No. 51PA13 NINETEEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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JACQUES A. DALLAIRE and wife, FERNANDE DALLAIRE	)	
	)	From Cabarrus County
v	)	No. 10CVS4366
	)	No. COA12-626
BANK OF AMERICA N.A., HOMEFOCUS SERVICES, LLC, and LANDSAFE SERVICES, LLC	)	

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 22 January 2013)
(Allowed 27 August 2013)

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant Bank of America, N.A. ("Bank of America") respectfully petitions the Supreme Court of North Carolina to certify for discretionary review that portion of the decision of the Court of Appeals filed on 18 December 2012 holding that the Superior Court erred in granting summary judgment in favor of Bank of America on Plaintiffs' claims for breach of fiduciary duty and negligent misrepresentation. The subject matter of that decision - the fiduciary duty of a bank in an ordinary debtor/creditor transaction and whether it is a question for the jury as to what constitutes legal advice- involves legal principles of major significance to the jurisprudence of this state, is likely to be in conflict with a decision of this Court, and raises issues of significant public interest under N.C. Gen. Stat. § 7A-31. In support of this Petition, Bank of America shows the following:

Statement of the Case and Facts

A. Parties and Procedural History

Plaintiffs Jacques and Fernande Dallaire (collectively, the "Dallaires" or "Plaintiffs") brought their claims seeking to blame Bank of America and LandSafe Services, LLC f/k/a HomeFocus Services, LLC ("HomeFocus")(collectively "Defendants") for not allowing them to complete their plan of selling their house and avoiding debt owed to another lender. Specifically, Plaintiffs'

claims against Bank of America relate to the priority of a lien held by Bank of America on their property and a title report provided by HomeFocus in connection with refinancing two loans by Bank of America.

On 15 December 2010, Plaintiffs filed this suit against Bank of America and HomeFocus in the Superior Court of Cabarrus County. It asserted various tort claims, a contract claim, a third-party beneficiary breach of contract claim, and a statutory claim under the Safe and Fair Enforcement Mortgage Licensing Act, N.C. Gen. Stat. § 53-244.110 (2011)("S.A.F.E.") and its predecessor the Mortgage Lending Act, N.C. Gen. Stat. §§ 53-243.01 to -543.18 (2001) (repealed 2009)("MLA").

Bank of America and HomeFocus moved to dismiss under rule 12(b)(6) on the basis that Plaintiffs had failed to state a claim against either Bank of America or HomeFocus. On 21 February 2011, the Superior Court denied Defendants' motion to dismiss.

On 19 December 2011, Plaintiffs filed their motion to amend the complaint to add LSI as a defendant based on the fact that LSI had provided services to Bank of America in conducting the underwriting of the loan. On 29 December 2011, Defendants filed their motion for summary judgment.

The Superior Court heard argument on both motions on 13 February 2012. The Superior Court entered summary judgment to

Defendants on all claims on 14 February 2012. The Court awarded costs to the Defendants and dismissed the case without prejudice to Plaintiffs' ability to bring a separate action against LSI.

In an opinion filed 18 December 2012, the Court of Appeals affirmed the Superior Court's grant of summary judgment to HomeFocus on all claims. The Court of Appeals also affirmed the Superior's Court's grant of summary judgment to Bank of America on the breach of contract claims and the claims under S.A.F.E. and the MLA, but reversed the decision granting summary judgment to Bank of America on the breach of fiduciary duty claim and negligent misrepresentation claim. Bank of America now petitions for discretionary review of that ruling.

B. Relevant Facts

In 2005, Plaintiffs filed Chapter 7 bankruptcy. After emerging from bankruptcy, Plaintiffs had three liens on their property located in Cabarrus County at 4796 Lauren Glenn St., Concord, North Carolina (the "Property"). (R. p. 54, Compl. ¶¶ 19.) The first two liens were with Bank of America and the third was with Branch Banking & Trust (the"BB&T Lien"). (R. p. 55, Compl. ¶¶ 24, 25.) Plaintiffs' personal liability to these lenders had been wiped away by the bankruptcy but the liens remained. (*Id.*) Plaintiffs knew that all of the liens, including the BB&T Lien, remained on the Property after the bankruptcy discharge. (Deposition of J. Dallaire, T. p. 39:21-

22; Deposition of F. Dallaire, T. p. 18:5-7)

Nevertheless, Plaintiffs chose to refinance their loan with Bank of America and received $24,142.42 in cash out from the refinance. (R. p. 14) Plaintiffs also willingly incurred renewed personal liability to Bank of America by doing the refinance. (Deposition of J. Dallaire, T. p. 43:1; Deposition of F. Dallaire, T. p. 17:18-21.) Plaintiffs then decided to sell the Property, pay off Bank of America's loan and walk away from BB&T's debt, because there was no personal liability to BB&T. Plaintiffs believed they could pay off Bank of America and never pay BB&T because the bankruptcy erased their personal liability. However, the main obstacle to their plan was that none of the liens were extinguished through the bankruptcy, and Plaintiffs never could have sold their house without satisfying the liens.

Despite the fact that their personal liability on the Bank of America loans had been discharged and knowing that the liens remained on the Property, Plaintiffs sought to refinance the previous Bank of America loans with Bank of America in order to obtain a better interest rate and to pay off two automobile loans. (R. p. 53, Compl. ¶ 6; Deposition of J. Dallaire, T. p. 40:14-22; Deposition of F. Dallaire, T. p. 17:5-8.) After seeing an advertisement regarding refinancing and seeking a better interest rate, Plaintiffs received a loan from Bank of America in the amount of $166,000. (R. p. 53, Compl. ¶ 7;

Deposition of J. Dallaire, T. p. 27:20-23; Deposition of F. Dallaire, T. p. 11:17-20, 15:21-23.) Mr. Dallaire went to a local Bank of America branch office and met once with a loan officer that he had never dealt with before to discuss the possibility of refinancing. (Deposition of J. Dallaire, T. p. 32:4-8, 68:19.) Plaintiffs allege that Bank of America agreed to make the refinance loan and to secure the loan with a first lien on title to the Property. (Deposition of J. Dallaire, T. p. 36:13-14.) Plaintiffs knew, however, that they were reinstituting personal liability on the Bank of America notes by refinancing. (Deposition of J. Dallaire, T. p. 43:1; Deposition of F. Dallaire, T. p. 17:18-21.) Even though Plaintiffs admit that they knew the BB&T Lien remained on the Property after the 2005 bankruptcy proceeding, they intended to use any future sale of the Property to pay off only the Bank of America refinance loan and not pay off the BB&T Lien in full. (Deposition of J. Dallaire, T. p. 46:10-25.) Despite having gone through bankruptcy and now professing concern about the liens on the Property, Plaintiffs chose to not consult their bankruptcy attorney during the course of the refinance. (Deposition of J. Dallaire, T. p. 28:15-16.)

In conducting the underwriting on the BOA Refinanced Loan, Bank of America engaged HomeFocus to prepare a title report on the Property for Bank of America's benefit, which disclosed the

existence of the BB&T Lien. (Deposition of R. Bramhall, T. p. 47:14-16; S. p. 291-295.) The report specifically states that it is not an abstract of title or a title opinion. An outside vendor, LSI, was engaged by Bank of America to conduct the curative title work, which included contacting Plaintiffs about the BB&T Lien. (Deposition of R. Bramhall, T. p. 50:24-25-51:1.) According to the log notes, LSI contacted Plaintiffs, and Mr. Dallaire advised LSI that the BB&T Lien had been discharged in bankruptcy. (Deposition of R. Bramhall, T. p. 31:7-10; S. p. 296-298.) LSI then advised Bank of America that the loan was clear to close, and the BOA Refinanced Loan closed August 10, 2007 ("2007 Note"). The prior Bank of America loans were cancelled, and a deed of trust was recorded in favor of Bank of America ("2007 Deed of Trust"). (R. p. 53-55, Compl. ¶ ¶ 11, 14, 21; Deposition of R. Bramhall, T. p. 30:22-25.)

Plaintiffs claim that in 2010 they found a buyer for the Property and in the course of a title search first learned that the BB&T Lien now occupied a first lien position on the Property, rather than the 2007 Deed of Trust. (R. p. 55, Compl. ¶ ¶ 26-27.) Plaintiffs claim this prevented them from selling the house. However, Plaintiffs' claims are nonsensical because the BB&T and Bank of America liens would have to be satisfied before clear title could be conveyed regardless of lien priority.

REASONS WHY CERTIFICATION SHOULD ISSUE

This Petition presents an opportunity for the Supreme Court to address the Court of Appeals' deviation from prior precedent regarding the fiduciary duty of a bank in a typical debtor/creditor transaction and whether the issue of what constitutes legal advice is a fact issue for the jury, and, in a negligent misrepresentation claim, the requirement that a party conduct an investigation prior to relying on alleged misrepresentations by another.

I. THE SUBJECT MATTER OF THIS PETITION RAISES ISSUES OF SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.

The Court of Appeals decision gives the power to determine what is legal advice to the jury and expands the scope of fiduciary relationships under North Carolina law, particularly in the debtor/creditor context. Further, the decision also changes the standard for a negligent misrepresentation claim by disregarding the requirement that a party be deprived of the ability to investigate the alleged misrepresentation. These issues are significant to the jurisprudence of North Carolina.

A. THE COURT OF APPEALS' DECISION DEPARTS FROM THE JURISPRUDENCE OF THIS STATE REGARDING QUESTIONS OF STATUTORY INTERPRETATION

In footnote 5 of its decision, the Court of Appeals finds that there is a question of fact regarding whether a loan officer sought to give Plaintiffs legal advice when discussing

the possibility of refinancing their loans. The Court of Appeals, then, gives the jury, rather than the court, the power to determine what constitutes legal advice. North Carolina General Statute § 84-2.1 defines what is the practice of law in North Carolina. This Court, and the Court of Appeals, has stated that questions of statutory interpretation are questions of law, not questions of fact. *See In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010); *State ex rel Guilford County Bd. Of Ed. v. Herbin*, 716 S.E.2d 35, 37 (Ct. App. 2011) (reviewing ruling of court regarding what constitutes the unauthorized practice of law under N.C. Gen. Stat. § 84-4). In order to determine whether something constitutes legal advice, the jury would thus have to analyze and interpret North Carolina General Statute § 84-2.1. As a question of statutory interpretation, then, the question of whether Bank of America gave legal advice is inherently a question for the court, not the jury. The Court of Appeals' decision would give the power to juries throughout the state to determine what constitutes legal advice.

Further, this Court has consistently held that the court has inherent power to deal with attorneys and allegations of the unauthorized practice of law. *See, e.g., Gardner v. N.C. State Bar*, 316 N.C. 285, 287, 341 S.E.2d 517, 519 (1986) (citing *In re Burton*, 257 N.C. 534, 542-43, 126 S.E.2d 581, 587-88 (1962) and finding the power is based upon the relationship of the attorney

to the court.) The *Gardner* court went on to find that the power to regulate the conduct of attorneys is held concurrently by the North Carolina State Bar and the court. *Id.* at 288, 341 S.E.2d 519. *See also N.C. Gen. Stat.* § 84-37 (2012) (giving the State Bar the primary responsibility for investigating the unauthorized practice of law.) The court and the State Bar, not the jury, have the power to regulate the unauthorized practice of law, including determining whether something rises to the level of giving legal advice. Given these precedents, the Court of Appeals' decision conflicts by determining that there is an issue of fact for the jury as to whether Bank of America gave legal advice.

Moreover, the Court of Appeals' decision implies that a loan officer discussing lien priority, or any aspect of a refinance transaction for that matter, could rise to the level of giving legal advice and thus create a fiduciary relationship. In their footnote 5, the Court of Appeals states that "a question of fact exists as to whether or not Defendant sought to give legal advice to Plaintiffs." This note does not make it clear what portion of the discussion between the loan officer and Plaintiffs could rise to giving legal advice and creates a situation where a loan officer could inadvertently create a fiduciary relationship simply by discussing an aspect of the

loan transaction. This decision is something for the court to determine, not an issue for the jury.

Granting this Petition would give this Court the opportunity to clarify the role of the court in making determinations as to what constitutes legal advice.

B. THE COURT OF APPEALS' DECISION CHANGES THE NATURE OF FIDUCIARY RELATIONSHIPS IN NORTH CAROLINA

In previous North Carolina cases, the imposition of a fiduciary duty has been limited to parties in a relationship of trust and confidence resulting in domination and influence on the other party. The courts of this state have consistently held that a fiduciary relationship is one where there has been "special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). It extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*. *Abbitt v. Gregory,* 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

By imposing a new standard for establishing a fiduciary relationship between a bank and a borrower, the Court of Appeals' decision contradicts, and implicitly overrules, settled

North Carolina precedents finding there is no fiduciary relationship between a borrower and lender in ordinary lending transactions. *See Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (Ct. App. 1992); *In re Gertzman*, 115 N.C. App. 634, 639, 446 S.E. 2d 130, 134 (Ct. App. 1994); *see also Security National Bank of Greensboro v. Educators Mutual Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) (declining to impose a constructive trust because there is no fiduciary relationship between a debtor and creditor.)

Those cases and their application of the rule regarding fiduciary relationships between borrowers and banks have been consistently followed by North Carolina state and federal courts and courts within the Fourth Circuit. *See also Bank of America v. Lykes*, 1:09cv435, 2010 U.S. Dist. LEXIS 65205, at *23-24(W.D.N.C. May 20, 2010) (finding there is no fiduciary relationship between a lender and a borrower under North Carolina Law); *Goldstein v. Bank of America*, 1:09cv329, 2010 U.S. Dist. LEXIS 28887, at *27(W.D.N.C. Jan. 19, 2010)(citing *Branch Banking & Trust v. Thompson* and dismissing breach of fiduciary duty claim because "there is no fiduciary relationship between a lender and a borrower under North Carolina law"); *Skeels v. Bank of America*, 1:09cv335-MU, 2010 U.S. Dist. LEXIS 1326 (W.D.N.C. January 7, 2010) (dismissing claims for breach of

fiduciary duty because of lack of fiduciary relationship). Similarly, "[c]ourts have been exceedingly reluctant to find special circumstances sufficient to transform an ordinary contractual relationship between a bank and its customer into a fiduciary relationship." *Kuechler v People's Bank*, 602 F. Supp. 2d 625, 633 (D. Md. March 9, 2009) (internal quotations omitted).

The approach taken by the Court of Appeals in this case dramatically alters the approach taken by courts of this state and numerous others regarding the fiduciary duty of lenders. The Court of Appeals found there was a question of fact as to whether a fiduciary relationship was created based solely on the interaction of the loan officer with the Plaintiffs, who had no previous relationship, prior to underwriting being conducted and prior to the loan closing. Specifically, the Court of Appeals distinguished this case from the long standing rule established in *BB&T v. Thompson* simply because the Plaintiffs chose not to seek the advice of their own bankruptcy counsel and instead chose to rely on a single discussion with a loan officer that took place prior to submitting any documents in support of the loan application. The alleged advice that the loan officer gave was part of a normal creditor/debtor transaction regarding what type of loan Plaintiffs were applying for. Again, the Court of Appeals points out in footnote 5 that such advice creates a

fiduciary duty only if it constitutes legal advice. In addition, Plaintiffs had bankruptcy counsel that they could have consulted, but chose not to.

The decision has broader implications for the law relating to fiduciary relationships, too. It could be read to create a fiduciary relationship any time a party to an arms-length transaction discusses something that may have legal ramifications. The decision of the Court of Appeals thus has far-reaching significance for the jurisprudence of North Carolina related to fiduciary relationships.

Moreover, the previous precedent established in North Carolina regarding the fiduciary relationship of borrowers and banks follows the same approach adopted by our neighboring states and the United States Court of Appeals. *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 53 (3d Cir. 1988) ("Creditor-debtor relationships such as that between the Bank and [the debtor] rarely are found to give rise to a fiduciary duty."); *Fryfogle v. First Nat'l Bank of Greencastle*, No. 6:07cv00035, 2009 U.S. Dist. LEXIS 21347, at *22-23 (W.D. Va. March 17, 2009) (finding that the legal relationship of borrower and bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between bank and borrower); *Marketic v. U.S. Bank Nat'l Ass'n*, 436 F. Supp. 2d 842, 855 (N.D. Tex. 2006) ("[A] fiduciary relationship does not exist

between a mortgagor and a mortgagee."); *Stern v. Great W. Bank*, 959 F. Supp. 478, 487 (N.D. Ill. 1997) ("[T]he conventional mortgagor-mortgagee relationship, standing alone, is insufficient to sustain an allegation of a fiduciary or special relationship."); *cf. S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 533 (4th Cir. 2002) ("[N]o fiduciary duty arises unless one party thoroughly dominates the other."); *G.E. Capital Mortgage Services, Inc. v. Pinnacle Mortgage Inv. Corp.*, 897 F. Supp. 854, 863 (E.D. Pa. 1995) ("A fiduciary relationship may arise by operation of law *only* if the lender exercises substantial control over the borrower's business affairs.")(emphasis added).

The Court of Appeals' decision in this case is thus an anomaly that will create inconsistency and uncertainty in the law governing fiduciary relationships. Granting this Petition affords this Court the opportunity to consider the implications of the decision of the Court of Appeals.

C. THE COURT OF APPEALS' DECISION CONFLICTS WITH ESTABLISHED PRECEDENT REGARDING THE STANDARD FOR A NEGLIGENT MISREPRESENTATION CLAIM.

The Court of Appeals decision also disregards the requirement under North Carolina law that a party undertake an independent investigation in order to establish reasonable reliance in a negligent misrepresentation claim. The Court of Appeals has established the rule that negligent

misrepresentation "'occurs when a party *justifiably relies* to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.'" *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 58, 554 S.E.2d 840, 846 (2001) (citation omitted) (emphasis added). North Carolina imposes a duty upon a party to make reasonable and diligent inquiry prior to relying on another party's representations. *See Calloway v. Wyatt*, 246 N.C. 129, 134-35, 97 S.E.2d 881, 885-86 (1957). North Carolina courts have repeatedly held that "when a party relying on a misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256, 552 S.E.2d 186, 192 (Ct. App. 2001)(quoting *Hudson-Cole Dev. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999)). The courts have established that the failure to make such an allegation warrants outright dismissal of claims for negligent misrepresentation. *Id.; Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847. Further, the courts of North Carolina have established that summary judgment on the issue of reasonable reliance is appropriate when the facts are so clear that they support only one conclusion, as when a "plaintiff fails to make any independent investigation." *State Props., LLC*

v. Ray, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (Ct. App. 2002); *see, e.g., Angell v. Kelly*, No. 01:01CV00435, U.S. Dist. LEXIS 87567 (M.D.N.C. Nov. 30, 2006); *Helms v. Holland*, 124 N.C. App.629, 636, 478 S.E.2d 513, 517-18 (Ct. App. 1996)(holding that when the evidence shows that a plaintiff failed to make a reasonable inquiry and was not reasonably diligent, it cannot establish justifiable or reasonable reliance as a matter of law, and summary judgment is appropriate).

Here, Plaintiffs clearly knew about the existing BB&T Lien. (R. p. 54, Compl. ¶ 19; Deposition of J. Dallaire, T. p. 20-21; Deposition of F. Dallaire, T. p. 9:19-22.) Further, Plaintiffs knew that the BB&T lien remained on the Property after the bankruptcy discharge. (Deposition of J. Dallaire, T. p. 39:21-22; Deposition of F. Dallaire, T. p. 18:5-7.) Importantly, Plaintiffs could have investigated the effect of the bankruptcy on the BB&T Lien simply by asking their bankruptcy counsel or having their own title search conducted.

The Court of Appeals' decision focuses exclusively on the issue of whether Bank of America owed a duty to Plaintiffs and reverses the decision of the trial court based solely on their finding that there is an issue of fact regarding the duty of Bank of America. The decision thus disregards the requirement of reasonable reliance and precedent from both this Court and the Court of Appeals instructing that Plaintiffs themselves had

a duty to undertake investigation before relying on any representation of Bank of America. Bank of America respectfully asks this Court to allow this Petition in order to review and consider the decision of the Court of Appeals in relation to other established precedent of this state.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE REQUIREMENT OF DOMINATION AND INFLUENCE IN FIDUCIARY RELATIONSHIPS.

The decision of the Court of Appeals also conflicts with longstanding precedent of this Court regarding fiduciary relationships. This Court has consistently held that a fiduciary relationship must result in one party exerting domination and influence over the other party. *See Abbitt,* 201 N.C. at 598, 160 S.E. at 906 (1931). The decision of the Court of Appeals does not address this requirement and instead allows Plaintiffs to raise an issue of fact regarding the establishment of a fiduciary relationship by simply saying they trusted the loan officer with whom they spoke. The Court of Appeals implicitly writes out the requirement of domination and influence by finding a fiduciary relationship might exist solely based on the assertions of a borrower who claims to have unilaterally placed his trust in a loan officer whom he met once. The Court of Appeals' decision ignoring the requirement that a fiduciary relationship also requires domination and influence conflicts with decisions by this Court, including

Abbitt v. Gregory and *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704(2001)and other decisions of the Court of Appeals. *See, e.g., Edwards v. Northwestern Bank*, 39 N.C. App. 261, 277, 250 S.E.2d 651, 662 (Ct. App. 1979)(finding that to create a fiduciary relationship, the financing party must completely dominate the will of the debtor). Allowing this Petition would permit this Court to consider the decision of the Court of Appeals in light of these decisions.

III. THE ISSUES RAISED BY THIS PETITION ARE OF SIGNIFICANT PUBLIC INTEREST.

Consistency and predictability in the law governing banking transactions are critically important to North Carolina because the headquarters to several major banks are located here. The consequences of abandoning these precedents to permit breach of fiduciary duty actions by borrowers in ordinary residential mortgage transactions would expose the banks to liability for merely discussing the loan transaction prior to underwriting even occurring. This Court now has an opportunity to address and apply the rule regarding fiduciary relationships in a banking transaction in light of the cases discussed above and public interest considerations.

CONCLUSION

The decision of the Court of Appeals hands the decision of what constitutes legal advice to the jury and departs from North

Carolina and federal precedents and grafts a new standard for fiduciary relationships in a debtor/creditor transaction. If not reviewed, the decision will impair banks' ability to handle a standard mortgage transaction without the threat of inadvertently creating a fiduciary relationship with a borrower. Reaffirmation of the rule as adopted and applied in *Branch Banking & Trust* and *Dalton* would restore consistency to the rule that banks do not owe a fiduciary duty to borrowers in an ordinary lending transaction. It would avoid further costly litigation of Plaintiffs' baseless tort claims. For these reasons, Bank of America's Petition satisfies the criteria set out in N.C. Gen. Stat. §7A-31(c) and should be allowed.

ISSUES TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Petitioner intends to present the following issues in its brief to the Court:

I. Did the Court of Appeals err in concluding that an issue of fact exists for the jury to decide whether a fiduciary duty arises when a bank representative discusses certain aspects of a loan with a customer?

II. Did the Court of Appeals err is concluding that an issue of fact exits for the jury to decide whether a bank provided legal advice and thereby created a fiduciary duty?

III. Is a borrower required to make an independent inquiry prior to allegedly relying on information supplied by a loan officer when the borrower has independent knowledge that would cause a reasonable person to further investigate the representations by the loan officer?

Respectfully submitted this the 22nd day of January, 2013.

MCGUIREWOODS, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **PETITION FOR DISCRETIONARY REVIEW BY DEFENDANT BANK OF AMERICA, N.A.**, was served on the parties to this action by transmitting a copy thereof by electronic mail and depositing a copy in the United States Mail, first class, postage prepaid, addressed to:

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This the 22nd day of January, 2013.

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No. 51PA13 NINETEEN A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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v.	)	From Cabarrus County 10-CVS-4366 COA 12-626
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RESPONSE OF PLAINTIFF-APPELLANTS TO DEFENDANT BANK OF AMERICA, N.A.'s PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. 7A-31

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SUPREME COURT OF NORTH CAROLINA

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v.	)	From Cabarrus County
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RESPONSE OF PLAINTIFF-APPELLANTS TO DEFENDANT BANK OF AMERICA, N.A.'s PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. 7A-31

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure, Plaintiff-Appellants Jacques and Fernande Dallaire (hereinafter "Dallaires") hereby respond to Defendant-Appellee Bank of America, N.A.'s (hereinafter "Bank of America") Petition for Discretionary Review. Bank of America has not met the strict standards required for discretionary review set forth in N.C. Gen. Stat. § 7A-31(c). Specifically, Bank of America has not established that the decision of the Court of Appeals conflicts with a prior decision of this Court, and it has not shown that this action has significant public interest or

involves legal principles of major significance to the jurisprudence of this state. N.C. Gen. Stat. § 7A-31(c). Consequently, Bank of America's Petition for Discretionary Review should be denied.

FACTS

Bank of America's statement of the facts insinuates that the Dallaire's had a "plan" to sell their home and avoid certain debt. (Def.['s] Pet. p.'s 1, 4.) By making this insinuation of a "plan" without supporting facts, Bank of America has deviated from Rule 15(c) of the North Carolina Rules of Appellate Procedure, which provides that "the petitioner...shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist...for discretionary review." At the risk of arguing the facts itself, plaintiffs cannot let this insinuation of a "plan" go unaddressed, and give the following restatement of the facts.

In 2005 the Dallaire's filed Chapter 7 personal bankruptcy due to business debt. (Aff. of J. Dallaire, ¶6, R. p. 188.) In the summer of 2007, after receiving numerous letters from Bank of America soliciting them to refinance their existing Bank of America loans, the Dallaire's visited a local Bank of America branch and, after assurances that any refinance loan would remain in first lien position, decided to refinance. (Dep. of J. Dallaire, T. p. 27; Dep. of J. Dallaire T. p. 32; Aff. of J.

Dallaire ¶10, 11, R. p. 189.) At the advice of the Bank of America loan officer, the Dallaire's increased the loan amount to receive $24,142.42 cash-out for the purpose of paying off outstanding auto loans. (Dep. of J. Dallaire, T. p. 34.)

The Dallaire's first discovered the predicament at issue in this case three years after the refinance when they tried to sell their home. (R. p. 55, Compl. ¶ ¶ 26-27.) Bank of America had made its lien subordinate to that of BB&T's. Now the Dallaire's have what amounts to an approximately $166,000.00 unsecured debt, when they intended to have their property stand as collateral for that debt, and were assured by Bank of America that that would be the case.

REASONS WHY CERTIFICATION SHOULD NOT ISSUE

I. THE SUBJECT MATTER OF BANK OF AMERICA'S PETITION DOES NOT RAISE ISSUES OF SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.

Bank of America argues that the Court of Appeals' decision raises issues significant to the jurisprudence of North Carolina because the decision (1) "gives the power to determine what is legal advice to the jury," (2) "expands the scope of fiduciary relationships under North Carolina law...in the debtor/creditor context," and (3) "changes the standard for a negligent misrepresentation claim by disregarding the requirement that a party be deprived of the ability to investigate the alleged misrepresentation." If these were the decision's actual

holdings of law, then there would be significant issues of jurisprudence. But they are not the actual holdings of the decision.

A. THE COURT OF APPEALS' DECISION DOES NOT DEPART FROM JURISPRUDENCE OF THIS STATE REGARDING QUESTIONS OF STATUTORY INTERPRETATION.

Bank of America declares that the Court of Appeals has now given juries, rather than the court, the power to determine what constitutes legal advice. In order to craft this as an issue, Bank of America focuses on one sentence in footnote 5 of the opinion. The first sentence of that footnote states, "[s]pecifically, a question of fact exists as to whether or not Defendant sought to give legal advice to Plaintiffs." Footnote 5 refers back to the Court of Appeals' finding that "there is a question of fact as to whether or not the circumstances of the parties' interaction prior to the signing of the loan give rise to a fiduciary relationship and consequently created a fiduciary duty for Defendant." (Op. p.'s 9-10.) (emphasis added).

Bank of America argues that this footnote creates new law because it gives juries the power to determine what constitutes the practice of law. This conclusion is unfounded. Assuming for the sake of argument that Bank of America has correctly interpreted footnote 5, the sentence could never be *stare decisis* on the question of what constitutes the practice of law. Therefore, Bank of America cannot say that because of this

single footnote, new law that conflicts with precedent has been established.

"For a case to be *stare decisis* on a particular point of law, that issue must have been raised in the action, decided by the court, and its decision made part of the opinion of the case...Thus, a case is not authority for any point not necessary to be passed on to decide the case..." 20 Am. Jur. 2d Courts § 134.

The first sentence of footnote 5 does not set forth a point of law "necessary to be passed on to decide the case." The point of law "necessary to be passed on to decide the case" was simply the well-settled rule that the existence of a fiduciary relationship is a question of fact for the jury. To make this point of law clear, the Court of Appeals' opinion cites *Carcano v. JBSS, LLC*, 200 N.C.App. 162, 684 S.E.2d 41 (2009). The *Carcano* court, referring to fiduciary relationships, held that "[w]hether such a relationship exists is generally a question of fact for the jury." *Id.* at 178. (citation omitted) (emphasis added).

As further proof that the first sentence of footnote 5 is "not necessary to be passed on to decide the case...," and thus not new law, one need only read the second sentence, which states, "[i]n either event, when a financial institution undertakes to provide a customer with a service beyond that

inherent in the creditor-debtor relationship, it must do so reasonably and with due care." (emphasis added). The reference to "legal advice" in the first sentence clearly cannot be necessary to decide the case, and thus constitute *stare decisis*, when the very next sentence expressly states it was not needed to reach the court's decision.

Instead of an inquiry on the practice of law, the Court of Appeals' analysis focused on the Dallaire's argument that "special circumstances were present to give rise to a fiduciary relationship where the facts suggest that [Bank of America] advised [the Dallaire's] that a first priority lien was possible and being provided." (Op. p. 9.) (emphasis added).

The Court of Appeals held that "there is a question of fact as to whether or not the circumstances of the parties' interaction prior to signing the loan give rise to a fiduciary relationship..." (Op. p.'s 9-10.) (emphasis added). In other words, there is a question of fact because the jury must weigh the totality of the circumstances to determine whether a fiduciary relationship existed and not because someone might or might not have given legal advice to the Dallaire's.

Far from making new law, the Court of Appeals based its decision to remand on very straightforward and sound reasoning: (1) the Dallaire's contended that special circumstances gave rise to a fiduciary relationship, and (2) North Carolina case

law holds that whether a fiduciary relationship exists is a question of fact for the jury. The court merely held that summary judgment for Bank of America was not proper because an issue of fact existed for the jury -- to determine whether there was a fiduciary relationship in these circumstances.

Bank of America also expresses concern over whether the Court of Appeals' decision "implies that a loan officer discussing lien priority, or any aspect of a refinance transaction for that matter, could rise to the level of giving legal advice and thus create a fiduciary relationship." (Def.['s] Pet. p. 9.) "[A] case is not binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced." 20 Am. Jur. 2d Courts § 134. Nowhere does the Court of Appeals hold that a single meeting with a loan officer can give rise to a fiduciary relationship. The court merely held that there were sufficient facts for the jury to determine whether special circumstances existed to give rise to such a fiduciary relationship.

B. THE COURT OF APPEALS' DECISION DOES NOT CHANGE THE NATURE OF FIDUCIARY RELATIONSHIPS IN NORTH CAROLINA.

Next, Bank of America declares that the Court of Appeals' decision contradicts and overrules "settled North Carolina precedents finding there is no fiduciary relationship between a borrower and lender in ordinary lending transactions." Not only

does the Court of Appeals' decision leave such precedents undisturbed, it goes out of its way to make assurances that it is not altering the law regarding borrower-lender fiduciary relationships. The court reaffirms that, "[w]hile uncommon, North Carolina law does leave room for the recognition of a fiduciary relationship between lender and borrower." The court then cites its opinion in *Branch Banking & Trust Co. v. Thompson*, 107 N.C.App. 53, 418 S.E.2d 694 (1992), which held:

> [A]n ordinary debtor-creditor relationship generally does not give rise to such a special confidence: [t]he mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship. This is not to say, however, that a bank-customer relationship will never give rise to a fiduciary relationship given the proper circumstances.

Id. at 60-61. (emphasis added).

Bank of America asserts that the decision is "an anomaly that will create inconsistency and uncertainty in the law governing fiduciary relationships," and "[g]ranting this Petition affords this Court the opportunity to consider the implications of the decision of the Court of Appeals." (Def.['s] Pet. p. 14.) One sentence in a footnote, that has no bearing on the actual holding of the case, does not make the decision an anomaly. The key word in Bank of America's conclusion is "implications." This Court should not spend its time chasing

down the "implications" of decisions which in no way contradict established common law.

C. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ESTABLISHED PRECEDENT REGARDING THE STANDARD FOR A NEGLIGENT MISREPRESENTATION CLAIM.

Bank of America contends that the Court of Appeals' decision "disregards the requirement under North Carolina law that a party undertake an independent investigation in order to establish reasonable reliance in a negligent misrepresentation claim." (Def.['s] Pet. p. 14.) Bank of America describes the decision as "focus[ing] exclusively on the issue of whether Bank of America owed a duty to Plaintiffs and revers[ing] the decision of the trial court based solely on their finding that there is an issue of fact regarding the duty of Bank of America." According to Bank of America, the Court of Appeals "disregard[ed] the requirement of reasonable reliance and precedent...instructing that Plaintiffs themselves had a duty to undertake investigation before relying on any representation of Bank of America." (Def.['s] Pet. p.'s 16-17.)

The Court of Appeals actually held, "[g]iven our decision to remand on the issue of whether a fiduciary duty existed, we remand on [the issue of negligent misrepresentation] to determine, if a duty existed, whether Defendant negligently

misrepresented the priority the loan would receive." (Op. p.'s 10-11.)

Bank of America's argument that the Court of Appeals disregarded the reasonable reliance element of a negligent misrepresentation claim is a classic example of an *argumentum ad ignorantiam*, or "argument from ignorance." The bank is arguing that the Court of Appeals remanded on the element of "duty," and therefore, the Court of Appeals dispensed with the requirement that a plaintiff conduct an investigation before there can be "reasonable reliance." Such reasoning is perhaps persuasive at first blush, but breaking it down reveals a statement that says, "because we can't find in the opinion where the Court of Appeals considered if plaintiffs should have conducted an investigation, that means the Court of Appeals dispensed with this requirement altogether."

In actuality, there was no reason for the Court of Appeals to discuss the "reasonable reliance" element. It had already decided that there was a question of fact on the most fundamental element of a negligent misrepresentation claim -- whether there was a duty owed to the party making the claim. Nothing in the decision conflicts with any established precedent by this Court. It is illogical for Bank of America to argue that because the decision does not address each element of

negligent misrepresentation in turn, the Court of Appeals has abandoned one of those elements.

As for Bank of America's assertion that the Dallaire's could have discovered the bank's negligence by consulting their bankruptcy counsel, it would have been impossible for the Dallaire's bankruptcy attorney to foretell that Bank of America would negligently subordinate itself to the BB&T loan, especially after it had assured the couple that the refinance loan would remain in first position. No investigation of <u>any kind</u> would have revealed Bank of America's negligence until it was too late.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE REQUIREMENT OF DOMINATION AND INFLUENCE IN FIDUCIARY RELATIONSHIPS.

Bank of America claims that the decision also conflicts with long-standing precedent on the "domination and influence" requirement in finding a fiduciary relationship. This argument is simply a disguised reiteration of the bank's objection to the finding that there is a question of fact on whether a fiduciary relationship existed in this case. It makes no sense to say that the decision set new standards for domination and influence in fiduciary relationships when the Court of Appeals remanded to the trial court on the very question of whether a fiduciary relationship existed in the first place. The Court of Appeals didn't make new law in its decision. It did interpret the facts

of the case in a way which Bank of America did not like, but that should not form the basis of issuing a certification to review the decision.

III. THE ISSUES RAISED BY THE PETITION ARE NOT OF SIGNIFICANT PUBLIC INTEREST.

Bank of America claims that this Court should hear this case because "the headquarters of several major banks are located [in North Carolina]." The Court of Appeals' decision has not strayed from any precedent governing banking transactions, and has in fact reaffirmed those precedents. There is no reason for this Court to accommodate Bank of America simply because it and several other megabanks have their headquarters in this state.

CONCLUSION

For the foregoing reasons, Bank of America's Petition fails to satisfy the strict standards required for discretionary review set forth in N.C. Gen. Stat. § 7A-31(c), and its Petition for Discretionary Review should be denied.

Respectfully submitted this the 31st day of January, 2013.

[SIGNATURES ON FOLLOWING PAGE]

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing response on counsel for all parties by depositing a copy, contained in a first-class postage paid wrapper, into a depository under the exclusive care and custody of the U.S. Postal Service, and also by facsmile, addressed as follows:

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EXHIBIT A

NO. COA12-626

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

JACQUES A. DALLAIRE and FERNANDE DALLAIRE,
Plaintiffs,

v. Cabarrus County
No. 10 CVS 4366

BANK OF AMERICA, N.A., HOMEFOCUS SERVICES, LLC, and LANDSAFE SERVICES, LLC
Defendants.

Appeal by Plaintiffs from judgment entered 14 February 2012 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 29 November 2012.

Ferguson, Scarbrough, Hayes, Hawkin & DeMay, P.A., by James E. Scarbrough, for the Plaintiff-Appellants.

McGuire Woods, LLP, by Lia A. Lesner and Robert A. Muckenfuss, for Defendant-Appellees.

BEASLEY, Judge.

Jacques and Fernande Dallaire (Plaintiffs) appeal from the trial court's entry of summary judgment in favor of Defendants. For the following reasons, we affirm in part and reverse and remand in part.

In 2005, Plaintiffs filed Chapter 7 bankruptcy to relieve their personal liability on their debts. Through the bankruptcy

proceedings, Plaintiffs were relieved of their personal liability on three mortgage liens held by two lenders against Plaintiffs' home. Defendant Bank of America held two of these liens: one, a deed of trust on a mortgage note in first priority status, in the original amount of $138,900 and a second, an equity line deed of trust in second priority status, in the original amount of $25,000. The third lien secured a business loan and was held by Branch Banking & Trust (BB&T) in the original amount of $241,449.37 in third priority status. All liens remained valid as against the property.

In July 2007, Plaintiffs responded to Defendant's mailing solicitations for refinancing home mortgages and went to Defendant Bank of America's local branch to discuss a refinance mortgage for their home. Plaintiffs allege that they informed Defendant's agent fully with respect to their bankruptcy and remaining liens. Plaintiffs also allege that Defendant Bank of America's agent repeatedly assured them that a new refinancing loan would receive first priority status and advised them to increase the amount of the loan to pay off two car notes. Relying on this assurance and advice, and without seeking outside counsel, Plaintiffs applied for a refinancing loan in the amount of $166,000. They were approved and received roughly

$24,000 in cash from the loan to repay their car notes. Overall, their monthly expenses were reduced.

The Plaintiffs' loan application was for a first-mortgage lien. On the application, Plaintiffs disclosed that they had "been obligated on [a] loan which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment[.]" However, Plaintiffs checked "No" next to the disclosure asking whether they had "been declared bankrupt within the past 10 years[.]"

Following the application and in accordance with general procedure, Defendant Bank of America ordered a "title search" from its subsidiary, Defendant HomeFocus (now Landsafe Services).[1] This "title search" showed the three liens held against Plaintiffs home. Defendant Bank of America employed LSI Title Agency (LSI), upon which Defendant employed to do "curative title work[,]" to assess the validity of the BB&T lien. LSI gathered information from Plaintiffs and noted that Plaintiffs advised LSI that the BB&T lien was discharged. LSI advised Defendant Bank of America that it was secure in moving

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[1] In their briefs, both parties refer to the research performed by Defendant HomeFocus (now LandSafe Services) as a "title search." We have placed this language in quotations because a title search in North Carolina is an act which constitutes the practice of law as defined by N.C. Gen. Stat. § 84-2.1 (2011). We also note that corporations are prohibited from practicing law. *See* N.C. Gen. Stat. § 84-5 (2011).

forward with the loan. Defendant Bank of America did not have an attorney review the information and handled the full refinance process itself.

In 2010, Plaintiffs attempted to sell their home and conducted a title search. The search revealed the priority status of the liens on the home: the BB&T lien now held first priority and the new Bank of America lien held second priority.

On 15 December 2010, Plaintiffs filed the instant action. Plaintiffs alleged negligent misrepresentation, negligent title search, breach of contract, breach of fiduciary duty, and statutory violations. On 18 January 2011, Defendants filed a motion to dismiss for failure to state a claim. The trial court denied this motion on 21 February 2011. On 19 December 2011, Plaintiffs moved to join LSI Title Agency as an additional defendant. On 29 December 2011, Defendants filed a motion for summary judgment. On 14 February 2012, the trial court heard both motions and granted Defendants' motion for summary judgment but dismissed the action without prejudice as to the non-party LSI Title Agency. Plaintiffs appeal the dismissal.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact

and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)(quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

We first note that Plaintiffs attribute no breach of duty, negligent act, or legal wrong to Defendant Landsafe Services (formerly HomeFocus Services). The entirety of Plaintiffs' brief is dedicated to allegations against Defendant Bank of America. Consequently, we affirm summary judgment with respect to Landsafe Services (formerly HomeFocus Services).[2] We also note that Plaintiffs did not argue that the trial court erred in granting summary judgment on the claim of negligent title search. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). This argument is thus abandoned.

I. Breach of Contract Claim

Plaintiffs first argue that the trial court erred in granting Defendants' motion for summary judgment because a genuine issue of material fact exists as to whether Defendant

[2] Because this leaves only Defendant Bank of America as a defendant in this action, this opinion will use the term "Defendant" moving forward to reference Defendant Bank of America.

Bank of America owed Plaintiffs a contractual duty to provide a first mortgage loan. We disagree.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000)(citation omitted).

Here, Plaintiffs make no clear allegations in their brief that a contract existed outside of the signed note and deed of trust to secure the loan.[3] Thus, to establish a breach of contract, Plaintiffs must show that Defendant breached the duty undertaken in the express terms of the written loan contract between the parties. The terms of deed of trust include the following duties:

> **Borrower shall** promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are

[3] Plaintiffs allude to the possibility that Defendant's refinancing solicitations or subsequent negotiations constituted an offer but provide nothing specific allowing this Court to determine that a clear and definite offer was made or accepted prior to the written contract signed by the parties.

> concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, **Lender may** give Borrower *a notice identifying the lien.* Within 10 days of the date on which that notice is given, **Borrower shall** satisfy the lien or take one or more of the actions set forth above in this Section 4.

(emphasis added). Thus, the terms of the contract designate the affirmative duty to assure that this lien has and maintains first priority to Plaintiffs as the borrowers. The only duty assumed by Defendant is a discretionary one in which Defendant may choose to notify Plaintiffs if it learns that this lien does not have first priority, but Defendant does not have to perform this action. Therefore, Plaintiffs can establish no affirmative duty on the part of Defendant to inform Plaintiffs that the lien held second priority status.[4]

II. Tort Claims

Plaintiffs next argue that the trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether a duty existed with respect to Plaintiffs' tort claims. We agree.

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[4] Although Plaintiffs' complaint alleges in the alternative that they were intended third-party beneficiaries of the contract between LandSafe and Bank of America, Plaintiffs do not advance this argument on appeal. Accordingly, we need not address it.

A. Breach of Fiduciary Duty

A fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Beyond the usual occurrence, such as that found between a lawyer and client, the relationship "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." *Id.* (citation omitted)(internal quotation marks omitted). "Whether such a relationship exists is generally a question of fact for the jury." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009)(citation omitted).

While uncommon, North Carolina law does leave room for the recognition of a fiduciary relationship between lender and borrower.

> [A]n ordinary debtor-creditor relationship generally does not give rise to such a special confidence: [t]he mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship. This is not to say, however,

> that a bank-customer relationship will never give rise to a fiduciary relationship given the proper circumstances. Rather, parties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract and the duties set forth in the U.C.C.

Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 60-61, 418 S.E.2d 694, 699 (1992)(second and third alteration in original)(citations omitted)(internal quotation marks omitted). In *Branch Banking & Trust Co.*, this Court found that no fiduciary duty existed where the borrowers relied on outside counsel and advice in addition to the representations of the lender. *Id.*

Here, Plaintiffs argue that special circumstances were present to give rise to a fiduciary relationship where the facts suggest that Defendant advised Plaintiffs that a first priority lien was possible and being provided. Plaintiffs allege that they openly discussed their circumstances with Defendant and that Defendant assured them they could obtain a first priority lien mortgage loan. We find this case distinguishable from *Branch Banking & Trust Co.* because Plaintiffs did not receive outside advice. *Id.* When the facts are viewed in the light most favorable to Plaintiffs, we find that there is a question of fact as to whether or not the circumstances of the parties'

interaction prior to signing the loan give rise to a fiduciary relationship and consequently created a fiduciary duty for Defendant.[5]

B. Negligent Misrepresentation

Plaintiffs argue that Defendant negligently misrepresented that the new loan would receive first priority status. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988)(citations omitted). In addition, "parties to a contract impose upon themselves the obligation to perform it; [however,] the law [also] imposes upon each of them the obligation to perform it with ordinary care . . . ." *See Toone v. Adams*, 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964).

Given our decision to remand on the issue of whether a fiduciary duty existed, we remand on this issue as well to

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[5] Specifically, a question of fact exists as to whether or not Defendant sought to give legal advice to Plaintiffs. In either event, when a financial institution undertakes to provide a customer with a service beyond that inherent in the creditor-debtor relationship, it must do so reasonably and with due care.

determine, if a duty existed, whether Defendant negligently misrepresented the priority the loan would receive.

III. The Secure and Fair Enforcement Mortgage Licensing Act

Plaintiffs argue that the trial court erred in dismissing the statutory claims under § 53-244.110 of the Secure and Fair Enforcement Mortgage Licensing Act (the S.A.F.E. Act), N.C. Gen. Stat. § 53-244.110 (2011), and its predecessor the Mortgage Lending Act (MLA), N.C. Gen. Stat. §§ 53-243.01 to -543.18 (2001)(repealed 2009). We disagree.

"It is a well-established rule of construction in North Carolina that a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999)(citation omitted). "The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). For example, in *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 718-19, 401 S.E.2d 85, 87 (1991), this Court refused to apply the

North Carolina "Lemon Law" under the New Motor Vehicles Warranties Act, N.C. Gen. Stat. §§ 20-351 to -351.10 (1990), to a plaintiff's vehicle lease where "the rights and obligations involved in the plaintiff's claim [arose] out of the lease contract which was executed . . . prior to the time when the statute came into effect in North Carolina" and there was no indication that the legislature intended such retroactive application. *Estridge*, 101 N.C. App. at 718, 401 S.E.2d at 86.

Here, it is not proper to retroactively apply the S.A.F.E. Act to the circumstances of Plaintiffs' loan with Defendant. The S.A.F.E. Act was enacted in July of 2009. Secure and Fair Enforcement Mortgage Licensing Act, ch. 374, 2009 N.C. Sess. Laws 681 (codified at N.C. Gen. Stat. § 53-244.010 to 53-244.121 (2011)). The legislature expressed clear intent that it be applied prospectively:

> Except as otherwise provided by Section 5 of this act [(pertaining to individuals licensed under the old requirements and the effect of the Act on their licensure status)], this act becomes effective July 31, 2009, and applies to all applications for licensure as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer filed on or after that date.

ch. 374, § 6, 2009 N.C. Sess. Laws at 709. As in *Estridge*, Plaintiffs' claims arise out of the negotiations and contract

executed prior to the enactment of this statute. In fact, Plaintiffs signed the contract in 2007, two years before the S.A.F.E. Act came into existence. Thus, it is inapplicable to the facts of this case and the trial court properly dismissed the claim that Defendant violated this Act.

With respect to Plaintiffs' reliance on the MLA, we find Plaintiffs' claim abandoned. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). Plaintiffs fail to provide any provision of the MLA that creates a statutory duty applicable to the case sub judice. Plaintiffs' brief merely alleges that the MLA had a similar purpose to the S.A.F.E. Act in protecting consumers in mortgage loan transactions. In order to vaguely establish that the MLA created duties of disclosure, Plaintiffs brief then cites *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 681 S.E.2d 465 (2009), where this Court found the MLA created a duty for a lender's to notify the borrower that the property was in a flood plain. *Id.* at 39-44, 681 S.E.2d at 473-76. However, Plaintiffs fail to provide any argument as to how that case or the MLA itself directly apply to the case *sub judice*. Plaintiffs' mere statement that "issues of material fact exist as to whether

[Defendant] violated its statutory standards of conduct" is insufficient where there is no argument as to what that statutory standard is or how it was violated. This Court will not make the argument for Plaintiffs.

Affirmed in part, Reversed and Remanded in part.

Judges STROUD and HUNTER, JR. concur.

Supreme Court of North Carolina

JACQUES A. DALLAIRE and wife, FERNANDE DALLAIRE

v

BANK OF AMERICA N.A., HOMEFOCUS SERVICES, LLC, and LANDSAFE SERVICES, LLC

From N.C. Court of Appeals
(12-626)
From Cabarrus
(10CVS4366)

ORDER

Upon consideration of the petition filed on the 22nd of January 2013 by Defendants in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 27th of August 2013."

Beasley, J. recused

s/ Jackson, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of August 2013.

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
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