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**Jan 12 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

James B. Jackson, Jr., Master-in-Equity

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Appellate Case No. 2022-001147

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U.S. Bank National Association, as Trustee, as successor to U.S. Bank Trust National Association, as Trustee, for Conseco Finance Home Equity Loan Trust 2001-C,.....Respondent,

v.

Frances L. Mack nka Frances L. Mack-Marion,.....Appellant.

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MOTION FOR CERTIFICATION BY AND TRANSFER TO SUPREME COURT

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Appellant hereby moves pursuant to Rule 204(b), SCACR, for the Supreme Court’s certification of this appeal and the transfer of this appeal from the Court of Appeals to the Supreme Court. This appeal raises an issue or issues regarding whether Supreme Court precedent should be modified. This precedent and modification thereof are of major legal importance. A decision in this appeal may change how South Carolina courts deal with the unauthorized practice of law in a mortgage loan closing that occurred before August 8, 2011.

At the center of this appeal is the question of whether the prospective-only application of the Supreme Court’s decision in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), ought to be overruled or modified, so that its unenforceability holding applies to mortgages closed without the required attorney

supervision before August 8, 2011, but after the Court's decision in State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), which established the attorney supervision requirement.

The Supreme Court's decisions bind the Court of Appeals as precedents, S.C. Const. Art. V, § 9, and the Court of Appeals is accordingly without authority to modify the Supreme Court's decision in Matrix. Even if the Court of Appeals agrees with Appellant that the prospective-only application of the rule in Matrix should be changed, that court is not empowered to change it. See S.C. Const. Art. V, § 9.

In addition, this appeal deals with the application of a Court of Appeals decision that conflicts with the Matrix decision, Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006). While the Court of Appeals is certainly equipped and empowered to address one of its own previous decisions, the Supreme Court, especially in light of the other Matrix issue present here, is in the best position to answer the questions about Hambrick presented by the instant case. Those questions relate closely to questions this case presents about Matrix that only the Supreme Court can answer.

The Appellant's memorandum from the trial court submitted as an exhibit to this motion lays out the heart of Appellant's arguments on these questions.

Respondent's counsel has advised the undersigned that he does not object to certification and transfer as sought by this motion.

WHEREFORE Appellant prays for certification and transfer of this appeal to the Supreme Court of South Carolina.

Respectfully submitted,

/s/ Andrew S. Radeker

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January 12, 2023

STATE OF SOUTH CAROLINA  
 COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS  
 Case No. 2020-CP-38-00086

U.S. Bank National Association, as  
 Trustee, as successor to U.S. Bank Trust  
 National Association, as Trustee, for  
 Conseco Finance Home Equity Loan  
 Trust 2001-C,

MEMORANDUM IN SUPPORT OF  
 MOTION TO RECONSIDER

Plaintiff,

vs.

Frances L. Mack nka Frances L. Mack-  
 Marion,

Defendant.

The Defendant submits this memorandum in support of her motion to reconsider the order filed May 4, 2022, in the above-captioned action. (That order is hereinafter referred to as “the order.”) In addition to what is below, the Defendant incorporates all of her previous filings and her argument at the previous hearing in this case as grounds for her motion, incorporating them as if they were here set forth verbatim.

**THIS COURT HAS JURISDICTION TO ADJUDGE THE COUNTERCLAIM THAT  
 THE MORTGAGE IS VOID OR UNENFORCEABLE**

The court ruled that, per Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), this court – the circuit court – lacks jurisdiction to hear the Defendant’s declaratory judgment claim that seeks a declaration that the subject mortgage, having been produced through the unauthorized practice of law, is void or unenforceable. This ruling is inconsistent with more recent case law by the Supreme Court of South Carolina that shows that Hambrick and its rationale do not square with precedent of this state’s highest court. The Supreme Court’s decision in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), has overruled or abrogated Hambrick. Hambrick has at least been overruled to the extent

that Hambrick held that if the factual background giving rise to a cause of action includes a party's having engaged in the unauthorized practice of law, the circuit court lacks any power to entertain the cause of action.

In Hambrick, Kristy and Scott Hambrick sued GMAC Mortgage Corporation, doing business as Ditech.com, where GMAC conducted the closing of a mortgage loan for the Hambricks and charged them for ostensible attorney's fees in connection with the closing when the closing was not conducted or supervised by an attorney. 634 S.E.2d at 6. "Each allegation stemmed from the Hambricks' claim that Ditech charged them for legal fees that were not provided nor could be provided due to Ditech's failure to utilize an attorney." Id. GMAC moved to dismiss the complaint, and the circuit court granted the motion, concluding that it lacked jurisdiction to hear the claim because "the only claim that could be brought based on an allegation of the unauthorized practice of law is a request for declaratory relief brought in the original jurisdiction of the Supreme Court." Id. at 7. The Court of Appeals affirmed, on the same rationale. Id. at 6, 9.

Respectfully, the Defendant must note that what the Court of Appeals did in Hambrick was to allow a tortfeasor to have immunity for its actions – actions that would be tortious *regardless of whether unauthorized practice of law was involved* – as long as the unauthorized practice of law formed some part of the facts giving rise to the cause of action. The Hambricks sued GMAC for making them "reimburse" GMAC for charges that GMAC had never incurred, for ostensible "attorney's fees" for a closing that no lawyer supervised. Id. at 6. In Hambrick, the Court of Appeals essentially gave GMAC a pass *because* it engaged in the unlawful activity of the unauthorized practice of law. Id. at 8-9. Imagine how this would play out in a case against someone who, despite not being a lawyer, undertook to represent someone as an attorney and was then sued after his or her negligence in that regard caused damages to the client.

A look at how the Supreme Court decided Matrix Financial shows that our state's highest court has rejected the Hambrick rationale, thereby overruling or abrogating Hambrick, as the rationale of the Matrix holding is at odds with that of Hambrick. In Matrix, the Court held that the master-in-equity not only should have taken into account whether the activity of closing a mortgage loan without an attorney was the unauthorized practice of law but also was right to use that as a basis to decide the case. 394 S.C. at 138-40. The Supreme Court's decisions bind the Court of Appeals as precedents, S.C. Const. Art. V, § 9, and Hambrick's reasoning that a circuit court cannot hear such matters has been abrogated and Hambrick overruled.

Deciding this claim of the Defendant's does not require this court to plow new ground and determine whether a given activity constitutes the practice of law. The Supreme Court has already determined that mortgage loan closings are required to be supervised by attorneys licensed to practice law in this state. See State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987); accord Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003) (noting that Buyers Service decided this question). This court is not being called upon to make the Supreme Court's determination, i.e., to determine whether X activity constitutes the practice of law. Like the master-in-equity in Matrix, this court is being called upon to determine what the effect is of activity that, under pre-existing, established law, we already know constitutes the unauthorized practice of law. Matrix, 394 S.C. at 138-40.

Alternatively, even if Hambrick has not been overruled or abrogated, it should be. As discussed above, the result in Hambrick is baffling. See 634 S.E.2d at 6, 9. Though it remains the Defendants's position that Matrix has already overruled Hambrick, even if that is determined not to be correct, Hambrick should be overruled. As discussed above, the Hambrick decision essentially provided a party a defense to a claim *because of* that party's illegal conduct. 634 S.E.2d

at 6-9. If Matrix has not overruled or abrogated Hambrick, then some court in this case needs to overrule Hambrick. The Hambrick rationale is unjust and unfair, and its application rewards wrongdoers in circumstances where, but for the presence of the unauthorized practice of law in the fact pattern, they would be held accountable for their actions.

Not only is Hambrick inconsistent with the Supreme Court's decision in Matrix, it is also inconsistent with earlier Supreme Court precedent, namely Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002). Contrary to what is implied in Hambrick, 634 S.E.2d at 7-9, Linder expressly provided for the circuit court to remedy Insurance Claims Consultants' unauthorized practice of law, as the passage quoted below illustrates:

We have found that respondents did commit some acts that amounted to the unauthorized practice of law. We note, however, that the majority of respondents' work appears to have *not* entailed the unauthorized practice of law. We therefore hold that the most appropriate manner in which to sanction respondents for their transgressions is for the trial court, in the underlying action, to determine the value of respondents' work which did not constitute the unauthorized practice of law. Respondents are entitled to that amount, but are not to be compensated for any amount attributable to their unauthorized activities.

Linder, 348 S.C. at 496 (emphasis added).

Further, in Linder (unlike in Hambrick) the Court did *not* throw out the Linders' causes of action because unauthorized law practice was a part of the factual milieu from which they arose; rather, the Court held that "there is no private right of action *for* the unauthorized practice of law." In other words, a person cannot sue another person *simply* because the second person practiced law without a license. That is a far cry from allowing a person to use the very unlawful nature of unauthorized law practice as a shield from liability. The latter, however, is exactly what Hambrick appears to permit. 634 S.E.2d at 7-9.

Hambrick is a deeply flawed decision.

**MATRIX'S 2011-FORWARD APPLICATION  
IS WRONGHEADED AND SHOULD BE OVERRULED**

This court also, inconsistently with its ruling that it lacked jurisdiction over the declaratory judgment claim, dismissed the claim on its merits, ruling that Matrix's "magic date" of August 8, 2011, the date of the Matrix opinion, prevents the Defendant's success on her claim on the merits. This ruling is wrong and should be changed.

The Defendant acknowledges that the court's ruling in this regard is consistent with how the Supreme Court has interpreted Matrix's cryptic language that "[w]e apply this ruling to all filing dates after the issuance of this opinion." Matrix, 394 S.C. at 140. In BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012), the Court clarified that the language referred to "the date the document a party seeks to enforce was filed." (The Court could have avoided much confusion by using the more specific, accurate term *recorded*, rather than filed, since it seems what was meant was the date a mortgage was recorded in the land records. Id.)

Respectfully to the Supreme Court, this arbitrary magic date makes no sense. Buyers Service established in 1987 that closing a mortgage loan without attorney supervision of the key closing activities constitutes the unauthorized practice of law. 292 S.C. at 430-34. This was nothing new. As had been discussed in a case the Supreme Court favorably cited in Matrix, Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010, *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013), holding that a mortgage closed through the unauthorized practice of law is not enforceable was just consistent with pre-existing law. Matrix did not create a new rule. It applied existing law to the Matrix set of facts to produce a holding – no differently from the vast majority of cases the Court decides.

There was no reason under precedent to make the Matrix holding prospective-only in its application. Also, it was unjust to do so. Mortgage lenders have known *since 1987* that closing mortgage loans without attorney supervision constitutes the unauthorized practice of law. Buyers Service, 292 S.C. at 430-34. The Supreme Court gave them a pass for *24 years* of thumbing their noses at South Carolina law, at the very Court that issued the Matrix opinion. 394 S.C. at 140.

The Court should not have done that, and it ought to be undone now. The “magic date” portion of Matrix should be overruled.

### **CONCLUSIONS**

The court should reconsider its previous order accordingly.

Respectfully submitted,

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Columbia, South Carolina  
May 13, 2022

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Frances L. Mack nka Frances L. Mack-Marion,.....Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing motion for certification by and transfer to the Supreme Court on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

Damon C. Wlodarczyk, Esq., at [damonw@rplfirm.com](mailto:damonw@rplfirm.com)

Respectfully submitted,

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