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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Supreme Court Case No. 2022-001651

Ditech Financial, LLC .....Respondent,

v.

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

AMENDED PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies that he timely made a petition for rehearing in this matter, which was ruled upon by the Court of Appeals on November 8, 2022.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in using a harmless error analysis to affirm an order that was structurally erroneous and void for lack of jurisdiction, in conflict with *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013) and *Arizona v. Fulminate*, 499 U.S. 279 (1991).

II. Whether the Court of Appeals' opinion, which required evidence of actual damages to seek a statutory penalty for violation of the Attorney Preference Statute (S.C. Code § 37-10-102), conflicts with S.C. Code § 37-10-105(A).

III. Whether the Court of Appeals erred in affirming the Master-in-Equity's award of summary judgment, dismissing a claim for civil compensatory contempt, when the record contained a scintilla of evidence the Respondent violated the provisions of this Court's Administrative Order 2011-05-02-01.

STATEMENT OF THE CASE

This petition concerns misconduct occurring during the contested residential foreclosure of a home located at 1752 Orange Grove Shores Drive, Charleston, South Carolina. The Petitioner is Kevin Snyder, in his individual capacity as a mortgagor of the property, and as personal representative of the estate 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 and its successor Green Tree Servicing, LLC.

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). Pursuant to Administrative Order 2011-05-02-01 (*In re Mortgage Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (2011) - the "Admin Order"), BAC served Kevin and Mary Snyder with a Notice of Foreclosure Intervention on December 17, 2012. (R 59-60). On April 4, 2013, BAC served a "Notice of Denial of Loan Modification or Other Means of Loss Mitigation" under the Admin Order claiming the Snyders did not qualify for foreclosure intervention. (R 63-64). Undersigned counsel appeared for Kevin and Mary Snyder on May 3, 2013, filing his notice of appearance with the Charleston County Clerk of Court and serving it on BAC's counsel the same day. (R 66). BAC purportedly transferred the Snyders' loan

[1] Two of the three inhabitants of 1752 Orange Grove Shores died during the pendency of this action. Faith Noel Snyder, the Snyders' profoundly disabled daughter, died on December 2, 2013, and Mary Snyder followed her on November 23, 2015, succumbing to previously undiagnosed lung cancer.

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 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 Green Tree Servicing, LLC and its successor Respondent Ditech Financial, LLC, set forth in greater detail in Argument III.

The Master-in-Equity stayed this action pending foreclosure intervention at a September 30, 2013, status conference. (R 4-5). 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, 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 Kevin Snyder (now individually and as personal representative of Mary Snyder's estate) 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).

On February 11, 2019, Ditech filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York, and filed notice in this action on March 1, 2019 (amended May 1, 2019). (R 199-288). While the Bankruptcy Court's stayed Snyder's claims for violation of the South Carolina Unfair Trade Practices Act, Breach of Contract, and Civil Compensatory Contempt (for money damages), it allowed Snyder's Quiet Title and Civil Compensatory Contempt (non-monetary relief) to proceed. (R 270-271, 297-298).

On March 11, 2019, the parties filed cross-motions for summary judgment on the non-stayed claims. (R 291-433). On March 18, 2019, the Master-in-Equity heard these motions at a pre-trial hearing. (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). Of relevance to this appeal, the Master-in-Equity's March 27, 2019, order dismissed Snyder's cause of action for civil compensatory contempt (for violation of the Admin Order) and struck the Estate of Mary Snyder's Attorney Preference Statute (S.C. Code § 37-10-102) defense.

Snyder timely served a notice of appeal on March 29, 2019. (R 531). On April 1, 2019, the Master-in-Equity held a final hearing, over Snyder's objection to jurisdiction. (R 606-660). 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).

On May 2, 2019, Snyder amended his notice of appeal to include the April 23, 2019, order and also filed a motion for supersedeas before the Master-in-Equity. (R 435-440, 536). Ditech filed its response to the motion on June 3, 2019. (R 554-560). The Master-in-Equity ultimately granted Snyder's motion on October 18, 2019, setting the supersedeas bond at $25,000.00. (R 916). Unable to afford this bond, Snyder petitioned the Court of Appeals 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. (R 905-917). On November 18, 2019, Snyder petitioned for panel rehearing of the petition under Rule 241(d)(7), SCACR; a panel of the Court of Appeals denied this petition on December 17, 2019. (R 927-946).

On October 21, 2021, the Master-in-Equity sold 1752 Orange Grove Shores at judicial sale for $249,600.00. (R 950).

The Court of Appeals entertained oral arguments on February 10, 2022. (R 973-984).[2] On July 20, 2022, the Court of Appeals affirmed the Master-in-Equity. *Ditech Financial, LLC v. Kevin Snyder, individually and as Personal Representative of the Estate of Mary Snyder*, Op. 2022-UP-308 (S.C. Ct. App. filed July 20, 2022) (the "Opinion"). (R 820-835). Snyder timely filed a petition for rehearing and rehearing *en banc* on August 3, 2022. (R 953-984). After requesting a response from Ditech, the Court of Appeals denied Snyder's petition by order dated November 8, 2022. (R 1011). This petition for a writ of certiorari follows.

[2] An unofficial transcript of the oral arguments is attached to Snyder's August 3, 2022, petition for rehearing as an exhibit. (R 972-984). Please note this transcript, prepared by a vendor in the United Kingdom, contains errors.

STANDARD OF REVIEW

"'It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence.'" *Skipper v. Perrone*, 382 S.C. 53, 674 S.E.2d 510 (Ct.App. 2009) (quoting *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965)).

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The interpretation of a statute is reviewed *de novo*. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Errors of law are also reviewed *de novo*. *E.g.*, *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014); *State v. Bash*, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015).

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An order granting summary judgment is reviewed *de novo*, applying the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure. *M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008).

ARGUMENT

As set forth in greater detail herein, the Court of Appeals' opinion conflicts with decisions of this Court in its application of harmless error analysis to a void order and its misinterpretation of the Attorney Preference Statute. *See* Rule 242(b)(3), SCACR. The Court of Appeals' use of harmless error analysis also conflicts with the decisions of the United States Supreme Court meant to preserve a litigant's Fifth and Fourteenth Amendment Due Process rights. *See* Rule 242(b)(5), SCACR. Further, the Court of Appeals' opinion implicates substantial rights, whether it be the Due Process right of a trial free of structural defects or the right to counsel of one's choice in a real estate transaction. *See* Rule 242(b)(4), SCACR. Finally, this petition presents this Court with a novel opportunity to provide guidance in the application of its 2011 administrative order governing residential foreclosures. *See* Rule 242(b)(1), SCACR.

I. The Court of Appeals erroneously applied a 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 striking the Estate of Mary Snyder's Attorney Preference Statute defense. (R 19-22). Snyder served the Notice of Appeal of this order on March 29, 2019. This was, as the Court of Appeals correctly noted, a valid appeal of an immediately appealable order. (Opinion pp. 14-16; R 833-835).

The Court of Appeals also correctly found "the master erred in proceeding with the foreclosure". (Opinion p. 14; R 833). Under South Carolina law, the Master-in-

Equity lost jurisdiction over this matter upon the service of the Notice of Appeal on March 29, 2019. Rule 241(a), SCACR; *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533, 787 S.E.2d 485, 493 (2016) ("…the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal…"). However, the Court of Appeals refused to recognize the Master-in-Equity's April 23, 2019, order was void for lack of jurisdiction, and instead applied a harmless error analysis[3] in affirming it.

Harmless error analysis is not appropriate under these circumstances. 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 (*i.e.*, its jurisdiction) 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); *see also Arizona v. Fulminate*, 499 U.S. 279 (1991) (structural defects in the trial mechanism, which violate Due Process, are not susceptible to harmless error analysis). The Master-in-Equity had no jurisdiction[4] to proceed with the final

[3] While the Court of Appeals did not use the exact phrase "harmless error", its relief was, in form and effect, a finding of harmless error. *Accord* Rule 61, SCRCP (harmless error).

[4] The Court of Appeals, citing dictum from *Tillman v. Oakes*, 398 S.C. 245, 256 n.3, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012), contends this lack of jurisdiction is not subject matter jurisdiction, but "the power to address a particular issue". (Opinion pp. 14-15; R 833-834) This is definition is functionally no different than the definition of subject matter jurisdiction. *See Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600

foreclosure hearing in this matter, and therefore the April 1, 2019, foreclosure hearing suffered from a fatal structural flaw. The April 23, 2019, order (R 23-32) produced by this hearing was void, and it cannot be subjected to harmless error analysis. This Court must grant this petition and reverse the Court of Appeals.

II. The Court of Appeals impermissibly wrote into South Carolina's Attorney Preference Statute a new condition precedent for a penalty.

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). The right to be represented by an attorney of one's own choice is also 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 Court of Appeals' 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

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(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").

provides a remedy for violations of the Attorney Preference Statute. (Opinion pp. 12-13; R 831-832). This holding directly contradicts the plain language of the code, which does not require proof of actual damages for a debtor 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) (emphasis added). A statutory penalty is defined as "a penalty imposing automatic liability on a wrongdoer for a violation of a statute's terms without reference to any actual damages suffered." *Black's Law Dictionary* 1181 (8th ed. 2005); *accord* S.C. Code § 36-9-625(c)(2) cmt. 4 (Statutory penalty is to be awarded "in any event" and "regardless of any injury that may have resulted.").

It is inappropriate for the Court of Appeals to re-write the Attorney Preference Statute to make actual damages a condition precedent for a statutory penalty. *See Rainey v. Charlotte-Mecklenburg Hosp. Auth.*, No. 2015-UP-209, 2015 WL 1880212 at *2 (S.C. Ct. App. Apr. 22, 2015) (citing Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 12-13 (2d ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.")). As three justices of this Court recently noted: "If it were true courts have the authority to interpret statutes according to a sense of justice and right, then courts would have the power to rewrite statutes to suit their own personal preferences, regardless of legislative intent.

Courts do not have that power." *Buchanan v. S.C. Prop, & Cas. Ins. Guar. Ass'n.*, 424 S.C. 542, 553, 819 S.E.2d 124, 130 (2018) (Few, J. concurring).

The Court of Appeals also erroneously found Ditech's waiver of a deficiency judgment prevented a setoff. (Opinion p. 13; R 832). This holding is perplexing in light of the fact that the Master-in-Equity did issue a judgment, and this judgment contained an accounting where a setoff could be performed. (R 26). This holding is also unsupported by any South Carolina law.

These errors prevented the Court of Appeals from considering the remaining issue of the Estate of Mary Snyder's entitlement to assert an Attorney Preference Statute defense (declaring that issue moot). (Opinion p. 12; R 831). The Master-in-Equity's March 27, 2019, order struck this defense: "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…" (R 21-22). Chapter 22 ("Mortgage Lending") of South Carolina's Consumer Protection Code defines a "borrower" as: "a natural person in whose dwelling a security interest is or is intended to be retained or acquired if that person's ownership interest in the dwelling is or is to be subject to the security interest." S.C. Code § 37-22-110(7). Because Mary Snyder (now her estate) is a party to this lawsuit and to the mortgage, including her in the definition of "borrower" is consistent with the liberal construction and remedial nature of the Consumer Protection Code. *See* S.C. Code § 37-1-102 (Purposes; rules of construction). The Estate of Mary Snyder has been prejudiced by not being able to

assert this defense, which would have served as a setoff to Ditech's judgment. *See* S.C. Code § 37-10-105(A). This Court must grant this petition and reverse the Court of Appeals.

III. The Court of Appeals erred in ignoring the scintilla of evidence supporting Ditech's violation of this Court's Administrative Order 2011-05-02-01.

The Admin Order was part of the response to a sharp increase in residential mortgage foreclosures arising out of the "Great Recession" of the early 21st Century. The stated intention of the Admin Order is:

> …to insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss mitigation where possible, and to insure that the procedures for handling issues relating to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued…

In re Mortgage Foreclosure Actions at 210, 720 S.E.2d at 908. The Admin Order prescribes certain procedures the mortgagor and mortgagee must follow to proceed with a residential mortgage foreclosure. It also prescribes, in relevant part:

> The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

Id. at 213, 720 S.E.2d at 910 (emphasis added).

Snyder asserted a counterclaim for Civil Compensatory Contempt premised on Ditech and its predecessors' violations of the above provision, and particularly their violations of their obligation of to "act in good faith". (R 73-74). The Court of Appeals recognized Ditech's violations of the Admin Order by finding the delay in the foreclosure proceeding resulted in "substantial interest and fees", and finding this delay was "at least in part a result of Snyder's own conduct". (Opinion p. 10; R 829). This finding necessarily implies the existence of fault on the part of Ditech or its predecessors. The Court of Appeals' recognition of fault, however small, represents the scintilla[5] of evidence necessary to defeat Ditech's motion for summary judgment. *E.g. Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (scintilla of evidence is sufficient to successfully oppose a motion for summary judgment).

The record reflects, however, substantially more than a scintilla of evidence of the lack of good faith (*i.e.*, violations of the Admin Order) of Ditech and its predecessors:

1. Failure to send correspondence to the correct address after notice.

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

[5] 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)).

aware of the following misdirected documents, but the true amount of lost correspondence is certainly greater:

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 Snyder's counsel's prior address, despite Ditech 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 Kevin and Mary Snyder's multiple applications for foreclosure intervention/mitigation.[6]

[6] Though more of a technical than substantive violation of the Admin Order, Ditech's predecessors also required Kevin and Mary Snyder 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

2. Failure to timely respond to foreclosure intervention request.

Ditech's predecessor Green Tree 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 121, 128, 131-132). Green Tree's counsel provided the foreclosure intervention application on August 21, 2013. (R 133). These acts 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. Snyder's 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

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retention by letter dated June 17, 2013. (R 121). Green Tree, however, demanded that Kevin and Mary Snyder execute a new authorization form (R 145) before it would discuss this matter with their counsel. While Kevin and Mary Snyder did execute an authorization on July 9, 2013 (provided July 18, 2013) (R 143-145), Green Tree repeatedly demanded it be re-submitted for no discernable reason. (R 142, 147).

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 Admin Order and the repeated requests of Snyder by attempting direct contact.[7] (*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). (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.[8] (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

[7] 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 relief under this statute is not appropriate here.

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

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).

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 November 26, 2018, responses to Snyder's Third Set of Interrogatories, explains that it could not admit or deny several requests to admit due to a lack of records. (R 99-101). These requests to admit were relevant to several material facts: receipt of Snyder's counsel's notice of appearance (Nos. 3 & 4) (R 104), receipt of Snyder's responses to requests to admit (Nos. 10 & 11) (R 105), the falsity of Ditech's predecessor's affidavit of default (No. 14) (R 106), and receipt of notice of Ditech's predecessor's violations of the Admin Order (Nos. 27 & 44) (R 108, 112). Not only has the loss or destruction of these records made certain facts impossible to prove, they have also contributed to the extreme delay in proceedings. Sanctions are appropriate. *Cf. Kershaw County Board of*

Education v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990) (Discovery sanctions for spoliation of evidence).

In light of the evidence of violations of the Admin Order the Court of Appeals acknowledged, and the evidence set forth above it ignored, this Court must grant this petition and reverse the Court of Appeals.

CONCLUSION

The petition should be granted.

Dated: 12/07/2022

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