THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity

Appellate Case No. 2019-000575
Circuit Court 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.

RETURN TO PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

This is an appeal from a residential foreclosure action that follows a fact pattern all too commonly presented to this Court: borrower admittedly fails to make mortgage payments, borrower defaults on loan obligations, mortgagee initiates foreclosure, and borrower asserts all counterclaims and defenses he or she can creatively manufacture to delay the inevitable foreclosure. Despite the procedural complexity the Appellant, Kevin G. Snyder ("Appellant" or "Snyder") has strategically injected into this case, this appeal is straightforward.

Ironically, in an appeal in which Snyder complains primarily about delays, his Petition for Rehearing and Rehearing *En Banc* ("Petition") represents yet another attempt to prolong this litigation. In addition to utilizing the limited time and resources of the parties and this Court to complain (again) about the routine denial of a motion to compel discovery (Petition at 13–16), Snyder advances other arguments in a catchall fashion that is commonplace in foreclosure appeals. Snyder's arguments are wrong and misleading. Snyder not only mischaracterizes the Court's July 20, 2022 Opinion ("Opinion") regarding his setoff defense under South Carolina's Attorney Preference Statute, S.C. Code Ann. § 37-10-102(a) (the "Attorney Preference Statute"), he also advances jurisdictional arguments using only the general term "jurisdiction" in circumstances that otherwise require him to clarify the type of jurisdiction to which he is referring.

As requested by the Court, Respondent submits this Return to Snyder's Petition. Snyder's arguments, individually and collectively, do not warrant additional time or attention, much less a rehearing. The Court should summarily deny the Petition.

BACKGROUND

A. The Promissory Note and the Mortgage.

On or about April 21, 2005, Snyder executed and delivered a promissory note ("Note") in the principal sum of $135,000.00 in favor of Gateway Funding Diversified Mortgage Services L.P. (R. p. 45, ¶ 4; R. p. 308, ¶ 6). Snyder's wife at the time, Mary Snyder, was not a signatory to the Note. (R. p. 308, ¶ 6; R. pp. 312–315). To secure payment of the Note, Snyder, together with his then-wife Mary Snyder, made, executed, and delivered a real estate mortgage ("Mortgage") encumbering real property located at 1752 Orange Grove Shores Drive, Charleston, South Carolina 29407 (the "Property"). (R. pp. 45–46, ¶ 5; R. p. 308, ¶ 7).

Snyder executed an Attorney/Insurance Preference Form and an Attorney/Insurance Preference Check List, forms in which Snyder selected – and handwrote in the name – Roy Reynolds as his preferred closing attorney. (R. p. 308, ¶ 8; R. pp. 330–332). Snyder also executed two Servicing Disclosure Statements providing notice that the right to collect mortgage loan payments could be transferred. (R. p. 308, ¶ 8; R. pp. 333–335).

B. Notice of Default, Foreclosure Action, and Initial Efforts at Loan Modification and Loss Mitigation.

The Note came into default for failure to make payments on September 1, 2008 and all subsequent payments. (R. p. 47, ¶ 15; R. p. 309, ¶ 12).[1] On April 27, 2010, Ditech Financial LLC's ("Ditech") predecessor in interest, BAC Home Loans Servicing, LP ("BAC"),[2] gave notice to Snyder that the Note was in default and that he had an opportunity to cure the default. (R. pp.

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[1] Ditech's predecessor in interest, Bank of America, N.A., filed an initial foreclosure action in 2009, in which the trial court granted a foreclosure judgment. The judgment was subsequently vacated owing to the first South Carolina Supreme Court Administrative Order regarding foreclosure intervention.

[2] Through various assignments, the mortgage was assigned to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP. (R. p. 46, ¶¶ 7–9).

309–310, ¶ 14; R. pp. 376–378). On September 23, 2010,[3] with the Note remaining in default, BAC initiated this foreclosure action against Snyder and filed an appropriate Lis Pendens. (R. pp. 35–42). On October 27, 2010, BAC filed an amended complaint ("Complaint") to add Mary Snyder as a defendant along with Snyder, together with an Amended Lis Pendens. (R. pp. 45–57). On December 16, 2010, the matter was referred to Mikell R. Scarborough, Master in Equity, by order of the trial court. (R. pp. 1–2).

Pursuant to the Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011) (the "2011 Order"), Ditech's predecessor in interest, on December 20, 2012, filed and served on Snyder and Mary Snyder a Notice of Foreclosure Intervention. (R. pp. 59–62). Several months later on April 8, 2013, Ditech's predecessor in interest filed and served a certificate of compliance with the 2011 Order, which certified that Snyder and Mary Snyder had been served with notice of their rights to foreclosure intervention but had failed to submit required documents to be reviewed for loss mitigation alternatives (resulting in being denied for loss mitigation), and which directed Snyder and Mary Snyder to answer the Complaint. (R. pp. 63–65).

C. Answer and Counterclaims.

On June 3, 2013, Snyder and Mary Snyder filed an Answer to the Complaint ("Answer"). (R. pp. 70–77). The Answer included several affirmative defenses, including (a) lack of standing, (b) violation the Attorney Preference Statute with regard to Mary Snyder, and (c) noncompliance with the 2011 Order. (R. p. 71, ¶¶ 11, 12, and 14(a)). The Answer also asserted four counterclaims: (1) civil compensatory contempt (for the alleged violation of the 2011 Order); (2) breach of contract; (3) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann.

[3] For the sake of clarification, dates of filed documents refer to the date of the Court's file-stamp on the document.

§ 39-5-10, *et seq.*; and (4) quiet title. (R. pp. 73–76, ¶¶ 21–34). Ditech's predecessor in interest timely filed a Reply to the Answer. (R. pp. 78–83).

D. Further Efforts Undertaken to Avoid Foreclosure.

Ditech, f/k/a Green Tree Servicing, LLC, began servicing the loan effective June 1, 2013. (R. p. 309, ¶ 9). On June 10 and 11, 2013, Ditech sent letters to Snyder notifying him of the servicing transfer and providing him with information regarding the loan balance and the identity of the creditor. (R. p. 309, ¶ 9; R. p. 336–344). The Mortgage was assigned to Ditech on June 17, 2013, following assignments from the original beneficiary to Countrywide Home Loans Inc. on September 25, 2007 and Countrywide Home Loans Servicing, LP on January 26, 2009. (R. p. 309, ¶ 10). The Note is endorsed in blank, and it is in Ditech's possession. (R. p. 309, ¶ 11).

Like its predecessors in interest, Ditech reviewed the Note and Mortgage for alternatives to foreclosure and attempted to resolve the delinquency through loss mitigation. On December 23, 2014, Ditech approved a trial plan for modification with monthly trial payments in the amount of $1,131.37. (R. p. 310, ¶ 15; R. pp. 379–385). Snyder rejected the trial plan, and Ditech, on March 10, 2015, notified Snyder that a permanent modification would be denied due to failure to complete the trial period plan. (R. pp. 386–391). In a March 25, 2015 letter, Ditech also provided Snyder's counsel with answers to questions posed concerning its calculation of the trial plan payment amounts. (R. pp. 392–393).

Notwithstanding Snyder's rejection of the trial payment plan, Ditech reviewed Snyder again for a modification. On May 11, 2017, Ditech notified Snyder that he was ineligible for a modification. (R. p. 310, ¶ 16; R. pp. 396–399). A month later on June 8, 2017, and following an appeal of the determination of ineligibility, Ditech confirmed Snyder's ineligibility. (R. pp. 400–401).

E. Relevant Procedural History

1. Denial of Motion to Compel Discovery Responses

On November 29, 2018, Appellant filed a motion to compel responses to four separate document requests (R. pp. 87–98), which sought to compel production of (a) a Consent Order entered in the United States District Court for the District of Minnesota in a suit brought by the Federal Trade Commission, (b) Ditech's policies and procedures related to loss mitigation evaluation, and (c) fee agreements between Ditech and the law firms engaged to handle this lawsuit. Ditech opposed the motion on relevancy grounds. (R. pp. 179–191). The parties discussed this motion at a March 18, 2019 hearing on the parties' cross-motions for summary judgment, with the trial court orally denying the motion to compel. (R. p. 578, lines 3–18). The trial court subsequently denied the motion to compel in a Form 4 Order (R. p. 17), and it denied the motion to compel again when ruling on the parties' motions for summary judgment (hereinafter "Summary Judgment Order") (R. p. 22, ¶ E).

2. Cross-Motions for Summary Judgment

On March 11, 2019, the parties both filed motions for summary judgment.[4] The Appellant moved for summary judgment as to his counterclaims for civil compensatory contempt and quiet title. (R. pp. 412–434). Ditech moved for summary judgment on its foreclosure action and on the Appellant's counterclaims for civil compensatory contempt and quiet title. (R. pp. 290–410).

[4] Prior to the parties filing motions for summary judgment, Ditech notified the Court of its Chapter 11 bankruptcy filing in the United States District Court for the Southern District of New York, together with the bankruptcy court's modification order which limited the scope of the automatic stay. (R. pp. 203–289). The parties agree that as a result of the limited automatic stay, the Appellant's counterclaims for breach of contract, unfair trade practices, and (to the extent it seeks monetary relief) civil compensatory contempt are stayed. Ditech's foreclosure action and the Appellant's counterclaims for quiet title and for civil compensatory contempt (to the extent those counterclaims seek non-monetary relief) are not stayed and were permitted to proceed to judgment.

Ditech also moved for summary judgment on the Appellant's defense alleging violation of the Attorney Preference Statute with regard to Mary Snyder. The trial court held a hearing on March 18, 2019, which was attended by counsel for the parties. (R. pp. 561–601). On March 28, 2019, the trial court entered its Summary Judgment Order denying the Appellant's motion, granting Ditech's motion with regard to the civil compensatory contempt counterclaim and the Attorney Preference Statute defense, and denying Ditech's motion with regard to the foreclosure claim and the quiet title counterclaim. (R. pp. 19–22).

3. Initial Notice of Appeal, Subsequent Trial, Foreclosure Order, and Amended Notice of Appeal

On March 29, 2019, the Appellant filed a notice of appeal, indicating his intent to appeal the following orders: (a) March 20, 2014 Order Amending Caption; (b) March 25, 2019 Form 4 Order Denying Motion to Compel; and (c) March 28, 2019 Order on Motions for Summary Judgment (hereinafter "Initial Notice of Appeal"). (R. pp. 531–533).[5]

On April 1, 2019, the trial proceeded. (R. pp. 602–662). At the inception of the trial, counsel for the Appellant objected to the trial going forward, arguing that the Initial Notice of Appeal deprived the trial court of jurisdiction. (R. p. 606, lines 12–p. 621, line 25). The trial court determined it had jurisdiction and proceeded. At the trial, Ditech produced the original Note for the trial court's inspection, and the trial court noted that it was endorsed in blank and was in Ditech's possession. (R. p. 24, ¶ 10). The trial court found that Ditech was entitled to foreclose and had complied with the 2011 Order, and it therefore entered judgment in Ditech's favor. (R.

[5] Referencing the date on which the trial court signed these orders, the Appellant refers to them as the orders "dated March 12, 2014, March 18, 2019, March 18, 2019, and March 27, 2019." (R. p. 531). The Appellant seems to have erroneously listed March 18, 2019 twice on the Initial Notice of Appeal. Although not expressly referenced therein, the Initial Notice of Appeal also attaches a March 25, 2019 Form 4 Order (signed by the trial court on March 20, 2019) denying the Appellant's Motion for Partial Summary Judgment. (R. p. 18).

pp. 27–32). Consistently, the trial court concluded the Appellant was not entitled to the remedy of quiet title. (R. p. 27, ¶ 3).

On May 2, 2019, the Appellant filed an amended notice of appeal (hereinafter "Amended Notice of Appeal"). (R. pp. 536–537). In addition to appealing the three orders referenced in the Initial Notice of Appeal, the Appellant indicated his intent to also appeal the April 26, 2019 Master in Equity's Order and Judgment of Foreclosure and Sale (referred to by the Appellant as the "April 23, 2019" order). (R. p. 536). Thus, all of Snyder's appellate issues were consolidated in this appeal.

4. Court of Appeals' Decision Affirming the Trial Court

Following oral argument, this Court affirmed the trial court. As to summary judgment in Ditech's favor on Snyder's counterclaim for civil compensatory contempt, this Court found that Ditech fully complied with the 2011 Order. As to the denial of Snyder's motion to compel discovery, the Court concluded the trial court did not abuse its discretion and that Ditech did not waive its objections. The Court further found that Snyder's challenge to an order granting a motion to amend a case caption was moot and that the trial court properly dismissed Snyder's setoff defense pursuant to the Attorney Preference Statute. And finally, although this Court found that the trial court erred in proceeding with the foreclosure hearing during the pendency of Snyder's initial appeal, the Court nevertheless found any such error to be harmless.

In response to the Opinion, Snyder filed his Petition. As requested by the Court, Ditech submits this Return.

ARGUMENT

I. STANDARD OF REVIEW.

"The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (internal quotation marks omitted). In order to prevail on a petition for rehearing, the Appellant must demonstrate the Court overlooked or misapprehended their argument or some material fact or principle of law. SCACR 221(a); *Goodwine v. Dorchester Dep't of Social Serv.*, 336 S.C. 413, 415–16, 519 S.E.2d 116, 117 (Ct. App. 1999) (per curiam). The Appellant "shall state with particularity the points supposed to have been overlooked or misapprehended by the Court." SCACR 221(a).

A rehearing *en banc* is "not favored and ordinarily will not be ordered" unless it is "necessary to secure or maintain uniformity" in the Court's decisions or "the proceeding involves a question of exceptional importance." SCACR 219(b).

II. THE COURT OF APPEALS DID NOT OVERLOOK OR MISAPPREHEND THE APPELLANT'S ARGUMENTS REGARDING THE TRIAL COURT'S JURISDICTION TO PROCEED WITH THE FORECLOSURE HEARING.

Ditech disagrees with the Court's conclusion that "the master erred in proceeding with the foreclosure." (Opinion at 14). As threshold matters, and as set out in Ditech's Respondent's Brief, (a) the summary judgment Order was not immediately appealable because it does not satisfy any subsection of S.C. Code Ann. § 14-3-340, and (b) even if the summary judgment Order were immediately appealable, Snyder's Initial Notice of Appeal did not prevent the trial court from proceeding with the foreclosure because the trial court's ability to decide all remaining facts and legal issues (not decided at the summary judgment stage) relative to Ditech's foreclosure was "not affected" by the initial interlocutory appeal. SCRAP 241(a).

Assuming, *arguendo*, that the trial court erred in proceeding with the foreclosure while Snyder's initial appeal remained pending, this Court correctly concluded that any such error was harmless. As this Court noted, "Snyder filed an amended notice of appeal to include the master's order and judgment of foreclosure and sale" and, in any event, the Court "affirm[ed] the master's order granting partial summary judgment in favor of Ditech as to Snyder's non-stayed counterclaim for civil compensatory contempt." (Opinion at 15).[6] Thus, all of Snyder's appellate arguments were adjudicated on appeal, and a stay of the trial court proceedings pending resolution of Snyder's initial appeal would have made no difference whatsoever. For these reasons, to the extent the trial court erred, any error was harmless.

Snyder makes no argument disputing that any such error was harmless.[7] Instead, he argues only that the Court should not have applied harmless error analysis in the first place. Specifically, Snyder argues that the trial court's alleged lack of subject matter jurisdiction constituted a "structural error," and that harmless error analysis cannot be used to cure structural errors. (Petition at 4, 6). Snyder's use of the word "jurisdiction" throughout his Petition—without clarifying the type of jurisdiction to which he is referring—is misleading. Because the initial interlocutory appeal did not deprive the trial court of *subject matter* jurisdiction, Snyder's entire argument falls apart.

It is true that Rules 205 and 241(a) speak in terms of "jurisdiction." *See* SCACR 205 ("Upon service of the notice of appeal, the appellate court shall have exclusive jurisdiction . . . .");

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[6] In addition, the Appellant could have paid a supersedeas bond to stay the foreclosure sale pending appeal. He simply chose not to do so.

[7] It is telling that Snyder makes no effort to even attempt to dispute that any error was completely harmless in the context of this case. Snyder recognizes any error was harmless since he was able to consolidate his two appeals. He is simply frustrated that his procedural ploy to delay foreclosure with an interlocutory appeal was unsuccessful.

SCACR 241(a) ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal . . . ."). But as this Court correctly recognized: "The reference in Rules 205 and 241(a) to the 'jurisdiction' of the lower courts does not refer to subject matter jurisdiction." (Opinion at 14–15 (quoting *Tillman v. Oakes*, 398 S.C. 245, 255 n.3, 728 S.E.2d 45, 51 n.3 (2012)).

Recognizing this is fatal to his argument, Snyder attempts to distinguish this language in *Tillman*, calling it "dicta" and suggesting this Court in *Tillman* merely describes "subject matter jurisdiction by another name." (Petition at 6). But if this Court in *Tillman* was somehow ambivalent, the South Carolina Supreme Court in *Metts v. Mims*, 384 S.C. 491, 682 S.E.2d 813 (2009), was not. In that case, as here, a party challenged a trial court's *subject matter* jurisdiction to consider a motion because that party had previously noticed an interlocutory appeal. *Id.* at 497, 682 S.E.2d at 816. Finding that the trial court retained subject matter jurisdiction despite the notice of appeal, the South Carolina Supreme Court explained:

> Initially, we note that petitioner couches this argument as one involving the trial court's subject matter jurisdiction. Generally speaking, subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Circuit courts have jurisdiction over general tort cases, such as the instant defamation case. Accordingly, petitioner's 'subject matter' jurisdiction claim is inapposite.

Id. at 498, 682 S.E.2d at 817 (internal citations omitted).

There is no dispute that South Carolina circuit courts have subject matter jurisdiction over foreclosure actions, which are typically referred to a master. *See* S.C.R. Civ. P. 71. And as *Metts* and *Tillman* make clear, a notice of appeal does not deprive the circuit courts of *subject matter* jurisdiction, despite the use of the word "jurisdiction" in Rules 205 and 241(a) of the South Carolina Rules of Appellate Procedure.

Even though the Appellant made an affirmative decision and choice to *not* clarify the type of jurisdiction to which he was referring, *all* of his arguments are about lack of *subject matter*

jurisdiction. For instance, Snyder cites *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995), for the proposition that "a judgment of a court without jurisdiction is void." (Petition at 4). But that case evaluated whether a judgment was "void" for purposes of a motion for relief from judgment under S.C.R. Civ. P. 60(b)(4), and "[t]he definition of void under th[at] rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked *subject matter jurisdiction* or personal jurisdiction,"[8] *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (emphasis added) (internal quotation marks omitted).[9] Because the trial court at all times retained *subject matter* jurisdiction, the trial court's foreclosure judgment was not void.[10] Because the trial court's foreclosure judgment was not void, this Court did not "apply[ ] a harmless error analysis to a judgment that was void for want of jurisdiction." (Petition at 4). That statement by Snyder is plainly inaccurate.

Snyder further argues that "[l]ack of jurisdiction is a 'structural error' not susceptible to harmless error analysis." (Petition at 4). But the cases on which he relies stand only for the proposition that harmless error analysis is inapplicable to structural errors. (*Id.* (citing *Arizona v. Fulminate*, 499 U.S. 279 (1991); *State v. Wright*, 432 S.C. 365, 852 S.E.2d 468 (Ct. App. 2020)). These cases do not even address or concerns themselves with whether "[l]ack of jurisdiction is a 'structural error.'" (*See* Petition at 4; *see also Fulminante*, 499 U.S. at 309–12 (evaluating whether

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[8] Ditech presumes Snyder is not making an argument premised on lack of *personal* jurisdiction.

[9] Further, the case on which *Thomas & Howard Co.* relies for this proposition concerned whether "Richland County Court" had subject matter jurisdiction over a state agency. *See* 318 S.C. at 291, 457 S.E.2d at 343 (citing *Ross v. Richland Cnty.*, 270 S.C. 100, 240 S.E.2d 649 (1978)).

[10] This conclusion comports with the applicable standard of review on appeal, whereby a trial court's decision to retain jurisdiction following a notice of appeal is reviewed for only an abuse of discretion. *See Cousar v. New London Eng'g Co., Inc.*, 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991).

admission of coerced confessions is a structural error or trial error, and nevertheless finding it to be a trial error subject to harmless error analysis); *Wright*, 432 S.C. at 370–71, 852 S.E.2d at 471 (evaluating whether denial of a jury poll request is a structural error versus a trial error)).

The direct question at issue—which Snyder altogether fails to address—is whether the trial court's exercise of discretion, *see Cousar*, 306 S.C. at 40, 410 S.E.2d at 245, in proceeding at the trial level following Snyder's Initial Notice of Appeal constitutes a "structural error" to which harmless error is inapplicable. The answer is no; it does not even come close to the types of errors South Carolina courts have deemed structural.

"Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis." *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013).[11] "The Supreme Court has found an error to be structural, and thus subject to automatic reversal only in a very limited class of cases." *Id.* at 247, 741 S.E.2d at 705 (collecting cases concerning disqualification of counsel of choice, defective reasonable-doubt instruction, racial discrimination in selection of grand jury, denial of public trial, denial of self-representation at trial, complete denial of counsel, and biased trial judge).[12] Stated differently, "[t]here is a strong presumption any error can be categorized as a trial error" and subjected to harmless-error analysis. *States v. Mouzon*, 326 S.C. 199, 204, 326 S.E.2d 918, 921 (1997).

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[11] Even the United States Supreme Court in *Fulminante* reached this conclusion. *See* 499 U.S. at 306–07 (noting that "a constitutional error does not automatically require reversal" and explaining that "most constitutional errors can be harmless").

[12] Trial errors, which are subject to harmless-error analysis, occur "'during the presentation of the case to the jury' and 'may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *States v. Mouzon*, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (quoting *Fulminante*, 499 U.S. at 307–08). On the other hand, structural errors, to which harmless-error analysis is inapplicable, "affect the 'entire conduct of trial from beginning to end.'" *Id.* (quoting *Fulminante*, 499 U.S. at 309).

Assuming that the concept of "structural errors" is even applicable in the civil context,[13] it should be apparent that the trial court's discretionary decision to enter a foreclosure judgment during the pendency of an interlocutory appeal of a summary judgment order is not in the same universe as the grave constitutional errors mentioned in *Rivera* above that typify structural defects. To the extent the trial court erred, it was not a structural error. Therefore, nothing prevents this Court from applying a harmless-error analysis.

III. THE COURT OF APPEALS DID NOT OVERLOOK OR MISAPPREHEND THE APPELLANT'S ARGUMENTS IN AFFIRMING THE TRIAL COURT'S DECISION TO STRIKE THE APPELLANT'S DEFENSE UNDER THE ATTORNEY PREFERENCE STATUTE.

The Appellant's entire argument regarding the Attorney Preference Statute is premised on an apparent misunderstanding of the term "setoff" and a misreading of the Court's Opinion. Contrary to the Appellant's argument, this Court did not conclude that "proof of actual damages is necessary for a party to avail himself of the penalty provision of S.C. Code § 37-10-105." (Petition at 5). Rather, the Court rested its affirmance of the dismissal of Snyder's affirmative defense based on the more basic concept that a debtor can only "setoff" from monies that it affirmatively owes to a creditor. Because, as this Court acknowledged, "Ditech waived its right to a deficiency judgment" (Opinion at 12), Snyder did not owe Ditech any monetary judgment, meaning there was nothing from which Snyder could assert a setoff. Thus, as the Court correctly

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[13] The Court will note that the cases on which Snyder relies to advance his structural-error argument are all criminal cases. It is doubtful whether this paradigm—distinguishing structural from trial errors—is even applicable in the context of a South Carolina civil case. *See United States v. Maritime Life Caribbean Ltd.*, 913 F.3d 1027, 1036 (11th Cir. 2019) (explaining that the concept of structural error does not apply to an ancillary third-party forfeiture proceeding "because such a proceeding is civil in nature"); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 988 (9th Cir. 2012) ("The Supreme Court has never held that an error in the *civil* context is structural." (emphasis in original)); *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 14 (D. Mass. 2017) (noting that "structural error is a concept that attaches only in criminal proceedings").

concluded: "any penalty amount Snyder may have recovered as a setoff was precluded by Ditech's deficiency waiver." (Opinion at 13).

The Court's discussion of Snyder's obligation and associated failure to present evidence of actual damages merely related to his burden of proof on his affirmative defense. The Appellant glosses over the fact that he asserted the Attorney Preference Statute as an affirmative defense only, and not as an affirmative cause of action. (R. p. 71–72, ¶ 14). But "[i]t is well established that a party pleading an affirmative defense has the burden of proving it." *Dawkins v. Sell*, 434 S.C. 572, 591, 865 S.E.2d 1, 11 (Ct. App. 2021) (internal quotation marks omitted). A party claiming a set-off has the burden of proof to establish actual damages with reasonable certainty. *Diamond Swimming Pool Co. v. Broome*, 252 S.C. 379, 386, 166 S.E.2d 308, 312 (1969). The Court was thus correct—and overlooked no law, facts, or arguments—when it stated, "Snyder was required to provide a factual basis for his claim *and* any actual damages suffered as a result of the alleged violation." (Opinion at 13 (emphasis in original)). Based on this unremarkable and straightforward conclusion, there is no basis for a rehearing or rehearing *en banc*.[14]

[14] If the Court has any concerns about the propriety of its affirmance of the dismissal of this defense (which it should not), it can withdraw its prior Opinion and affirm the dismissal of the defense because Mary Snyder was not a signatory to the Note and was, therefore, not a "borrower" within the meaning of the Attorney Preference Statute. This Court declined to rule on that issue, deeming it "moot" in light of its conclusion that Snyder presented no evidence in support of his affirmative defense. (Opinion at 13 n.7). But this Court can affirm based on any reason appearing in the record. *See Brading v. Cnty. of Georgetown*, 327 S.C. 107, 113 n.4, 490 S.E.2d 4, 7 n.4 (1997); *cf. Ex parte S.C. Dep't of Health & Human Serv.*, 364 S.C. 527, 529, 614 S.E.2d 609, 610 (2005) (affirming on rehearing "[f]or a different reason than in our prior opinion").

IV. THE APPELLANT'S REMAINING ARGUMENTS DO NOT WARRANT A REHEARING.

The Appellant makes two last-ditch arguments, contending the Court overlooked evidence when (a) affirming dismissal of his counterclaim for civil compensatory contempt and (b) affirming the denial of a motion to compel discovery. Neither argument warrants a rehearing.

A. No arguments were overlooked or misapprehended with respect to summary judgment dismissing the Appellant's counterclaim for civil compensatory contempt.

The Appellant first contends this Court misapprehended the scintilla-of-evidence standard in affirming dismissal of his civil compensatory contempt counterclaim at summary judgment. By advancing the same arguments he asserted in his appellate briefing, the Appellant is merely trying to "have the case tried in the appellate court a second time." *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322. Indeed, the specific instances of alleged violations of the 2011 Order raised by the Appellant in his Petition were all previously raised to and addressed by this Court. Nothing was overlooked or misapprehended.

1. Ditech (and its predecessors) fully complied with the 2011 Order.

As a threshold matter, a review of Ditech's (and its predecessors') engagement with the Appellant in the foreclosure intervention process makes clear that Ditech fully complied with the 2011 Order.

- Prior counsel for the original underlying plaintiff in this action served Snyder with a notice of foreclosure intervention on December 17, 2012. (R. pp. 59–62);
- Snyder failed to complete a loss mitigation application in response to the notice of foreclosure intervention; therefore, prior counsel served and filed a certificate of compliance with the 2011 Order on April 8, 2013. (R. pp. 63–65);
- After counsel appeared for the Appellant, Ditech also reviewed him for a loan modification. Ditech then offered the Appellant a trial period plan for a permanent modification in 2014, which contemplated a reduction in the Appellant's monthly payments. However, the Appellant rejected the trial period plan, deciding that the terms offered were not sufficiently favorable in his view. (R. p. 310, ¶ 15); and

- Ditech reviewed the Appellant for another loan modification in 2017, but it determined he was no longer eligible. (R. p. 310, ¶ 16).

The 2011 Order provides that "[n]o foreclosure hearing may be held in the foreclosure action until the Mortgagee's attorney certifies that the Mortgagee has complied with the requirements" set forth in the 2011 Order. Those requirements include that the mortgagor has been served with the notice of right to foreclosure intervention, that the lender has received and examined all documents submitted by the borrower, and that the borrower has been afforded a full and fair opportunity to submit documents and information, but that either the mortgagor does not qualify for loss mitigation and has been so informed, or the mortgagor has failed to participate in foreclosure intervention.

As set forth above, both the prior servicer and Ditech complied with the requirements of the 2011 Order. This Court neither misapprehended arguments nor overlooked facts or law in concluding the trial court properly dismissed the counterclaim at the summary judgment stage.

2. This Court did not overlook or misapprehend the Appellant's myriad complaints about Ditech's compliance with the 2011 Order; instead, this Court considered them and concluded they did not constitute bad faith.

In seeking a rehearing, the Appellant advances the same "kitchen-sink" argumentation about the foreclosure intervention process, hoping that the Court will latch onto at least one of his myriad complaints. This Court properly determined each complaint was immaterial or without merit or both.

As to the Appellant's arguments about sending correspondence to the wrong address and contacting the mortgagors directly, this Court concluded:

> [C]onsidering Snyder's counsel's three changes of address, Green Tree's merger with Ditech, and the significant amount of correspondence exchanged between the parties during this period, we find the evidence does not demonstrate Ditech's actions constituted a failure to act in good faith during the foreclosure intervention process.

(Opinion at 10). Indeed, the Appellant's counsel admitted his office moves "may have disrupted normal mail service." (R. p. 387). In any event, it is undisputed that the Appellant's counsel received the December 23, 2014 trial payment plan terms (*see* R. p. 310, ¶ 15; R. pp. 381–385) because he rejected them (R. pp. 386–387). Moreover, the Appellant's briefing to the Court identified only a single instance in which Ditech inadvertently sent correspondence to the borrower directly.

As to the Appellant's arguments about delays in responding to foreclosure intervention requests, this Court noted that "Snyder's own conduct" caused some of the delay and that "Snyder, through his counsel, continued to pursue foreclosure intervention of his own volition for four years, during which time Ditech paid all taxes and insurance premiums on the mortgaged property." (Opinion at 10). There is no real dispute that the foreclosure intervention process was completed by the parties. In any event, mere delays do not amount to bad faith.[15]

And finally, as to the Appellant's accusations about destruction of evidence and the filing of an affidavit of default, this Court noted: "We find Snyder failed to demonstrate how Ditech's improper affidavit of default, which the master subsequently lifted, and alleged spoliation of evidence show Ditech and its predecessors violated the Administrative Order." (Opinion at 10). The Court no doubt reached this conclusion because (a) the affidavit of default was stricken from the record (*see* R. p. 17), meaning it had nothing to do with the underlying foreclosure judgment, and (b) Ditech did not destroy any documents, it was only "unable to admit or deny certain facts" (R. p. 650, line 24) because certain documents in the possession of a prior loan servicer were not

[15] The Appellant seems to suggest that any delay attributable to Ditech constitutes evidence of bad faith. This Court properly disagreed with that false equivalence. (Opinion at 10).

within Ditech's business records. Snyder's persistent use of the inflammatory term "spoliation" does not mean that any such action occurred. It did not.

The Court acknowledged and addressed each of the Appellant's contentions. The Appellant just disagrees with the Court's views, which is not grounds for rehearing.[16]

B. No arguments were overlooked or misapprehended with respect to the routine denial of the Appellant's motion to compel discovery.

Finally, the Appellant seeks a rehearing of the Court's conclusion that the trial court did not abuse its discretion in denying requests for production. *See Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion."); *see also Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001) ("An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based upon an error of law.").

This Court affirmed based on its unremarkable conclusion that "evidence supports the master's denial of Snyder's motion to compel," namely "evidence shows the materials Snyder sought were irrelevant and overly broad." (Opinion at 11). The Appellant does not challenge this routine conclusion. Instead, he seeks rehearing only on the Court of Appeals' conclusion that a particular argument was unpreserved, namely whether Ditech's written objections were too generic and therefore waived. (Petition at 14). By making reference to out-of-state and federal

[16] If the Court has any concerns about the propriety of its affirmance of the dismissal of the civil compensatory contempt counterclaim (which it should not), it can withdraw its prior Opinion and affirm the dismissal of the counterclaim in light of the fact that "[t]he Toal Administrative Order, on its face, does not create a private cause of action." *Weber v. Bank of Am. NA*, 2013 WL 4820446, at *3 (D.S.C. Sept. 10, 2013). This Court declined to rule on this issue. (Opinion at 10 n.7). But this Court can affirm based on any reason appearing in the record. *See Brading*, 327 S.C. at 113 n.4, 490 S.E.2d at 7 n.4; *cf. Ex parte S.C. Dep't of Health & Human Serv.*, 364 S.C. at 529, 614 S.E.2d at 610.

court opinions (R. pp. 663–667, 789–819) and a generic Bar Memorandum from Judge Roger Young, unrelated to this case and apparently distributed to members of the Charleston Bar (R. pp. 779–788), the Appellant seems to be arguing that there is evidence in the Record on Appeal that—according to some courts and some judges—boilerplate objections to discovery may be deemed waived. The significance or import of those arguments and associated authorities, in the context of this Petition, is unclear. In any event, the Court of Appeals correctly noted that the Appellant did not raise this argument in his underlying motion to compel (*see* R. pp. 88–90), and there is no transcription of the hearing on the motion to compel. Nothing has been overlooked or misapprehended.

CONCLUSION

For the foregoing reasons, Appellant's Petition for Rehearing and Rehearing *En Banc* should be denied.

This 12th day of August, 2022.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity

Appellate Case No. 2019-000575
Circuit Court 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.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing **RETURN TO PETITION FOR REHEARING AND REHEARING *EN BANC*** was sent via first-class U.S. Mail, postage prepaid, and via e-mail, addressed as follows:

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This the 12th day of August, 2022.

/s/ Jonathan E. Schulz
Jonathan E. Schulz (SC Bar No. 79850)