THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2020-001027

JOHN MICHAEL TIMMONS, JR., d/b/a TAVERN ON THE LOOP, Appellant/Respondent,

v.

FIRST RELIANCE BANK, INC.; THE BLANTON COMPANY, INC.; JBJR ENTERPRISES, INC. d/b/a THE BLANTON COMPANY, INC.; WW PLASMA II, LLC; DALE PORTER; F.R. SAUNDERS, JR.; HUNTER WILLIAMS; and JOSEPH B. BLANTON, individually, Defendants,

Of Which FIRST RELIANCE BANK, INC.; DALE PORTER; F.R. SAUNDERS, JR. are the, Respondents,

And

WW PLASMA II, LLC and HUNTER WILLIAMS are the Defendants.

APPELLANT'S INITIAL BRIEF

Ben Le Clercq
David D. Ashley
708 South Shelmore Blvd., Suite 202
Mount Pleasant, SC 29464
843-722-3523
Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR WHEN IT FOUND AS A MATTER OF LAW THAT THE FILING OF THE *LIS PENDENS* AND FORECLOSURE JUDGMENT AND SALE RENDERED APPELLANT'S LEASE UNENFORCEABLE AGAINST RESPONDENT?

II. DID THE TRIAL COURT ERR WHEN IT FOUND AS A MATTER OF LAW THAT: I) RESPONDENT DID NOT OWN THE SWEETBRIAR PROPERTY AT THE TIME OF APPELLANT'S LEASE ON AUGUST 20, 2015, DIRECTLY CONTRARY TO A SPECIFIC CLAUSE IN THE MORTGAGE, AND II) ALL "RIGHT, TITLE AND INTEREST" (INCLUDING THE RIGHT TO ACT AS LANDLORD AND LESSOR) IN ATLANTIC'S LEASES *DID NOT* TRANSFER TO RESPONDENT AT MOMENT OF EXECUTION, AGAIN DIRECTLY CONTRARY TO A SEPARATE CLAUSE IN THE MORTGAGE

III. DID THE TRIAL COURT ERRONEOUSLY IGNORE EVIDENCE DEMONSTRATING GENUINE ISSUES OF MATERIAL FACT THAT RESPONDENT WAS LESSOR OF APPELLANT'S LEASE?

IV. DID THE TRIAL COURT ERR BY FAILING TO CONSIDER WHETHER BANK HAD ACTED IN A COMMERCIALLY UNREASONABLE MANNER AS DESCRIBED IN SC CODE 29-3-100

V. DID THE TRIAL COURT ERROUNEOUSLY IGNORE GENUINE ISSUES OF MATERIAL FACT AS TO RESPONDENT'S RATIFICATION OF APPELLANT'S LEASE?

VI. DID THE TRIAL COURT ERR WHEN IT GRANTED SUMMARY JUDGMENT ON APPELLANT'S CAUSES OF ACTION FOR MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, AND BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT BASED ON ITS FINDING THAT RESPONDENT WAS NOT A PARTY TO APPELLANT'S LEASE?

STATEMENT OF THE CASE

This case is about an 18 year lease entered August 20, 2015 by Appellant John Michael Timmons, Jr. ("Lease") for part of the Sweetbriar Shopping Center ("Sweetbriar"), where Timmons opened and ran his restaurant and nightclub business, Tavern on the Loop. On January 29, 2018, Timmons brought this action against Respondent First Reliance Bank and others claiming that on August 20, 2015, First Reliance Bank was the lessor of the Sweetbriar Shopping Center and that property manager, The Blanton Company, leased the Sweetbriar space to Timmons on behalf of Respondent making Respondent a party to the lease. (**Complaint).** Timmons further alleged that Respondent breached the lease with him on February 26, 2016 when it extinguished all of the leases at the Sweetbriar Shopping Center converting them to month to month terms prior to selling the property to WW Plasma II, LLC in January 2017.

Respondent First Reliance Bank claims that it only had a security interest in the Sweetbriar property and was not the lessor of the property at the time Timmons entered the lease on August 20, 2015 and that the lessor and landlord for the property at that time was Atlantic Regional, LLC ("Atlantic"). Respondent further claims that the December 3, 2015 foreclosure judgment and Respondent's subsequent purchase of the property on February 4, 2016 lawfully made Timmons' lease unenforceable against it.

Appellant filed his Complaint on January 29, 2018, against Respondents First Reliance Bank, Inc.; F.R. Saunders, Jr. (an employee and executive of the Bank); and Dale Porter (an employee and executive of the Bank) ("Respondents" or "Bank"); The Blanton Company, Inc.; JBJR Enterprises, Inc. d/b/a The Blanton Company, Inc.; Joseph B. Blanton, individually ("Blanton Defendants" or "Blanton"); and WW Plasma II, LLC and Hunter Williams (a member and agent of Plasma) ("Plasma Defendants" or "Plasma"). In his Complaint, as to Respondents,

Appellant alleged (1) breach of contract; (2) breach of contract accompanied by fraudulent act; (3) fraud; (4) negligent misrepresentation; (5) violation of the South Carolina Unfair Trade Practices Act; (6) tortious interference with contract; (7) tortious interference with prospective business opportunities; (8) breach of duty of good faith and fair dealing; and (9) negligent supervision. **(Complaint)**. Further, Appellant alleged damages for loss of his and his wife's life savings; damage to his professional personal reputation; lost income; lost profits; emotional distress; loss of goodwill; loss of equipment and prejudgment interest.

Cross motions for summary judgment were filed by all parties. A Webex video hearing was held on Respondents' Motion for Summary Judgment on June 10, 2020. On June 23, 2020, the trial court filed its Order denying in whole Appellant's Motion for Summary Judgment against Respondents and granting in whole Respondents' Motion for Summary Judgment against Appellant. Appellant served Notice of Appeal on July 23, 2020. This case was extensively briefed, with Appellant filing a Motion for Summary Judgment ("MSJ") with Memorandum in Support **(App. Memo MSJ)**, a Supplemental Memorandum in Opposition to Respondents' Motion for Summary Judgment **(Supp. Memo in Opp. MSJ)**, and a Motion to Reconsider **(Mot to Recon)**.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable

issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Sauner v. Public Serv. Auth.,* 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.,* 353 S.C. 449, 578 S.E.2d 711 (2003); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); *see also Laurens Emergency Med. Specialists*, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.,* 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where 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 judgment as a matter of law. *Russell v. Wachovia Bank, N.A.,* 353 S.C. 208, 578 S.E.2d 329 (2003); *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below."). That did not happen here.

Further, there is no heightened evidentiary standard for Appellant's claim for breach of contract and in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion

for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 381 S.C. 326 (S.C. 2009). Additionally, in *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982), the South Carolina Supreme Court explained that, generally, "[q]uestions of agency ordinarily should not be resolved by summary judgment where there are any facts giving rise to an inference of an agency relationship." See also, *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E. (2d) 24 (1980); *Jamison v. Howard,* 271 S.C. 385, 247 S.E. (2d) 450 (1978).

STATEMENT OF FACTS[1]

1. On August 14, 2006, Atlantic was the borrower in possession of the Sweetbriar Shopping Center ("Sweetbriar" or "the Property") and executed a Note and Mortgage for not more than $2,125,000 for this strip mall/commercial complex located at 1945 Second Loop Road, Florence, SC 29501, in favor of Respondent First Reliance Bank ("Respondent" or "Bank"). **(App.'s Memo in Supp. MSJ, Ex. 2, Note; Ex. 3, Mortgage)**. The Mortgage transferred title to Sweetbriar from Atlantic to Respondent, was filed at the RMC office as a matter of record, and states on the first page:

- [par. 3] "[Atlantic] mortgages, grants and conveys to [First Reliance Bank] all of [Atlantic's] right, title, and interest in and to the following described real property . . . [Sweetbriar]."

- ***[par. 6] "[Atlantic] presently assigns to [First Reliance Bank] all of [Atlantic's] right, title, and interest in and to all present and future leases of the property [Sweetbriar] and all rents from the property [Sweetbriar].***

(Mortgage, p. 1, par. 3, 6) (emphasis supplied).

[1] Below is a summary of relevant facts and Appellant will refer to the more expansive description of the facts found in Appellant's Memo in Support of Motion for Summary Judgment.

2. Incredibly, in disturbing testimony, Bank President Saunders testified in all of his years of running the Bank ***he had never once read*** the note and mortgage used by Bank, which of course Bank strictly enforced against numerous borrowers. **(Saunders Dep. at p. 85, line 20-24).**

3. The "Great Recession" followed swiftly on the heels of the signature of these documents, and Atlantic had a terrible payment history. **(App.'s Memo in Supp. of MSJ, p. 6 par. 3.** A number of South Carolina banks were shut down by the FDIC during this time. ***Id.*** **at , p. 8 par. 5**

4. Bank had $80-$100 million of non-performing assets ("NPAs"), one of which was Atlantic, and was under significant "pressure" from FDIC from 2010 to 2014 to get NPAs and bad loans off its books, including the Atlantic loan. **(Dale Porter Dep. at pp. 257-263; p. 293; n.b. p. 257, line 18-21); (App.'s Memo in Supp. of MSJ, p. 7 par. 3).**

5. In 2013, Atlantic Principal Richard Cooke pled guilty to overbilling Medicare, submitting "fraudulent cost reports" and was sentenced by Circuit Judge L. Casey Manning to 10 years on the two forgery indictments, suspended to five years probation, and three years each on the Medicaid fraud charges, all suspended to probation, and forced to "make full restitution" to Medicaid of more than $1,000,000. (**App.'s Memo in Supp. of MSJ, Ex. 5(b)).**

6. Additionally, Carolina Medcare, an ambulance company run by Cooke's accountant and "***straw man***" Ryan Finklea (since Cooke had been barred since approximately 2008 from doing business with Medicaid), and the anchor tenant at Sweetbriar (Atlantic's sole property), had its own problems with federal authorities on similar issues, part of the explanation of the foreclosure. **(App.'s Memo in Supp. MSJ at p. 7).**

7. From 2004 to 2017, Blanton, a former owner of Sweetbriar, was property manager for Sweetbriar, in charge of leasing vacant property and collecting rents. Blanton testified that property managers have a duty to maximize rentals, leases, and profitability for the principles for

whom they work. Blanton also testifies that these Principals are obligated to honor the leases that he the property manager enters **(Blanton Dep. (vol. 1) at p. 62, lns. 14-24; p. 21, lns. 18-22).**

8. On November 27, 2014, because of its payment history, Bank forced Atlantic to sign an Assignment of Rents, which was filed at the RMC office as a matter of record, which stated:

> ***[Bank] shall have the right at any time, and even though no default shall have occurred under this Assignment, to collect and receive the Rents***. For this purpose, Lender is hereby given and granted the following rights, powers, and authority:
> . . . .
>
> Enter the Property. Lender may enter upon and take possession of the Property; demand, collect and receive from the tenants or from any other persons liable therefor, all of the Rents; institute and carry on all legal proceedings necessary for the protection of the Property, including such proceedings as may be necessary to recover possession of the Property; collect the Rents and remove any tenant or tenants or other persons from the Property.
>
> . . . .
>
> **Lease the Property.** ***Lender may rent or lease the whole or any part of the Property for such term or terms and on such conditions as Lender may deem appropriate.***

(Assignment of Rents at p. 2, final par.) (emphasis supplied). As a matter of law, this language, found in a document registered and a matter of public record, is enforceable and must be given its plain and obvious meaning: subsequent to the date of the execution of this document, ***Bank had the right to lease the property*** directly or through an agent like Property Manager Blanton. ***Id.* at p. 4. par. 1**. But did they? The lower court ignores evidence that Bank was the Lessor, requiring reversal. (See, *infra*, e.g. at par.21)

9. Atlantic was in trouble on the Mortgage early and often, and was frequently in default. **(App.'s Memo in Supp. of MSJ p. 6 par. 3).** Blanton stated at his deposition that he was aware ***prior*** to the filing of foreclosure by Bank that Atlantic was having financial problems. **(Blanton**

Dep. (vol. II), p. 71 line 5-24). Blanton was also well aware of Atlantic's defunct status immediately *after* the foreclosure filing **(Blanton Dep. (vol. 1) at p. 101 line 24 – p. 102, lns. 3-9)**. Blanton had telephone conversations with Atlantic prior to the execution of the Lease, with Atlantic telling Blanton "we are out of business." (**Blanton Dep. (vol. 1) at p. 96, line 3—p. 97 line 21)**. Any suggestion that "out of business" Atlantic could honor an 18 year Lease entered August 20, 2015, is disingenuous and deceptive.

10. In June 2015, the Atlantic file transferred from Lending Dept at Bank to "Bad Loans" Dept run by Dale Porter and Jess Nance. Porter testified at his deposition that very few borrowers in default were able to cure the default subsequent to file being transferred to his department, less than "5% or so", and a similarly low percentage of such properties were ultimately purchased at foreclosure sale by a third party. **(Dale Porter Dep. at pp. 56 line 20 – p. 57 line 17;).** In other words, in the great majority of cases (>95% but probably approaching 99-100%), Bank knew once file was transferred from "Lending" to "Bad Loans" that Bank would extinguish Borrower's interest, be the high bidder at foreclosure sale, and be in a position (needing to stay alive and facing "pressure" from the FDIC) to sell property quickly and get it off its books. These facts also inform Bank's obligation to act in a "commercially reasonable" manner (see par. 12 infra).

11. Porter described himself as the "bad guy" at the bank in charge of foreclosing, extinguishing borrowers' interest, and selling the property. He also testified that he typically did not have communication with borrowers relating to any attempts to cure the default, that was the role of the "Lending Department." (**Dale Porter Dep. at p. 106, line 7)**. Saunders testified that Porter's "bad loans" department was in frequent communication with the "lending department", but that Porter was in charge, and *Porter's* department decided when to "take" files from the loan department and put them in foreclosure and "take the asset from them." **(Saunders Dep. at p. 63**

line 20 – p. 64 line 9).

12. On July 20, 2015, Bank, via employee Porter, filed foreclosure proceedings on Atlantic, including *lis pendens*. **(*lis pendens*).** On July 23, 2015, Bank attorney Coit Yarborough, on behalf of Bank, filed Motion to Enforce Assignment of Rents against Atlantic, which motion (almost one month *before* the Lease) requested that "agent" Blanton become agent of Bank for collecting rents. **(App.'s Memo in Support of MSJ, Ex. 15, Mot. to Enf. Ass. of Rents)**. The motion referenced S.C. Code Ann. § 29-3-100 which states ***"assignee [in this case Bank] must proceed in a commercially reasonable manner."*** *Id*. (emphasis supplied). Bank's duty to act in a commercially reasonable manner of course extends to its agents acting on its behalf, such as Blanton, and is an independent basis for recovery against Bank (no matter who the Lessor was), all of which was ignored by the lower court.

13. On July 24, 2015, Bank's motion to enforce rents was personally served on Blanton, informing him that the Bank had started foreclosure on Atlantic. Within several days Blanton learned (though he already knew Atlantic was in trouble) that Atlantic intended to let the property go, and was "out of business", "out of here" and "gone". **(Blanton Dep. (vol. 1) at p. 110, lns. 17-21; p. 96, lns. 14-22; p. 101 lns 24—p. 102, lns -20).**

14. Blanton's testimony beginning at p. 95, line 1 of volume one of his deposition through p. 103, line 10 is particularly critical, as he describes his communications with convicted felon and Atlantic principal Cooke in the days after the foreclosure papers were served on Blanton, but prior to the execution of the Lease, and his understanding of who was leasing the property after the July 24, 2015 foreclosure filing by Bank. Blanton testified that he had an obligation when foreclosure was filed to make contact with the borrower in possession, Atlantic, to find out their intentions, then testified that Atlantic was "out of business" and, as to Sweetbriar, was "out of here," which

Blanton interpreted to mean that Atlantic was not going to try to bring that mortgage current, but rather, that title to Sweetbriar would be lost in the foreclosure to Bank:

> Q: Do you think that you have an obligation to go to [Atlantic] just to find out whether they are going to either bring the property current or whether they're going to let it go to the bank? Because you have to rent the property.
>
> A: . . . Yeah. Sure. "What are you guys going to do? Are you moving out of here? Are you just going to sit until they [Bank] basically throw you out?" I don't know.
>
> Q: Did you actually do that in this case? Did you go to Atlantic any time after July 24 and have a conversation with them to find out what their intentions were [regarding] the foreclosure?
>
> A: ***I'm sure that we had phone conversations… With them saying, "yeah, you know, we are out of business," or "we're gone."***
>
> Q: That's what they told you?
>
> A: I think so, yes . . . .
>
> Q: Okay. Who was [it that] told you that? Richard Cook[e]?
>
> A: Richard. He was my main guy that I talked with, yes. . . .
>
> Q: And he didn't say, "No. Everything's cool. We're going to bring this current."
>
> A: No.
>
> Q: Did he say that the ambulance company was out of business?
>
> A: I can't truthfully say that he did or did not . . . . but he basically told me that their business was bad.

(Blanton Dep. (vol. 1) at p. 96, line 3—p. 97 line 21); see also (vol. 1) pp 100-103.

15. Critically, ***Blanton understood that because of Atlantic was "out of business", it was Bank that would be leasing the property to tenants like Timmons, not Atlantic***:

Q: [G]ive me a range of time that you think those conversations [with Cooke] took place. Was it on July 24 [date of service upon Blanton] itself? Was it a week later? Was it a month? You know when do you think it was?

A: There's no way I can answer that except to guess. You know, it certainly wasn't on the day that I was presented with the fact that there was a foreclosure action. I guess [Richard Cook] called me or I called him and said, ***"hey, you know, let me know what you're doing, when you're getting out of here, so I can talk with the bank and see if they subsequently want to lease – – you know, to lease the space."***

(Blanton Dep. (vol. 1)at p. 102 line 21 – p. 103 line 10) (emphasis supplied)**.** The clear inference, again ignored by the lower court (which was required to make inferences favoring Appellant instead of Bank), is that Atlantic was "out of here" as of the date of filing of the foreclosure papers on July 23, 2015, if not before that, since they were already "out of business," and that subsequent to July 23, 2015 ***Bank*** would "lease the space."

16. Blanton did in fact speak with Bank and Bank's attorney about Timmons' 18 year Lease prior to August 20, 2015 (the date of the Lease), both of whom instructed Blanton to lease the space. In fact Within several days of the foreclosure papers being served upon Blanton on July 24, 2015, almost a month *before* the Timmons Lease, Bank Defendant Dale Porter, Bank Attorney Coit Yarborough had an in person meeting with Blanton at Yarborough's office. ***Blanton, who knew at that meeting that Atlantic was "out of business" and could not honor any long term leases, testified in his deposition that he was told by Dale Porter at Bank during this critical meeting to "[l]ease what you can and, you know, let's get the income coming until we decide to sell it or to continue to manage it."*** **(Blanton Depo. (vol. 1) at p. 188, lns. 2-24**). The lower court ignores this evidence -which is much more than a "scintilla."

17. Blanton was adamant that the Bank was the lessor:

Q: So we've got this lease that is signed between Mr. Timmons and you, as lessor, for what I would call a long term lease . . . on August 20 of 2015.

> Would you agree with me that you would not have let [Timmons] sign that lease knowing that the property was in foreclosure proceedings unless you had also told the bank about the proposed lease?
>
> Ms. Houghton: Object to form.
>
> A: There is no way in this world – – and I'll give my [real estate] license up tomorrow, and Mike [Timmons] knows this. ***There's no way that I would've ever facilitated a lease with someone who's willing to spend their money, put their heart into it, and my heart into it, being a reputable broker has been here 41 years, and I would never, ever do that. And if I did, then just take my damn license away from me. I would not do that.***
>
> Q: You were not intending to deceive or trick [Timmons]?
>
> A: No, sir. I was not. And off the record, I think if you and I and Mike sat down and had a beer and me a Coke, then we would both agree.

(Blanton Dep. (vol. 1) at p. 125 line 25 – p. 126 line 25). (emphasis supplied). Blanton would not have allowed Timmons to "ever do that"—that is--enter a Lease with defunct, "out of business" Atlantic. Rather, Bank was running the show and had approved the Lease, and Blanton would "give [his real estate] license up tomorrow" if Bank were not the Lessor and Blanton had set Timmons up to be had by the defunct Atlantic. This of course is also why Blanton did not list Atlantic as the lessor of the property, as he had done one year previously on the Sweetbriar lease with the Sunshine House. (see below). Instead, he listed *himself* as lessor. Again, the lower court fails to construe the evidence in the light most favorable to Appellant.

18. Blanton also testified that this was the first time in his career he could recall managing a property that was in foreclosure. **(Blanton Depo. (vol. 1) at p. 83, line 9-11**).

19. From July 24, 2015 through January 27, 2017, Blanton served as property manager and agent for Bank, collected rents from Sweetbriar tenants, deducted property management expenses and other expenses, and forwarded rent revenues to Bank, usually sending the check to Bank by the "17th" of the month according to Blanton in his deposition. Rent revenues from all tenants at

Sweetbriar where occupancy was subsequent to July 24, 2015 were sent by Blanton to and accepted by Bank. **(Blanton Depo. (vol. 1) at p. 226, lns. 20-25 and p. 227, lns. 1-10; p. 138 line 16-21).** Blanton admitted in his discovery responses that he had a ***contract*** with Bank, was property manager for Bank, and that Bank paid him for his services with regard to the same**. (Blanton RTA Nos. 17, 5).** In his deposition Blanton admitted that he acted as agent for the bank ***on and after*** July 24, 2015. **(Blanton Depo. (vol. 1) at p. 69 line 10 – p. 71, line 4; n.b. p. 70 lns. 15-22—** "subsequent" – in other words, beginning on July 24—"**).**

20. From August 1 – 17, 2015, Blanton -- aware that Sweetbriar was in foreclosure, out of business, "out of here [Sweetbriar]", and would let [Sweetbriar] go to Bank, with specific authorization from Bank Executive Porter to "***lease what you can***" at Sweetbriar, and aware that Bank had moved to have him appointed as agent and property manager for Bank per the Assignment of Rents described in if not attached to papers served on Blanton on 7/24/15) was in contact with Timmons and told him that the property was available at Sweetbriar. Blanton met with Timmons, showed him the site, and Timmons was interested. **(Blanton Dep. (vol. 1) at pp. 112 line 6 -p. 113 line 4; Timmons Dep. (vol. 2) at p. 54 line 12 – p. 55 line 11)**. Timmons told Blanton the property was a "total gut job" and "total redo" and that he would have to invest substantial sums to renovate it, and thus needed a long term Lease to justify the investment. **(Timmons Depo. (vol. 2) at p. 55, lns. 7-23)**.

21. On August 17, 2015, Timmons (at Blanton's request) sent Blanton a proposal calling for a long-term lease and proposing payment amount and other terms. **(App. Memo in Supp. of MSJ, Ex. 22 - Timmons Proposal).** Blanton made substantial handwritten notes on this paper and (covering "all his bases" because of his unfamiliarity with managing property in foreclosure) sent the proposal both to Bank attorney Coit Yarborough (and to Atlantic), the *only* parties with

ownership interests in Sweetbriar. (**Blanton Depo. (vol. 1) at p. 123, lns. 1-9; App. Memo in Supp. SMJ, Ex. 24 - Blanton notes with Timmons Proposal**). Blanton wrote "Ray Coit Yarborough 676-0580" on this document, and testified that he "***obviously***" spoke with Bank attorney Yarborough about Timmons' lease ***prior*** to it being signed on August 20, 2015 as indicated by his notes. **(Blanton Dep. (vol. 1) at p. 125, lns. 24-25 and p. 126, lns. 1-19; p. 178, line 23; p. 180 line 4-7; n.b. p. 181 line 3-9:** *"Q. Tell me what it means: the "Ray Coit Yarborough, the telephone number… A. It's all my handwriting. Obviously [I] spoke with Ray [Coit Yarborough]*"**).**

This is evidence that, on or about August 17, 2015, three days prior to the execution of the Timmons Lease, and *in addition* to his in person meeting with Bank executive Porter and Bank Counsel Yarborough, Blanton also had at least one separate conversation with Yarborough about the Timmons lease. Bank and its counsel specifically authorized and engaged property manager Blanton to enter the Timmons Lease on Bank's behalf – – a mandate of actual agency authority. ***Appellant is entitled to the inference that, since Bank admittedly had the right to enter the Lease, clearly had the financial incentive to enter the Lease, received all rent revenues from the Lease, and there were multiple conversations regarding the Lease between Blanton, Bank executive Porter and Bank Counsel Yarborough, prior to the date of the Lease, that Bank did in fact authorize Blanton to enter the Lease and was the Lessor, as occurred in the Laser Tag lease described infra par. 31***. The lower court ignores these conversations and their import, unfairly giving preferential inferences to Bank rather than Appellant, which merits reversal.

22. Having conferred with Bank and its counsel on multiple occasions prior to August 20, 2015 about Timmons' proposed Lease, and received authority to proceed with the Lease, on August 20, 2015, Blanton, knowing Bank had filed foreclosure against Atlantic for Sweetbriar, that Atlantic

was "out of business," and that Bank had moved to have him appointed property manager and agent for Bank, executed the long term lease (3 terms totaling 18 years) as "Lessor" with Timmons as "Tenant" **(App. Memo in Supp. SMJ, Ex. 26 - Timmons Commercial Lease**). Notably, Blanton did not list Atlantic as "Landlord" or "Lessor" in Timmons' lease (one year after having listed the "Landlord" in the Sunshine House long term lease at Sweetbriar as "Atlantic"). **(App. Memo in Supp. MSJ, Ex. 27 - Sunshine House lease).** Bank, which knew it was going to be marketing the property for sale, or demolishing it, benefited greatly by having a long-term tenant on the property, since that would increase the appraised value of the entire property. (**Blanton Dep. (vol. 1) p. 44 line 21 – p. 45 line 6).** The mandatory inference, of course, in this case, is that had Blanton intended that Atlantic be the Lessor of Timmons' Lease, he would have done that in the Lease, as he did with the Sunshine House Lease. That is evidence in favor of Appellant's position, that Bank was Lessor. Yet again, the Court fails to interpret the evidence in the light most favorable to Appellant.

23. Blanton and Bank Defendants admit that, while of course knowing about the foreclosure, they did not disclose to Timmons the existence of the foreclosure prior to Timmons signing the 18 year Lease. **(Blanton RTA No. 12) (Bank RTA No. 11)**. *Whatever the decision this Court makes on the identity of the Lessor*, this is not "commercially reasonable" action under S.C. Code Ann. § 29-3-100, as a matter of law. See, *infra*, Argument, Sec. IV at p. 45-46.

24. From August 20, 2015 through October 31, 2015, Timmons invested his and wife's life savings ($109,000 in cash, doing much of the work himself with friends and family, furnishing w/ equipment with new value of $80,158.72) in reliance on the 18-year lease. (**Timmons Aff., par. 14**). Also, in reliance on the long term lease, Timmons and his wife took out loans for $28,000 and $15,000 to fund the business, ***Id.* at par. 2**, and credit card debt. On September 2, 2015,

Blanton entered a long term lease with Xavier Sams for a unit at Sweetbriar, which Sams invested in and upfitted for a recording studio. **(App. Memo MSJ, Ex. 30 - Xavier Sams Lease)**. Blanton sought approval from Bank prior to Timmons' signature, and obtained same, again the mandate of actual authority to Bank's agent Blanton. **(supra, par. 21; Blanton Depo. (vol. 1) at p. 123, lns. 1-9).**

25. The hearing on Bank's Motion to Enforce Rents (filed on July 23 and served on Blanton the next day, and thus well before the Timmons Lease was signed on August 20) was heard on September 30, 2015. **(App. Memo MSJ, Ex. 31 - 9/30/15 Hearing on Mot. Assignment of Rents).**

26. Present at the September 30, 2015 hearing on Bank's motion to enforce assignment of rents were Bank attorney Yarborough, and property manager and Bank agent Blanton. ***Neither Atlantic nor it's attorney were present***. Bank attorney Yarborough told the Court:

> ***there are some other potential leases sort of up in the air, and something needs to be done to, to either consummate the leases or, you know, reject the leases. We would like to employ the Blanton Company to collect the, collect the leases and to manage the property, as they have been doing all along, on behalf of the bank***, as well as the owner, pending this action, and ***we want the rents paid over to First Reliance Bank***.

(***Id.*** **at p. 3)**(emphasis added).

27. Attorney Yarborough's request at the hearing, confirming the explicit request in Bank's motion, confirmed the "facts on the ground" and made Blanton Bank's agent and property manager as of the date of the filing of Bank's Motion to Enforce Rents on July 23, 2015. As evidence of the same, all rents for occupancy subsequent to July 23, 2015, including the Timmons' Lease rents, were collected by Bank's agent Blanton and in fact paid to Bank. **(*Id.*).** Principals are bound by the acts of their agents acting within the scope of their authority. *Fernander v. Thigpen*, 278 S.C.

140, 293 S.E.2d 424 (1982). The scope of authority of a property manager includes the ability to lease vacant property for maximum profitable use, which for a strip mall like Sweetbriar includes long-term good credit tenants, like Timmons, who Blanton confirmed in his deposition paid "on time every time." **(Blanton Depo. (vol. 1) at p. 157, lns. 9-15)**.

28. There was no discussion at the hearing with Atlantic or Atlantic's counsel (who was not present) about "consummat[ing]" the "leases"— the only discussion was with Bank's counsel. No one at the hearing – not the Court, not Mr. Yarborough, was asking Atlantic about whether the Sweetbriar lease should be "consummate[d]" or not, and Bank/Yarborough knew at the time (or is imputed with the knowledge) that Blanton had executed a long-term Lease with Timmons who was making substantial investments in reliance on that long-term Lease, and Blanton was seeking other long term tenants like Elite Laser Tag (infra, par. 31-33). Yarborough's use of the term "consummate" ("bring to completion, achieve, fulfill") was a clear representation to the court that *Bank* would be consummating the lease rather than "reject[ing]" them, as Bank would be getting the rents.

29. Blanton admitted that "subsequent to July 24, 2015, Blanton was acting as property manager for First Reliance Bank with regard to Sweetbriar, including for the property leased by Timmons." **(Blanton RTA No. 5).** Blanton confirmed the same in his deposition. (**Blanton Dep**. **(vol. 1) at p. 172, line 24 to p. 173, line 25)**. Blanton confirmed in his deposition that Principals for whom he works as property manager are bound to comply with the leases he enters on their behalf. (**Blanton Dep. (vol. 1) at p. 21, lns. 18-22).**

30. On October 2, 2015, the court issued an order (drafted by Bank counsel Yarborough) on Bank's motion, and the order stated: ***"[Bank] Proposes that the current property manager, the Blanton company, remain property manager***, but that all rents collected be paid over to [Bank],

which is what Court ordered. **(App. Memo MSJ, Ex. 34 - 10/2/15 Order on Rents, p. 1 1st par, p. 2 par. 1).** (emphasis supplied).

31. Local business Elite Laser Tag ("Elite") wanted a long-term lease for the "anchor space" at Sweetbriar in early October, 2015, quickly, and they hand delivered their proposal to Blanton on Friday, October 2, 2015. **(App. Memo MSJ, Ex. 35 - Elite Laser Tag lease proposal).** Elite principal Efrem Andrews had been in communication with property manager Blanton for a month or so before that, and had seen the space "seven or eight" times. ***At no time prior to October 2, 2015 did Blanton reveal to Andrews that Sweetbriar property was in foreclosure.*** **(App.'s Memo MSJ, Ex. 36 - Efrem Andrews Declaration, p. 2 par. 12).**

32. Blanton received Elite proposal on Friday, October 2, 2015 and acted quickly to try and close the "hot lead." He had just been in the lower court *two days previously* with Bank counsel Yarborough, on Wednesday, September 30, 2015. As with Timmons' lease proposal, Blanton contacted Bank (**Elite Laser Tag lease proposal**). This was Blanton's first property he managed in his 43-year career to be in foreclosure, so he was "covering his bases." (**Blanton Depo. (vol. 1) p. 151 lns. 1-13).** Blanton's receipt of Elite's proposal was confirmed in **(Elite Laser Tag lease proposal at p. 5)**, which contains Elite's letter proposal and Blanton's "sticky notes" as to follow up action. Blanton stated at his deposition that the sticky notes were written by him (e.g., "Call Coit + First Reliance Connection" and "Call Dale Porter @ First Reliance Tuesday"), and that as indicated, he spoke both with Bank attorney Yarborough and Bank defendant Dale Porter about the proposed ***long-term lease*** with Elite. (**Blanton Depo. (vol. 1) p. 146 line 1-12).**

33. On October 8, 2015, Blanton had a telephone conversation with Bank attorney Coit Yarborough about the Elite lease, and made handwritten notes on an email containing the Elite lease proposal:

> ***"10/8/15 Called Coit Yarborough He Said to proceed with lease and hold rents in escrow until court order says where rents go. JBB 10/8/15."***

(Elite proposal email) (emphasis supplied). (Mr. Yarborough likely had not yet received from the clerk the October 2 order). Blanton confirmed in his deposition that his handwriting is on this document, and those are his initials. As a matter of law, Blanton was acting as agent for Bank with actual authority to enter leases on its behalf during the "post foreclosure filing/pre-foreclosure sale" period, and Bank is obligated to honor leases entered by Blanton, including Timmons' Lease. That Bank counsel Yarborough specifically authorized Blanton to enter the Elite Laser Tag Lease corroborates and is evidence supporting Appellant's position that Bank and Yarbrough acted ***in exactly the same manner*** as to the Timmons lease, but the lower court ignores that inference, instead drawing inferences to the contrary in favor of Bank, which merits reversal.

34. Porter testified at his deposition that one of the first things he did when a file landed on his desk was to order an appraisal. (**Porter dep. p. 101 line 24 – p. 102 line 2)**. The Atlantic file was no exception. In September 2015 Bank Defendant Dale Porter began a valuation analysis of Sweetbriar, completing his analysis by November 2015, which indicated that "highest and best use" of Sweetbriar was to ***"demolish"*** it but that [long-term] lease revenues from tenants like Timmons (whom they knew about *before* Lease signed) could mitigate costs of demolition! **(App.'s Memo MSJ, Ex. 38, at p. 8**) (Porter wrote in 11/20/15 memo to Bank:

> ***It appears the highest and best use is to sell as raw land which will require the demolition of the current building. The expense to do that is estimated at $60,000 but should receive approximately $25,000 in rents between the time the bank takes ownership and it actually demolish the building .*** . . Hearing scheduled for December 2 and ***expect to take ownership of building mid-first quarter 2016***").

35. October 29, 2015, was opening night at Tavern on the Loop and it was remarkably successful. Thereafter, until Defendants breached Timmons' 18 year Lease and destroyed his

business (and life), Timmons enjoyed average monthly net profits of $8,028.38 and Timmons was hopeful for higher profit numbers going forward. **(Timmons Aff., par. 16-18).** Bank knew all along that demolition was an option, given the substantial deferred maintenance needed, and that some post foreclosure sale buyers would not want long - term tenants. Yet, knowing about Timmons and Sams' long term leases, in advance, but wanting the increased value appraisals such tenants would bring to Sweetbriar (and their rents that could be used to demolish the building), Bank let Blanton enter the Timmons Lease and the Sams lease anyway. Plaintiff respectfully submits that such conduct, ignored or glossed over by the lower court, is further evidence that Bank failed to act in a commercially reasonable manner under S.C. Code Ann. § 29-3-100. **(App.'s Memo MSJ, Ex. 38, at p. 8**)

36. On November 30, 2015, Timmons paid first rent payment of $2,000, check number 2038 for "dec rent" to "The Blanton Co." **(App.'s Memo MSJ, Ex. 39 - Timmons Checks**). Thereafter, until he was forced out in 2017, Timmons paid rent "on time every time." **(Blanton Dep. (vol. 1) at p. 157 line 13-15; Timmons Depo. (vol. 1) at pp. 43 line 23 – p. 44 line 2).** Blanton testified in his deposition that typically they reconcile incoming payments against expenses and forward revenues to Principal by "the 17th" of the month. **(Blanton Depo. (vol. 1) at pp. 226-227).**

37. In late December 2015 or early January 2016, Timmons competitor Britt Campana offered to purchase Tavern on the Loop for $250,000 after seeing first hand that Tavern was very successful and Timmons was "crushing it." **(Timmons Aff., par. 21, pp. 3-40).** Campana, with many years of experience in the food, beverage and nightclub industry in Florence, estimated monthly profit, given the number of people there every weekend, should be $15,000 per month. (**Campana Aff. par. 15-19)**. Timmons declined Campana's offer, believing Tavern on Loop to be worth more than Campana's offer.

38. On December 3, 2015, Bank got Judgment of Foreclosure. **(Judgment of Foreclosure and Sale).** By January 2, 2016, there had been no appeal by Atlantic of Judgment of Foreclosure, the order was final and the property was subject to foreclosure sale. On January 4, 2016, Timmons paid January rent to Blanton, by check #2074, later sent to and accepted by Bank in late January 2016. **(Timmons Checks).** Bank thus accepted rent payment under Timmons' 18 year Lease *after* having final judgment of foreclosure.

39. The foreclosure sale of Sweetbriar took place on February 4, 2016. Bank extinguished BIP Atlantic's interest in Sweetbriar, and was the "high bidder" at the sale. ***Critically, Bank accepted Timmons' February 2016 rent payment (Check #2129) which was accepted by Blanton on or about February 3, 2015 and came into Bank's account "on February 24, 2016" (Acct, p. 34). This was prior to Bank's attempt to disavow the Lease was communicated to Timmons by Blanton's letter of February 26, 2016*** **(App.'s Memo MSJ, Ex. 45 - The Blanton Company Letter "TBC Letter").** At a minimum, the acceptance by of Timmons' check by Blanton, who all admit was the agent of bank at that time, and again prior to Bank's attempt to repudiate the same, is imputed to Bank.

40. From February 4, 2016 through July 2016, under substantial "pressure" from the FDIC to get non-performing assets ("NPAs") off books, as well as heavy internal pressure from Bank CEO Saunders applied to Porter, to "clean up the books" and "foreclose and dispose," since they would all make more money that way **(Saunders Depo. at p. 53, lns. 12-19)**. Bank aggressively marketed Sweetbriar for sale. Getting NPAs like Sweetbriar off Bank's books would increase Bank's profitability, from which Bank owners and officers like Saunders, Nance and Porter would all personally benefit, including via bonus compensation. **(Id. at p. 61 line 13-15).**

41. On February 8, 2016, Bank sent Blanton letter stating as to Sweetbriar Tenants "***leases are***

extinguished" **(App.'s Memo MSJ, Ex. 46, Bank Letter to Blanton)**. Blanton, likely realizing Defendants had a big problem, did not mail to Tenants, including Timmons, ***until February 26, 2016*** (**TBC Letter)**, which they received several days later. Blanton's letter to Tenants said

> It is with much regret that I write this letter. I have enclosed a copy of First Reliance Bank's letter to me. I sincerely wish I had an answer for this, but legally, I do not. . . . Again, I am sorry to forward this information, but I have no choice. I would assume that any new buyer would want to continue your leases.

Id.

42. On February 24, 2016, Bank accepted Timmons' February rent under Timmons' Lease (which it had a copy of), prior to any notification to Timmons that Bank purported to extinguish leases of Sweetbriar tenants. (**App.'s Memo MSJ, Ex. 44, p. 34).**

43. From March 2016 through July 2016, Bank realtor David Brock had large "FOR SALE" signs posted on property. Bank marketed property aggressively, and Tavern on Loop revenues quickly plummeted and never recovered.

> In a short amount of time we went from having an average of 300-400 people on weekend nights to having 50-75--and as time went on we were lucky to have 25-50. Our revenues plummeted, which I had never experienced before in 25 years. I couldn't go anywhere in Florence without hearing "we heard you're closing up" or "we heard your place is being torn down," the effect of which was very disheartening for me.

(Timmons, Aff. par. 22). (emphasis supplied).

44. In July 2016, WW Plasma II, LLC ("Plasma") signed a contract of purchase and sale for Sweetbriar. The parties extended the closing multiple times while negotiating the issue of the Tenants and their long term leases. **(App.'s Memo MSJ, Ex. 47).**

45. On December 23, 2016, Plasma's Greg Wood wrote to Bank's agent Brock:

> *We are still not comfortable with the Landlord's rights in existing leases. It is understandable the Bank will not want to terminate any of the leases prior to closing* ***but we need assurance the Landlord has occupancy rights to all of the***

> ***space in the center. Since our intention is to demolish a portion of the center, we will require written acknowledgement from each tenant designating a month-to-month tenancy with a 30-day cancellation right retained by the Landlord***.

(App.'s Memo MSJ, Ex. 48, p. 1). (emphasis supplied).

46. Also on December 23, 2016, in a significant admission against interest, that tenants like Timmons have long term "leases in place that go for years" [directly contra to the lower court's holding that there was no long term Lease] and further demonstrating Bank's "commercially unreasonable" actions, **Bank's agent** Brock wrote an email to Porter and copied Plasma:

> *Apparently the* ***tenants all have leases in place that go for years and from my experience they will transfer to the new owners*** [see South Carolina Code § 29-3-100] ***. Basically they don't have to leave unless they are willing to leave.*** *I understand that Mr. Blanton sent notices to all tenants informing them that they were on month to month lease's effective immediately.* ***That sounds as if we are voiding their individual contracts with the lessor. Please advise my experience they may leave on their own accord but they certainly do not have to based on their individual leases****. I was told that they were on a month to month situation but apparently this is not the case only by notice.*"

(App.'s Memo MSJ, Ex. 48, p. 2 final par.). **)** (emphasis supplied).

47. On January 27, 2017, after receiving an unqualified, uncapped indemnification agreement from Bank, **(App.'s Memo MSJ, Ex. 50)**, and thus with "nothing to fear" (from litigation costs and fees, etc.) from long-term Sweetbriar tenants (since Bank agreed to indemnify Plasma), Plasma purchased Sweetbriar. **(App.'s Memo MSJ, Ex. 51; Ex. 52).**

48. On December 28, 2016, Bank sent a letter to Blanton instructing him to forward to Sweetbriar tenants telling them they must sign the acknowledgment that their leases are month to month. **(App.'s Memo MSJ, Ex. 49).** Timmons, Sams and tenant Dunham refused to sign, and their refusal was known to Plasma before closing.

49. On February 6, 2017, Plasma sent notice of eviction to Sweet Briar tenants, including Timmons. **(App.'s Memo MSJ, Ex. 53).**

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND AS A MATTER OF LAW THAT THE FILING OF THE *LIS PENDENS* AND FORECLOSURE JUDGMENT AND SALE RENDERED APPELLANT'S LEASE UNENFORCEABLE AGAINST RESPONDENT

The trial court found erred when it found as a matter of law that the *Lis Pendens* statute and the Foreclosure judgment and sale rendered Appellant's lease unenforceable against Respondent. **(Order at pp. 8-10)**. The foreclosure sale did not extinguish the Lease that Bank was a party to and/or had knowledge of prior to the purchase. Both Bank and its counsel admit that Bank had the right to lease the property during the "post-foreclosure filing/pre-foreclosure sale period" and that such a lease would survive the foreclosure sale. **(Hr'g. Tr. at p. 33. ll. 18-25; p. 34. ll. 1-12); (Porter Depo. at p. 129, lns. 14-21).**

It is axiomatic that foreclosure only extinguishes the ***borrower in possessions'*** possessory interest, and does not diminish a lender's rights in the property, but only augments them, including of course a lender's right (in this case, Respondent) to lease property. Foreclosure is the process by which all further possessory or other right existing in a mortgagor to redeem the estate is defeated and lost to him, and the estate becomes the absolute property of the mortgagee. *Black's Law Dictionary* (10th ed. 2014), defines "foreclose" as:

> ***To terminate a mortgagor's interest in property***; to subject (property) to foreclosure proceedings. "*Should the mortgagor default in his obligations under the mortgage, the mortgagee will seek to "foreclose", i.e., "end" or "close" the mortgagor's rights in the security."* Edward H. Rabin, *Fundamentals of Modern Real Property Law* 1087 (1974). (emphasis supplied).

There is substantial evidence, described above, that Respondent specifically authorized Blanton to enter multiple leases on the property, a mandate of specific agency authority. Accordingly, Bank was Lessor for these leases entered into by Blanton, including Appellant's

lease. The trial court's assumption and finding to the contrary -- (that "out of business" Atlantic was Lessor), despite the additional evidence of a clear assignment of all "right, title and interest" Sweetbriar leases from Atlantic to Bank described in the Mortgage, (supra, par. 1 and 8) -- is impermissible and reversible error. Moreover, as is clear from the foreclosure judgment, it is only the Mortgagor, and all parties that take from the mortgagor, that have had their rights extinguished. Bank's rights have not been extinguished by the foreclosure judgment, only amplified and augmented.

The purpose of the South Carolina recording statute is to protect subsequent creditors and ***purchasers for value without notice***. *See e.g. Eppes v. McCallum Realty Co*. 139 S.C. 481, 138 S.E. 297 (1927) , *Hayden v. Prevatte* 327 F. Supp. 635 (D.C.S.C. 1971); S.C. Code Ann. § 30–7–10. (emphasis added). There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. *Spence v. Spence* 368 S.C. 106, 628 S.E.2d 869, 875 (2006), rehearing denied. Here, as discussed further in Section III below, a genuine issue of material fact exists as to whether Respondent was a party to Appellant's Lease and therefore had constructive or actual knowledge of Appellant's lease at the time it purchased the Sweetbriar Property on February 4, 2016**. (Blanton Depo. (vol. 1) at p. 123, lns. 1-17; pp. 125-126; p. 188, lns. 9-21; Porter Depo. at p. 139, lns. 1-13; pp. 167-168).** Accordingly, Respondent could not have been a ***purchaser for value without notice.***

The trial court's Order cites *Pipkin* and *Savannah Timber Co.* to support its finding that a party may not rely on a purchase or encumbrance made after the filing of the *lis pendens.* **(Order at p. 9)**. However, these cases are distinguishable from Appellant's case because unlike Respondent, those subsequent purchasers at the foreclosure sale were unaware of any prior

conveyances or encumbrances. In *Pipkin*, when Pipkin purchased the property at the foreclosure sale, he did not have notice that Fletcher executed a lease with the lessor of the property. *Pipkin v. Fletcher*, 165 S.C. 98, 162 S.E. 774, 777 (1932). Likewise, in *Savannah Timber Co. v. Deer*, 285 F. 777, 783 (D.S.C. 1918), the mortgager defaulted and the mortgagee instituted foreclosure proceedings and filed a Notice of *Lis Pendens*. *Savannah Timber Co. v. Deer*, 285 F. 777, 783 (D.S.C. 1918). After the filing of the *lis pendens,* but before the property was foreclosed and sold, the mortgagor executed a deed conveying the property to Deer Island Lumber Co. *Id.* Notably, in its holding the court specified that "[a]t the date of the commencement of the foreclosure proceedings there was nothing on the record to notify any subsequent purchaser that [the mortgager] had ever parted with the title to the real estate . . . ." *Id.* at 782. The court's ruling in *Savannah Timber Co.* led off with the fact that the purchaser at the foreclosure sale was unaware that the property had been conveyed to another party. *Id.*

In the present matter, although Appellant did not record his Lease, Respondent cannot argue that as a subsequent purchaser, it did not have actual or constructive notice of the Timmons Lease. As illustrated in detail in Section III below, Respondent instructed Blanton to lease the property and Blanton consulted with Respondent prior to leasing the property to Appellant. Respondent of course had a vested financial interest in entering the long-term Lease, since Respondent would be getting (and did in fact get) all rents. The right to "collect the rents" includes not just the right to collect existing rents, but to rent the property to bring in *new* rents. **(Assignment of Rents)**. Blanton also provided a copy of the rent rolls to Respondent with all of the leases at the property, including Appellant's lease. **(Blanton Depo. (vol. 1) at p. 123, lns. 1-17; pp. 125-126; p. 188, lns. 9-21; Porter Depo. at p. 139, lns. 1-13; pp. 167-168).** Respondent employee Porter testified that he had this document *prior to* the execution of Appellant's Lease on

August 20, 2015, and thus Porter had full knowledge of Appellant's lease at the time of the foreclosure sale. *Id.*

II. THE TRIAL COURT ERRED WHEN IT FOUND AS A MATTER OF LAW THAT: I) RESPONDENT DID NOT OWN THE SWEETBRIAR PROPERTY AT THE TIME OF APPELLANT'S LEASE ON AUGUST 20, 2015, CONTRARY TO A SPECIFIC CLAUSE IN THE MORTGAGE, AND II) ALL "RIGHT, TITLE AND INTEREST" (INCLUDING THE RIGHT TO ACT AS LANDLORD AND LESSOR) IN APPELLANT'S LEASE *DID NOT* TRANSFER TO RESPONDENT AT MOMENT OF EXECUTION, CONTRARY TO A SEPARATE CLAUSE IN THE MORTGAGE

The trial court erroneously ignored the plain, unambiguous language of the Mortgage and Assignment of Rents cited above (supra, par. 1 and 8), and rejected Appellant's argument that: i) Respondent was the legal owner of the Sweetbriar property on August 20, 2015, and ii) that the leases Atlantic purportedly[4] entered into were transferred to Respondent, finding supposed inconsistencies with S.C. Code Ann. §§ 29-3-10 and 29-3-630; *Epstein v. Coastal Timber Co.,* 393 S.C. 276, 282, 711 S.E.2d 912, 915 (2011). **(Order at p. 11)**. However, Appellant respectfully submits that this Court should accept and enforce the plain language of Respondent's own Mortgage and Assignment of Rents documents and reverse.

This is an extraordinary case, where Bank seeks to avoid the plain meaning of documents it authored and executed. Imagine the many Bank borrowers that will be thrilled to hear Bank's allegations that its documents (and borrower's obligation to pay amounts borrowed) *don't* actually mean what they say. To the contrary, the "sauce for the goose is good for the gander," and documents (i.e., the Mortgage and Assignment of Rents) *strictly* enforced by the Bank in prior related proceedings to this case, and against borrowers in this Court and other courts

[4] As described above, Appellant disputes that "out of business" Atlantic, run by a convicted felon, was the Lessor. But even assuming it was, as described herein, any Lease transferred at the moment of signature to Bank.

in South Carolina scores if not hundreds of times (with residential borrowers losing their homes and commercial borrowers losing their businesses as a result) must be given their plain meaning, and Bank judicially estopped from "playing fast and loose" with this Court. That leads inexorably and as a matter to law to the conclusion that the Bank was lessor of Timmons' Lease. Bank got all rent revenues, collected by its agent Blanton (who also benefitted thereby), for occupancy at Sweetbriar subsequent to the filing of Bank's foreclosure action. ***Follow the money, it leads directly to the Bank***.

Contracts must be given their plain meaning, and the meaning and the wording of the Mortgage and Assignment of Rents is clear. If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect. *Jordan v. Security Group, Inc.,* 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); *Blakeley v. Rabon* 266 S.C. 68, *72*, *221 S.E.2d* 767, *769* (1976). "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) (quoting *Heins v. Heins,* 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). The lower court failed to give the Mortgage and Assignment of Rents, publicly recorded documents, their clear and unambiguous meaning. In doing so, the trial court failed to follow its mandate to construe the documents in the light most favorable to the non moving party, impermissibly and substantially reading them in Bank's favor.

Here, the mortgage executed by Atlantic and recorded by Respondent (**Mortgage**, **p. 1**) obtains two separate clauses both of which in plain, unambiguous language favor appellant – – 1) a "Transfer of Title Clause" and 2) a "Transfer of Leases Clause." Both of them are described at page 1 of the Mortgage:

- "[Atlantic] ***mortgages, grants and conveys to [First Reliance Bank] all of [Atlantic's] right, title, and interest in and to the following described real property*** . . . [Sweetbriar]."

- ***"[Atlantic] presently assigns to [First Reliance Bank] all of [Atlantic's] right, title, and interest in and to all present and future leases of the property [Sweetbriar] and all rents from the property [Sweetbriar]***.

(emphasis supplied). The Mortgage was registered and thus a matter of public record. The lower court impermissibly "lumps these clauses together" and fails to apprehend their significance, or construe them in the light most favorable to Appellant.

To the contrary however, and as a matter of law, these clauses mean what they say: 1) first, that all " right, title, and interest" to Sweetbriar transferred from Atlantic to Bank at the moment of execution of the Mortgage under the Transfer of Title Clause, and 2) second, all "right, title, and interest in and to all present and future leases of the property [Sweetbriar] was assigned *ab initio* to Bank, including the right to be "landlord/lessor" by the Transfer of Leases Clause. Accordingly, even if Atlantic, in foreclosure and owned/controlled by a convicted felon who owed millions of dollars to federal and state governments, known by all to be "out of business", and "out of here" as to Sweetbriar, was considered to be the Lessor as of August 20, 2015 (which Appellant disputes and denies), the moment Blanton signed the Lease Bank became lessor and "landlord" by operation of the Mortgage.

The order granting summary judgment cites no authority that the Transfer of Title Clause and the Transfer of Leases Clause are contrary to South Carolina law; lenders are free to put such

standard and normal terms in documents with commercial borrowers as have not been found to violate South Carolina public policy. Respondent is the author of both clauses, and put them in its documents --they should be enforced regardless of their "wisdom or folly." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

The trial court cites S.C. Code Ann. § 29-3-10 and *Epstein v. Coastal Timber Co.,* 393 S.C. 276, 282, 711 S.E.2d 912, 915 (2011) for the proposition that South Carolina is a "lien" state rather than a "title" state regarding the Transfer of Title Clause, but this miscomprehends the statute. The statute is a "default rule" – a floor below which parties (particularly in consumer situations) may not go, but it does not prevent sophisticated business parties like Bank and Atlantic from entering different contractual arrangements. Does it offend the law of South Carolina for two sophisticated business parties to decide that a mortgage is in fact a transfer of property title to the lender? The answer is "no." The lower court cites no such authority, and thus again impermissibly fails to construe the relevant precedent in the light most favorable to Appellant.

The lower court's ignoring of the Transfer of Leases Clause, or suggesting that it is contrary to South Carolina public policy in the same manner as the Transfer of Title Clause, since South Carolina is a "lien" state, is an even more blatant error. The lower court cites no authority for such nullification of the Transfer of Leases Clause. Rather, the lower court simply lumps these two clauses together. To the contrary, however, opposing counsel admitted at the oral argument, that Bank has no authority on this point. (**Hr'g Tr., p. 35 line 7-17)**.

But even outside the plain, unambiguous language of the Transfer of Leases Clause, Respondent additionally had the right to rent Sweetbriar under clear language of the Assignment of Rents (supra, par 8), and had a compelling financial interest to do so (much more than Atlantic), since *Respondent* would be getting the rents, *not* Atlantic, and long term tenants would increase

the appraised value of Sweetbriar making it easier to sell. The Mortgage executed by Atlantic and recorded by Bank *also* stated:

- "Until the occurrence of an Event of Default, [Bank] may . . . (3) collect the Rents from the Property. (p. 1, 4th par. from bottom)

- "**RIGHTS AND REMEDIES ON DEFAULT**. Upon the occurrence of an Event of Default and at any time thereafter, [Bank], at [Bank's] option, may exercise any one or more of the following rights and remedies . . . .

  Collect Rents. Lender shall have the right, without notice to [Atlantic], to take possession of the property and, as mortgagee – in – possession, collect the rents… . Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver." (Ex. 3 of Plaintiff's Memo in Support of MSJ, Mortgage at p. 6/8, par. 8, emphasis in original).

The right to "collect rents" reasonably includes the right to enter new leases to collect new rents.

Additionally, Respondent was entitled to lease Sweetbriar pursuant to the November 27, 2014 Assignment of Rents which states:

> [Bank] shall have the right at any time, ***and even though no default shall have occurred under this Assignment, to collect and receive the Rents. For this purpose, Lender is hereby given and granted the following rights, powers, and authority***: . . . .
>
> Enter the Property. Lender may enter upon and take possession of the Property; demand, collect and receive from the tenants or from any other persons liable therefor, all of the Rents; institute and carry on all legal proceedings necessary for the protection of the Property, including such proceedings as may be necessary to recover possession of the Property; collect the Rents and remove any tenant or tenants or other persons from the Property.
> . . .
> **Lease the Property.** ***Lender may rent or lease the whole or any part of the Property for such term or terms and on such conditions as Lender may deem appropriate.***

(Assignment of Rents). (emphasis added). The Assignment of Rents further states that Respondent had the right to lease the property through an agent - like Property Manager Blanton. *Id*. at p. 3. par. 1:

> Employ Agents. Lender may engage such agent or agents as Lender may deem appropriate, either in Lender's name or in Grantor's name, ***to rent*** and manage the Property, including the collection and application of Rents. (emphasis added).

Bank had the right to lease the property directly or through an agent like Property Manager Blanton. ***Id.* at p. 4. par. 1**. But did they? The lower court ignores evidence that Bank was the Lessor, requiring reversal. Even counsel for Respondent confirms Bank's right to enter the Timmons Lease, and accurately described Bank's rights in this Assignment of Rents:

> This assignment makes clear – – I mean it grants the banks and fairly expansive rights under the terms of the assignment. . . . Under the terms of this document, the ***bank did have the right to enter into a lease with Mr. Timmons if they wanted***. . . . This is all, of course, to protect the bank's investment in – – in the property and the ***bank has the right to lease the property, if it so determines***."

(Hr'g Tr. p. 33 line 18 – p. 34 line 12 (emphasis supplied). Is the Bank's right to rent the property limited by the foreclosure proceedings it filed and the foreclosure sale it obtained? Can anyone maintain "with a straight face" that Bank could enter such a lease only to have it extinguished by the foreclosure? The answer to both questions is firmly "no." Even Bank executive Porter admitted Bank had the right to enter a "30 year lease" on Sweetbriar beginning August 1, 2015. **(Porter Depo. at p. 129, lns. 14-21).** Respondent's counsel confirmed the veracity of that statement at the hearing:

> The only way… that the plaintiff can… Avoid these clear legal bars of the *Lis Pendens* statute, of the fact that the foreclosure terminated the lease is if the plaintiff could show that the bank, in fact, entered into that lease, the bank was a party to that lease…

(Hr'g Tr. p. 49 line 20 – 25) (emphasis supplied).

Respondent's Mortgage and Assignment of Rents does not merely allow it the right to *existing* rent proceeds, but provides in clear, precise language that Respondent has the right to lease the property and collect rents from *new* tenants, and perform all activities that accompany

that right including the right to enter the property and take possession and the right to employ agents (like Blanton) to lease the property and collect new rents from new tenants on its behalf, as its counsel Lacey Houghton admitted at the hearing. Respondent clearly wanted more than just the right to existing rent proceeds from the leases, it required the right to lease vacant space at the property in order to generate those proceeds. The obvious reason for this is that it prevents a property from sitting vacant until a foreclosure sale can take place.

As discussed more thoroughly in Section III below, not only did Respondent have the right to lease the property (as admitted by Bank and its counsel), ***it exercised that right*** when Dale Porter and Coit Yarborough instructed Blanton within several days of serving foreclosure documents on Blanton on July 23, 2015, and well prior to the execution by Blanton of the Timmons Lease, to "[l]ease what you can and, you know, let's get the income coming until we decide to sell it or to continue to manage it." **(Blanton Depo. (vol. 1) at p. 188, lns. 2-24)**. Contrary to Bank's suggestion, Appellant does not request that longstanding South Carolina law on mortgages be changed, as relating to the Transfer of Title Clause, only that commercial, savvy, experienced mortgagees like Respondent be accountable for the unambiguous language of the documents they prepare and bargain for. There is no law in South Carolina to the contrary of the Transfer of Leases Clause, and the trial court erred in not enforcing the plain language of the Transfer of Leases Clause.

Additionally, the trial court cites the Restatement (Third) of Property which provides that the "collection of rents pursuant to such a mortgage does not constitute the mortgagee a 'mortgagee in possession,' with the duties and liabilities attendant to that status." Restatement (Third) of Property (Mortgages) § 4.2 (1997). First, Respondent leasing Sweetbriar does not strictly mean that Respondent has "taken possession" of Sweetbriar. Rather, Respondent can lease property

without taking possession, and the Assignment of Rents describes multiple, independent rights, one of which is to "enter upon and take possession of the Property," *however*, another of which is to "Lease the Property" and let someone else "take possession." **(Assignment of Rents at p. 2)**. Second, Appellant does not contend that the mere collection of rents made Respondent a "mortgagee in possession," or lessor. Rather, as detailed below in Section III, what made Respondent the lessor it is the language of Respondent's own documents that entitled it to be a lessor, the actions of Respondent instructing Blanton to rent the property, its continuous actions approving and authorizing multiple leases in the "post foreclosure filing/pre foreclosure sale period", and Blanton's knowledge that "out of business" Atlantic was not the lessor, but that Respondent was.

The trial court also cites a completely different and unrelated assignment agreement from the Georgia case, *Wright v. Home Beneficial Life Ins. Co.*, to support its finding that Respondent's own assignment document with Atlantic serves merely as a security interest. *Wright v. Home Beneficial Life Ins. Co.* 155 Ga. App. 241, 242, 270 S.E.2d 400, 402 (1980). In *Wright*, the court reviewed the assignment of rents at issue and found that it only gave the foreclosing bank entitlement to rents but did not amount to a transfer of the borrower's entire interest in the property. *Id* at 242. The court in *Wright* did not rule as a matter of law that no assignment of rents could entitle a mortgagee to the right to possess and lease the property, only that that particular assignment did not. In reaching its conclusion, the *Wright* Court cited a similar assignment of rents from *Padget v. Butler* which only provided the lender "all rents, issues, and profits from said property." *Padget v. Butler* 84 Ga. App. 297, 298, 66 S.E.2d 194. ***Notably the assignment of rents cited in Padget, unlike Respondent's assignment, did not provide to the lender the right to possess and lease the property***. Accordingly, Appellant's case is easily distinguishable because

the language of the present assignment of rents unambiguously grants Respondent the right to possess and lease the property.

III. THE TRIAL COURT ERRONEOUSLY IGNORED EVIDENCE DEMONSTRATING GENUINE ISSUES OF MATERIAL FACT THAT BANK WAS LESSOR OF TIMMONS' LEASE

The trial court found that no genuine issue of material fact exists as to whether Respondent was a party to Appellant's lease. (Order at p. 10). Summary judgment was not appropriate in this case because trial worthy issues of material fact, supported by substantial evidence, existed which preclude judgment as a matter of law. *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667, at 670 (Ct. App. 2008).

A. Under the terms of the Sweetbriar Mortgage and Assignment of Rents, Respondent had the right to lease the property to Appellant and did lease the property to Appellant through its agent, Blanton, and such a Lease survives Foreclosure.

1. Property Manager Blanton, acting as Respondent's agent, entered the lease with Appellant on behalf of Respondent

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Kirkland Dale Smith, Janel Elizabeth Smith, Euro Mortg. Bankers, Inc.*, 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013)(quoting Restatement (Third) of Agency § 1.01 (2006)). An agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties." *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 239, 638 S.E.2d 685, 693 (2006). A property manager collecting rents is an agent for the principal. *F&D Electrical Contractors, Inc. v. Powder Coaters, Inc.,* 350 S.C. 454, 567 S.E.2d 842 (S.C.

2002). Respondent and Blanton's express admissions and conduct in the transacting of Sweetbriar established an agency relationship. *Peoples Fed. S & L Assoc. v. Myrtle Beach Golf*, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992) (finding that ***defendant could be liable*** where an agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow); *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 152, 352 S.E.2d 488, 501 (Ct. App. 1986); (establishing the broad scope of authority given to an agent is that in which the principal held the agent out to possess, including those expressly authorized or ***necessarily implied***).

Here, Respondent's July 23, 2015 motion to enforce rents against Atlantic pursuant to its November 27, 2014 Assignment of Rents and SC Code § 29-3-100 (Rev. 2007) specifically identifies Blanton as an "agent" and requests the court to make Blanton ***its*** agent to collect rents and manage the Sweetbriar property. **(Mot. to Enforce Rents).** As Blanton testified, one of the most critical duties of a property manager is to lease vacant property, **(Blanton Depo. (vol. 1) at p. 123, lns. 15-19)**, and though sometimes the subject of a written agreement, that duty is "necessarily implied" by the relationship itself. Plain and simple—property managers lease vacant property on the highest and most profitable terms they can get (frequently involving long-term leases) – – which redounds to their own financial interest and that of their principal as well.

Additionally, in his responses to Respondent's Request to Admit, Blanton confirms that subsequent to ("on and after") being served with Bank's motion to enforce rents on July 24, 2015, Blanton was acting as property manager and agent for Respondent First Reliance Bank with regard to Sweetbriar, including for the property leased by Timmons. **(Blanton RTA No. 5).** As of July 24, 2015, Blanton had a contract with Respondent to act as property manager and agent and expected to be and was in fact paid by Respondent to serve as its agent**. (Blanton RTAs Nos. 15**

and 17; Blanton Depo. (vol. 1) at p. 69- line 10 – p. 71, line 4). Blanton's work for Respondent as its agent included collecting and forwarding rent payments to Respondent (which Respondent accepted) as well as leasing vacant property which increased the value of the property for Respondent. **(Blanton RTA Nos. 1 and 2**). After July 24, 2015, with regard to tenant issues or questions relating to tenant issues at Sweetbriar, including Timmons, Blanton and Blanton's staff would have addressed the same with Respondent or Respondent's employees/officers. **(Blanton RTA No. 7).**

Blanton was acting within his authority when he entered the Lease with Timmons. Blanton testified that property managers have authority to execute leases on behalf of landlords and that landlords have a responsibility to honor leases the property manager signs on their behalf. **(Blanton Depo. at p. 21, lns. 13-22).** Also, ***Dale Porter testified in his deposition that he agreed that as early as August 1, 2015 (19 days before the date of Timmons' lease), Respondent had the authority under the Assignment of Rents to lease the Sweetbriar property***:

> Q: You would agree with me then that if that language means what it says, that if Atlantic is in default on the property, say, on August 1, 2015, that if the Sweetbriar property -- if some of it is vacant the bank has the right, if it wants to, to come in and lease the property?
>
> A: That would be correct.

(Porter Depo. at p. 127, lns. 6 - p. 128, lns. 11). Porter also confirmed that as early as August 1, 2015, Respondent had the right under the Assignment of Rents to enter a long term lease on the property, like a "30 year lease". **(Porter Depo. at p. 129, lns. 14-21).** Counsel for Respondent confirmed the accuracy of this statement at the hearing (**Hr.g' Tr. p. 33, ll. 23-25**), and that such a Lease survives foreclosure (**Hr.g' Tr. p. 49, ll. 21-25)**.

Blanton testified that Respondent employed him to act as its agent with regard to

Sweetbriar and that Respondent's attorney, Coit Yarborough, confirmed that this had been the case as of the September 30, 2015 Court proceeding on the enforcement of the Assignment of Rents:

> Q: And you would agree with me that he is – what he says is that they want to employ you, the bank wants to employ you as the property manager to basically confirm the situation which has existed on the ground, which is that you have been acting as the property manager.
>
> Ms. Houghton: Object to form.
>
> Q: Do you agree?
>
> A: Yes, sir.
>
> Q: Okay. And so did you understand from that that Mr. Yarborough was confirming that you were acting as the agent of the bank with regard to matters happening at the Sweetbriar?
>
> Ms. Houghton: Object to form.
>
> A: Yes. My understanding is yes. Uh-huh.

(Blanton Dep. (vol. 1) at p. 173, ll. 9-25).

In fact, Blanton even billed Respondent, not Atlantic, for his time to attend this September 30, 2015 hearing. Blanton testified:

> Q: Appears to be dated October 16. And it's for $100. It's an invoice to Sweetbriar from Joe Blanton. Extended time in court hearing with bank; total $100.
>
> A: Correct.
>
> Q: Would you agree with me that the hearing that you attended on September 30th that you billed $100 for your attendance at that hearing?
>
> A: That would have to be with Attorney Coit, I think – it would have to be with Attorney Coit Yarborough.

(Blanton Dep. (vol. 1) at p. 195, ll. 4-25; p. 196, ll. 13-25; and p. 197, ll. 1-2).

Blanton also testified that, at a minimum, he had a verbal agreement with Respondent to

continue managing the Sweetbriar property as he had been doing for them at the time the Timmons Lease was executed. Blanton testified as follows:

> Q: So you would agree with me that you had a contract with the bank whereby you would provide property managing services, including leasing vacant property and that you would be compensated by the bank for that.
>
> Ms. Houghton: Object to form.
>
> Q: Do you agree with that?
>
> Ms. Houghton: Object to form.
>
> A: Yes. They – and we'd have to go bank and look back at a whole lot of records. I don't know if there was a written agreement. There was a verbal agreement for me to continue managing on behalf of First Reliance Bank.

(Blanton Dep. (vol. 1) at p. 195, ll. 4-25; p. 196, ll. 13-25; and p. 197, ll. 1-2).

Blanton's discovery responses similarly confirm that he was acting as agent for Respondent on and after July 24, 2015. Blanton's answers to Appellant's Requests to Admit:

> 17. Admit that, subsequent to July 24, 2015, Blanton had either an oral, written or implied contract with First Reliance Bank under which Blanton had the right to be compensated for his services for:
>
> i) work done collecting rents from tenants of Sweetbriar, including Timmons, and sending the same to First Reliance Bank, and
>
> ii) acting as property manager with regard to Sweetbriar, including managing the property Timmons leased.
>
> RESPONSE: Admitted.

(Blanton Responses to Plt.'s RTAs, pp. 13-14).

Further, Blanton confirmed in his deposition that in his conversation with Dale Porter/Respondent with regard to the prospective Timmons lease prior to August 20, 2015, Porter instructed him to lease the Sweetbriar properties:

Q: Did you have a conversation with Dale Porter regarding the prospective lease of Mr. Timmons for this property prior to August 20?

A: I think that I did.

Q: And can you tell me what you recall from that conversation?

A: . . . ***"Lease what you can and, you know, let's get the income coming until we decide to sell it or to continue to manage it."*** And subsequently, they said, "We do not want to continue to hold it. We want to sell it."

(Blanton Depo. (vol. 1) at p. 188, lns. 1-21). (emphasis supplied).

To deny in this case the notion that Respondent and Blanton are that of principal and agent, is to reject the working mechanisms of the most fundamental principles of agency. Respondent expressly authorized Blanton to act on its behalf, and requested on July 23, 2015 that the Court approve the same. **(7/23/15 letter to Blanton)**. Subsequently, Blanton acted in accordance with this authorization, and Timmons relied on Blanton's representations and suffered catastrophic financial results and the destruction of a once very successful career. During the course of Timmons' negotiation with Blanton prior to signing the lease, Blanton was conferring with Respondent about Timmons' proposal through the entirety of the pre-lease process. Blanton's handwritten notes describing Timmons' lease proposal, dated August 17, 2015, three days before the Lease was signed, include Blanton's writing the name of Respondent's counsel "Coit Yarborough" and Yarborough's telephone number. **(Timmons proposal with notes).** Blanton wrote "Ray Coit Yarborough 676-0580" on this document, and testified that he "***obviously***" spoke with Bank attorney Yarborough about Timmons' lease ***prior*** to it being signed on August 20, 2015 as indicated by his notes. **(Blanton Dep. (vol. 1) at p. 125, lns. 24-25 and p. 126, lns. 1-19; p. 178, line 23; p. 180 line 4-7; n.b. p. 181 line 3-9:** *"Q. Tell me what it means: the "Ray Coit Yarborough, the telephone number… A. It's all my handwriting. Obviously [I] spoke with Ray*

[Coit Yarborough]"**).**

Additionally, Blanton confirmed in his deposition that he forwarded Timmons' August 17, 2015 lease proposal to Respondent for approval before executing it:

> Q: And so we will – it appears to me, based on my review of the documents, that you informed Atlantic and you also informed the bank of Mr. Timmons' proposal to lease the property. Do you recall that, sir?
>
> Ms. Houghton: Object to form.
>
> A: Well, sure. I would have passed that through to others. I couldn't approve it. Yes.
>
> Q: And you would also agree with me that neither Atlantic nor the bank ever said, "Don't enter this lease with Mike Timmons."
>
> A: No one ever told me not to do that.
>
> Q: And your marching orders as a property manager were to rent vacant property.
>
> A: Correct.

(Blanton Depo. (vol. 1) at p. 123, lns. 1-17). The Elite Laser Tag lease specifically approved by Bank (supra, Facts, par. 31-33) strongly supports Appellant's argument that Bank also approved the Timmons Lease.

Under *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982), the mere conduct of Blanton and Respondent is sufficient to constitute an agency relationship, the addition of Respondent's own statements during the September 30, 2015 hearing for the Motion to Enforce Rents confirms this assertion, as the Bank Defendants themselves have verbally acknowledged the existence of the relationship.

A genuine issue of material fact exists as to whether Blanton had actual authority from the Respondent to lease the property to Appellant. The trial court found that under South Carolina law,

actual authority is expressly conferred upon the agent by the principal. *See Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004); *see also Anderson Bros. Bank v. EBT Prop. Holding Co.* (S.C. App. 2013). Property managers lease property for principals and the evidence shows that Blanton had authority from Respondent to lease the property at Sweetbriar, including leasing the property to Appellant. **(Blanton Depo. (vol. 1) at p. 21, lns. 13-22).** Bank attorney Coit Yarborough as well as Bank officer Dale Porter instructed Blanton to lease the property. Blanton testified that Respondent employee Porter told him to lease the property he could until Respondent figured out what to do later. **(Blanton Depo. (vol. 1) at p. 188, lns. 9-21).** Blanton's "marching orders" from Respondent were specifically to rent the vacant property. **(Blanton Depo. (vol. 1) at p. 123, lns. 1-17).** Following those orders, in addition to the Timmons lease, Blanton also executed a long term lease on September 1, 2015 with Xavier Sams. Most notably, Respondent attorney Yarborough referenced the Elite Laser Tag lease at the September 30, 2015 hearing on Respondent's motion to enforce rents and informed the court that there were leases that needed to be "consummated" and that Blanton would be doing that as agent for Respondent. (9/30/15 Hearing Transcript). Neither Atlantic nor its counsel were at the hearing—Respondent was in charge.

Bank's contention now that Blanton was *not* its agent, **(Ex. 68, Porter Depo. at p. 129, lns. 3-8),** has no merit and the Bank Defendants should be precluded/estopped from saying so. The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing those who seek to misrepresent facts to gain advantage. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *see also John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995) (stating goal of judicial estoppel "is to

prevent a party from playing 'fast and loose' with the courts, and to protect the essential integrity of the process."). As explicitly embraced by the South Carolina Supreme Court, "[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne*, 327 S.C. at 251, 489 S.E.2d at 477. "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Id.*

2. Even if Blanton did not have actual authority, a genuine issue of material fact exists as to whether he had apparent authority to enter the lease with Appellant on behalf of Respondent.

The trial court erroneously found that there was no evidence of apparent authority. **(Order at pp. 15-16).** Under the doctrine of apparent authority, a principal is bound by its agent's acts "when it has placed the agent in such a position that persons of ordinary prudence, reasonably 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,* at 143, 293 S.E.2d at 426 (1982). To establish apparent agency, a party must prove that the purported principal has represented another to be his agent by either affirmative conduct or conscious and voluntary inaction. *Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 352 S.E.2d 284 (Ct.App.1986). A principal creates apparent authority as to a third person by the principal's written or spoken words or any other conduct which, "reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), *overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000). With respect to one having the apparent authority to bind another, '[t]he general rule, embraces three primary elements. These are (1) a representation by the principal, (2)

a reliance upon such representation by a third person; and (3) a change of position by such third person in reliance upon such representation. *ZIV Television Programs, Inc. v. Associated Grocers, Inc., of S. C.*, 114 S.E.2d 826, 236 S.C. 448 (S.C. 1960).

The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996). At the same time, 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, reasonably 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*, supra; *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 470 S.E.2d 397 (Ct. App. 1996). Thus, the concept of apparent authority depends upon manifestations by the principal and the reasonable belief by third parties that the agent is authorized to bind the principal. *Beasley v. Kerr-McGee Chem. Corp.*, 273 S.C. 523, 257 S.E.2d 726 (1979); *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993).

Contrary to the trial court's finding, there is exists evidence of manifestations by Respondent to Appellant that Blanton was authorized to transact business on its behalf. Appellant understood that property managers lease vacant property. Blanton negotiated and accepted Appellant's lease proposal. While Timmons was unaware of the identity of Respondent, **(Timmons Depo. at p. 49, line. 3-15)**, Blanton's communications with Timmons regarding the Lease and execution of the Lease were manifestations to Timmons of Respondent's (an unidentified principal's) instructions to lease the property. Timmons reasonably relied on Blanton's manifestation of Respondent's instructions to him that Blanton had authority to negotiate and execute long term leases. Based on this reasonable reliance, Timmons made his decision to lease the space at Sweetbriar.

In recognition of both Respondent's appointment of Blanton as agent and the factual circumstances giving rise to the relationship of the same, a genuine issue of material fact as to whether a principal-agent relationship existed between Blanton and Respondent at the time the Timmons lease was executed thus making Respondent a party to the August 20, 2015 lease.

IV. THE TRIAL COURT ERRED BY FAILING TO CONSIDER WHETHER BANK HAD ACTED IN A COMMERCIALLY REASONABLE MANNER AS DESCRIBED IN S.C. CODE 29-3-100

The lower court failed to acknowledge that Appellant has a cause of action against Respondent for its failure to comply with its obligations to act in a "commercially reasonable" manner as described in SC Code Sec. 29-3-100. This section, which applies to Blanton acting as the agent to collect Bank's rents under this section, states that a party seeking assignment of rents, in this case, Bank "must proceed in a commercially reasonable manner." Whatever this Court's decision as to whether Bank is a party to Timmons' Lease, Timmons has a separate, independent claim against Bank for failure to act in a "commercially reasonable" manner.

Is it "commercially reasonable" that Bank in the process of collecting rents from Timmons, including the instruction of its agent Blanton to enter a Lease with Timmons (from which all rent proceeds would go to Bank), failed to disclose the existence of the foreclosure to Timmons (and other tenants), when Bank: i) had the right to enter the Lease; ii) had a strong incentive both to collect rents and to increase the appraised value of the property by having long-term tenants like Timmons and Sams on the property, iii) knew that Bank almost certainly would [and in fact did] extinguish the interest of Atlantic, then quickly sell the property in the short term (less than 1 year), iv) wanted rent revenues only to defray its expenses to demolish the building, and v) Bank *also* knew there were long term tenants that had invested heavily in the property in reliance on their long-term leases? The answer can only be a resounding – – "**no**" – – such action is unscrupulous

and sanctionable.

This was a jury question. The lower court ignores Bank's duties under this section. If one takes the deceptive, disingenuous position, as Bank does, that "out of business" *Atlantic* was the lessor of an 18 year Lease, as found by the lower court as a matter of law, Bank and its agent Blanton's failure to disclose the foreclosure violates Bank's duty to act in a "commercially reasonable" manner in seeking and collecting rents under the statute. Bank is responsible for the actions of its agent conducted within the scope of the agent's authority. **(App. Memo MSJ p. 18 par. 20)**. Given the nature of Atlantic and its principles, those facts only *heighten* Bank's duty to disclose to Timmons and other tenants that "we are taking the rents." This is crucial information regarding a putative landlord's ability to comply with a lease, and this statute requires its disclosure. At a minimum, what is "commercially reasonable" under this statute, and whether Bank violated its obligations in that regard, is a question of fact for resolution by the jury.

V. THE TRIAL COURT ERROUNEOUSLY IGNORED GENUINE ISSUES OF MATERIAL FACT AS TO RESPONDENT'S RATIFICATION OF APPELLANT'S LEASE

The trial court erroneously found that no evidence was presented creating a genuine issue of material fact that Respondent ratified and adopted Appellant's lease. **(Order at p. 17)**. Under South Carolina law, "[r]atification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). "Ratification proceeds upon the assumption that there has been no prior authority." 2A C.J.S. Agency § 52 (2013). "However, once a ratification has occurred, it is equivalent to original, prior, or previous authority." *Id.* In *Lincoln*, the South Carolina Court of Appeals first stated the three elements of ratification, "(1) acceptance

by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements." 300 S.C. at 191, 386 S.E.2d at 803; *see Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011).

First, Respondent accepted the benefits of Blanton's lease with Appellant because Respndent accepted all of the rent payments from Appellant that came under the lease. **(Blanton RTA Nos. 1 and 2; Porter RTA No. 2)**. Second, Respondent was fully aware that Blanton was negotiating and executing leases for Sweetbriar, specifically the lease with Appellant because Blanton sent Respondent the Timmons lease proposal. (**Blanton Depo. at p. 123, lns. 1-17)**, and Respondent is imputed with constructive knowledge of *all* facts known by its agent Blanton. Moreover, Blanton was instructed by Respondent to enter leases for Sweetbriar and at no point was he ever told not to enter long term leases. **(Blanton Depo. at p. 188, lns. 9-21; Blanton RTA No. 13)**. Third, *and most critical with regard to the trial court's finding*, Respondent made an affirmative election indicating an intention to adopt the "unauthorized arrangement" (Timmons lease) by accepting Timmons' rent payments under the lease prior to any communication to Timmons that it did not intend to honor the long term lease agreement. **(Blanton RTA Nos. 1 and 2; Porter RTA No. 2)**. Notably, Respondent specifically accepted rent payments from Appellant no later than February 24, 2015, which was after the February 4, 2015 foreclosure sale, and even as early as February 4, the date of acceptance by Blanton, both of which are before notice was provided to Appellant that it intended to terminate the lease. **(Blanton Depo. at p. 225, lns. 9-25; p. 226, lns. 1-4; Porter Depo. at pp. 158 line 17 – 159 line 9);** (**Ex. 44, p. 34)**.

VI. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON APPELLANT'S CAUSES OF ACTION FOR MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, AND BREACH OF CONTRACT

ACCOMPANIED BY A FRAUDULENT ACT BASED ON ITS FINDING THAT RESPONDENT WAS NOT A PARTY TO APPELLANT'S LEASE

The trial court also found that Respondent is entitled to summary judgment as to Appellant's claims for misrepresentation, negligent misrepresentation, and breach of contract because there was no evidence to support Appellant's contention that Blanton served as agent of Respondent in negotiating and executing Appellant's lease**. (Order at pp. 19; 22)**. Based on the reasons cited above, summary judgment should be reversed because a genuine issue of material fact exists as to whether Blanton acted as agent for Respondent and entered the lease with Appellant on behalf of Respondent. To the extent that this court reverses the trial court's findings regarding Blanton's agency relationship with Respondent, the trial court's grant of summary judgment as to Appellant's causes of action for misrepresentation, negligent misrepresentation, and breach of contract accompanied by a fraudulent act should be reversed as well.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the trial court's decision to grant Respondent's Motion for Summary Judgment.

October 26, 2020

s/Ben Le Clercq

Ben Le Clercq (S.C. Bar # 65754)
David D. Ashley (S.C. Bar #76206)
Le Clercq Law Firm
Ben@LeClercqLaw.com
David@LeClercqLaw.com
708 South Shelmore Blvd. #202
Mount Pleasant, SC 29464
Phone (843) 722-3523
Fax (843) 352-2977
Counsel for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2020-001027

JOHN MICHAEL TIMMONS, JR., d/b/a TAVERN ON THE LOOP, Appellant/Respondent,

v.

FIRST RELIANCE BANK, INC.; THE BLANTON COMPANY, INC.; JBJR ENTERPRISES, INC. d/b/a THE BLANTON COMPANY, INC.; WW PLASMA II, LLC; DALE PORTER; F.R. SAUNDERS, JR.; HUNTER WILLIAMS; and JOSEPH B. BLANTON, individually, Defendants,

Of Which FIRST RELIANCE BANK, INC.; DALE PORTER; F.R. SAUNDERS, JR. are the, Respondents,

And

WW PLASMA II, LLC and HUNTER WILLIAMS are the Respondents/Appellants.

PROOF OF SERVICE OF APPELLANT'S INITIAL BRIEF

I, David Ashley, certify that I have served *Appellant's Initial Brief* on Respondents First Reliance Bank, Inc., Dale Porter, and F.R. Saunders, Jr. by e-mailing a copy to their attorney of record, D. Gary Lovell, Jr., at glovell@cskl.law and Lacey Houghton at lhoughton@cskl.law on October 26, 2020.

October 26, 2020

s/David D. Ashley
Ben Le Clercq (S.C. Bar # 65754)
David D. Ashley (S.C. Bar #76206)
Le Clercq Law Firm
Ben@LeClercqLaw.com

David@LeClercqLaw.com
708 South Shelmore Blvd. #202
Mount Pleasant, SC 29464
Phone (843) 722-3523
Fax (843) 352-2977
Counsel for Appellant

Gmail

David Ashley <david@leclercqlaw.com>

Timmons v. First Reliance Bank - Appeal - Case No. 2020-001027

1 message

David Ashley <david@leclercqlaw.com> Mon, Oct 26, 2020 at 8:59 PM
To: "Lovell, Gary D." <glovell@cskl.law>, "Houghton, Lacey L." <lhoughton@cskl.law>, Ben Le Clercq <ben@leclercqlaw.com>, Debbie Mathews <Debbie@leclercqlaw.com>, "Travis, Sarah H." <STravis@cskl.law>

Please see the attached Initial Brief and Designation of Matter to be Included in the Record on Appeal for Appellant in the above-referenced matter. Also, please let us know if you would like paper copies.

Respectfully,

David D. Ashley
Le Clercq Law Firm
708 South Shelmore Blvd., Suite 202
Mount Pleasant, SC 29464
Tel: 843-722-3523
Fax: 843-352-2977
david@leclercqlaw.com
www.leclercqlaw.com

4 attachments

- **2020 10 26 Appellant's Initial Brief.pdf** 867K
- **2020 10 26 Appellant's Designation of Matter.pdf** 271K
- **2020 10 26 Proof of Service of Initial Brief.pdf** 435K
- **2020 10 26 Proof of Service of Designation of Matter.pdf** 431K