14-2078

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR COOPERATIVE BANK,

Plaintiff-Appellant,

v.

RICHARD ALLEN RIPPY; JAMES D. HUNDLEY; FRANCES PETER FENSEL, JR.; HORACE THOMPSON KING, III; FREDRICK WILLETTS, III; DICKSON B. BRIDGER; PAUL G. BURTON; OTTIS RICHARD WRIGHT, JR.; OTTO C. BUDDY BURRELL, JR.,

Defendants-Appellees.

On Appeal From The United States District Court For The Eastern District Of North Carolina in Case No. 7:11-cv-00165-BO

UNSEALED REPLY BRIEF FOR APPELLANT FDIC-RECEIVER

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Date: March 3, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, the Federal Deposit Insurance Corporation as Receiver for Cooperative Bank ("FDIC-Receiver"), who is Appellant, makes the following disclosures:

(1) Is the party a publicly held corporation or other publicly held company? NO.

(2) Does FDIC-Receiver have any parent corporations? NO.

(3) Is 10% or more of the stock of the FDIC-Receiver owned by a publicly held corporation or other publicly held entity? NO.

(4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? NO.

(5) Is the FDIC-Receiver a trade association? NO.

(6) Does this case arise out of a bankruptcy proceeding? NO.

Signed: /s/ James Scott Watson **Date:** March 3, 2015

Counsel for the Federal Deposit Insurance Corporation as Receiver for Cooperative Bank, Appellant

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INTRODUCTION

A North Carolina statute establishes the obligation of directors and officers to perform their duties with ordinary care. The statute expressly addresses liability by providing that directors and officers who *meet* that standard "shall have no liability." Nevertheless, in this case the district court rewrote North Carolina's statute prescribing these duties by applying a gross negligence standard.

Relying primarily on an unreported state trial-court opinion, the district court applied Delaware's expansive common-law business-judgment rule and its gross negligence "standard of review" for director conduct, and held that only directors and officers (" D&Os") who commit gross negligence shall be liable. The court then relied on a summary grade in a 2006 examination – conducted *prior* to the loans involved here – to hold that, as a matter of law, FDIC-R could not overcome the business-judgment rule. The court failed to address evidence that the D&Os here, acting against the bank's interests, negligently ignored warnings and their own pledges to change the bank's credit culture. The court then compounded its error, holding that in North Carolina, claims of gross negligence require evidence of *intentional* wrongdoing, ignoring the North Carolina Supreme Court's holding that gross negligence can be found "even where a party's conduct does not rise to the level of deliberate or conscious action[.]"[1] These errors must be reversed.

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[1] *Jones v. City of Durham*, 622 S.E.2d 596, 600 (N.C. 2005), *superseded and*

The D&Os respond by relying principally on a recent unreported trial-court opinion that adopted Delaware's common-law business-judgment rule and its *gross* negligence standard for liability. The district court relied on this unpublished opinion as well, and in doing so effectively rewrote North Carolina's statute. Other courts have consistently reversed attempts to interpret statutes identical to North Carolina's as imposing a gross-negligence standard, and this Court should do the same.

The D&Os ignore the language of North Carolina's statute and instead wrongly argue that this unpublished North Carolina decision and a comment to the statute (which they misinterpret) support the application of Delaware law and its gross negligence standard of "review" in this case. But the words "gross negligence" and "standard of review" are not found in North Carolina's statute. Incorrectly assuming that this flawed "standard of review" (applying Delaware's presumptions) can be applied here, the D&Os then make conclusory statements that the FDIC-R's evidence did not overcome the presumptions prescribed by their "standard of review." This Court should reject attempts to rewrite the statute by imposing a gross negligence "standard of review," and should instead apply North Carolina's statute and a business-judgment rule consistent with that statute and North Carolina's longstanding common law.

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withdrawn on other grounds, 638 S.E.2d 202 (N.C. 2006).

Similarly, the D&Os ask this Court to ignore recent decisions of the North Carolina Supreme Court – the *Jones* decisions, withdrawn on *other* grounds – which rejected the argument that *intentional* conduct is a necessary element of gross negligence. The North Carolina Supreme Court explained that earlier decisions had conflated cases involving intentional conduct with cases involving gross negligence, and explained that North Carolina's statutes reflect the legislature's intent to distinguish intentional conduct from gross negligence. The D&Os, like the district court below, rely on the withdrawal of *Jones* without addressing its reasoning. Other decisions of the North Carolina courts have recognized the rule announced in *Jones*, as should this Court, to hold that gross negligence does *not* require a showing of intentional conduct. Under the appropriate standards, genuine issues of material fact require remand for trial.

ARGUMENT

I. The Business-Judgment Rule Does Not Insulate the D&Os From Liability For Ordinary Negligence

A. The Plain Language of N.C.G.S. § 55-8-30 Establishes Ordinary Care as the Standard and Exclusively Provides that Directors Meeting *That* Standard Shall Have No Liability

The plain text of Section 55-8-30, North Carolina's statute governing the conduct of bank and other corporate directors and officers, requires them to exercise good faith *and* the diligence, care, and skill of "ordinarily prudent [men] . . .

under similar circumstances."[2] The statute thus provides a standard of ordinary care for directors and officers, and it explicitly addresses *liability* and the conduct that will avoid liability: "A director is not liable for any action taken as a director, or any failure to take any action, *if he performed the duties of his office in compliance with this section"* (emphasis added).[3] The plain text of the statute should end any debate about the standard of care or the "standard of review" for director or officer conduct: he or she will not be liable *if* he or she performed with ordinary care.

Notwithstanding this clear and unambiguous language, the D&Os (and the *amici*) urge this court to disregard the will of the North Carolina legislature and engraft substantially different terms onto the statute. Such a revision of the statute is impermissible. North Carolina's Supreme Court has unequivocally held that where

> the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.[4]

The statute exclusively provides only one exemption for liability – "if he

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[2] "A director shall discharge his duties as a director, including his duties as a member of a committee: (1) In good faith; (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) In a manner he reasonably believes to be in the best interests of the corporation." N.C.G.S. § 55-8-30(a).

[3] N.C.G.S. § 55-8-30 (emphasis added).

[4] *Boseman v. Jarrell,* 704 S.E.2d 494, 500 (N.C. 2010) (internal citations omitted); *see also Williams v. Williams*, 261 S.E.2d 849, 854 (N.C. 1980)("[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning").

performed the duties of his office in compliance with this section." Nevertheless, the D&Os argue that the statute should be read to insert "and a director shall not be liable for ***breaches*** of the duties of his office described in this section unless those breaches constitute gross negligence." The D&Os also would construe the statute to add "the judicial standard of review of the directors' performance of duties shall be under Delaware's common-law business-judgment rule." Such an impermissible judicial construction of the statute contravenes its plain language and is forbidden in North Carolina. "It is a well-settled principle of statutory construction that where a statute is intelligible without any additional words, no additional words may be supplied."[5] This Court should decline to add these additional terms and instead hold that under the plain language of N.C.G.S. § 55-8-30 directors and officers are liable for ordinary negligence under North Carolina law.

B. Under Established Principles of Statutory Construction, Directors and Officers Are Liable for Conduct Not Meeting the Ordinary Standard of Care

As the FDIC-R argued below, the long-standing common law in North Carolina held directors and officers liable for ordinary negligence, and the statute did nothing to change that.[6] In addition to its plain language, an

[5] *State v. Camp*, 209 S.E. 2d 754, 756 (N.C. 1974).

[6] D.E. 46, pp. 4-10 ("The common law business judgment rule does not change the standard of care."). The D&Os mistakenly assert at p. 41, n.17 of their brief that the

examination of the context of the statute and application of fundamental principles of statutory interpretation confirm that the legislature understood and intended directors and officers to be liable for ordinary negligence and did not intend to allow them to avoid liability if their conduct did not constitute gross negligence.

First, the North Carolina legislature has repeatedly demonstrated that it knows perfectly well how to immunize parties from liability for conduct that does not rise to gross negligence, and when it does so it does so explicitly.[7] For example, in N.C.G.S. § 55A-8-30, the legislature established the same duties and standards of conduct for directors of non-profit corporations as for other corporations, using language *identical* to Section 55-8-30. But, recognizing that the standards established for directors of non-profits give rise to actions for ordinary negligence, the legislature also enacted N.C.G.S.A. § 55A-8-60, which provides that directors and officers of those corporations "shall be immune individually from civil liability for monetary damages" unless the director "committed gross negligence or willful or wanton

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FDIC-R waived the issue, citing *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013). Unlike the appellants in *Liberty*, who never raised the issue below, the FDIC-R raised and briefed the issue, leading the district court initially to hold that there was no reason for the legislature to use the language of ordinary negligence if it intended a gross negligence standard. *FDIC v. Willetts*, 882 F. Supp. 2d 859, 867-68 (E.D.N.C. 2012)(internal citations omitted).

[7] *See, e.g.* N.C.G.S.A. §58-24-35; §18B-700; §130A-471; §143B-708; §166A-14 (repealed in 2012); §58-84-60; §131E-47.1.

misconduct that resulted in the damage or injury." Such an immunizing provision is entirely superfluous unless the language of the statute otherwise imposed liability for ordinary negligence.[8] It is a fundamental "principle of statutory construction that a statute should not be interpreted in a manner which would render any of its words superfluous."[9] Reading Section 55-8-30 to impose liability only for gross negligence violates this principle by rendering Section 55A-8-60 superfluous. And this immunizing language is absent from Section 55-8-30.

Other states with statutory standards of conduct functionally identical to North Carolina's that wished to immunize their directors and officers from liability except for gross negligence have done so explicitly.[10] Those states implicitly recognized that, without explicit provisions providing a gross negligence standard, language like that of Section 55-8-30 imposed liability for ordinary negligence.

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[8] The *amicus* brief of the American Association of Bank Directors and the Clearinghouse argues that the legislature "knows how to" impose liability with specificity, pointing to § 55-8-33. Brief at 19. But that statute serves not only to impose personal liability (without need to address the standard of care), but to precisely *measure* the liability, and provide specific contribution rights from other directors. The decision to elsewhere impose liability, measure damages, and establish rights of contribution duties by statute does not alter the plain language of Section 55-8-30.

[9] *State v. Coffey,* 444 S.E.2d 431, 434 (N.C. 1994) (internal citations omitted).

[10] *See, e.g.* Ind. Code Ann. §§ 23-1-35-1(e)(2), 28-13-11-5(a)(2); Me. Rev. Stat. tit. 13-C, §§ 832(1)(B) (directors), § 843(3) (officers); N.D. Cent. Code § 6-01-32; D.C. Code §§ 29-306.31(a)(2), 29-306.42(d).

Second, the North Carolina legislature has explicitly stated that a director "shall not be liable" if he performs consistent with the level of care established in the statute. The statute contains only one standard of care–"the care an ordinarily prudent person in a like position would exercise under similar circumstances." It also provides only one level of performance for which a director or officer shall not be liable. *Expresio unius est exclusio alterius.* The legislature's expression of the ordinary care standard and only one level of performance to avoid liability show that it did not intend to prescribe a different gross-negligence standard.[11]

No court addressing language functionally identical to Section 55-8-30 has construed the statute in the way the D&Os suggest. The plain language of the statute cannot bear the weight of their construction, and principles of statutory construction preclude it. As the Eleventh Circuit stated in rejecting a lower court's reading of the statute like that urged by the D&Os:

> What [that] court has done is completely ignore the threshold requirement of the exercise of ordinary care under [the statute]. . . .
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> * * *
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> For directors to be entitled to the cloak of protection of the BJR on the merits of their judgments under [the statute], however, they still must have exercised due care in making them.[12]

This Court should join the Eleventh Circuit and the other courts analyzing

[11] *State v. White,* 753 S.E.2d 698, 704 (N.C.App. 2014).
[12] *FDIC v. Stahl,* 89 F.3d 1510, 1517 (11th Cir. 1996).

similarly worded statutes, which have held that the plain language should be applied and that it imposes a standard of ordinary negligence.[13]

C. North Carolina Common Law Prior To the Enactment Of the Statute Did *Not* Provide That the Business-Judgment Rule Eliminated Actions For Ordinary Negligence

In an effort to avoid the plain meaning of the statute in the hope of achieving a minimum standard of gross negligence, the D&Os and *amici* point to a comment accompanying the statute, and the recognition of the North Carolina courts, that the statute did not abrogate the common law.[14] The comment and the North Carolina decisions do not, however, evidence that the North Carolina legislature changed the standard of care from ordinary to gross negligence.

As the FDIC-R acknowledged in its opening brief, Section 55-8-30 reflects the common law of North Carolina *prior* to enactment of the statute.[15] However, contrary to the D&Os' argument[16], when the North Carolina Court of Appeals explained that the statute did not abrogate the common law, it did *not* hold, nor could it, that the courts were free after its enactment to craft or

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[13] *Id., see also e.g. Hoye v. Meek*, 795 F.2d 893, 896 (10th Cir. 1986) ("Assuming appellant's good faith, that alone was not sufficient to shield him from liability. . . . The Oklahoma statute requires good faith *and* the diligence, care and skill of a prudent man").
[14] D&Os' Brief at 30, 41-45; Brief of American Bankers Association, *et al.* at 22.
[15] FDIC-R Brief at 36.
[16] D&Os' Brief at 30, 43.

extend the common law to contravene the statute. Such an extension would violate the North Carolina Supreme Court's admonition that the courts must enforce the language as written.

The D&Os have pointed to no North Carolina decision that predated the statute and applied the expansive business-judgment rule they now wish this Court to adopt. No such North Carolina precedent describes the business-judgment rule as creating a separate "standard of review," or refers to Delaware cases in articulating the contours of the business-judgment rule in North Carolina.

The North Carolina Supreme Court has long held that bank directors are liable for all losses arising from their failure to "use ordinary diligence to supervise the conduct of their office, and to understand the condition of the bank."[17] In a suit where bank directors were sued for negligently extending loans to uncreditworthy borrowers, the Court explained:

> Were depositors, when intrusting to a bank their entire fortune, to be informed that the directors, upon whose honor and careful watchfulness they were relying, owed them no duty, were under no obligation to take, at least, reasonable precautions to guard their money from the itching fingers of dishonorable officials, they would certainly hesitate long before surrendering it upon such terms.[18]

This is the common law that was not abrogated by the statute.

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[17] *Solomon v. Bates*, 24 S.E. 478, 480-81 (N.C. 1896).
[18] *Id.*

The cases that predate Section 55-8-30 demonstrate that directors and officers of other corporations are similarly liable for ordinary negligence. In *North Carolina Corp. Comm'n*, the North Carolina Supreme Court explained that D&Os are liable for ordinary negligence:

> Directors and managing officers of a corporation are deemed by the law to be trustees, or quasi trustees, in respect to the performance of their official duties incident to corporate management, and are therefore liable for either willful *or negligent* failure to perform their official duties.
>
> * * *
>
> [I]f there is a loss of the corporation's assets, caused and brought about by the negligent failure of its officers to perform their duties, the corporation or its receiver, in the case of insolvency, can maintain an action therefor."[19]

The Supreme Court reaffirmed this general rule of liability imposed upon corporate directors in *Minnis v. Sharpe.*[20] And in *Gordon v. Pendleton*, the Supreme Court reaffirmed that directors and officers "may be held liable for . . . their willful *or negligent* failure to perform their official duties," citing numerous cases establishing the right of a receiver for banks or other corporations to bring such actions.[21] While mere errors of judgment or slight omissions that could not be reasonably expected would not generally give rise to liability, breaches of the duty of ordinary care do give rise to liability.

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[19] *North Carolina Corp. Comm. v. Harnett County Trust Co.*, 134 S.E. 656, 657 (N.C. 1926) (emphasis added).

[20] *Minnis v. Sharpe*, 162 S.E. 606 (N.C. 1932), quoting *North Carolina Corp, Comm'n.*

[21] *Gordon v. Pendleton*, 162 S.E. 546 (N.C. 1932).

"[W]here [directors and officers] accept these positions of trust, they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances and charged with a like duty."[22] This is the same standard established in Section 55-8-30. Thus, while North Carolina precedent interpreting this statute held that the statute did not abrogate North Carolina common law, the common law predating the statute did not hold that North Carolina's business-judgment rule eliminated causes of action for ordinary negligence or elevated the standard of liability to gross negligence.[23]

D. North Carolina's Common Law and the Statute Are Inconsistent With A Gross Negligence As The Minimum Standard of Liability

The D&Os mistakenly argue that North Carolina's pre-statute cases are "difficult to reconcile" with a business-judgment rule that coexists with a standard of ordinary care (D&Os' Brief at 45, n.20), but the courts have long recognized (as the FDIC-R urges here) that the business-judgment rule, the duty of care, and liability for ordinary negligence are harmonious:

> The question is frequently asked, how does the operation of the so-called 'business judgment rule' tie in with the concept of negligence? There is no conflict between the two. When courts say that they will not interfere in matters of business judgment, it is presupposed that

[22] *Besselieu v. Brown*, 97 S.E. 743, 744 (N.C. 1919).

[23] In fact, the term "business judgment rule" appears in only two North Carolina Supreme Court decisions before enactment of Section 55-8-30, and neither discussed the business-judgment rule as changing the standard of care to gross negligence or establishing a separate or different "standard of review."

> judgment–reasonable diligence–has in fact been exercised.[24]

In *Stahl*, the Eleventh Circuit applied this principle to an ordinary negligence claim under a statute like North Carolina's, holding:

> the BJR may be viewed as a method of preventing a factfinder, in hindsight, from second-guessing the decisions of directors. For directors to be entitled to the cloak of protection of the BJR on the merits of their judgments . . ., however, they still must have exercised due care in making them.[25]

This understanding of the business-judgment rule is the only way to give effect to North Carolina's common law and the statute.

The Georgia Supreme Court recently decided two cases certified by federal courts–*Loudermilk* and *Skow*–strikingly similar to this one, and concluded that the business-judgment rule did not preclude liability for ordinary negligence.[26] Just as in North Carolina, directors and officers in Georgia have long been held liable for ordinary negligence, but courts applied the business-judgment rule to require ordinary diligence and care in "the way in which business decisions are made," but did not second-guess "the wisdom of the decisions."[27] *Loudermilk* and *Skow* thus held that "mere errors of

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[24] *Casey v. Woodruff*, 49 N.Y.S.2d 625, 643 (N.Y.Sup.Ct.1944).
[25] *FDIC v. Stahl*, 89 F.3d 1510, 1517 (11th Cir. 1996).
[26] *FDIC v. Loudermilk*, 761 S.E.2d 332 (Ga. 2014); *Skow*, 763 S.E.2d 879 (Ga. 2014).
[27] *Loudermilk*, 761 S.E.2d at 337. The D&Os argue that "North Carolina and Delaware" have a "robust" rule, unlike Georgia. As discussed above, no such robust rule was applied in North Carolina prior to enactment. As in Georgia, lower courts

judgment" did not give rise to liability, provided the directors and officers exercised their duties with reasonable diligence and care. These decisions are consistent with North Carolina law.

Just as in North Carolina, the Georgia legislature passed a statute imposing a duty of ordinary care, and providing that directors "who so perform" shall have no liability. And just as here, after Georgia's legislature enacted statutory standards of care and liability, Georgia's lower courts *impermissibly* applied a business-judgment rule derived from Delaware law and elevated the standard for liability to gross negligence.[28] In *Loudermilk* and *Skow*, the Georgia Supreme Court explicitly overruled those cases, holding that the "variant" of the business-judgment rule applying a gross negligence standard of liability found no support in the common law or in the statute:

> Although the Corporation Code seems to leave room for the sort of business judgment rule acknowledged at common law in the decisions of this Court . . . the relevant provisions of the Corporation Code are inconsistent with the alternative version of the rule articulated in [the lower court decisions applying Delaware's standard].[29]

Applying the statute and the pre-statute common law, the Georgia Supreme Court described the appropriate standard reconciling the statute and the business-judgment

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extended the rule in contravention of the statute.

[28] *See Flexible Products Co. v. Ervast*, 643 S.E.2d 560 (Ga. App. 2007)*; Brock Built LLC v. Blake,* 686 S.E.2d 425 (Ga. App. 2009).

[29] *Loudermilk*, 761 S.E. 2d at 343.

rule: "[a] bank director or officer may violate the standard of care established by [the statute], even where he acts in good faith, where, with respect to the process by which he makes decisions, he fails to exercise the diligence, care, and skill of 'ordinarily prudent men [acting] under similar circumstances in like positions.'"[30] North Carolina, like Georgia, had pre-statute common law holding directors and officers liable for failing to exercise ordinary care and diligence. North Carolina law is indistinguishable from Georgia's, and this Court should follow the Georgia Supreme Court's well-reasoned opinions and hold that the business-judgment rule does not eliminate a cause of action for ordinary negligence against bank directors and officers in North Carolina.[31]

The D&Os argue that this Court should defer to the North Carolina Court of Appeals, which stated in its *ILA Corp.* decision that the statute "does not abrogate the common law of the business judgment rule."[32] D&Os' Brief at 42-43. But that decision's articulation of the business-judgment rule, and how it interacts with Section 55-8-30, is consistent with FDIC-R's understanding of the rule: "the business judgment rule protects corporate directors from being judicially second-guessed *when they exercise reasonable*

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[30] *Fed. Deposit Ins. Corp. v. Skow,* 763 S.E.2d 879, 881 (Ga. 2014).

[31] *See Meiselman v. Meiselman*, 307 S.E.2d 551, 560-61 (N.C. 1983) (N.C. Supreme Court looks to states with similar statutes to determine applicability).

[32] *State ex rel Long v. ILA Corp.*, 513 S.E.2d 812, 821-22 (N.C.App. 1999).

care and business judgment."[33] That statement of the rule, which describes the law in effect when Section 55-8-30 was enacted, is consistent with the rule described in *Stahl, Casey, Loudermilk, Skow,* and other cases construing similar statutes, which all acknowledged that the business-judgment rule does not preclude a cause of action for ordinary negligence. This Court should, like the Eleventh Circuit in *Skow*, decline to apply *later* lower-court decisions expanding the rule to "contradict the plain language of the pertinent [state] statute."[34] Instead, like the Georgia Supreme Court, the Eleventh Circuit, and the Tenth Circuit – indeed, every court to analyze the effect of similarly worded statutes–this Court should conclude that lower-court decisions expanding the common law to apply a gross negligence standard cannot be reconciled with the statute.[35]

E. Adoption of Delaware's Common-Law Business-Judgment

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[33] *ILA Corp.*, 513 S.E.2d at 822.

[34] *FDIC v. Skow*, 741 F.3d 1342, 1346 (11th Cir. 2013). In *Skow*, the Eleventh Circuit certified the case to the Georgia Supreme Court, correctly recognizing that the lower-court decisions could not be reconciled with the statute. While this Court has no mechanism to certify this case to the North Carolina Supreme Court, it too can and should recognize that the lower-court decisions relied on by the D&Os and the district court are irreconcilable with the statute.

[35] In *Alford v. Shaw*, the North Carolina Supreme Court originally agreed with a lower court's rigid application of a business-judgment rule to shield a decision of directors and officers, but on reconsideration rejected its earlier reasoning and determined the case should "be resolved not by slavish adherence to the business judgment rule, but by careful interpretation of the provisions of our own Business Corporation Act." *Alford v. Shaw*, 358 S.E.2d 323, 325 (N.C. 1987), *withdrawing* 349 S.E.2d 41 (N.C. 1986).

Rule Impermissibly Departs From The Statute

The D&Os principally rely on an unreported trial-court decision, *State v. Custard*[36], and subsequent decisions applying the rule announced in *Custard*[37], to argue that "in North Carolina and other states following Delaware law" the courts must apply the "robust" Delaware business-judgment rule, under which decisions of directors and officers will be immunized by the business-judgment rule if they are "the product of a rational process." D&Os' Brief at 28-29; 31. But *Custard* and its progeny's adoption of Delaware law contravenes the fundamental principle that "the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein."[38] There is no support in the statute for Delaware's "far lower . . . rather permissive" "rationality" test, which conflicts with and rewrites the plain language of Section 55-8-30(d).

There is no support in North Carolina's common law for this rule either. The D&Os assert that North Carolina courts "follow" or "regularly look to" Delaware law, but none of the cases they cite as support for applying Delaware law support adopting an expansive Delaware rule at odds with North Carolina's statute

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[36] 2010 WL 1025809 (N.C. Super. 2010).
[37] *See Ehrenhaus v. Baker*, 717 S.E.2d 9 (N.C.App. 2011); *Technik v. WinWholesale, Inc.*, 2012 WL 160068 (N.C.Super. Jan. 13, 2012).
[38] *Boseman v. Jarrell,* 704 S.E.2d 494, 500 (N.C. 2010) (internal citations omitted).

and prior common law. Indeed, none of the cases they cite specifically address North Carolina's statute, or a statute like North Carolina's. For example, while the *Meiselman* case cited by the D&Os relied on a Delaware case to explain a general concept in corporate law, the North Carolina Supreme Court did not apply or adopt Delaware law.[39] Rather, the Supreme Court looked to "[t]wo other states [that] have *similar statutes*" and cases interpreting those similar statutes, in order to determine the proper application of North Carolina's statute.[40]

The D&Os argue that the FDIC-R seeks "to look elsewhere–notably, not Delaware–for the proposition that North Carolina's statutory standard must trump the rule."[41] While the FDIC-R urges this Court to look to North Carolina law, this Court *should* look to jurisdictions with statutes and common law precedents that are similar to North Carolina's to determine how to apply North Carolina's statute. As the Eleventh Circuit explained in rejecting the use of Delaware's and D.C.'s gross-negligence *common-law* standards to determine the standard of liability under Florida's *statute*, "neither of these states had a general statute setting forth an ordinary care standard."[42]

Finally, the arguments by the AABD in support of the recognition of a "divergence" of the standard of conduct and the standard of liability in North

[39] *Meiselman*, 307 S.E.2d at 568.
[40] *Meiselman*, 307 S.E.2d at 560-61.
[41] D&Os' Brief at 41.
[42] *Stahl*, 89 F.3d at 1518, n.14.

Carolina, and for application of a "variant" or expansive business-judgment rule[43] with a "divergent standard of review" like those in Delaware, reinforce that the statutes at issue here–the statutes actually *enacted* by the legislature–do not contain these standards. The North Carolina statute that establishes the duty of care requires a bank director or officer to "so perform his duties" to be insulated from liability. This statute is consistent with North Carolina's existing common-law rules, which recognized that "if there is a loss of the corporation's assets, caused and brought about by the negligent failure of its officers to perform their duties, the corporation or its receiver, in the case of insolvency, can maintain an action therefor."[44] Neither the statute nor the preexisting common law support the adoption of an expanded business-judgment rule or "divergent" standard of review. While *ILA Corp* held that the statute did not abrogate the common law, it also firmly stated that the common law predating the statute provided: "the business judgment rule protects corporate directors from being judicially second-guessed *when they exercise reasonable care and business judgment.*"[45] Subsequent modifications to the Model Business Code, creating a "standard of liability" distinct from the standard of conduct, merely confirm (and acknowledge) that the language of the statute *enacted* by North Carolina gives rise to liability and does not create a

[43] AABD Brief at 20-21.
[44] *North Carolina Corp. Comm.,* 134 S.E. at 657.
[45] *ILA Corp.,* 513 S.E.2d at 822.

separate standard of liability (which had never been a part of North Carolina's common law). The Georgia Supreme Court rejected the same arguments made by the AABD with respect to an essentially identical statute with similar official comments and similar pre-statute common law. This Court should do the same.

II. Genuine Disputed Issues Of Material Fact Exist Whether The D&Os Were Negligent, Precluding Summary Judgment

Having established that North Carolina's statute and business-judgment rule require directors and officers to exercise ordinary care in performing their duties, and would not allow a gross negligence standard of review focused on "rationality," it is evident that the FDIC-R has adduced evidence creating genuine issues of material fact as to whether the D&Os exercised ordinary care. FDIC-R's opening brief at pp. 17-25. The evidence shows that the D&Os [redacted]

[redacted]

[46] JA [redacted]

[redacted]

[47] JA [redacted].

[48] [redacted]

[49] See 12 C.F.R. § 323.5(b)(1) ("the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or the transaction."); *See also* 2003 Independent Appraisal and Evaluation Functions, FDIC FIL-84-2003 ("Individuals independent from the loan production area should oversee the selection of appraisers and individuals providing evaluation services."); 1994 Interagency Guidelines on Real Estate Appraisals and Evaluations, FDIC FIL-74-94, November 11, 1994.

[50] JA [redacted].

[redacted]

In reply, the D&Os rely on the CAMELS "2" rating in the RoE-2006 – issued before the loans involved here were made – arguing that the rating has a "defined, objective meaning," and that as a matter of law the ratings establish that the D&Os' used a process to approve loans that met the "highly deferential 'rationality' standard."[54] But as the FDIC-R demonstrated in its opening brief at pp. 43-49, that conclusion ignores the contradictory evidence on the face of those examination reports, and impermissibly ignores reasonable inferences.

For instance, the D&Os make the accusation that the FDIC-R made "a newly-minted (and wholly unsupported) factual claim that regulators bargained with Cooperative for these high CAMELS marks in exchange for promises to improve." D&Os' Brief at 38. But the actual facts presented by the FDIC-R are [redacted]eniable

[51] JA [redacted] (emphasis added).
[52] JA [redacted]
[53] JA [redacted]
[54] D&Os' brief at 37-38.

and apparent from the face of the RoE2006: (1) [redacted][55] The D&Os' *conclusion* that "regulators bargained with Cooperative for these high CAMELS marks in exchange for promises to improve"– an inference that the D&Os drew from those facts – was one that the finders of fact should have but did not make because the district court improperly entered summary judgment.

More importantly, and as demonstrated above, the proper standard under North Carolina law is whether the D&Os exercised *ordinary care* when they ignored the regulators' warnings and failed to improve their underwriting and loan-approval process. Whether the D&Os exercised ordinary care, and the evidence supporting the FDIC-R's position that they did not, is hotly disputed[redacted]

[redacted]

[55] FDIC-R Brief at 13, *citing* [redacted] (emphasis added).
[56] *Id.*

[redacted] From these facts, and others detailed in the FDIC's opening brief, a reasonable factfinder could conclude that the D&Os did not exercise ordinary care.

Even under the "lenient" business-judgment rule urged by the D&Os, a director or officer is not entitled to the protection of the business-judgment rule where he "did not act in the best interests of those to whom a fiduciary duty is owed" or "try in good faith to perform [the] duties with care."[58] Because the FDIC-R adduced evidence that [redacted][60] the case must be [redacted]manded. The evidence demonstrates that whether the D&Os acted in the best interests of the bank or tried in good faith "to perform [their] duties with care"[61] are disputed issues of material fact. Contrary to the D&Os' assertion that "bad faith" means only "insider abuse, self-dealing, and improper motive" (D&Os' brief at 33), proof of breach of the duty of loyalty (the lack of good faith) is *not* limited to proof of fraud, self-dealing, or

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[57] *Id.*
[58] *Custard*, 2010 WL 1035809, at *19.
[59] [redacted] (emphasis added).
[60] [redacted]
[61] *Custard*, 2010 WL 1035809, at *19.

conflict of interest.[62]

The D&Os never discuss the FDIC-R's authorities establishing that approvals by directors who have no conflict of interest and are not self-dealing, but nevertheless make approvals without reviewing key documents or otherwise demonstrate a "we don't care about the risks" attitude, fall outside the protection of the business-judgment rule.[63] The D&Os instead respond by citing North Carolina decisions declining to apply the business-judgment rule where bad faith or self-dealing were evident. But these decisions do not establish all conduct falling outside the protection of the business-judgment rule.[64] Under the FDIC-R's authorities, the conduct of the D&Os fell outside the protection of the business-judgment rule.

As FDIC-R demonstrated in its opening brief at pp. 20-22, the D&Os repeatedly approved loans without first reviewing key documents. Indeed, [redacted]

[62] *Custard*, 2010 WL 1035809, at *19 ("there may be circumstances devoid of a conflict of interest in which the duty of loyalty requires a director to act").
[63] *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275, 287-89 (Del. Ch. 2003).
[64] D&Os' Brief at 33.

[redacted].[65]

The FDIC-R's evidence supports the inference "that the [D&Os] *knew* that they were making material decisions without adequate information and without adequate deliberation," and did not care about the risks, and thus were not protected by the business-judgment rule.[66]

Even Delaware's *Caremark* decision, upon which the D&Os rely, accepts the proposition that directors must:

> [a]ssur[e] themselves that information and reporting systems exist in the organization that are *reasonably designed* to provide to senior management and to the board itself *timely, accurate information* sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.[67]

[redacted] Genuine issues of material fact remain about (1) whether the D&Os exercised reasonable care by approving risky ADC and Lot Loans after they ignored the *known* underwriting and credit-approval deficiencies; and (2) whether the D&Os

[65] JA [redacted].
[66] *Disney*, 825 A.2d at 289.
[67] *In re Caremark Intern. Inc. Derivative Litigation,* 698 A.2d 959, 970 (Del. Ch. 1996) (emphasis added).
[68] See, *e.g.*, JA [redacted]

decision to ignore known risks against the bank's "best interests" and failure to employ systems reasonably designed to allow informed business judgments fell outside the business-judgment rule.

III. Gross Negligence In North Carolina Does Not Require Intentional Conduct

As the FDIC-R explained in its opening brief, in 2005 the North Carolina Supreme Court considered, in *Jones v. City of Durham,* whether a cause of action for gross negligence required a showing of intentional conduct, and held:

> "willful and wanton conduct" . . . is more than gross negligence. . . . [W]hile willful and wanton conduct includes gross negligence, *gross negligence may be found even where a party's conduct does not rise to the level of deliberate or conscious action* implied in the combined terms of "willful and wanton."[69]

In reaching this decision, the Court relied on a comprehensive review of its earlier decisions and concluded that many of these decisions had mistakenly conflated gross negligence and willful misconduct. The Court explicitly held that "the General Assembly intended to distinguish" intentional acts from reckless acts that nevertheless constituted gross negligence. The Court subsequently withdrew these decisions after rehearing, concluding that facts identified in a dissenting opinion below demonstrated that there were genuine issues of material fact. The Court made it clear that it withdrew its earlier opinion because of these disputed facts, not

[69] *Jones v. City of Durham*, 622 S.E.2d 596, 600 (N.C. 2005) (emphasis added), *superseded and withdrawn on other grounds*, *Jones v. City of Durham*, 638 S.E.2d 202 (N.C. 2006).

because it reconsidered its conclusion that intentional conduct was not necessary to establish gross negligence. *Jones* accurately describes North Carolina law.

The D&Os ignore the Court's explanation of why it withdrew its earlier opinion affirming summary judgment in *Jones* and never address the Court's reasoning. They claim that *Jones* is "inapposite" because it involved a statute addressing gross negligence in high-speed chases, and assert that the statute the Court relied on in *Jones* is "irrelevant." D&Os' Brief at 49. Neither is true.

While *Jones* involved a statute addressing high-speed chases, it also analyzed the gross negligence *standard*, and its analysis was not limited to a specific statute. It also analyzed the punitive damages statute and relied on this statute as expressing the legislature's intent to distinguish gross negligence from intentional conduct, consistent with the Court's earlier *Foster v. Hyman* decision and many other North Carolina decisions.[70] The statute establishes that, in order to obtain punitive damages, a plaintiff must establish intentional conduct, a *higher* standard than gross

[70] *Foster v. Hyman,* 148 S.E. 36, 37–38 (N.C. 1929). *See also Cole v. Duke Power Co.,* 344 S.E.2d 130, 133 (N.C.App. 1986) ("gross negligence is something less than willful and wanton conduct"; *Cowan v. Brian Center Management Corp.*, 428 S.E.2d 263, 266 (N.C.App. 1993) ("we must treat gross negligence as something distinct from willful and wanton conduct.... gross negligence is 'something less than willful and wanton conduct'"); *Kingsley v. Brenda and Gene Lummus, Inc.*, 2012 WL 727091 *11 (W.D.N.C. March 6, 2012) ("'Willful or wanton conduct' means more than gross negligence."); *Fussman v. Novartis Pharmaceuticals Corp.*, 2011 WL 5836928 *4 (M.D.N.C. November 21, 2011) (same).

negligence.[71] And the Court did not limit its analysis to these statutes, but instead unequivocally held that "our previous decisions have conflated actions done with wicked purpose with actions done while manifesting a reckless indifference to the rights and safety of others under the rubric of 'gross negligence,' [but] we conclude that the General Assembly intended to distinguish these two types of action."[72] Thus, the Supreme Court's reasoning and conclusion in *Jones* were unequivocal, and were unchanged when it withdrew the opinion and reversed the court of appeals' affirmance of summary judgment because there were disputed material facts from which gross negligence could be inferred.

The Court's prior ruling is consistent with North Carolina precedent. In *Cole v. Duke Power Co,* the court expressly held that "gross negligence is something less than willful and wanton conduct."[73] In *Cowan,* the court also rejected the argument that gross negligence is synonymous with willful and wanton conduct, holding in pertinent part:

> In order to give effect to the wording of the wrongful death statute, we must treat gross negligence as something distinct from willful and wanton conduct . . . . We are guided by the more recent decisions of *Cole, Beck*, and *Henderson* in holding that gross negligence is "something less than willful and wanton conduct,". . . and includes "the absence of even slight care," "indifference to the rights and welfare of

[71] Other statutes also explicitly distinguish between gross negligence "or" willful and wanton conduct. *See, e.g.,* N.C.G.S. § 58-24-35(d)(4); 18B-700(j)(3).
[72] *Jones*, 622 S.E.2d 600.
[73] 344 S.E.2d 130, 133 (N.C. App. 1986).

others," and "negligence of an aggravated character."[74]

The D&Os do nothing to refute the reasoning of the Supreme Court in *Jones I,* or other cases with the same holding, beyond repeatedly noting that *Jones I* was "withdrawn."[75] Rather, they cite to the Supreme Court's decision in *Yancey v. Lea*, one of the earlier cases that the Supreme Court acknowledged had conflated gross negligence and intentional conduct, and cite to post-*Jones* cases repeating the conflated standard in boilerplate string cites.[76]

That conflation is apparent in *Yancey* itself: *Yancey* stated that gross negligence requires intentional or willful conduct. In support, it relied extensively on the Court's earlier *Foster v. Hyman* decision to define "willful" and "wanton" without acknowledging that *Foster* did nothing to define "gross negligence," a term that does not appear in *Foster* and was not yet in use.[77] And *Yancey* relied on the

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[74] 428 S.E.2d at 266 (internal citations omitted). *See also Kingsley v. Brenda and Gene Lummus, Inc.*, 2012 WL 727091 *11 ("'Willful or wanton conduct' means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence."); *Fussman v. Novartis Pharmaceuticals Corp.*, 2011 WL 5836928 *4 (same); N.C.G.S. § 1D-5 (same).

[75] Even in this case, the district court recognized that the opinion was superseded "on *other* grounds," before inexplicably reversing his conclusion. *Willetts*, 882 F. Supp.2d at 865 (emphasis added). The district court was right the first time.

[76] *Yancey v. Lea*, 550 S.E.2d 155, 158 (N.C. 2001).

[77] *Foster* was concerned with whether a particular form of relief-execution against the person–was available. That relief, like punitive damages under the modern statute, required that "the injury ha[d] been inflicted intentionally or maliciously." *Foster* continued to distinguish between intentional conduct and reckless negligence. The

Court's *Hinson* decision, which also announced the "intent" requirement for gross negligence, but (1) patently conflated the requirement for punitive damages with requirements for gross negligence, and (2) cited in support numerous cases that did nothing to define gross negligence.[78] The "post-*Jones*" decisions that the D&Os cite as additional support are no help; they are merely boilerplate reiterations of the standard stated in *Yancey,* in cases where the required elements of gross negligence were not at issue. The D&Os' contention that gross negligence is "a mindset" requiring intentional conduct is insupportable without relying on decisions that incorrectly articulate a requirement of intent, as explicitly rejected in *Jones*.

Because intent is not a required element of proof for gross negligence in North Carolina, the D&Os' argument that the FDIC-R did not show wanton conduct or conscious disregard is immaterial.[79] And the D&Os' argument that "the FDIC wants a jury to decide whether equity backing . . . was sufficient" or whether information was meaningful is a canard misstating the FDIC-R's arguments regarding gross negligence.[80] The FDIC-R believes that a jury could find that continuing a seriously flawed underwriting and credit-approval process, with foreseeable risk of strain on the credit quality and an understanding that loan officers were not obtaining

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Jones decision understandably cited *Foster* for the correct statement that gross negligence might also be intentional, but that that intentional conduct is not *necessary*. *Jones I,* 622 S.E.2d at 600.

[78] *Hinson v. Dawson*, 92 S.E.2d 393 (N.C. 1956).

[79] D&Os' Brief at 50*, citing* JA 77, 80.

[80] D&Os' brief at 51.

necessary information on proposed loans, demonstrated reckless disregard for the bank and the foreseeable injuries that would result.

IV. Disputed Issues of Fact Preclude Summary Judgment On Alternative Grounds

As the FDIC-R explained in its opening brief, "elimination of liability" clauses have no application under North Carolina law where a director knew or believed that his acts or omissions were clearly in conflict with the best interests of the corporation. The statute does not permit elimination of liability for directors' breaches of the duties of loyalty or good faith.[81] Acts or omissions that were not in good faith - actions harmful to the corporation and decisions made without adequate information - are not entitled to exculpation. Nor do elimination-of-liability clauses apply to gross negligence or to violations of banking law.[82]

As discussed at pp. 24-27 above and pp. 42-45 of FDIC-R's opening brief, the issues of whether the D&Os acted in good faith – an issue generally reserved for the factfinder[83]– was hotly disputed, as was the issue whether the D&Os made their decisions with adequate information. And as the FDIC-R demonstrated above, the case must be remanded for a determination by the fact-finder of whether the D&Os were grossly negligent. The D&Os' argument that summary judgment may be

[81] *Id.*
[82] N.C.G.S. § 55-2-02(b)(3).
[83] *Embree Const. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 925 (1992) ("The question of 'good faith' is one of fact to be resolved by the jury").

granted on the basis of the exculpatory clauses is premised on its flawed understanding of the standard for gross negligence, and its flawed contention that the issue of good faith requires allegations of "self-dealing or other insider abuse." The question of a director or officers' good faith includes whether the director or officer acted "in the best interests of those to whom a fiduciary duty is owed" or "tr[ied] in good faith to perform [their] duties with care."[84] As discussed above, genuine issues of material fact exist about whether the D&Os knew that their actions were not in the best interest of the bank, and whether their "we don't care about the risks" attitude demonstrated an absence of good faith.

Similarly, there are disputed issues of material fact about whether the D&Os reasonably relied on others when they ignored pointed warnings and directions to implement underwriting and credit-approval policies in the face of known risk to the bank. N.C.G.S. § 55-8-30(b)(1) permits directors to rely on the advice of officers and employees only if they "reasonably believe" the officers and employees are "reliable and competent in the matters presented." N.C.G.S. § 55-8-42(b)(1) similarly requires that an officer's reliance on the advice of other officers and employees must be "reasonable." Both statutes provide that reliance is not permitted when the director or officer has knowledge of matters that make reliance unwarranted.[85]

In light of the many factual disputes (see FDIC-R's opening brief pp. 57-58),

[84] *Custard II*, 2010 WL 1035809; *Walt Disney*, 825 A.2d at 289.
[85] N.C.G.S. §§ 55-8-30(c), 55-8-42(c).

the district court erred by entering summary judgment because the parties dispute whether the D&Os could reasonably rely on the bank's managers and loan officers and whether those employees were "competent in the matters they presented," [redacted] As North Carolina's leading treatise on corporate law explains, "[o]bviously, a director would not be acting in good faith if he claimed reliance with actual knowledge that it was unwarranted, so the statute expressly makes it unavailable in such a case. Similarly, a reliance defense might be unavailable to a director who ignored expert advice that was contrary to his action."[86]

The D&Os' argument that the Great Recession should provide an alternative basis for affirming fails as well. In the face of all of the evidence of the defendants' negligence– ignoring pointed and detailed [redacted]

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[86] *Robinson on North Carolina Corporation Law* § 14.05.

[redacted] the D&Os argue that the FDIC-R has failed to prove proximate cause. Instead, they argue that "the Great Recession caused a free-fall in real estate values and a collapse in the nation's credit markets," which led to the failure of the underlying projects that would repay the loans.[87] Their argument is unavailing, because the D&O's negligence in approving the loans was the proximate cause of these losses on these loans.

The North Carolina Supreme Court has defined "proximate cause" as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred."[88] "The proximate cause of an injury is ordinarily a question for the jury."[89] Regardless of the economy, "but for" the D&Os' approval of the subject loans, no funds would have been advanced and no loss would have been sustained on the subject transactions.

The "Great Recession" does not change this. First, the economic downturn of the late 2000s was not only foreseeable, but was actually foreseen by the Defendants. Cooperative's Senior Management foresaw the downturn in the real estate market in October 2006 [redacted]

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[87] D&Os' Brief at 59-60. The argument relies on the supposed testimony of "Ben Bernanke and many others in authority."
[88] *Adams v. Mills*, 322 S.E.2d 164, 172 (N.C. 1984).
[89] *Id.*

[redacted][90] The effects of what came to be known as "the Great Recession" were openly discussed by the D&Os, who nevertheless pressed ahead with their plan.

Moreover, absent the defendants' negligence in approving the Subject Loans, the economy would not have produced *the losses to the bank*. These losses would not have occurred because no loan would have been made. Accordingly, the economic downturn is at most a contributing cause and not an intervening/superseding cause that would constitute a "new" proximate cause.

As the North Carolina Supreme Court has explained, in order to be a superseding cause, the new intervening cause must be *independent* of the negligence the FDIC-R proves, and adequate itself to bring about the loss.[91] Here, the negligent loan approvals made the losses to the bank possible, and wide-spread economic woes do not "supersede or obliterate" the negligence.

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[90] JA [redacted]; *see also* JA [redacted].

[91] *Riddle v. Artis*, 91 S.E.2d 894, 897 (N.C. 1956). *See also Adams*, 322 S.E.2d at 173 ("An efficient intervening cause is a new proximate cause. It must be an independent force which entirely supersedes the original action and renders its effect in the chain of causation remote"); *Hairston v. Alexander Tank and Equipment Co.*, 311 S.E.2d 559, 567 (N.C. 1984).

The D&Os are also wrong that the "continually expanding and contracting loss figures" cannot survive summary judgment.[92] The D&Os are "responsible for all damages directly caused by [their] misconduct, and for all indirect or consequential damages which are the natural and probable effects of the wrong, under the facts as they exist at the time the same is committed and which can be ascertained with a *reasonable* degree of certainty."[93] "Reasonable certainty does not mean precise or mathematical certainty. Reasonable certainty does not require absolute assurance or mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation and provide a reasonable basis for computing an approximate amount of damages. . . ."[94]

V. The Policy Arguments Raised By *Amici* Should Be Reserved For the North Carolina Legislature

The *amicus* briefs by the various groups representing bank directors and officers are policy arguments that should be reserved for testimony before the legislature, but have little place before this Court. North Carolina law is clear: where

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[92] D&Os' Brief at 60. The D&Os also assert that because the testimony of the FDIC-R's expert *rebuttal* witness was stricken, "FDIC has no damages case to present at trial if this Court reverses summary judgment." *Id.* This is patently false. The FDIC-R does not rely on an expert witness to establish damages, but instead will rely at trial on FDIC-R employees who will establish the damages suffered from the D&Os' negligence and gross negligence. *See, e.g.*, JA[redacted]

[93] *Severn Peanut Co., Inc. v. Industrial Fumigant Co.*, 2014 WL 1056991 *4 (E.D.N.C. March 15, 2014) (emphasis added).

[94] 22 Am.Jur.2d Damages § 340. "Reasonable certainty requires proof of a rational basis for measuring the loss, without allowing a jury to speculate." *Id.*

"the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein."[95] This Court should not engage in an appraisal of policy arguments in order to apply a court-made rule that would effectively change the statute.

For the FDIC to even begin to address the *policy* arguments made by the *amicus* brief would implicitly accept a false premise: that this Court is free to make policy decisions in determining whether bank directors and officers are liable for breaches of the duty of ordinary care. But this Court is not free to weigh policy arguments to determine the standard of care for directors and officers or what a director or officer must do to have no liability.[96] The legislature has already made those determinations. Were the Court to now weigh policy arguments to effectively rewrite the statute, it would risk overturning a policy decision already weighed and made by the legislature. Instead, this Court should apply the statute as written.

As discussed above, other court decisions interpreting similar statutes have interpreted functionally identical language and held that the statute imposes liability for ordinary negligence and does not allow a business-judgment rule that would

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[95] *Boseman v. Jarrell,* 704 S.E.2d 494, 500 (N.C. 2010) (internal citations omitted).
[96] *See Rhyne v. K-Mart Corp.,* 594 S.E.2d 1, 8 (N.C. 2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws").

modify the standard of liability. When legislatures have intended to modify statutes, and establish a "divergent" standard of liability, they have done so explicitly.[97] North Carolina has not.

Finally, North Carolina and this Court's long-standing rule that it will apply the plain statutory language and leave modification of the statute up to the legislature is wise, because this Court is not in a position to determine whether the very policy arguments offered by the *amici* have already been considered by the legislature or are in the best interests of or are supported by North Carolina residents. The best evidence of the intent of the North Carolina legislature is the language of the statutes it has enacted. The statute here establishes a duty of care, recognizes liability for breaches of that duty, and only provides that a director or officer who performs that duty of care shall have no liability. That standard is consistent with the common-law business-judgment rule in place when the statute was enacted.[98] This Court should not modify the statutory scheme and engraft additional categories of performance that "shall have no liability" under the guise of applying an expanded common-law business-judgment rule that conflicts with the statute.

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[97] *See* footnote10 above.
[98] *ILA Corp.,* 513 S.E.2d at 822.

CONCLUSION

For the foregoing reasons, the district court's rulings on the questions presented on appeal should be reversed, and this case should be remanded for consideration of the FDIC-R's motions for partial summary judgment and to strike testimony, and for trial.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-2078

FDIC as Receiver for Cooperative Bank v. Rippy, et al.

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/s/ James Scott Watson
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Dated: 3 March 2015

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I certify that on **March 3, 2015**, the foregoing document filed under seal was served on counsel for the defendants-appellees by serving a true and correct copy by U.S. Mail, postage prepaid, to the addresses listed below:

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