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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Appellate Case No. 2019-000575
Charleston County Case No. 2010-CP-10-7838

Ditech Financial, LLC ..... Respondent,

v.

Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder.....Appellant.

PETITION FOR REHEARING AND REHEARING *EN BANC*

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BACKGROUND

This is the appeal of a contested residential foreclosure of Kevin, Mary, and Faith Snyder's (now former) home located at 1753 Orange Grove Shores Drive, Charleston, SC. The Appellant is Kevin Snyder, in his individual capacity as a mortgagor of the property, and as personal representative of his late[1] wife Mary Snyder, who was also a mortgagor. The Respondent is the purported successor to the original Plaintiff loan servicer, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. BAC filed the original foreclosure Complaint and Lis Pendens on September 23, 2010, and amended the Complaint and Lis Pendens on October 13, 2010. (R 35-39, 42, 45-49, 56-57). Kevin and Mary Snyder were served a Notice of Foreclosure Intervention on December 17, 2012, which BAC denied on or about April 4, 2013. (R 59-60, 63-64). Undersigned counsel appeared for the Snyders on May 3, 2013, filing his notice of appearance with the Clerk of Court and serving it on BAC's counsel. (R 66). BAC purportedly transferred the Snyders' loan at some point shortly thereafter to Green Tree Servicing, LLC, and on June 17, 2013, undersigned counsel sent Green Tree a letter informing it of the Snyders' representation, and enclosing a copy of *In re Mortgage Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (2011) (the "Admin Order"). (R 121). Undersigned counsel followed up this letter with another letter on July 18, 2013, enclosing a written authorization from the Snyders (requested by Green Tree) and another copy of the Admin Order. (R 144-145). Green Tree's attorney was copied on this letter. (R 144). These June and July letters inaugurated a nearly six year ordeal of bungled foreclosure interventions by Ditech and its predecessors, set forth in greater detail in Argument III.

[1] Faith Noel Snyder, who was profoundly disabled, died on December 2, 2013. Mary Snyder died unexpectedly of lung cancer on November 23, 2015.

The Master-in-Equity stayed this action pending foreclosure intervention at a September 30, 2013, status conference. Undersigned counsel was never notified of this hearing, and was never served with a copy of the resulting order staying the action. (R 4). On March 12, 2014, the Master-in-Equity, again without notice to undersigned counsel or a hearing, granted BAC's motion to replace BAC Home Loans Servicing, LP with Green Tree Servicing, LLC as Plaintiff. (R 9-10, 179-187).

Green Tree substituted counsel on April 9, 2015, and again on July 2, 2018. The parties engaged in discovery, and Snyder filed a motion to compel on November 29, 2018 to compel Green Tree's responses to his discovery. (R 88-90, 179-187). Pursuant to a December 10, 2018, status conference (where the motion to compel was heard without a court reporter), the Master-in-Equity issued a consent scheduling order and a consent order amending the caption to replace Green Tree Servicing, LLC with Ditech Financial, LLC. (R 13-16).

Ditech filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York on February 11, 2019, and filed notice in this action on March 1, 2019 (amended May 1, 2019). (R 199-288). All parties filed motions for summary judgment on March 11, 2019. (R 291-433). These motions were heard at a pre-trial hearing on March 18, 2019. (R 561-601). The Master-in-Equity denied Snyder's motion, granted Ditech's motion in part, and denied Snyder's motion to compel by order dated March 27, 2019. (R 19-22). Snyder timely served a notice of appeal on March 29, 2019. Though Snyder argued that the Master-in-Equity lacked jurisdiction due to the pending appeal (R 606-622), the Master-in-Equity proceeded with a final hearing. (R 622-660). The Master-in-Equity issued his final order on April 23, 2019, ordering the foreclosure of the mortgage and the sale of 1752 Orange Grove Shores. (R 23-32).

Snyder amended his notice of appeal to include this order and also filed a motion for supersedeas before the Master-in-Equity on May 2, 2019. (R 436-440). Ditech filed its response to the motion on June 3, 2019. (R 554-560). After being heard (and denied) by the Circuit Court, this motion was heard by the Master-in-Equity. (10/28/2019 Pet. for Supersedeas, Ex. A & B). The Master-in-Equity granted Snyder's motion on October 18, 2019, setting the supersedeas bond at $25,000.00. (10/28/2019 Pet. for Supersedeas, Ex. B). Unable to afford this bond, Snyder petitioned this Court for a writ of supersedeas on October 28, 2019, requesting bond be waived or set at a nominal amount; said petition was denied on November 7, 2019. On November 18, 2019, Snyder petitioned for panel rehearing of the petition under Rule 241(d)(7), SCACR; this petition was denied on December 17, 2019.

On October 21, 2021, the Master-in-Equity sold 1752 Orange Grove Shores at judicial sale for $249,600.00. (01/18/2022 Supp. Citation letter, Ex. A). This Court entertained oral arguments on February 10, 2022. (Unofficial transcript).[2] On July 20, 2022, this Court issued its opinion affirming the Master-in-Equity (the "Opinion"). This petition follows.

[2] An unofficial transcript of the oral arguments is attached to this petition as an exhibit. Please note this transcript, prepared by a vendor in the United Kingdom, contains errors.

SUGGESTION TO GRANT *EN BANC* REHEARING

Snyder suggests, pursuant to Rule 219(b), SCACR, the following grounds for rehearing render this decision appropriate for rehearing *en banc*:

A. This Court applies a harmless error analysis to an order that was structurally erroneous and void for lack of jurisdiction, contradicting this Court's prior decisions, South Carolina Supreme Court precedent, and United States Supreme Court precedent.

Snyder timely and properly served a notice of appeal of the Master-in-Equity's order dismissing his counterclaims and striking an affirmative defense to the mortgage foreclosure. "Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal…" *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016). Further, a judgment of a court without jurisdiction is void. *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). Even though the Master-in-Equity did not have the jurisdiction to proceed with a final foreclosure hearing, this Court's opinion allowed the final order of foreclosure and sale to stand, effectively applying a harmless error analysis to a judgment that was void for want of jurisdiction. Lack of jurisdiction is a "structural error" not susceptible to harmless error analysis. *See Arizona v. Fulminate*, 499 U.S. 279 (1991); *State v. Wright*, 432 S.C. 365, 852 S.E.2d 468 (Ct. App. 2020) (structural error not subject to harmless error analysis).

The issue of continued jurisdiction after an interlocutory appeal is also a matter of extreme importance. The appeal of an interlocutory order that is immediately appealable can effectively shut down a proceeding before the trial court. Uniformity in the law in considering interlocutory appeals is critical for this Court, which handles the majority of appeals in this state, making it the front line of the battle to preserve the constitutional right to a speedy civil trial. *See* S.C. Const.

Art. I Sec. 9 ("All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.").

B. This Court's interpretation of South Carolina's Attorney Preference Statute conflicts with the decisions of this Court and the plain text of the Consumer Protection Code.

The Opinion holds proof of actual damages is necessary for a party to avail himself of the penalty provision of S.C. Code § 37-10-105, which provides a remedy for violations of S.C. Code § 37-10-102 (the "Attorney Preference Statute"). (Opinion pp. 12-13). No case law, including case law of this Court, supports this interpretation. *See, e.g., Wells Fargo Bank, Nat'l Ass'n v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012). Further, the plain language of the statute does not require proof of actual damages for a party to seek a penalty against a creditor:

> If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars…

S.C. Code § 37-10-105(A).

The interpretation of the Attorney Preference Statute is also a matter of extreme importance. The right to be represented by an attorney of one's own choice is a substantial right. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). This right is not diminished simply because representation is in the context of the closing of a mortgage.

REASONS TO GRANT REHEARING

I. This Court misapprehended the applicability of harmless error analysis to a void order.

On March 27, 2019, the Master-in-Equity granted Ditech's motion for summary judgment, dismissing Snyder's counterclaim for civil compensatory contempt and the Estate of Mary Snyder's attorney preference statute defense. (R 19-22). Snyder served a notice of appeal of this order on March 29, 2019. This Court correctly noted this notice of appeal was a valid appeal of an immediately appealable order. (Opinion pp. 14-16). This Court also correctly found "the master erred in proceeding with the foreclosure". (Opinion p. 14).

However, this Court misapprehended and overlooked the law regarding a trial court's jurisdiction after a notice of appeal is served, and ultimately applied a "harmless error" analysis to the Master-in-Equity's April 23, 2019, final order (R 23-32), which was void for lack of jurisdiction. The dicta of *Tillman*, cited in the Opinion (pp. 14-15), contends this lack of jurisdiction is not subject matter jurisdiction, but "the power to address a particular issue", which is merely subject matter jurisdiction by another name. *See Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (subject matter jurisdiction is "the power of a court to hear and determine cases of the general class to which the proceedings in question belong"). Upon the service of Snyder's March 29, 2019, notice of appeal, the Master-in-Equity lost the power to consider matters affected by the March 27, 2019 order granting summary judgment (*i.e.*, he lost jurisdiction over these matters). Rule 241(a), SCACR; *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533, 787 S.E.2d 485, 493 (2016) ("Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal…").

A judgment of a court without jurisdiction is void. *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). Further, a court acting outside of its

authority represents a structural error in the mechanism of the trial. *See State v. Harrison*, 432 S.C. 448, 473, 854 S.E.2d 468 (2021). "The finding of a structural error simply renders the harmless error doctrine unavailable on appellate review." *State v. Rivera*, 402 S.C. 225, n.4, 741 S.E.2d 694, n.4 (2013). Though this Court did not use the exact phrase "harmless error", its relief was, in form and effect, a finding of harmless error. This matter must be reheard to correct this misapprehension.

II. This Court misapprehended the intent and effect of South Carolina's Attorney Preference Statute.

The Master-in-Equity's March 27, 2019, order struck one defense of the Estate of Mary Snyder: "The Court finds that Defendants cannot raise a defense to foreclosure on the basis of alleged noncompliance with S.C. Code § 37-10-102 ("Attorney Preference Statute") as to Mary Snyder, because Mary Snyder was not a "borrower" within the meaning of the statute, and the Court therefore strikes this defense." (R 21-22). While this Court describes this argument as moot[3] and unpreserved, finding the Estate of Mary Snyder did not provide evidence of actual damages and Ditech's waiver of a deficiency judgment prevented a setoff of any judgment. (Opinion pp.12-13). This finding misapprehends and overlooks both the intent and effect of the Attorney Preference Statute.

At issue in this appeal is a South Carolina mortgage loan. (R 316-329). Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. *See Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773, 777-778 (2003); *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. *Id.* In *Wachovia Bank, N.A. v. Coffey*, this Court observed that

[3] While the Opinion (p.13) found the issue as to whether Mary Snyder was a "borrower" under S.C. Code § 37-10-102(a) as moot, it nonetheless analyzed the issue as if she were a "borrower".

"[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" 389 S.C. 68, 698 S.E.2d 244, 248 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013). The purpose behind this requirement is "the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." *Id.* (quoting *Buyers Service*, 292 S.C. at 431).

The right to be represented by an attorney of one's own choice is a substantial right. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). This right is not diminished simply because representation is in the context of the closing of a mortgage. South Carolina's Attorney Preference Statute recognizes and protects this substantial right by penalizing an institution who does not provide a borrower his choice of attorney ($1,500.00 to $7,500.00), and also allowing the borrower to recover his actual damages arising from the transaction. S.C. Code § 37-10-105(A). The Attorney Preference Statute explicitly provides it may be asserted as a defense "by recoupment or set-off". S.C. Code § 37-10-105(A). The statute does not require a showing of actual damages in order to trigger its penalty; the Opinion's requirement of a showing of actual damages misapprehends this aspect of the Attorney Preference Statute.

III. This Court overlooked the scintilla of evidence in the record supporting Snyder's counterclaim for civil compensatory contempt.

Snyder asserted a counterclaim for Civil Compensatory Contempt in his counterclaims, based on Ditech's predecessor's violations of the Admin Order (R 73-74), which provides for sanctions for failure to "act in good faith in complying with the terms of [the Admin Order]." *In re Mortgage Foreclosure Actions* at 213, 720 S.E.2d at 910. This Court affirmed the Master-in-Equity's dismissal of this counterclaim via summary judgment, concluding "there was no genuine issue as to any material fact concerning whether Ditech complied with the Administrative Order."

(Opinion p. 9). This holding overlooks *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), which provides Snyder could proceed with his counterclaims (and his affirmative defenses) if he could make a showing of a scintilla of evidence Ditech, or its predecessors, did not act in good faith. "Good faith" is defined as: "honesty in fact and the observance of reasonable commercial standards of fair dealing." S.C. Code § 36-1-201(20).[4] A "scintilla" is "'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.'" *Bethea v. Floyd*, 177 S.C. 521, 181 S.E. 721, 724 (1935); *see also Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 588 S.E.2d 87 (2003) (Burnett, J., dissenting) ("A scintilla is defined as 'a trace' of evidence.") (citing *Black's Law Dictionary* 1347 (7th ed.1999)). This Court implicitly recognized Ditech's violation of the Admin order by recognizing the delay in the foreclosure proceeding resulted in "substantial interest and fees", and recognizing this delay was "at least in part a result of Snyder's own conduct", which implies the existence of fault on the part of Ditech or its predecessors. (Opinion p. 10).

This Court also overlooked the following evidence, which constitutes, at a minimum, the scintilla sufficient to defeat a motion for summary judgment:

1. <u>Failure to send correspondence to the correct address after notice.</u>

Throughout the foreclosure intervention process, Ditech and its predecessors repeatedly mailed critical correspondence and documents to the wrong mailing address. By and large, Ditech has conceded these mistakes. (R 103-115). Snyder is aware of the following misdirected documents, but the true amount of lost correspondence is certainly greater:

[4] As the note and mortgage in this case are subject to articles 3 & 9 of the Uniform Commercial Code, this definition is appropriately used here.

a) Green Tree's March 13, 2014, application deficiency letter (R 152-154) used an incorrect address;

b) Green Tree's May 7, 2014, August 7, 2014, and September 7, 2014, billing statements (R 157, 161-162) used an incorrect address;

c) Green Tree's August 6, 2014 acknowledgement letter (R 160) used an incorrect address;

d) Green Tree sent an October 2014 foreclosure intervention application to an incorrect address, resulting in denial of a proposed modification (R 163); and

e) Ditech's April 13, 2016 foreclosure intervention application (R 168-170) is addressed to the Snyders' counsel's prior address, despite being informed of the new address a year earlier (R 164, 168-170).

Snyder's counsel placed Ditech and its predecessors on notice of changes of address and/or incorrect addressing on October 22, 2014, March 4, 2015, and March 26, 2015. (R 163-164, 168). These failures, at a minimum, contributed to the excessive delays in processing the Snyder's multiple applications for foreclosure intervention/mitigation.[5]

2. Failure to timely respond to foreclosure intervention request.

Ditech's predecessor ignored Snyder's June 17, 2013, request for foreclosure intervention until Snyder's counsel repeatedly contacted Ditech's predecessor's counsel in August of 2013. (R

[5] Though more of a technical than substantive violation of the Supreme Court's order, Ditech's predecessors also required the Snyders' counsel to repeatedly submit needless written authorizations. Undersigned counsel appeared of record in this action on May 3, 2013. (R 118). Ditech's predecessor's attorneys were served with this notice of appearance the same day. (R 119). Undersigned counsel informed Green Tree of his retention by letter dated June 17, 2013. (R 121). Green Tree, however, demanded that the Snyders execute a separate authorization form (R 145) before it would discuss this matter with the Snyders' counsel. While the Snyders did execute an authorization on July 9, 2013 (provided July 18, 2013) (R 143-145), Ditech's predecessor repeatedly demanded it be re-submitted. (R 142, 147).

121, 128, 131-132). Ditech's predecessor's counsel provided the foreclosure intervention application on August 21, 2013. (R 133). This also contributed to delays in foreclosure intervention.

3. Repeated contacts with represented mortgagors.

Ditech and its predecessors consistently, repeatedly, and flagrantly continued to contact Snyder via telephone and/or mail until approximately 2017, when Ditech began mailing all correspondence, including billing statements, to Snyder's counsel. The Admin Order mandates that foreclosure communications shall flow through the Mortgagor's attorney: "…the Mortgagee *shall* communicate with and otherwise deal with the Mortgagor through the Mortgagor's attorney" *In re Mortgage Foreclosure Actions* at 213, 720 S.E.2d at 909 (emphasis added). On June 17, 2013, Snyder's counsel contacted Ditech's predecessor directly to inform it of Snyder's representation, though Ditech's predecessor's attorney had been notified on May 3, 2013. (R 118-121). Included in the June 17, 2013, letter was a copy of the Admin Order. The Snyders' counsel notified Ditech and its predecessors on June 17, 2013, July 18, 2013, October 30, 2013, November, 6, 2013, November 12, 2013, June 4, 2014, and August 1, 2014, that the Snyders were represented by counsel and/or to cease communications with the Snyders. (R 121, 137, 139-147, 158). Ditech and its predecessors repeatedly ignored the clear language of the Supreme Court's order and the repeated requests of Snyder by attempting direct contact.[6] (*e.g.* R 136, 139-140).

4. Inappropriate conduct in litigation.

On June 14, 2013, Ditech's predecessor served requests to admit on Snyder. (R 123). Snyder timely served answers to these requests on July 15, 2013 (July 14, 2013 fell on a Sunday).

[6] Because this debt was in dispute, Ditech's predecessors' acts also violated the Fair Debt Collection Practices Act. *See* 15 U.S.C. § 1692c(c). Because the Bankruptcy Court's order stays any action for damages, any potential action under this statute is stayed.

(R 122-127). On August 13, 2013, Snyder's counsel spoke with Ditech's predecessor's counsel via telephone about the potential for settlement of this matter. (R 128, 587). On the same day, Ditech's predecessor's counsel executed an Affidavit of Default, stating that Snyder had failed to respond to its Requests to Admit. (R 129-130, 587). Not only was this affidavit false, it was never served on Snyder's counsel when it was filed with the court.[7] (R 129-130, 156). Snyder's counsel did not learn of this affidavit until March 27, 2014, when Snyder's counsel received a notice of the entry of a heretofore-unknown order amending the caption. (R 155). Upon review of the docket online, Snyder's counsel discovered that he had not been informed of: (1) Ditech's predecessor's counsel's filing of the August 13, 2013, affidavit; (2) a September 30, 2013, status conference that Ditech's predecessor's counsel allowed to go forward without notice to Snyder's counsel; (3) a September 30, 2013 order staying this case pending foreclosure intervention; and (4) Ditech's predecessor's counsel's filing of a motion and proposed order to amend on February 20, 2014, which was granted without hearing. (R 129-130, 134-135, 148-150, 156).

Snyder's counsel immediately wrote Ditech's predecessor's counsel and demanded that Ditech's predecessor's counsel request the court strike the August 13, 2013 affidavit. (R 156). Snyder's counsel referenced this request again on March 26, 2015 and April 28, 2015; the affidavit remained part of the record until struck/withdrawn at the motion for summary judgment hearing on March 18, 2019 (R 156, 168, 172-173, 587-588).

This Court noted in the Opinion (p. 10) Snyder "failed to demonstrate" how this affidavit violated the Admin Order. As set forth above, this affidavit did not represent "honesty in fact", which is an element of good faith.

[7] Ditech denied the affidavit is false, though it does admit it was never served on the Snyders' counsel. (R 106).

5. Spoliation of evidence.

On March 4, 2015, the Snyder's counsel requested that Ditech's predecessor preserve documents related to this action. (R 164). Ditech, in its responses to Snyder's Third Set of Interrogatories, explains that it could not admit or deny several requests due to a lack of records from its predecessor. (R 99-101). The loss or destruction of these records have thus frustrated factfinding in this matter and have also contributed to the extreme delay in proceedings.

This Court noted in the Opinion (p. 10) Snyder "failed to demonstrate" how this conduct violated the Admin Order. Spoliation of evidence does not represent "honesty in fact" or "fair dealing", which are elements of good faith.

IV. This Court overlooked the case law supporting Snyder's motion to compel.

On or about March 26, 2018, Snyder served Ditech with his second interrogatories and second requests to produce. (R 88). Ditech, under extension, served its responses to these discovery requests on July 23, 2018. (R 91-94). On or about August 15, 2018, Snyder's counsel wrote to Ditech's counsel regarding his objections to certain requests, and requesting amended requests. (R 88). Specifically, Snyder's counsel considered the following objections inappropriate:

> 25. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph A of Federal Trade Comm'n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015) (the "FTC Order").
>
> RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action.
>
> 26. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph B of the FTC Order for the following:
>
> a. Cassandra Turner
> b. Michael Young
> c. Swarn [last name unknown]
> d. Xaiver A. [Referenced in a Nov. 21, 2013 letter (R 138)]
> e. All persons who interacted with Kevin Snyder, Mary Snyder, or their representatives (e.g. their attorney) regarding this loan or its collection

f. All persons who reviewed the Snyders' loss mitigation applications

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action. Plaintiff objects further as it seeks personally identifiable information of its employees.

29. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph E of the FTC Order that would have been used in the collection of the loan at issue in this action.

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action.

32. A copy of your fee agreement(s) with all attorneys who were retained to handle this mortgage foreclosure action.

RESPONSE: Plaintiff objects to this request on grounds that this request seeks information protected by the Attorney-Client Privilege. Plaintiff objects to this request on the grounds that it seeks information that is not relevant to any cause of action or defense in this action. Plaintiff objects to this request as it seeks business confidential and proprietary information.

(R 91-97).

Ditech's counsel responded to Snyder's counsel's concerns via a letter dated August 31, 2018, stating: "…[Plaintiff] is standing on its objections which I understand will likely lead to a motion to compel." (R 89, 188-90). Snyder filed a motion to compel Ditech's responses, which was heard on December 10, 2018, at a status conference (no court reporter was present). The Master-in-Equity denied this motion via a Form 4 order on March 18, 2019, and in his March 27, 2019 order. (R 17, 22).

This Court found Snyder did not preserve his argument that Ditech's generic objections waived its right to object. (Opinion p. 11). This holding overlooks the record evidence the cases underpinning this argument were presented to the Master-in-Equity. While the December 10, 2018, status conference was conducted without the benefit of a court reporter, less than three months earlier this very Master-in-Equity issued a "NOTICE REGARDING ALL MOTIONS TO

COMPEL" (R 778) that references an earlier memorandum of the then-Chief Administrative Judge Roger Young incorporating all of Snyder's waiver arguments and including a copy of *In Re Oxbow Carbon, LLC Unitholder Litig.*, No. CV 12447-VCL, 2017 WL 959396 (Del. Ch. Order dated March 13, 2017) (R 779-808). Ditech has never argued Snyder's argument was not presented to the Master-in-Equity (Resp. Brief p. 18), and Ditech never objected to the inclusion in the Record on Appeal of the Master-in-Equity's notice (R 778); Judge Young's memorandum (R 779-788); *In Re Oxbow Carbon, LLC* (R 789-808); *Crescom v. Terry*, No. 2:12-cv-63-PMD, 2017 WL 2880866 (D.S.C. Order dated July 6, 2017) (R 809-819); and *Curtis v. Time Warner Entertainment-Advance-Newhouse P'ship*, No. 3:12-cv-2370-JFA, 2013 WL 2099496 (D.S.C. May 14, 2013) (R 663-667). *See* Rule 210(b), SCACR ("The Record [on Appeal] shall not…include matter which was not presented to the lower court or tribunal.").

Accordingly, the argument Ditech's objections were impermissibly generic, and therefore waived, was before the Master-in-Equity. According to the Delaware Court of Chancery:

> …numerous federal decisions made clear that "boilerplate, generalized objections are inadequate and tantamount to not making any objection at all." Summarizing the case law, one commentator observed that "[b]oilerplate objections have been considered prima facie evidence of a Rule 26 violation, which causes the objecting party to waive any legitimate objections that they may or may not have had.

In Re Oxbow Carbon, LLC, supra. (footnotes and citations removed) (R 789-808); *see also Curtis, supra.* ("Objections that state that the discovery request is 'vague, overly broad, or unduly burdensome' are, standing alone, meaningless and will be found meritless by this court.") (R 663-667); *Crescom, supra.* (citing multiple jurisdictions for the same proposition). (R 809-19). Further:

> For an objecting party to carry its burden, the objection must be specific, the party making it must explain why it applies on the facts of the case to the request being made, and if the party is providing information subject to the objection, the party must articulate how it is applying the objection to limit the information it is providing. In short, "[o]bjections should be plain enough and specific enough so

> that the Court can understand in what way the discovery is] claimed to be objectionable."

Id. at 5-6 (footnotes and citations removed). Snyder would ask this Court to reconsider its finding regarding this important issue, which is faced by litigants nearly every day in South Carolina trial courts.

CONCLUSION

The petition should be granted.

Dated: August 3, 2022

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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EXHIBIT TO PETITION FOR REHEARING
(UNOFFICIAL TRANSCRIPT OF ORAL ARGUMENTS)

Note: this transcript is presented exactly as received, including all errors

[pause 00:00:10]

Madam Clerk: Okay. Due when you are ready? All up in there.

Judge Vincent: Sure. I'm ready whenever you're.

Madam Clerk: Okay.

[pause 00:00:40]

Madam Clerk: Be upstanding for the court.

Judge Vincent: Thank you. Please be seated. Thank you. Madam Clerk?

Madam Clerk: Our next case is number 2019000575, Ditech Financial versus Kevin Snyder.

Judge Vincent: All right. Thank you. Mr. Luck, it'll be glad to hear from you, sir.

Luck: May it please the court. This case is, uh, procedurally and jurisdictionally complex, so I want to start really at the end. I wanna start at the relief. So I want to tell this court that, practically speaking, the only relief that, well, again, the only relief that is practical, uh, in this matter would be a modification of the lien that Ditech holds and a reallocation of the sales proceeds.

That is in light of the unique circumstances of, uh, one having a sale of the home in question that has taken place and is finished, and that party is not- the buyer is not a party to this action or this appeal. And also, pending bankruptcy action, uh, before the Southern District of New York, which has carved off certain aspects of this case that I am dealing with in that court, in that jurisdiction, but does leave here a certain sort of romp counterclaim of Mr. Snyder, that would be part of this appeal, and other issues of equity, not in the issues of money damages, but issues of equity.

Judge Vincent: Is the bankruptcy stay lifted, or it still in place.

Luck: It is still in place, Your Honor. And regarding that automatic stay, that was an issue early on in this case, especially before we went to the trial. And so, uh, for your, I guess for your review later, uh, I would direct you to the record in page 505 of the record, and also page 204 of the record. If you want to see some, uh, sort of some descriptions of, not just from the respondent, but also from the bankruptcy court itself of permissible relief that is available under these circumstances by the State Court, because we are constrained here.

Uh, and when I mentioned earlier, we start at the end here, the relief that we are asking for is where we le- is where we end up no matter what theory of recovery we decide to take to get there. And so, looking at those sections in the record, we, uh, the bankruptcy court and the re- the respondent have both noted that each issue such as rescission and modification, basically, equitable, equitable, equitable relief is

what's available here, and what can be re-ordered here. We cannot ask for money damages. We cannot ask for attorneys' fees, we, being the Snyders.

What we can do, what we really- only thing we can do is to ask that the lien that was imposed on this property be modified under principles of equity, which this court can consider and make its own decision under our, under our appellate rules. It may review and issue its own modified ruling, or it may remand for a hearing de novo on those issues. But I would argue that, of the $247,104, that some portion of it should be returned to the homeowner as, again, a matter of equity.

Judge Konduros: Because did he make any house payments?

Luck: He did Your Honor, but that was early on, and that was-

Judge Konduros: To what- to what amount?

Luck: Your Honor, I don't have that in before me, but it's- it would be in the record and it's not substantial. And so-

Judge Vincent: So what portion of this 247,000 would you suggest be returned?

Luck: Well, obviously, you know, advocating for my client, I would say 100% of it.

Judge Vincent: That's my question too, you're asking for it, so tell me how much that is.

Luck: So, the $247,104, of that, I can break it down somewhat.

Judge Vincent: I'm-I'm specifically asking for a number, so just--

Judge Konduros: You're looking de-de novo overview.

Luck: De novo overview. Well, Your Honor, if we were to award the homeowner, my client-clients, because I also represent the estate, the entire amount, it's that-that is the value of what the property was sold for. And that would--

Judge Vincent: It's your position today that you're asking this court to return $247,000?

Luck: It is, Your Honor, but I have an alternative position as well.

Judge Vincent: And when you say return, is that re-return because money was- that amount of money was paid?

Luck: No, Your Honor, because that was the value of the home though. That was the value of the property that was owned by Mr. and Mrs. Snyder, and that was what was sold. This is a lien state, and so.

Judge Vincent: How much money was paid? Just refresh my memory with that? How much money was actually paid by your client?

Luck: And that's, uh, I don't actually have that number, Your Honor, but like I told, uh, Judge Konduros, it was, it was not substantial. And so it can be--

Judge Vincent: What would be- what would be not substantial?

Luck: It-it can only be several thousand dollars. We're not talking tens or twenties or thirties, we're talking just thousands of dollars. So, and that's, I can't- I can't deny what the record says.

Judge Vincent: Yes, right. You- just like you said, using our equity- sorry, I just was curious what your thought of equity we- might be in this circumstance?

Luck: I understand, Your Honor. So, but even if that 247,000, if you wanna break that down a little bit, we do know that 109,000 and some other, $109,606, that's- that's interest. That's money that was- that is cost that accrued during the pendency of this matter, which has been pending for quite a long time.

Judge Vincent: So that also includes paying for the insurance on the house and paying the taxes that were due each year on the house. Is that correct?

Luck: Your Honor, that's actually an additional $40,000 of advances.

Judge Vincent: So you're talking about above the 109, just in interest?

Luck: It would be those interests, costs. Uh, this is in the brief, but their interest, advances. It would be 149,000 and some other 149,606.64 cents. Uh.

Judge Vincent: If we were to consider awarding anything, we should also consider backing out all the money the bank paid for these costs, such as insurance and homeowners, and, uh, the taxes that were paid for all the time that your clients resided in that home?

Luck: That is something that can be considered, Your Honor. Absolutely. Now, do I believe that it should occur? No, but, uh, it is- it should be considered, Your Honor.

Judge Vincent: Well, let me get beyond where we are in terms of talking about, uh, just the pure money for just a few moments. And help me understand how, uh, the Supreme Court's Administrative Orders for foreclosure actions creates this- creates any kind of private call cause of action.

Luck: Well, Your Honor, when we talk about a private cause of action, we talk about- when I say a cause of action, here is a cause of action for contempt. It is a contempt action. And so-

Judge Vincent: So why wasn't it brought as a rule to show cause during the pendency of the action? That's what I would think most people would do with an Administrative Orders, is as the, uh, as the action is progressing, if there's something that seemed to be in violation of a court's order is brought attention- brought to the attention of the trial court by way of a rule to show cause, and you say, "I wanna hold them in content because they haven't done this.

And then you can ask for attorney's fees and compensatory damages related to that and-and get the court to do something that you can feel like they need to do to move that forward because that's the purpose of the administrative is- order is to facilitate these, uh, processes of foreclosure. Is that correct?

Luck: That's correct, Your Honor. But we'd also look at the substance of these requests to the court rather than just the form. And so, a request was made, so it wasn't made in the form of the rule to show cause, it was nonetheless presented to the court with proof in writing for the court to consider. Now, was it ca- if it's called a cause of action instead of a rule to show cause, okay, there's a issue of form, but is not an issue of substance though.

Judge Vincent: Well, it is to the extent that you're asking the court to hold somebody in contempt. And-and aren't you bound by what's in your complaint that you filed in 2013, so that any acts subsequent to that, this court could not consider and the lower court could not consider because they're not on- the-the, uh, uh, contempt nor is not on notice of what contempt you're alleging?

Luck: Well, Your Honor, the-the acts- subsequent acts were nonetheless presented to the other side and to the court. And so, I understand your argument, however, I would note that the, uh, the respondent has an object to the consideration of those acts. At least the consideration in that- under that context. Of course, they object to it, but they do not object to it as something they didn't receive notice of, they receive notice it's been argued. It's been tried by consent in effect.

Judge Konduros: Do you wanna speak to the attorney preference, defense?

Luck: Yeah, Your Honor, that's an interesting issue in that the term "borrower" within that section of the *Consumer Protection Code,* isn't really defined at least in that chapter. So you can look in the def- the definition section. I was looking at it this morning, the beginning of that title, the definition section doesn't define what a borrower is. The particular section that describes the attorney preference statute, it doesn't describe what a borrower is.

But a subsequent section that discusses mortgage loans, I believe that it's actually the name of the chapter, mortgage loans, does describe what a borrower is and describes it in a relatively broad- relatively broad terms. And it becomes the- whoever's property is burdened by this, uh, security interest. And so that's not just the person who puts his or her ink on paper, on the loan application. It's-in this case, it's the other owner of the property. It's the mortgages on her interest as well.

Judge Vincent: Well, I look at *Section 37-10102* compliance, uh, with that section requires that they provide the information at the ti- with the credit application or that they send notice to the borrower within three days after the credit application has been completed. Uh-uh, your client's, uh-uh, deceased wife was not borrowing money on that credit application. Was she?

Luck: No, Your Honor.

Judge Vincent: So it was just him.

Luck: It was just him, Your Honor.

Judge Vincent: And so, how would the bank have known- how would the bank have complied? I mean, they did exactly what they were supposed to do pursuant to the statute. Do you disagree with that?

Luck: Well, Your Honor, if they were to provide a choice to someone whose ownership interest will be burdened by the security interest, no, they did not comply with it.

Judge Vincent: Where does it say they have to do that though in *Section 37-10102,* which is the-is the compliance section?

Luck: Well, we have to read these sections in harmony with one another as well though. And so we can't und- we cannot create a definition of borrower that in this case, sort of, implicitly repeals the definition of borrower and other chapters here. We need to- the-the entire consumer protection title needs to work together. The parts need to look in--

Judge Vincent: Can I just follow the plain language of the statute though, the plain language of the requirement- the compliance requirement.

Luck: Yeah, but Your Honor, even in most closings, the application's still presented to- or most- every closing, the application's still presented to the persons at the closing table. And so, there's going to be a signature. The application is presented to all parties involved. And so, every person must see the application. I see where you're- what you're talking about, Your Honor.

Judge Vincent: I'm-I'm-I'm trying to figure out how the bank was supposed to comply with that provision, the *Attorney Preference Statute Provision* when they sent or provided that information to the borrower on the credit application. That's what the statute requires. It doesn't say to the borrower and anybody who might be on a mortgage with the borrower. Um, it just says, "the borrower" and that's the- and by- by direct inference, I mean, it's not really an inference. It says, "Send it to the- with the credit application, or immediately afterwards to the person who signed the credit application."

Luck: I hear, Your Honor, and that may be something that, uh, I'm going to have to look in the record and see if the application itself is part of the record, because that's raising an interesting question I want to look at myself.

Judge Vincent: Okay. And-and really what you're asking for under that particular defense is, uh, recoupment or set-off, is that correct?

Luck: Correct, Your Honor.

Judge Vincent: And so, how would that, if-if would the waiver of deficiency in any way affect your claim for recoupment?

Luck: Your Honor, I do not think so. I think in this case, the- in this- when we talk about a set-off for recoupment. She owned half the property, you know, I'm trying to keep, you know, basically, keep this as simple as possible. If she owned half the property, then half the property would not be subject to the, uh, the lien. That's the way I would look at it, Your Honor.

Judge Vincent: So are you pleading this recoupment or set-off as, uh, a defense or as a counterclaim?

Luck: Is-is it a defense, Your Honor?

Judge Vincent: Okay.

Luck: I see my time is up, so.

Judge Vincent: Thank you. We're going to reply. Thank you, sir.

Luck: Thank you.

Judge Vincent: Thank you. Mr. Schulz, be glad to hear from you, sir.

Jonathan Schulz: Thank, Your Honors. And may it please the court, um, Jonathan Schulz on behalf of respondent, Ditech Financial LLC. Um, Mr. Luck described this case as procedurally and jurisdictionally complex. Um, I think that may have been by design at-at bottom. This is a routine residential foreclosure action. There's no dispute about the following facts. The note, uh-uh, came into default in 2008. Uh, it was in default at the time, uh, Ditech's predecessor and interest sued for foreclosure. The appellant declined, uh, loan modification offers and lost mitigation options. Um-

Judge Konduros: Did they qualify for the loan obligation? Uh, modifications?

Jonathan: Did-did they qualify for it? I'm-I'm not sure what I under- what-what you mean by that, Your Honor.

Judge Konduros: Well, I thought at one point it said that he did and she didn't, or there was some-- Was there some issue about loan modification? They were never given one. Were they?

Jonathan: The-- Y-yes. They were, your Honor. Um, and it's-and it's sort of a- it's a long about, you know, seven, eight year history of this, uh, um, foreclosure intervention process and I'm-I'm happy to-to--

Judge Konduros: That's fine.

Jonathan: Yeah, but-but I think-I think the, uh, the degree to which Ditech and its predecessors and interest did try to work with, uh, with Mr. Snyder, sort of, gets to the-the underlying point I wanted to raise, which is all this discussion about, um, about recouping some of the interest or some of the cost. I think there needs to be a preliminary question about why. Wh-why would his clients be entitled to that?

The-the only-the only, sort of, procedural mechanism through which they could obtain that relief is as a sanction under Justice Saul's 2011 Administrative Order. Um, and, uh, as Judge Vincent already mentioned, um, there was never any motion to show cause to try to seek that relief. So I'm not even sure what the- what the, sort of, predicate order would be, uh, in order to obtain that relief.

Um, but i-i-in all events, uh, again, Ditech and its predecessors interest fully complied with the foreclosure intervention process. So there's no real basis to make that claim. I-I-I think at bottom, what the appellants complain mostly about is the, uh, alleged delays in that process. Um, and, and I guess what I would point out is, um, it-it-it's not just on Ditech for any delays in that process. At-at any point in time, the Snyders could have agreed to proceed to an uncontested foreclosure hearing and asserted all these counterclaims.

They-they don't dispute that they were in default. And I suppose of all, they have some sort of standing argument, Ditech showed up at the hearing with the, you know, a note endorsed to bearer. So they're entitled to enforce it. And the mortgage follows the- they're entitled to enforce that. So the-there's no real dispute about, sort of, those elements that, uh, a lender would have to establish for foreclosure.

So at, you know, at-at any point in this process, so, um, you know, in-in-in 2013, a Certificate of Compliance with the 2011 order, uh, was filed. At that point, they could have proceeded to an uncontested foreclosure hearing. They could have asserted whatever defenses they wanted to assert under Justice Saul's 2011 order, which I guess they claimed to have had at the time they filed their answer and counterclaims.

Um, and-and that could have short circuited, any type of delay. So-so when-when we're looking at, uh, delays, I-I think it really cuts both ways. Um, but again, there-there's this-there's this predicate issue of, I-I'm not sure what the basis would be, uh, for any set-off or recoupment. And-and relatedly, I-I'm not sure that relief could even

be, uh, had, and-and I'd like to sort of address the, uh, the jurisdictional issue that I raised by way of supplemental authority in light of the November, 2021, sale of the property.

Um, the appellant could have stayed that sale, uh, by posting a bond. In fact, we litigated his motion for supersedeas at the trial level, uh, here at the court of appeals, and then also on a motion to reconsider. And, ultimately, he could have stayed, uh, that sale by posting a bond. He decided not to do so therefore the sale has gone through, therefore the case is closed.

Um, and I-I-I understand the argument that-that he's making. He's not trying to say, "Well, I-I can- I can unwind that sale at this point." Instead, he's trying to nibble around the edges and say, "Well, I-I think I can sort of cut into some of that, uh, uh, money that was disbursed ultimately through-through counsel, to the mortgage service lender. And then it's probably with the investors at this point."

Um, but there's the- there's a host of problems with that argument. Um, first and foremost, it-it's an end runaround, uh, *Rule 241,* which-which provides the, uh, a foreclosure is an exception to the automatic stay. I think the-the wisdom behind that is to bring finality to a foreclosure. Uh, and if a borrower like, uh, Mr. Snyder is able now, after not posting a bond to stay the hearing, the-the, I'm sorry, to-to stay the trial proceedings pending appeal, um, the-the foreclosure sale occurs and to now in have the court of appeals weigh in and change around on some of that disbursement order that the master and equity, um, decided to allocate. I think that would really undermine, uh, the finality of foreclosures and really the purpose behind, uh, foreclosure sales being an exception to the automatic stay. Um, and then I guess, you know, also to the-to the point where, I'm not even sure how-how this court or even the trial court would go about trying to calculate what that is because again, I think he's making arguments about-about delays.

But, um, but-but ultimately because I don't think that relief is available. I mean, I, I-I think I-I think that the current posture of the case, uh, the-the issues are moot. I-I-I'm not sure what if any relief he can get and as the court is well aware, it doesn't have jurisdiction or render advisory opinion. So-so, I-I-I, we would ask the court just to dismiss the appeal for lack of jurisdiction, um, because the-the issues have-have come to finality.

The master in equity made clear in his, uh, disbursement order that the matter is closed. Um, so-so I'm not sure what-what more could be done at this point. Um, of-of course, we'd-we'd ask the court to on alternative grounds to affirm all the rulings below. Uh, but I think my primary request of this court would be just to dismiss the appeal as moot at this point, for lack of jurisdiction.

Judge Vincent: What about the things that were not ruled on are dealt with because of the stay at the trial level?

Jonathan: Well, uh--

Judge Vincent: Some things that were not addressed, obviously, because of the stay and-and, um, and I don't know if any of those things, uh, are-are still, um, something that the parties want to litigate. But, uh, I, I'm trying to figure out if that if we can actually consider doing in what you're doing if there's still issues that were unresolved by the lower courts, uh, uh, order in this matter because they were stayed.

Jonathan: Right. Your Honor, the-the, the-the claims that were stayed were certain counterclaims of, uh, of the appellants, uh, uh, to degree that they were seeking money damages. Uh, it's my understanding that he has filed claims with the bankruptcy court. Uh, and so I-I think that those would get adjudicated, and-and I'm- I'm not a bankruptcy expert.

But it's my understanding that those claims would get adjudicated in the context of the-of the bankruptcy proceeding in the Southern District of New York, as opposed to, you know, many years down the line, somehow the, the-the matter at the trial level will being reopened to adjudicate these counterclaims. I-I-I-I think that is the way that it would work, so I-I don't view that as an impediment to-to dismissing this matter on-on jurisdictional grounds. Um, but,

Judge Vincent: Are there any- he-he mentioned the- pending bankruptcy as-as well. Uh, the-the pending bankruptcy, what limitations do- does this court have as a result of that pending bankruptcy?

Jonathan: Well, it's my understanding Your Honor, that as a result of the bankruptcy, the-the relief to which the appellant could be afforded is-is limited to non-monetary sort of injunctive, uh, equitable type of relief. I-I, I-I frankly don't think, uh, the stay would allow for the-the-the money damage claim that he's asserting.

Now-now, the appellant has captured it in terms of a-a recoupment or a set-off, but at bottom what he would be seeking is a monetary sanction under justice Saul's order, and I think any type of monetary remedy is stayed by the bankruptcy order. So I-I-I don't even think, uh, that's sort of an additional reason why I-I don't think he would be entitled to that even if there were a-a basis for it, uh, which there is not.

Judge Vincent: Well, the-the recoupment, um, and set-off were raised under the Attorney Preference, uh, Statute not under the-the claim for compensatory contempt. That's-that's been one of the-one of the, uh, issues that have, uh, troubled, uh, me as I've looked at this case, is exactly how to deal with that recoupment and set-off issue under the- under that statute, and it was raised as a-a defense, obviously, too.

Jonathan: It-it-it was, Your Honor, and-and the- it-it was dismissed at the summary judgment stage. And, uh, you know, I-I, I-I think Judge Konduros was-was sort of and you were as well, kind of, asking the-the right questions. I mean, I-I think it's-it's just clear from the plain language of the statute and-and forgive me if I'm not answering your question directly, but, uh, the-the under the attorney preference statute, it's-it's the borrower, uh, that we're concerned about?

Um, I'm not sure what-what type of, uh, you know, analysis or creative argumentation one would have to go through to say that somehow a borrower includes people who didn't borrow anything. Um, so if-if that, Your Honor, is the- is the sole basis for a recoupment claim, I-I think- I think, uh, uh, the decision by the master in equity to dismiss that claim should be affirmed just based on the plain language of the contract, uh, plain language of the statute. Um, and-and that should deal with the-the recoupment or set-off.

And-and I, when I used recoupment set-off perhaps I was using the wrong sort of language. I was trying to refer to the-the claim he is making to, uh, to-to set-off or to get back some of the accrued interests that he claims, uh, uh, accrued during the pendency of the foreclosure intervention process, but, uh, again, I-I'm not sure what the- what the factual predicate would be for that in the first instance so. Um, um, I see that my time is up unless the court has any questions, I'll rest on my briefs.

Judge Vincent: Thank you, sir.

Jonathan: Thank you.

Judge Vincent: Mr. Luck?

Luck: Thank you. Uh, addressing this mootness issue, let me get that out of the way right now, I would direct the court's attention to, uh, Wachesaw Plantation east versus Alexander, the case number is 414 S.C 355. And that's very explicitly holds that, "even though the property has been sold as a judicial-judicial sale, the appeal is not moot".

Now, footnote six of that opinion also has some additional, uh, authority for his old authority but good authority from the 1930s that also authorizes the sort of relief that I am talking about today. So I would commend to both that case and the case cited in footnote six which is Nichols versus Andrews 154 Southeast, not Southeast second, Southeast 305, from 193-1930. Those--

Judge Konduros: If I may- if I may just focus you in as clearly as you can. What, under-under what theory would your clients be entitled to any money back? Would they be, uh, uh, either Wachesaw, or Nichols, or anything else, I mean, what-what have they put in that they would get out other than if you get something under, uh, Justice Sul's sanction letters, which, obviously, your opponent has said you wouldn't be entitled to what? "They would get this money because of X," if you could just fill in those two blanks for me?

Jonathan: Understand, Your Honor. Uh, the, when we talk about, again, we're talking about equity here, and I understand, uh, what you're looking at just purely the dollars put into it, but keep in mind this was their home. This is where they live. This is where their daughter died. This is where, uh, Mr. Mrs. Snyder almost, well, she began dying. This is their home. That is what they put into it. They put their lives into it and so, yes, that has a value of some sort.

Now, do we have to quantify that we may have to in some way? We do that all the time in many other cases. Now, what other- what other rights? So we-we talk about, you know, violations of this Administrative Order. Yes, and that's detailed in the brief, there's this, isn't the only wrongful act here that the-the Ditech or its predecessors have engaged in.

Again, it's all in the brief there. You know, there is not, there's been a number of acts that I, you know, I- don't wanna sound- use a lot of hyperbole here, but you know, that do sort of attack the dignity of the court, that are disrespectful to the court. And that goes from the-the-the affi, you know, the affidavit to the discovery abuse. Those-the-the spoliation of evidence, all of these things accumulate. There it's--

Judge Vincent: That doesn't give you necessarily a private cause of action or lead to a counterclaim. That's something that we deal with as, uh, trial courts. And we s-we sanction the-the parties, we sanction the, uh, the-the- for the conduct and award fees and deal with any other, uh, damages it might result, but I don't see how it gives you a-a-a private cause of action at this point in time under that order.

And-and when I read the relief that you're in-in essence seeking for, what- well, I guess, a better way of what-what damage was caused by the- this- the alleged violations, they all have to do with delay. And yet, this very delay allowed your clients to live in that home at no cost to them from 2008, until they left. I don't even know exactly when they left. I'm assuming sometime in 2020. And so they lived there for, uh, 11 or 12 years at no cost to them because of these delays, so I can't- I'm having difficulty understanding what the damage to them is when they've lived there, uh, at no cost for that length of time.

Luck: Lived there with the threat of eviction hanging over their heads the entire time, and so it has been told or it has been said that they could've just consented to this, right? I don't think that's really very, it doesn't make a lot of sense to me. Why would anyone consent to begin the process of being evicted from your home, the foreclosure process and then eviction afterwards? Why would they do that? Why would they ask to be removed from their home?

So you talk-talk about what's these-- you said these are issues of sanctions. Yes. Well, we are asking for sanctions. And so these are sanctionable acts. We are asking for sanctions and sanctions are appropriate. And so that's-that's how we get to the end here. There's a lot of routes to get here.

Judge Vincent: And the trial judge denied those. Is that correct?

Luck: Correct, Your Honor. There's a- I could go into a little more detail about some of the orders. Bear in mind, there's not just a foreclosure order on appeal here. There was also an order granting summary judgment, striking a-an affirmative defense, which in my opinion, no one agreed with me, but in my opinion, should have been immediately appealable and issued an automatic stay. But that's another debate for another time perhaps.

Judge Vincent: Well, I-I suppose, I-I-I'd see what you're saying in terms of, uh, the delays and them wanting to remain in the home and not be there under this cloud the whole time, but couldn't, they just as easily have done as your, as-as opposing counsel has suggested? And that is to assert all of these counterclaims as a part of the foreclosure action go ahead and try it and move on. If they had been successful on any of these, it may have provided them with the-the funds to buy another house and they wouldn't have had to live under a cloud or-or in this discomfort for, uh, 11 or 12 years.

Luck: Well, Your Honor, that's a strategy concern or strategy question. And, do you proceed with-- do-do you gamble or do you know- do you go with what you know you have in hand? I mean, I think that's kind of a human concern that we have where we tend to want to take the path of less risk, take the path of where we- what go with what we have, not what we could have. These are not gamblers, these are just ordinary people. I see my time's up.

Judge Vincent: Thank you.

Luck: Thank you, Your Honors.

Judge Vincent: Thank you both. Very fine arguments. Have a good- have a good day

Madam Clerk: Be upstanding for the court.

[00:42:34] [END OF AUDIO]