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.: 2018-CP-21-00227

Appellate Case No.: 2020-001027

RECEIVED
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SC Court of Appeals

John Michael Timmons, Jr., d/b/a Tavern on the Loop, Appellant,

v.

First Reliance Bank, Inc.; The Blanton Company, Inc.; JB JR 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. Sanders, Jr. are the Respondents,

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INITIAL BRIEF OF RESPONDENTS FIRST RELIANCE BANK, INC., DALE PORTER, AND F.R. SAUNDERS, JR.

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II. Whether the Circuit Court properly rejected Timmons' arguments that First Reliance was a party to his Lease based on Timmons' incorrect interpretation of language contained in loan documents executed by First Reliance's borrower Atlantic Regional, LLC.

III. Whether the Circuit Court properly held Timmons' allegation Blanton executed his Lease as agent of First Reliance as opposed to Atlantic Regional, LLC fails as a matter of law and because there is no evidence to support it.

IV. Whether the Circuit Court erred in failing to consider section 29-3-100 of the South Carolina Code when Timmons did not raise the issue, and the statute does not authorize an independent cause of action by Timmons.

V. Whether a genuine issue of material fact prevents summary judgment on Timmons' claim that First Reliance ratified the Lease when ratification does not apply and no evidence shows First Reliance intended to adopt the Lease.

VI. Whether summary judgment was appropriate regarding Timmons' claims for misrepresentation, negligent misrepresentation, and breach of contract accompanied by a fraudulent act when Timmons did not appeal all grounds upon which the court granted summary judgment and there is no evidence Blanton served as the agent of First Reliance.

STATEMENT OF THE CASE

This case arises out of Appellant Timmons' execution of a commercial lease agreement dated August 20, 2015 ("Lease"), for part of the Sweetbriar Shopping Center ("Sweetbriar"). Timmons executed the Lease with Lessor "The Blanton Company," who managed Sweetbriar for its owner, non-party Atlantic Regional, LLC. Timmons executed this Lease approximately one month after Respondent First Reliance Bank filed a foreclosure action against Atlantic Regional and *lis pendens* dated July 20, 2015, notifying the public of such foreclosure proceedings. On February 4, 2016, First Reliance was the highest bidder at the public foreclosure auction of the property held by the Special Referee, and became the owner of the property at that time. Timmons brought this action asserting, *inter alia*, the Lease is enforceable against First Reliance, and First Reliance is liable for its breach. The circuit court properly held, as a matter of law, Timmons cannot enforce the Lease against First Reliance due to the foreclosure judgment and sale, as well as by operation of the *lis pendens* statute. In an effort to avoid these clear legal bars to his claims, Timmons argues the Bank was in fact the lessor and a party to his Lease based on a number of theories. The circuit court rejected these arguments.

On August 14, 2006, Atlantic Regional executed a Promissory Note and Mortgage in favor of First Reliance, conveying a first-position security interest in Sweetbriar. **Compl. Ex. G-1.** On November 17, 2014, Atlantic Regional executed and recorded an Assignment of Rents in favor of First Reliance, assigning an interest in all rents derived from Sweetbriar, further securing Atlantic Regional's debt to First Reliance. **Compl. Ex. F.**

Since 2008, Atlantic Regional engaged The Blanton Company, Inc., and its owner Joe Blanton (collectively "Blanton") as its property manager to manage tenants and rentals at Sweetbriar. **Blanton Depo. Tr. p. 8-10, Vol 2.** Blanton managed Sweetbriar under a written

management agreement with Atlantic Regional. **Blanton Depo. Tr. Vol. 2 p. 8-10; Vol. 1 p. 60, Ex. 1**. The management agreement authorized Blanton to execute leases with tenants on behalf of Atlantic Regional. ***Id.*** The agreement also provided "the owner retains the right to make all management decisions concerning establishing parameters for new tenants, rental terms, and capital expenditures in excess of $500." ***Id.*** Blanton's practice was to collect rents, deduct expenses and a management fee, and disburse the remaining funds to Atlantic Regional. **Blanton Depo. Tr. p. 13 Vol. 2**. Regarding new leases, Blanton would not enter into a new lease unless he had express permission from Atlantic Regional. **Blanton Depo. Tr. p. 183 Vol. 1; Blanton Depo. Tr. p. 11, Vol. 2.**

On July 20, 2015, First Reliance filed a foreclosure complaint against Atlantic Regional ("Foreclosure Action"). **Compl. Ex. G.** In connection with the Foreclosure Action, on July 20, 2015, First Reliance filed a Notice of *Lis Pendens* against Sweetbriar, stating "[n]otice is hereby given that an action has been commenced by the Plaintiff [] against the Defendant [] for the foreclosure of a certain mortgage given by Atlantic Regional, LLC to First Reliance Bank." **Compl. Ex. G.**

On July 23, 2015, First Reliance filed a "Motion for Order to Pay Rents" ("Rents Motion") in the Foreclosure Action directed against Atlantic Regional and Atlantic Regional's property manager, Blanton. Contrary to Appellant Timmons' assertion that the Rents Motion "requested that 'agent' Blanton become agent of Bank for collecting rents" (**App. Br. ¶ 12)**, the Rents Motion states simply that First Reliance "will move the Court to direct the agent for [Atlantic Regional] to pay lease proceeds due to Atlantic Regional, LLC over to" First Reliance. **Compl. Ex. I.** By letter dated July 23, 2015, to Atlantic Regional and Blanton, as

agent for Atlantic Regional, First Reliance demanded payment of the rents derived from Sweetbriar and enclosed a copy of the Rents Motion. **Compl. Ex. I.**

Approximately one month after filing of the Foreclosure Action and Notice of *Lis Pendens*, on August 20, 2015, Timmons executed his Lease for retail space in Sweetbriar. **Compl. Ex. A.** Timmons submitted a lease proposal to Blanton, as property manager for Sweetbriar, who subsequently forwarded it to Atlantic Regional for review and approval. **First Reliance Memo Mot. Summ. J., Ex D.** In his proposal, Timmons requested a six-month rent free period to account for renovation costs. **First Reliance Memo Mot. Summ. J., Ex D; Blanton Depo. Tr. Ex. 29.** Atlantic Regional instructed Blanton to negotiate the rent-free period, which was reduced to three-months, and Atlantic Regional approved and authorized the Lease. **First Reliance Memo Mot. Summ. J., Ex D; Blanton Depo. Tr. p. 179, 181 Vol. 1; Ex. 29.** The Lease states that it is between "The Blanton Company" as Lessor, and Mike Timmons d/b/a Tavern on the Loop as Lessee. **Compl. Ex. A.** First Reliance is not a party to the Lease, nor is it mentioned within the document. **Compl. Ex. A.** Blanton testified plainly "I entered [Timmons's] lease on behalf of Atlantic Regional" **(Blanton Depo. Tr. at p. 120 Vol. 2)—**contrary to Timmons' assertion that Blanton understood First Reliance would be the landlord on the lease and that "Blanton was adamant that the Bank was the lessor" (**App. Br. ¶¶ 15, 17**).

Although Blanton testified he thinks he may have told First Reliance employee Respondent Dale Porter about Timmons' interest in Sweetbriar, he further testified as follows:

Q. And I believe you testified that you spoke
to Rick Cranford, who was with Atlantic Regional,
about Mr. Timmons' interest in the property?
A. Yes.
Q. And did Mr. Cranford, acting on behalf of
Atlantic Regional, approve Mr. Timmons' lease for
the property?
A. Yes.

Q.· And you asked Atlantic Regional to approve Mr. Timmons' lease because you had always asked Atlantic Regional to approve new leases for the property, correct?

A.· I'm sorry.· Repeat that, that last part. I'm sorry.

Q.· Yes, sir.· So you told me earlier today that it was your practice to ask Atlantic Regional to approve any tenants for the property, correct?

A.· Certainly.

Q.· So with regard to Mr. Timmons, you asked Atlantic Regional to approve that lease just as you did in your typical practice?

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MR. LE CLERCQ:· Object to form.

THE DEPONENT:· Yes.

BY MS. HOUGHTON:

Q.· And you had a contract with Atlantic Regional that authorized you to enter into leases on their behalf?

MR. LE CLERCQ:· Object to form.

THE DEPONENT:· Correct.

BY MS. HOUGHTON:

So if you'll look at Exhibit 5 in the book in front of you, that should be Mr. Timmons's lease.

A.· Okay.· Let's see.· Number 5.· Okay.

Q.· Is that Mr. Timmons' lease agreement for the property?

A.· Yes.

Q.· Is that dated August 20, 2015?

A.· The lease was to commence on August 20, 2015.· Signed and dated on August 20, 2015.

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Q.· And at that time, in August -- on August 20 of 2015, you didn't have an agreement with First Reliance Bank that authorized you to enter into leases on their behalf, correct?

MR. LE CLERCQ:· Object to form.

THE DEPONENT:· No.

BY MS. HOUGHTON:

Q.· Do you have a recollection of speaking with anyone at Bank about Mr. Timmons' proposed lease or interest in the property?

A.· No.

Q.· Do you have a specific memory of speaking with anybody about this at the bank after Mr. Timmons signed that lease about Mr. Timmons' tenancy or anything pertaining to Mr. Timmons?

A.· No, not prior to the foreclosure proceeding.

Q.· And when you say "foreclosure proceeding," you mean the time that the bank actually became the owner of the property?

A.· I spoke with them after the process began.

Q.· And so my question is:· After the process began, the foreclosure process began, do you recall having a conversation with anyone at First Reliance Bank specifically about Mr. Timmons?

MR. LE CLERCQ:· Object to form.

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·1· · · · · · · · ·THE DEPONENT:· Specifically about
·2· · · · · Mr. Timmons?· No.· The shopping center as a
·3· · · · · whole?· Yes.

Blanton Depo. Tr. at p. 35-38 Vol. 2; *see also* Blanton Depo. Tr. at p. 117, Vol. 1.

Respondent Porter, the First Reliance employee involved in the Foreclosure Action, testified he does not recall any discussion about Timmons during the Foreclosure Action, was not told about Timmons' proposed lease terms, and did not receive a copy of Timmons' lease proposal. **Porter Depo. Tr. at p. 166-67; 174; Ex. 16.** Blanton testified he believes he spoke with Coit Yarborough, First Reliance's foreclosure attorney, regarding Timmons' interest in Sweetbriar because he had a written note on Timmons' lease proposal that stated simply "Coit Yarborough 676-0580." **Blanton Depo. Tr. at p. 81-82 Vol. 2.** Blanton further testified that he cannot recall any specific details about the content of the conversation he believes he had with attorney Yarborough about Timmons. **Blanton Depo. Tr. at p. 150-51 Vol. 2**. Although Blanton believes he had a conversation about Timmons with Yarborough, when asked directly if Yarborough approved or authorized the Lease, he stated he does not know. **Blanton Depo. Tr. at p. 181, Vol. 1**. Yarbrough did not recall any discussion about Timmons, stated he did not have authority to approve any lease on behalf of First Reliance at that time, and would not have approved any lease on behalf of First Reliance if he had been asked. **Yarborough Affidavit ¶¶ 11-15.**

The Lease provides for a term of three years, commencing August 20, 2015, and terminating on September 1, 2018, with subsequent option periods of five and ten years. **Compl. Ex. A.** The Lease states it "is and shall be subordinated to all existing and future liens against the property." **Compl. Ex. A.** Timmons did not record the Lease. Timmons testified he did not know about the Foreclosure Action at the time he executed the Lease, and did not learn about it until February 2016. **Timmons Depo. Tr. at p. 64.** Timmons testified "the only

person I had any discussion with concerning this contract before I signed it was Joe Blanton." **Timmons Cont. Depo. Tr. at p. 67.** Timmons also testified he had no communications with First Reliance until January 2017, almost seventeen months after he executed the Lease. **Timmons Cont. Depo. Tr. at p. 67, 75.**

By Order dated October 2, 2015, the circuit court granted First Reliance's Rents Motion ("Rents Order"). The Rents Order provides:

> [First Reliance] holds a recorded Assignment of Rents given by Defendants in connection with the loan. The Assignment provides that Plaintiff may collect the rents if the Defendants default in payment of the loan. . . . [First Reliance] proposes that the current property manager, The Blanton Company, remain property manager, but that all rents collected be paid over to [First Reliance] pursuant to the terms of the Assignment until this action is concluded. I find that the Defendants are in default in payment of the loan. The Blanton Company should remain as property manager, and all rents collected should be paid over to [First Reliance].

Compl. Ex. J. Blanton did not distribute any rental proceeds from Sweetbriar to First Reliance until after the Court entered the Rents Order—Blanton issued the first rental proceeds check to First Reliance on October 16, 2015. **Blanton Depo. Tr. at p. 31-32 Vol. 2**. Timmons made his first rent payment to Blanton on November 30, 2015. **Pl. Memo Mot. Summ. J., Ex. 39.**

On December 3, 2015, the Court entered a foreclosure judgment in favor of First Reliance against Atlantic Regional. **Compl. Ex. L.** The foreclosure judgment provides, in pertinent part:

> That [First Reliance] have judgment of foreclosure against Atlantic Regional, LLC on the obligation and mortgage as set forth in the Complaint for the sum of $887, 222.47 . . . .
>
> . . . .
>
> That the Defendants liable for the aforesaid mortgage debt shall on or before the date of sale of the property hereinafter described, pay to [First Reliance], or [First Reliance's] attorney, the amount of [First Reliance's] debt as aforesaid . . . .

> That on default of payment at or before the time herein indicated, the mortgaged property described in the Complaint, as hereinafter set forth, be sold by the undersigned, at public auction . . . .
>
> . . . .
>
> **The sale shall be subject to taxes and assessments, existing easements and restrictions of record.**
>
> . . . .
>
> And it is further ORDERED, ADJUDGED AND DECREED **that each Defendant named herein and all person whomsoever claiming under him, them or it be forever barred and foreclosed of all right, title, interest, and equity in redemption in the said mortgaged premises so sold, or any part thereof**.

Compl. Ex. L (emphasis added). The Foreclosure judgment further provides that "The Blanton Company will be released from any further obligation under the Order of the Court filed October 2, 2015 when the property is conveyed to the purchaser at the sale." ***Id.*** The Special Referee held a public auction and sale on February 4, 2016, at which First Reliance was the highest bidder. **Compl. Ex. M.** On February 11, 2016, the Special Referee issued a deed to First Reliance. **Compl. Ex. M.**

By letter dated February 8, 2016, First Reliance informed Blanton of its purchase at public auction on February 4, 2016, and that it was now the owner of Sweetbriar. **Compl. Ex. N.** First Reliance communicated its position as follows:

> As a result of [the foreclosure] sale, **all agreements** (lease or otherwise) with Atlantic Regional and occupants related to the Sweet Briar Shopping Center **are extinguished**. [First Reliance] would like to enter into month-to-month lease agreements with the current tenants until it has the opportunity to explore purchaser opportunities. We would also like to employ your firm to assist the bank with these agreements and the management of this property while the bank finds a purchaser. If a future purchaser wishes to enter into long term leases with any of the current tenants that will be between them and the tenants with the change of ownership. However, if the bank finds a purchaser that wishes to use the property for some other purpose then the

> bank cannot put itself in a position not to be able to accommodate that purchaser's wishes.

Compl. Ex. N. First Reliance disputes Blanton acted as agent for First Reliance at any time prior to First Reliance Bank's purchase of the property on February 4, 2016. **Porter Deposition Tr. at p. 129, 153-55, 166-67, 177; Yarborough Affidavit.**

By letter dated February 26, 2016, Blanton forwarded First Reliance's letter to all existing Sweetbriar tenants, including Timmons, informing them of First Reliance's position. **Compl. Ex. O; Timmons Cont. Depo. Tr. at p. 71-72.** Timmons received a copy of this letter from First Reliance, but he continued operating his business and did not attempt to contact First Reliance regarding the property until approximately one year later, at which time he disputed First Reliance's position that the foreclosure terminated the Lease. **Timmons Cont. Depo Tr. at p. 71-72; 75.** First Reliance sold Sweetbriar to WW Plasma II, LLC ("Plasma") on January 27, 2017. **Compl. Ex. Q.** After Plasma purchased Sweetbriar, by letter dated February 6, 2017, Plasma notified Timmons it intended to terminate his month-to-month tenancy. **Compl. Ex. R.** After reaching an agreement with Plasma, Timmons subsequently vacated Sweetbriar. **Timmons Cont. Depo. Tr. at p. 91; 133-36.**

Timmons filed his Complaint on January 29, 2018, alleging the Lease is enforceable against First Reliance. Timmons asserted the following causes of action against First Reliance Bank, and its employees Dale Porter and F.R. Saunders Jr. (collectively at times "First Reliance"): (1) Breach of Contract; (2) Breach of Contract accompanied by Fraudulent Act; (3) Fraud; (4) Negligent Misrepresentation; (5) 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.

Following extensive briefing and two (2) hearings on Timmons' and Respondents' cross motions for summary judgment, on June 23, 2020, the circuit court entered its order granting Respondents summary judgment as to all claims asserted by Timmons, and denying Timmons' and Blanton's motions for summary judgment. **Order (June 23, 2020)**. Timmons filed a motion to reconsider the circuit court's order, which was also denied. **Plts. Mtn. Reconsider (July 6, 2020)**.[1] This Appeal followed. Of the circuit court's various rulings, we address solely the errors raised by Timmons in his Statement of Issues on Appeal. Timmons does not assert errors with respect to the circuit court's rulings and grant of summary judgment as to Timmons' claims for violation of the Unfair Trade Practices Act (Count 9), Tortious Interference with Contract (Count 11), Tortious Interference with prospective Business Opportunities (Count 12), Breach of Duty of Good Faith and Fair Dealing (Count 13), and Negligent Supervision (Count 14). **App. Br. at vi.** ***See*** Rule 208(b)(1)(B), SCACR.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56, SCRCP." *Quail Hill, LLC v. Cty. of Richland,* 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

[1] Timmons includes a number of factual allegations in his Statement of Facts that are not relevant to the issues Timmons asserts on appeal, including allegations about Timmons' alleged damages, legal troubles encountered by Atlantic Regional and its principals, who Timmons elected not to sue and are thus not parties to this matter, and allegations pertaining to the alleged link between the "Great Recession" *circa* 2007 and the banking regulatory environment that followed and Timmons' Lease and claims. In an effort to focus on the issues relevant to the circuit court's ruling and Timmons' asserted errors in this Appeal, Respondents have not specifically responded to these allegations.

moving party is entitled to a judgment as a matter of law.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003) (quoting Rule 56(c), SCRCP). An issue is considered "material" if the facts alleged would "constitute a legal defense or are of such a nature as to affect the result of the action." *Nelson v. Piggly Wiggly Cent., Inc*., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010). "[I]n cases applying the preponderance of the evidence burden of proof," the nonmoving party must submit a scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). To withstand a motion for summary judgment in cases involving a heightened burden of proof, however, the nonmoving party must submit more than a scintilla of evidence. *Id.*

Although all *reasonable* inferences from the facts are to be viewed in the light most favorable to the nonmoving party, the nonmoving party cannot create a genuine issue of material fact by speculation, guesswork, or an inferential leap. *Nelson*, 390 S.C. at 390, 701 S.E.2d at 780 (holding one may not create a genuine issue of material fact by speculation or an "inferential leap"); *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 45, 386 S.E.2d 290, 292 (Ct. App. 1989) ("It is not sufficient that evidence create a far-fetched inference."). Additionally, Timmons argues the circuit court erred by failing to construe contracts and relevant precedent in the light most favorable to him as the non-moving party. While the standard requires facts to be construed in favor of the non-moving party, the construction of statutes, precedent, and unambiguous contracts are questions of law for the court and are not to be interpreted or construed in the favor of a non-moving party at the summary judgment stage. *See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718–19 (2000); *Dep't of Transp. v. M & T Ent.*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008).

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY HELD TIMMONS' UNRECORDED LEASE WAS NOT ENFORCEABLE AGAINST FIRST RELIANCE DUE TO THE FILING OF THE *LIS PENDENS,* FORECLOSURE, AND SALE OF SWEETBRIAR.

The circuit court held that because Timmons executed his Lease after First Reliance recorded a Notice of *Lis Pendens*, as a matter of law, Timmons is charged with notice of the foreclosure proceedings, he cannot rely upon the Lease, the Lease is subject to the foreclosure judgment and sale, and Timmons is bound by the foreclosure judgment and sale as if he had been made a party to the foreclosure action. **Summ. J. Order p. 9.** The circuit court further held, independent of the effect of the *lis pendens,* that the Lease was extinguished by operation of law following the entry of foreclosure judgment and sale of the property to First Reliance. ***Id.*** Timmons asserts the circuit court erred in holding the *lis pendens* statute rendered Timmons' lease unenforceable against First Reliance because First Reliance had knowledge of or was a party to the Lease. **App. Br. 25**. Timmons argues the circuit court also erred in finding the foreclosure sale extinguished his Lease for similar reasons. **App. Br. 23-24**. Timmons' arguments are addressed separately below. Timmons' arguments that there is a genuine issue of material fact as to whether First Reliance is a party to his Lease are refuted in Sections II and III below.

1. Timmons executed his Lease following the filing of a *lis pendens*; therefore, Timmons is charged with notice and bound by the Foreclosure Action, judgment, and sale.

A *lis pendens* informs a prospective purchaser or encumbrancer that a particular piece of real property is subject to litigation. The *lis pendens* statute states:

> From the time of filing only, the pendency of the action shall be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance

> or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer and *shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action*.

S.C. Code Ann. § 15-11-20 (emphasis added); S.C. Jur. Mortgages § 108 ("The *lis pendens* constitutes constructive notice to a subsequent purchaser who shall be bound by the foreclosure decree to the same extent as if made a party.").

When a *lis pendens* is filed, an encumbrancer is charged with notice of the litigation if his encumbrance is subsequently executed. *MI Co., Ltd. v. McLean*, 325 S.C. 616, 626, 482 S.E.2d 597, 602 (Ct. App. 1997). That the person who acquires an interest in the property lacks actual knowledge of the filing is irrelevant, and the court is not permitted to weigh equities between the filer of the *lis pendens* and the subsequent encumbrancer. *Id.* A properly filed *lis pendens* binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation. *South Carolina Nat'l Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 562 (1987). A *lis pendens "*notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) (quoting 51 Am. Jur. 2d *Lis Pendens* § 2 (2000)); *see* 51 Am. Jur. 2d *Lis Pendens* § 2 ("[T]he legal effect of lis pendens is that nothing relating to the subject matter of the suit can be changed while it is pending and one acquiring an interest in the property involved therein from a party thereto takes such interest subject to the parties' rights as finally determined, and is conclusively bound by the results of the litigation.").

South Carolina law is clear that a person who acquires an interest in property subject to a *lis pendens* in a foreclosure action, whether that interest is acquired by lease or deed, that

interest is subject to the foreclosure. *See Pipkin v. Fletcher*, 165 S.C. 98, 162 S.E. 774, 777 (1932) (finding one who rents property from a mortgagor after a *lis pendens* was filed in suit to foreclose was bound by the filing of *lis pendens* and took no rights in the lease); *Savannah Timber Co. v. Deer*, 258 F. 777, 783 (D.S.C. 1918) (finding deed conveying timber was not valid because deed was executed after property was subject to *lis pendens*); *McNair v. Alex*, 105 S.C. 445, 90 S.E. 23 (1916) (finding Alex, who obtained deed to property from owner and mortgagor after *lis pendens* was filed, was bound by *lis pendens* statute and not entitled to possession of property over mortgagee and purchaser at foreclosure sale).

For example, in *Pipkin v. Fletcher*, Pipkin commenced foreclosure proceedings on real property and filed a *lis pendens*. 165 S.C. 98, 162 S.E. at 777. Two months after the *lis pendens* was filed, Fletcher executed a lease as lessee of the property. *Id.* Pipkin purchased the property at the foreclosure sale and sought to dispossess Fletcher. Fletcher was not a party to the foreclosure action and argued she had a valid lease. *Id.* The court stated:

> Fletcher entered under the defendant in the action for foreclosure after suit commenced pendente lite. . . . [Fletcher] acquired her interest after the filing of the lis pendens, she is bound by the very express provisions of our lis pendens statute . . . as effectively as if she had been made a party to the action for foreclosure.

Id. at 777. The court also stated, unequivocally, "one may not rely upon a purchase or [e]ncumbrance made after the filing of the lis pendens." *Id.* at 776 (emphasis added); *see also E. Hathaway Const., Inc. v. Eli*, 2004 WL 6306191, at *3 (S.C. Ct. App. May 4, 2004) (holding lien foreclosure was effective against non-party who did not record lease until after filing of *lis pendens* and commencement of foreclosure action).

The same result was reached in *Savannah Timber Co. v. Deer*, where the *lis pendens* statute prevented a third party, who obtained a deed from a mortgagor and owner of a property

subject to a *lis pendens* and foreclosure action, from claiming any right in the property over the purchaser at the foreclosure sale. 258 F. at 783. In *Savannah Timber*, a property owner executed a mortgage on timber on his real property, and recorded that mortgage. Subsequently, the mortgagor defaulted and the mortgagee instituted foreclosure proceedings. *Id.* at 782. The mortgagee also filed a Notice of *Lis Pendens.* Prior to the filing of the *lis pendens*, the mortgagor attempted to assign his rights to the property, but the court determined the assignment did not comply with the law, was not recorded, and was an invalid transfer. *Id.* 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.* at 779. The court held that the filing of the *lis pendens* made any deed executed thereafter subject to the decree of foreclosure, stating:

> At the date of the commencement of the foreclosure proceedings there was nothing on the record to notify any subsequent purchaser that [the mortgagor] had ever parted with the title to the real estate, and the filing of the lis pendens as required by the Code of Procedure on May 26, 1913, made any after deed between any subsequent purchasers and [the mortgagor] subject in all respects to the pendency of and the ultimate decree in those foreclosure proceedings.

Savannah Timber Co., 258 F. at 782.

In this case, the foreclosure and *lis pendens* were filed on July 20, 2015. *See* **Compl. Ex. G**. Any deed or other interest in the property acquired after that date is subject to the foreclosure proceedings, regardless of whether the person who subsequently acquired the interest had knowledge of the filing. *MI Co., Ltd.*, 325 S.C. at 626, 482 S.E.2d at 602. Because Timmons executed his Lease after the *lis pendens* was recorded, the circuit court properly held he is charged with notice of the foreclosure proceedings, the Lease is subject to the foreclosure

judgment and sale, Timmons cannot rely on the Lease, and Timmons is bound by the foreclosure judgment and sale as if he had been made a party thereto.

Timmons argues that First Reliance had knowledge of his unrecorded Lease, and such knowledge precludes application of the *lis pendens* statute. **App. Br. 25**. First, Timmons does not cite any law in support of the proposition that if First Reliance had knowledge of Timmons' Lease prior to the date of the foreclosure sale, that this would render the *lis pendens* statute inapplicable. Second, Timmons confusingly refers to the purpose of the general South Carolina race-notice recording statute, S.C. Code Ann. § 30-7-1, without any explanation of how the recording statute is relevant to the analysis of the South Carolina *lis pendens* statute in this case. Assuming, *arguendo*, First Reliance was aware of Timmons' Lease, First Reliance's knowledge is irrelevant for the purpose of the *lis pendens* statute.[2] The plain language of section 15-11-20 is property and time specific, meaning it is irrelevant from whom the purported interest is acquired, so long as the interest is in the same property and acquired after the *lis pendens* is filed. There is no indication from the statute to support Timmons' argument that knowledge by the filer of the *lis pendens* of a post-*lis pendens* attempted

[2] First Reliance denies it had knowledge of Timmons' Lease prior to the date of the foreclosure sale. As set forth below in Section III, there is no evidence First Reliance was provided a copy of Timmons' Lease proposal, the executed Lease, or otherwise informed of the specific terms of Timmons' Lease prior to the date of the foreclosure sale. Timmons asserts Respondent Porter was provided with a copy of Timmons' Lease prior to the foreclosure sale attached to a rent roll provided by Blanton to Porter. **App. Br. 25.** There is no evidence this occurred. Porter testified he received a statement from Blanton that included a listing of rental income for Sweetbriar during the foreclosure, and Blanton had written a note with the word "Timmons" on the document. Porter testified he did not understand this to mean Timmons was a new tenant and did not know when he received this document other than it was at some point during the foreclosure. No leases were attached to this document. **Porter Depo. Tr. p. 169; 276; Pltf. Mot. Summ. J. Ex. 38.** Even if knowledge by First Reliance of the Lease could defeat the operation of the *lis pendens* or foreclosure judgment and sale, First Reliance disputes there is any evidence it had actual notice of the Lease.

conveyance would have any implications for the clear and unequivocal impact and effect of the statute. If the legislature intended for such knowledge by the filer of the *lis pendens* to alter the legal effect of the statute, it would have so provided. *See, e.g., First Citizens Bank & Tr. Co., Inc. v. Blue Ox, LLC*, 422 S.C. 461, 471, 812 S.E.2d 418, 423 (Ct. App. 2018) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will . . . [Courts] are not at liberty, under the guise of construction, to alter the plain language of a statute by adding words that the legislature saw fit not to include."). The purpose of the statute is to provide a lawful manner for providing notice of litigation affecting real property, and clarity regarding attempts to create new interests in land subject to a *lis pendens*, namely, that such attempts must fail as a matter of law.

Third, Timmons attempts to distinguish *Pipkin* and *Savannah Timber,* by arguing the mortgagee who filed the *lis pendens* in those cases had no knowledge of the post *lis pendens* conveyance, and this fact would have changed the Court's analysis and decision in those cases. The mortgagee's knowledge of a purported post-*lis pendens*, pre-foreclosure sale conveyance was not a factor in the courts' decisions in *Pipkin* or *Savannah Timber*. Timmons argues the *Savannah Timber* Court emphasized the knowledge of the mortgagee would be relevant by stating "[a]t the date of the commencement of the foreclosure proceedings there was nothing on the record to notify any subsequent purchaser that [the mortgagor] had ever parted with the title to the real estate." In that case there was both a pre-*lis pendens* conveyance that was not recorded, and a post-*lis pendens*, pre-foreclosure sale conveyance that was recorded. The court was emphasizing there was nothing on the record to show the pre-*lis pendens* conveyance, and went on to state it was irrelevant whether the post-*lis pendens* conveyance was recorded because it was subject to the foreclosure judgment and sale in all respects. 258 F. 782.

Therefore, contrary to Timmons' assertions, the courts' decisions in *Pipkin* and *Savannah Timber* indicate a *lis pendens* filer's knowledge of a purported conveyance will not alter application of the *lis pendens* statute to that conveyance. Because Sweetbriar was subject to a *lis pendens* and Timmons acquired his Lease after the *lis pendens* was filed, his Lease is subject to the statute and he cannot enforce the Lease against First Reliance.

2. Timmons' unrecorded Lease was extinguished by operation of law following the sale of the property at public foreclosure auction.

The circuit court properly held that in addition to the reasons set forth above based on the operation of the *lis pendens* statute, by operation of law and priority, Timmons' unrecorded lease was extinguished by the foreclosure sale.

Generally, when a lease is executed subsequent to the execution of a mortgage on the same property, a foreclosure of the mortgage and sale of the property terminates the lease. S*ee Hursey v. Hursey*, 284 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct. App. 1985) ("A purchase money mortgage is recognized at common law and in equity where a purchaser of land, contemporaneous with the acquisition of the legal title or afterward, but as a part of the same transaction, executes a mortgage to secure the purchase money…. It is accorded priority over all other claims or liens arising through the mortgagor"); *Wright v. Home Beneficial Life Ins. Co.*, 155 Ga. App. 241, 242, 270 S.E.2d 400, 401–02 (1980) ("When a lessee leases property subsequent to the execution of a deed to secure debt and the grantee of such deed exercises the power of sale, the lessee becomes a tenant at sufferance, and the party acquiring title by foreclosure is entitled to maintain a statutory eviction proceeding against the tenant.").

Here, First Reliance's mortgage was recorded on August 16, 2006, and the Foreclosure Action was commenced July 20, 2015. Timmons executed his Lease on August 20, 2015, subsequent to the recording of First Reliance's mortgage and the filing of the Foreclosure

Action. **Compl. Ex. A.** Moreover, the Lease contained a subordination clause providing: "This lease is and shall be subordinated to all existing and future liens and encumbrances against the property." **Id.** Both by operation of law and pursuant to the express terms of the Lease, First Reliance had a superior interest in the property and the Lease was subject to First Reliance's Mortgage. Accordingly, Timmons' Lease was extinguished when First Reliance purchased the Subject Property at the public foreclosure auction conducted by the Special Referee on February 4, 2016.

Furthermore, because Timmons' Lease was not recorded, it was extinguished by the foreclosure judgment and sale. Section 27-33-30 of the South Carolina Code provides: "[i]n order to give notice to third persons any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate." The foreclosure judgment established the amount of the debt and provided the parameters for the forthcoming sale, specifying that "[t]he sale shall be subject to taxes and assessments, existing easements and restrictions of record" and that Atlantic Regional and "all person whomsoever claiming under him, them or it be forever barred and foreclosed of all right, title, interest, and equity in redemption in the said mortgaged premises so sold, or any part thereof." **Compl. Ex. L.** It is undisputed Timmons never recorded his Lease. Thus, the Lease was not a "restriction of record" pursuant to the Foreclosure Judgment, and there was no proper notice to third parties of the existence of the Lease.

Timmons again cites no law for the proposition that if First Reliance had knowledge of the Lease, this would change the legal effect on the Lease of the foreclosure. Timmons' arguments that First Reliance cannot take advantage of the general race-notice recording statute because First Reliance was not a purchaser for value without notice are again confusing

and miss the mark. First, section 27-33-30 of the South Carolina Code, requiring that leases be recorded in order to be enforceable against third persons, contains no reference to the recording statute or a requirement that the "third person" be a "purchaser for value without notice." The statute simply provides that in order to provide notice to third persons, a lease must be recorded. By failing to record the Lease, by the plain terms of the statute, Timmons failed to provide proper notice of his claimed interest in Sweetbriar. Second, to the extent the recording statute has application in this case, it is based on the fact that First Reliance recorded its Mortgage prior to Timmons' execution of his Lease, and that First Reliance's rights in the Mortgage take priority over Timmons' purported rights in his Lease. Whether or not First Reliance was a purchaser for value without notice in the foreclosure sale is irrelevant because First Reliance's Mortgage was recorded and the *lis pendens* was filed against Sweetbriar before Timmons executed his Lease. Thus, Timmons was on notice of First Reliance's superior interest in the property and that the property was subject to litigation. Even if First Reliance had notice of the Lease, general rule still applies and foreclosure and sale extinguished his Lease.

In sum, because Timmons executed his Lease subsequent to First Reliance's Mortgage, his Lease was subordinate to the Mortgage, and the Lease was executed subsequent to the filing of the *lis pendens,* the foreclosure and sale extinguished Timmons' Lease and rendered it unenforceable against First Reliance and this Court should affirm summary judgment.

II. THE CIRCUIT COURT PROPERLY REJECTED TIMMONS' ARGUMENTS THAT FIRST RELIANCE WAS THE LESSOR OF HIS LEASE BASED ON TIMMONS' INCORRECT INTERPRETATION OF LANGUAGE CONTAINED IN LOAN DOCUMENTS EXECUTED BY ATLANTIC REGIONAL.

In an attempt to avoid the consequences of the *lis pendens* and foreclosure sale, Timmons argues that as a matter of law First Reliance was his lessor and a party to his lease

by virtue of language contained in loan documents executed by Atlantic Regional in favor of First Reliance. Specifically, Timmons argues: (1) First Reliance, not Atlantic Regional, was the owner of Sweetbriar when Timmons executed his Lease because the Mortgage executed by Atlantic Regional in 2006 conveyed title and legal ownership of Sweetbriar to First Reliance; **(App. Br. 26)**, and (2) all leases entered into by Atlantic Regional were immediately "transferred" to the Bank at the moment of execution due to assignment language in the loan documents **(App. Br. 26)**.

Timmons' assertions are contrary to the meaning of the loan documents and South Carolina law regarding mortgages and foreclosure, which establish that as a matter of law First Reliance held only a security interest at the time Blanton and Atlantic Regional entered into the Lease with Timmons. Moreover, First Reliance rejects Timmons' attempts to use the loan documents, to which he is not a party and had no knowledge of at the time he entered the Lease, as a sword to force First Reliance into a landlord-tenant relationship with him.

1. First Reliance was not the Owner of Sweetbriar on August 20, 2015.

South Carolina follows the lien theory of mortgages, and establishes that a mortgagor is the owner of the land and the mortgagee is the owner of the money lent, being given the right to recover the money lent by foreclosure and sale of the land. S.C. Code Ann. § 29-3-10 provides:

> No mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by mortgage is elapsed, but the mortgagor shall be deemed the owner of the land and the mortgagee as owner of the money lent or due and the mortgagee shall be entitled to recover satisfaction for such money out of the land by foreclosure and sale according to law….

See also S.C. Code Ann. § 29–3–630 (2007) (requiring a court of competent jurisdiction must establish "the debt for which the security is given" before any sale of the foreclosed property may be valid to pass title); *Epstein v. Coastal Timber Co.,* 393 S.C. 276, 282, 711 S.E.2d 912, 915 (2011) ("The mortgagor of land is the owner in fee and has title to the land so mortgaged, but the mortgagee has a lien upon the land to secure his debt.").

South Carolina has rejected the common law theory of mortgages, which is the minority view that holds the mortgagee has title to the property. *See, e.g.*, *Bartles v. Livingston*, 282 S.C. 448, 455–58, 319 S.E.2d 707, 711–13 (Ct. App. 1984). Before the title to mortgaged land will pass to a mortgagee (or some other bidder at a foreclosure sale), a court must establish the amount of the debt, the property must be sold at auction, and the property must be sold to the highest bidder. Timmons asserts "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." **App. Br. 23.** This is a fundamental misconstruction of what a foreclosure is—which is a process by which the mortgagee applies to the court for a sale of the property to the highest bidder in order to seek satisfaction of its lien on the property. *See* S.C. Code Ann. § 29-3-10.

The Mortgage executed by Atlantic Regional on August 14, 2006, states that Atlantic Regional "mortgages, grants and conveys to [First Reliance] all of Grantor's right, title, and interest in and to" Sweetbriar. **Compl. Ex. G-1.** The Mortgage further makes clear it is a security instrument, providing "this mortgage, including the assignment of rents and the security interest in the rents and personal property, is given to secure" Atlantic Regional's indebtedness to First Reliance. **Compl. Ex. G-1.** The Mortgage provides it is governed by South Carolina state law. **Compl. Ex. G-1.** The Mortgage clearly establishes it is intended to

serve as a conveyance of a security interest and not a present conveyance of title. Timmons' argument that First Reliance became the owner of Sweetbriar in 2006 when the Mortgage was executed is contrary to South Carolina law regarding how a mortgage is construed in this state. Timmons' argues rhetorically that nothing in South Carolina law prevents two parties from deciding a mortgage is in fact a transfer of property title to the lender, particularly in the context of a commercial transaction between sophisticated parties. **App. Br. 29.** Timmons cites no authority for the proposition that a commercial mortgage should be treated any differently from a residential mortgage, when no hint of such a distinction is found in section 29-3-10, which establishes how mortgages are to be interpreted and defined in this state. *See also Shiver v. Arthur*, 54 S.C. 184, 32 S.E. 310 (1899) (illustrating that, under South Carolina law, a mortgage is a security for a debt, rather than a deed conveying title and, in order for a mortgagee to take possession or ownership of mortgaged property, there must first be a foreclosure and open public sale). The circuit court properly rejected Timmons' argument that First Reliance was the owner of Sweetbriar on the day he executed his Lease and therefore his Landlord.

2. The Lease was not "transferred" to First Reliance upon execution.

South Carolina recognizes a "collateral assignment of rents," which is an assignment of "leases, rents, issues or profits made and delivered in connection with the grant of any mortgage." S.C. Code Ann. § 29-3-100(A)(3). The Statute goes on to provide:

> [A]fter a default under the mortgage, conditional sales contract, or evidence of indebtedness which the assignment secures**, the assignee is thereafter entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, <u>any act to take possession of the property,</u> or any further demand on the assignor.** . . . .

S.C. Code Ann. § 29-3-100(c) (emphasis added). South Carolina law thus expressly recognizes the validity of an instrument conveying a mortgagee a separate, collateral interest in rents derived from a mortgaged property, and emphasizes a mortgagee may collect rents and profits under such a document without the need for "any act to take possession of the property." The Restatement (Third) of Property 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). The guidance in the Restatement and section 29-3-100(A)(3) is illustrative of the fact that by collecting rents pursuant to its assignment, First Reliance did not step into the shoes of Atlantic Regional or otherwise become lessor to any of Atlantic Regional's tenants, as argued by Timmons.

As noted by Timmons, the Mortgage states Atlantic Regional "assigns to [First Reliance] all of [Atlantic Regional's] right, title, and interest in and to all present and future leases of the property and all rents from the Property." **Compl. Ex. G-1**. The Mortgage further makes clear "the assignment of rents and the security interest in the rents and personal property, is given to secure" Atlantic Regional's indebtedness to First Reliance. **Compl. Ex. G-1.** Atlantic Regional also executed a separate Assignment of Rents in favor of First Reliance as additional security for its loan, which provides:

> [I]t is given to secure (1) payment of the indebtedness and (2) performance of any and all obligations of Grantor under the Note, this assignment, and the related documents…
>
> **Collect Rents.** Lender shall have the right, without notice to Grantor, to take possession of the property and collect the rents…and apply the net proceeds, over and above Lender's costs, against the indebtedness….Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any

> proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

Compl. Ex. F. By its terms, the Assignment of Rents also granted First Reliance a number of other rights, including the right to take possession of the property, to appoint a receiver, to enter and maintain the property, and to lease the property in its own name. However, the Assignment provides that "[First Reliance] shall not be required to do any of the foregoing acts or things, and the fact that [First Reliance] shall have performed one or more of the foregoing acts or things does not require [First Reliance] to do any other specific act or thing." **Compl. Ex. F.** The Mortgage and Assignment further provide they are governed by South Carolina law. **Compl. Ex. G-1, F.** Thus, subject to state law, First Reliance was free to elect to exercise or not exercise any of the rights granted to it by Atlantic Regional.[3]

Timmons cites no authority in support of his argument that the language in the Mortgage or Assignment of Rents supports the existence of a landlord-tenant relationship between First Reliance and Timmons. As noted by the circuit court, Timmons' arguments are defied by basic contract law because neither of these documents contain any agreement by First Reliance to assume the duties of Atlantic Regional under any leases or contracts Atlantic Regional entered into with its tenants. **Pl. Compl. at Ex. G-1, F.** The circuit court also

[3] Timmons argues First Reliance acknowledged that it had the right under the Assignment of Rents to take possession of the property and enter into leases as lessor prior to acquiring ownership of the property at foreclosure. **App. Br. 31-32.** First Reliance's position was that although the Assignment of Rents by its terms states First Reliance could lease property, it is unclear if such a provision would be inconsistent with sections 29-3-10 and 26-3-630 of the South Carolina Code requiring that a mortgagee conduct a foreclosure prior to exercising any possessory rights. However, in any event it was a moot question since having a right to do something is different from in fact exercising that right, and the undisputed evidence shows First Reliance did not in fact exercise such a right**. 5-20-20 Hearing Transcript at p. 141; 6-10-20 Hearing Transcript at p. 33-35.**

properly evaluated the loan documents as providing various options to First Reliance to attempt to seek satisfaction of Atlantic Regional's debt, none of which the First Reliance was required to exercise. **Summ. J. Order at p. 11-12.** As set forth above, the only right First Reliance sought to exercise with respect to leases or rents was the right to receive rental proceeds derived from Sweetbriar during the pendency of the foreclosure pursuant to its Motion for Rents, and even this right was not granted by the Court until after Timmons executed his Lease. **Compl. Ex. I, J.**

As noted by the circuit court, there does not appear to be a South Carolina case specifically addressing Timmons' argument that a tenant that enters into a lease with a property owner can assert a landlord-tenant relationship with the property owner's lender due to assignment language in the property owner's loan documents executed in favor of the lender. While basic contract law does not support Timmons' theory, other jurisdictions who have considered this argument have rejected it. *See, e.g.,* Restatement (Third) of Property (Mortgages) § 4.2 (1997). The circuit court also cited a Georgia case, *Wright v. Home Beneficial Life Ins. Co.*, 155 Ga. App. 241, 242, 270 S.E.2d 400, 402 (1980), in which the Georgia Court of Appeals stated:

> [Tenant] asserts that the trial court erred in not enforcing a landlord-tenant relationship between himself and [foreclosing bank] which allegedly arose from the assignment agreement between [the borrower/landlord] and [the foreclosing bank]. In effect, [tenant] contends that the assignment of leases, rents and profits amounted to a transfer of [the borrower's] entire interest in the property to [the bank]. This contention is without merit. What [the bank] received by this assignment was merely additional security for the indebtedness-a chose in action in the event of default.

Timmons attempts to distinguish *Wright* by limiting the court's ruling to the assignment of rents at issue, and arguing the court did not address an assignment of rents that also granted

the right to possess and lease the property, as did the assignment of rents in this case. **App. Br. 33**. Timmons' arguments are unavailing. The assignment at issue in *Wright* was an assignment of "leases, rents, and profits" and gave the lender the ability to control existing lease terms. Contrary to Timmons' arguments, the court indicated the assignment granted the lender rights to dictate lease terms, and this did not alter the conclusion the assignment was merely a security interest and chose in action. Therefore, *Wright* is applicable and supports the circuit court's conclusion that the Assignment of Rents in this case was merely an additional security interest and chose in action, and did not create a landlord-tenant relationship between First Reliance and Timmons.

In sum, as a matter of law, Atlantic Regional was the owner and lessor of Sweetbriar at the time Timmons executed his Lease. The circuit court properly held Atlantic Regional was the owner of Sweetbriar and had not been divested of any rights at the time the Lease was executed. Further, the only right First Reliance sought to exercise was the right to receive rental monies derived from Sweetbriar to apply against Atlantic Regional's debt, and that right was not granted until after Timmons executed his Lease. **Summ. J. Order at p. 13.** The language in the loan documents did not alter Atlantic Regional's status as Timmons' lessor.

III. THE CIRCUIT COURT PROPERLY HELD TIMMONS' ALLEGATION BLANTON EXECUTED THE LEASE AS AGENT OF FIRST RELIANCE FAILS AS A MATTER OF LAW AND THERE IS NO EVIDENCE TO SUPPORT IT.

Timmons asserts the circuit court erred when it "ignored" evidence showing Blanton acted as First Reliance's agent when Blanton executed the lease with Timmons, and Blanton had either actual or apparent authority to enter leases on First Reliance's behalf. **App. Br. 34.**

"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. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013). "A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987). An agency relationship is determined by the relation, situation, the conduct, and the declarations of the party sought to be charged as principal. *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011). "An agency may not be established solely by the declarations and conduct of an alleged agent." *Cowburn v. Leventis*, 366 S.C. 20, 39–40, 619 S.E.2d 437, 448 (Ct. App. 2005). "An agency relationship may be established by evidence of actual or apparent authority." *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). Actual authority is expressly conferred upon the agent by the principal. *Id.* Apparent authority arises when the principal knowingly permits the agent to exercise or holds the agent out as possessing authority. *Id.* As set forth below, there is no evidence to support either actual or apparent authority as between First Reliance and Blanton.

1. No evidence or reasonable inferences therefrom support a finding there was an actual agency between First Reliance and Blanton.

Actual authority is based on the relationship between the purported principal and agent. *See Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) (defining actual authority as authority that is "expressly conferred upon the agent by the principal"). An agency relationship based on actual authority exists when a purported principal and an alleged agent mutually consent to the principal controlling the agent in the work the agent has agreed to do on the principal's behalf. *Froneberger*, 406 S.C. at 61–62, 748 S.E.2d at 638.

First, Timmons asserts as a legal matter, First Reliance's rights with respect to leases and rents, and First Reliance's exercise of the right to be paid rents pursuant to the Order to

Pay Rents, indicates Blanton was First Reliance's agent with actual authority to lease the property subsequent to the date First Reliance filed the Motion on July 25, 2015, citing *F&D Elec. Contractors, Inc. v. Powder Coaters, Inc.*, 350 S.C. 454, 567 S.E.2d 842 (2002). **App. Br. 34, 36-37.** Timmons' citation to *F&D Electric* is misplaced as that case does not hold that a property manager collecting rents is automatically an agent of any party to which it remits rental proceeds. *F&D Electric* dealt with South Carolina's mechanics lien statute and held a land owner "or his agent is free to enter into a lease or agreement with a tenant which allows the tenant to direct the modifications to the property which have been specifically consented to by the landlord or his agent." *Id.* at 459, 567 S.E.2d at 844. *F&D Electric* is inapplicable.

The relationships between First Reliance, Atlantic Regional, Blanton and Sweetbriar are clear as a matter of law based on South Carolina statutes defining the rights of the parties, and the filings and court orders in the Foreclosure Action. The circuit court properly held that as of the date Timmons executed his Lease with Blanton, Atlantic Regional was the owner of Sweetbriar, and had not been divested of any rights in the property. As a matter of law, the relationship between First Reliance and Blanton as of the date Timmons executed his Lease, August 20, 2015, was not that of principal and agent. **Summ. J. Order at p. 13**.

The relationship of First Reliance to Sweetbriar and Blanton, and the rights First Reliance sought to exercise with respect to Sweetbriar during the pendency of the Foreclosure are set out in the Motion for Rents and the court's Orders during the Foreclosure Action. First Reliance's "Motion for Order to Pay Rents" simply states it "will move the Court to direct the agent for the above-named Lessor to pay lease proceeds due to Atlantic Regional, LLC over to" First Reliance. **Compl. Ex. I.** First Reliance sought to enforce its right to be paid rent proceeds under the Assignment of Rents through a Motion and Court Order expressly

sanctioning its right to receive such rents. Moreover, the **only** right First Reliance sought to exercise was the right to be paid rents. **Compl. Ex. I.** By Order dated October 2, 2015, over a month **after** Timmons executed his Lease, the Foreclosure Court granted First Reliance's Motion. **Compl. Ex. J.** The Rents Order directs Blanton to pay over rents to First Reliance until the Foreclosure Action is concluded, but does not provide authority for First Reliance to possess the property, take control of the rental operations, or do anything other than receive rent payments from Blanton. ***Id.*** The court granted nothing more than what First Reliance asked for in its Rents Motion, and that was simply an order directing Atlantic Regional and Blanton to pay over any rents to First Reliance during the pendency of the foreclosure. ***Id.***

Thus, it is clear from First Reliance's Motion and the Rents Order that it only exercised the right to receive rents during the pendency of the foreclosure, and did not seek or in fact exercise any broader involvement with the property which would support Timmons' theory that First Reliance stepped into the shoes of Atlantic Regional as his landlord during the pendency of the foreclosure or certainly that as of August 20, 2015, First Reliance had assumed control over Blanton as property manager of Sweetbriar. Even if the Rents Order could be construed as some pronouncement that First Reliance had stepped into the shoes of Atlantic Regional or somehow become Blanton's principal, **the Rents Order was not entered, and Blanton did not begin disbursing rental proceeds to First Reliance, until over one month after Timmons executed his Lease. Blanton Depo. Tr. at p. 31-32 Vol. 2; Ex. 8**. Thus, it cannot be argued that First Reliance had assumed some expanded role with respect to Sweetbriar as of August 20, 2015, the date Timmons executed the Lease.

Second, the circuit court properly held there was no evidence to support Timmons' factual allegation that Blanton entered Timmons' Lease as agent of First Reliance on August

20, 2015. There is no evidence in the record, and Timmons has certainly pointed to none, that First Reliance authorized Blanton to enter into Timmons' lease, or that First Reliance had generally authorized Blanton to enter into contracts on its behalf as of August 20, 2015.

It is an undisputed fact that Blanton acted as the agent of Atlantic Regional when he executed Timmons' Lease on August 20, 2015, based on Blanton's express testimony to that effect. **Blanton Depo. Tr. at p. 120 Vol. 2** ("I entered the lease on behalf of Atlantic Regional."). Blanton further testified:

> I think -- again, I think Atlantic Regional was struggling so bad, you know, saying, 'Hey, man. Get a tenant in there. Get a tenant in there.' And [Plaintiff] and I have known each other; we spoke back and forth. And when it came available, he and I worked out terms that we thought were acceptable. And I passed that on to Atlantic Regional, and they thought it was acceptable, and then Mike and I executed the lease.

Blanton Depo. Tr. at p. 117, Vol. 1. The undisputed evidence shows Blanton emailed the Lease proposal to a representative of Atlantic Regional. ***See* Mot. Summ. J., Ex. D.** Atlantic Regional directed Blanton to negotiate the terms of the lease, and he did so. ***See id.*; Blanton Depo. Tr. at Ex. 29, p. 179, 181 Vol. 1.** Atlantic Regional approved and authorized Blanton to enter the Lease. ***See* Blanton Depo. Tr. at p. 181 Vol. 1; Ex. 29; Blanton Depo. Tr. at p. 35-38 Vol. 2**. Blanton testified he entered the Lease on behalf of Atlantic Regional. ***See* Blanton Depo. Tr. at p. 120 Vol. 2; *see also* Blanton Depo. Tr. at p. 135 Vol. 2**. At the time Blanton executed the Lease, Blanton had an agreement with Atlantic Regional that authorized it to enter leases on behalf of Atlantic Regional. ***See* Blanton Depo. Tr. at p. 35-38 Vol. 2.** Blanton testified that at the time he entered into Timmons' Lease, he had no agreement with First Reliance that authorized him to enter leases on behalf of First Reliance. ***See* Blanton Depo. Tr. at p. 35-38 Vol. 2**.

Thus, as the circuit court found, the only conclusion authorized by the evidence is that Blanton entered the Lease as an agent on behalf of Atlantic Regional. There is no evidence that deviates from Blanton's unequivocal testimony that he entered the lease on behalf of Atlantic Regional. Timmons cites no evidence in the record showing the existence of an actual agency between Blanton and First Reliance as of August 20, 2015, and, instead, asks this Court to find there is a genuine issue of material fact based upon Timmons' speculations and inferential leaps. Timmons alleges "Blanton did in fact speak with [First Reliance] and [First Reliance'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" and Blanton "conferred with [First Reliance] and its counsel on multiple occasions prior to August 20, 2015 about Timmons proposed Lease, and received authority to proceed with the Lease." **App. Br. 10, 13.** The portions of deposition testimony Timmons relies upon for these statements do not support Timmons' allegation that First Reliance or its foreclosure attorney directed Blanton to enter into a lease with Timmons or authorized it. Respondent Porter testified that he does not recall any discussion about Timmons during the Foreclosure Action, was not told about Timmons' proposed Lease terms, and did not receive a copy of Timmons' Lease proposal. ***See*** **Porter Depo. Tr. at p. 166-67; 174; Ex. 16.** While Blanton makes some statements that he thinks he would have told Respondent Porter about Timmons' interest in the property, Blanton further testifies:

> Do you have a recollection of speaking with anyone at First Reliance Bank about Mr. Timmons' proposed lease or interest in the property?
>
> A: No.

Blanton Depo. Tr. P. 37 Vol 2. As to First Reliance's foreclosure attorney, Yarbrough does not recall any discussion about Timmons, states he did not have authority to approve any lease

on behalf of First Reliance at that time and would not have approved any lease on behalf of First Reliance if he had been asked. ***See* Yarborough Affidavit ¶¶ 11-15.** Although Blanton does testify he believes he spoke to First Reliance's foreclosure attorney regarding Timmons' interest in Sweetbriar, he does not recall the content of the discussion. ***See* Blanton Depo. Tr. at p. 150-51 Vol. 2; p. 181, Vol. 1.** When directly asked if Yarborough approved or authorized Timmons' Lease, Blanton testified he did not know. ***See* Blanton Depo. Tr. at p. 181, Vol. 1.** Timmons asserts that Blanton provided a copy of his Lease proposal to First Reliance and attorney Yarborough. **App. Br. 12.** However, Blanton did not testify accordingly and there are no documents or emails to showing the proposal was sent to First Reliance or attorney Yarborough, as there are plain emails sending the proposal and Lease to Atlantic Regional.

The circuit court held, at most, Timmons can establish conflicting testimony about whether Blanton told First Reliance about Timmons' interest in leasing a portion of Sweetbriar. However, there is no evidence to support Timmons' allegation that on or before August 20, 2015, First Reliance authorized Blanton to enter the Lease on its behalf. **Summ J. Order at p. 15.** Timmons also points to allegations regarding events which occurred after August 15, 2015, to support his allegation that Blanton entered Timmons' Lease on August 20, 2015, on behalf of First Reliance.[4] The circuit court properly held these allegations do not create a genuine

[4] Timmons argues First Reliance's attorney Yarborough's comments at the hearing on First Reliance's Motion for Rents on September 30, 2015, over one month after Timmons executed his Lease show First Reliance intended to employ Blanton as its agent. **App. Br. 15-16.** At most, attorney Yarborough's comments were unclear and the product of imprecise language. ***See* Yarborough Affidavit ¶¶ 9-10; Porter Depo. Tr. At 183.** Moreover, even under Timmons' interpretation, if Yarborough was asking the Court for permission to control Blanton's management of Sweetbriar on September 30, 2015, then it would mean that First Reliance unequivocally did not control Blanton's management of Sweetbriar prior to that date, to include Blanton's execution of Timmons' Lease. Timmons also asserts Blanton billed First Reliance, not Atlantic Regional for his appearance at the hearing. The deposition testimony cited does not support this allegation, and in fact all expenses Blanton incurred for Sweetbriar

issue of material fact because Timmons was unable to point to any evidence showing First Reliance Bank authorized Blanton to enter into contracts on its behalf as of August 20, 2015,[5] or that First Reliance authorized Blanton to enter into Timmons' Lease on its behalf.

Despite the undisputed fact that Blanton entered Timmons' Lease on behalf and as agent of Atlantic Regional, Timmons refers to portions of Blanton's testimony and discovery responses indicating Blanton believed he was an agent for First Reliance during the Foreclosure Action. First, Blanton's declarations he may have considered himself an agent of First Reliance during the pendency of the Foreclosure Action are immaterial. *See Cowburn*, 366 S.C. at 39–40, 619 S.E.2d at 448 (Ct. App. 2005) ("An agency may not be established solely by the declarations and conduct of an alleged agent.").

Second, examining the entirety of Blanton's testimony indicates the only reasonable inference is that Blanton was not an agent for First Reliance and, instead, was an agent for

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were billed to the Sweetbriar account prior to Blanton disbursing monthly rental proceeds. **Blanton Depo. Tr. at p. 13, Vol. 2.**

[5] Timmons asserts the Circuit Court erred in granting First Reliance's Motion because Blanton testified "when the bank took it over, to my recollection was- is- you know, lease what you can and, you know, let's get the income coming until we decide to sell it or continue to manage it." **App. Br. 16.** Based on the phrase "when the Bank took it over," it appears Blanton may be referring to the time period after First Reliance took ownership of the property in February 2017, approximately six months after Timmons executed his 8-20-15 Lease. This further appears to be the case as Blanton also testified that after he found out about the foreclosure, he spoke with First Reliance, and was told that First Reliance did **not** want to lease the property, but wanted to sell it. **Blanton Depo. Tr. at p. 107**. Even if the ambiguous testimony highlighted by Timmons (directly contradicted by other testimony) could create an issue of fact as to whether First Reliance generally told Blanton it wanted property leased during the Foreclosure Action, this is not a material issue of fact that precludes summary judgment. This testimony, accepted as true at the summary judgment stage, does not change the clear testimony of Blanton that it entered into Timmons' Lease on behalf of Atlantic Regional. Neither does the referenced testimony change the nature of the legal relationships between First Reliance, Atlantic Regional and Blanton, and does not amount to evidence of an agreement between First Reliance and Blanton for Blanton to act on behalf of First Reliance and enter into binding contractual agreements on First Reliance's behalf.

Atlantic Regional at the time Timmons executed his Lease on August 20, 2015. ***See, e.g.,*** **Blanton Depo. Tr. at p. 24, Vol. 2** ("Until it is absolutely tee-totally foreclosed, which the bank notified me it had been foreclosed on, technically I was still working for Atlantic Regional"); ***see also*** **Blanton Depo. Tr. at p. 99-100, Vol. 1** ("I was going to do whatever [Atlantic Regional] told me to do until the Bank told me what to do. Okay? And so, again, I was in that gray area. I was caught between the ropes."); **Blanton Depo. Tr. at p. 120-21, Vol. 1** ("But as I understand it, until the bank actually foreclosed as opposed to notice of intent to foreclose, I was still basically being employed by Atlantic Regional."). During the pendency of the foreclosure and until First Reliance purchased the property on February 4, 2016, Blanton addressed questions about building maintenance and proposed alterations to Atlantic Regional; Blanton did not address these questions to First Reliance because he believed he was still working for Atlantic Regional until the sale. **Blanton Depo. Tr. at p. 38-41, Vol. 2, Ex. First Reliance 2;** ***see also*** **First Reliance Supp. Memo in Support of Mot. Summ. J. at Exhibit A** (outlining email correspondence between Blanton and Atlantic Regional during the foreclosure action in which Blanton sought Atlantic Regional's approval to enter into other tenant leases and sought direction regarding building maintenance, building repair, tenant requests, insurance and utility charges; no such correspondence exists between Blanton and First Reliance during the foreclosure action).

Timmons cites portions of Blanton's Responses to his Requests to Admit in his Brief which stand only for the proposition that Blanton contended he managed the property for First Reliance "subsequent to July 24, 2015." There is no dispute that First Reliance asked Blanton to manage Sweetbriar for First Reliance after it acquired the property in the foreclosure sale on February 4, 2016. Blanton's Request to Admit Responses may also show that Blanton

believed itself to manage the property on behalf of First Reliance after the Foreclosure Court entered an Order directing payment of rent on October 2, 2015. ***See*** **Blanton Response to RTA No. 4** (Q: Admit that subsequent to July 24, 2015, Blanton was acting as agent of First Reliance Bank…A: Admitted that after the October 2, 2015 Blanton was serving as First Reliance's Agent in collecting rents and managing the property."). Regardless, Blanton's discovery responses cannot reasonably be interpreted as evidence that Blanton acted as agent of First Reliance on August 20, 2015 when Blanton executed Timmons' Lease, in light of his express deposition testimony that he entered the Lease on behalf of Atlantic Regional and had no authority to enter the leases on behalf of First Reliance on that date.

Timmons asserts he is entitled to an inference that Blanton entered his Lease on behalf of First Reliance as opposed to Atlantic Regional, which precludes summary judgment in this case. While Timmons is entitled to all inferences to be drawn from the evidence in his favor at the summary judgment stage, he is not entitled to an "inference" that is directly contrary to the undisputed facts in the record. Moreover, "this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009).

Timmons also argues First Reliance is judicially estopped from denying that Blanton is its agent. In addition to lacking substantive merit, this Court should refuse to address this argument because it is not preserved. In order to preserve an argument or issue for appeal, the argument must be raised to and ruled upon by the circuit court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). If a party raises an argument to the circuit court, but it is not ruled on, then the party has the obligation to file a motion for reconsideration requesting a ruling on the issue in order to preserve it for appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338

S.C. 406, 526 S.E.2d 716 (2000). Timmons raised the issue of judicial estoppel to the circuit court in his Motion for Summary Judgment. The circuit court, however, did not rule on the issue in its order denying Timmons' motion and granting First Reliance's motion. Therefore, it was incumbent on Timmons to request a ruling on the issue in a motion for reconsideration. Timmons moved to reconsider the circuit court's order, but did not request nor receive a ruling on the judicial estoppel issue. Thus, Timmons has failed to preserve this issue.

The circuit court properly ruled the issues raised by Timmons are not genuine issues of material fact that preclude summary judgment in favor of the Respondents because Timmons has pointed to no evidence that shows First Reliance authorized Blanton to transact business on its behalf as of August 20, 2015, or that First Reliance authorized Blanton to enter into Timmons' Lease on its behalf.

2. No evidence or reasonable inferences therefrom support a finding there was an apparent agency between First Reliance and Blanton.

"While actual authority is that which is expressly conferred upon the agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing." *Charleston, S.C. Registry for Golf & Tourism, Inc.*, 359 S.C. at 642 (citing *Moore v. North Am. Van Lines*, 310 S.C. 236, 239, 423 S.E.2d 116, 118 (1992)). Therefore, when evaluating the existence of apparent authority, "[t]he proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party." *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117–18 (Ct. App. 2000). "[T]he concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal." *Id.* Further:

> To establish apparent agency, it is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant. In order for a third party to recover against the principal based upon this theory, it must be shown that he reasonably relied on the indicia of authority *originated by the principal* and such reliance must have effected a change of position by the third party.

Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244–45, 473 S.E.2d 865, 868 (Ct. App. 1996) (citations and quotations omitted). Furthermore, a party must also prove reliance on the representation and a change of position to his detriment in reliance on the representation. *Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App. 1986).

For example, in *Frasier*, the Court of Appeals reversed the circuit court's denial of the purported agent's motion for directed verdict, and held there was no evidence to support a finding of an agency relationship because there was no evidence that the purported principal made any representations to the plaintiff, and because there was no evidence that the plaintiff relied on any indicia of authority conferred by the purported principal. The Court noted the purported principal had no contact with the plaintiff during the transaction at issue, and the plaintiff did not place any significance on the identity of the principal (i.e. plaintiff did not rely on the purported principal's reputation, solvency, or any other facts relevant to that particular alleged principal). *See id.* ("[T]here is no evidence [plaintiff] relied on the alleged apparent authority . . . there is no evidence they relied on [the purported principal] as to business practice, reliability or solvency."); *see also Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 142–43, 399 S.E.2d 430, 433 (Ct. App. 1990) (overruled on other grounds) (reversing bench trial judgment finding agency relationship noting the plaintiff only learned who purported principal was after the relevant events).

Here, Timmons testified unequivocally that he did not have any communications with First Reliance and did not know of any potential involvement First Reliance had with Sweetbriar until he had actual knowledge of the foreclosure four months after he executed the Lease. ***See* Timmons Depo. Tr. at p. 64; Timmons Cont. Depo. Tr. at pp. 67, 69, 72, 75**. As in *Frasier,* there was no representation or manifestation of authority from First Reliance to Timmons, thus precluding an apparent agency claim. Timmons testified he knew Blanton worked as a property manager for a principal, but did not care to know the identity of the principal because it was not important to him. ***See* Timmons Cont. Depo. Tr. at p. 81**. Again, as in *Frasier,* the fact that Timmons claims he did not know the identity of the alleged principal on whose behalf Blanton worked and placed no import whatsoever on the identity of the principal precludes his apparent agency argument. Accordingly, the circuit court properly held there is no evidence to support an apparent agency theory.

IV. TIMMONS HAS FAILED TO PRESERVE HIS ARGUMENT THAT FIRST RELIANCE FAILED TO ACT IN A "COMMERCIALLY REASONABLE" MANNER AND, EVEN IF PRESERVED, THE "COMMERCIAL REASONABLENESS" REQUIREMENT IN SECTION 29-3-100 DOES NOT SUPPORT A CLAIM BY TIMMONS AGAINST FIRST RELIANCE.

Preservation & Abandonment

As an initial matter, Timmons has failed to preserve this argument on appeal. In order to preserve an issue for appellate review, the appellant must have raised it to the circuit court. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d 712 (2004). The party need not use the exact name of the legal doctrine, but it must be clear the argument was presented on that ground. *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593 (2010). Furthermore, the circuit court must rule upon the issue. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). If the circuit court fails to rule on an issue it was presented, the party must file a motion to alter

or amend the judgment in order to preserve the issue for appellate review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Here, Timmons argues the circuit court erred by failing to consider that he has an independent cause of action against First Reliance for its alleged failure to comply with a duty to Timmons to act in a "commercially reasonable" manner under section 29-3-100 of the South Carolina Code. **App. Br. 50**. On appeal, and for the first time, Timmons asserts he has a separate cause of action pursuant to this statute. Timmons never asserted a cause of action against First Reliance based on this statute. ***See* Compl**. Timmons argued in brief at summary judgment that First Reliance failed to act in a commercially reasonable manner, which required First Reliance to discover Timmons' identity and the facts regarding the Lease he contemplated entering into with Blanton, and warn Timmons it would take the position that the foreclosure and sale would terminate all existing leases if in fact First Reliance ended up being the highest bidder at the foreclosure sale. **Timmons. Memo in Support of Summ. J., at 46-50**. First Reliance responded and pointed out that Timmons failed to "explain how a requirement of commercial reasonability exists in this case, and does not point to any of his specific causes of action (i.e. breach of contract, fraud, intentional interference with contractual relations, intentional interference with business opportunities etc.) of which "commercial reasonableness" is an element. " **First Reliance Supp. Memo in Support of Mot. Summ. J. at 14**. Timmons has never asserted he had a separate cause of action under the statute, and indeed he has not brought such an action based upon his Complaint. Because Timmons did not raise to the circuit court the issue of a separate cause of action under section 29-3-100, it is not preserved for this Court's review.

Additionally, although Timmons' Summary Judgment briefing referenced S.C. Code. Ann. 29-3-100, the circuit court did not address whether or not First Reliance's actions were commercially reasonable in its order on summary judgment. **Summ. J. Order**. Because the court did not rule on the issue, it was incumbent upon Timmons to request a ruling in a timely motion for reconsideration. Timmons did file a Motion for Reconsideration, but Timmons did not reference the statute or request a ruling regarding section 29-3-100. **Timmons Mot. Reconsideration.** Because Timmons failed to preserve his arguments regarding section 29-3-100, this Court should decline to address them.

Furthermore, Timmons did not cite any law in support of his argument he has a separate cause of action for First Reliance's alleged commercially unreasonable actions. **App. Br. 50-51**. Therefore Timmons has abandoned this issue on appeal. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."); *see also State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (stating an argument is abandoned when a party provides no legal authority for the argument and the court will not address the merits of the issue).

Merits

In the event the Court considers the merits of Timmons' argument, this Court should still affirm summary judgment because section 29-3-100 by its terms does not apply to the circumstances alleged by Timmons, does not confer the claimed duty on First Reliance, and does not authorize a cause of right of action by Timmons against First Reliance.

The cardinal rule of statutory construction is to ascertain and give effect to the legislative intent, and the text of a statute is considered the best evidence of that legislative intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When the text of a statute is clear and explicit, it is to be applied pursuant to its plain meaning, the rules of statutory interpretation are unnecessary, and the court is prohibited from imposing another meaning. *Id.*

Section 29-3-100 states, in pertinent part,

> Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage, conditional sales contract, or evidence of indebtedness which the assignment secures, the assignee is thereafter entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. Unless otherwise agreed, after default the assignee is entitled to notify the tenant or other obligor to make payment to him and is also entitled to take control of any proceeds to which he may be entitled. The assignee must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

S.C. Code Ann. § 29-3-100(3).

Timmons argues that it was not commercially reasonable for First Reliance to not disclose the foreclosure to Timmons in the process of "collecting rents" from Timmons. **App. Br. 50.** Timmons asserts that the act of Blanton entering into the Lease with Timmons is considered collecting rents under the statute and that act is attributable to First Reliance as the principal under an agency theory. **App. Br. 50**.

Timmons' broad interpretation of "collecting rents" is contrary to the plain language of the statue. The plain language of this statute directs an assignee to act in a commercially

reasonable manner when it acts to "collect and receive any accrued and unpaid or subsequently accruing lease revenues" due an assignor. The statute does not describe or address the act of executing new leases. For the purpose of the statute, the right to collect and receive rents does not include the power to rent. S.C. Code Ann. § 29-3-100(3), by its plain terms, simply does not extend to the circumstances alleged by Timmons.

Timmons cites no law to support his position that section 29-3-100 imposes a duty on First Reliance in favor of Timmons or provides a basis for a cause of action against First Reliance. Legislative intent is the driving factor in determining whether a statute creates a private cause of action and establishes a civil liability. *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 208, 544 S.E.2d 38, 45 (Ct. App. 2001) (quoting *Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990)). "The test to determine whether a right of private action in favor of a certain party is created by implication under a civil statute is whether the legislation was enacted for the special benefit of that party. *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993).

Here, Section 29-3-100 contains no language establishing civil liability specifically for violating its provisions. Moreover, because the factual scenario alleged by Timmons is simply beyond the matters embraced in section 29-3-100, there is certainly "no implication . . . the legislation was enacted for the special benefit of [Timmons]." *See Camp*, 310 S.C. at 516, 426 S.E.2d at 305. The plain and unambiguous language of the statute indicates it was not the legislature's intent to create or authorize an independent cause of action by a tenant against a lender in which the tenant alleges the lender acted in an unreasonable manner in entering into a lease with the tenant.

At most, section 29-3-100 would seem to allow an assignor to challenge the commercial reasonability of an assignee's action in collecting rent that would otherwise go to the assignor. *See Mid-Continent Refrigerator Co. v. Carpenter*, 287 S.C. 624, 625, 340 S.E.2d 559, 560 (Ct. App. 1986) (examining the commercially reasonable requirement under S.C. Code 36-9-504(3) when a creditor takes possession of and sells collateral then seeks a deficiency judgment against the debtor). Here, Timmons is not challenging a collateral assignment of rents and is not challenging the manner in which First Reliance collected rents. Therefore, Timmons has no claim against First Reliance based on its alleged failure to act in a commercially reasonable manner and this Court should affirm summary judgment.

V. THE CIRCUIT COURT PROPERLY HELD THERE WAS NO EVIDENCE TO SUPPORT TIMMONS' CLAIM THAT FIRST RELIANCE RATIFIED THE LEASE BLANTON AND TIMMONS EXECUTED.

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) (emphasis added). With respect to the relationship between principal and unauthorized agent, the agent's actions sought to be ratified must be on behalf of the purported principal. *See* S.C. Jur. *Agency* § 86 ("Ratification is the adoption by one person of an act done or bargain *made for him* by another under such circumstances that he would not have been bound but for his subsequent assent." (emphasis added)).

Ratification exists upon the concurrence of three elements: (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. *See Neely v. Love*, 144 S.C. 271, 142 S.E. 623, 642 (1928). "Ratification is a matter of intention express or implied, on the part of the principal, and, in order to establish an implied ratification, there must be some acts or conduct on his part which reasonably tends to show such intention." *Id.* "When the act relied on to show ratification is equally consistent with a purpose to the contrary, an intent to ratify is not ordinarily implied." *Id.*

Here, after the Court entered its Order directing Blanton to pay over Sweetbriar Lease proceeds to First Reliance, on October 16, 2015, Blanton began paying over the rent proceeds to First Reliance as ordered by the Court. **Blanton Depo. Tr. at p. 31-32 Vol. 2**. Timmons made his first rent payment to Blanton on November 30, 2015. **Pl. Memo Mot. Summ. J., Ex. 39.** On February 2, 2016, Timmons wrote a rent check to Blanton for the month of February. ***See* Timmons Memo Mot. Summ. J. at Ex. 39**. On February 4, 2016, First Reliance purchased Sweetbriar at the foreclosure sale. ***See* Compl. Ex. G.** By letter dated February 8, 2016, First Reliance notified Blanton of its purchase and stated its unequivocal position that all leases were extinguished as result of the foreclosure sale. **Compl. Ex. N.** First Reliance further noted it would allow the current tenants to remain on a month to month basis only. ***See id.*** On February 24, 2016, Blanton remitted funds to First Reliance representing February rental payments less expenses. ***See* Timmons Memo Mot. Summ. J. at Ex. 44**. By letter dated February 26, 2016, Blanton informed the Sweetbriar tenants of First Reliance's lease extinguishment letter.

First, ratification does not apply under the present circumstances. Ratification requires that the unauthorized agent's actions sought to be ratified must be carried out on behalf of the purported principal. If this Court finds no genuine issue of material fact exists that Blanton entered the Lease on behalf of then-owner and landlord Atlantic Regional, then the ratification

inquiry ends because Blanton would not have carried out the action in the name of First Reliance and thus could not satisfy this required element of a ratification claim.

Second, the circuit court's ruling rejected Plaintiff's allegation that "First Reliance Bank accepted [Timmons'] rental payment after First Reliance Bank became the owner of Sweetbriar in February 2016." **Summ. J. Order at p. 16-17.**The trial court's understanding of Timmons' argument was that Timmons argued that First Reliance's acceptance of post-foreclosure sale rent proceeds constituted ratification of the Lease, and not that Timmons argued that First Reliance's acceptance of rent proceeds prior to the foreclosure sale under the court's Rents Order constituted First Reliance's ratification of the Lease. ***Id.*** Assuming Timmons made this argument to the circuit court, Timmons did not seek a ruling as to his argument that First Reliance's acceptance of pre-foreclosure sale rental proceeds under the Rents Order constitutes evidence of ratification, and thus has failed to preserve this argument. *See Lucas,* 359 S.C. 505; *I'On, L.L.C.,* 338 S.C. 406.

Third, summary judgment is appropriate because Timmons cannot establish any evidence to support the required element of First Reliance's intention to adopt the Lease. In support of ratification, Timmons argues First Reliance made an "affirmative election indicating an intention to adopt the 'unauthorized agreement'" by accepting rent payments before advising Timmons it did not intend to honor the Lease. **App. Br. 46.** Timmons' argument relies upon the timing of his knowledge as an expression of First Reliance's intent, specifically the fact that Timmons did not learn First Reliance's position was that all leases were extinguished by the foreclosure and First Reliance permitted existing tenants to remain on the premises on a month to month basis only until after his rent payments were disbursed to First Reliance. Timmons' knowledge, however, is irrelevant to determining ratification. Instead,

the focus in the ratification inquiry is the conduct and intent of the alleged principal, here First Reliance. Considering the acts and conduct of First Reliance, the undisputed facts establish First Reliance did not have an intent to adopt Timmons' Lease. First Reliance accepted all rent proceeds from Blanton prior to its acquisition of Sweetbriar as a creditor of Atlantic Regional entitled to payment of rental proceeds pursuant to its rights under the loan documents, and not as a landlord. As to the February rent payment accepted by First Reliance after it became the owner of Sweetbriar, First Reliance sent its February 8, 2016 letter stating its intention that all leases were terminated and henceforth month-to-month, before receiving any post-foreclosure rent proceeds on February 24, 2015. First Reliance expressed its unequivocal intent that is accepted all pre-foreclosure sale rent proceeds as a creditor of Atlantic Regional, and to extinguish all leases and engage in month-to-month leases with tenants prior to accepting Timmons' post-foreclosure rent payments. Accordingly, the circuit court properly held there is no evidence to show an affirmative election by First Reliance to adopt Timmons' Lease, and thus no evidence to support Timmons' allegation that First Reliance ratified the Lease.

VI. THIS COURT SHOULD AFFIRM SUMMARY JUDGMENT WITH RESPECT TO TIMMONS' CLAIMS FOR MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, AND BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT BECAUSE BLANTON WAS NOT FIRST RELIANCE'S AGENT AND TIMMONS DID NOT APPEAL ALL GROUNDS UPON WHICH THE CIRCUIT COURT RULED.

Timmons argues the circuit court erred when it granted summary judgment on his claims for misrepresentation, negligent misrepresentation, and breach of contract accompanied by a fraudulent act. **App. Br. 47**. In support, Timmons claims the circuit court erred because there was evidence that Blanton acted as agent for First Reliance in negotiating and executing Timmons' Lease. **App. Br. 47**. The only ground for appeal asserted by Timmons as to his claims for misrepresentation, negligent misrepresentation, and breach of contract accompanied

by a fraudulent act is that to the extent this Court finds there was a genuine issue of material fact as to whether Blanton acted as agent for First Reliance in entering the Lease, this Court should also reverse on these claims. **App. Br. 47**.

As outlined in Part III above, there is no genuine issue of material fact on the agency issue, and Blanton did not act as the agent of First Reliance. To the extent this Court affirms the circuit court's ruling with respect to agency, it should also affirm the circuit court's ruling on Timmons' claims for misrepresentation, negligent misrepresentation, and breach of contract accompanied by a fraudulent act.

However, even if this Court reverses the decision on the agency issue, summary judgment is still appropriate on these claims because Timmons did not appeal all grounds upon which the circuit court ruled.[6] *See Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (holding where the ruling of the circuit court is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds).

First, as it relates to misrepresentation and negligent misrepresentation (Counts 5 and 7 of Timmons' Complaint), Timmons only appealed the circuit court's ruling that the misrepresentations he alleged Blanton made to him were not attributable to First Reliance, and did not appeal the circuit court's ruling with respect to his claims for fraudulent and negligent misrepresentation based on representations Timmons claims First Reliance made to him after acquiring ownership of Sweetbriar. As recognized by the circuit court, Timmons essentially

[6] Additionally, because the entirety of Timmons' arguments with respect to his claims for misrepresentation, negligent misrepresentation, and breach of contract accompanied by a fraudulent act are conclusory and contain no citations, this Court could consider the issues abandoned on appeal and not presented for review. *See Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

alleged First Reliance took an incorrect legal position as to the effect of the foreclosure on Timmons' Lease. **Summ. J. Order. p. 19.** The circuit court ruled that the representations were communications of a legal position or understanding of the law and, as a matter of law those types of representations are not actionable. *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 240-41, 692 S.E.2d 499, 508-09 (2010) ("[M]isrepresentations as to matters of law are not actionable."). The circuit court also ruled Timmons failed to create a genuine issue of material fact as to other required elements of these claims, including that First Reliance intended the representations be acted upon, that Timmons had the right to rely, or that he actually relied on the representations, and in the context of Timmons' claim for negligent misrepresentation, Timmons failed to establish that First Reliance had a duty to him. **Summ. J. Order p. 19-21.** Timmons did not appeal these rulings. **See App. Br. 47**.

Additionally, Timmons argued Blanton fraudulently and negligently misrepresented to him that it was likely a new buyer of Sweetbriar would want to continue his lease despite the warning from First Reliance that there was no guarantee the new buyer would want to continue any tenancies. The circuit court ruled that Blanton's statement was merely an expression of an opinion, rather than a statement of fact, and, therefore, it was not an actionable statement. *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 526–27, 455 S.E.2d 183, 187 (Ct. App. 1995). "The false representation must be predicated upon misstatements of fact rather than upon an expression of opinion . . . ."). **Summ. J. Order p. 21-22.** Timmons did not appeal this ruling. **See App. Br. 47**. Therefore, this Court should affirm summary judgment on Timmons' misrepresentation and negligent misrepresentation claims.

Second, regarding the contract claim, the circuit court ruled that, even if the Lease was a contract between Timmons and First Reliance, First Reliance was entitled to summary

judgment on Timmons' breach of contract accompanied by a fraudulent act because Timmons failed to establish a genuine issue of material fact as whether First Reliance acted with fraudulent intent to commit a breach the Lease. *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 654, 780 S.E.2d 263, 273–74 (Ct. App. 2015) (outlining the elements of a claim for breach of contract accompanied by fraudulent act as: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract, not merely to its making; and (3) a fraudulent act accompanying the breach)**. Summ. J. Order at p. 22.** Timmons appealed only the ruling that Lease was not a contract between First Reliance and himself, asserting it is a contract with First Reliance because Blanton was First Reliance's agent. Timmons did not appeal the circuit court's ruling on fraudulent intent, he did not appeal all grounds upon which the circuit court ruled and this Court must affirm.

Because the circuit court granted summary judgment on multiple grounds related to Timmons' misrepresentation, negligent misrepresentation, and breach of contract accompanied by a fraudulent act claims and Timmons did not appeal all grounds, this Court must affirm summary judgment.

CONCLUSION

For the aforementioned reasons this Court should affirm the circuit court's grant of summary judgment to Respondents on all claims asserted by Timmons against Respondents.

This 29th day of December, 2020.

Respectfully submitted,

s/ Lacey L. Houghton
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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.: 2018-CP-21-00227

Appellate 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.; JB JR 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. Sanders, Jr. are the Respondents.

PROOF OF SERVICE

I certify that on the date indicated below, I served the *Initial Brief of Respondent* and *Respondents' Designation of Matter to be included in the Record on Appeal* upon Appellant by e-mailing a copy to counsel for Appellant below at the email address registered with the Attorney Information Service:

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Pursuant to section (g)(3) of the Supreme Court's May 29, 2020 Order on Operation of the Appellate Courts During the Coronavirus Emergency, a copy of the e-mail is enclosed.

This 29th day of December, 2020.

s/ Skyler C. Wilson
D. Gary Lovell, Jr., Esq.
Lacey L. Houghton, Esq.
Skyler C. Wilson, Esq.
Attorneys for Respondents First Reliance Bank, Inc.; Dale Porter; and F.R. Saunders, Jr.

From:	Wilson, Skyler C.
To:	"David Ashley"; Ben Le Clercq; Debbie Mathews
Cc:	Houghton, Lacey L.; Travis, Sarah H.
Bcc:	"056894 Timmons d_b_a Tavern on the Loop v_ First Reliance Bancshares_ et al 056894_E_Mail"
Subject:	Timmons v. First Reliance Bank - Appeal - Case No. 2020-001027 - Respondents" Initial Brief and Designation of Matter
Date:	Tuesday, December 29, 2020 3:30:52 PM
Attachments:	image001.png Initial Brief of Respondents First Reliance Bank, Dale Porter, and F.R. Saunders, Jr..PDF Respondents_ Designation of Matter.PDF

David and Ben,

Please find attached for service upon you Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal.

Let us know if you have any issues accessing the documents.

Best regards,

Skyler

CSKL
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