THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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Case No. 2014-CP-37-00526
Appellate Case No. 2019-000614

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Debi Baker Brookshire,

Appellant,

v.

Community First Bank and
Benjamin Hiott,

Defendants,

Of Which, Community First
Bank is

Respondent.



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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

The Appellant filed a Summons and Complaint on September 8, 2014 alleging six (6) causes of action against the Respondent and Benjamin Hiott, including Breach of Fiduciary Duty, Conversion, Negligent Supervision, Negligence/Gross Negligence, Breach of Contract Accompanied by Fraudulent Act, and Accounting. Respondent timely filed an Answer and Counterclaim against Appellant alleging two (2) causes of action for Conversion and Unjust Enrichment. Appellant filed a timely reply to the counterclaims, wherein she raised, among other things, the statute of limitations as a defense to the Respondent's counterclaims.

Defendant Hiott filed a motion to dismiss pursuant to Rule 12, SCRCP on October 30, 2014. By Form 4 Order filed February 2, 2015 and formal Order filed February 25, 2015, the trial court denied Hiott's motion to dismiss. On October 13, 2016 and October 19, 2016 respectively, Respondent and Defendant Hiott each filed motions for summary judgment. A hearing was held December 13, 2016, where the matter was taken under advisement. On August 29, 2017 the court issued a Form 4 Order denying "all Motions for Summary Judgment." On September 8, 2017 the court issued a Form 4 Order replacing and superceding, in its entirety, the Form 4 Order issued on August 29, 2017, and denying Defendant Hiott's motion for summary judgment with a formal order to follow. The trial court issued an Order filed September 26, 2017 granting Respondent's motion for summary judgment and denying Defendant Hiott's motion for summary judgment. Appellant filed a timely Motion to Alter or Amend the Judgment Pursuant to Rule 59(e), SCRCP on October 6, 2017. A hearing was held on Appellant's motion on December 6, 2017, where the matter was taken under advisement. On March 22, 2019 the court issued an Order Denying Appellant's Motion to Alter or Amend Judgment. On April 9, 2019 Appellant filed a timely notice of appeal.

## STATEMENT OF FACTS

On May 25, 2007, Debi Baker Brookshiore signed a Power of Attorney with Benjamin Lee Hiot. At the time, Defendant Hiott was a Senior Vice President of Community First Bank. A month later, all of the proceeds ($1,171,823.58) from an established trust account at BB&T were transferred to Respondent, in what Appellant believed to be a Trust account (R. pp. 866 – 881, p. 916, line 19 - p. 917, line 22; p. 918, line 15 - p. 919, line 20; p. 920, lines 5-10, 17-21; p. 921, lines 7-11; p. 922, lines 3-14; p. 923, lines 3-7; p. 923, line 12 - p. 924, line 6; p. 925, lines 13-24; p. 926, lines 19-25; p. 927, lines 18-20; p. 928, line 1 - p. 929, line 4) operating in substantially the same manner as her trust at BB&T. At no time did any bank employee, including Hiott, ever inform Appellant that Respondent did not have a trust department or the legal authority to open or maintain a trust account. On the contrary, to Appellant, who's only knowledge of fiances came from her own affairs, the account paperwork indicated that she was opening a trust with Respondent. (R. pp. 866 – 881). Less than one week after the account was opened, and unbeknownst to the Appellant, Defendant Hiott, acting supposedly under the Power of Attorney, but also acting within the scope and course of his employment and agency with Respondent, issued a $500,000 cashier's check to a Joseph C. Crosby, an account and loan holder of Respondent. Neither Hiott, Appellant, nor the trust received anything of value in return for the "gift" of half a million dollars. From this point on, Defendant Hiott withdrew or transferred sums in excess of $2,000,000 from Appellant's trust account in which Appellant received no benefit.

By reason of Defendant Hiott's position within the bank, he was able to manipulate account balances electronically, and often manipulated account balances by transferring assests from one account to another in order to avoid detecton and to attempt to conceal his fraudulent

acts.[1] Respondent identified these transfers as "journal transfers." In the years prior to 2007, Defendant Hiott, while acting in his capacity as a Senior Vice President of Respondent, began to manipulate and misappropriate both customer and bank funds. These misappropriations were not discovered by Respondent, due to its lack of internal controls and adherence to standard banking practice, until the allegations regarding Appellant's accounts came to light. Respondent's negligence and failure to operate in a manner consistent with banking industry standards, allowed Appellant to be the vicitim of a scheme that had begun with other accounts, specifically MPS, Inc., owned by three well known members of the bank and community – James McCoy (Chairman of the Board of Directors of both Respondent and its parent company); John Powell (Owner of Powell Real Estate); and Frederick D. Shepard, Jr. (President of Respondent and Defendant Hiott's direct supervisor), more than two (2) years before Appellant's money was tranferred to the Respondent. (R. p. 884, line 14 - p. 886, line 18).

Respondent hired Palmetto Consulting Services (hereafter "PCS") to conduct an investigation into irregular transactions in 2013, after repeated requests by Appellant's counsel to explain the discrepencies in Appellant's account. While researching Appellant's account, PCS "became aware that other such 'juggling' entries had been made to the general ledger securities account prior to the initial opening of the Brookshire DDA account." (R. pp. 887 – 910, 911 – 914). Defendant Hiott used the accounts of MPS Incorporated, which is comprised of MPS Golf, Inc. and MPS Development, Inc. and owned by Frederick D. Shepherd, Jr., James McCoy, and John Powell. Defendant Hiott, utilizing the exact same concealment scheme as with Appellant's account, transferred $1,665,898 of bank money to MPS Incorporated in

[1] Towards the end of the time Appellant's account was open, Appellant requested monies be transferred from her account with Respondent to her BB&T checking account. In an effort to avoid detection, Defendant Hiott transferred money to Appellant's account from other places, including from Respondent's own accounts, as Appellant's account was so depleted of funds.

which the three owners benefitted. (R. pp. 1046 - 1048). Moreover, using the exact same concealment scheme, Defendant Hiott transferred $994,666 of Respondent's money to Joseph C. Crosby during the same time as Appellant's money was stolen. (R. pp. 1046 - 1048). Respondent did not discover either the MPS Incorporated misappropriations nor the Crosby misappropriations committed by Senor Vice President Hiott until the Brookshire investigation in 2013.

Appellant was not aware of receiving bank statements at any point in time while the account was open. (R. p. 916, line 19 - p. 917, line 22; p. 918, line 15 - p. 919, line 20; p. 920, lines 5-10, 17-21; p. 921, lines 7-11; p. 922, lines 3-14; p. 923, lines 3-7; p. 923, line 12 - p. 924, line 6; p. 925, lines 13-24; p. 926, lines 19-25; p. 927, lines 18-20; p. 928, line 1 - p. 929, line 4). At best, Appellant received the few statements discussed in Respondent 's motion when Defendant Hiott returned an RV belonging to Appellant and her husband. (R. p. 934, lines 13-23). In fact, in early 2010, the bank statements began to read "Exclude - do not mail." According to Carol Wilson, from February 2010 until the closing of the account, these "excluded" and returned statements were placed in a box at the branch. (R. p. 937, lines 13-24). In fact, Appellant was not provided these specific statements until the morning of Mrs. Wilson's deposition on February 25, 2016. Moreover, Defendant Hiott had access to the mail and could have easily removed all statements from the mail, especially since he had power of attorney over Appellant's finances. Even if Appellant was receiving statements, these statements would not be reliable, nor would she have had a reason to question whether or not her money was being misappropriated (R. pp. 508 - 588), as Mr. Hiott engaged in a scheme to conceal the originating and ending location of fund transfers and also manipulated the dates that funds were shown to be transferred or were actually transferred. Further, because Defendant Hiott had a valid POA, further inquiry and detail of the nature of transactions would

be necessary to determine if any wrongdoing had taken place. All legitimate transfers to BB&T and other bills look exactly like the illegitimate transfers, as they are all marked as "miscellaneous debits" or "investment counter withdrawals" or "wire transfer." When counsel met with Jim Williams (of counsel for Respondent) and Jeff Griffith (employee for Respondent), Mr. Griffith explained the statements were marked this way because there are rules on how many transactions that can be completed per month with Trust Accounts. Respondent, during the course of this litigation, consistently maintained that the bank did not have a trust department or trust powers and that Mrs. Brookshire's account was NOT a trust account.

On August 23, 2010, Appellant, through counsel (Kathleen McDaniels), requested an accounting of the Trust assets from Respondent. On September 7, 2010, Defendant Hiott sent via facsimile to Appellant's attorney a purported "accounting." This "accounting" consisted of a generic list of amounts withdrawn from the Trust with no explanation of withdrawals, and with no accounting of the monthly deposits Appellant received from Baker & Baker. (R. pp. 945 - 948). Defendant Hiott further stated that Ms. Brookshire should have been in possession of the documentation related to the $500,000 "annuity" and that it was concerning to him that she had not provided this information to Mrs. McDaniels. Unbeknownst to Mrs. McDaniels or Appellant, there was no documentation relating to any "annuity" because no annuity was ever purchased. On September 21, 2010, Appellant's attorney again requested a formal accounting of the Trust assets. (R, pp. 950 - 952). Mrs. McDaniels never received a formal accounting or other complete record of transactions from the account, including transaction details as requested.

Defendant Hiott, acting within the scope and course of his employment with Respondent, closed Appellant's Trust at some point between October 1, 2010 and October 19,

2010 without informing the Appellant of this action. He also failed to disclose that the Trust had a balance of zero. On October 19, 2010, Mrs. McDaniels sent a letter to Frederick D. Shepherd, Jr. (President of Respondent) and James E. McCoy (Chairman of the Respondent's Board), requesting assistance with Defendant Hiott in obtaining the requested documents, including a full accounting. On October 21, 2010, Defendant Hiott sent Appellant's counsel a letter stating that he had set aside money for Appellant's two children and would be glad to send documentation reflecting the whereabouts of this money. (R. p. 947). Appellant has since learned that these documents do not exist. On December 1, 2010, Mrs. McDaniels and Mr. Williams spoke on the phone. Mr. Williams advised that he would send a full accounting of the Appellant's Trust account. (R. p. 959). He never did. Moreover, at some point in Mrs. McDaniels' dealings with Respondent, either Defendant Hiott or Mr. Williams told her that the $500,000 miscellaneous debit was used to purchase a Lafayette product single premium annuity. (R. p. 962, lines 1 - 16). This, of course, was false information and a direct effort by Defendant Hiott and Respondent to mislead the Appellant and to conceil their malfeasence.

On February 17, 2011, Mrs. McDaniels sent Mr. Williams a letter requesting that Mrs. Brookshire's account be closed and all of the funds delivered to Appellant's attorney. (R. p. 964). On February 22, 2010, Defendant Hiott, at all times acting within the scope and course of his employment and agency with Respondent, re-opened Appellant's Trust with one penny. Defendant Hiott, using his managerial position in Respondent, transferred $285,233.34 from account number 117001 at Respondent bank, via journal entry, into the Trust. That same day Mrs. McDaniels closed the account and received a check in the above-referenced amount which allegedly represented all assets of the Trust. On March 11, 2011, Mrs. McDaniels notified counsel for Respondent that she no longer represented the Appellant and requested that he send the documents requested to Appellant at her home address. (R. p. 966). These

documents were never sent.

Appellant enlisted the help of Tabor Investigative Services to track down the paperwork associated with the $500,000 miscellaneous debit. On November 27, 2012 Tabor Investigative Services phoned Carol Wilson, an employee of Respondent, and requested documents from Appellant's Trust account. Mrs. Wilson requested that a signed authorization of release be faxed to her for her review and that she would contact Tabor when she received the authorization. This authorization was sent the same day and as of the date this case was dismissed, Tabor Investigative Services has yet to receive a response to this request from anyone at Respondent. (R. pp. 968 - 970).

On March 19, 2013, Appellant, through current counsel, sent a letter to Defendant Hiott requesting an accounting of the Trust assets and a meeting. Copies of this letter were also sent to Frederick D. Shepherd, Jr., James E. McCoy, and Carol Wilson. (R. p. 972). Sometime between March 19, 2013 and May 7, 2013, Defendant Hiott telephoned counsel and represented that the $500,000 transfer was put into two separate annuities for Appellant's two children and that the annuities were placed with Nationwide Insurance Agency. Nationwide Insurance has no annuities payable to Appellant or her children. This was yet another direct effort by Defendant Hiott and Respondent to mislead the Appellant. (R. pp. 974 – 975).

On May 7, 2013, Tabor Investigative Services and counsel met with Defendant Hiott. In this meeting Defendant Hiott informed Tabor and counsel that he wrote a check for $500,000 to Mr. Holcombe of Holcombe Insurance Agency in Easley, South Carolina and that Mr. Holcombe used the funds to purchase two annuities in the names of Jordan Taylor Blackwell and Laura Ann Elizabeth Blackwell (Appellant's children) from Lafayette Insurance Company. Lafayette Insurance has no annuities payable to the Appellant or her children. Moreover, Defendant Hiott and Respondent failed to provide Appellant with a formal accounting of the

Trust. (R. pp. 974 – 975). Additionally, Defendant Hiott said he would not provide any documentation unless Appellant provided the following information: "account of amounts and purpose of Debi's withdrawals from her BB&T account(s); copy of her tax returns since 2009; copy of her DBS reports; and asked her to be drug tested." (R. p. 977).

On June 14, 2013, Appellant's counsel sent a letter to Mr. Williams, counsel for Respondent, informing him of the communications between counsel and Defendant Hiott and again requesting a formal accounting of the Trust. (R. pp. 974 – 975).

On July 18, 2013, Mr. Williams wrote to Appellant's counsel and he advised that Defendant Hiott indicated to him that the $500,000 was removed from the Trust, with Appellant'a consent and knowledge, for an investment with Joseph C. Crosby, Jr., and that the Appellant was provided a promissory note signed by Mr. Crosby and that Appellant was in possession of the note. Appellant does not and has never had a promissory note, nor had she ever heard of Mr. Crosby before this lawsuit, has never met him, and was never aware of this transaction. Respondent provided some documents related to the Trust but did not provide a formal and complete accounting, or a copy of the alleged promissory note. Mr. Crosby testified that he never signed a promissory note with Appellant. (R. p. 980). The bogus promissory note was just more false information provided by the Respondent and Defendant Hiott to the Appellant in order to delay any lawsuit.

On August 19, 2013, Appellant's counsel requested records of all deposits and the source of the deposits into the Trust, all documents related to any and all "miscellaneous debits" and "investment counter withdrawals," and all monthly bank statements from November 1, 2010 through February 22, 2011. (R. pp. 982 – 987). Having not heard from Respondent, Appellant sent a follow up letter on September 17, 2013. (R. p. 989). Again, not hearing anything from Respondent or counsel. Appellant sent another follow up letter on

October 17, 2013 re-requesting the documents listed in the two previous letters as well as a full accounting and an entire copy of the Trust file from the date of creation to date of termination. (R. pp. 991 – 997).

On December 17, 2013, Respondent provided the Appellant with the documents purportedly showing the activities in the Trust account. Donald Jones, with Palmetto Consulting, created 4 binders detailing the Appellant's Trust Account for Respondent. When Mr. Jones turned them over to Mr. Shepherd, Mr. Jones was able to account for all transactions in and out of the Trust. When transferring the 4 binders to Appellant's counsel, Mr. Williams and Mr. Griffith represented to Appellant's counsel that these were all of the documents associated with the Trust. This was in fact, not the case. Paperwork for over $500,000 was purposefully withheld from the four (4) binders provided to the Appellant. Mr. Jones testified "Mr. Shepherd was responsible for what was put in the binders or not. He was asking me for, you know, data to copy to respond to you. I knew he was doing that. And Jeff Griffith was working with him but it appeared to me, from the conversation that was going on right outside my door, that Mr. Shepherd was deciding what to put in the binders and what not to, not Jeff." (R. p. 1000, line 5 – p. 1001, line 24).

Moreover, Appellant subpoenaed Palmetto Consulting's entire file with relation to this investigation. Over 40,000 pages of documents were produced. Within these pages were the 4 binders (in scanned format) that had previously been produced by Respondent to Appellant. Within these binders, the paperwork associated with the approximately $500,000 missing transactions was indeed present. These pages were intentionally withheld from the Appellant. The transactions revealed within the 40,000 pages produced by Palmetto Consulting, many of which were intentionally withheld by Respondent despite Appellant's repeated attempts to obtain this information, include the following:

- $310,510.75 juggling:
    - On 12/31/2007, $310,510.75 went from Appellant's account into Respondent's account # 1002901 (Due From Bank - Banker's Bank).
    - On January 7, 2008, $310,510.75 was transferred from account #1052201 (State County Muni Securities - AFS) into Appellant's account, causing Appellant to lose the use of and interest for a full week.
    - On March 31, 2008, $310,510.75 was transferred from account 1029002 into account 1052201.
    - Respondent represented in their Reponses to Appellant's 1st set of interrogatories that this $310,510.75 transaction in Appellant's account was a "reverse transaction." According to Jeff Griffith's testimony, this transaction was not a reverse transaction and he "would call it juggling." (R. p. 1004, line 2 – p. 1005, line 16). When posed with the question, "that's not a reverse transaction is it," Don Jones testified, "It's a juggling—no. He's moving, hiding money from one place to the other, juggling." (R, p. 1008, line 2 – p. 1009, line 12)
    - This $310,510.75 transaction was marked as "Tax" on Appellant's bank statement. (R. pp. 521 – 522).
- On 2/29/2008, $8,500 was transferred from Appellant's account to Marc Hiott's (Defendant Hiott's brother) CFB account.
- On 3/13/2008, $2,224 was transferred from Appellant's account to account 1222001 (Respondent's Miscellaneous Accounts Receivable). $1,360 of this money was then transferred from Respondent's Miscellaneous Accounts Receivable into Ben Wilson's account at Respondent in exchange for some Respondent bank stock. Ben Wilson is the step-son of Fred Shepard, President of CFB. Fred Shepard's wife was also on this

account. (R. p. 1012, line 18 – p. 1013, line 25; p. 1016, line 21 – p. 1017, line 25).

- On 8/29/2008, $65,000 was transferred from Appellant account to CLCB, LLC's CFB account. CLCB, LLC stands for Coach's Low County Brand and was owned by Joseph C. Crosby, Jr. At this point in time, Joe Crosby's business was failing, which Respondentand Defendant Hiott knew, as he was running deficits in most of his accounts with Respondent. In fact, CLCB's balance on accounts with Respondent on July 22, 2008 was negative $157,803.62.
- On 9/22/2008, $1,000 was transferred from Appellant's account to Ben Hiott's account with Respondent.
- On 10/24/2008, $3,500 was transferred from Appellant's account to Ben Hiott's account with Respondent.
- On 11/1/2008, $85,000 was transferred from Appellant's account to Jim McCoy's account and was immediately offset to pay a debt owed by Mr. McCoy to Respondent. (R. pp. 1019 – 1040).
- On 6/5/2009, $25,387.20 was transferred from Appellant's CFB account into Respondent's accounts receivable, in which Respondent was able to derivedirect benefit and control in exchange for nothing.
- On 6/15/2010, $3,000 was transferred from Appellant's account to Defendant Hiott's account with Respondent.

Defendant Hiott was also purchasing stock shares of Respondent stock with funds from Appellant's account, which, according to Respondent's expert is a direct violation of banking regulations. (R. pp. 1047 – 1048). When Mrs. McDaniels closed the account in February of 2011, the check issued was represented to be all proceeds from the Trust account. Appellant was never notified of the 16,519 shares of Respondent bank stock owned by Appellant at the

time the Trust proceeds were transferred. Unbeknownst to Appellant, she had an RBC account (an investment company) with 5,300 shares of Respondent bank stock. Defendant Hiott closed the RBC account on May 11, 2011 and the stock certificate was issued in Appellant's name and delivered to the address for Appellant's RBC account which happened to be PO Box 711, West Union, SC 29696. That address is the same address as Hilltop, Inc. Moreover, Respondent's Proxy Mailing Address for Appellant was 449 ByPass 123, Seneca, SC 29678, which also happens to be Respondent's address for one of its branches.

On August 5, 2011, five months after the Trust account was closed and at least three months after the revocation of the Power of Attorney was executed and filed, 16,518 shares in Appellant's name were transferred to Hilltop, Inc. Appellant received no funds or compensation from this transfer. (R. p. 1042). On August 5, 2011, Respondent bank's stock was worth $4.55 a share. In exchange for nothing, Hilltop received 16,518 shares of stock, at a value of $75,156.90, for free; these stock shares, and the value thereof, rightfully belonged to the Appellant as Defendant Hiott was only able to orchestrate such a transfer using the tools provided to him by Respondent.

Respondent did not have investment brokerage powers. It was improper for Defendant Hiott to be trading Respondent band stock using bank funds to purchase and then sell the stock, regarding Ms. Brookshire or otherwise. (R. p. 1045, lines 1 - 23). Kenneth Richey, Plaintiff's Expert, explained, "[s]ince Hiott was conducting stock transactions on behalf of Brookshire and the Bank he was essentially representing both the Bank and Brookshire, which created a conflict of interest. Senior Officers of the Bank and Internal Affairs failed to monitor Hiott. (R. pp. 1047 – 1048). Defendant Hiott was essentially serving two masters as he was an agent of each.

## STANDARD OF REVIEW

"In reviewing a grant of summary judgment, our appellate courts have applied the same standard as the trial court under Rule 56(c), SCRCP." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). "[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. At 220, 616 S.E.2d at 729. "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferrences to be drawn from them, summary judgment should be denied." Id. "However, when plain, palpable, and indisputable facts exist on which no reasonable minds cannot differ, summary judgment should be granted." Id.

"In determining whether any triable issues of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Blumenthal Mills, 365 S.C. at 219, 616 S.E.2d at 729. "If triable issues exist, those issues must go to the jury." Id. Similarly, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferrences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

"The party seeking summary judgment has the burden of clearly establishing the

absence of a genuine issue of material fact." Id. At 220, 616 S.E.2d at 730. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Id. "Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Blumenthal Mills, 365 S.C. at 220, 616 S.E.2d at 730. "Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." Id. "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

## ARGUMENTS

The trial court erroneously granted Summary Judgment in favor of Respondent for both its defense of Appellant's claims as well as Respondent's counterclaims against Appellant. The Order conflicts with existing precedent on both issues and in the analyses undertaken, creates novel issues for which no precedent exists. On each issue, the trial court's analysis is deeply flawed, and this Court after review of the issues should reverse.

### I. The trial court erred in applying inconsistent analysis of the applicable statute of limitations.

"[A] statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded," City of Newberry v. Newberry Electric Coop. Inc., 387 S.C. 254, 692 S.E.2d 510, 513 (2010). "[T]he discovery rule, in other words, applies

to discovery of facts, not to discovery of law." Id. at 694 n.4, 692 S.E.2d at 515 n.4. The discovery rule requires the plaintiff exercise due diligence.

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. ...
>
> The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of the wrongdoer.... [T]he statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.

Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 328-29, 534 S.E.2d 672, 676 (2000) (internal citations and quote marks deleted).

As the Order correctly points out, the statute of limitations begins to run when a party either knew or should have known of a cause of action, not when the party has consulted legal counsel or developed a theory of recovery. In the matter at hand, the trial court has found that the statute of limitations began to run when Appellant had actual possession of bank statements, showing not the details of transactions, but the transactions themselves. The court's Order, and by reference, Respondents Memorandum in Support of Summary Judgment hold that Appellant had actual possession of these statements either monthly beginning in 2007 or at the latest, March of 2011, when the entire account history was provided to Appellant's previous counsel. The court found that the knowledge that funds had been transferred from or to an account placed a duty on the account's owner to investigate and act within the applicable statute of limitations.

If the court placed such a duty and standard on Appellant, the same should apply to

Respondent. It is unquestioned that on December 31, 2007, Three Hundred Ten Thousand, Five Hudred Ten and 75/100 dollars ($310,510.75) were transferred from Appellant's account to an account owned and maintained by Respondent. The sudden influx of over $300,000 dollars should have alerted Respondent to further investigate.

Even if receiving Appellant's funds did not place Respondent on notice, on May 14, 2009, over five years prior to Respondent's filing of counterclaims, Ten Thousand dollars ($10,000) was transferred directly from Respondent's account #1222001 to Appellant's account. Further, Appellant's account was closed in October 2010, four years prior to Respondent's filing of any claims. For a federally accredited bank, who at various times has employed both internal and external independent auditors, maintains an audit committee, and whose president conducts daily review of the ledgers, to be held to a lower standard than one of its customers is completely inconsistent with precedent and constitutes an error of law abuse of discretion by the trial court. At the very minimum, Respondent was placed on notice by the very letter which it claims was evidence of Appellant's "serious, documented concerns about Hiott's behavior with regard to her account in mid-2010." (R. p. 136, pp. 506 – 507).

While Appellant contends that there is a material issue of fact as to when she knew or should have known about the activity in her accounts as she was reliant on Respondent to provide the necessary documentation, the bank, which excersized control of its own records at all times, cannot claim such. Respondent knew of should have known of that funds from its accounts were transferred to Appellant's account substantially longer more than three (3) years prior to the filing of Respondent's counterclaims. Therefore, the trial court erred in granting summary judgment for Respondent's counterclaims in spite of Appellant's raising of the statute of limitations as a defense.

II. **The trial court erred in finding that appellant's claims are barred**

**under the uniform commercial code?**

The trial court erroneously found that Appellant's claims are barred under a one-year[2] statute of repose created by the Uniform Commercial Code codified at S.C. Code Ann. §36-4-406 (2003 & Supp. 2015)[3] That code section places a responsibility on the account holder to "discover and report the customer's unauthorized signature on or any alteration of the item[4]," to the bank or be precluded from asserting that an item contained an unauthorized signature or alteration to the item. Section §36-4-406 is designed to protect both the bank and the customer from fraud or forgery, mainly of checks. In fact, "unauthorized signature" is defined by the UCC as a signature "made without actual, implied or apparent authority and includes a forgery." S.C. Code Ann. §36-1-201(43) (2003). South Carolina case law on the statute is almost exclusively focuses on forged or unauthorized signatures on checks and which party bears the responsibility when a check with a forged or unauthorized signature has been presented to or paid by a bank.

The court's Order, through reference to Respondent's Memorandum in Support of Summary Judgment, relies on a very small portion of of Appellant's approximately 14 hours of deposition testimony where Appellant testified that she contended that disbursements of $500,000 and $200,000 would be inappropriate and *unauthorized* for Defendant Hiott to make. (R. p. 225, lines 5 – 11). Appellant does not now, and has never, contended that Defendant Hiott did not have broad powers over her finances as granted by the POA. The transactions and transfers that occurred to and from Appellant's account were not unauthorized as

[2] Respondent, as allowed under S.C. Code Ann. §36-4-103(1) and S.C. Code Ann. §36-4-103(a) had reduced the statute of repose down to 60 days.

[3] South Carolina adopted Revised Article 4 of the Uniform Commercial Code effective July 1, 2008. Consequently, slightly different rules apply to pre-July 2008 Account statements versus post-July 2008 Account Statements.

[4] "Item" is a term defined in the UCC by S.C. Code Ann. 36-4-104(1)(g) (2003) as "any instrument for the payment of money even though it is not negotiable but does not include money" controlling pre-July 1, 2008 transactions and by S.C. Code Ann. §36-4-104(9) as "an instrument or a promise or order to pay money handled by a bank for collection or payment" after July 1, 2008.

contemplated by the UCC and, as such, the limitation period set forth in §36-4-406 does not apply. Therefore, the trial court's Order, through reference to Respondent's Memorandum, constitutes an error of law. Appellant respectfully requests this Court to reverse the Order of the trial court and remand the matter to the Circuit Court for further proceedings.

III. **The trial court erred in finding that appellant's claims are barred by the power of attorney she granted to Defendant Hiott, a senior vice president of respondent?**

The trial court's Order found that there is no material question of fact the Power of Attorney ("POA") absolved the Respondent of any liability at all regarding Appellant's account and the Respondent is entitled to judgment as a matter of law for the reasons stated in the Respondent's Memorandum in Support of Summary Judgment. Appellant respectfully alleges that questions of fact do in fact exist and the Respondent is not entitled to judgment as a matter of law.

The trial court's Order, through reference to Respondent's Memorandum cites §62-5-501 (F)(2) (2009) as authority for why the Respondent, as a third-party to the POA, had no duty to investigate whether the attorney-in-fact was acting within his power while making transactions to and from Appellant's account. However, Appellant's claims allege conduct on behalf of Respondent outside of the actual transactions themselves or the authority of Defendant Hiott to make them. While Defendant Hiott was given broad authority to conduct business on Appellant's behalf, he did so at the Bank, utilizing systems and practices that were contrary to accepted banking practice. (R. p. 1045, lines 1 – 23, pp. 1047 – 1048). In fact, the existence of the POA, coupled with Appellant's account at the institution where Hiott worked, was against Respondent's own policy. (R. pp. 888 – 910, pp. 1047 - 1048). The systems and practices at the Bank allowed Hiott to execute his scheme both with Plaintiff's funds and with

the Bank's funds as well.

Additionally, the trial court's Order, on its face and through reference to Respondent's Memorandum in Support of Summary Judgment, holds that because of the POA, Defendant Hiott, in making transactions involving Appellant's account, was acting as her agent only and not as an agent of Respondent. Appellant contends that substantial material questions of fact do exist regarding this issue and that Respondent is not entitled to summary judgment. While theoretically, Defendant Hiott could have maintained separation between his role as agent of Appellant and as agent of Respondent, in reality his actions showed that he was acting in such a manner as to be an agent of both parties simultaneously. It was his access to the Respondent's money, accounts, and transfer mechanisms that allowed the fraud to take place, not the POA.

Defendant Hiott was authorized to conduct business on Plaintiff's behalf, however, the business that he conducted "on her behalf" was also while he was a senior employee of the Bank. The ability to conduct business with Joseph Crosby, or any other person, was authorized by the POA. The transfers were made however, with direct knowledge that Crosby was also a customer of the bank who had significant outstanding loans as well as negative balances on checking accounts. (R. pp. 888 – 910). By providing Appellant's funds to a debtor of the Respondent, Defendant Hiott is conferring a benefit to Respondent, thus acting on behalf of Respondent. In fact, some of the transfers made from Appellant's account for the benefit of Crosby were made directly to Respondent in the form of loan payments. (R. pp. 888 – 910). Additionally, there were transfers made from Appellant's account directly into the accouts of Respondent, its senior officers, and the families of those officers. (R. pp. 1019 – 1040). To rule that no question of material fact exists and the POA eliminates any opportunity for Defendant Hiott to act as Respondent's agent in such situations is contrary to the evidence

in this matter.

Further, the POA granted Defendant Hiott the authority to conduct business on behalf of Appellant and he conducted this "business" in areas of the banking world where he was not authorized to act, but had the ability to do so because of the lack of internal controls and adherence to standard banking practice. For example, while the POA allowed Hiott to purchase and sell stock on Plaintiff's behalf, he was not authorized to do so, but was given the ability to do so, by his employer, the Respondent. In essence the Respondent was aiding Hiott in carrying out his scheme and the Respondent's conduct goes beyond a third-party honoring or not honoring the POA as contemplated by §62-5-501 (F)(2) (2009).

Finally, Appellant's claims and some causes of action go beyond the actual transfer of funds themselves. Appellant alleges causes of action for Breach of Contract Accompanied by Fraudulent Act, Negligent Supervision, Negligence/Gross Negligence and Accounting. To the extent that the Order relies on the Respondent's Memorandum for legal reasoning as to why the Respondent is entitled to Summary Judgment, Appellant contends that the legal reasoning set forth in the Respondent's Memorandum is incorrect for the reasons outlined. Appellant respectfully requests this Court to reverse the Order of the trial court and remand the matter to the Circuit Court for further proceedings.

## IV. The trial court erred in finding that S.C. Code Ann. §15-3-110 does not apply to this matter.

The trial court's Order Granting Summary Judgment holds that "S.C. Code Ann §15-3-110 does not apply to this matter for the reasons outlined in Community First's Reply Memorandum."

As an initial issue Respondent's Reply Memorandum was not filed with the Oconee County Clerk of Court's Office until after the Order Granting Summary Judgment was filed

and therefore the memorandum was not part of the record in this case at the time of entry of the Order. None of the Orders in this matter, including the Order Denying Plaintiff's Motion to Alter or Amend Judgment, incorporates the Reply Memorandum after its filing.

> The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 5(e), SCRCP. As of the date of Plaintiff's Motion to Alter or Amend Judgment was filed, the Bank's "Reply Memorandum" was not on file with the Oconee County Clerk of Court. Accordingly, neither the unfiled memorandum nor anything argued therein should have been considered by the Court since it was not in the record. See, e.g., Loyd's Inc. by Richardson Const. Co. of Columbia, S.C. v. Good, 306 S.C. 450, 453, 412 S.E.2d 441, 443 (Ct. App. 1991) Rule 56(c), SCRCP, "requires summary judgment motions and, inferentially, supporting materials to be on file when they are to be relied upon at a summary judgment motion hearing. To be on file, we hold they ordinarily must have been filed.").

To the extent the Order relies upon unfiled documents and materials for support, Appellant respectfully asks the Court reverse the decision of the trial court, or in the alternative, to remand the Order with instruction to remove references to unfiled materials.

S.C. Code Ann. § 15-3-110 provides that "[l]imitations are not applicable to bills, notes or other evidence of debt issued by moneyed corporations. This chapter shall not affect actions to enforce the payment of bills, notes or other evidences of debt issued by moneyed corporations or issued or put in circulation as money." The South Carolina Supreme Court addressed this issue and its definitions in Grice v. Anderson, 109 S.C. 388 (1918) holding:

> If a corporation shall make it a business to lend money, to borrow money, to deal in negotiable paper, bonds, stocks, and other securities, it is a moneyed corporation. See Platt v. Wilmot, 103

> U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809. If, moreover, attention be directed to the very words of section 156, it will be observed that it refers to moneyed corporations or banking associations, and the preposition "or" was manifestly intended to be conjunctive, rather than disjunctive; so that the section has reference to other moneyed corporations than banks, for banks are confessedly moneyed corporations.

Additionally, the dictionary definition of a "moneyed corporation" is "a corporation authorized to engage in the investment of moneyed capital." Merriam-Webster Dictionary. Respondent would fall within the Court's definition as well as this dictionary definition of "moneyed corporation."

When the Appellant deposited funds with Respondent, she became a creditor of the Bank and the Bank became indebted to her in the amount of the funds deposited. The Bank acknowledged as much in its Memorandum when it asserted that "the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." (R. p. 162). Giving the words of Section 15-3-110 their plain and ordinary meaning, the three-year statute of limitations applicable to most causes of action does not apply here because the more specific statute of limitations contained in § 15-3-110 applies. South Carolina law is clear that:

> [W]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied.

Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468–69 (2010) (internal citations omitted).

Should the Respondent's Reply Memorandum be considered, it erroneously interprets the clear language of the statute. According to the Memorandum only items "considered as

money" would apply to §15-3-110. The clear language of the statute is in direct contravertion of this interpretation. Appellant respectfully requests this Court to vacate and reverse outright the Order of the trial court or, in the alternative, to remand the Order with instruction to remove references to unfiled materials.

## V. The trial court erred in finding that neither equitable tolling or equitable estoppel apply to this matter.

The trial court's Order, through reference to Respondent's Memorandum in Support of Summary Judgment, finds that Appellant's claims and the accompanying statutes of limitation are not subject to either equitable tolling or equitable estoppel. Respondent should not be permitted to avail themselves of the statute of limitations where Respondent's own actions equitably tolled the statute of limitations.

South Carolina law provides a number of statutory devices for tolling the statute of limitations. See, e.g., S.C. Code Ann. § 15-3-30 (stating exceptions to the running of the statute of [l]imitations when the defendant is out of the state); § 15-3-40 (providing exceptions for persons under a disability, including being underage or insane); § 15-3-80 (providing exceptions for suits by and against enemy aliens or citizens of countries at war with the United States). In addition to these statutory tolling mechanisms, "in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Hooper v. Ebemzer Senior Services and Rehabilitation Center, 386 S.C. 108, 687 S.E.2d 29 (2009) (citing 54 C.J.S. Limitations of Actions § 115 (2005)).

> Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.

Hooper, supra, at 115,687 S,E.2d at 32 (internal citations and quotation marks omitted).

The Court in Hooper described a number of circumstances in which the doctrine of equitable tolling would apply, including "where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit[.]" Id. The Court did not limit application of the doctrine to only those examples set forth in Hooper. Instead, the Court explained,

> [t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to sofier a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Hooper, supra, at 116 - 117, 687 S.E,2d at 33 (emphasis added; internal citations and quotation marks omitted).

"Under South Carolina law, 'a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct,'" Black v. Lexington School Dist. 2, 327 S.C. 55, 488 S.E.2d 327)(1991) (quoting Wiggins v, Edwards, 314 S.C. 126, 130,442 S.E.2d 169, 171 (1994)).

Here, Respondent argues the Appellant should have asked for an accounting, but she has been asking for an accounting for years and the Defendants refuse to provide it. These facts are particularly important as because of the POA, Appellant has to make further inquiry than just a review of bank statements to determine the validity of the transactions. Additionally, because of lack of specificity as to the details of the transactions contained in the reprinted statements, Appellant would have lacked the knowledge to determine whether a cause of action exists at all. As recently as May 7, 2013, Respondent, represented to the

Appellant that she had $500,000.00 in annuities that never existed. This is precisely the type of conduct that gives rise to equitable tolling: Respondent and Defendant Hiott, acting as Respondent's agent, misappropriated the Appellant's money, and then concealed the misappropriation by refusing to provide the Appellant and her representatives an accounting and affirmatively representing to her that she had valuable annuities that never existed. Now Respondent claims the statute of limitations bars the Appellant's suit because it took her too long to catch onto the theft. Particularly in light of Defendant Hiott's authority under the Power of Attorney, it was imperative that Plaintiff be able to discern, not only that funds had been removed from the account, but specifically what they had been removed for so she could determine whether a cause of action existed or not. In its counterclaims against the Appellant, the Respondent essentially admits that Defendant Hiott was deceiving bank customers. (R. p. 54). ("Upon information and belief, funds in the approximate amount of $788,855.00 ("Funds"), none of which belonged to Plaintiff were deposited in Plaintiffs Account by Defendant Hiott during the time the Account was held at the Bank."). The Respondent's statement acknowledges that Hiott was moving money through the Appellant's Account in order to avoid detection.

The Respondent's conduct is the very definition of injustice and unfairness. Respondent should be estopped from claiming the statute of limitations as a bar to the action.

Through the discovery process, the Appellant has discovered numerous instances of conduct on the part of Defendant Hiott and Respondent that should give rise to equitable tolling: (R. pp. 856 – 860). All of these allegations indicate a pattern and practice of intentional concealment and misrepresentation on the part of the Respondent and Defendant Hiott for the purpose of delaying the Appellant from discovering that her funds had been misappropriated and to delay her from filing suit. Appellant continued to press for an Accounting, or other

records of her accounts, and was only able to obtain complete records from a third-party following the filing of this action. These actions are especially egregious when the Court considers that Defendant Hiott was acting in a position of trust to the Appellant on behalf of Respondent. Respondent should not be permitted to profit from, or escape civil liability for, its unethical and in some cases, criminal activity. The Appellant respectfully asks the Court to not permit Respondent to do so. Appellant respectfully requests this Court to reverse the Order of the trial court and remand the matter to the Circuit Court for further proceedings.

## VI. The trial court erred in finding that respondent did not owe fiduciary duties to appellant.

The trial court erroneously granted Respondent summary judgment on Appellant's breach of fiduciary duty cause of action. The court found that no fiduciary duty existed between Respondent and Appellant because Appellant's account was a normal checking account. Appellant's intention when moving her funds from her Trust account at BB&T was to create a trust account at Respondent bank. The deposit agreement indicates in numerous locations on the document that this is a trust account. (R. pp. 867 – 881). Describing just a few of the trust indicators on the paperwork, on one page, a bank employee writes "Trust Paperwork on file in vault." Moreover, the paperwork identifies a taxpayer I.D. for the trust. When the paperwork asks to describe your products and services below, the answer is written as 'Trust Acct." When the Respondent bank paperwork asks for the business type, the answer is "trust." When questioned as to why transactions were labeled with the generic terms "miscellaneous debit" and "investment counter withdrawal," Jeff Griffith represented to counsel that there was a limit on the transactions on a trust account. Lastly, on the account agreement, a new box is created to state "Trust Accounts." The numerous references to the account being a trust as well as Defendant Hiott's representations to Appellant constitute, at

minimum, a material question of fact regarding the relationship of Respondent to Appellant.

Additionally, Appellant signed a Power of Attorney granting Defendant Hiott, a Senior Vice President of Respondent, the power to manage her funds. "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." Regions Bank v. Schmauch. 354 S.C. 648, 670, 582 S.E.2d 432, 444 (2003) (internal citations omitted). "[A] bank may be held to a fiduciary duty if it undertakes to advise a depositor as part of services the bank offers. Such a relationship charges the bank with a duty to disclose material facts that may affect its customer's interests. Yet, no fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it." Id. at 671, 582 S.E.2d at 444 (2003) (internal citations omitted).

Through the power of attorney, a fiduciary relationship clearly existed between Defendant Hiott and Appellant. Appellant trusted Defendant Hiott with handling her money as a Senior Vice President of Respondent. Respondent had knowledge of this relationship because Defendant Hiott's knowledge is imputed to Respondent as its agent.

SOUTH CAROLINA LAW OF AGENCY/APPARENT AGENCY

> Generally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E.2d 272 (1958).
>
> The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowl^geable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. Fochtman v. Clanton's Auto Auction Sales, supra. See generally. West's General Digest, Principal & Agent, Key # 99.

> A true agency relationship may be established by showing evidence of apparent or implied authority, even where the parties have entered an agreement to the contrary...
>
> The test to determine agency is whether or not the purported principal has the right to control the conduct of his alleged agent Id.

Fernander v. Thigpen, 278 S.C. 140, 143-44,293 S.E.2d 424,426-27 (1982) (emphasis added).

> Under South Carolina law, "[t]he elements which must be proven to establish apparent agency are: (I) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to die relying party's detriment." Graves v. Serhin Farms. Inc., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). "Apparent authority to do an act Is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." Frasier v. Palmetto Homes of Florence. Inc., 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct.App.l996). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." Id. at 245, 473 S,E.2d at 868. "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." Id.
>
> The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction. See Watkins v, Mobil Oil Corp., 291 S.C. 62, 67, 352 S.E.2d 284, 287 (CtApp.1986) (discussing the elements of apparent agency and finding the first element may be established "by either affirmative conduct or conscious and voluntary inaction"); Graves, 306 S.C. at 63, 409 S.E.2d at 771 (the first element of apparent agency requires "that the purported principal consciously or impliedly represented another to be his agent." (emphasis added)). Under die first of these two scenarios, the principal makes direct representations to a third party that another has authority to act on his behalf. See Frasier. 323 S.C. at 244, 473 S.E.2d at 868 (apparent agency is created by "written or spoken words or any other conduct of the principal" showing consent to allow another to act on a principal's behalf). Under the second, the principal implies authority by passively permitting another to appear to third parties to have authority to act on his

> behalf. See R & G Constr., Inc. v. Lowcomtry Reg'l Tramp. Auth., 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct.App.2000) ("Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf."); Fernander v. Thigpen, 278 S.C, 140, 143, 293 S.E.2d 424, 426 (1982) ( "[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal.").

Froneberger v. Smith, 406 S.C. 47-48, 748 S.E.2d 625, 630 (Ct. App. 2013).

Defendant Hiott was clearly acting as an agent of Respondent. He was employed as Senior Vice President of the Bank when he lured Appellant's money up to Seneca. He was using bank materials and resources to conduct the subsequent thievery. Respondent gave him the power, opportunity, and tools with which to conduct his concealment scheme, without such, he would not have been able to. Moreover, Respondent directly benefitted from Hiott's actions. Defendant Hiott was an agent of Respondent and his actions are Respondent's actions. Appellant respectfully requests this Court to reverse the Order of the trial court and remand the matter to the Circuit Court for further proceedings.

VII. **The trial court erred in finding that respondent had no duty to exercise reasonable control over its employee.**

To the extent the Order relies on the Respondent's Memorandum to grant Respondent summary judgment on Appellant's cause of action for Negligent Supervision, Appellant contends that the legal reasoning outlined in the Respondent's Memorandum is contrary to the facts and circumstances of the case at hand. The Respondent's Memorandum relays the duties of an employer to exercise reasonable care to control an employee when acting outside the scope of employment to prevent the employee from intentionally harming others on if:

a) [the employee]

> i. is upon the premises of the [employer] or upon which the [employee] is privileged to enter only as his [employee], or

ii. is using a chattel of the [employer], and

b) [the employer]

i. knows or has reason to know that he has the ability to control his [employee], and

ii. knows or should know of the necessity and opportunity for exercising such control.

Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). While Defendant Hiott was operating under a POA, he was doing so using the Respondent's equipment and systems, on Respondent's property, and in a manner only available to him as a Senior VP of Respondent. Further, the unquestioned evidence is that Defendant Hiott was conducting his scheme in a similar manner using Respondent bank's funds and funds of MPS Incorporated as early as 2004. The question of whether the Respondent should have known about Defendant Hiott's conduct in 2004 and continuing through 2013 is one properly determined by a jury. A question of fact exists as to whether the Respondent knew or should have known about Defendant Hiott's conduct, from 2004 on, and by extension the necessity and opportunity for excersing control over him. Appellant respectfully requests the Court reverse the ruling of the trial court and remand the matter to the Circuit Court for further proceedings.

## VIII. The trial court erred in granting summary judgment to respondent on appellant's cause of action for breach of contract accompanied by a fraudulent act.

To the extent the trial court's Order relies on the Respondent's Memorandum with regards to Appellant's cause of action for Breach of Contract Accompanied by Fraudulent Act, Appellant contends the legal reasoning outlined in the Respondent's Memorandum is likewise contrary to the facts and circumstances of the case. The Respondent's Memorandum assumes,

incorrectly, that the contract with Appellant in question is the POA, and any and all reasoning relied upon by the Court in incorporating the Respondent's Memorandum into its Order is therefore also making an incorrect assumption. Appellant only entered into one (1) contract solely with the Respondent: the "Account Agreement" as identified by Respondent at (R. pp. 315 – 394). In a footnote to the Respondent's Memorandum, the only mention of any potential breach of the Account Agreement by the Respondent is that "Community First has not breached the Account agreement." (R. p. 167 at footnote 32).

Inherent in each and every contract is a duty of good faith and fair dealing between the parties. On December 17, 2013, some ten (10) months prior to the filing of this action, the Respondent, at Appellant's request, provided her with what the Respondent represented to be a complete record of documents showing the activities of the account. Those documents were initially compiled by Donald Jones, an outside auditor working for the Respondent, and transferred by Mr. Jones to Fred Shepard, the Respondent's President. Mr. Jones overheard Fred Shepard and Jeff Griffith, another employee of Respondent, discussing removing records of transactions totaling over $500,000 from the "complete" set compiled by Mr. Jones. (R. p. 1000, line 3 – p. 1001, line 24). The incomplete and edited set was then produced on December 17, 2013 and held out as a complete set. These actions are the fraudulent act that Appellant contends the Respondent committed. These actions took place less than one (1) year prior to the filing of this action and thus would require a separate analysis as to the application of the Statute of Limitations as a bar to this claim. Appellant respectfully requests the Court reverse the ruling of the trial court and remand the matter to the Circuit Court for further proceedings.

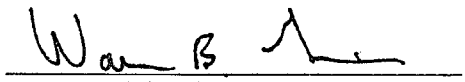
## IX. The trial court erred in granting summary judgment to respondent on appellant's cause of action for conversion.

To the extent that the Order relies on the Respondent's Memorandum with regards to Appellant's cause of action for conversion, the Respondent's Memorandum is incomplete. The Respondent's Memorandum contends that "there can be no conversion of money unless there is an obligation on the defendant to deliver a specific identifiable fund to the plaintiff." Richardson's Restaurants, Inc. v. Nat'l Bank of S.C., 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991). In the case at hand, however the alleged conversion concerns both funds as well as stock shares. Unbeknownst to Appellant, Defendant Hiott had purchased shares of Community First Bank stock in her name, as he was authorized to do by the POA, but against proper banking practice. (R. p. 1045, lines 1 – 23; pp 1047 – 1048). In February of 2011, the Appellant's account was closed. At the time it was closed, Appellant was not aware that her funds had been used to purchase 16,519 shares of Bank stock. The Bank's Proxy Mailing Address for Plaintiff was 449 ByPass 123, Seneca, SC 29678, which happens to be the address of a branch location of the Bank. Appellant did not know or have reason to know of her ownership of these shares of stock. Nothing on any of the statements produced by the Respondent in support of its summary judgment motion would have alerted Appellant to her ownership of any stock. (R. pp. 508 – 588). Subsequent to the account being closed and the POA revoked, the 16,518 shares of Bank stock were transferred from Appellant to a third-party. Appellant has contended that the retention and ultimate transfer of these shares of stock, in addition to other fund transfers, represent a cause of action for conversion against the Respondent. The Respondent's Memorandum, and as a consequence, the Order, is silent as to reasoning why the Respondent is entitled to Summary Judgment with respect to the shares of stock.

Respondent further contends that they are entitled to summary judgement on Appellant's conversion cause of action. As stated in Respondent's motion, "[conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights." Gordon v. Busbee, 397 S.C. 199, 135, 723 E,E.2d 822, 831 (Ct. App. 2001) (internal quotation omitted). Respondent contends that no evidence exists that Respondent assumed and exercised ownership rights over Appellant's funds at their disbursement such that Appellant suffered any loss. Appellant contends that all misappropriations from her account committed by Senior Vice President Defendant Hiott constitute acts of conversion by both Defendant Hiott and Respondent. Additionally, several sums of money were transferred directly from Appellant's account into Respondent's accounts receivable and for which the Appellant received nothing in return. Respondent clearly used the funds for their own benefit. Unbeknownst to Respondent, Defendant Hiott made direct payments for a large loan totaling $548,745.24 on behalf of Joseph Crosby, Jr. in which Respondent derived direct benefit.(R. pp. 887 - 910). In a similar fashion, Defendant Hiott transferred $85,000 to Chairman of the Board Jim McCoy's account. This $85,000 was directly offset to pay for a July 18, 2008 Official Check drawn off Respondent funds and payable to the Blue Ridge Bank of Walhalla, specifically the MPS Golf Operating Account. (R. pp. 1019 - 1040).

## CONCLUSION

The findings and conclusions by the trial court should be reviewed by this Court. On all issues presented, the trial deviated from binding precedent and created novel issues and analyses. The Appellant therefore respectfully requests that this Court grant the relief sought herein, inquire further into these matters, and reverse the trial court.



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ATTORNEY FOR APPELLANT

January 22, 2020
Columbia, S.C.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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Case No. 2014-CP-37-00526
Appellate Case No. 2019-000614

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Debi Baker Brookshire,

Appellant,

v.

Community First Bank and
Benjamin Hiott,

Defendants,

Of Which, Community First
Bank is

Respondent.



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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

January 22, 2020

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