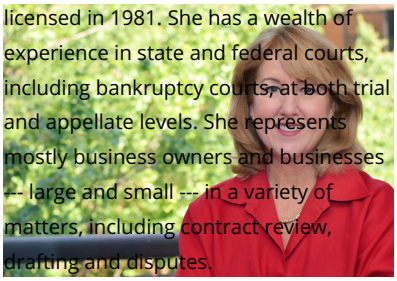
# What We Know

**ARTICLES & INSIGHTS**

**ABOUT THE AUTHOR**

Bettie Kelley Sousa has been practicing law with Smith Debnam since becoming licensed in 1981. She has a wealth of experience in state and federal courts, including bankruptcy courts, at both trial and appellate levels. She represents mostly business owners and businesses --- large and small --- in a variety of matters, including contract review, drafting and disputes.



## When is a Question of Fact NOT a Question of Fact?

June 20, 2017 | by

*His light was red*, swore the nuns. *My light was green*, slurred the drunk. *Question of fact*, ruled the judge. Summary judgment, denied.

If cases were that simple, our courts wouldn't have enough to do. Trial court motion calendars pack in summary judgment motions. And with each release of opinions, parties challenge many of those rulings before our Court of Appeals and Supreme Court. A quick, unscientific tally of the released COA opinions from January through early June of 2017 reveals 21 decisions in which summary judgment was at least part of the review.

So, why do lawyers move for summary judgment so much? Can't they just look at a material issue and apply the red light/green light test before filing a motion? Apparently not.

As in a good relationship or a delicious meal, it is the nuances that make things interesting. In contrast, with a stoplight you only have green, yellow, red; and when one goes off, another comes on. Most questions of fact are not as crisp. Consider a contract's terms. Words. A phrase might seem clear to one party, who argues that the court must limit consideration to the "four corners" of the document. Question of law. But another party may interpret the same phrase differently and hope to offer context (e.g., course of dealing, industry standards) to show what the phrase really means. Question of fact.

Case in point is a recent decision, *United Community Bank (Georgia) v. Wolfe*, from our North Carolina Supreme Court. As a creditors' rights attorney, I love this decision. And, as noted in my article posted a few months ago titled *Has the Deficiency Worm Turned?* yours truly saw it coming. Not clairvoyant, I do believe that based on a few prior decisions, it was getting a *littttle* too hard for creditors to carry out their duties to diligently collect their unpaid loans. Finding questions of fact too quickly, trial courts were taking the path of least resistance by sending deficiency cases to trial over the factual question of the value of the collateral.

A deficiency is what remains owing on a debt after the collateral has been sold and the

proceeds of that sale applied to the debt.

**Here's how it usually plays out.**

**Stage one** is like a wedding; the parties to the loan believe everything is going to work out as they promise. The property was bought for a fair price, it is worth more than the loan, the borrowers will keep their good jobs and make their payments on time, and the lender will earn some income on the loan. Like marriage, many of these deals work out as expected. But, like marriages, many fail.

**Stage two** occurs when the payments slow down, or some are missed. Most lenders would prefer that the borrowers keep the property and pay off the debt. Often, payment terms are extended, with or without a completely new agreement. During this time, there are typically ample communications as to what is owed and what has been paid. Rarely is there a question of fact in this day and age of electronic payments and digital bank statements. Borrowers know what they owe. The issue is they simply can't pay.

**Stage three** is not pretty. It's when the lender must cut its losses. The borrower must give up the property. This can be done by agreement, but usually is achieved with a foreclosure under the power of sale clause in the agreement. With a foreclosure, the borrower is given ample opportunity to pay or restructure the debt. Usually, when a foreclosure sale is noticed, we know how it's going to end. The borrower, the vultures, and the rest of the free world are given notice of the foreclosure sale. But few if any come forward; and the lender, to protect the collateral from getting purchased for next to nothing, enters a credit bid, basically paying itself to buy the property.

**Stage four** is the deficiency action. The lender owns the property. The debt has been reduced by the credit bid. But a lot of money remains owed. So, the lender sues the borrower. At about this time, the borrowers have either given up or woken up. Unlike situations allowing a borrower to "walk away" from the collateral with no debt owed, North Carolina allows a third-party lender to foreclose, bid at its sale, and sue for the deficiency. But, the catch is that, by way of defense, the borrower can argue that the property, at the time of the foreclosure sale, was worth the debt, or that the lender's bid was substantially less than the true value of the property. Basically, "you orchestrated this sale, you bought the property and sold it to yourself too cheap, and now you're expecting me to pay you more."

Now, back to our Supreme Court and summary judgment. With an eye on the statutory defenses, the Wolfes submitted an affidavit opposing summary judgment. The affidavit correctly narrowed the time to the date of the foreclosure sale, something earlier cases required.  And, as the property owners, they could provide their opinion of the value without an expert. Despite their opinion, the Supremes gave the Wolfes a supreme smackdown. They reinstated the bank's summary judgment granted by the trial court (but reversed by the Court of Appeals). No question of fact.

So, what was wrong with the borrowers' affidavit? It jumped to the right conclusion but had no facts to support it. The affidavit stated that the property "at the time of the sale" was "fairly worth the amount of the debt" and the lender's bid "was substantially less

than its fair market value." Pretty much parroting the statute, G.S. §45-21.36. But, there was no dollar amount given. There was no "supporting evidence."

So, when moving for summary judgment, get your affidavit in order and scrutinize the opposing side's. And should you find yourself opposing the nuns' motion for summary judgment – your (formerly) drunk client's affidavit needs to say more than his light was green. He should state that he was awake, listening to Charley Pride on the radio, Channel 4, that he saw the light from 50 yards away turn from red to green, and he watched it as it stayed green while he approached, entered the intersection, and collided with the other car. Burp.


CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541