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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Deadra L. Jefferson
Presiding Circuit Court Judge

Appellate Case No.: 2021-001170

Eddie B. Lewis..... Respondent

v.

Saul, LLC and Wells Fargo Bank National Association,

Of Whom Saul, LLC is the Petitioner and

Of Whom Wells Fargo Bank National Association is also the Respondent.

**PETITIONER’S CONSOLIDATED REPLY TO RESPONDENTS’ RETURNS TO
PETITION FOR WRIT OF CERTIORARI**

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Petitioner Saul, LLC (hereinafter “Saul”), submits this consolidated Reply in support of its Petition for Writ of Certiorari pursuant to Rule 242(g) of the South Carolina Appellate Court Rules and the Court’s Order dated August 2, 2022, allowing for a consolidated Reply brief.

SUMMARY OF ARGUMENT

Saul appealed the Trial Court’s Order vacating its Order for Summary Judgment because there was an erroneous exercise of discretion on the part of the circuit court judge. *See Winslow Brothers & Smith Co. v. Gossett.*, 120 S.C. 164, 112 S.E. 825 (1922) (emphasis added), *see also* S.C. Const. art V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”) and *Campbell v. Robinson*, 398 S.C. 12, 18, 726 S.E.2d 221, 225 (Ct. App. 2012) (stating that the Court of Appeals “may not overrule supreme court precedent”). The holding in *Winslow Bros.* is still the law of South Carolina as it has not been overturned and is not abrogated by S.C. Code Ann. § 14-3-330.

It is an erroneous exercise of discretion to vacate a judgment which was consented to by Respondent, Eddie B. Lewis (“Lewis”), unopposed by the other Respondent Wells Fargo Bank National Association, (hereinafter “Wells Fargo”), and premised upon arguments which are not supported by the actual Record. A circuit court is a court of Record. *See* S.C. Code Ann. § 14-5-10. What occurs in open court matters and cannot be ignored. Here, Lewis’ counsel conceded its claims against Saul were not sustainable, which was the basis for granting Saul’s Motion for Summary Judgment (hereinafter “Motion”). (Appx. 482-483); *See also Shelton v. Bressant*, 312 S.C. 183, 184, 439 S.E. 2d 833, 834 (1993) (“Acts of an attorney are directly attributable to and binding upon a client.”). Only after the passage of over a year, did Wells Fargo finally seek to revise history by arguing the subject Order Vacating Saul’s summary judgement (hereinafter “Order”) was improperly entered. The Order was without a scintilla of support from the actual

Record and ignored Wells Fargo's deliberate inaction while casting of aspersions against Saul by suggesting it improperly presented the case to the trial court. The Record firmly establishes that the premise for the Order granting Saul summary judgment was appropriate, and Wells Fargo's conscious decision to not timely appear in court or file opposition papers should not be sanctified by this Court. To hold otherwise, devalues the confidence that litigants have with the judicial process and the foundation of the judicial system – *res judicata*.

I. WINSLOW BROTHERS & SMITH CO. V. GOSSETT IS STILL THE LAW OF SOUTH CAROLINA

Saul appeals this matter based on the South Carolina Supreme Court holding in *Winslow Bros.*, 120 S.C. 164, 112 S.E. 825, and not pursuant to S.C. Code Ann. § 14-3-330. An order *generally* must fall into one of the several categories set forth in the statute governing appellate jurisdiction in order to be immediately appealable. *See State v. Wilson*, 387 S.C. 597, 693 S.E.2d 923 (2010) (emphasis added). Determination of whether a party may immediately appeal an order issued before or during trial is governed *primarily* by statute. *See Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 671 S.E.2d 98 (Ct. App. 2008) (emphasis added).¹ When making decisions on issues of appealability of matters under S.C. Code Ann. § 14-3-330, South Carolina Courts have consistently and carefully crafted their holdings to include qualifying language like “generally” and “primarily” which evidences that appeals may arise outside of categories set forth in the statutes governing appellate jurisdiction.² The question of whether an order is immediately

¹ Lewis suggests in his return (page 7) that *Pocisk* was decided by the Supreme Court – it was not. It is a Court of Appeals case and did not overrule *Winslow Brothers*.

² Saul acknowledges the holding in *North Carolina Federal Sav. And Loan Ass'n v. Twin States Development Corp.*, 289 S.C.480, 347 S.E.2d 97 (1986) (holding an appeal pursuant to Rule 72, SCRCP, does not authorize an immediate appeal of a trial court's order). However, the holding in *North Carolina Federal Sav.* dealt entirely with an appeal based on Rule 72, SCRCP, which explicitly finds that the rules shall not be construed to extend or limit the jurisdiction of any court of this state. *Id.*, citing Rule 82(a), SCRCP. This appeal arises pursuant to the South Carolina Supreme Court's holding in *Winslow Bros. & Smith Co. v. Gossett*, 120 S.C. 164, 112 S.E. 825 (1922) (holding that an order granting a motion vacating a judgment is only appealable if there was an *erroneous exercise of discretion on the part of his honor*, the circuit court judge) (emphasis added).

appealable is determined on a case-by-case bases. *See Stone v. Thompson*, 426 S.C. 291, 826 S.E.2d 868 (2019). For example, the *Pocisk* court acknowledged that the Appellate Courts have considered appeals from the granting of Rule 60(b) relief. *See e.g. Johnson v. Johnson*, 310 S.C. 44, 425 S.E.2d 46 (Ct. App. 1992); *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988).

The Trial Court's ruling that there was a basis to grant a motion to set aside which is based on Wells Fargo's failure and neglect to argue at the appropriate time resulted in an abuse of discretion which is immediately appealable pursuant to *Winslow Bros.*, 120 S.C. 164, 112 S.E. 825; *see gen. Mitchell Supply Co.*, 297 S.C. 160, 375 S.E.2d 321 (holding in which the court of appeals considered an appeal from the granting of Rule 60(b) relief.).

Assuming arguendo, that the only manner in which a matter is immediately appealable is bound by S.C. Code Ann. § 14-3-330, then *Winslow Bros.*' holding is still good law, and this matter is immediately appealable. Lewis/Wells Fargo assert that the South Carolina Supreme Court holding in *Winslow Bros.* is no longer good law. Respondents rely on the flawed argument that *Winslow Bros.* which was decided in 1922, has been abrogated when the South Carolina General Assembly enacted S.C. Code Ann. § 14-3-330. Neither Respondent provide any legal support for this blanket contention. Rather a plain reading of S.C. Code. Ann. § 14-3-330 with the holding in *Winslow Bros.* clearly establishes that this exact type of case is in fact immediately appealable. S.C. Code Ann. § 14-3-330 provides as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon

appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

(emphasis added).

The holding in *Winslow Bros.* is that an order granting a motion vacating a judgment is only appealable if there was *an erroneous exercise of discretion on the part of his honor*, the circuit court judge. 120 S.C. 164, 112 S.E. 825 (1922) (emphasis added). Abuse of discretion means that the ruling of the trial court was without reasonable factual support, which resulted in prejudice to the rights of the appellant, and therefore, in the circumstances, *amounted to error of law*. See *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961) (emphasis added). An error of law is the same as an erroneous exercise of discretion which is not based on reasonable factual support. See *gen. Id.* The South Carolina General Assembly expressly included appellate jurisdiction for the correction of errors of law. See S.C. Code Ann. § 14-3-330. Therefore, the holding of *Winslow Bros.* is indeed still the law of South Carolina and this matter is immediately appealable.

II. THE TRIAL COURT'S ORDER LACKS ANY IDENTIFIABLE FACTUAL SUPPORT IN THE RECORD WHICH AMOUNTS TO AN ERROR OF LAW

Saul's appeal arises from the Trial Court's abuse of its discretion by granting Wells Fargo's

Motion to Set Aside Judgement when the Record establishes that the Respondent conceded Saul's Motion and Wells Fargo waived any arguments to the same. (Appx. 485-518). As evidenced in Saul's Initial Brief at the Court of Appeals, the Trial Court's holding was unsupported by any supporting facts and are contradicted by the record which amounted in an erroneous exercise of discretion.

First, the Record shows that Lewis consented to Saul's Motion for Summary Judgment ("Motion"). At the hearing, Lewis' counsel, on the Record, conceded that Saul's Motion for Summary Judgment was supported by the law and by the facts. (Appx. 482-483). The Trial Court granted Saul's Motion for Summary Judgment, based on the Lewis' concessions. (*See Id.*; *see also* Appx. 2-8). Lewis even filed a Memorandum in opposition to Wells Fargo's Motion to Set Aside. (Appx. 238-242).

Second, the Trial Court's Order states that Wells Fargo was not afforded an opportunity to be heard on Saul's Motion. (Appx. 9-16). Nowhere in the Record is there any factual support for this holding. The procedural history of this matter encapsulates the utter failure by Wells Fargo's counsel to raise any argument at the appropriate time to Saul's Motion. More specifically, it shows that Wells Fargo clearly had every opportunity to be heard yet it waived to do so at the appropriate time. Waiver is a voluntary and intentional abandonment of a known right. *SPUR at Williams Brice Owners Ass'n v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015). Acts inconsistent with the continued assertion of a right may give rise to waiver. *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994).

Initially, on January 20, 2020, Saul filed its Motion with the Beaufort County Clerk of Court. (Appx. 32-223). Then counsel for Wells Fargo, Laura Robinson, received notice of this Motion through the Notice of Electronic Filing. (Appx. 222-223). On March 13, 2020, Laura

Robinson emailed counsel for Lewis and Saul requesting a continuance for the Motion. (Appx. 322-325). That same day, counsel for Saul informed Ms. Robinson that he could not consent to the request for continuance. (*See Id.*). On March 16, 2020, Charles G. Blackburn filed a Notice of Appearance on behalf of Wells Fargo. (Appx. 328). That same day, counsel for Saul received a phone call from Mr. Blackburn at or around 2:37 p.m. on March 16, 2020, in which he advised that he would be appearing on behalf of Wells Fargo but would not be appearing at the hearing. (Appx. 326-327). During this call, Mr. Blackburn informed the undersigned that he had read the Motion, that he did not believe he had a basis to oppose the Motion, and that he would not be attending the hearing on the Motion. (*Id.*).

On March 17, 2020, the Trial Court heard arguments on the Motion. Counsel for the Lewis and Saul were present for this hearing; however, *counsel for Wells Fargo failed to appear*. (Appx. 301-321). Wells Fargo failed to file a Motion for Continuance or any Memorandums in Opposition, despite having notice of the Motion since January 20, 2020. (*See Id.*). During the hearing, Lewis' counsel informed the Trial Court that counsel for Wells Fargo informed him that he was not going to attend the hearing on the Motion. (Appx. 474; *see also* Appx. 240). After the Motion was granted, Wells Fargo's counsel received notice that the proposed Order was electronically filed. (Appx. 329). Wells Fargo did not raise any objections to the proposed Order.

On March 24, 2020, the Trial Court, after careful consideration of the Record, granted Saul's Motion. (Appx. 330-335; compare Appx 336-340). Neither the Lewis nor Wells Fargo filed a Motion to Reconsider. (Appx. 226-237). Wells Fargo did not appeal the Trial Court's Order. (*See Id.*).

Almost a year later, on March 19, 2021, Wells Fargo first challenged the Trial Court's Order pursuant to Rules 60(b)(2) and (b)(3), SCRCP. (Appx. 265-278). Wells Fargo failed to

make any argument or excuse as to why its counsel did not argue against Saul's Motion, file a motion or appeal the Trial Court's Order granting Saul's Motion. Given this, there is nothing in the Record to indicate that Wells Fargo did not have an *opportunity* to be heard. Rather the Record is replete with support for the exact opposite: ***Wells Fargo had every opportunity to be heard and waived this opportunity.***

Wells Fargo's counsel had notice of the Motion, proposed Order, and final Order. Yet, it made no arguments. Still, the Trial Court erroneously concluded that Wells Fargo was not afforded an opportunity to be heard on Saul's Motion. This clearly ignores the facts of the case: ***Wells Fargo's counsel failed to appear at the hearing, despite being on notice.*** Despite being put on notice of Saul's Motion on January 20, 2020, Wells Fargo did nothing until March 19, 2021. Wells Fargo has waived any rights to raise any arguments that should have been made at the time of the hearing. *See gen. SPUR at Williams Brice Owners Ass'n*, 415 S.C. 72, 91, 781 S.E.2d 115, 125.

The Trial Court's Order states that former Wells Fargo's counsel's requests for a continuance, via email, should have been relayed onto the Court (Appx. 9-16) ignores the fact that Mr. Blackburn, ***counsel of record for Wells Fargo at the time of the hearing***, informed both parties of his intent not to appear at the hearing. (Appx. 301-321; 326-327; 239-240).³ Further, Wells Fargo's counsel, at the time of the hearing, informed counsel for Saul that he had read the Motion, that he did not believe he had a basis to oppose the Motion, and that he would not be appearing at the hearing. (Appx. 326-327). Additionally, it was relayed onto the Trial Court that Wells Fargo would indeed not be present based on Mr. Blackburn's conversation with Lewis' counsel. (Appx. 474). Wells Fargo's very own memorandum simply states: "...for reasons

³ Further, the Trial Court's Order erroneously states that it was represented that Wells Fargo was not necessary for the disposition of Saul's Motion; however, the hearing transcript establishes that counsel for Lewis fully informed the Court about Wells Fargo's roll in the case. (Appx. 474-475).

unknown, Mr. Blackburn, did not attend the hearing on March 17, 2020, and did not file a response to the Order after it was entered.” (Appx. 265).

There is nothing in the Record which evidences or even hints to any support that Wells Fargo did not have an opportunity to be heard on Saul’s Motion. The Trial Court’s holding that Wells Fargo was not afforded an opportunity to be heard on the matter is an erroneous exercise of discretion which is unsupported by any supporting facts which has amounted in Saul being severely prejudiced in having to relitigate this matter and therefore constitutes an error of law. *See Bridges*, 239 S.C. 37, 40, 121 S.E.2d 300, 302.

Putting it simply, Lewis’ counsel conceded that Saul’s Motion was supported by the law and by the facts. (Appx. 482-483). The Trial Court granted Saul’s Motion, based on the Lewis’ concessions. (*See Id.*; Appx. 2-8). In addition is the fact that the Trial Court was made aware of the fact that Wells Fargo’s then-counsel, called Saul’s counsel and informed him that he had read the Motion, that he did not believe he had a basis to oppose the Motion, and he would not be attending the hearing. (Appx. 326-327)). Nevertheless, the Trial Court ignored these key facts, which were presented to it, which resulted in an abuse of its discretion by granting Wells Fargo’s Motion to Set Aside without reasonable factual support.

III. SAUL HAS BEEN PREJUDICED BY THE TRIAL COURT’S ORDER SETTING ASIDE JUDGEMENT

Contrary to Respondents’ assertions, the Trial Court’s Order has severely prejudiced Saul in that it has incurred significant costs, fees, and delay in litigating a matter which has been conceded to by the Lewis’ counsel on the Record. (Appx. 482). Further, Wells Fargo failed to set forth any argument or supporting documents which refute Saul will be prejudiced, which it had the burden to do at the time it filed the Motion to Set Aside. *See BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). Nevertheless, Saul identifies the following manners in which it

will be prejudiced:

First, given the Respondent's concessions on the Record, a rehearing on this matter will only reach the same conclusion: Saul being dismissed. It has long been the case that parties to a suit are bound by admissions, made by their attorneys of record in open court. *See Shelton*, 312 S.C. 184, 439 S.E. 2d 834; *Smith v. Pearson*, 210 S.C. 524, 530, 43 S.E.2d 479, 481 (1947) (finding appellants bound by statement made by counsel at the outset of hearing); *Hall v. Benefit Ass'n of Ry. Employees*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932) ("The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial."). What occurs in open court matters and cannot be ignored. Here, Respondent's counsel conceded that its claims against Saul were not sustainable, and judgment was entered based on these concessions. However, by vacating the same the Trial Court's Order will result in avoidable unnecessary litigation. *See gen. Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995) (holding that an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation.). Given this, Saul has been prejudiced in time, legal fees, and costs in having to reargue its Motion which will result in the same conclusion: Summary Judgment.

Second, Saul has been prejudiced by not having an opportunity to participate in over a year of discovery and depositions that have been undergoing since it was dismissed. Saul will undertake significant legal fees and costs in re-noticing depositions and reviewing discovery due to Wells Fargo's unreasonable delay in making even a basic argument at the appropriate time. All the while, Saul will be incurring these unnecessary legal fees and costs with the fact that Lewis, the only party who has brought claims against Saul, has conceded that his claims are not

sustainable.

Third, Saul's due process rights of having a final determination in this case have been prejudiced by Wells Fargo's complete and utter disregard to argue even the most basic argument at the appropriate time. The procedural history of this case establishes that the Trial Court's Order has created a revisionist history of the Record which is in contradiction to the only reasonable view of the Record: *Wells Fargo had every opportunity to be heard and waived this opportunity*. The outcome of the Trial Court's Order has prejudiced Saul by shifting the burden from Wells Fargo, the party with unclean hands, to Saul.

Wells Fargo filed its Motion to Set Aside on March 19, 2021, which asserted that it will be supported with "sworn Affidavits of Wells Fargo representatives, and a Memorandum of Law...." (Appx. 224-225). Lewis' Memorandum in response to the Motion to Set Aside stated that the responding parties were left to guess what Wells Fargo's allegations and evidence presented were going to be. (Appx. 238-242). One-hundred nine (109) days after the filing of its Motion to Set Aside, Wells Fargo filed its affidavits and Memorandum of law. (Appx. 265-271). Wells Fargo's Memorandum in Support of its Motion to Set Aside attempted to reargue the Motion for Summary Judgment in the context of a Rule 60(b) Motion. (*See Id.*). Pursuant to Rule 60(b), SCRPC, the burden of proof rested entirely on Wells Fargo, not Saul. *See Sanders v. Smith*, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). However, Saul and Lewis were left guessing as to what exactly Wells Fargo's arguments were when it made its Motion to Set Aside. (Appx. 226-242). As the maxim goes, "he who seeks equity must do equity." *Provident Life & Accident v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994). Wells Fargo has not done equity in this instance. It sat on its hands and did not come to Court with clean hands. *See gen. Associate Spring Corp v. Roy F. Wilson*, 410 F. Supp. 967, 978 (D.S.C. 1976) (applying SC law and collecting cases noting parties

who seek equity must come with clean hands).

Wells Fargo has caused this entire situation by its own failure to appear, oppose a motion, and its decision to make baseless accusations in an effort to avoid the consequences of its own inaction and omissions. Wells Fargo's original motion was devoid of articulable information, facts, law, etc. (Appx. 224-225). Finally, when Wells Fargo was forced to provide a more meaningful motion (well after the one-year requirement), Saul was given three-days to respond. (Appx. 301-321). Despite Wells Fargo bearing the burden of proof, Saul has essentially had to defend itself in the "dark," while the impression has been made that Saul has done something improper. Wells Fargo had over a year, beyond the provided one year timeframe of Rule 60, SCRCF, to provide clear and convincing evidence that Saul acted improperly. It failed to do so within the one-year time period contemplated by Rule 60, SCRCF. As such, Saul has been prejudiced by the Trial Court's Order which erroneously exercised discretion in relying on any arguments and memorandum made by Wells Fargo which were made beyond the one-year timeframe laid out by Rule 60(b), SCRCF.

CONCLUSION

For all of the aforementioned reasons, Saul respectfully submits this memorandum in reply to Respondents' opposition briefs to the Petition for Certiorari. Petitioner asks this Court to accept this Petition.

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Dated this 12th day of August, 2022.

Respectfully,

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