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**Mar 16 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Lisa Lee Smith, Special Referee

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Case No. 2014-CP-32-02795  
Appellate Case No. 2023-000244

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Federal National Mortgage Association  
("Fannie Mae"), a corporation organized  
and existing under the laws of the United  
States of America, and its assignee  
Nationstar Mortgage LLC d/b/a Mr. Cooper  
("Mr. Cooper"), Respondents,

v.

D. Randolph Whitt and Pearce W. Fleming, Defendants

Of whom D. Randolph Whitt is the Appellant.

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**PETITION FOR REHEARING**

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D. Randolph Whitt  
S.C. Bar No. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com

Other counsel of Record:

Sean A. O'Connor, Esq.  
4000 Faber Place Drive Suite 450  
North Charleston, SC 294058578

Pearce W. Fleming  
3723 Linwood Rd.  
Columbia, SC 29205-2545

Attorney for Petitioner

Attorney for Respondents

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TABLE OF AUTHORITIES

CASES

*Collins v. Sigmon*, 299 S.C. 464, 385 S.E.2d 835 (1989) .....1-2

STATUTES

None

OTHER AUTHORITIES

None

## INTRODUCTION

This Court issued its Order dismissing this appeal which was filed March 1, 2023. Appellant was not notified of this decision, via email, on March 1, 2023.

## ARGUMENT FOR REHEARING

**The Court overlooked or misapprehended the authority of *Collins v. Sigmon*, 299 S.C. 464, 385 S.E.2d 835 (1989) which holds that an order on a motion to amend is not generally immediately appealable.**

The Supreme Court's use of the qualifier “generally” in the *Collins* holding is important. The Court has said any number of issues are not immediately appealable, without qualification. The use of the additional qualifier should be interpreted as having been done with intention, and meaning ascribed and effect given to the additional term.

Giving effect to the word generally supports the conclusion that there are exceptions to the rule that such orders are not immediately appealable. Appellant asserts that full briefing and a record on appeal are necessary to consideration of whether this particular order is immediately appealable.

The procedural history of *Collins* itself reinforces this assertion:

“Collins appealed this Order, and Sigmon sought to dismiss the appeal, claiming that the Order was interlocutory and not appealable. We ruled that the Order was not interlocutory, denying Sigmon's motion to dismiss Collins' appeal. “ *Collins* at 466

Then *Collins* was assigned to the Court of Appeals and :

“The Court of Appeals dismissed the appeal as an attempted appeal of an interlocutory order. We granted *certiorari* and vacated the Court of Appeals' dismissal.” *Collins* at 466

Finally, the Supreme Court considered the merits and held:

We hold now, **having the benefit of the entire record and the briefs of the parties**, that the order of the trial judge is interlocutory, but we also express our view that the trial judge erred in his ruling on the *res judicata* issue. *Collins* at 466 (emphasis added)

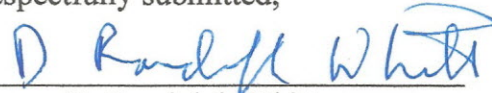
The fact that the Supreme Court referred to the importance of briefs and a record to their decision is important given the stage at which this appeal is being dismissed. Further, like in *Collins*, guidance can be given to the trial court on the issues that briefs will raise, such as whether judicial estoppel bars respondent from filing a second motion to amend and add additional defenses shortly after their first motion to amend which was granted contained the assertion that the first amendment would not subject the Appellant to additional defenses. The briefs will also raise the trial court's failure to allow Appellant to amend as a matter of fundamental fairness after granting Respondents a second chance to amend.

Appellant asserts the the procedure should be the same as in *Collins*, a full set of briefs and a record on appeal being in place before a decision on whether this order is an exception to the basic rule.

#### CONCLUSION

For the foregoing reasons, this Court should grant rehearing, and allow the briefing schedule and creation of the record on appeal to continue.

Respectfully submitted,



D. Randolph Whitt  
S.C. Bar No. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com  
Attorney for Appellant

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Of whom D. Randolph Whitt is the Appellant.

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PROOF OF SERVICE

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I certify that I have served the Petition for Rehearing on Respondent listed above via emailing a copy of it on March 16, 2023, addressed to their attorney of record as follows:

Sean O'Connor      soconnor@FinkelLaw.com

Kathleen Klaiber      kklaiber@finkellaw.com,

A copy was emailed to Pearce W. Fleming at:      pfleming3@att.net

A copy was also sent via regular mail to Pearce W. Fleming at the address indicated below.



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D. Randolph Whitt  
S.C. Bar no. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com  
Attorney for Appellant

March 16, 2023

Other counsel of Record:

Sean A. O'Connor, Esq.  
4000 Faber Place Drive Suite 450  
North Charleston, SC 294058578

Pearce W. Fleming  
3723 Linwood Rd.  
Columbia, SC 29205-2545

Attorney for Respondents

**From:** dwhitt2001@aol.com,

**To:** soconnor@finkellaw.com, kklaiber@finkellaw.com, pfleming3@att.net,

**Subject:** petition for rehearing

**Date:** Thu, Mar 16, 2023 4:07 pm

**Attachments:** petition for rehearing Scan.pdf (1156K), seterus 2023 svc 2 Scan.pdf (404K)

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Good afternoon Sean,

attached and served upon you is the petition for rehearing in this matter and proof of service that will be filed this afternoon

Regards,  
Randy Whitt