inc. ("Community First")[1] by holding that Brookshire's power of attorney ("the POA") granted to Defendant Benjamin Lee Hiott ("Hiott") barred her claims against Community First.

IV. Whether the trial court correctly granted summary judgment to Community First by holding that Brookshire's claims against Community First are time barred under the Uniform Commercial Code ("UCC"), S.C. Code Ann. § 36-4-406 (2003 & Supp. 2019).

V. Whether the trial court correctly granted summary judgment to Community First by holding that Brookshire's claims against Community First are time barred under S.C. Code Ann. § 15-3-530(5) (2005), and are not subject to equitable estoppel or equitable tolling.

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VII. Whether the trial court correctly granted summary judgment to Community First on Brookshire's breach of fiduciary cause of action.

VIII. Whether the trial court correctly granted summary judgment to Community First on Brookshire's conversion cause of action.

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[1] Brookshire improperly refers to Community First in the appellate caption as "Community First Bank." The correct name is Community First Bank, Inc.

IX. Whether the trial court correctly granted summary judgment to Community First on Brookshire's negligent supervision cause of action.

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XIII. Whether the trial court properly denied Brookshire's Rule 59(e) Motion when Brookshire failed to send a copy to the trial judge in the timeframe required by Rule 59(g), SCRCP.

STATEMENT OF THE CASE

On May 25, 2007, Brookshire executed the POA granting Hiott the personal authority to handle virtually all aspects of her financial affairs. With Brookshire's knowledge, Hiott exercised the authority granted by the POA by, among other things, making disbursements from Brookshire's checking account at Community First during the period from July 12, 2007, until the account was closed on February 23, 2011 (the "Account"). Brookshire filed her lawsuit against Community First and Hiott on September 8, 2014, based on the premise that disbursements Hiott made from the Account were unauthorized. The Complaint asserted six causes of action: breach of fiduciary duty, conversion, negligent supervision, negligence/gross negligence, breach of contract accompanied by fraudulent act, and an accounting.

Community First answered Brookshire's Complaint on October 9, 2014, asserting various defenses and denying that Brookshire was entitled to relief on any of her causes of action, and also asserted offsets and counterclaims for conversion and unjust enrichment. Brookshire answered Community First's counterclaims on November 7, 2014. Pursuant to the terms of the July 6, 2016

Second Consent Amended Scheduling Order, discovery ended on September 15, 2016. Thereafter, Community First and Hiott filed motions for summary judgment on October 11, 2016 (Community First), and October 17, 2016 (Hiott), respectively. The court heard the motions on December 13, 2016. On April 17, 2017, the court emailed all counsel announcing its decision to deny Hiott's motion and grant Community First's motion. On August 29, 2017, the court issued a Form 4 order denying "[a]ll Motions for Summary Judgment." On September 8, 2017, the court issued a Form 4 order replacing and superseding the August 29, 2017 Form 4 order, and denying Hiott's motion. The court issued an order on September 26, 2017, granting Community First's motion for summary judgment and directed the entry of final judgment in its favor pursuant to Rule 54(b), SCRCP.

Brookshire filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP on October 6, 2017, and a hearing was held on December 6, 2017. On March 22, 2019, the trial court issued an order denying Brookshire's motion to alter or amend the judgment. Brookshire filed a notice of appeal on April 9, 2019.

FACTS

Over the course of approximately 3.5 years, a total of $4,057,114.34 was deposited into and thereafter disbursed from the Account. Brookshire admits that the POA granted Hiott authority to make all of these disbursements. Initial Brief, pp. 19, 21. This critical admission alone demonstrates that summary judgment to Community First was entirely proper.

A. Brookshire gave her old friend Hiott a sweeping power of attorney in Hiott's personal capacity only.

Brookshire is a college educated former business owner. (R. p. 173, lines 1-22). She has been handling funds and bank accounts since at least her college days in the early 1970s. (R. p. 264, line 4 – p. 269, line 9). On February 2, 2005, Brookshire executed a Revocable Management Trust Agreement with BB&T acting as trustee. (R. pp. 287-290). BB&T was to manage

Brookshire's interest in Baker and Baker Real Estate Developers, LLC ("Baker and Baker"), a real estate development company founded by Brookshire's uncle and father, operated by other members of Brookshire's family (with whom she had recent legal disputes), and of which Brookshire owned approximately 10.8%, which was valued in May 2007 at $2,047,684. (R. pp. 292-293, 295-296, 298-305). In addition to managing the relationship with Baker and Baker, Brookshire directed BB&T to pay certain bills and make certain purchases with the cash portion of her Revocable Trust at BB&T, which was $1,178,437.06 as of May 31, 2007. (R. p. 207, line 22 – p. 203, line 23; 298-305; 307-314). Over the next two years, Brookshire experienced various conflicts with BB&T over her cash management priorities, especially with regard to her desired purchase of a $250,000 motor home and other tax and responsiveness issues. (R. p. 211, line 2 – p. 220, line 4; pp. 316-317). Brookshire revoked her Revocable Trust Agreement with BB&T on May 25, 2007. (R. p. 319).

That same day, Brookshire executed the POA, granting Hiott broad authority to handle her financial affairs. (*See* R. p. 189, line 19 – p. 190, line 11; pp. 321-323). The first sentence of the POA states: "I, Debi Baker Brookshire, residing at 1707 Devine Street, Columbia, SC 29201, hereby appoint Benjamin Lee Hiott of 9 Topsail Lane, Salem, SC 29676, as my Attorney-in-Fact ('Agent')." (R. p. 321). The Topsail Lane address is not an address for Community First and was Hiott's home address. The POA provides that "[m]y Agent shall have **full power and authority to act on my behalf**. This power and authority shall authorize my Agent to **manage and conduct all of my affairs and to exercise all of my legal rights and powers**." (R. p. 321 (emphases added)). The POA contains a non-exclusive list of the Agent's powers, and includes the powers to "[o]pen, maintain or close bank accounts;" "[c]onduct any business with any banking or financial institution with respect to any of my accounts, including, but not limited to, making

deposits and withdrawals;" "[s]ell, exchange, buy[,] invest, or reinvest any assets or property owned by me;" and "[e]nter into binding contracts on my behalf." (R. p. 321). The POA recites that it was signed at "Branch Banking & Trust, Columbia, SC." (R. p. 323). Although not mentioned or even alluded to in the POA, Hiott was employed as a Senior Vice President at Community First during the operative time period. (*See* R. p. 326).

Brookshire and Hiott met in the 1980s and were friendly acquaintances in Columbia in the 1980s and 1990s. During that period, Hiott worked for several banks in the Columbia area. Brookshire was a customer at those banks and interacted with Hiott in the conduct of her banking business, but they also tailgated together at football games and socialized at bars in Columbia or at Hiott's house. (R. p. 177, line 3 – p. 179, line 25). Brookshire testified that her opinion of Hiott was that he was "[h]onorable and nice" and that she knew that "he worked for a bank." (R. p. 177, line 24). After Hiott moved to Oconee County around 2000, however, he and Brookshire did not keep in touch. (R. p. 180, lines 1-9). Around 2007, Brookshire reached out to mutual friends, Ron and Peg Craven, and asked Mr. Craven "to take care of her finances" and "handle all of [her] business." (R. p. 330, line 7 – p. 331, line 16). Mr. Craven is retired from Pillsbury Company where he was employed as a reset merchandiser in grocery stores. (R. p. 329, lines 8-25). The Cravens declined to help Brookshire in that capacity, and Hiott's name was brought up in the conversation as someone to potentially assist Brookshire with her finances. (R. p. 330, lines 2-13). The Cravens gave Brookshire Hiott's telephone number, and Brookshire thereafter contacted Hiott for the first time in many years. (R. p. 180, line 10 – p. 181, line 13). Brookshire testified that she asked Hiott "if he would be interested in protecting [her] interests" and stated that she was not with Hiott when she executed the POA. (R. p. 183, lines 13-15 – p. 184, line 5). She affirmed her signature on the POA, that she understood that she was transferring her money for Hiott to handle

her interests, that she understood what a power of attorney was and how they operated, and that she had previously both served as a power of attorney and had given others a power of attorney. (R. p. 183, line 20 – p. 184, line 22; p. 185, line 16 – p. 188, line 11).

By June 2007, Hiott was performing his duties under the POA, and he signed June 2007 correspondence to Baker and Baker and BB&T as "Benjamin L. Hiott, Power of Attorney." (R. pp. 339, 341-342). Brookshire also signed these communications. (R. pp. 339, 341-342). Over time, Hiott also handled Brookshire's taxes, various insurance matters, and signed residential leases for her. (R. pp. 344-354, 356, 358-361, 363-369). He paid her telephone and utility bills, car payments, storage unit fees, professional fees, insurance bills, medical bills, traffic tickets, childcare bills, and made charitable contributions on her behalf. (*See* R. pp. 371-383). Brookshire estimates that she was having Hiott pay "[m]aybe ten to twenty" monthly bills for her, although she could not provide a comprehensive list of his responsibilities. (R. p. 260, line 12 – p. 263, line 8). Hiott also regularly assisted Brookshire with the two children in the custody of Brookshire and her husband by arranging for their care on weekends and, on at least one occasion, Hiott kept the children for several days at Christmas. (R. p. 223, lines 21-25; p. 332, lines 14-25; p. 333 lines 9-25; p. 334, line 1 – p. 335, line 25; p. 336, line 1 – p. 337, line 26; pp. 385, 387, 389, 391). Hiott further arranged for the storage and maintenance of Brookshire's motor home and was entrusted with personal possession of about $500,000 worth of her jewelry and silver. (R. p. 191, lines 7-22; p. 195, line 1 – p. 196, line 17; p. 279, line 17 – p. 280, line 23). In short, Brookshire's relationship with Hiott while he held her POA was personal, close, and involved just about all aspects of her life.

B. Pursuant to the POA, Hiott managed Brookshire's financial affairs through a checking Account at Community First.

The primary way that Hiott handled Brookshire's financial affairs and paid her financial obligations was through the Account—a checking account held at Community First from June 2007 until February 23, 2011. (*See* R. p. 394, lines 19-21, 25). It is undisputed that Hiott handled deposits into and withdrawals from the Account, and that Brookshire knew about the Account and understood that Hiott was paying her obligations from it. (R. p. 226, line 4 – p. 227, line 25; p. 228, lines 7-11; p. 229, lines 10-15; p. 230, lines 5-17; pp. 341-342).

Community First mailed monthly statements for Brookshire's Account at Community First to the address where Brookshire was receiving her mail (R. p. 174, line 9 – p. 176, line 23; p. 182, lines 10-19; p. 271, lines 14-15) from the Account's inception in June 2007 until early 2010, when Community First received for the first time in April 2010 a statement addressed to Brookshire in return mail as "unable to forward." (R. p. 400, ¶¶ 17-18). Community First's account management system automatically generates and prints a periodic account statement for each of its more than 25,000 accounts. (R. pp. 396-397, ¶¶ 3, 8). These account statements are routinely, regularly, and automatically compiled, processed, and transmitted for mailing with the United States Postal Service, as detailed in the affidavit of Carol Wilson. (R. pp. 397-399, ¶¶ 9-12). At all times during the Account's existence, Community First followed its normal procedures with regard to the Account statements. (*See* R. p. 399, ¶ 14).

The extensive and undisputed evidence in the record of Community First's *sending* of the monthly Account statements to Brookshire is corroborated by her production of three original statements (November and December 2007 and January 2008) and a photocopy of another original statement (July 2007). (R. pp. 402, 404, ¶¶ 28, 29, 30, 34). Brookshire also testified that she

potentially discarded documents regarding Community First and Hiott after 2010. (R. p. 251, line 8 – p. 253, line 18).

Brookshire's former private investigator for a wide variety of matters, Billy Tabor, testified that he received the original July 2007 statement (or copy thereof) directly from Brookshire when she brought him several boxes of documents in or around 2012. (R. p. 439, line 15 – p. 441, line 20; p. 444, lines 1-25; pp. 448-458). The original statement (page Giese-CFB 1418) was in one of the boxes, although Brookshire directly gave Mr. Tabor a reprinted copy of the July 2007 statement (page Giese-CFB 1417). (R. p. 444, lines 3-25; pp. 449-450). The boxes Brookshire gave Mr. Tabor were unorganized and contained various items including "bank records," "things about the children," and "personal letters." (R. p. 442, line 7 – p. 443, line 14). Mr. Tabor affirmed that Brookshire also provided him with the original Account statements from November and December 2007 and January 2008. (R. p. 445, lines 5-25; pp., 460-463, 465-466, 468-471).[2] Mr. Tabor thereafter turned all of these documents over to the Giese Law Firm. (R. p. 446, lines 1-7).[3]

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[2] Brookshire argues that she received those statements when Hiott returned the motor home to her in the summer of 2010. Initial Brief p. 5. Although Brookshire cites the testimony of Ann Gell Hamiter for supposed support, Ms. Hamiter does not actually remember what "paperwork" Hiott brought back in the motor home. (R. p. 934, lines 21-25). Such speculative testimony is insufficient to raise a genuine issue of material fact to preclude summary judgment. *See Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

[3] Brookshire's former attorney, Michael Sgobbo, Esq., produced in discovery in 2016 a 2007 "Audit Confirmation" letter sent from J.W. Hunt and Company, LLP to Brookshire regarding the Account, and asking her to "please report any discrepancy by us[ing] the reverse side of this form and returning in t[he] enclosed envelope." (R. p. 473). The Audit Confirmation letter gave the "current balance" for the Account as $392,097.12 and the "balance last statement" for the Account as $296,587.54 on November 30, 2007. (R. p. 473). Despite repeated, specific inquiries into when and how she came into possession of this Audit Confirmation letter (including a written supplemental response made at court order), Brookshire failed to provide any information as to when she received this document, which is dated 2007 and is not found in Community First's files. (R. pp. 475-481).

Taken together, the undisputed evidence demonstrates that Community First mailed to Brookshire original Account statements in the normal course of the Account's existence from 2007 until early 2010, Brookshire provided at least some original statements to Mr. Tabor along with voluminous other documents in 2012, and that thereafter Mr. Tabor organized the Account statements in some fashion and transmitted them to Brookshire's counsel. The undisputed evidence also shows that Brookshire *never* notified Community First in 2007, 2008, 2009, or early 2010 that she was missing or had failed to receive any Account statements. (R. p. 192, line 8 – p. 193, line 10).

C. Brookshire's relationship with Hiott unraveled no later than mid-2010.

Brookshire testified that by the spring or summer of 2010 at the latest, she had become distrustful of Hiott and believed he was being untruthful with her about her assets, especially regarding the amount of money in the Account. (R. p. 194, lines 13-23; p. 199, line 4 – p. 200, line 14; p. 205, line 10 – p. 206, line 2). On July 19, 2010, she instructed Baker and Baker not to deposit any more funds into the Account. (R. p. 231, line 17 – p. 232, line 20). Over the course of the Account's existence, at least $1,307,706.43 was deposited there from Baker and Baker. (R. pp. 483-484). Brookshire entrusted another friend, Ann Gell Hamiter, with bill paying duties in the spring of 2010 and sought legal advice from Kathleen McDaniel, Esq. beginning in August 2010 due to her concerns about Hiott and the inconsistent information she and Ms. Hamiter were receiving from him. (R. p. 197, line 1 – p. 198, line 18; p. 202, lines 1-17; p. 235, line 3 – p. 236, line 18; p. 259, lines 1-23; p. 490, lines 6-19). As Ms. Hamiter testified, Brookshire "was totally put out" with Hiott in 2010 because Brookshire believed that Hiott "was stealing her money." (R. p. 502, lines 9-17). Ms. McDaniel wrote to Hiott on September 21, 2010:

> It is my understanding that on August 11, 2010, you transferred all of the cash remaining in the trust account, approximately $200,000.00 to Ms. Baker-Brookshire's account at BB&T. I spoke yesterday with Ann Gel Hammiter [sic],

> Ms. Baker-Brookshire's bookkeeper. Ms. Hammiter [sic] informs me that, when she last spoke to you about one month before the wire out to BB&T, you told her that there was approximately $900,000 remaining in the trust account. There appears to be some serious inconsistencies in this information.

(R. p. 506-507). Ms. Hamiter testified that Brookshire "was violently upset" and surprised when she received the $200,000 in August 2010 and believed she should have had more money in the Account. (R. p. 503, line 12 – p. 504, line 16). Consequently, Brookshire had serious, documented concerns about Hiott's behavior with regard to her Account in mid-2010.

In approximately December 2010, counsel for Community First, James Williams, Esq., sent a package of reprinted Account statements to date to Ms. McDaniel, which on their face were printed on November 18, 2010. (R. p. 493, line 1 – p. 494, line 24; pp. 509-588). Ms. McDaniel confirmed that she received the set of reprinted Account statements during her representation of Brookshire and that she sent the package of reprinted Account statements on to Brookshire. (R. p. 496, lines 4-10). Brookshire confirmed that she received this package no later than March or April 2011. (R. p. 244, line 18 – p. 248, line 14). On February 17, 2011, Ms. McDaniel instructed Community First to "close Ms. Baker-Brookshire's account with Community First Bank and prepare a check made out to Debi Baker-Brookshire for *all funds remaining in the account*." (R. p. 590 (emphasis added)). Ms. McDaniel met with Mr. Williams and Hiott on February 22, 2011, and received a Community First Bank "Official Check" for $285,233.34 made out to Debi Baker Brookshire. (R. p. 497, line 5 – p. 498, line 23; pp. 592-595). Both Ms. McDaniel and Brookshire testified that they understood that the $285,233.34 was all the money remaining in the Account as of February 2011. (R. p. 204, lines 3-18; p. 241, line 2 – p. 242, line 5; p. 498, line 3 – p. 499, line 7). Ms. McDaniel ceased representing Brookshire on March 11, 2011. (R. p. 499, lines 19-22). On April 6, 2011, Brookshire revoked the POA. (R. p. 597). Brookshire has not spoken with or directly communicated with Hiott since mid-2010. (R. p. 203, lines 8-23).

D. The POA authorized all disbursements from Brookshire's Account regardless of her present concerns about the propriety of Hiott's disbursement decisions.

Over the course of the Account's existence from June 2007 until February 2011, a total of $4,057,114.34 was deposited into and withdrawn from the Account. Brookshire initially claimed that essentially *all* of the disbursements from the Account were unauthorized or were allegedly "stolen or misappropriated." Complaint ¶¶ 102, 110. As discovery progressed, Brookshire eventually admitted that she does not dispute that Hiott disbursed $1,865,761.69 from the Account to her or for her benefit in payment of her obligations. (R. p. 249, line 12 – p. 250, line 25; p. 254, line 3 – p. 257, line 10; pp. 599-635; pp. 637-643). These payments represent payments by Hiott for Brookshire's taxes ($564,634.21); her various bills including rent, cable, utilities, daycare, insurance, traffic tickets, and medical bills ($115,488.96); transfers to her accounts at BB&T ($1,020,626.62); and payments to her husband ($51,208.15) among other various payments. (R. pp. 637-643).

Subtracting the undisputed amount leaves $2,191,352.65 that Brookshire still disputes, representing 115 disbursement transactions. (R. pp. 645-648); *see also* Initial Brief p. 3. While Brookshire admits that the POA authorized all of these disbursements (Initial Brief pp. 19, 21), to the extent Brookshire disputes the propriety of these 115 disbursements, the overall amount is subdivided into three core buckets: (1) $556,977.20, for which uncontroverted documentary evidence shows either no net loss to the Account or that the disbursements were for Brookshire's benefit;[4] (2) $880,855.58 of Community First funds that Hiott deposited into the Account on eight separate occasions, and which Brookshire has confirmed were inappropriate and to which she has

[4] *See* R. pp. 645-648, with the categories of BB&T, CFB (transaction reversals), Community First (credit card), Insurance, Logan Voxx, Car, and the CFB closing withdrawal of $0.01 on February 24, 2011, comprising the disbursements in this category. *See also* R. pp. 650-657, 659-711, 713-739, 741-753, 755-769, 771-776 for relevant backup documentation for such disbursements.

no valid claim (R. p. 243, line 14 – p. 244, line 14; p. 779, lines 16-20; p. 781); and (3) the amount remaining in dispute, which after applying the $880,855.58 offset of Community First funds, is, at most, $753,519.87.

The withdrawals from the Account that, after discovery, were remotely subject to dispute are far less than the total damages originally claimed. As discussed more fully below and as the trial court ruled, Brookshire's claims are fatally time barred. For example, Brookshire's problems are starkly obvious with regard to one category of transactions—disbursements made to Joseph Crosby or made for his benefit or for the benefit of a company he owned.[5] Mr. Crosby was an upstate restaurateur who developed a line of spice rubs and other food products that were sold in local stores, to the United States military, and on QVC. (R. p. 784, line 11 – p. 789, line 18; p. 790, lines 4-23). The only evidence is that in 2007 and 2008, this business was growing rapidly and was poised for great success. (R. p. 796, line 23 – p. 798, line 21). Mr. Crosby testified that his company collapsed during the financial crisis, and he could not repay his debts, including the debt to Brookshire. (R. p. 799, line 3 – p. 803, line 19; p. 804, line 1 – p. 806, line 18; p. 807, lines 5-25). The disbursements to Mr. Crosby represent the largest by amount ($1,053,437.39) and oldest by date (beginning July 12, 2007, and ending December 17, 2008) of the categories of payments that Brookshire could, after discovery, conceivably contest in any way. (*See* R. pp. 645-

[5] Brookshire has admitted that Hiott's "ability to conduct business with Joseph Crosby, or any other person, was authorized by the POA." Initial Brief, p. 21. Mr. Crosby testified that he understood that the July 12, 2007 $500,000.00 disbursement to him (made on an Official Check of Community First and endorsed by him) was a *loan* to him from Brookshire, as confirmed by the words "Brookshire Loan Advance" on the remitter line of the check. (R. p. 791, line 6 – p. 795, line 14; p. 809). Indeed, Mr. Crosby referred to Brookshire as a sort of "angel investor" in his company. (R. p. 794, lines 7-10). He considered the other advances of Brookshire's funds to be of the same category and nature. (R. p. 796, lines 1-12).

648). The failure to timely challenge these payments renders Brookshire entirely upside down on her damages theories. (*See* R. p. 1334).

STANDARD OF REVIEW

Summary judgment is appropriate 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 that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact; however, the moving party need not support its motion with affidavits or other materials negating the opponent's claims but must clearly establish by the record the absence of a triable issue of fact. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the court the absence of evidence to support the non-moving party's case. *Id.*

After the moving party has met his or her initial burden, Rule 56(e), SCRCP requires the opposing party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* In response to a properly supported motion for summary judgment, the opposing party "must come forward with specific facts showing there is a genuine issue of material fact." *Id.* Thus, "the non-moving party may not rest on the mere allegations or denial of pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact." *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994) (quoting *Dickert v.*

Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993)); Rule 56(c), SCRCP.

ARGUMENT

A. Brookshire has failed to appropriately raise or preserve certain arguments.

Brookshire has advanced arguments on issues that are not part of any claim in this matter and have not been added to the case by consent. In addition, Brookshire raised certain arguments for the first time in her Rule 59(e) motion.[6] Consequently, these arguments are not preserved for appellate review. *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999); *Andrews v. von Elten & Walker, Inc.*, 315 S.C. 199, 201-02, 432 S.E.2d 500, 502 (Ct. App. 1993). In an abundance of caution, Community First will address these arguments substantively below, but the arguments at issue are as follows:

1. Brookshire argued for the first time at the December 13, 2016 summary judgment hearing that Hiott's transfer of stock held by Brookshire constituted "the actual bit of fraud" Community First "committed against Mrs. Brookshire." (R. p. 1289, line 15 – p. 1290, line 11). Counsel for Hiott and Community First thereafter informed the trial court that "the stock is not in the complaint." (R. p. 1291, lines 10-11, 19-20). Brookshire has never amended or even sought

[6] Pursuant to Rules 208(b)(2) and 220(c), SCACR, as an additional sustaining ground, the trial court's denial of Brookshire's October 6, 2017 59(e) Motion was proper because Brookshire failed to "provide a copy of the motion to the judge within ten (10) days after the filing of the motion," as required in Rule 59(g), SCRCP. Brookshire's deadline to provide a copy of the 59(e) Motion to the trial judge was October 16, 2017. *See* Rule 6(a), SCRCP. However, Brookshire did not provide a copy of the 59(e) Motion to the trial judge until October 19, 2017. (*See* R. pp. 1336-1338). The time limits for motions under Rule 59, SCRCP "may not be extended" unless provided in that rule. Rule 6(b), SCRCP. No mechanism exists in Rule 59 to so extend this time period. Consequently, Brookshire's 59(e) Motion fails in its entirety for failure to comply with the jurisdictional rules of Rule 59, SCRCP. *See, e.g. Citizens & S. Nat'l Bank of S.C. v. Easton*, 310 S.C. 458, 460, 427 S.E.2d 640, 641 (1993) (applying Rule 6(b)'s prohibition on time extension to order made under Rule 59(d) and setting aside such order).

to amend her Complaint to contain any allegations about stock transfers in reference to any of her causes of action.

2. Brookshire first argued in her 59(e) Motion that Hiott's position as a senior executive of Community First and the internal banking system that he was able to access in his employment capacity prevent or inhibit Community First from statutorily relying on the POA under S.C. Code Ann. § 62-5-501(F)(2). (R. pp. 1200-1201).

3. Brookshire first argued in her 59(e) Motion that her cause of action for conversion encompasses Hiott's purchases of stock. (R. pp. 1201-1202).

4. Brookshire first identified in her 59(e) Motion the alleged contract and the term allegedly breached in support of her cause of action for breach of contract accompanied by a fraudulent act. (R. pp. 1203-1204).

B. Brookshire has offered no evidence to create a genuine issue of material fact on multiple arguments.

Brookshire repeatedly fails to cite any admissible evidence for many of her claims. A genuine issue of material fact "can be created only by evidence which would be admissible at trial." *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994). Arguments of counsel, whether made in oral argument or in written briefs or memoranda, "ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists." *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Community First will address these material deficiencies in the substantive areas in which they appear below.

C. The trial court correctly found that Brookshire's POA to Hiott bars her claims against Community First.

The trial court properly granted summary judgment to Community First on all of Brookshire's causes of action because she authorized Hiott to take all of the actions he did with

regard to the Account, and the law imposes no duty on Community First to monitor or regulate Hiott's activities and decisions undertaken pursuant to the POA. Brookshire gave Hiott the POA in his individual capacity to, among other things, conduct *all* of her financial affairs. The POA predated her Account at Community First and was not revoked until after the Account was finally closed. Brookshire authorized Hiott to make withdrawals from and deposits into the Account. She authorized him to open accounts, invest her assets, file her taxes, and "manage and conduct all of [her] affairs and to exercise all of [her] legal rights and powers." (R. pp. 321-323). The POA is unambiguous, and its interpretation is confined to the language used in the four corners of the document. *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161-62 (Ct. App. 2014).

Community First is not a party to the POA. (R. pp. 321-323). Community First, as a third party, has a statutory right to rely on powers of attorney and "does not incur liability to the principal or the principal's estate by reason of acting upon the authority of it or permitting the attorney-in-fact to exercise authority." S.C. Code Ann. § 62-5-501(F)(2)(a) (2009).[7] Further, Community First "is not required to inquire whether the attorney-in-fact has power to act or is properly exercising the power." *Id.* § 62-5-501(F)(2)(b). Nor is Community First "responsible to determine or ensure the proper application of assets, funds, or property belonging to the principal." *Id.* § 62-5-501(F)(2)(c). Further, Brookshire has conceded that the POA authorized *all* disbursements from the Account. Initial Brief, pp. 19, 21. This admission fully disposes of Brookshire's claims against Community First and confirms summary judgment to Community First.

Nevertheless, Brookshire advances several arguments on appeal that seek to obscure or dilute the actual contract-based relationships that govern the legal duties owed to Brookshire by

[7] The General Assembly comprehensively revised the statutory law regarding powers of attorney effective January 1, 2017. As this matter involves a power of attorney in effect from 2007 until 2011, the prior version of the statute is applicable and is the version referenced herein.

Hiott, on one hand, and by Community First, on the other hand. These arguments are untimely, devoid of evidence in support, or legally flawed, and are all premised on the erroneous assumption that Community First had some sort of duty to monitor Hiott's disbursements from the Account or inquire into the purpose behind the disbursements while Hiott was acting under the POA.

1. The Account was never a trust account with Community First serving as a trustee for Brookshire

Community First did not serve as a trustee for Brookshire. There is no documentary or testamentary evidence to support Brookshire's claim that the Account was a trust account. "[T]o prove the existence of a trust, the law requires the following elements to be shown: a declaration creating the trust, a trust *res*, and designated beneficiaries." *Whetstone v. Whetstone*, 309 S.C. 227, 231, 420 S.E.2d 877, 879 (Ct. App. 1992). Brookshire cannot show any of these with regard to her arrangement with Community First. Indeed, Brookshire knows how a trust is created—she created one in February 2005 with BB&T, with BB&T serving as trustee. (R. pp. 287-290). After expressing her dissatisfaction with BB&T's attempts to advise her on various financial matters (R. pp. 316-317, 821, 823-824), among other concerns, Brookshire revoked her trust with BB&T (R. p. 319), and *that very same day* decided to go a different direction with the management of her finances and gave the POA to Hiott. (R. pp. 321-323). Unlike the written affirmation and declaration by BB&T that it was serving as trustee for Brookshire (R. pp. 287-290), Community First has *never* represented in any way that Community First served as her trustee. Unlike with BB&T (R. p. 288, ¶ F; p. 304), Community First has never charged her trustee fees. (*See* R. pp. 417-420, 425-428). Unlike with BB&T (R. pp. 287, 304), Brookshire herself is the trustee. (*See* R. pp. 417, 422, 425, 430, 432). There is no evidence whatsoever that Brookshire and Community First entered into a trust arrangement with Community First serving as a trustee. Without evidence,

there cannot be a genuine issue of material fact to defeat summary judgment. *See Jackson*, 383 S.C. at 17, 677 S.E.2d at 616.

Ultimately, this is a case that boils down to what the contracts *actually say* that govern the relationships between Brookshire and Hiott on one hand and between Brookshire and Community First on the other. As a matter of public policy and law, Brookshire is charged with knowledge of and is bound by the terms of her written contracts. *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986) ("One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it."); *Regions Bank v. Schmauch*, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003). Here, those terms are the unambiguous terms of the POA and Account Agreement. (R. pp. 321-323, 432-436). In addition, under the UCC, Brookshire has a duty to obtain and review her Account statements – in essence she is charged with knowledge of the contents of her statements. *See infra* pp. 23-27.

The Account Agreement clearly and unambiguously states that the Account description is "Business Premium Investment Checking" and the owner/signer of the Account is "Debi Baker Brookshire Trustee." (R. pp. 432-433; more legible copy at R. pp. 121-122). Brookshire contorts the plain language of the Account Agreement to argue that the typed words "Trust Accounts" somehow transforms the disclosed "Business Premium Investment Checking" Account into a trust account with Community First serving as trustee, yet completely fails to mention that the typed words "Trust Accounts" appears under the heading "Ownership of Account." (R. pp. 432-433; more legible copy at R. pp. 121-122). The plain language of the Account Agreement and other Account opening documentation (R. pp. 867-881) show exactly what Community First has always maintained: this was a checking account opened in the name of and owned by a trust. (*See* R. p. 1150, line 23 – p. 1151, line 13; p. 1152, line 13 – p. 1157, line 19; p. 1158, line 20 – p. 1162, line

19; p. 1169, line 5 – p. 1170, line 13). Brookshire's monthly Account statements that Community First sent to her show that Brookshire herself was serving as trustee of the trust—not Community First. (*See* R. pp. 417, 422, 425, 430).

Contract language matters and controls this case. The POA states that Hiott is Brookshire's attorney in fact. (R. p. 321). Community First is not mentioned or even impliedly referenced in the POA, nor is Hiott's profession as a banker. (R. pp. 321-323). Brookshire cannot create a trust account (or a genuine issue of material fact that she created a trust account) by assuming she had one. Brookshire's assumption is wholly inconsistent with the actual agreements, the monthly Account statements, and the *voluminous* other documents showing that Hiott was acting as her attorney in fact under the POA in disbursing her money from the Account (along with keeping children for her, storing her motor home, negotiating her lease, and personally keeping $500,000 worth of her jewelry and silver—hardly actions undertaken by someone acting as a banker). Not one document and not one piece of record evidence demonstrate that Community First was acting as a trustee for Brookshire. In fact, Brookshire's own expert testified that Brookshire did not have a "trust account at Community First with the bank serving as a trustee," nor is Brookshire's expert "aware of any agreement where [Community First] undertook any trustee duties for [her.]" (R. p. 1185, line 20 – p. 1186, line 2).

2. Hiott's employment at Community First does not give rise to any duties to Brookshire that dilute the authority Brookshire gave to Hiott in the POA.

Community First does not owe any duties to Brookshire by virtue of Hiott's employment there that dilute the authority Brookshire gave to Hiott in the POA. As it pertains to transactions from the Account and as the POA makes clear, Hiott was acting as *Brookshire's* agent—not as an agent of Community First. Brookshire, however, argues that the actions Hiott undertook with Brookshire's funds were motivated by a desire to benefit other Community First customers or

account holders and that such motivation makes Community First responsible for his actions with regard to the Account. Thus, reasons Brookshire, Community First cannot statutorily rely on the POA as a third party under S.C. Code Ann. § 62-5-501(F)(2). Brookshire cites no actual evidentiary or legal authority for this assertion, and, indeed, there is no causal relationship between Hiott's employment status and the disbursements Hiott was authorized to make from the Account. Under the plain language of the POA, Hiott could have made every transaction and payment from Brookshire's funds at any bank. The mechanics of how he did so are unrelated to the expansive grant of authority Brookshire voluntarily gave to Hiott in the POA and do not impact the ability of a third party (like Community First or any other bank, stock broker, or institution) to rely on the POA with the protections provided by South Carolina law. Under the plain terms of the POA, Brookshire—not Community First—was the master of the scope of authority she gave to Hiott.

Whether a given relationship gives rise to certain duties and the contours of those legal duties are questions of law for the court to decide. *Roe v. Bibby*, 410 S.C. 287, 293, 763 S.E.2d 645, 648 (Ct. App. 2014). As the POA and the Account Agreement are contracts, the court's role is to interpret these unambiguous contracts using the language found in the four corners of the respective documents to determine the duties owed to and by the parties to those contracts. *See Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 594, 493 S.E.2d 875, 879 (Ct. App. 1997). In the POA, Brookshire granted Hiott individually the authority to "[c]onduct any business with any banking or financial institution," including "making deposits and withdrawals." (R. p. 321). Under this grant of authority, Community First had no right to control Hiott's decisions about how to spend Brookshire's funds. Brookshire voluntarily and openly ceded that control to Hiott—and Hiott alone—on May 25, 2007. The Account Agreement unambiguously sets forth the terms governing the relationship between Brookshire and Community First and contains no

language to indicate that Community First is serving as a trustee for Brookshire or that Community First is exerting any control over the propriety of disbursements from the Account. (R. pp. 432-436).

3. Brookshire misrepresents Hiott's activities about which she complains.

Brookshire states that Hiott, in conducting authorized business on her behalf, "utilize[ed] systems and practices that were contrary to accepted banking practice" and that "the existence of the POA, coupled with [Brookshire's] account at the institution where Hiott worked, was against [Community First's] own policy." Initial Brief p. 20. She also alleges that Community First "lack[ed] internal controls" with regard to Hiott. *Id.* p. 21. No evidence exists to support these claims. Indeed, the "evidence" that Brookshire cites in support is nothing but improper speculation. *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) (A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."); *see also Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995) ("Mere unsupported speculation ... is not enough to defeat a summary judgment motion."). (*See* R. p. 1045, lines 17-23) (testimony of Don Jones that he was interested in whether or not certain activities at the bank were permitted or not but he "never did get a legal opinion on it or anything like that"); (R. p. 1048, ¶ 8) (written report of Kenneth Richey that "Hiott was conducting stock transactions on behalf of Brookshire and the Bank" thus creating "a conflict of interest"). Mr. Richey's report is pure speculation, as Mr. Richey testified in his deposition that he did not actually know what Hiott's role was in any buying and selling of stock. (R. p. 1186, lines 21-24). Mr. Richey further testified that he has never reviewed any Community First policies and procedures to actually know what they say. (R. p. 1179, lines 7-9). He further could not cite any published

industry standard that discusses whether it is appropriate for a bank officer to hold a power of attorney for a bank customer. (R. p. 1183, line 22 – p. 1184, line 2).[8]

Brookshire also untimely and inappropriately complains about Hiott's purchases of stock for her. *See supra* pp. 14-15. However, Brookshire concedes that "the POA allowed Hiott to purchase and sell stock on [Brookshire's] behalf." Initial Brief, pp. 21-22. It is undisputed that Hiott did, in fact, purchase and sell stock on Brookshire's behalf. (R. p. 1042). Brookshire, however, misrepresents the evidence in the record for how Hiott or Community First effected such transactions. She claims that Hiott was "not authorized [by Community First] to act" with regard to stock transactions (Initial Brief pp. 21-22) and that Hiott was "trading Respondent band [sic] stock." Initial Brief p. 14. The only evidence in the record shows that a company called Transfer Online, Inc. actually transferred stock from Brookshire. (R. p. 1042). As shown on this form, the owner of Community First Bancorporation stock can effect the transfer of that stock to another party through the transfer agent (Transfer Online, Inc.) without the participation of or input from Community First or its holding company, Community First Bancorporation. Based on the evidence in the record, Hiott's employment and duties at Community First are unconnected to his actions under the POA to effect a stock transfer for Brookshire through Transfer Online, Inc.

Brookshire also argues that the POA does not cover claims and causes of action that "go beyond the actual transfer of funds themselves." Initial Brief p. 22.[9] Brookshire, however, has

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[8] This is of no legal consequence, as the Supreme Court has squarely rejected the contention that a bank's policy manual creates a duty by the bank to its customer—the manual is for the bank's protection only. *Citizens & S. Nat'l Bank v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994); *see also Coristo v. Twin City Bank*, 520 S.W.2d 218, 221-22 (Ark. 1975) (finding bank policy enacted for "the convenience and protection of the bank, and, as such, may be waived by the bank").

[9] Brookshire identifies both her Negligence/Gross Negligence cause of action and her Accounting cause of action as claims not covered by the POA. The trial court granted summary

not alleged any claims or causes of action that go beyond the actual transfer of the funds in the Account. Her damages claims are for the amount of money she held in the Account, and the root of all of her claims is the Account. *See generally* Complaint. Indeed, it could not be otherwise because the relationship between Brookshire and Community First is defined in the Account Agreement (R. pp. 432-436), and her sole legal relationship with Community First is by virtue of the Account. As Brookshire has conceded, all of Hiott's disbursements from the Account were authorized by the POA. Consequently, summary judgment was warranted to Community First on all claims and causes of action due to the terms of the POA, Community First's statutory right to rely on the POA, and Community First's statutory *lack* of obligation to monitor or inquire about how Hiott undertook his authorized actions under the POA.

D. The trial court correctly found that Brookshire's claims regarding the Account are time barred under the UCC because Brookshire failed to timely challenge the disbursements.

Brookshire's claims regarding the propriety of certain disbursements from her Account are barred under the UCC because Brookshire utterly failed to promptly review the monthly statements for her Account and bring her concerns about Hiott allegedly exceeding the scope of his authorization in the conduct of her business to Community First's attention. *See* S.C. Code Ann. § 36-4-406 (2003 & Supp. 2019) as applicable.[10] Both versions of this section impose a strict one year maximum time limit for a customer to discover and report unauthorized signatures[11] on

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judgment to Community First on both of those causes of action, and Brookshire failed to appeal the granting of summary judgment on those specific causes of action. *See* Initial Brief, p. 1.

[10] South Carolina adopted Revised Article 4 of the UCC effective July 1, 2008. Consequently, slightly different rules apply to pre-July 1, 2008 Account statements versus post-July 1, 2008 Account statements. 2008 Act No. 204, § 4.A.

[11] "Unauthorized signature" is a defined term in the UCC and means one "made without actual, implied or apparent authority and includes a forgery." S.C. Code Ann. § 36-1-201(43) (2003); S.C. Code Ann. § 36-1-201(41) (Supp. 2019) (unchanged in meaning, though using slightly different phrasing); *see also* S.C. Code Ann. § 36-1-201, Off. Cmt. 41 (Supp. 2019).

items.[12] S.C. Code Ann. § 36-4-406(4) (2003); S.C. Code Ann. § 36-4-406(f) (Supp. 2019); *see also Sabatino v. Atl. Sav. Bank, F.S.B.*, 314 S.C. 402, 403, 444 S.E.2d 537, 538 (Ct. App. 1994). It is critically important for account holders to promptly review their bank statements because:

> One of the most serious consequences of failure of the customer to comply with the requirements [to review statements] is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items.

S.C. Code Ann. § 36-4-406 (2003), Off. Cmt. 3. Brookshire's own expert agrees, as he testified that it is "absolutely" important for the bank's "customer to review the statements that are sent to the customer" and that "the customer bears the responsibility for keeping up with his or her bank accounts." (R. p. 814, lines 5-16). He further testified that the bank customer should notify the bank if a monthly statement does not arrive. (R. p. 814, lines 17-20).

In addition, South Carolina law specifically permits banks and their customers to vary by agreement the timeframe in which a customer must review and report unauthorized signatures or other concerns about transactions on the account. S.C. Code Ann. § 36-4-103(1) (2003); S.C. Code Ann. § 36-4-103(a) & S.C. Reporter's Cmt. (Supp. 2019). Brookshire's Account Agreement with Community First sets the timeframe for her to report unauthorized signatures or other Account errors to Community First as 60 days after Community First sends the monthly statement. The monthly statements reinforce this timeframe with the monthly reminder to "[p]lease examine

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[12] "Item" is a defined term in the UCC and meant "any instrument for the payment of money even though it is not negotiable but does not include money" before July 1, 2008. S.C. Code Ann. § 36-4-104(1)(g) (2003). After July 1, 2008, the definition of "item" changed slightly to "an instrument or a promise or order to pay money handled by a bank for collection or payment." S.C. Code Ann. § 36-4-104(a)(9) (Supp. 2019). Both definitions of "item" encompass a wide variety of instructions to pay beyond traditional checks, including journal vouchers, deposit slips, account withdrawal orders, and handwritten notes asking for cashiers' checks. *See, e.g. Am. Airlines Emps. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 92-94 (Tex. 2000).

immediately and report if incorrect. If no reply is received within **60** days the account will be considered correct." (*See* R. pp. 410, 418, 423, 426) (emphasis in original).

Community First mailed monthly statements for the Account to the address where Brookshire was receiving her mail from the Account's inception in June 2007 until early 2010, when Community First received for the first time in April 2010 a statement addressed to Brookshire in return mail as "unable to forward." (R. p. 400, ¶¶ 17-18). Community First's account management system automatically generates and prints a periodic account statement for each of its more than 25,000 accounts. (R. pp. 396-397, ¶¶ 3, 8). These account statements are routinely, regularly, and automatically compiled, processed, and transmitted for mailing with the United States Postal Service. (R. pp. 397-399, ¶¶ 9-12). At all times during the Account's existence, Community First followed its normal procedures with regard to the Account statements. (*See* R. p. 399, ¶ 14). This evidence of Community First's "usage and custom ... in delivering statements" to its customers is competent proof of delivery. *Cooley v. First Nat'l Bank of Little Rock*, 635 S.W.2d 250, 252 (Ark. 1982);[13] *see also Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) ("Evidence of mailing establishes a rebuttable presumption of receipt.").

Brookshire's testimony that she did not receive monthly statements from Community First is unavailing and fails to present a genuine issue of material fact to preclude summary judgment to Community First. First, ***Brookshire actually received at least four monthly statements, as she produced original statements in discovery.*** (R. pp. 402-404, ¶¶ 27-35). The only time original

[13] For the UCC, the General Assembly has provided "a statement of legislative direction to the courts of a tendency to imply an interpretation and construction of the Code sections which is consistent with the case law construction of those sections in other Code jurisdictions." S.C. Code Ann. § 36-1-103, S.C. Reporter's Cmt. (Supp. 2019); *see also In re Parker*, 363 B.R. 769, 774 (Bankr. D.S.C. 2006) ("Since South Carolina has adopted a uniform law, the Court is guided by decisions in other jurisdictions that have interpreted this provision of the UCC.").

statements are ever printed by Community First are when they are placed in the mail. (R. p. 401, ¶ 21). They are printed and mailed within a few days of the closing period represented in the respective Account statement. (*See* R. pp. 398-400, 404, ¶¶ 10, 12, 17, 35). Brookshire's *actual receipt* of statements is dispositive.

Second, the burden is on the bank customer—not the bank—to ensure receipt of account statements. S.C. Code Ann. §§ 36-1-201, 36-4-406 (2003), § 36-1-201(36)(A), 36-4-406(a) (Supp. 2019) (describing the bank's "sending" of statements to customers as the operative event giving rise to the customer's duty of examination and further defining "send" in part as "to deposit in the mail"). The UCC allocates the risk of loss or interception of bank statements to the bank customer. *Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567, 571-72 (Minn. 1997) (collecting cases). In other words, the bank customer has an affirmative duty to ensure that he or she is receiving account statements, and the customer's claims will be barred if the customer fails to timely discharge this duty. *Id.* at 569-70; *Mesnick v. Hempstead Bank*, 434 N.Y.S.2d 579, 580 (N.Y. Sup. Ct. 1980); *Westport Bank & Trust Co. v. Lodge*, 325 A.2d 222, 223-24 (Conn. 1973); *Terry v. Puget Sound Nat'l Bank*, 492 P.2d 534, 535 (Wash. 1972); *Myrick v. Nat'l Sav. & Trust Co.*, 268 A.2d 526, 528 (D.C. 1970) (all holding the claims are time barred when bank customers fail to timely notify the bank of missing statements regardless of reason).

Indeed, Brookshire's own expert opined that Brookshire, or any reasonable bank customer, could wait, at most, 90 days to notify Community First that she was not receiving Account statements. (R. p. 815, line 22 – p. 816, line 11; *see also* R. p. 282, line 24 – p. 285, line 10). Brookshire's failure to appropriately discharge her duties as a bank customer serves as an absolute bar to all of her claims against Community First. *Peters v. Riggs Nat'l Bank, N.A.*, 942 A.2d 1163,

1168-69 (D.C. 2008); *First Place Computers, Inc. v. Sec. Nat'l Bank of Omaha*, 558 N.W.2d 57, 60 (Neb. 1997) (both holding that 4-406 is a statute of repose that cannot be tolled).

Applying the UCC here, Community First sent and Brookshire received the July 2007 Account statement in or around early August 2007. (R. pp. 399-400, 403, ¶¶ 14, 16, 17, 32). Brookshire thereafter had *at most* one year to challenge any transactions reflected on that statement. Applying the Account Agreement reduces this timeframe from one year to 60 days. (*See* R. p. 435). Thus, the UCC statute of repose ran, at the latest, in August ***2008*** for every transaction reflected on the July 2007 statement. The same analysis applies to each and every monthly Account statement that Community First sent to Brookshire. Brookshire was on actual and/or constructive notice of her Account balance and the amount of the withdrawals and deposits that comprised that balance each month, and the corresponding maximum time limitation of one year would thus shift one month at a time. In other words, each monthly Account statement represents a separate timeframe for challenging the Account balance and transactions reflected therein. Brookshire's failure to timely do so with each passing month renders any challenge to the transactions time-barred.

It is insufficient at summary judgment for Brookshire to simply deny that she received statements from Community First (testimony that Brookshire's document production flatly contradicts). Instead, she must present evidence that raises a genuine issue of material fact that Community First did not "send" the statements. This she has not done and cannot do. Brookshire's failure to ensure receipt of and to review her statements and report any unauthorized signatures or other specific disbursement concerns to Community First within the requisite time period bars all her claims against Community First. *Sabatino*, 314 S.C. at 404, 444 S.E.2d at 538; *Villa Contracting Co., Inc. v. Summit Bancorporation*, 695 A.2d 762, 766 (N.J. Super. Ct. Law Div.

1996) ("[T]he customer must deal in specifics rather than generalities. In other words, in order to satisfy the statute, he must notify the bank of exactly which items" are unauthorized.) The trial court appropriately awarded summary judgment to Community First on all of Brookshire's claims.

Brookshire argues that the UCC's statute of repose does not apply to her claims because "[t]he transactions and transfers that occurred to and from [Brookshire's] account were not unauthorized as contemplated by the UCC." Initial Brief p. 19. Unauthorized is defined in the UCC as "without actual, implied or apparent authority." S.C. Code Ann. § 36-1-201(43) (2003); S.C. Code Ann. § 36-1-201(41) (Supp. 2019). If the disbursements from the Account were "not unauthorized," then they were made *with* actual, implied, or apparent authority. Consequently, Brookshire's entire case against Community First falls apart, and summary judgment on all of Brookshire's claims is fully warranted and should be affirmed in full.

Brookshire also argues that the UCC's statute of repose does not apply because she is not complaining about a forged signature. Brookshire reads the UCC too narrowly. The entire premise of Brookshire's lawsuit seeks to hold Community First liable for permitting Hiott to make disbursements from her Account. Brookshire testified that if she had seen the bank statement from July 2007 showing a $500,000 withdrawal several weeks after the Account was opened, she would have contested it and asked questions about it. (R. p. 275, lines 1-25; p. 278, lines 7-15). Further, the UCC's statute of repose is not just about forgeries. It is about bringing unauthorized or inappropriate account activity to the bank's attention in a timely manner so that losses may be stopped. *See* S.C. Code Ann. § 36-4-406, S.C. Rptr. Cmt. ("[I]f the customer should reasonably have discovered the unauthorized payment based upon the statement or items provided, Subsection (c) also requires the customer to notify the payor bank promptly of the relevant facts."). The Account Agreement reinforces this purpose: Brookshire "further agree[s] that if you fail to report

any unauthorized signatures, alterations, forgeries, *or any other errors in your account* within 60 days of when we first send or make the statement available, you cannot assert a claim against us on any items in that statement, and as between you and us the loss will be entirely yours." (R. p. 435) (emphasis added). Brookshire utterly failed in her duties as an Account holder at Community First, and her complaints about Account disbursements coming *years* after they occurred are time barred. The trial court correctly granted summary judgment to Community First on all of Brookshire's claims.

E. The trial court correctly found that all of Brookshire's claims are time barred pursuant to S.C. Code Ann. § 15-3-530(5).

Brookshire's claims are also barred by the three year statute of limitations applicable to all of Brookshire's causes of action. S.C. Code Ann. § 15-3-530(5) (2005).

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation." *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115, 124, 781 S.E.2d 126, 131 (Ct. App. 2015).

The discovery rule applies to the running of the statute of limitations here, and Brookshire knew or should have known of the alleged harm more than three years before August 1, 2014, the date of the tolling agreement between Brookshire and Community First, that preceded the filing of her Complaint on September 8, 2014. *See* S.C. Code Ann. § 15-3-535 (2005). This is true for multiple reasons, as Brookshire both received the monthly statements for her Account and

suspected Hiott of misconduct with regard to her Account well over three years prior to August 1, 2014. *See* S.C. Code Ann. §§ 15-3-530(5), 15-3-535 (2005). The law is clear:

> Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. This standard as to when the limitations period begins to run is *objective* rather than *subjective*. Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his favor ....

Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 787 S.E.2d 485, 489-90 (2016) (citations and quotations omitted). The statute of limitations begins running when "the exercise of reasonable diligence" puts one "on notice that some right of his has been invaded or that some claim against another party *might* exist and *not* when advice of counsel is sought or a full-blown theory developed." *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000) (emphases added); *see also Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 409-10, 680 S.E.2d 778, 783-84 (Ct. App. 2009) (holding that receipt of bank statements in June 2000 that disclosed account balances placed the account holder "on notice that she had some type of claim for any perceived discrepancy, even if she did not know the precise details behind the discrepancy" and barred lawsuit against bank brought in September 2003).

1. Brookshire received statements for the Account more than three years prior to August 1, 2014.

Community First sent and Brookshire actually or constructively received monthly Account statements from June 2007 through January 2010. *See supra* pp. 23-27; (R. pp. 396-436). Brookshire was on actual and/or constructive notice *every month* for the transactions found in each statement such that any claim as to those transactions would expire, at the *very* longest, three years and 60 days from when Community First sent each respective statement to Brookshire.

Brookshire's lawsuit is thus time-barred under the discovery rule. *Gibson*, 383 S.C. at 409-10, 680 S.E.2d at 783-84.

Further, Brookshire admits that she received a compiled copy of her Account statements for July 2007 through November 2010 in March or April 2011—well over three years before August 1, 2014. (R. p. 244, line 18 – p. 248, line 12). Brookshire testified that the first time she knew that the $500,000 disbursement of July 2007 had been made was when she reviewed a version of the July 2007 statement with "Lafayette, single premium annuity to children" written on it in blue ink. (R. p. 221, line 25 – p. 222, line 20). Ms. McDaniel wrote that information on a copy of the July 2007 statement and provided the Account statement packet to Brookshire no later than March or April 2011. (R. p. 248, lines 1-12; p. 495, lines 3-16). Brookshire's lawsuit is thus barred by the three year statute of limitations under the discovery rule. *Gibson*, 383 S.C. at 409-10, 680 S.E.2d at 783-84.

2. Brookshire believed that Hiott had misappropriated her funds or otherwise was untruthful with her about her affairs more than three years prior to August 1, 2014.

Brookshire testified that, by the spring and summer of 2010, she had become distrustful of Hiott, believed him to be lying to her about her affairs and her Account at Community First, and suspected that he had acted inappropriately with regard to her finances. (R. p. 199, line 4 – p. 200, line 12). She engaged Ms. McDaniel in August 2010 to investigate her concerns regarding Hiott and Community First. (R. p. 202, lines 14-16). Consequently, Brookshire *actually knew* in the summer of 2010 "that some claim ... might exist" with regard to the Account and her finances. *Grillo*, 340 S.C. at 503, 532 S.E.2d at 3. This actual knowledge is more than sufficient to begin

the running of the statute of limitations, and the trial court correctly found that Brookshire's lawsuit was barred.

F. Equitable doctrines do not save Brookshire's time-barred claims.

Two distinct, but related and potentially overlapping, equitable doctrines can apply in limited situations to toll or estop the statute of limitations defense: equitable tolling and equitable estoppel. *See, e.g. Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 370, 725 S.E.2d 112, 124 (Ct. App. 2012). The doctrines "should be used sparingly and only when the interests of justice compel [their] use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116, 687 S.E.2d 29, 32 (2009). Contrary to Brookshire's arguments, neither doctrine saves her time-barred claims.

1. Equitable tolling.

Equitable tolling is a "judicially created" doctrine stemming "from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.* at 115, 687 S.E.2d at 32. *Hooper* describes a non-exhaustive list of circumstances where equitable tolling might apply, with the common theme being "where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* Equitable tolling may only be applied "where it is justified under *all* the circumstances." *Id.* "The party claiming the statute of limitations should be tolled bears the burden of establishing facts sufficient to justify its use." *Id.*

South Carolina courts discussing equitable tolling have applied it to toll the statute of limitations in extraordinary situations where—due to no fault of the plaintiff—an extraordinary event occurred to delay the proper commencement of a lawsuit. In *Hooper*, the plaintiff filed the lawsuit well within the statute of limitations. *Id.* at 111, 687 S.E.2d at 30. Yet due to the defendant's "failure to supply the correct information regarding its agent to the Secretary of State as required by law," the plaintiff "diligently pursued service on what turned out to be a nonexistent

agent," and was consequently only able to accomplish service "approximately one week past" the applicable time limits to effectuate service. *Id.* at 118-19, 687 S.E.2d at 34. In *Magnolia North*, the Court of Appeals found that equitable tolling was appropriate in a case brought by a property owner's association and filed after the statute of limitations expired because, until the date of "turnover," the association's board was controlled by the very defendants the association would need to sue. The court found "unpersuasive" the "claim that an organization [the defendants] controlled would have initiated an action against itself" prior to "turnover." *Magnolia N.*, 397 S.C. at 372, 725 S.E.2d at 125. Both cases emphasized that plaintiffs must be diligent in all of their endeavors to properly invoke equitable tolling. *Id.*; *Hooper*, 386 S.C. at 119, 687 S.E.2d at 34.

In contrast, courts applying South Carolina law do *not* apply equitable tolling if the facts and circumstances show that the plaintiff was on notice of potential problems *before* receiving misinformation from a defendant. *Vieira v. Simpson*, No. 2:13-cv-2610, 2015 WL 1299959, *6 (D.S.C. March 23, 2015) (applying *Hooper* and finding that a defendant attorney's provision of misinformation after plaintiffs became "suspicious" "was not an extraordinary event that kept the [plaintiffs] in the dark or prevented them from recognizing any impropriety"). Indeed, believing "that *perhaps* a lawsuit was unnecessary" is not sufficient to meet the plaintiff's burden on equitable tolling. *Id.*; *see also In re Stotz Fredenhagen Indus., Inc.*, 554 B.R. 777, 787 (Bankr. D.S.C. 2016) (applying *Hooper* and holding that "[t]he evidence and allegations of delay, withholding of information, or lack of cooperation by other parties here is not enough. The evidence must also support a finding that these things *caused* the requisite period of delay and also must support a finding that the period of delay was *beyond Plaintiff's control.*") (emphasis in original). Put simply, equitable tolling is an extraordinary remedy *only* applied when the plaintiff

has been diligent, and some outside force beyond plaintiff's control wholly prevents the commencement of a timely lawsuit.

2. Equitable estoppel.

Equitable estoppel is slightly different from equitable tolling and centers more on the plaintiff's reasonable reliance on specific conduct of a defendant. "A defendant is estopped to assert the statute of limitations defense against a plaintiff's claim if the *defendant's conduct* has induced the delay that otherwise would give operation to the statute. The conduct may involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to otherwise forbear exercising the right to sue." *Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 211, 503 S.E.2d 761, 768 (Ct. App. 1998) (emphasis added). The determination of whether equitable estoppel is warranted is a matter for the court alone. *Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997). In order to establish equitable estoppel, a plaintiff must present evidence of her "(1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." *Schmauch*, 354 S.C. at 675, 582 S.E.2d at 446. In addition, "[t]o prove equitable estoppel under South Carolina law, the aggrieved party must have 'reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.'" *Dilmar Oil Co., Inc. v. Fed. Mut. Ins. Co.*, 986 F. Supp. 959, 975 (D.S.C. 1997) (quoting *Dillon Cnty. Sch. Dist. No. 2. v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555, 561 (Ct. App. 1985)). The gravamen of an estoppel showing refers to "lull[ing the plaintiff] into a sense of security, preventing [her] from filing suit before the running of the statute." *Republic Contracting*, 332 S.C. at 211, 503 S.E.2d at 769. However, "if the obstructive behavior occurs *after* the plaintiff's inquiry has reached the point at which he has discovered that he has a claim upon which to found a suit, the defendant's obstructionism has no

causal significance, and so is not a ground for estoppel." *Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 385 (7th Cir. 2010); *see also Little v. Brown & Williamson Tobacco Corp.*, No. 2:98-1879-23, 2000 WL 33957172, *6 (D.S.C. May 8, 2000) (applying South Carolina law on equitable estoppel and holding that equitable estoppel did not apply because Plaintiff failed to "offer any proof" that he relied on allegedly false statements by tobacco company executives in delaying his suit).

3. Brookshire's claims to equitable relief fail.

Brookshire argues that Community First is estopped from invoking the statute of limitations to bar her claims or that the statute should be equitably tolled for two reasons: first, Brookshire claims that she had a right to an "accounting" and that Community First's failure to provide her with her demanded "accounting" saves her otherwise time-barred claims. Second, Brookshire claims that Hiott misrepresented to her the nature and recipient of the $500,000 withdrawal of July 12, 2007. Brookshire claims that her representatives were told that the $500,000 withdrawal in July 2007 was made to purchase annuities for the children then in her custody when in fact the funds were actually sent to Mr. Crosby.

Brookshire's attempt to wiggle around her statute of limitations problems suffers from multiple flaws. First, and foundationally, Brookshire confuses the legal triggering of the statute of limitations with the level of proof necessary to win a lawsuit. In essence, Brookshire argues that because Hiott and Community First did not (allegedly) provide complete and open pre-suit discovery to her, the statute of limitations does not begin to run until all of her questions are answered. Not so. In South Carolina, "[t]he statute of limitations begins to run when a plaintiff knows or should know of a potential claim against another party, *not when the plaintiff develops a full-blown theory of recovery.*" *Republic Contracting*, 332 S.C. at 208, 503 S.E.2d at 767 (emphasis added). Indeed, "[a] plaintiff is not required to have collected, *before* he files suit, all

the evidence he needs in order to win the suit. Otherwise the civil procedure rules would have to authorize precomplaint discovery rather than just pretrial discovery." *Jay E. Hayden*, 610 F.3d at 386; *see also Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) ("[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial" to the statute of limitations inquiry.). In the specific context of a bank account, if a customer "disagreed with the bank's representation of [the account balance shown in a statement], she was then on notice that she had some type of claim for any perceived discrepancy, even if she did not know the precise details behind the discrepancy." *Gibson*, 383 S.C. at 409, 680 S.E.2d at 783-84.

Second, equitable doctrines do not apply to the UCC's one year maximum statute of repose. It cannot be tolled, and its running cannot be estopped—even when the result reached may appear harsh. *Peters*, 942 A.2d at 1169 (finding claims for breach of contract, negligence, and statutory violations to be time-barred under the UCC even when the bank customer had died); *Siecinski v. First State Bank of E. Detroit*, 531 N.W.2d 768, 769 (Mich. Ct. App. 1995) (finding claims for breach of contract, negligence, and conversion to be time-barred under the UCC when an account holder suffered a head injury, fell into a coma, and died soon after a woman presented the bank with a forged power of attorney and ultimately withdrew all funds in the account). This is in accord with South Carolina law. *See Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 244 (1993) ("Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which *liability no longer exists*.") (emphasis added); *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (describing how statutes of repose cannot be tolled or extended "for any reason because to do so would upset the economic balance

struck by the legislative body"). Brookshire's failure to challenge disbursements within the applicable UCC time limits renders her claims against Community First completely barred.

Third, the undisputed facts show that Brookshire was on notice "that a claim against another party might exist," *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647, well before August 2011. *See supra* pp. 9-10; (R. p. 194, lines 13-23; p. 199, line 4 – p. 201, line 16; p. 202, lines 1-22; p. 204, lines 3-25; p. 205, line 17 – p. 206, line 2; p. 225, lines 5-11; p. 233, line 2 – p. 234, line 24; p. 235, line 3 – p. 236, line 1; p. 237, line 4 – p. 239, line 25; p. 240, lines 2-22; p. 247, line 6 – p. 248, line 12; p. 259, lines 1-21; p. 270, lines 1-25; p. 274, line 15 – p. 275, line 25; p. 277, lines 2-4; p. 278, lines 7-15; p. 489, line 1 – p. 490, line 19; pp. 506-507). Despite all of these concerns, disputes, and contradictory information, no suit was filed for well over three more years.

Fourth, Brookshire's reasons for invoking equitable estoppel or equitable tolling are blatantly pretextual given the undisputed facts recited above. She claims that she is entitled to equitable relief because the defendants failed to provide her an "accounting." It is undisputed that Community First sent her monthly Account statements and further provided her attorney with a full set of statements to date no later than March 2011. Under South Carolina law, the receipt of bank statements is wholly sufficient on its own to trigger and begin the statute of limitations. *Gibson*, 383 S.C. at 409, 680 S.E.2d at 783-84; *Sabatino*, 314 S.C. at 404-05, 444 S.E.2d at 538. This is in addition to the legal presumption of bank statement receipt that the UCC imposes on bank customers. *See supra* pp. 25-27. Brookshire began seeking what she called a "full accounting" from Hiott no later than September 21, 2010—almost four years before she filed suit. (R. pp. 506-507).[14] Viewing the evidence in the light most favorable to Brookshire, the simple

[14] Brookshire failed to define what she means by a "full accounting" as it pertains to Community First. (*See* R. pp. 506-507; *see also* R. pp. 321-322 ("My Agent [defined as Hiott individually] shall provide an accounting for all funds handled and all acts performed as my Agent,

fact that her attorney began asking for a "full accounting" due to "serious inconsistencies" with regard to her Account in September 2010 is uncontroverted evidence that Brookshire was on *actual notice* that she had "a potential claim against another party" at that time. *Republic Contracting*, 332 S.C. at 208, 503 S.E.2d at 767. Brookshire has made no argument or advanced any evidence to show that any failure by Community First to provide her a "full accounting" "lulled" her into a sense of security that her perceived injury would be "righted" absent legal action. *See id.* at 211, 503 S.E.2d at 768-69. Indeed, Community First's alleged failure to provide something she began asking for in September 2010 would *confirm* her need to file suit within the requisite time period.

Brookshire also argues that Hiott's changing story on the recipient of the July 12, 2007 $500,000 disbursement estops Community First from defending on statute of limitations grounds or otherwise tolls the statute. Again, this is pretextual. Brookshire bears the burden of proving her *reasonable reliance* on Community First's words or conduct that *caused* her to file her lawsuit after the statute of limitations had expired. *Dilmar Oil*, 986 F. Supp. at 972-73. Brookshire must do more than suggest some sort of "cover-up"—instead, she must provide an evidentiary link between this alleged "cover-up" and "lulling" her into a sense of security such that she was prevented from filing suit before the statute of limitations expired. *Republic Contracting*, 332 S.C. at 211, 503 S.E.2d at 768-69. Brookshire has cited no evidence to meet this standard. The earliest time that a specific explanation for the July 2007 $500,000 disbursement was given to Brookshire or her representative was when Ms. McDaniel wrote "[a]nnuity for children" and "Lafayette Life Product Single premium annuity" on a copy of Brookshire's July 2007 Account statement that was reprinted on November 18, 2010. (R. p. 495, lines 3-16; p. 509). Ms. McDaniel received this

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if I so request ...."). It is undisputed that Brookshire or her prior counsel was provided with a reprinted set of Account statements in late 2010 or early 2011. (R. p. 244, line 18 – p. 248, line 12; p. 493, line 1 – p. 494, line 24; p. 496, lines 4-10).

information during her representation of Brookshire, which ended on March 11, 2011. (R. p. 499, lines 19-22). According to Brookshire, Hiott gave *different* stories about the disbursement on various later occasions, naming at various times Lafayette, Nationwide, and Holcombe Insurance Agency as recipients of these funds for the children's benefit before informing counsel for Community First that the $500,000 was actually used as an investment with Mr. Crosby. (*See* R. pp. 818-819). Counsel for Brookshire was informed of the Crosby investment on July 18, 2013. (R. pp. 818-819).

Brookshire's testimony belies any reasonable, causative reliance on Hiott's changing story. Brookshire testified that there was nothing that Hiott could have spent $500,000 on in July 2007 that would have been appropriate or authorized by her. (R. p. 225, lines 5-11). She testified that the children in her custody were well taken care of financially, did not need life insurance, and that she never directed Hiott to procure an annuity, life insurance policy, or trust for the children. (R. p. 225, lines 5-11; p. 237, line 17 – p. 239, line 25; p. 240, lines 2-22). In other words, Brookshire's unequivocal testimony is that *no matter what, no matter to whom, and no matter why*, the $500,000 disbursement of July 12, 2007, was unauthorized, inappropriate, and wrongful. Thus, Hiott's stories are of no legal consequence, and Brookshire did not actually rely on them to determine whether or not she needed to file suit. To her, the wrongful act is the disbursement of $500,000 itself. By waiting well over three years from March 2011 to file suit, Brookshire simply "slept on [her] rights." *Moates*, 322 S.C. at 176, 470 S.E.2d at 404. The trial court properly granted summary judgment to Community First. *See Schmauch*, 354 S.C. at 675, 582 S.E.2d at 446 ("[S]ummary judgment is proper where there is no evidence of conduct warranting estoppel.").

G. The trial court correctly held that S.C. Code Ann. § 15-3-110 (2005) does not apply to this matter.

Under South Carolina law, statutes of limitation do not apply to actions to "enforce the payment of bills, notes or other evidences of debt issued by moneyed corporations or issued or put in circulation as money." S.C. Code Ann. § 15-3-110 (2005). Although it does not appear that South Carolina courts have construed this particular statute beyond defining "moneyed corporations," several other states have enacted similar statutes. *See* N.D. Cent. Code Ann. § 28-01-35 (West); S.D. Codified Laws § 15-2-18; Mo. Ann. Stat. § 516.310 (West); Miss. Code. Ann. § 15-1-79 (West). Both historical banking practice and cases from other jurisdictions with these statutes demonstrate that this statute is antiquated and applies only to bank-specific bills, notes, or actual tangible instruments intended to function as currency, which are no longer circulated and of which there is no evidence of use by Community First here.

In *Butts v. Vicksburg & Meridian R.R. Co.*, 63 Miss. 462 (Miss. 1886), the appellants argued that notes issued by a railroad company were substantially the same as bank notes to which the statute of limitation did not apply. The Supreme Court of Mississippi held that the statutory exception to the statute of limitation did not apply because the railroad-issued notes had ceased to circulate as currency and had ceased to be taken in and reissued by banks. *Id.* at 465. The court explained why bank notes were excepted from the statute of limitation:

> While the general rule is that statutes of limitation do not apply to bank bills, because they are by the consent of mankind and course of business *considered as money*, and that their date is no evidence of the time when they were issued, as they are being continually returned and reissued by the banks, yet if such bills have ceased to circulate as currency and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts which excepts them from the operation of the statutes of limitation.

Id. (emphasis added). In *Quattrochi v. Farmer's & Merchants' Bank*, 89 Mo. App. 500 (Mo. Ct. App. 1901), the court held that an action against a bank to recover the difference between a balance

shown and the balance that was actually due was not within the purview of Missouri's statute excepting actions to enforce bills, notes, and other evidences of debt from the general statute of limitations because the claim did not involve notes circulated as money. *Id.* at 508, 510. Thus, under *Butts* and *Quattrochi*, this type of statute applies only in situations where a moneyed corporation is circulating its own bills or notes intended to function as money.

Brookshire is not seeking to enforce any bill, note, or evidence of indebtedness *issued* by Community First that would be *considered as money*. Further, the cases applying this statute all arose in a pre-New Deal economic era where companies, including banks, would circulate their own bills and currency. (*See* R. pp. 1188-1190; 1192-1194). Community First is not issuing any specialized currency, and Brookshire has made no claim that it has. Thus, the statute does not apply.

Further, applying this statute to the modern practice of banking would upend the UCC and decades of established case law. The UCC represents a specific balancing of modern commercial practice and a careful allocation of rights and responsibilities among the parties to commerce. Article 4 of the UCC specifically addresses the timeframe that a bank customer has to challenge disbursements from his or her account—limiting the maximum timeframe to one year. S.C. Code Ann. § 36-4-406 (2003 & Supp. 2019) as applicable; *see also Sabatino*, 314 S.C. at 403, 444 S.E.2d at 538. The statute of repose contained in the UCC, as a more recent and specific statute, prevails over the older and more general provisions of S.C. Code Ann. § 15-3-110. *See Stone v. State (City of Orangeburg)*, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994). Further, "[a] statute of limitations is a procedural device that operates as a defense to limit the remedy from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Capco*, 368 S.C. at 142, 628 S.E.2d at 41. As §

15-3-110 only applies to bar statutes of limitation, it does not affect the UCC statute of repose. The trial court correctly held that S.C. Code Ann. § 15-3-110 does not apply to this matter.[15]

H. The trial court correctly granted summary judgment to Community First on Brookshire's breach of fiduciary duty cause of action.

The trial court correctly granted summary judgment to Community First on Brookshire's breach of fiduciary duty cause of action because Community First did not owe fiduciary duties to Brookshire with regard to the checking account at issue in this matter. "[T]he normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." *Schmauch*, 354 S.C. at 671, 582 S.E.2d at 444. While a bank can take on fiduciary duties to its customers "if

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[15] With regard to this issue, Brookshire claims that the trial court's September 26, 2017 Order is flawed because it relies on Community First's Reply Memorandum it submitted in support of its Motion for Summary Judgment. Brookshire claims that the trial court was unable to consider the written arguments in Community First's Reply Memorandum because the Reply Memorandum was not contained in the clerk of court's file at the time of the Order and is therefore not a part of the record in this case. Brookshire is incorrect. Community First's Reply Memorandum was emailed to Judge Maddox, Judge Maddox's law clerk, and all counsel of record on December 13, 2016, the morning of the hearing on Community First's motion for summary judgment. A hard copy of the Reply Memorandum was also handed to the Court and all counsel present at the beginning of the hearing. (*See* R. pp. 1195-1196). It is thus appropriately contained in the record for this case. *See* Rule 210(c), SCACR (requiring the record to include only matter "presented" to the trial court).

Brookshire's arguments fail for additional reasons, as well. As an initial matter, there is no requirement to file a reply memorandum with the clerk of court, as it is not a "pleading [or] other paper" that is "required by these rules" to be filed with the clerk of court. Rule 5(e), SCRCP. A reply memorandum is not a pleading. Rule 7(a), SCRCP. Neither is it a motion or one of the "other papers provided for by these rules." Rule 7(b), SCRCP. There is no specific provision for supporting or opposing memoranda in the South Carolina Rules of Civil Procedure. Indeed, the case Brookshire relies on, *Loyd's Inc. v. Good*, 306 S.C. 450, 412 S.E.2d 441 (1991), did not concern supporting or opposing memoranda. Instead, it concerned the requirement to file original discovery responses with the clerk of court pursuant to Rule 26(g)(1) in order to rely on them during a summary judgment motion hearing. *Loyd's*, 306 S.C. at 452, 412 S.E.2d at 443. Even if *Loyd's* had some applicability here, the Court of Appeals found that the party objecting must show prejudice in order for the materials to be excluded. *Id.* at 453, 412 S.E.2d at 443. Brookshire here can show no prejudice, as the Court and all counsel received copies of the Reply Memorandum prior to and at the beginning of the hearing. Various arguments contained therein were also advanced at oral argument. (R. pp. 1208-1294). Finally, Brookshire has failed to properly present this issue to the Court of Appeals, as Brookshire failed to list this issue in her Statement of the Issues on Appeal for the Court's consideration. Initial Brief p. 1.

it undertakes to advise a depositor as part of the services the bank offers," *id.*, there is no genuine issue of material fact that Community First ever undertook to advise Brookshire as part of the services Community First offers. Indeed, Community First does not have, nor has it ever had, a trust department. (R. p. 394, lines 8-10).[16]

Even if Hiott owed Brookshire fiduciary duties by virtue of the POA, Brookshire's efforts to impute those duties to Community First by virtue of Hiott's employment fails. *See supra* pp. 19-21. Brookshire's general argument that the doctrine of apparent agency makes Community First liable to Brookshire based on Hiott's alleged breach of fiduciary duty similarly fails. "The doctrine of apparent agency provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonable knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982); *see also R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (requiring evidence of the "third party reasonably rel[ying] on the representation [of agency] and of the "third party detrimentally chang[ing] his or her position in reliance on the representation" for apparent agency to apply).

There is no evidence in the record that Brookshire gave Hiott the POA because of his employment with Community First or that she intended Community First to assume the duties that she gave Hiott in the POA. In contrast to Brookshire's representations, Hiott did not "lure"

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[16] Brookshire cites to pages 126 and 127 of Jeff Griffith's deposition testimony for support that Community First understood the Account to be a trust account. Initial Brief p. 28. These pages do not support Brookshire's argument and do not even discuss the type of account the Account was at Community First. Elsewhere in Mr. Griffith's deposition testimony, he testified that Community First has "many trusts – a checking account held by a trust. We don't offer trust services." He also testified that the Account was a checking account. (R. p. 1169, lines 5-7).

Brookshire to Community First. Initial Brief p. 31. Brookshire testified that she sought out Hiott, received his telephone number from some mutual friends, and then contacted him about handling her affairs. (R. p. 180, line 1 – p. 181, line 13). There is no evidence in the record that Brookshire dealt with Hiott *because* Community First held him out as its agent. By executing the POA, Brookshire made Hiott *her* agent weeks before ever beginning a relationship whatsoever with Community First. And, as Brookshire has conceded, all of Hiott's actions with regard to the Account were authorized. The trial court correctly granted summary judgment to Community First on this cause of action.

I. The trial court correctly granted summary judgment to Community First on Brookshire's cause of action for conversion.

The trial court correctly granted summary judgment to Community First on Brookshire's conversion cause of action. "Conversion is the unauthorized *assumption and exercise of the right of ownership* over goods or personal chattels belonging to another, to the exclusion of the owner's rights." *Gordon v. Busbee*, 397 S.C. 119, 135, 723 S.E.2d 822, 831 (Ct. App. 2011) (emphasis added). To be liable for conversion, Community First must have assumed and exercised the rights of ownership over goods or chattels belonging to Brookshire, which she identified as occurring upon the transfer of "large sums of money" from her Account. Compl. ¶ 114. No evidence exists that Community First assumed and exercised ownership rights over Brookshire's funds at their disbursement such that Brookshire suffered any loss.[17] In addition, "there can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff." *Richardson's Rests., Inc. v. Nat'l Bank of S.C.*, 304 S.C. 289, 294, 403 S.E.2d 669,

[17] Further, the UCC has displaced common law "conversion and negligence claims based on payment over a forged or unauthorized indorsement." *Flavor-Inn, Inc. v. NCNB Nat'l Bank of S.C.*, 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992); *see also* S.C. Code Ann. § 36-3-419 (2003); S.C. Code Ann. § 36-3-420 (Supp. 2019); *Equitable Life Assur. Soc'y of U.S. v. Okey*, 812 F.2d 906, 909 (4th Cir. 1987).

672 (Ct. App. 1991). No such obligation exists here, so no action for conversion of money can lie. Because Community First and Brookshire only had a debtor/creditor relationship, the funds in her Account were "in the nature of a general deposit and not subject to conversion." *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1975). Consequently, "where there is merely the relationship of debtor and creditor, an action based on conversion of the funds representing the debt is improper." *Id.* (internal citation omitted).

Brookshire argued for the first time in her 59(e) Motion that Community First allegedly converted stock belonging to her and that this stock conversion forms part of her claim. As discussed above, this argument is untimely and has not been properly presented to the lower court. Substantively, Brookshire cites no evidence in the record for her assumption that Community First itself effectuated any such stock transfer, and, as discussed above, the only evidence in the record shows that a company called Transfer Online, Inc.—not Community First—transferred stock from Brookshire to Hilltop, Inc. (R. p. 1042). *See supra* p. 22. Brookshire's untimely and incorrect speculation that *Community First* effected the stock transfer is insufficient to raise a genuine issue of material fact to preclude summary judgment.

Brookshire also complains about how her Community First account statements did not alert her to the stock purchases. Brookshire misunderstands the responsibilities of a bank account holder under South Carolina law. If withdrawals "were reflected in the monthly statements," and they were truly unauthorized, such withdrawals "should have been sufficient to notify [the account holder] of the need to investigate the transactions." *Sabatino*, 314 S.C. at 404 n.2, 444 S.E.2d at 538 n.2. Here, the withdrawals from Brookshire's account at Community First that went to purchases of stock were disclosed as withdrawals from her account on her monthly account statements in 2007 and 2008. (*See* R. pp. 515, 525, 527, 529, 533, 535, 537, 541, 543, 647).

Brookshire utterly failed to timely undertake her duties as an account holder. The trial court correctly granted summary judgment to Community First on Brookshire's conversion cause of action.

J. The trial court correctly granted summary judgment to Community First on Brookshire's cause of action for negligent supervision.

The trial court correctly granted summary judgment to Community First on Brookshire's cause of action for negligent supervision. An employer has a duty in certain, limited circumstances to exercise reasonable care to control its employee when acting outside the scope of his or her employment. *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). None of those limited circumstances apply here. Because Brookshire gave Hiott full authority to handle her affairs (including her bank accounts) in the POA (on which Community First was legally entitled to rely and for which the law insulates Community First from liability to Brookshire), Community First had no duty to control Hiott as he proceeded under the POA. Further, to show a genuine issue of material fact on this cause of action, Brookshire must put forward evidence that Community First had prior notice of the need to supervise Hiott to prevent him from intentionally harming her. In South Carolina, this requires proof that the employer knew about prior acts of similar misconduct in order for the need for supervision to arise. *Moore by Moore v. Berkeley Cnty. Sch. Dist.*, 326 S.C. 584, 591, 486 S.E.2d 9, 13 (Ct. App. 1997). "However, if an employer has no knowledge that their employee has been engaged in wrongdoing, they cannot be found negligent for failing to act on circumstances of which they were not aware." *Doe v. Octapharma Plasma, Inc.*, No. 3:15-cv-01302, 2015 WL 3467027, *4 (D.S.C. June 2, 2015) (citing *Brockington v. Pee Dee Mental Health Ctr.*, 315 S.C. 214, 433 S.E.2d 16, 18 (Ct. App. 1993)). Brookshire's claim that Hiott had misappropriated bank funds and the funds of MPS

Incorporated as early as 2004 without any evidence of contemporaneous notice by Community First of this alleged misconduct is insufficient to meet this standard.[18]

Substantively, Brookshire, without citing to *any evidence whatsoever*, claims that there is a genuine issue of material fact as to whether Community First knew or should have known about Hiott's alleged 2004 conduct. There is not. Not only has Brookshire cited no evidence at all to support her new claims, she earlier argued to the trial court that Community First "did not discover" Hiott's manipulation and misappropriation of both customer and bank funds "until the Brookshire investigation in 2013." (*See* R. pp. 826-827). Community First agrees with the timing contained in Brookshire's statements to the trial court, and all of the evidence in this matter reflects no notice or indication to Community First before 2013—and certainly nothing from 2004—that Hiott had misappropriated any funds belonging to the bank or anyone else. (*See* R. p. 897) (describing telephone call of September 3, 2013, as beginning the formal investigation by auditor Don Jones into Hiott's conduct). Consequently, Brookshire's cause of action for negligent supervision fails as a matter of law, and the trial court correctly granted summary judgment to Community First.

K. The trial court correctly granted summary judgment to Community First on Brookshire's cause of action for breach of contract accompanied by a fraudulent act.

The trial court correctly granted summary judgment to Community First on Brookshire's cause of action for breach of contract accompanied by a fraudulent act. In her Complaint, Brookshire identifies the "contract" that Community First allegedly breached as "set forth above."

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[18] Brookshire claims that Hiott's actions with regard to Brookshire are similar to or part of the same "scheme" that Hiott allegedly used on other accounts at Community First. Initial Brief pp. 4, 5, 32. This is incorrect. There is no evidence in the record that Hiott held a power of attorney for any other account holder at Community First other than Brookshire. There is also no evidence in the record that any other customer of Community First has ever made claims similar to those made by Brookshire. (*See, e.g.* R. p. 1084).

(R. p. 42, ¶ 134). The only documents named in the Complaint that Brookshire could conceivably argue are contracts are the POA (R. p. 16, ¶¶ 6-7) and a revocable trust claimed to be settled and created by Plaintiff on June 22, 2007. (R. p. 16, ¶ 10). As Community First was not a party to either of these contracts, the trial court correctly granted summary judgment to Community First on this cause of action. *See Greene v. Quest Diagnostics Clinical Labs., Inc.*, 455 F. Supp. 2d 483, 495 (D.S.C. 2006) (describing the prerequisite establishment of a contract to this cause of action).

In her 59(e) Motion, Brookshire asserted a brand new theory of relief for this cause of action. For the first time, Brookshire alleged that the contract that Community First breached was the Account Agreement (*see* R. pp. 432-436) and also for the first time identified the contract term allegedly breached as only the implied "duty of good faith and fair dealing between the parties." (R. p. 1204). She repeats these arguments on appeal. Initial Brief p. 33. Brookshire also now identifies the alleged fraudulent act to apply to this cause of action as Community First representing to her counsel in December 2013 that four binders of documents produced at that time were a "complete record of documents showing the activities of the account." (R. p. 1204); Initial Brief p. 31.

In addition to being barred because it was raised for the first time in the 59(e) Motion, Plaintiff's new claim fails as a matter of law for at least three independent reasons. First, under its own terms, the Account Agreement was "terminat[ed]" upon closure and "tender of the account balance" to the customer, which occurred in February 2011. (R. pp. 435, 590, 592-595). The conduct that Plaintiff alleges constitutes the "fraud" took place almost three years later in December 2013. This is too remote in time from the alleged breach "to be construed as accompanying that breach." *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350

(1980). There also can be no breach of contract arising from conduct after the contract has terminated. *See Pennell & Harley v. Hearon*, 169 S.C. 16, 168 S.E. 188, 189 (1933) ("[I]t is elementary that there can be no action for breach of a contract without a valid contract upon which to ground such action."). And, of course, there must be a valid contract in place for a breach of contract accompanied by a fraudulent act cause of action to lie. *See Smith*, 275 S.C. at 260, 269 S.E.2d at 350. Without a current, valid contract, Brookshire's claim fails.

Second, because Brookshire does not allege that Community First violated an explicit term of the Account Agreement, any claim that Community First violated *only* the implied covenant of good faith and fair dealing fails as a matter of law. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471-73, 597 S.E.2d 881, 883-84 (Ct. App. 2004) (holding that "there is no separate cause of action for breach of th[e] implied covenant" of good faith and fair dealing). Because Brookshire has failed to allege a breach of an explicit contract term, there can be no cause of action alleged for breach of the implied covenant of good faith and fair dealing as a matter of law.

Third, Brookshire provides no evidence, cites no testimony, and submits no documentation whatsoever to show that, as Brookshire argues, "[Community First], at [Brookshire's] request, provided her with *what [Community First] represented* to be a complete record of documents showing the activities of the account" and that "[t]he incomplete and edited set was then produced on December 17, 2013 and held out as a complete set." (R. p. 1204); Initial Brief p. 33 (emphasis added). There is nothing whatsoever in the evidentiary record to provide a scintilla of evidence that Community First represented that the documentation produced in December 2013 was "a complete set." "[F]actual statements of counsel, whether made during oral argument or in written briefs or memoranda," unaccompanied by admissible evidence may not be considered by the court in determining whether a genuine issue of material fact exists. *Gilmore*, 290 S.C. at 58, 348 S.E.2d

at 183. The only "evidence" Brookshire cites is Mr. Jones's testimony that prior to December 17, 2013, he provided "copies of some of my research out of my work and binders" to Community First in order for those items to be provided to Brookshire's counsel. (R. p. 1000, lines 9-16; p. 1001, lines 21-23). Mr. Jones testified that he overheard Commuity First employees discussing what to include in general terms, but he "did not have anything to do with assembling those binders." (R. p. 1001, lines 21-22). Mr. Jones did *not* testify about any representations made by Community First to Brookshire's representatives—the critical evidence that Brookshire alleges constitutes the fraud element of her cause of action. No evidence exists to support Brookshire's claims about actual representations made by Community First to Brookshire's representatives. The Court's award of summary judgment to Community First on this cause of action was fully warranted.

L. The trial court correctly awarded summary judgment to Community First on its offset and counterclaims against Brookshire.

The trial court correctly awarded summary judgment to Community First on its offset and counterclaims against Brookshire for the funds belonging to Community First that Hiott transferred to Brookshire's Account and which were thereafter used to pay her obligations or to further her interests. Brookshire has admitted that it was inappropriate for any bank funds to be deposited into her Account and affirmed that she has no claim to that money. (*See* R. p. 243, line 14 – p. 244, line 14). Consequently, no genuine issue of material fact exists with regard to the offset and counterclaims, and the trial court correctly awarded summary judgment to Community First.

Brookshire, however, argues that summary judgment to Community First is improper because the trial court inconsistently applied the statute of limitations. Brookshire is incorrect. As discussed above, the trial court held that the one-year statute of repose found at S.C. Code Ann. §

36-4-406(4) (2003); § 36-4-406(f) (Supp. 2019), as applicable, barred Brookshire's claims against Community First because all of the transactions and withdrawals about which Brookshire complains were disclosed on her monthly account statements. In addition, the trial court further found that there is no question of material fact that Brookshire both suspected Hiott of wrongdoing with regard to her account at Community First and received a packet of monthly account statements well over three years before she filed her lawsuit. Thus, all of Brookshire's claims were also barred under the discovery rule. (*See* R. p. 6).

The circumstances of Brookshire's statutorily presumed knowledge and the knowledge she admits she had well over three years before she filed her Complaint are a far cry from the circumstances in which Community First first learned that Hiott may have misappropriated funds belonging to Community First. Brookshire's attempt to conflate the two situations is unavailing. First, the UCC's statute of repose—applicable to bar Brookshire's claims as a bank account holder against Community First—has no impact on any applicable statutes of limitation that could apply as a defense to Community First's claims against Brookshire. Second, Brookshire has conceded and argued affirmatively that Community First did not discover Hiott's alleged manipulation and misappropriation of both customer and bank funds until 2013. Under Brookshire's own theory, the statute of limitations as to Community First did not begin to run until 2013 under the discovery rule. The evidence in this case confirms this date. *See supra* p. 47. Community First filed its counterclaim against Plaintiff on October 9, 2014—well within the three-year statute of limitations under S.C. Code Ann. § 15-3-530(5).

Neither the appropriate legal framework nor the applicable underlying facts allow the court to impose the exact same analysis on Community First's counterclaims as found in the analysis of Brookshire's claims against Community First. There is nothing inconsistent in the trial court's

findings with regard to the statutes of limitations or repose on these various claims. The trial court correctly granted summary judgment to Community First on its offset and counterclaims.

CONCLUSION

For the reasons discussed above, the trial court's orders granting Community First summary judgment on all claims should be affirmed in all respects.

Respectfully submitted,

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January 22, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable 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, Inc. and
Benjamin Hiott,

Defendants,

Of Which, Community First
Bank, Inc. is

Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that the Respondent's Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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January 22, 2020

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