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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2019-000614

Debi Baker Brookshire,

Appellant,

v.

Community First Bank and
Benjamin Hiott,

Defendants,

Of Which, Community First
Bank is

Respondent.

PETITION FOR REHEARING OF APPELLANT

Warren Blair Giese, SC Bar No. 2219
Kelly L. Giese, SC Bar No. 100089
THE GIESE LAW FIRM, LLC
1821 Hampton Street
Columbia, SC 29201

Jonathan D. Waller
SC Bar No. 76290
210 Newberry Street, NW
Aiken, South Carolina 2801

ATTORNEYS FOR APPELLANT

Appellant Debi Baker Brookshire ("Brookshire" or "Appellant"), pursuant to Rules 219 and 221 of the South Carolina Appellate Court Rules, request that this Honorable Court grant a rehearing in this matter. Respondent respectfully asserts that the issues set forth below warrant reconsideration by this Court.[1]

STANDARD FOR A PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR a properly drawn petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court." *See Kennedy v. S.C. Retirement Sys*, 349 S.C. 531, 564 S.E.2d 322 (2001); *see also* James A. Atkins, 16 S.C. JUR. APPEAL AND ERROR § 147 (2007). "The purpose of such a petition (for rehearing) is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

In applying the aforementioned concept or articulating points and issued which were "overlooked or misapprehended" the South Carolina Supreme Court has suggested that rehearing can be appropriate where the court issued a decision without keeping a material principle "fully in mind." *Green v. E.B. Gresham Co*., 168 S.C. 395, 167 S.E. 659 (1933) (implying that decision by a court "unmindful" of legal principle, such as the availability of an affirmative defense, can be candidate for rehearing).

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,

[1] Appellant incorporates by reference her statement of facts and arguments set forth in her Final Brief on file with the Court.

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. On April 6, 2022, this Court affirmed in part and reversed in part the decision of the circuit court in a per curiam, unpublished opinion.

Appellant hereby petitions for rehearing of this Court's affirmation of the trial

court's summary judgment order dismissing all of Appellant's claims.

GROUNDS FOR PETITION

For the reasons set forth below, Appellant respectfully contends the Court misapprehended, misconstrued, or overlooked the laws and rules regarding the application of S.C. Code Ann. §15-3-110 and the statute of limitations impose upon the Appellant.

a. The Court failed to issue a ruling as to why the debts owed to the Appellant are not considered governed by S.C. Code Ann. § 15-3-110.

It is necessary that the Court issues a ruling as to why the debts owed to the Appellant by the Respondent do not rise to the level of bank instrument as described in S.C. Code Ann. §15-3-110. 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.

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).

The Court addresses the statute of limitations and equitable tolling arguments without providing a ruling as to why these debts do not rise to the level of "bank instruments" that this statute is meant to protect. As stated in *Grice*, banks, like the Respondent, are moneyed corporations. According to Section 15-3-110, when dealing with bills, notes and other evidence of debt issued by moneyed corporations, no statute of limitation applies. When giving the words of Section 15-3-110 their plain and ordinary meaning, the three-year statute of limitations does not apply because the more specific statute of limitations contained in § 15-3-110 applies. Moreover, given the lack of caselaw, the question remains as to whether or not these transactions and the documents evidencing debts owed rise to the type of bank instruments that are described in § 15-3-110.

Appellant respectfully requests this Court to reconsider this issue and 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.

b. The Court erred in finding that a single triggering date for the statute of limitations applies to all occurrences of malfeasance and deceit, even though there were multiple and continuing injuries to the Appellant.

Appellant asserts that her monetary loss was ongoing, not one single theft, but multiple thefts over a multi-year period by a bank employee. Moreover, the dishonest actions by the Respondent and Defendant Hiott continued well after the account was

closed.

"The [S]upreme [C]ourt has held that when a nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the time of the original intrusion on the property and cannot be a complete bar." *Silvester v. Spring Valley Country Club,* 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct.App.2001). "Rather, a new statute of limitations begins to run after each separate invasion of the property." *Id.; see Cutchin v. S.C. Dep't of Highways & Pub. Transp.,* 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (stating if the injury is permanent, the plaintiff has a single cause of action that cannot be split; however, if the cause of the injury is abatable, each injury gives rise to a new cause of action (citing *Webb v. Greenwood Cnty.,* 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956))).

In E*st. of Livingston v. Livingston*, the Court equates a continuing nuisance injury to a contract. That Court ruled "the master properly determined the statute of limitations was not a complete bar on the USDA benefits. Similar to the Supreme Court and this court's rulings in other statute of limitations cases, because each application with the USDA was for a fixed duration, it required a separate renewal each year and the benefit was contingent upon an offer and acceptance by the USDA. *Est. of Livingston v. Livingston*, 404 S.C. 137, 147, 744 S.E.2d 203, 209 (Ct. App. 2013).

In *Benton v. Roger C. Peace Hospital,* 313 S.C. 520, 443 S.E.2d 537 (S.C. 1992), the Court held that a single event, causing separate and distinct injuries discovered at different times, could sustain multiple dates in which claims would become time-barred.

Like the cases above, each event in this case should be treated as an isolated event, thus triggering its own statute of limitations. For example, because Defendant Hiott had

Power of Attorney over Appellant's finances, being made aware of the removal of funds from her account, authorized or not, may trigger the running of a statute of limitations against Hiott as it would put Appellant on notice to further investigate the destination of those funds. Unknown to the Appellant though, and the reason a separate and distinct statute of limitations does not begin to run at the same time, are the actions of Appellant. Because of the POA bestowed upon Hiott, the specific facts of this case require deeper analysis into when causes of action against Respondent were known or should have been known. The Court's analysis that the fact that Hiott was a bank employee with POA powers over her account at the same bank would lead a reasonable person to realize a claim against Community First might exist fails to consider that an individual could reasonably assume that a federally regulated bank should have had systems and internal checks in place in order to catch fraud occurring from within its walls. The discovery of the lack of such systems and controls, in violation of standard banking practice, should be the triggering event with regards to Respondent as the injuries caused by Defendant Hiott and Respondent are different.

Further, when Defendant Hiott removed funds from Appellant's account to purchase Respondent' Stock, in Appellant's name, he did so under the authority granted to him by the POA, but using the tools and systems only available to him because Respondent lacked institutional controls. The purchase of stock for market value would not trigger a cause of action against Defendant Hiott as he would be acting within his authority. The transfer of stock shares from Appellant to a third party, after the revocation of the POA and the closing of the account with Respondent, for no value, and when using Respondent's systems and licenses would trigger the running of a statute of limitations for a separate and

distinct cause of action, including the necessary analysis regarding when discovery of a stock sale, by an individual with no authority to do so from a bank where Appellant had no account, was made. (R. p. 1042, 1047 – 1048).

Appellant alleged causes of action for Breach of Fiduciary Duty, Conversion, Negligent Supervision, Negligence/Gross Negligence, Breach of Contract Accompanied by Fraudulent Act and Accounting. Theses causes of action allege separate and distinct or continuing injuries and as such, have statutes of limitations that begin to run at different times.

c. The court erred in affirming the circuit court's determination that equitable tolling did not suspend the limitations clock and that Community First was not estopped from asserting the statute of limitations.

The court, in determining that equitable tolling did not suspend the statute of limitations clock relies on a very small portion from Appellant's approximately 14-hour deposition in which she responded that disbursements of $500,000 and $200,000 would be inappropriate and unauthorized for Defendant Hiott to make. That statement is in opposition to **all** argument made by both Appellant and Respondent, who states in its Final Brief, "Brookshire has conceded, all of Hiott's disbursements from the account were authorized by the POA." The fact that it was represented repeatedly to Appellant, not only by Defendant Hiott, but by officers of Respondent and counsel for Respondent, that the funds were used to purchase annuities with multiple companies and agencies or that they were used to make a properly documented loan to a business would allow her to ascertain those grounds for a suit existed. (R. pp. 962, lines 1 – 16, 974 – 975, 980). Respondent took other deceitful actions in an attempt to hide it's culpability such as removing selected records from documents requested by

counsel for Appellant in a further attempt to deprive Appellant the knowledge that a claim may exist. (R. p. 1000, line 5 – p. 1001, line 24).

Further, Appellant contends that the court misapprehended the facts regarding the applicability of equitable estoppel. By providing Appellant with explanation as to where her funds were, including details such as dollar amounts which coincided with withdrawals, documents supposedly signed, and names of insurance agencies, Respondent **was** assuring Appellant that there were no problems with her account and that she didn't need to sue because her funds were secure, just in a different format than when they were deposited. Such repeated conduct, not only by Defendant Hiott who remained employed despite the allegations, but by officers and agents of Respondent induced Appellant to delay filing as it suggested a lawsuit is not necessary.

Appellant respectfully requests this Court for a rehearing and to reverse the Order of the trial court and remand the matter to the Circuit Court for further proceedings.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court grant its Petition for Rehearing and reconsider its decision pursuant to oral argument as per the provisions of the South Carolina Appellate Court Rules.

s/Warren Giese
Warren Giese
THE GIESE LAW FIRM, LLC
1315 Blanding Street
Columbia, SC 29201
barneygiese@gmail.com
Phone: 803-708-6767
Fax: 803-708-6767

ATTORNEY FOR APPELLANT

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Columbia, S.C.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Petition for Rehearing complies with Rule 221, SCAR.

April 21, 2022

s/Warren Giese
Warren Blair Giese, SC Bar No. 2219
THE GIESE LAW FIRM, LLC
1821 Hampton Street
Columbia, SC 29201
(803) 708-6767
(803) 708-6769 (facsimile)
barneygiese@gmail.com

ATTORNEY FOR APPELLANT

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PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing on the following recipients by electronic mail, pursuant to the Supreme Court's Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules:

Robert Yates Knowlton, Sr.
bknowlton@hsblawfirm.com
Elizabeth H. Black
eblack@hsblawfirm.com
Post Office Box 11889
Columbia, South Carolina 29211

Attorneys for Respondent Community First Bank

Daryl G. Hawkins
dgh@dghlaw.net
Post Office Box 11906
Columbia, South Carolina 29211

Attorney for Defendant Benjamin Hiott

And

South Carolina Court Administration
1220 Senate Street
Suite 200
Columbia, SC 29201

April 21, 2022

s/Warren Giese
Warren Blair Giese
S.C. Bar No.: 2219
The Giese Law Firm
1821 Hampton Street Street
Columbia, South Carolina 29201
(803) 708-6767
barneygiese@gmail.com

Attorney for Appellant

Gmail Barney Giese <barneygiese@gmail.com>

Appellate Case No. 2019-000614

Barney Giese <barneygiese@gmail.com> Thu, Apr 21, 2022 at 4:07 PM
To: "Knowlton, Bob" <bknowlton@hsblawfirm.com>, "Black, Elizabeth" <eblack@hsblawfirm.com>, Daryl Hawkins <dgh@dghlaw.net>, jonathan@angellmolony.com, Kelly Giese <klg@thegieselawfirm.com>

Good afternoon,

Attached please find Appellant's Petition for Rehearing filed electronically with the Court today in the above-referenced matter.

Thank you,

Barney Giese

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W. Barney Giese
Attorney at Law
1821 Hampton Street
Columbia, SC 29201
(803) 708-6767
Fax: (803) 708-6769
barneygiese@gmail.com

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