THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-2433

Appellate Case No. 2012210729

Floyd E. Jernigan . . . . Respondent,

v.

Suzanne Boone Katz and Bank of America, NA . . . . Defendants,

Of Whom Suzanne Boone Katz is . . . . Respondent,

And Bank of America, NA is . . . . Appellant.

INITIAL BRIEF OF RESPONDENT FLOYD E. JERNIGAN

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QUESTIONS PRESENTED

I. Where a bank's negligence leads to an erroneous suspicion that a bank customer has engaged in fraudulent activity employing the bank's services, and the bank should reasonably foresee the customer being arrested as a result, does the bank have a duty to investigate, in order to clear the suspicion, separate from its duty not to carelessly or maliciously accuse the customer of fraud?

II. If the answer to the above is "No" as a general matter, does the bank undertake a duty to reasonably investigate and clear the customer's name when it tells the one who suspects fraud not to speak to the suspected customer, and to instead allow the bank to conduct an investigation?

III. Is Appellant's argument that Dr. Jernigan's claim is limited to breach of contract properly before the Court?

IV. Did the trial court err in the amount of its award of damages to Dr. Jernigan?

OVERVIEW

Appellant Bank of America, NA, maintains it has no duty to its customers, separate from the general obligation to observe the rules against defamation and malicious prosecution, to clear their names when a customer is reasonably but erroneously suspected of using the bank's services to commit fraud. The Bank maintains there is no duty even when a bank's negligence is a but-for cause of the suspicion, where the bank is the only entity with the information that could clear the suspicion, and the bank informs the apparent "victim" not to communicate with the bank's customer.

The essential facts are these: an ex-wife (Suzanne Boone Katz) thought her ex-husband (Floyd Jernigan, M.D.) had deceptively employed Bank of America's on-line "bill pay" system to pay some of his bills on-line with her funds. The problem was caused in whole or in part by bank error. The Bank admitted part of its error, but never let on to the

ex-wife that the entire problem may have been caused by the Bank, without any fraudulent activity on the ex-husband's part, until after the ex-husband was arrested. Instead, the Bank instructed the ex-wife not to ask the ex-husband what happened.

Nor, when the police investigated, did the Bank let on that the entire problem may have been caused by the Bank.

Nor did the Bank, the only entity with access to the records that could have shown what actually happened to cause the transfer, instruct its third-party vendor to retain the records that could have shown what happened.

The ex-wife filed charges against the ex-husband for obtaining property by false pretenses.

The ex-husband was arrested in the presence of his son in the early morning hours and held in police custody for 18 hours. The charges were subsequently dismissed.

The Appellant Bank maintains that the remedy for such wrongs lays only in a cause of action for slander. Slander in this situation requires a showing of malice, and no malice was found. The Bank also maintains that the remedy for such wrongs lays only in a cause of action for malicious prosecution. No malice was found. Therefore, since the Bank's actions were not malicious, and malice is required, the Bank argues, it is immune from liability.

The Bank's violations of these commands were simply careless, the Bank maintains, and not malicious.

Respondent Jernigan concedes for the purposes of this appeal that the Bank's actions, while highly negligent, were without actual malice, and that the causes of action for slander and for malicious prosecution require a showing of malice. However, the Bank further

maintains that its only obligations were to obey the negative prohibitions against publishing derogatory untruths and against maliciously seeking an arrest. Respondent Jernigan maintains that the Bank, as the sole custodian of his financial data, had an affirmative obligation to admit that the entire incident may have been entirely due to its mistakes, rather than to leave the impression that its customer must have acted with fraudulent intent. In the second alternative, Respondent Jernigan maintains that the Bank, as the sole custodian of his financial data, had an affirmative obligation to protect the data that would show conclusively what occurred to cause the transfers. In the third alternative, Respondent Jernigan maintains that the Bank, having told the ex-wife to not to talk to the ex-husband about the matter, and to let the Bank investigate, had an affirmative duty to investigate and to report accurately.

The Bank's multiple breaches of these duties give rise to the negligence claim.

The Bank similarly argues that Dr. Jernigan's negligence claim is subsumed in a defamation cause of action, which fails for similar reasons, and it argues that Dr. Jernigan's negligence claim is voided by its contract. This latter argument fails because, inter alia, the Bank never presented any evidence of the contract's terms, nor the applicability of any contractual provisions, nor did it argue below that Dr. Jernigan's claims were barred by contract.

Finally, the Bank argues that the award of $85,000 was excessive. However, the award was entirely within the reasonable range, and somewhat on the low side.

STATEMENT OF THE CASE

On April 17, 2009, Dr. Floyd Jernigan filed suit against Bank of America, NA, asserting claims for negligence, slander, and malicious prosecution. (Compl.). Dr. Jernigan also filed suit against his ex-wife, Ms. Suzanne Boone Katz, for false arrest and

imprisonment and intentional infliction of emotional distress. Ms. Katz counterclaimed Dr. Jernigan for conversion, invasion of privacy and breach of contract. She also cross-claimed the Bank for negligence and breach of contract. (Katz Ans./Cr.Cl./Ctr.Cl.). Dr. Jernigan and Ms. Katz subsequently dismissed their claims against one another prior to trial.

The parties agreed to proceed with a bench trial in front of the Honorable J.C. Nicholson, Jr., on September 13-15, 2011. The Bank moved for a non-suit and judgment as a matter of law as to all claims at the close of both Dr. Jernigan's and Ms. Katz's cases, as well as its own. (Tr. II 138:9-161:3; 269:14-273:7). The Court granted the Bank's motion for Dr. Jernigan's claims for defamation and malicious prosecution, but denied the Bank's motion regarding Dr. Jernigan's claim of negligence. (Tr. II 138:9 - 154:1). (The Court also denied the Bank's motion as to Ms. Katz' claims for breach of contract and negligence, but required her to elect a remedy. Ms. Katz elected to recover under her negligence cause of action. (Tr. II 154:3-161:23)).

On December 12, 2012, separate written Orders were entered, granting judgments in favor of Dr. Jernigan and Ms. Katz. (Jernigan Order; Katz Order). Judge Nicholson awarded Dr. Jernigan $85,000 in actual damages on his negligence claim. (Jernigan Order, at 6). (Judge Nicholson also awarded $100,000 to Ms. Katz. (Katz Order)). The Bank timely filed a motion pursuant to SCRCP 52(b) and 59 (e) to alter or amend the trial orders. By Order filed March 22, 2012, the court denied the Bank's motion as to Dr. Jernigan. (Jernigan Order Den. Mot. Alter). (By separate Order, the court also denied the Bank's motion as to Ms. Katz. (Katz Order Den. Mot. Alter)).

The Bank timely filed notice of appeal.

FACTS

Dr. Floyd E. Jernigan is a physician living in Charleston. (Tr. I 34:10-12). He graduated from the Medical University of South Carolina, and is Board certified in internal medicine and pulmonary disease. (Tr. I 35:19-23). Semi-retired, he now works as locum's hospitalist. (A locum's hospitalist is, "Short assignment. It's like a temporary or travel assignment." (Testimony of Dr. Floyd Jernigan, Tr. I 84:3-5, from *locum tenens*, "where needed," Id. at 6-7)). He had never been warned, reprimanded or disciplined by any professional board or employer, had never been charged with a crime or arrested, until the events at issue here. (Tr. I 35:7-11; 36:22-25).

He had banked with Bank of America for at least 15 or 20 years. He did all his banking with Bank of America. He was what the Bank calls "a premier banking customer." (Tr. I 38:3-12).

In 2003, Dr. Jernigan happened to be in a Bank of America branch. While he was there, Bank employee Michael Boyle introduced a new Bank product known as "bill pay," which allows Bank customers to write digital checks from their bank accounts to any payee that will accept the same. In an effort to encourage Dr. Jernigan to use this new on-line function, Mr. Boyle set up Dr. Jernigan's on-line banking profile and bill pay functions, and automatically linked all of his accounts thereto. (Tr. I 40:21-41:25).

The next year, Dr. Jernigan and his wife separated after nearly 20 years of marriage, which created a tremendous amount of acrimony. As part of the settlement, their primary joint account (hereinafter referred to at times as "#8854") was to be signed over to Ms. Katz. (Tr. I 43:1-8). To properly remove Dr. Jernigan from the formerly joint account, both parties were required to meet with a Bank employee and sign affidavits requesting his removal.

The ex-husband and ex-wife arranged to meet at the Bank to sign the paperwork. The interactions were memorable.

Q. And did you and Dr. Jernigan interact at all?

A. Yes. Very unpleasantly.

Q. Did you have an argument?

A. We did.

Q. In the office?

A. In the office.

Q. In front of [Bank of America branch manager] Mr. Boyle?

A. In front of Mr. Boyle.

(Tr. II 86:18-25 (testimony of ex-wife, Ms. Katz)).

Once the parties signed the removal request, the Bank was to take a series of steps to remove not only Dr. Jernigan's name from ownership title from the #8854 account, but to also "delink" all of his on-line banking access as well. (Tr. I 191:2-9).

The Bank would later admit through the course of litigation that the steps established by the Bank, and memorialized in their policies and procedures, were not followed by its employees. (E.g., Tr. I 191:10-21).[1]

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[1] Mr. William Navarez was the Bank of America corporate representative. (Tr. I 180:18-25). He testified,

Q. And there was a procedure which was set in place for the bank to do. When I say the bank, I obviously mean an employee of the Bank?

A. Correct.

Q. There were written procedures in effect that somebody had not followed back in January of '04?

A. Correct.

Q. Or thereafter. And as a result, access had been accomplished?

A. Correct.

Q. These payments had occurred?

The ex-wife testified,

> A. I wanted complete reassurance and I was told, yes, this is no problem. He will be removed in every way. Will he have any access? No.

(Tr. II 87:25-88:2). See also id., 87:16-23),

> A. Yes. Very clearly. And so I – we talked about that account and, you know, whether my ex-husband could be removed or did I need another account. And he said, oh, no, this is – we can get him off. And I am very, very, very particular about my money and about details like this. And so I asked repeatedly, are you sure? Are you sure? Because I don't want him to have any access to my account. Are you sure? Well, yes, yes, yes, yes.

Dr. Jernigan continued to pay alimony into what was now the ex-wife's sole account, three to four thousand dollars ($3,000.00-$4,000.00) a month. Dr. Jernigan also continued to use the on-line bill pay function, as established and encouraged by the Bank. From 2003 to 2007, Dr. Jernigan used the on-line bill pay function to pay several of his monthly bills, always from his solely owned account ending in #4502. (Tr. I 44:15-45:1).

On two nights in January 2007 – three years after the accounts had been separated – payments totaling $1,100.00 were made to Dr. Jernigan's payees, but rather than being deducted from his #4502 account as had always been done for years prior, the payments were deducted from Ms. Katz's #8854 account. The reasons the transfers occurred are still disputed. Dr. Jernigan testified that while he did not recall the actual on-line session, he believed he used his on-line bill pay as he had always done, and that had always been without incident. (Tr. I 51:1-11). He further testified would not have known how to change the bill pay to the #8854 account, even if he had wanted to so. (Tr. I 49:3-21). (See also id., 82:12-24). All that is known for certain is that the transfers could not have occurred if the

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A. Correct.

(Tr. I 191:10-21).

Bank had properly followed its own protocols in removing Dr. Jernigan from the #8854 account. (Tr. I 191:10-21).

At nearly the identical time, unbeknownst to Dr. Jernigan, his account ending in #4502 had recently been subjected to a "restricted status" by the Bank. This restriction occurred because Dr. Jernigan attempted to deposit a large check, but that check "bounced" which automatically resulted in the Bank limiting Dr. Jernigan's ability to write checks from this account. (Tr. I 52:16-53:8).

Evidence as to how the transactions actually occurred has never been presented because the Bank failed to preserve the evidence. Whenever on-line bill pay is used, data is created which demonstrates the mechanism for the payments. In the present case, such data is in the sole possession of Bank of America, through its affiliation with a third-party vendor.

If this evidence had been preserved, it would have shown Dr. Jernigan's specific actions at the time of the disputed payments. Furthermore, that evidence could have shown the effect of the restricted status of Dr. Jernigan's account at the time he paid the bills. Finally, that evidence may have shown whether a simple computer glitch, software problem, bug, or mis-communication between Bank of America's software and the third-party vendor's software played a role in the problem. (12/11/12 Jernigan Order, at 4) (the court so finding); (Order Mot. Alter Jernigan, at 4) (same). See also (Tr. I 202:2-14, 211:10-212:3; Tr. II 248:21-249:1, 254:19-23) (Bank employees testifying that the Bank never asked for the data from its third party vendor)); (Tr. II 271:14-21 (Judge finding generally that the Bank never asked its third-party vendor for the data)); (Mot. Alter Hr'g Tr. 35:10-17 (Judge specifically finding that the Bank never asked for the data that could have shown whether

the third party software meshed with the Bank's software to see if there was an error, and that the Bank was the only party that could do so)).

As to looking into Dr. Jernigan's theory that some sort of overdraft protection or the like had shifted or defaulted or bounced his bill-payments to his ex-wife's account, the corporate representative testified,

> Q. But at that time in August of 2007, or even before your deposition of November of '9, or before the bank filed its amended answer, you never looked at the history of Dr. Jernigan's account to confirm that transaction, that deposit transaction. Isn't that a fair statement?
>
> A. Yes, fair statement.
>
> Q. Okay. You never looked at his account to, and no one to your knowledge had ever checked into his account, which he claims to be the basis of this whole transaction?
>
> A. Correct.

(Tr. I 202:2-14).

And that evidence should have been preserved. Bank of America was informed of the problem the day after the transfers were funded. The day after the transfers were funded, the ex-wife, checking her account, as she does frequently (Tr. II 92:22-93:1), noticed the suspicious transfers out of her account and called Bank of America. (Tr. II 92:5-21). She spoke to several representatives. They:

a. told her that the transactions had originated with Dr. Jernigan's personal account;

b. told her that the transactions required deliberate action by Dr. Jernigan;

c. told her that if Bank of America was to recover the funds, she would have to file a report with police; and

d. instructed her to avoid any communication with Dr. Jernigan regarding the situation.

(See, e.g., Tr. II 96:4-20, 97:6; see generally, Tr. I 92:9-103:13).

That was on Thursday, January 18, 2007. She was on the telephone with Bank of America "for about four hours" that night. (Tr. II 93:18). She kept getting moved up to different people. (Id.). It seemed to keep going higher and higher. (Tr. II 93:18-20).

On Saturday, January 20, her then-boyfriend drove her to the police station. Ms. Katz was physically sick at the thought of filing a police report against the father of her children. She could not get out of the car. The boyfriend went into the police station and brought an officer out to the car to get her report. (Tr. I 98:17-99:1).

On the next regular banking day, Tuesday, January 22, 2007, Ms. Katz and her then-boyfriend went to a Bank of America branch, and she informed the Bank that she had filed a police report as the Bank had instructed. Only then did the Bank call Dr. Jernigan to inform him of the situation. (Tr. I 54:4-7).

Upon learning that funds of Ms. Katz's were used to pay his bills, he immediately authorized the debit of his account to reimburse her. He also inquired whether, as long as they had him on the phone, the Bank could transfer from his account to hers the next alimony payment that he was due to pay her, and that was effected. (Tr. II 100:11-14).

However, as the Bank was well aware, Ms. Katz wanted to know what had happened. How had it happened that her funds were transferred to his account, after the Bank had promised so clearly that could never happen?

Ms. Katz testified that during this meeting with Bank employee Laura Brisson, she reiterated her need to understand what happened. Ms. Brisson similarly testified that Ms.

Katz was particularly agitated and concerned as to how these transactions could have occurred, given that Dr. Jernigan had renounced ownership to the #8854 account in January of 2004. (Tr. II 11:7-8).

She kept asking.

A. I never got any answer. And I've talked to different people. I was just referred to different people. It was almost always on the phone. There would be somebody in Tampa. There would be somebody – I kept saying, I need to know how this happened. I need to know how this happened.

Q. Nobody gave you an answer?

A. Nobody gave me an answer.

Q. Did they give you any kind of explanation other than Dr. Jernigan had access to your account?

A. No other explanation whatsoever.

(Tr. II 101:8-14).[2]

Q. But you heard nothing from the bank but he had to do it deliberately. Isn't that right?

A. That' s right. That's correct.

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[2] See also Tr. II 99:19-22.

Q. So you went and filed the police report after the bank. Did you then after that first meeting with Ms. Brisson, did you continue to seek answers from the bank?

A. I did.

(Tr. I 100:18-101:7) (emphasis added).

Q After you reported things to the bank, things cooled up off somewhat, meaning you got your money back and there was no further action taken on your part for few months?

A Well, no. I did call the bank and want an explanation. I felt like there was more that needed to be – I wanted an explanation. I trusted the bank. I'd banked there for a long time. And I wanted to know how this had occurred. And I did ask the bank for explanation.

Q All right. I know we will get shortly to your letter-writing campaign beginning in late July. But before that, is it your testimony you spoke with the bank several times after going to the police?

A Yes.

(Tr. II 134:25-135:2).[3]

Q. .... [W]hy didn't you just call Dr. Jernigan?

A. The bank that night on the phone, and I wrote that down, it's on my – on a piece of paper that was up here the other day. The bank said, do not call him. I was not – they were absolutely specific, do not call him ....

....

A. Right. And we didn't truthfully talk. But this is something that I probably would have called him about. I mean, this was big. I mean, I felt very violated. I am very personal about – I'm very friendly and I will talk to people, but when it comes to my personal business and my money, I am very, very protective.

(Tr. II 101:18-102:8). See also Tr. I 104:9-13 ("Q. All right. Did you ever talk with Dr. Jernigan about any of this during this time period? A. No, the bank told me not to.").[4]

Without knowledge of the full extent of the Bank's negligence, nor the restricted status of Dr. Jernigan's #4502 account, Ms. Katz spent the next several months investigating the circumstances of the transaction with inquiries to the Bank. She did learn that the Bank had failed to remove Dr. Jernigan from the #8854 account; however, there was no mention of the restricted status of Dr. Jernigan's account at the same time,[5] and the Bank's assertion,

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[3] See also Tr. II 134:19-24.

Q. If they had looked at his account and discovered the restriction [on his account], and they had told you that, whether or not at or about the same time as these bill pays were paid, would that have not given you pause or concern to question what had really happened?

A. Yes.

[4] See also Tr. I 96:7-12.

A .... And they also told me not to talk to Floyd about this at all, and I wrote that that night.

Q So you wrote not to talk to Floyd at all during the conversation with the bank?

A They told me. They said, do not talk to Floyd about this at all.

[5] The restricted status of Dr. Jernigan's #4502 account was not disclosed to counsel for Dr. Jernigan until after multiple depositions, including the Bank's 30(b)(6) witness, had occurred. It was not until just prior to Laura Brisson's deposition on March 24, 2010, that counsel for the Plaintiff was ever provided proof that Dr. Jernigan's long held position regarding his account was proved true.

and her belief, that the transactions could not have occurred without deliberate action on Dr. Jernigan's part motivated Ms. Katz to revive the police investigation and pursue criminal charges. (Tr. II 104:3-9). The investigating officer went to the Bank, and was provided the same limited information Ms. Katz had been provided: that Dr. Jernigan must have acted deliberately in order to effect the transfers. (Tr. I 152:2-176:11).

Dr. Jernigan was arrested in the early morning hours, at his home, with his son present. (Tr. I 58:9-61:9). He was charged with obtaining property by false pretenses. (Id.).

With formal criminal proceedings pending against him, Dr. Jernigan and his attorney, Susan Dunn, Esquire, visited the Bank in person. (Tr. I 129:16-25). They did so via making an appointment with the Bank. (Id.). Ms. Dunn made a second appointment and again visited the Bank. (Tr. I 132:6-19). She and Dr. Jernigan made several inquiries to the Bank regarding the mechanics of the transactions, but were not provided complete answers. (Tr. I 133:20-134:3). Ms. Dunn eventually discovered that the Bank engaged a third-party vendor for its bill pay processing, Check-Free Corp (otherwise known as FiServ); and also learned that the transactions occurred because the #8854 account was still linked to Dr. Jernigan's on-line bill pay, without his knowledge. (Tr. I 138:15-25). The coincident restriction of Dr. Jernigan's personal account at the same time was not acknowledged, or volunteered, by the Bank.

It was only after Dr. Jernigan's arrest that the Bank – having been asked by Ms. Katz to put in writing what it had been telling her, that Dr. Jernigan must have made the transfers deliberately – sent a letter stating that one could not infer criminal intent from the transactions.

A. . . . . It was more my ex-husband has accessed my account. The bank is telling me that he had to have done it. And she was interested I think in being protective of anything else further happening. She was very gracious. Very kind and very gracious.

Q. What I want to know is you just said the bank had told you he had to have done it, that's what I want to know. What did you understand then from the bank?

A. Well from that night on the phone with the bank, that is what I had been told.

Q. Which is what?

A. That he had to have accessed it.

Q. Had you ever been told, as long as we are talking about ever, have you ever – has it ever been suggested to you that this could have been an inadvertent error or something that automatically happened because of the status of his account?

A. Never.

Q. Never?

A. Never.

Q. Was it always your understanding from the bank that Floyd Jernigan had to have used our [sic] somehow accessed your account with a code or a PIN number or something like that?

A. Yes. That he had to have set it up to pay these bills.

(Tr. I 99:1-100:1).

Q. [By] May 5, 2007 [the date of the warrant], had the bank ever suggested to you that there was some other explanation besides his deliberate action?

A. No.

Q. At that point had any employee of the bank, and this is again in May '07, suggested to you that his account had been frozen?

A. No.

Q. Did you have any knowledge of that?

A. No. I had no knowledge of his account whatsoever.

(Tr. I 105:1-11).

It was only after the arrest, and after the preliminary hearing at which the charges were bound over, that the Bank came clean on this point. As brought out by the Bank's counsel, up until and after the arrest and the binding-over at the preliminary hearing,

> Q. What they told you was that the transaction would require active participation on his part, correct?
>
> A. Yes.
>
> Q. And you understood Dr. Jernigan had to, at least from what the bank was telling you, that Dr. Jernigan had to have selected your account for the payments, correct?
>
> A. Yes.

(Tr. I 111:5-14).

As also brought out by the Bank's counsel, it was not until August 2, 2007 – well after the arrest, and a month after the preliminary hearing at which Dr. Jernigan was bound over for criminal trial – that anyone at the bank let on that it could have been an honest mistake. As a result of her still-ongoing campaign to get answers, the ex-wife had written to the President of Bank of America, and one of his assistants telephoned her. "I again advised her that it could have been an honest mistake if he believed he was accessing his account." (Tr. II 127:4-5 (Bank's counsel quoting from BOA Ex. 4)). (By "again," he means a second time during that same telephone conversation). (BOA Ex. 4).

The next day, as admitted in the Bank's brief, which, it bears repeating, was well after the arrest, the Bank sent Ms. Katz a letter, stating that it could not "determine or

comment on the state of mind or intent of Mr. Jernigan in accessing the account in question." (Initial Br. of Appellant at 14).

As Ms. Katz testified,

> Q. After the cat's out of the bag, you already went to the police, had the report filed, right?
>
> A. Right.
>
> Q. He had been arrested, right?
>
> A. Right.
>
> Q. Your sons found about it, right?
>
> A. Right.
>
> Q. You had all of that to deal with then at that point, right?
>
> A. Right.
>
> Q. Only then did the bank say, we can't comment on his state of mind. Isn't that right?
>
> A. Right.
>
> Q. That's all I have. Thank you, ma'am.

(Tr. II 136:1-15).

As the court found, "up until today, four years later, they still have not requested what account he went into, whether it was her account or his account, four years later. They still have not made a complete disclosure." (Tr. II 270:17-20).

The court found for Dr. Jernigan on his negligence claim.

ARGUMENT

Preliminary Observation

Of the Bank's six Arguments, three concern solely the award to Ms. Katz; two concern the awards to both Ms. Katz and Dr. Jernigan; only one concerns solely the award to Dr. Jernigan. (Similarly, of the Bank's seven "Issues on Appeal," only one concerns Dr. Jernigan exclusively; two concern both Respondents; and four exclusively concern Ms. Katz.) The Bank's Arguments concerning Dr. Jernigan's award are its Arguments I, IV, and VI. Dr. Jernigan addresses only those Arguments of Appellant that address his award. Thus, the numbering of the Arguments herein will not match the numbering in the Brief of the Appellant.

I. RE: THE BANK'S ARGUMENT I

To avoid duplicative discussion, relevant cases cited in any subsection below are incorporated by reference into all subsections.

A. Defamation.

Background law. The elements of negligence and of defamation are set forth in the following chart. As this comparison makes clear, the elements of the two causes of action are very different.

Generally, the elements of negligence are:		**The elements of defamation include:**
1. duty; 2. breach; 3. proximate cause; and 4. injury. Cody P. v. Bank of Am., N.A.,395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011).		1. a false and defamatory statement concerning another; 2. an unprivileged publication to a third party; 3. fault on the part of the publisher; and 4. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thomson Newspapers, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998).

Merits. The Bank's Argument I puts its greatest emphasis on its claim that Dr. Jernigan's negligence claim is subsumed in his defamation claim. In support thereof, it argues that a successful suit for defamation has requirements that are "more stringent" than the requirements for a negligence cause of action, including a requirement of malice where, as here, the publication was found to be privileged. Regarding the requirements for defamation, the Bank is more or less correct.[6]

However, in a typical defamation case, the defendant had no obligation towards the plaintiff other than to obey the negative prohibition against making public, derogatory, and untrue statements about the plaintiff.[7]

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[6] In regard to statements about a public figure, or statements by a newspaper or similar organization, a "malice" requirement exists. Similarly, for statements made under a privilege, such as the Bank had with its complaining customer (ex-wife) or for its statements to police.

[7] One of the Bank's errors is shown in its discussion under its Heading VI. There, the Bank argues, "Any duties owed by the Bank in this regard were limited to the negative duties to refrain from defaming him or acting with malice or ulterior motive in invoking the legal system." Initial Br. of Appellant, at 42. It is the position of the Respondent that the Bank has duties to its customer beyond that, as discussed in the ensuing text.

The Bank relies primarily upon Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 629 S.E.2d 653 (2006). The newspaper there had published highly derogatory statements about a guardian ad litem. After upholding the award for defamation, the Court explained that the plaintiff there could not also recover under a negligence theory. That was true in that case, as the newspaper there had no connection to the plaintiff other than its publishing of the derogatory untruths. It had no duty to the plaintiff there other than to refrain from publishing derogatory untruths. Similarly for most newspapers in most defamation actions: the only duty owed to the "victim" was the duty to avoid defaming the subject. Here, on the other hand, where a bank customer is accused of fraud due to something that happened with his account, a bank has another obligation: it has an affirmative obligation to explain that the suspicious activity does not indicate fraud.

This is especially so when the suspicious activity could not have happened but for bank error.

This is also especially so when the bank informs the possible defraudee not to communicate about the matter with the possible defrauder. Suppose, in the hypothetical jurisdiction of Medium-Sized State, a merchant telephones a bank and informs it that the merchant is holding a check from one of the bank's customers, returned for insufficient funds, and the merchant suspects fraud. "What happened?", asks the merchant. "We'll handle it," says the bank, "Do not ask our customer what happened."

It may be that the check bounced because the customer erroneously deposited money in one account that he thought he had deposited in another. It may be that the check bounced because the busy customer simply took the wrong checkbook out of her purse when making the purchase at the store. It may be that the check bounced because the Bank had wrongly

attributed a deposit intended for one account to another account; or had erroneously delayed in granting "cleared" status to certain funds; or due to simple bank error, as when a bank erroneously deducts an amount from an account larger than the amount of the check it processes, leaving a balance too low cover the next incoming check.

However, once the bank tells the merchant not to speak to the customer, the bank becomes liable to speak in the customer's stead, to either state that no fraud can be assumed from the facts known to it, or to investigate if more facts are required. This is an affirmative duty, very different from the simple negative injunction against speaking evilly of another.

It is this separate and additional duty, created by the Bank, that the Bank repeatedly breached. See, e.g., Murray v. Bank of America, 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003); Simons v. Wal-Mart Stores E., L.P., and Bank of America, 2013 U.S. Dist. LEXIS 13497 (Civil Action No.: 8:11-cv-03180-JMC) (D.S.C. Feb. 1, 2013); Mouse v. Central Sav. & Trust Co., 120 Ohio St 599, 167 NE 868 (1929); Waggoner v. Bank of Bernie, 220 Mo App 165, 170, 281 SW 130, 132 (1926).

B. Additional Considerations.

1. Malicious Prosecution.

While the Bank's focus is its argument that defamation is the sole cause of action appropriate here, it also argues that malicious prosecution is the sole cause of action appropriate here. As an initial matter, this argument is not preserved. At trial, the Bank maintained that malicious prosecution had nothing to do with this case, as the Bank had not been the entity that asked the police to arrest. (Tr. II 145:25-146:4). On appeal, the Bank argues that the Doctor's claim was required to have been brought as, and only as, a claim for malicious prosecution. That is, having told the trial court that malicious prosecution is

irrelevant to the case against it, as it had not initiated the arrest, the Bank now asks this Court to hold it is protected by the stringent requirement of malice that attaches to those who carelessly ask the police to make an arrest. The Court can eliminate this claim very easily by (a) agreeing with the Bank's trial-court argument on the merits, that malicious prosecution does not apply except to the party that asks the authorities to effect the arrest, see Firstley v. Bill Watson Ford, 268 So. 2d 314, 317 (La. App. 1972) ("Clearly, this is not a case of malicious prosecution; there was no prosecution on the part of Watson Ford. This is a tort suit based on negligence."); (b) finding that regardless of whether the Bank's argument to the trial court is correct on the merits, an appellant is precluded from raising an argument on appeal directly contrary to the argument it urged below, e.g., State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000); or (c) declining the Appellant's invitation to conflate protected actions (urging a wrongful arrest, but without malice) and un-protected inactions (failing to clear a customer's name when bank error has led to a suspicion of crime).

South Carolina law will not bear the absurd interpretation the Bank gives it.[8] This

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[8] The Bank cites but one case in support of its theory that malicious prosecution is the sole cause of action applicable here, and that in a footnote. (Initial Br. of Appellant, at 15 n.6 (citing Bushardt v. United Inv. Co., 121 S.C. 324, 330-31, 113 S.E. 637, 639 (1922))). The case is highly distinguishable on the facts: There, the Court held that the defendant (store) was not liable for the actions of its low-level employee (soda jerker) in identifying the plaintiff as the man who had robbed him at the store, where the store had done nothing to condone or approve the actions of the soda jerker. Moreover, nothing in the opinion suggests to the modern mind that there was any lack of probable cause. The Court appeared more concerned with making the point that taking the word of a Negro about the guilt of a white man was not improper, which was "the only possible ground" for the plaintiff's claim. Bushardt, 121 S.C. at 334-35, 113 S.E.at 640-41.

The plaintiff, however, had brought a claim not for malicious prosecution, but only a claim for false imprisonment. In dicta, the Court stated that malicious prosecution is the only remedy for an arrest by lawful authority, thereby distinguishing that cause of action from the false arrest claim which was the plaintiff's sole theory of recovery. The distinction regularly escapes plaintiffs' lawyers, as it apparently had escaped the plaintiff's lawyer there. (The Court expended much energy explaining the circumstances under which the policeman might have been liable for false imprisonment, as that was the only cause of action brought – that is, explaining whether the police officer had probable cause based on the employee's statements, for if not, the case must end. All this was doubly dicta, as the

Court should not hold, despite the Bank's argument to the contrary, that where one has been arrested, one is always limited to only a malicious prosecution or false imprisonment cause of action: that a doctor, who negligently prescribes the wrong medicine, which leads to the patient urinating in public and being arrested for indecent exposure, must be sued for malicious prosecution rather than for medical malpractice;[9] that a dentist or other health professional, who sedates a patient, and allows him to drive off without warning that the sedation would still be affecting him, escapes all liability when the patient is arrested for driving under the influence, as no malicious intent can be shown; that a homeowner, who asks a landscaper to remove trees from his property, telling him not to burn the trees because there is a strict law against burning, and the landscaper say he knows, but accidentally sets a fire before leaving, has no recovery when the police come and arrest the homeowner. In all of these, there is no defamation, no false imprisonment, no malicious prosecution – just negligence with resulting damages.

A woman takes her car in for repairs on the bumper – and they negligently replace the license plate with one they should know is stolen – and she is arrested. There is no false arrest, no malicious prosecution, no defamation – just negligence. Cf. Firstley v. Bill Watson

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officer was not a defendant, and even if he had committed false imprisonment, the store could not be liable except through its employee.) The dicta to which the present Appellant refers was simply distinguishing false imprisonment and malicious prosecution, and not, as the Appellant would have it, stating that where there is a wrongful arrest, all other wrongs are forgiven, or that no negligence claim can ever be brought. There, the question of negligence never arose.

[9] Cf. Ridgeview Inst. v. Handley, 224 Ga. App. 533, 535-536, 481 S.E.2d 531, 534 (Ga. Ct. App. 1997) (emphasis added):

> We therefore reaffirm our holding in Williams, supra at 716, that "where one is taken into custody pursuant to a procedurally valid certificate of a physician authorizing involuntary mental treatment, the resulting detention is not 'unlawful.'" Although such detention may give rise to other claims, a cause of action for false imprisonment is not among them." Accordingly, the trial court erred in ruling that Handley has a viable claim for false imprisonment based upon Ridgeview's alleged failure to provide the statutory notices required by O.C.G.A. § 37-3-44.

Ford, 268 So. 2d 314, 317 (La. App. 1972) (where a car dealership negligently allows a customer to drive a demonstrator which the dealership had reported stolen, the dealership is liable for damages caused by the motorist's arrest).[10]

South Carolina has already decided this issue in the specific context a Bank failing to notify those who reasonably suspect that someone has defrauded them using the Bank as an instrumentality. If the Bank fails to correct the misperception, the Bank is liable in negligence when the person is arrested, Murray v. Bank of America, 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003) – at least where "[t]he "bank failed to follow its own procedures," id. at 344, 580 S.E.2d at 198, as the Bank did here; "did not timely close the account," as here; "and did not notify" those who reasonably misperceived the future-arrestee's actions as fraudulent.

The District of South has Carolina ruled similarly. Simons v. Wal-Mart Stores E., L.P., and Bank of America, 2013 U.S. Dist. LEXIS 13497 (Civil Action No.: 8:11-cv-03180-JMC) (D.S.C. Feb. 1, 2013). There, former South Carolina circuit judge and now Federal district judge Michelle Childs, interpreting South Carolina law, rejected Bank of America's claims that its negligence leading to a customer's arrest was not actionable as negligence.

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[10] Firstley v. Bill Watson Ford, 268 So. 2d 314, 316-317 (La. App. 1972) (footnote omitted).

> In seeking to have us reject plaintiffs' demands for damages because of an absence of showings of no probable cause and the presence of malice (a plaintiff burden in a suit for malicious prosecution), this appellant seeks to have us consider the suit for damages as being based on malicious prosecution. Clearly, this is not a case of malicious prosecution; there was no prosecution on the part of Watson Ford. This is a tort suit based on negligence. The sole cause of plaintiffs' incarceration and the criminal charges made against them was Watson Ford's negligence in causing Firstley to use a demonstrator which Watson Ford had reported as stolen and which it had never reported as recovered. The fact that the vehicle remained on the police list of stolen cars made it probable that in the event it was stopped by the police for any reason its driver and other occupants would be arrested as a result of being the operator and occupants of a stolen car. Watson Ford is liable for the damages resulting from that negligence.

Id. at 316-17.

Id. at *7-10. She rejected the Bank's claim that the plaintiff's negligence cause of action was subsumed in a claim for negligent enablement of imposter fraud. Id. at *10-12. The Federal court further held that the Bank could be obligated in equitable indemnification to reimburse Wal-Mart Stores, the entity that had signed the arrest warrants, if it could be proven that the Bank's negligence was the sole and proximate cause of the customer's injuries. As this was a factual issue, she thus denied the Bank's motion for summary judgment on that issue, too. Id. at *14.

Cf. Mouse v. Central Sav. & Trust Co., 120 Ohio St 599, 167 NE 868 (1929), wherein the court held that "had the bank used due care in examining its records or had it at any time notified the payee of its mistake, he would not have preferred the charge." This is directly on-point to the present case, in which the accuser (Ms. Katz) testified she would not have sought nor procured the arrest had the Bank at any time notified her of its mistake. Moreover, under the particular facts of that case, as here, "the bank therefore had notice that its dishonor of the check was likely to suggest immediate criminal prosecution." Id. [11]

Moreover, in Waggoner v. Bank of Bernie, 220 Mo App 165, 170, 281 SW 130, 132 (1926), the bank was held not to be liable because, under the facts of that case, it was not

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[11] The court further explained,

> The case is differentiated from the Hartford case, which we discuss below, by the fact that Cory deliberately consulted with the bank, looked over its books with the bookkeeper, and made a searching investigation before he instituted the prosecution.

Id. at 603 (internal citation omitted). So too here.

> By the exercise of reasonable diligence, the bank could have foreseen that this exact consequence would occur, for the issuance of a check upon a bank without funds or credit to meet it is a public offense, which, notoriously, frequently results in the arrest and imprisonment of the drawer of the check.

Id. at 605. So too here.

reasonable to suppose that the payee would procure the arrest of the depositor "without some attempt, at least, to permit the depositor to make an explanation . . . ." Here, in contrast, the Bank directed the "victim" of the improper transfer not to allow the depositor to explain – indeed, not to speak with him at all. It was thus completely foreseeable, in this case, that the "victim" would proceed without any attempt to permit the depositor to make an explanation.[12]

The Bank's position is nonsensical and should be rejected.

The Bank fails to appreciate the difficulties it has gotten Dr. Jernigan and Ms. Katz into when it writes, "Any duties owed by the Bank in this regard were limited to the negative duties to refrain from defaming him or acting with malice or ulterior motive in invoking the legal system." (Initial Br. of Appellant, at 42).

2. The Bank's Other Authorities

In addition to Erickson, which it discusses in great detail, the Bank makes passing reference in text to other authorities. E.g., its Brief discusses Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990), which held that statements at a certain stage of litigation become absolutely privileged against a defamation claim. (Initial Br. of Appellant, at 20). However, the present claim is not a defamation claim. The only application of Crowell to the instant controversy is that it stands for the proposition, on which the parties agree, that one who owes another no affirmative duty to act, but is simply obligated not to speak falsely and derogatorily against another, is immune from liability for defamation in certain circumstances. On the same page the Bank cites a federal statute, not

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[12] The court added, "Everyday of every week such mistakes occur but arrests are not made without investigation." Id.

cited to the trial court (31 U.S.C. § 5318(g)(3)(A)) and a federal case interpreting that statute, also not cited to the trial court (Stoutt v. Banco Popular de Puerto Rico). The trial court obviously did not err in failing to consider a federal statute not cited to it, nor a case not cited to it interpreting that uncited statute. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (even constitutional claims must be raised to the trial court or they are waived). Nor does the federal statute remove the bank's underlying affirmative duty in this case.

3. The Bank's Factual Argument Concerning Defamation.

The Bank argues that it is not liable for defamation because, if one takes all the evidence in the light most favorable to the Bank, everything it told the ex-wife was technically true (if misleading), and truth is an absolute defense to defamation. The Bank's argument is multiply flawed, as discussed below.[13] However, the preliminary question is, why is it even relevant? The trial court did not award damages for defamation.

Nevertheless, to the extent, if any, that the Court wishes to consider the Bank's argument here, Respondent Jernigan would make the following observations:

The Bank appears to wish to re-litigate the factual findings of the court.

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[13] It is also flawed in that there is such a thing as defamation by insinuation, in which one states facts that are literally true but lead the listener to a reasonable, derogatory, and untrue inference. See, e.g., Tyler v. Mack Stores, Inc., 275 S.C. 456, 272 S.E.2d 633, 634 (1980).

Scope of Review

The court's factual findings are subject to an "any evidence" standard, as the court was sitting without a jury. See Frazier v. Smallseed, 384 S.C. 56, 64, 682 S.E.2d 8, 12 (Ct. App. 2009) (quoting Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997)) ("'The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury.'").

Thus, the factual findings below are not to be reversed if there is any evidence in their support.

Merits

The evidence is ample – indeed, overwhelming – that the Bank did nothing to explain to the "defraudee" that the problem could have occurred without fraudulent intent on the Doctor's part. As the lower court found, "BOA's explanation at trial that Katz was fully informed about the Bank's error is not believable." (Order on Mot. Alter, p. 4). The trial judge heard the testimony and evaluated the demeanor of the witnesses. There is far more than "any evidence" supporting this factual finding.

The Bank is particularly concerned with proving a lack of evidence on Dr. Jernigan's part in support of his view that the restrictions or "freezes" placed on his account during and around the time of the transfers played a role. The Bank makes much of a single sentence directed to Dr. Jernigan's counsel from the bench: "'I understand that's your theory, but there's just absolutely no evidence there.'" (Initial Br. of Appellant, at 22) (quoting Tr. II 276:9-20)). See also id. at 9 (Appellant's Brief complaining that "Jernigan presented no evidence to the contrary to support his theory that the Restriction caused the Disputed

Payments to be paid from the 8854 Account.") The reason there is no evidence is that the Bank failed to preserve the evidence. The Bank's agents testified at trial that they could have asked the third-party vendor to pull up and preserve the date, but they did not.

THE COURT: . . . . Now, whether he intentionally, on the drop-down box chose her account accidentally or intentionally or not, I don't know. But if the bank had done a complete investigation, we may know. Today, four years later, this Court still doesn't know whether or not he went into his account on the drop-down box to do the pay or went into her account to do the pay. Still don't know that because the bank hasn't asked. Okay?

(Tr. II 271:14-21 (emphasis added)).[14]

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[14] The Court's factual finding here is supported by extensive testimony. See, e.g., Tr. I 211:10- 212:3.

Q. (By Mr. Waggoner) Mr. Navarez, did you ever at any time speak to a representative from CheckFree Corp about how these transactions occurred?

A. May I check my tracker notes?

Q. Yes.

A. According to my tracker notes, sir, I did not speak with someone from CheckFree.

Q. Did you know then who CheckFree was?

A. Yes, sir.

Q. And do you agree that they were an outsourced source of this bill pay arrangement?

A. Yes, sir.

Q. And you were aware then that CheckFree would have been the entity which housed the actual transactions which detail the payments that concern us?

A. To an extent, yes.

Q. But you made no phone calls or had no communications with them?

A. Correct.

As further explained by Bank employee, Jeffrey Mitchell,

Q. Have you ever asked for that documentation?

A. No, I have not.

Q. Why haven't you asked for the documentation for which account was actually selected in this case?

A. It was not asked of me to produce it.

(Tr. II 254: 19-23).

But the Bank does not stop there. The destroyed data would have made no difference, the Bank claims. The Bank argues that it presented an employee at trial who explained why, under his theory, the restriction could not possibly have played any role. Even were that the situation – which it is not – the fact-finder obviously did not find the witness credible. We are all familiar with experts saying "X could never happen" – and then it does. Anyone who has ever called in for software support, and been raised to a higher and higher level, until one is talking with the most expert people in the organization, and been told, "That shouldn't be happening. In theory, that shouldn't even be possible," knows how great the gap can be between software theory and practice.

And here, Appellant does not even have that. Instead, there was a Bank of America expert testifying that the Bank gave a third party certain specifications, but that it does not mandate or control how the third-party vendor writes or implements its software.

> Q. Help me with this analogy because this is how I've sort of been imagining this. Bank of America is sort of the architect. You sort of establish a blueprint, if you will, of how on-line bill pay will work. However, you hand off the plumbing to a sub-contractor. Is that fair to say?
>
> A. That's fair.

(Tr. II 247:11-17).

Asked whether Bank of America is "the party that writes the software development plan?," the Bank's expert could only say, "We give [the outside vendor] the requirements and how it needs to operate, look and operate." (<u>Id</u>. at 21-24.) "Q. Okay, so you tell the plumber, I need it to be copper, but you don't tell them how to lay the pipe? A. No." (<u>Id.</u> at 247:25-248:2).

> Q. Okay. <u>Have you actually reviewed this operative development plan for the bill pay application that would have been in place in January 2007</u>?

> A. I have reviewed and used the subsequent plans. <u>I was not involved in the plans that were used to update the system as it was in 2007</u>.

(Tr. II 248:21-249:1) (emphasis added).

So he had not even reviewed the "operative development plan," let alone the actual software, as it stood in 2007.

> Q. So fair to say that you may know that it was supposed to be copper pipe, but you have absolutely no idea how the pipe was actually laid in 2007?
>
> A. Correct.

(Id. at 249:2-6).

The Bank has another argument based on a selective quotation from the Court. The Court's Order of December 12, 2011, stated, in part,

> 2. In failing and neglecting to follow its standard procedures for the removal of the Plaintiff from Defendant Katz's account, in failing to properly investigate the circumstances thereof, in failing to communicate with the Plaintiff, and in leading Defendant Katz and the police to believe that the Plaintiff's Bill Pay transactions could not have been made from Defendant Katz's account without deliberation on the Plaintiff's part, Defendant BOA breached its duty of due care to the Plaintiff, and thereby caused his arrest on criminal charges, and the tangible and intangible damages caused thereby.

Id. at 5-6.

Ignoring all the rest, the Bank writes, "The trial court ruled that the Bank was negligent 'in misleading Katz and the police to believe that [the Disputed Payments] could not have been made from Defendant Katz's account without deliberation on the Plaintiffs [sic] part.'" (Initial Br. of Appellant, at 18). Perhaps that one phrase should have read, "in failing to affirmatively inform Katz that the Disputed Payments could have been made from Defendant Katz's account without deliberation on the Plaintiff's part"—which the Bank clearly had the duty to do, and to do before, not after, the doctor was arrested. If that phrase

from the trial court's Order troubles the Court, the remedy is to in effect revise that one partial sentence, and affirm as modified.

II. RE: THE BANK'S ARGUMENT V

The Bank's Argument V is an argument that any duties owed by the Bank would be in contract, not tort. This argument is not preserved. As the trial court explicitly found in its Order on the Motion to Alter, "Defendant BOA failed to provide any evidence regarding the existence, terms, or applicability of any contractual relationships in this case. Therefore, any argument that the negligence claim is barred by the contractual relationship fails." (Id. at 7). On appeal, the Bank does not challenge this factual finding; it merely asserts that the terms of the contracts preclude liability in tort.

Because the Bank fails to challenge the finding that it failed to present any evidence in support of its contract argument, its argument fails. See, e.g., State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991). The Court should not even address the merits.[15]

Nevertheless, Respondent has made a good-faith effort to examine the transcript for any such evidence, and found none. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (purpose of issue preservation rules is to ensure that all facts and

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[15] Respondent's point may seem technical, but it is not. The only effort the Bank makes on appeal to demonstrate where any such evidence was presented below is in a footnote, n.16 on p. 42, wherein it references a page of the transcript in which certain exhibits were introduced "without objection." (Initial Br. of Appellant, at 42, n.16 (citing Tr. I 71:4-6)). That transcript page, in turn, reflects a "document dump" ("Whereupon, Defendant Bank of America's Exhibit Nos. 1 through 21, 25, and 28 through 38 are admitted into evidence."). Merely placing 24 exhibits, en masse, into evidence does not direct the trial court's attention to what, if anything, it is supposed to consider in those documents.

To recapitulate: Respondent Jernigan is not stating that the evidence is in the transcript, but that Appellant simply forgot to cite to it. Rather, Respondent Jernigan is stating (a) that the fact-finder was correct, there is no reference to any such evidence or argument in the transcript; and (b) in an abundance of caution, and in the remote possibility that Respondent has overlooked it, Respondent can scarcely be blamed; when Appellant fails to provide any citations despite the lower court's finding that the Appellant presented no such evidence below.

arguments are presented to the trial court; those that are not raised or ruled on are not to be considered as grounds to reverse on appeal).

Respondent has also searched the transcript for any such argument the Bank may have made to the trial court, and finds none. I'On, L.L.C (arguments not raised to the trial court may not be considered on appeal). Respondent does see significant argumentation on the part of Appellant's trial counsel re: Ms. Katz's claims being barred by contract. However, there was no argument made to the trial court, prior to the motion to alter the judgment, that Dr. Jernigan's remedy was in contract.

Indeed, the only argument made by the Bank is largely to the reverse: that any contractual duty of the Bank for its failure to remove Dr. Jernigan from the account would be a duty to Ms. Katz, and not to Dr. Jernigan. (Tr. II 153:2-6). The Bank's argument was that it had no duty to Dr. Jernigan, neither in contract nor in tort. Again, the Bank's contract claim is unpreserved. I'On, L.L.C.; State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (an appellant cannot take a position on appeal different from its position at trial).

Even in its principal Brief, the Appellant never states the terms of the contract, so Respondent Jernigan has no opportunity to argue in response. For example, the Bank does not state what the limit of liability is, if any, in its contract, etc., so Respondent Jernigan has no opportunity to argue whether the limit is unconscionable; whether it would apply to the events at issue here; whether it is proper for a contract to limit damages such as these to some trivial amount. Thus, the argument is waived on appeal.

The trial court did not err in rejecting the Bank's contract argument as without evidentiary support; the Bank did not preserve any contract argument regarding Dr. Jernigan's claims.

III. RE: THE BANK'S ARGUMENT VI

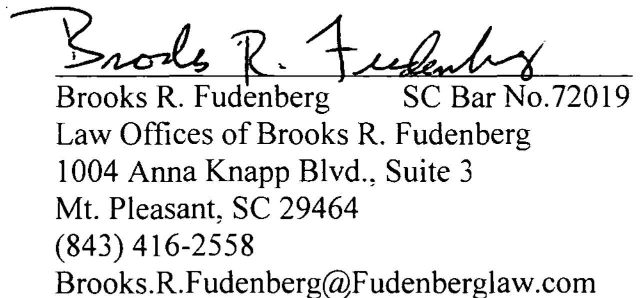
Dr. Jernigan's injuries are far greater than what the Bank describes as "the minimal amounts he paid to make bail and to his criminal defense attorney to get the criminal charge expunged, which totaled $2,650.00." (Initial Br. of Appellant, at 43). An established doctor, semi-retired, never been accused of any crime, never arrested, never disciplined by any medical board or employer, he was arrested, at his home, in the darkness of an early morning, with his girlfriend and his son present, and held for approximately eighteen (18) hours. (Tr. I 58:9-61:9). He was unable to leave the state until after the preliminary hearing, some months later, and the charges were hanging over his head until they were dismissed, on March 19th of the following year, some ten months after the arrest. (Tr. II 173:6-7). He was unable to apply for work, because the forms ask whether the applicant has been arrested, and if he has, they do not hire that applicant. (Tr. I 84:9-15). He was worried that if he were convicted, he would lose his medical license and never be able to work as a doctor again, due to a conviction of a felony. (Tr. I 83:13-21). This was no "ordinary" mistaken arrest. He was arrested on a warrant signed by the mother of his children due to the Bank's negligence.

All the evidence is that Dr. Jernigan is the type who holds pain inside, but that does not mean that he is hurt any less than someone who is more vocal in articulating her pain. The fact-finder who listened to the testimony, heard the tones of voice, the pauses and speed of speech, who saw the body language, was in the best position to determine how greatly he was hurt.

CONCLUSION

For the foregoing reasons, and other reasons as may be apparent to the Court, Dr. Jernigan respectfully asks the Court to AFFIRM the trial court's holding in favor of Dr. Jernigan.

Respectfully submitted,



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