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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2022-000087
Civil Action No. 2020-CP-32-03441

Ahmad Mazloom and ARM Quality Builders, LLC . . . . Appellants,

vs.

First Citizens Bank . . . . Respondent.

INITIAL BRIEF OF RESPONDENT

Samuel W. Outten
SC Bar No. 4295
E-Mail: sam.outten@nelsonmullins.com
William S. Brown
SC Bar No. 64164
E-Mail: william.brown@nelsonmullins.com
Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
Abigail L. Wood
SC Bar No. 105426
E-Mail: abigail.wood@nelsonmullins.com
2 W. Washington Street / Suite 400
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for First Citizens Bank

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COUNTER STATEMENT OF ISSUES ON APPEAL

1. Did the trial court correctly conclude that a third party has no duty to refuse to disclose records in response to a valid subpoena under South Carolina law, and, therefore, First Citizens could not be liable for producing Appellants' records in response to a valid subpoena?

2. Did the trial court correctly conclude that First Citizens complied with Rule 45 of the South Carolina Rules of Civil Procedure by providing relevant and discoverable records requested by a valid subpoena, twelve days after service of the subpoena?

3. Did the trial court correctly conclude that there is no private cause of action for an alleged violation of the South Carolina Rules of Civil Procedure and the remedies for such a violation must be pursued in the action in which the alleged violation occurred?

4. Did the trial court correctly conclude that Appellants have not alleged damages?

5. Did the trial court correctly conclude that the question of whether Appellants' negligence claim is viable is not a novel issue in South Carolina?

INTRODUCTION

Unhappy with discovery proceedings in a separate suit, Appellants filed this suit, purporting to assert a claim for negligence arising from alleged violations of the discovery rules in the other litigation.[1] The claim arises from a subpoena that was served on First Citizens Bank[2] in the prior suit seeking records of Mr. Mazloom's account. In response to the subpoena, First Citizens produced the documents sought. And although Mr. Mazloom and his company, Arm Quality Builders, LLC, initially objected to the subpoena, they withdrew their objection, consented to the production, and agreed to the Confidentiality Order protecting the records. Almost three years later, however, they filed this suit, alleging First Citizens' production of the records in the prior suit in response to a valid subpoena constituted negligence. The trial court dismissed the suit. This Court should affirm for any of the following reasons.

First, this Court has previously held that a bank that receives a valid subpoena for the production of account records has no duty to investigate the request; has no obligation to refuse to produce the records; and faces no liability for producing them. Accordingly, First Citizens' production of the records in the prior suit does not give rise to a viable cause of action.

Second, Appellants fail to cite a single South Carolina case (because there is none) in support of their argument that this Court should adopt and impose a new requirement not found in Rule 45, SCRCP, namely that recipients of subpoenas must wait to respond until the last possible

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[1] The prior litigation was *Arm Quality Builders LLC v. Joseph and Lycia Golson*, Civil Action No. 2017-CP-32-02204 (the "Underlying Case").

[2] Respondent's full name is "First-Citizens Bank & Trust Company," incorrectly identified as "First Citizens Bank" in the original Complaint. This distinction does not materially affect the merits of the case, and as such, this brief will refer to Respondent as "First Citizens Bank" throughout.

moment before the deadline. This argument lacks any support in the text of the Rule or in South Carolina precedent, and is contrary to the language of Rule 45.

Third, even if First Citizens' document production in response to the subpoena in the prior suit violated some new-found requirement of Rule 45, SCRCP (which it did not), there is no private right of action to bring a civil action asserting claims arising from alleged violations of the Rules of Civil Procedure, and any remedy must have been sought in the prior litigation in which the subpoena was issued.

Fourth, the Complaint fails to allege any damages, and at no time in this litigation, including in their appellate brief, have Appellants explained what harm, injury, or prejudice they claim to have suffered as a result of First Citizens' supposedly premature document production in the prior suit. The trial court correctly ruled that in the absence of any allegations of damages—a mandatory element of a negligence claim—Appellants have not asserted a claim on which relief could be granted.

Fifth, the issues raised in this appeal are not novel in South Carolina. Appellants' argument to the contrary is so sparse and so unsupported as to be deemed abandoned. Even if the argument were properly raised to this Court, it is incorrect.

Any of the foregoing reasons, standing alone, would be a sufficient basis to affirm the trial court's dismissal of this suit. Together, they lead inescapably to that conclusion. Accordingly, First Citizens Bank respectfully requests that this Court affirm the lower court's ruling.

COUNTER STATEMENT OF THE CASE

This case arises from Appellants' allegations that First Citizens "negligently" produced bank records in response to a valid subpoena served in a previous lawsuit. The subpoena at issue was served on First Citizens on October 25, 2017, in prior litigation entitled *Arm Quality Builders*

LLC v. Joseph and Lycia Golson, Civil Action No. 2017-CP-32-02204 (the "Underlying Case"), requiring First Citizens to produce Mr. Mazloom's bank account records by November 10, 2017. (Compl. ¶¶ 4–5; R. __.) Mr. Mazloom was the owner of Arm Quality Builders LLC and was fully informed as to the nature of the subpoena and the information sought. (*See* Mot. to Dismiss Hr'g Tr. 11:21–12:5; 13:18–14:12.) Appellants allege that they filed a Motion to Quash the subpoena on November 6, 2017.[3] (Compl. ¶ 6; R.__.) First Citizens produced the bank records pursuant to the subpoena on November 7, 2017, before receiving notice of any objection to the subpoena or Motion to Quash. Appellants complain that this production was negligent and premature under Rule 45. (Tr. of Hr'g at 4: 5–6; R. __.)

Although Appellants never actually filed a Motion to Quash the subpoena to First Citizens in the Underlying Case, they asserted an objection to the subpoena, which was addressed by the court at a hearing on May 8, 2018. (May 18, 2018 Order; R. __) (the "Underlying Order").[4] At or prior to the hearing, Appellants agreed to withdraw the objection to the subpoena, and this agreement was memorialized on the record. (May 18, 2018 Order at 2–3; R.__.) In the Underlying Order, the court noted that "[t]he parties . . . agreed to resolve an ancillary discovery matter relating to Plaintiff's objection to Defendants' subpoena to First Citizens Bank," and that counsel for Plaintiff had "agreed and confirmed on the Record that Plaintiff withdraws its objection to the Subpoena." (May 18, 2018 Order at 2–3; R.__.) The court also specifically found that "[a]ll

[3] Appellants never actually filed a Motion to Quash the subpoena directed to First Citizens in the Underlying Action. *See* Docket for *ARM Quality Builders LLC v. Joseph and Lycia Golson*, Civil Action No. 2017-CP-32-02204 (R. ___); Notice of Mot. & Mot. to Quash Subpoenas (R.___.) However, it is not disputed that Appellants provided First Citizens with a copy of a Motion to Quash on November 7, 2017, *after* First Citizens had sent out its response to the subpoena.

[4] An appeal is currently pending regarding the Underlying Case. *See* Appellate Case No. 2020-001406. The Underlying Order and its findings that the material produced by First Citizens was properly discoverable is not addressed in that appeal.

records relating to any personal bank accounts maintained by Ahmad Mazloom and produced by First Citizens Bank in response to Defendant's subpoena are discoverable. . . ." (May 18, 2018 Order p. 4; R.__.)

Appellants filed the Complaint in the present action on October 12, 2020. (Compl.; R.__.) Nowhere in the Complaint do Appellants allege that the subpoena was unlawful, invalid, or improper. Instead, Appellants pled that First Citizens was negligent in responding to the subpoena prior to the specified return date. (Compl. ¶ 7; R.__.)

First Citizens filed a Motion to Dismiss on November 12, 2020, arguing that First Citizens cannot be liable for complying with its obligation to respond to a duly issued subpoena, which was valid on its face, and that Appellants' objection to the subpoena itself was addressed by the court in the Underlying Action, was withdrawn by Appellants in the Underlying Action, and was confirmed by a Court Order in that action. (May 18, 2018 Order; R. __.) First Citizens' Motion to Dismiss was fully briefed by the parties, and an in-person hearing was held on December 1, 2021. (Br. in Opp'n to Mot. to Dismiss; R. __; First Citizens Bank's Memo. in Supp. of Mot. to Dismiss; R. __; Tr. of Hr'g; R. __.) The Court granted First Citizens' Motion to Dismiss on December 8, 2021. (Order Granting Mot. to Dismiss; R. __.) On December 20, 2021, Appellants filed a Motion to Reconsider, which the Court denied on December 29, 2021. (Mot. To Recons.; R. __; Order Den. Mot. to Recons.; R. __.) This appeal followed. (Notice of Appeal; R. ___).

STANDARD OF REVIEW

When reviewing a dismissal for failure to state a claim, an appellate court applies the same standard as the trial court—the pleadings are construed liberally, and all well-pled facts are presumed true. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498–99 (2014) (citation omitted). The court need *not*, however, presume the truth of allegations pled

merely in conclusory fashion or stating legal conclusions. *HHHunt Corp. v. Town of Lexington,* 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010) ("[O]n a 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true.") (emphasis in original); *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (stating that even under the liberal standard applicable to a motion to dismiss, a mere conclusory allegation, unsupported by particular allegations of fact, is insufficient). Under this standard, a claim should be dismissed when the facts alleged in the complaint do not support relief. *Brouwer v. Sisters of Charity Providence Hospital*, 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014).

In considering a motion to dismiss, the trial court ordinarily must base its rulings on the allegations set forth in the complaint. *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). However, the court may also consider documents attached to or referenced in the complaint. *Brazell v. Windsor,* 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). In addition, the court may take judicial notice of court orders and other filings from related litigation. *Doe,* 407 S.C. at 134 n.2, 754 S.E.2d at 497 n.2 (recognizing that a circuit court may take judicial notice of such orders and filings when ruling on a 12(b)(6) motion without converting it into one of summary judgment); *see also* Rule 201(d), SCRE ("A court shall take judicial notice if requested by a party and supplied with the necessary information."); Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding.").

ARGUMENT

I. The trial court correctly concluded that South Carolina law, including this Court's precedent, expressly states that a bank has no duty to withhold or refuse to disclose financial records in response to a valid subpoena.

Appellants allege that First Citizens "negligently" produced bank records in response to a valid subpoena issued in the Underlying Case. Not only have Appellants failed to show that there

is a duty not to disclose financial records in South Carolina, but they concede (as they must) that this Court has previously, affirmatively, and expressly held *there is no duty to withhold* such records when (as here) they are requested by a valid subpoena. (Brief of Appellants p. 5.) Further, even assuming there were some generalized, abstract duty to protect bank records, Appellants have failed to show that producing documents pursuant to a lawful subpoena would constitute a breach of such a duty.

A. First Citizens did not owe a duty to withhold financial records when served with a subpoena.

There is no recognized common law duty in South Carolina for a financial institution to withhold financial records. Further, it is generally recognized that there is no legitimate "expectation of privacy" for bank records. *See United States v. Miller*, 425 U.S. 435, 442 (1976) (holding that there was no expectation of privacy for bank records provided pursuant to the subpoena because the checks and records were "not confidential communications but negotiable instruments to be used in commercial transactions"). Even if such a duty were recognized in South Carolina, a valid subpoena would be an exception under the law.

In *Rycroft v. Gaddy*, the plaintiff sued a bank for the torts of abuse of process, invasion of privacy, and negligence for disclosing records in response to a subpoena. *See* 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984). The South Carolina Court of Appeals affirmed dismissal of all three claims, reasoning that "[plaintiff] is claiming that the bank had no right to reveal his private records to a member of the public. However, the subpoena[s] were proper on their face and the bank had no choice but to comply." *Id.* at 123–124, 314 S.E.2d at 43. The court held in response to the negligence claim that "[s]ince the subpoena[s] were valid on their face, the bank had **no duty** to inquire into the circumstances behind the subpoena[s] as **a bank cannot refuse to give information** concerning an account when questioned in response to a lawful subpoena." *Id.* at

123, 314 S.E.2d at 42 (emphasis added). Later South Carolina cases have followed *Rycroft* as controlling authority.[5] The trial court properly found the holding from *Rycroft* applicable, binding, and requiring dismissal of the claim. (Order Granting Mot. to Dismiss; R. __.)

B. Appellants rely on non-binding and distinguishable authority.

Appellants discuss several state cases from other jurisdictions in their Brief in an effort to avoid binding South Carolina law. (Brief of Appellants pp. 3–4.) The out-of-state authority does not support Appellants' claim, because it either (1) holds that a bank does *not* have a duty regarding disclosure of information, (2) notes an exception for subpoenas, or (3) addresses an entirely different duty. S*ee Schoneweis v. Dando*, 435 N.W.2d 666 (Neb. 1989) (holding that a bank did not owe its customer a duty of confidentiality); *Macon County Livestock Market, Inc. v. Kentucky State Bank*, 724 S.W.2d 343 (Tenn. 1986) (holding that a bank had no affirmative duty to disclose financial information of business associate to his employer); *Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474 (Ind. Ct. App. 1985) (holding that the bank was not negligent in releasing financial records to a person who had a legitimate public interest); *Milohnich v. First Nat'l Bank*, 224 So.2d 759 (Fla. Ct. App. 1969) (finding that though the complaint alleged a cause of action for violation of an implied duty on the part of a national bank not to disclose information, "[t]his opinion does not attempt to deal with the disclosures of a national bank relating to . . . disclosure required by the government or under compulsion of law[.]"); *Sparks v. Union Trust*, 124 S.E.2d 365 (N.C. 1962) (holding that a bank was under no duty at law to warn or tell plaintiff of customer's financial condition);[6] *Peterson v. Idaho First National Bank*, 367 P.2d 284 (1961) (finding that bank

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[5] Because this Court's 2015 opinion holding that production of "banking information was 'permitted by law' because it was in response to a subpoena" was unpublished, First Citizens mentions it without citation pursuant to Rule 268, SCACR.

[6] Appellants also compare *Sparks v. Union Trust* to another North Carolina case, *State v. Melvin*, 357 S.E.2d 379 (N.C. Ct. App. 1987). (*See* Brief of Appellants p. 5.) Neither case supports

generally was not at liberty to disclose depositor information to employer, but noting that a bank cannot refuse to give information in response to a lawful subpoena).

Appellants also cite a treatise that appears to *contradict* their theory that a negligence claim exists for a bank's disclosure of records. *See* Philip Blumstein & Linda Pohly, *Confidentiality, Access and Certainty: Disclosure of Customer Bank Records*, 1 ANN. REV. BANKING L. 101 (1982) (specifically finding that "a bank may not assert a duty of confidentiality as a defense to a lawful subpoena" and concluding that "[t]he common law has provided only limited protection to bank customers aggrieved by disclosure of their financial records," and that [c]ustomers have only recovered under the implied contract theory," not under negligence).

C. First Citizens acted reasonably and in accordance with Rule 45.

Appellants contend that First Citizens was negligent in "prematurely" responding to the subpoena by failing to respond on the exact date and time specified. (Brief of Appellants p. 9.) Appellants' contention is wrong for the following reasons.

1. Appellants seek an unreasonable interpretation of Rule 45.

Appellants argue that because the subpoena does not say "on *or before*" November 10, 2017 at 5:00 p.m., the documents were required to be produced at the **exact** time and date specified. (Brief of Appellants p. 6; middle paragraph.) Under Appellants' theory, even a 60-second departure from the *exact* time and date specified constitutes actionable negligence, and First

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Appellants' position, and *State v. Melvin* explicitly supports *First Citizens' position* that a bank does not owe a duty not to disclose financial records pursuant to a subpoena. *See Melvin*, 357 S.E.2d 379 (holding the right to privacy is not implicated when bank responds pursuant to subpoena).

Citizens would have still been subject to liability if it produced the documents at 4:59 p.m. This is an absurd interpretation of the Rule and one for which no authority is cited.[7]

2. Appellants' interpretation is inconsistent with provisions of Rule 45.

Appellants' interpretation is inconsistent with other provisions and directives within Rule 45. For example, Rule 45(c)(1) requires that a party and attorney issuing a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 45(c)(1) also provides that the court from which the subpoena issues shall enforce this duty to avoid undue burden and expense on the party responding. Appellants' interpretation of Rule 45 to impose civil liability in subsequent litigation if production is not at the exact moment listed on the subpoena seeks to create and impose an extreme, unreasonable, and undue burden on third parties subject to a subpoena and is wholly inconsistent with the letter and spirit of subpart (c)(1) of Rule 45.

3. Appellants' argument is inconsistent with Rule 45(a)(4).

In apparent contradiction to its primary argument that only production at the exact date and time listed on the subpoena can be proper, Appellants then argue that they simply ask for First Citizens to "wait and give it a reasonable opportunity to file a motion to quash." (Brief of Appellants p. 6; bottom paragraph.) First Citizens cannot be liable under this argument either. As explained more fully below, the ten-day period provided in Rule 45 ***is*** the "reasonable opportunity"

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[7] Appellants cite two federal cases regarding timing of objections: *United States v. Int'l. Bus. Machines*, 70 F.R.D. 700 (S.D.N.Y. 1976) and *Ross v. Citieis Service Gas Co.*, 21 F.R.D. 34 (D. Mo. 1957) (Brief of Appellants p. 6). Neither case supports Appellant's interpretation that documents could only have been produced at the exact time and date specified in the subpoena. In fact, neither case addresses or imposes any obligation or limitation on timing of production in response to a subpoena.

in which a party may object to a subpoena, and once the ten days have passed without an objection, the recipient of a subpoena has no reason to think any objection is forthcoming.

Appellants base their negligence claims on Rule 45 of the South Carolina Rules of Civil Procedure. Rule 45(a)(4) specifies the amount of time a party has to object to a subpoena commanding the production of documents. South Carolina Rule 45(a)(4) specifies that the subpoena must be served on each party "at least **ten days** before the time specified for compliance." S.C. R. Civ. P. 45(a)(4) (emphasis added). Although there is no South Carolina authority interpreting the purpose of this ten-day period, the rule is based upon the Federal Rule 45. *See* S.C. R. Civ. P. 45 advisory committee's note ("This Rule 45 is substantially the same as the Federal Rule, modified to the limits of State court jurisdiction."). The federal rule simply states that "If the subpoena commands the production of documents . . . then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party." Fed. R. Civ. P. 45(a)(4). The purpose of this provision of the rule is to allow parties a "reasonable period of time" to object to the subpoena. *See* Fed. R. Civ. P. 45(a) advisory committee's note to 2013 amendment; *see, e.g. Butler v. Biocore Med. Techs.*, 348 F.3d 1163, 1173 (10th Cir. 2003) ("'[T]he purpose behind the notice requirement is to provide opposing counsel an opportunity to object to the subpoena.'") (quoting *Biocore Med. Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660 (D. Kan. 1998)). South Carolina Rule 45(a)(4) goes further, and specifies the **ten day** period provided to parties. S.C. R. Civ. P. 45(a)(4) (emphasis added). Thus, under Rule 45, upon which Appellants base their claims, a reasonable time for parties to object to a subpoena is ten days.

Likewise, Appellants' citation to the Financial Right to Privacy Act ("FRPA") actually supports First Citizens' position. (*See* Brief of Appellants pp. 6–7). The FRPA provides that a government authority may obtain financial records pursuant to a subpoena only if "**ten days** have

expired from the date of service of the notice . . . and within such time period the customer has not filed a sworn statement and motion to quash[.]" 12 U.S.C. § 3405(3) (2021) (emphasis added). Under FRPA, then, if no motion to quash has been filed within ten days after service of the subpoena, the custodian is free to produce the documents.

Here, the subpoena was issued on October 25, 2017 and First Citizens responded on November 7, 2017—more than ten days later—prior to receiving notice of any motion to quash.[8] Therefore, First Citizens' response to the subpoena about 12 days after it was issued was reasonable and in accordance with Rule 45. Appellants had a reasonable opportunity to seek to quash and notify First Citizens of the objection.

The trial court properly concluded that South Carolina does not recognize a duty not to disclose financial records pursuant to a subpoena. Even if there were such a duty, First Citizens' production was not premature, as Appellants were provided reasonable time to object to the subpoena, but failed during that ten-day period to file a Motion to Quash or to notify First Citizens of their objection.

II. The trial court correctly concluded that First Citizens complied with Rule 45 in providing relevant and discoverable records in response to a valid subpoena.

Appellants contend that Rule 45 of the South Carolina Rules of Civil Procedure prohibits parties from producing banking records prior to the specified return date on a subpoena. They argue that because First Citizens produced the subpoenaed documents in the Underlying Case prior to the specific return date on the subpoena, "the defendant's actions were in violation of the spirit and the letter of Rule 45." (Brief of Appellants p. 11.) Actually, under South Carolina law, First Citizens' actions complied with both.

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[8] Appellants served (but never filed, *see* note 3, *supra*) a Motion to Quash on First Citizens on November 7, 2017. (Tr. of Hr'g at 14:10–12; R. ___.)

Appellants significantly rely on, and mischaracterize, the holding of *Estate of Watson v. Babb,* No. 2007-UP-329, 2007 WL 8327913 (S.C. Ct. App. 2007). As an initial matter, Appellants' reliance on *Estate of Watson*—an unpublished opinion—is violative of Rule 268, SCACR. Nevertheless, because Appellants have discussed the case (and discussed it wrongly), First Citizens will respond to and clarify that discussion. In *Estate of Watson*, the appellant argued that the trial court erred in not granting a motion to quash because the documents were delivered prior to the date specified in the subpoena. *Id.* This Court held that the allegedly "premature" production of the documents was not erroneous because the documents were discoverable, and the supposedly early production, therefore, had caused no prejudice:

> [W]e perceive no prejudice to Babb in the allegedly premature furnishing for the records by the bank inasmuch as he does not contend that the records were not discoverable. Thus, the bank's release of them before the deadline set out in the letter to Babb, does not give rise to reversible error.

Id. at *4. Here, Appellants do not allege in their Complaint that the records at issue were not discoverable.[9] In fact, the court in the Underlying Case specifically held that "[a]ll records relating to any personal bank accounts maintained by Ahmad Mazloom and produced by First Citizens Bank in response to Defendant's subpoena are discoverable. . . ." (May 18, 2018 Order pp. 2–3; R. ___.) Because an unappealed Order finds the records discoverable, pursuant to the reasoning in *Estate of Watson*, Appellants have not been prejudiced by First Citizens' allegedly premature production in response to the subpoena.[10] Even if First Citizens had committed an error by responding to the subpoena

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[9] Appellants, without authority or factual basis, assert a single sentence in their Brief stating that the records were "irrelevant and were non-discoverable." (Brief of Appellant p. 10.)

[10] The fact that Appellants consented to the Underlying Order and did not challenge the production in the Underlying Case is yet another reason that *Estate of Watson* provides no support for their argument here. *Estate of Watson* did not involve a negligence claim or seek to impose monetary damages on the party responding to a subpoena. It was an appeal from the same action in which the subpoena had been issued, directly challenging the discovery ruling allowing production of

prior to the specified return date, any such error would be harmless, as South Carolina law establishes that Appellants have not been prejudiced by this production.

Appellants also cite and discuss two nonbinding, nonauthoritative, and distinguishable state cases from outside of South Carolina. Appellants rely on sound bites from *Bond v. Slavin*, 851 A.2d 598 (Md. Ct. App. 2004), but seek to avoid the actual holding of the case. *Bond v. Slavin* does not permit a negligence claim as appellants seek here. In *Bond v. Slavin*, the appellant had been previously denied a hearing on the issue of whether the trial court should enter a protective order prohibiting disclosure of financial records, and the Maryland Court of Appeals remanded to allow a hearing on the issue. *See* 851 A.2d 598, 601 (Md. Ct. App. 2004). Conversely, the Appellants in the present case had the opportunity for a hearing on their objections in the Underlying Case and received the relief sought and provided in *Bond*.[11]

In *Mann v. University of Cincinnati*, the court admonished defense counsel for improperly representing to the custodian of medical records that she must provide the records before the subpoena return date in order to avoid appearing in court. *See* 824 F.Supp. 1190, 1201 (S.D. Oh. 1993). The court found no fault with the responding party, but found the attorney's actions sanctionable, reasoning that "Nothing in Rule 45 authorizes an instruction to produce documents prior to the subpoena date. . . . Defendants' argument that the recipient had to produce the records prior to the subpoena date to avoid contempt proceedings for failure to produce at the time and place designated on the subpoena is, frankly, ridiculous." *Id.* at 1202. The court held that early

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documents. Appellants here did not appeal the Underlying Order (May 18, 2018 Order; R. __), which addressed their objections to the subpoenas in the Underlying Case.

[11] Additionally, the subpoena in *Bond* required the custodian to personally appear and produce the documents at the courthouse on a specific day and at a specific time, but the Bank delivered the records to opposing counsel at his office. *Id.* at 609. The court's chief concern appeared to be the Bank's disregard of the specific instructions for delivery at the courthouse, not the timing of production. *Id.*

subpoena responses are not *mandated*, but in no way indicated that they are prohibited. *Id.* Instead, the court's concern was with the attorney's misrepresentation to the third party.

Thus, not only do Appellants fail to cite any South Carolina cases supporting their argument that an early subpoena response by a custodian on its own is improper and can support a negligence claim, but fail to produce any case at all to support this proposition.

Here, First Citizens waited twelve days before responding, and responded to the subpoena only a few days before the deadline. Under South Carolina law, First Citizens' response to the subpoena prior to the deadline was neither premature nor prejudicial under Rule 45 and, therefore, could not constitute negligent disclosure.

III. The trial court correctly concluded that there is no private cause of action to bring a lawsuit challenging an alleged violation of the Rules of Civil Procedure in another lawsuit and the remedies for such a violation must be pursued in the action in which the alleged violation occurred.

Appellants' negligence claim not only has no basis under Rule 45 or South Carolina law, but is also procedurally improper.

There is no private cause of action for an alleged violation of the Rules of Civil Procedure. Appellants have cited to no case, from any jurisdiction, which creates or recognizes such a cause of action. In fact, Appellants provide no authority *at all* to support their assumption that a private right of action exists.[12] If there is a violation of Rule 45, parties are provided remedies which must be sought in the case in which the subpoena is issued. The court from which the subpoena was issued

[12] "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Miller v. Dillon,* 432 S.C. 197, 207, 851 S.E.2d 462, 468 (Ct. App. 2020) (*citing State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009)). Additionally, any attempt by Appellants to provide authority in a Reply brief does not change the abandonment. *Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding that argument that was not fully addressed with authority until the reply brief was not properly presented to the court for consideration).

can provide relief by way of motions to quash and broad powers to issue protective orders under Rule 45 and 26(c).

In fact, Appellants did seek the available remedies in the Underlying Case. In its Order on May 18, 2018 addressing discovery issues, including the subpoena at issue, the court noted that "[t]he parties . . . agreed to resolve an ancillary discovery matter relating to Plaintiff's objection to Defendants' subpoena to First Citizens Bank" and that Counsel for Plaintiff "agreed and confirmed on the Record that Plaintiff withdraws its objection to the Subpoena." (May 18, 2018 Order pp. 2–3; R. __.)

Appellants have not cited any authority which would allow them to seek monetary damages in a new, later lawsuit to collaterally challenge the ruling of the court on the discovery issues in prior litigation. Appellants argue that "[c]ollateral estoppel and res judicate do not apply . . . " (Brief of Appellant p. 12.) However, the trial court did not engage in a collateral estoppel or res judicata analysis and this Court does not need to do so either. In this matter, the Underlying Order, allowing production of the documents subject to the subpoena, was entered by agreement. Appellants' efforts to collaterally attack the discovery order are contrary to South Carolina authority. *See Johnson v. Johnson*, 310 S.C. 44, 46, 425 S.E.2d 46, 46 (Ct. App. 1992) (where an order is entered by consent, as it was here, "it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding.").

IV. The trial court correctly ruled that Appellants' failure to allege damages was fatal to their claim.

Appellants have failed to allege any damages on the face of the Complaint. (Compl. ¶ 8; R. __.) The Complaint has a place in which damages are to be listed, but none are listed. (Compl.

¶ 8; R. __.) The trial court properly found that the face of the Complaint did not identify any alleged damages and that this was a fatal defect. (Order Granting Mot. to Dismiss; R.__.)

Appellants now argue, without any citation to authority or the record,[13] that "Plaintiffs' Complaint indicated damages in a general form." (Brief of Appellants p. 12.) An essential element of a claim for negligence is damages proximately caused by the alleged actions. Appellants' only argument refuting this well-settled tenant of law is that *Lord v. D & J Enterprises, Inc.*, which the Court cites in its Order, is (according to Appellants) an unpublished opinion and does not have precedential value. This argument is as confusing as it is erroneous. *Lord* is a published opinion of the South Carolina Supreme Court that has been cited and relied upon by no fewer than 16 subsequent appellate court opinions. *See* 407 S.C. 544, 757 S.E.2d 695 (2014). Regardless, South Carolina law is clear that damages must be pled in order to establish negligence. *See, e.g., Cowburn v. Leventis*, 366 S.C. 20, 46, 619 S.E.2d 437, 451 (Ct. App. 2005) (holding that damages must be pled in order to establish a claim for negligence); *Andrade v. Johnson*, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003) (same); *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (holding that if a plaintiff fails to prove damages then she fails to prove her case); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). The trial court did not err by reaching the same conclusion.

[13] "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Miller v. Dillon,* 432 S.C. 197, 207, 851 S.E.2d 462, 468 (Ct. App. 2020) (citing *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009)). Additionally, any attempt by Appellants to provide authority in a Reply brief does not change the abandonment. *Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding that argument that was not fully addressed with authority until the reply brief was not properly presented to the court for consideration).

V. The trial court correctly concluded that the question of whether Appellants' negligence claim is viable is not a novel issue in South Carolina.

The trial court correctly ruled that the issue of whether there is a duty not to disclose financial records in South Carolina is not a novel issue. Appellants' argument to the contrary—that this case involves a novel issue that cannot be decided on a motion to dismiss—fails to provide any basis for this argument.

First, whether South Carolina recognizes a duty not to disclose financial records has already been decided by the South Carolina Supreme Court in *Rycroft*. In *Rycroft*, the court explicitly held that "[s]ince the subpoena[s] were valid on their face, the bank had **no duty** to inquire into the circumstances behind the subpoena[s] as **a bank cannot refuse to give information** concerning an account when questioned in response to a lawful subpoena." *See* 281 S.C. at 123, 314 S.E.2d at 42 (Ct. App. 1984) (emphasis added). Banks do not owe a duty to withhold financial records in response to a valid subpoena under South Carolina law. This issue is not novel and may be decided at the motion to dismiss stage of litigation.

Additionally, the purpose of disallowing Rule 12(b)(6) resolution of novel issues of law is to allow for the factual record to be developed before the court rules on the supposedly novel issue. *See Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). "Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss." *Id.* Appellants do not cite to a single issue of fact in the record that is in dispute, and do not contend that further facts must be developed prior to a legal ruling. Thus, a ruling as a matter of law was appropriate.

CONCLUSION

For the reasons stated herein, this Court should affirm the well-reasoned Order of the trial court.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:

William S. Brown
SC Bar No. 64164
E-Mail: william.brown@nelsonmullins.com
Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
Abigail L. Wood
SC Bar No. 105426
E-Mail: abigail.wood@nelsonmullins.com
2 W. Washington Street / Suite 400
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for First Citizens Bank

Greenville, South Carolina
June 1, 2022

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2022-000087
Civil Action No. 2020-CP-32-03441

Ahmad Mazloom and ARM Quality Builders, LLC . . . . Appellants,

vs.

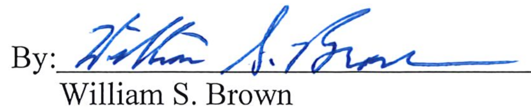
First Citizens Bank . . . . Respondent.

PROOF OF SERVICE

Pursuant to Rule 262, SCACR and Order No. 2021-08-25-02 of the Supreme Court, undersigned counsel hereby certifies I have served a copy of Respondent's Initial Brief and Designation of Matter on counsel of record by electronic mail (see attached sent email) and mailing copies of the same by United States Mail, postage prepaid:

Counsel Served:

James Randall Davis (randy@oldcourthouse.com)
Davis Frawley, LLC
140 East Main Street, P.O. Box 489
Lexington, SC 29071

By: 
William S. Brown

Attorney for First Citizens Bank

Greenville, South Carolina
June 1, 2022

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

2 W. Washington Street, Suite 400
Greenville, SC 29601
T: 864.373.2300 F: 864.373.2925
nelsonmullins.com

William S. Brown
T: 864.373.2297 F: 864.250.2283
william.brown@nelsonmullins.com

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Via electronic filing
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

RE: *Ahmad Mazloom and ARM Quality Builders, LLC v. First Citizens Bank*
Appellate Case No. 2022-000087
Civil Action No. 2020-CP-32-03441
Our File No. 005454.01516

Dear Ms. Kitchings:

Please find enclosed for electronic filing in the above matter, the Initial Brief of Respondent First Citizens Bank, Respondent's Designation of Matter, and a Proof of Service of same.

We ask also that, at your convenience, you return a copy of the attached documents to us bearing the Court's file stamp. Should you have any questions pertaining to these filings, or if we can provide any other information, please do not hesitate to let us know.

Very truly yours,

William S. Brown

WSB:fss
Enclosures
cc: James Randall Davis, Esq.