

**RECEIVED**

**May 17 2023**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Lisa Lee Smith, Special Referee

---

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

---

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.

---

**PETITION FOR CERTIORARI**

---

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

TABLE OF CONTENTS

Certificate of Counsel.....ii

Questions Presented for Review..... 1

Statement of the Case.....1

Argument

The Court of Appeals 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.....2

Conclusion .....3

## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 19 , 2023, and received by counsel for Petitioner on April 19, 2023 when the Court of Appeals announced that it would not act on either the request for reinstatement or the Petition for Rehearing.

## QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals overlook or misapprehend 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 ?

Also did the Court of Appeals err in refusing to consider the request for reinstatement and petition for rehearing and in sending the remittitur on the same day of its decision to decline to act on rehearing April 10, 2023?

## STATEMENT OF THE CASE

This mortgage foreclosure action was commenced by the Respondent's filing of a Lis Pendens, Summons and Complaint on August 1, 2014. Petitioner served and Amended Answer and Counterclaims alleging respondent had breached the implied duty of good faith under the mortgage contract and asserting the affirmative defense of unclean hands. Respondent served a Reply to the Counterclaims.

An order of reference was entered. A judgment of foreclosure was granted by the Special Referee. Petitioner filed a motion to vacate this judgment which was granted. Respondent filed a motion for summary judgment which had an affidavit attached. Respondent filed an additional affidavit at the time of the motion hearing, and another affidavit pursuant to an order allowing further materials to be submitted. Petitioner filed counter affidavits as the summary judgment process unfolded.

The motion for summary judgment was granted in part and denied in part. However, Petitioner's Counterclaim alleging respondent had breached the implied duty of good faith under the mortgage contract and assertion the affirmative defense of unclean hands remain viable and to be tried.

The Special Referee granted Respondent's first motion to amend based in part on Respondent's assertion in its first motion to amend that "Plaintiff seeks only to change the name of the plaintiff based upon a transfer of interest and does not plead any new claims."

However Respondent filed a second motion to amend, seeking to plead new claims, despite their earlier disavowal of this intention, which was granted in an order dated January 9, 2023. The Notice of Appeal was timely served on February 8, 2023.

The Court of Appeals issued its *sua sponte* Order dismissing this appeal before any briefing had been done and without creation of a record on appeal. This order of dismissal was filed March 1, 2023. Appellant was not notified of this decision, via email, on March 1, 2023. A timely Petition for Rehearing was filed via email. Petitioner inadvertently failed to pay the required \$50 filing fee, and overlooked the single email reminder sent regarding the filing fee, which showed the sender's personal name, rather than any indication that it was from the Court.

Petitioner learned in an April 10 email that the Petition for Rehearing would not be considered. Petitioner moved promptly to correct his oversight, and filed a Request for Reinstatement on April 18, 2023 along with hand delivering the filing fee for both the reinstatement and the Petition for Rehearing.

Via correspondence on April 19 the Court of Appeals indicated that it would take no further action on either rehearing or reinstatement, because the remittitur had already been sent. Since the Court of Appeals acted on April 10, 2023, returning the remittitur the same days was premature under Rule 221 S.C. Rules of Appellate Procedure.

## ARGUMENT

**The Court of Appeals 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)

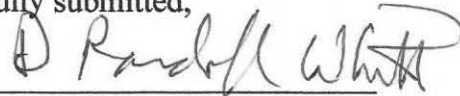
The fact that the Supreme Court referred to the importance of briefs and a record to their decision is important given the stage at which this appeal is being dismissed. Further, like in *Collins*, guidance can be given to the trial court on the issues that briefs will raise, such as whether judicial 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.

Petitioner 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 certiorari, vacate the orders of the Court of Appeals and direct that the briefing schedule and creation of the record on appeal should move forward.

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

May 17, 2023