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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

L. Casey Manning, Presiding Judge

Case No: 2012-CP-40-0249

BRANCH BANKING AND TRUST COMPANY.....Respondent,

v.

GRAPHIC EXPRESS, LLC, LANNY R. GUNTER, II
and HARRY B. BENENHALEY.....Appellants.

**RESPONDENT'S MOTION TO DISMISS
OR, ALTERNATIVELY, MOTION
TO EXCLUDE MATTER**

Respondent Branch Banking and Trust Company (hereinafter "BB&T") moves this Court to dismiss the present appeal pursuant to Rule 240 of the South Carolina Appellate Court Rules or, in the alternative, to exclude matter from the Record on Appeal pursuant to Rule 209 (c) and (h), SCACR.

This appeal should be dismissed because *none* of the arguments raised by Appellants has been properly preserved for this Court's review. Appellants did not, at either one of the two opportunities available to them, preserve any issue in this matter for appellate review. Specifically, Appellants did not place

any disputed fact or any issue, document or defense whatsoever before the trial court. Further, following the trial court's entry of summary judgment against them, Appellants did not file a motion for reconsideration, thereby forfeiting their final opportunity to place any matter or issue before the trial court. Appellants' failure to preserve any issue for review on appeal is fatal and dismissal on this basis is required.

Alternatively, BB&T moves this Court to exclude from the Record the deposition transcript of Lanny R. Gunter[1] pursuant to Rule 209 (c) and (h), SCACR. This deposition, which was taken in connection with a matter separate and distinct from the underlying lawsuit, is not properly preserved since it was not part of the trial court's record and was not considered by the trial court. It is additionally wholly unrelated to this lawsuit and has no bearing on the facts of this case. Further, because Appellants have relied exclusively on this transcript which must, by law, be excluded, there is no matter in the Record to support *any* of the newly raised assertions and arguments set forth in Appellants' Initial Brief. BB&T thus submits that dismissal of the appeal is also warranted on this basis.

FACTS AND PROCEDURAL BACKGROUND

This is an action for collection of a debt for which Appellants Graphic Express, LLC, Lanny R. Gunter II and Harry B. Benenhaley (collectively "Appellants") are liable for payment. Specifically, BB&T provided credit on October 19, 2009 to Graphic Express, LLC pursuant to a promissory note, wherein it promised to repay the loan of $82,000.00, plus interest. (Compl. ¶ 5,

[1] In both their Designation of Matter to be Included in the Record on Appeal and throughout the text of their Initial Brief, Appellants incorrectly refer to this Appellant as *Larry* R. Gunter.

attached hereto as **Exhibit A**). Appellants Gunter and Benenhaley executed guaranty agreements by which they pledged personal liability for payment to BB&T for the full amount of the loan. (Compl. ¶¶ 10-14, Compl. Exhibit C). Appellants failed to make monthly payments when due and were thus in default pursuant to the terms of the note. (Compl. ¶¶ 6-14, Compl. Exhibit B). When Appellants failed to cure the default upon demand, BB&T filed suit.

BB&T filed the Verified Complaint against Appellants on January 13, 2012, setting forth causes of action with respect to both the note and personal guarantees. Attached as exhibits were an Affidavit of Account and copies of both the note and the personal guaranty agreements executed by Gunter and Benenhaley. In response, counsel for Appellants submitted an Answer in which they summarily denied every allegation of the Verified Complaint in one sentence: "The material allegations of the Complaint are denied." (Ans., attached hereto as **Exhibit B**). Appellants neither raised a single affirmative defense nor made any counterclaims against BB&T.

In an attempt to ascertain any unresolved issues and to determine upon what facts, if any, Appellants would rely in their defense, BB&T submitted discovery requests in which it asked for any and all facts, witnesses and/or documents which would support Appellants' position or constitute a defense to the stated claims. (Defendants' Ans. to Interrogatories & Resp. to Requests for Production, attached hereto as **Exhibit C** & **Exhibit D**). Following BB&T's filing of a motion to compel discovery responses from Appellants, Appellants submitted answers with virtually no responsive information and they failed to

identify or to produce a single document to substantiate their general denial. (Id.). Likewise, and in contravention of the good faith requirement set forth in Rule 36 SCRCP, Appellants submitted only a general denial of each of BB&T's eleven Requests for Admissions. Appellants even denied BB&T's innocuous request that Appellants admit they received copies of exhibits to the Verified Complaint, and further denied that they had executed the personal guarantees, though they now admit all such facts in their Initial Brief. (BB&T Requests for Admissions, attached hereto as **Exhibit E**; Defendants' Resp. to Requests for Admissions, attached hereto as **Exhibit F**).

In summary, though the action had been pending against Appellants for six and one-half months, they failed at any time to offer any information or evidence whatsoever to raise or support any legal defense, failed to request any written discovery, failed to take any depositions, and failed to meaningfully respond to BB&T's discovery requests. Because Appellants presented absolutely no evidence or information to even suggest the existence of any issue of material fact in this case, BB&T moved for summary judgment on May 18, 2012. BB&T subsequently filed with the trial court a Memorandum of Law in Support of its Motion for Summary Judgment. (Mem. of Law, attached hereto as **Exhibit G**). Appellants submitted no memorandum, affidavit, or any other material in opposition to the motion.

The hearing on BB&T's Motion for Summary Judgment was held on September 4, 2012 before the Honorable L. Casey Manning. During the hearing, counsel for BB&T argued that pursuant to controlling South Carolina case law, a

defendant's responsive pleadings that simply deny allegations supporting a valid cause of action are not sufficient to raise issues of fact or to defeat summary judgment, and summary judgment in this matter was required. (Trans. of Record, pp. 3-4; attached hereto as **Exhibit H**). In response, counsel for Appellants for the first time suggested to the court that a deposition transcript of one of the debtors, Lanny Gunter, which was taken forty-nine days prior pursuant to a separate action involving a default on an entirely unrelated line of credit issued to a different limited liability company, "would basically explain why we believe this debt really isn't owed."[2] (Trans. of Record, pp. 4-5). Counsel for Appellants asked that the court consider issues and testimony which he claimed were reflected within the subject deposition, and said that he would thereafter be willing to identify and submit "the appropriate [UCC] code sections," which he suggested may show why they thought this debt should be forgiven. (Trans. of Record, pp. 4-7).

Appellants did not at any time—whether before, during, or following the hearing before Judge Manning—submit to the court or publish the transcript of the subject deposition or any portion thereof, nor did they submit or cite to any

[2] The subject deposition of Lanny Gunter was taken on July 17, 2012 in C.A. No. 2011-CP-40-3246. That action was filed against Mr. Gunter and Bob's Novelties, LLC by BB&T Financial, FSB f/k/a BB&T Bankcard Corporation, an entity not involved in the present suit, for unpaid credit card debt. In that action, which was filed approximately eight months prior to the present suit, Gunter *did* raise affirmative defenses and counterclaims. Specifically, Gunter alleged that equipment and inventory belonging to Bob's Novelties had been negligently seized and sold by that plaintiff. If Mr. Gunter believed his defenses and counterclaims raised with respect to this entirely separate loan transaction to be equally applicable in the present case, it is inexplicable that he did not simply state such facts, defenses or claims in his Answer, in his discovery responses, by way of affidavit, or by any other method whatsoever prior to this appeal. Appellants have no factual or legal basis upon which to dispute the debt in this case, and their efforts to drag in arguments and testimony related to an entirely separate transaction involving entirely separate and distinct entities is a transparent attempt to give the impression of an issue of fact where there simply is not one.

UCC provision or any other legal authority. In fact, Appellants put forth no information or documentation whatsoever before the trial court beyond their one-sentence Answer and their vague and unsubstantiated suggestion at oral argument that an unpublished deposition transcript from an unrelated action may show the existence of a factual dispute in the present case.

Judge Manning took the matter under advisement and on September 10, 2012, issued Judgment in favor of BB&T, conclusively ending the matter. (Judgment, attached hereto as **Exhibit I**). The order made no reference to the subject deposition testimony or to any provision of the UCC. Appellants did not file a motion for reconsideration or a motion to alter or amend the judgment pursuant to Rules 59(e) or 60, SCRCP; rather, they appealed the matter directly to this Court raising defenses, arguments and "facts" which were never before the trial court and relying exclusively upon deposition testimony of Appellant Gunter which was, without question, never placed before the trial court. The entirety of this appeal is based upon Appellants' newfound theory that the trial court "overlook[ed] questions of law and fact," when in reality, they have improperly raised such issues for the very first time on appeal.

ARGUMENT

I. DISMISSAL OF THE APPEAL IS REQUIRED BOTH BECAUSE THE ISSUES RAISED ARE NOT PRESERVED FOR THIS COURT'S REVIEW AND BECAUSE THERE ARE NO FACTS IN THE RECORD UPON WHICH APPELLANTS' NEWLY RAISED THEORIES CAN BE SUPPORTED.

A. Appellants' Arguments are Not Preserved for Appellate Review and the Appeal is Thus Procedurally Barred.

1. South Carolina Law Mandates that All Issues Be Raised to and Ruled Upon by the Trial Court to Be Considered on Appeal.

Appellants did not place a single issue before the trial court. Their claims are not preserved for this Court's review because they were neither presented to nor ruled upon by the trial court and because no motion for reconsideration was filed. Their arguments, raised for the first time on appeal, are thus procedurally barred.

South Carolina has long held that it is "axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (S.C. 1998). Indeed, the South Carolina Supreme Court in 1910 regarded this as a rule which was "too well settled to require citation" of case law. Long v. Dunlap, 87 S.C. 8, 18, 68 S.E. 801, 804 (S.C. 1910). "[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for consideration." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 22, 602 S.E.2d 722, 780 (S.C. 2004). Further, when an issue or argument has been raised, but not ruled upon, a party "*must*" file a motion for reconsideration in order to preserve the issue for appellate review. Id. (emphasis in original). A trial judge "will not be reversed for failing to act on a matter that was not submitted to him." Roche v. S.C. Alcoholic Beverage Control Com'n, 263 S.C. 451, 211 S.E.2d 243 (S.C. 1975).

In 2000, the South Carolina Supreme Court highlighted the importance of this principle and the reasoning behind its application:

> [D]ifferent preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. . . .
>
> If the losing party has raised an issue to the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve it for appellate review.
>
> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. . . [W]hen appellant's contentions are not presented [to] or passed on by the trial judge, such contentions will not be considered on appeal[]. The requirement also serves as a keen incentive for a party to properly prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (S.C. 2000) (internal citations omitted).

In this regard, South Carolina courts have repeatedly held that even where an appellant raises a particular argument during a summary judgment or other dispositive motion hearing, where the matter is not explicitly ruled upon by the court, the party *must* file a motion for reconsideration or his argument is thereafter "procedurally barred" and cannot be addressed on appeal. Metts v. Mims, 384 S.C. 491, 499, 682 S.E.2d 813, 817-18 (S.C. 2009); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (S.C. 1991) (where the record reflected no "explicit" ruling on appellant's argument and appellant failed to show it made a

Rule 59(e) motion, the issue was not properly before the Court of Appeals and should not have been addressed by it). Moreover, this Court has unequivocally declared its unwillingness to consider a matter which has not been properly and fully preserved: "We take this opportunity to remind the Bar that both this Court and our Supreme Court have repeatedly and explicitly held that [a Rule 59(e) motion] is required" in circumstances where a matter is not ruled upon by the lower court. Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (S.C. Ct. App. 1992).

2. Pursuant to this Well Settled South Carolina Law, Appellants' Claims are Not Preserved for Review because they were Neither Raised to Nor Ruled Upon by the Trial Court.

Appellants here have offered two issues on appeal, neither of which is properly before this Court: (1) the court's order gives BB&T an "improper windfall" and (2) the trial court "overlooked" questions of law and fact as to whether BB&T "exceeded its security interest." (App. Initial Brief, "Statement of Issues on Appeal").

The first of these two proffered issues on appeal raised by Appellants is procedurally barred. Appellants' allegation that a ruling in favor of BB&T gives it an improper windfall was never raised by Appellants prior to the submission of their Initial Brief and unquestionably has been raised for the first time on appeal. In accordance with South Carolina case law set forth herein above, it is axiomatic that an issue cannot be raised for the first time on appeal. This issue is thus procedurally barred from consideration by this Court.

The second of Appellants' two proffered issues similarly was neither raised to nor ruled upon by the trial court and is thus not preserved for this Court's review. This issue loosely appears to be the theory espoused for the first time by Appellants' counsel at the summary judgment hearing, when he suggested that deposition testimony of Appellant Gunter taken in an entirely separate action may show the existence of an issue of fact in this case. (Trans. of Record, pp. 4-7). Counsel's unsupported argument at the summary judgment hearing does not, however, equate to having "raised" the issue to the trial court, as in South Carolina, "a representation of fact by counsel . . . made during oral argument[] may not be considered by the court where it is unsupported by the record." Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (S.C. Ct. App. 1997). Because Appellants' counsel did not place this transcript or any other supporting document, fact or legal theory whatsoever in the record, the claims raised by Appellants' counsel during the summary judgment hearing were properly disregarded by Judge Manning.

However, even if this Court were to disregard its Cobb holding and regard such claim as having been "raised to" the lower court, this proffered issue on appeal still is not preserved for review because it was not "ruled upon" by the lower court. Judge Manning's order did not explicitly address this issue, the deposition testimony, or any UCC provision. Appellants were then required, pursuant to procedural and common law mandates, to "first try to convince the lower court that it ruled wrongly" and only then, if that effort failed, could they appeal to this Court for review. Appellants did not file a motion for

reconsideration so as to place these "overlooked" issues before the trial court to obtain a ruling, and their failure to do so here is similarly fatal to their appeal.

In this regard, Appellants have violated South Carolina's deep-rooted issue-preservation requirements which were established to protect against the precise circumstances with which this Court and Respondent are now confronted. These preservation requirements are meant to "serve as a keen incentive for a party to prepare a case thoroughly" and to "prevent[] a party from keeping an ace card up his sleeve . . . in the hope that an appellate court will accept that ace card and . . . give him another opportunity to prove his case." I'On, 338 S.C. at 421-22, 526 S.E.2d at 724. Appellants never put a single fact, argument, or legal theory in the Record before the trial court. The facts set forth in their Initial Brief, the arguments they raise, and the case and statutory law upon which they rely are all being raised for the first time on appeal. To allow them to rely upon such matter now would condone their "keeping an ace card up [their] sleeve" for use for the first time on appeal, which is precisely what this state's preservation rules were designed to prevent. Their failure to preserve any issue is fatal to their appeal and it must be dismissed.

B. Appellants' Designation of Matter and Initial Brief Include Matter which is not in the Record and which Therefore Must be Excluded, Without which their Appeal Cannot Survive.

In addition to the fact that none of Appellants' proffered issues on appeal is preserved for this Court's review, the matter upon which they exclusively rely in their appeal must be excluded from the Record and all references made thereto must be stricken. Appellants' proposed Designation of Matter to be Included in

the Record on Appeal includes a "deposition transcript of Larry [sic] R. Gunter, II taken in the case of BB&T Financial v. Bob's Novelties, Inc., dated July 17, 2012 (with exhibits)." South Carolina procedural and case law set forth herein below unequivocally provide that the proffered deposition transcript is not appropriate for consideration on appeal. BB&T thus moves to exclude this matter from the Record on Appeal. Further, because there is no matter in the Record upon which Appellants could rely to support their proffered issues on appeal, BB&T submits that the appeal should similarly be dismissed on this basis.

1. The Proffered Deposition Transcript Must Be Excluded from the Record on Appeal and from the Court's Consideration.

The South Carolina Appellate Court Rules and controlling case law of this Court require that the deposition transcript upon which Appellants exclusively rely in their Brief be excluded from the Record. Rule 209, SCACR provides that the "Designation may only propose to include portions of the transcript, pleadings, orders, exhibits or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]." Rule 210(c), then, provides: "The Record shall not . . . include matter which was not presented to the lower court or tribunal." This Court has on multiple occasions been presented with circumstances nearly identical to those presently at issue and has excluded similarly proffered material from the Record and required all references made thereto to be stricken.

In the directly-on-point case of Gilmore v. Ivey, counsel for Gilmore presented an oral argument in opposition to Ivey's motion for summary judgment during which he "merely referred to testimony purportedly given by [the parties] and certain unnamed doctors in their respective depositions," though "he did not

publish any deposition either in whole or in part." 290 S.C. 53, 348 S.E.2d 180 (S.C. Ct. App. 1986). This Court held that such deposition testimony was not properly before the trial court and any claims or representations made by counsel as to its content were properly disregarded by the lower court:

> While statements of fact can constitute an "admission on file" and thus be entitled to consideration by the court in determining whether a genuine issue of material fact exists, factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be so considered.
>
> In determining whether a genuine issue of material fact exists, a court must consider *everything* in the record—pleadings, depositions, interrogatories, admissions on file, affidavits, etc. . . .
>
> Here, because the depositions relied upon by Gilmore either had not been filed as the rule required or had not been published and therefore were not in the record, the hearing judge properly disregarded the testimony that Gilmore's counsel, during his argument, claimed was reflected by those depositions.

Id. at 56-57, 182-83 (internal citations omitted). Thus, deposition testimony which was discussed or paraphrased by counsel during summary judgment oral arguments but was not published to or filed with the court was properly disregarded by the trial judge, and similarly was not fit for consideration on appeal.

Additionally, this Court subsequently relied upon its Gilmore opinion in again affirming that material referenced and discussed by counsel at a hearing does not then become a part of the record for purposes of appeal. Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (S.C. Ct. App. 1997). In Cobb, counsel for Auto-Owners Insurance discussed relevant provisions of an applicable insurance policy during oral argument before the trial judge. Id. at 581, 593.

Counsel did not place a copy of the policy before the court. On appeal of the trial court's unfavorable ruling, counsel for Auto-Owners designated the policy to be included in the record on appeal. This Court held that as the appellant, Auto-Owners had the burden of presenting a sufficient record for review. Id. It had simply failed to do so here. Though counsel for Auto-Owners depicted the relevant language of the policy at the trial court stage, this Court held that "a representation of fact by counsel in written briefs, memoranda or made during oral argument[] may not be considered by the court where it is unsupported by the record." Id. For this reason, the policy was excluded. Significantly, this Court thus refused to address issues raised on appeal that would have required the Court's review of the policy. Id.

Pursuant to the clear mandates of South Carolina Appellate Court Rules and prior holdings of this Court, the proffered deposition transcript must be excluded from the Record on Appeal and all references made thereto must be stricken.

2. Because Appellants' Issues on Appeal are Based Solely upon Information which Must be Excluded from the Record on Appeal, the Appeal Should Be Dismissed.

As set forth above, the proffered deposition transcript must be excluded from the Record on Appeal in this case. Appellants have no other matter whatsoever properly in the Record upon which they could rely to support their new theories, and BB&T submits their appeal should therefore be dismissed.

South Carolina Appellate Court Rules provide that this Court "*will not consider any fact* which does not appear in the Record on Appeal." Rule 209(h),

SCACR (emphasis added). It is the appellant who "has the burden of presenting a sufficient record for review. There is a presumption in favor of correctness of an order, and the appellant must overcome that presumption" with proper presentation of facts which support his arguments on appeal. Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (S.C. Ct. App. 1992) (internal citations omitted). This Court has emphasized the importance of compliance with appellate procedural rules with respect to the record on appeal and has criticized parties for doing precisely that which Appellants attempt to do in the instant case—improperly insert numerous "facts" for the first time in their Brief without ever having placed matter in the record to support such assertions. Forner v. Butler, 319 S.C. 275, 460 S.E.2d 425 (S.C. Ct. App. 1995). Though not prompted to do so by any motion to strike or exclude, this Court independently and resolutely proclaimed its unwillingness and inability to consider such material on appeal:

> We also note the parties make numerous factual assertions in their briefs which have no basis in the record on appeal. . . . **If the parties in this case considered a fact relevant and worthy of mention in the brief, the parties should have included matter in the record to support that factual assertion**. . . As the Supreme Court advised the bar in *Henning v. Kaye*, 307 S.C 436, 415 S.E.2d 794 (S.C. 1992), **the Appellate Court Rules "are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review."**

Id. at n.2 (emphasis added).

Because this Court *will not consider any fact* which does not appear in the Record on Appeal and will not, then, consider arguments which rely exclusively

upon such facts, (see Cobb, *supra*, where this Court held that because it was unable to review language of an insurance policy which was discussed by counsel at oral argument but never placed on the record, it could not address related questions on appeal), BB&T submits that allowing Appellants to resubmit an Initial Brief without reference to the excluded material would be futile. As this Court can see from a review of Appellants' proposed "Designation of Matter to be Included in Record on Appeal"—the substantive material of which is attached as exhibits hereto—there simply is no fact properly in the Record which could support Appellants' current position on appeal. BB&T therefore submits that dismissal is also appropriate on this basis.

CONCLUSION

Based upon the foregoing authority and argument, BB&T submits that this appeal must be dismissed because it is procedurally barred due to Appellants' failure to preserve any issue for appeal. Alternatively, BB&T moves to exclude the proffered deposition transcript from the Record on Appeal. Pursuant to Rule 240(b), SCACR, BB&T requests that the time for filing its Initial Brief and Designation of Matter to Be Included on the Record on Appeal, if required, be held in abeyance pending the consideration of this Motion.

(Signature appears on following page)

CLAWSON AND STAUBES, LLC

Laura Simons Greaver
Clawson AND Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Respondent

Charleston, South Carolina
April 12, 2013

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CERTIFICATE OF SERVICE
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I certify that I have served Respondent's Motion to Dismiss or, Alternatively, Motion to Exclude Matter on the Clerk of Court for the South Carolina Court of Appeals and Counsel for the Appellants by serving copies of the same via U.S. Mail on April 12, 2013 to the following:

S. Jahue Moore
John C. Bradley, Jr.
MOORE, TAYLOR & THOMAS, PA
Post Office Box 5709
West Columbia, SC 29169

CLAWSON AND STAUBES, LLC

Laura Simons Greaver
Clawson AND Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Respondent

Charleston, South Carolina

April 12, 2013