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**Jul 20 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Gordon G. Cooper, Master-in-Equity

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Appellate Case No. 2020-000454

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U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed  
Certificates, Series 2004-B, .....Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce  
F. Otto dated the 17<sup>th</sup> of November 2009; TD Bank, NA; The United States of America,  
acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese,  
as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated  
May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas  
Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.;  
Citibank, NA, .....Defendants,

and

Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November  
17, 2009.....Plaintiff,

v.

Jackson L. Munsey, Jr.....Defendant.

of whom Jackson L. Munsey, Jr., is the.....Appellant,

and

Alyce F. Otto, Individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce  
F. Otto dated the 17<sup>th</sup> of November 2009; Laura Kerhulas Giese, as Co-Trustee of the  
Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark  
Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under  
Declaration of Trust dated May 25, 2004 are the.....Respondents.

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PETITION FOR REHEARING OR REHEARING *EN BANC*

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Appellant, Jackson L. Munsey, Jr. (hereinafter “Munsey”) hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. Munsey, in an effort to keep this petition succinct, incorporates herein by reference his previously submitted briefs, making by reference those same arguments here. This petition does not restate the briefs, except by incorporation, any more than is needed to address the misapprehensions evident from the opinion issued in this case.

This court should give this case a second look – if need be, by this court as a whole, *en banc*. See S.C. Code Ann. §§ 14-8-80 & -90.

**I. The April 2106 order decided that only the evidence adduced at the 2019 damages hearing would be used to determine the damages.**

The court held that “the master did not err in using damages set forth in Exhibit A from the December 2015 and April 2016 Orders and the evidence from the earlier damages hearing when calculating the damages in his final judgment[.]” that “[a]lthough the master explained in the April 2016 Order that he would determine the final judgment amount after the foreclosure sale, he specifically incorporated Exhibit A into the April 2016 Order and the December 2015 Order as the damages due at that time[.]” and that “the master did not intend to disregard his previous calculation of

damages; rather, he intended to leave the issue open to allow him to adjust the Exhibit A damages amounts as needed after the appeal and the foreclosure sale.”

A look at the April 2016 order reveals that its words do not support this determination. The master issued a December 2015 order (which the master later called “the Otto Order”) on the basis of evidence from a November 24, 2015, hearing. (R. pp. 29-30.) It stated that the component amounts of the judgment in favor of Respondent Otto were set forth on an Exhibit A, but no such exhibit was attached to the order. (R. pp. 29-30.) The April 2016 order did attach that Exhibit A, but it did not evince an intent for the figures in Exhibit A to be used in computing the later judgment amount; it simply noted that the Exhibit A attachment to the April 2016 order was the one that was intended to be attached to the December 2015 order. (R. p. 48, 50.) It was a housekeeping matter, tying up the loose end created when Exhibit A was not attached to the first order. (R. pp. 29-30, 48, 50.)

What the April 2016 order also did, though, was to undo the granting of a judgment for the amounts of the Exhibit A figures. The April 2016 order, issued on Munsey’s motion under Rule 59, SCRCF, walked back the grant of the judgment to Otto for the Exhibit A figures and changed the master’s ruling to provide that, “pending the disposition of Munsey’s appeal, no final judgment amount shall be established by either the Otto Order or this Order. A final judgment amount will only be determined by the Court in a separate damages hearing subsequent to the foreclosure sale of the Plaintiff’s mortgage as ordered by this Court in the Foreclosure Order.” (R. p. 49.)

Per that order, “[a] final judgment amount [would] *only* be determined by the Court in a *separate* damages hearing” to be held later. (R. p. 49) (emphasis added). The

April 2016 order did not provide that the amount of the judgment against Munsey would be determined cumulatively on the basis of evidence from the November 24, 2015, hearing *and* evidence adduced that the damages hearing to be held later. (R. p. 49.) It, rather, ruled that the amount of the judgment would *only* be determined in the later damages hearing, the damages hearing that was held on October 29, 2019. (R. p. 49.)

This court's holding in this regard is at odds with the record. The court must have overlooked or misapprehended the law in reaching its decision in this regard, and rehearing should be granted.

**II. Otto never proved that she has sustained or will sustain damages by virtue of Munsey's failure to pay the TD Bank note.**

Regardless of whether it was proper for the master to consider evidence from the 2015 hearing, the evidence adduced at the 2019 hearing showed that the TD Bank note debt, usually referred to by the parties as the second mortgage debt, was not part of Otto's damages. The court must have overlooked or misapprehended the law in deciding not to reverse as to this component of the judgment against Munsey.

The court held that "[t]he record includes no evidence that TD Bank forgave the note it held or that it will not attempt to collect this debt from Otto. The doctrine of mitigation of damages does not require Otto to unreasonably exert herself or incur expense by litigating the statute of limitations defense to a collection action TD Bank might bring against her." The court has missed the gravamen of Munsey's argument.

As Respondent Otto's counsel conceded at oral argument, the contract between Otto and Munsey required Munsey to pay the TD Bank debt. If Munsey had performed his obligations under the contract, that performance would have made it so that Otto

would not have to pay the TD Bank debt, since Munsey would have paid it. (R. pp. 326-45.) If the contract had been performed, Otto would not have gotten the money subject of the TD Bank debt; she just would not have been exposed to a potential judgment against her by TD Bank for that debt. (R. pp. 326-45.) Since the statute of limitations has run on TD Bank's claim on that debt, Newell v. Neal, 50 S.C. 68, 27 S.E. 560, 567 (1897), Otto is, with regard to the TD Bank note debt, in the same position she would be if Munsey had performed the contract – not exposed to a judgment in favor of TD Bank and not out money paid to TD Bank.

“In a breach of contract action, the measure of damages is the loss actually suffered by the contractee as the result of the breach.” Collins Holding Corp. v. Landrum, 360 S.C. 346, 350, 601 S.E.2d 332 (2004) (internal quotation marks omitted). “The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed. The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach.” Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996).

The master entered – and this court has now affirmed – an order that “compensates” Otto for a loss she has not incurred, placing her in a far better position that she would have been in had the contract been performed. (R. pp. 6, 7, 12, 99-100, p. 284 ln. 11 through p. 286 ln. 8, pp. 326-45.) The master, with neither law nor evidence to support doing so, gave Otto a windfall of hundreds of thousands of dollars more than she could have ever received had Munsey performed under his contract with her. (R. pp. 6, 7, 12, 99-100, p. 284 ln. 11 through p. 286 ln. 8, pp. 326-45.) The law

of contract damages does not permit this. Collins Holding Corp., 360 S.C. at 350; Minter, 322 S.C. at 528.

Nor is the master's award of this money to Otto supported by the idea that TD Bank may sue Otto in the future. While one cannot definitively determine what would happen if TD Bank were to sue Otto on this debt, the only evidence that was before the court was to the effect that Otto would have a complete defense to such a suit under the statute of limitations. (R. pp. 6, 7, 12, 99-101, p. 272 ln. 14 through p. 273 ln. 8, p. 280 ln. 16 through p. 281 ln. 7, p. 284 ln. 11 through p. 286 ln. 8); see S.C. Code Ann. § 15-3-530(1); Newell, 27 S.E. at 567. The obligation to mitigate damages applies to breach of contract cases, and, under mitigation of damages principles, Otto cannot recover for the second mortgage debt if she can avoid incurring any damage concerning it by taking reasonable measures. E.g., Small v. Springs Industries, Inc., 300 S.C. 481, 388 S.E.2d 808 (1990); Lyons v. Fidelity Natl. Title Ins. Co., 415 S.C. 115, 133, 781 S.E.2d 126, 136 (Ct. App. 2015). Raising a statute of limitations defense in any future collection action by TD Bank on this debt would be a reasonable measure for Otto to take. While Otto never proved the existence of any damage concerning the second mortgage debt, the only evidence before the court was that, if TD Bank ever seeks to collect from Otto, mitigation is possible and reasonable that would prevent such collection altogether. Lyons, 415 S.C. at 134.

There is nothing in the record tending to indicate that, in the purely speculative event that TD Bank ever does sue Otto on its limitation-barred debt claim, simply answering and raising a statute of limitations defense would cause Otto "to unreasonably exert herself or incur expense[.]" While Otto probably would hire a

lawyer to defend her in that event, she could defend herself *pro se*. Nothing would require her to incur *any* expense to make such a defense. Given the simplicity of a statute of limitations defense, the undersigned is at a loss to see how simply pointing out the passage of time could constitute unreasonable exertion.

While Otto certainly does have an obligation to mitigate her damages, that is only part of a bigger point: Otto has not suffered any loss by reason of Munsey's failure to pay the TD Bank debt, and all the facts in the record indicate that it is likely that she never will suffer any such loss. There are no facts in the record that indicate she has or ever will suffer any loss in this regard.

The master's award in this regard is in no way connected to "the loss actually suffered by the plaintiff as a result of the breach." Minter, 322 S.C. at 528.

**III. The master's use of the Greenspace Affidavit was a structural defect and was not harmless.**

The master's use of the Greenspace affidavit was no harmless error but, rather, a structural defect. This document was not even put before the master at the damages hearing. As discussed above, the law of the case was that the judgment against Munsey would be determined by the evidence adduced at the damages hearing held in 2019. No evidence of the amount of the Greenspace debt was adduced at that hearing. The improperly used affidavit was not cumulative to other evidence that could have produced such a debt figure.

The court overlooked or misapprehended the record in this regard.

**IV. Rehearing *en banc* would be proper.**

"A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of this court’s decisions, as well as to ensure adherence to Supreme Court precedent. Collins Holding Corp., 360 S.C. at 350; Minter, 322 S.C. at 528. The judgment award components affirmed by this court were not produced in accordance with the law of how damages are calculated. Collins Holding Corp., 360 S.C. at 350; Minter, 322 S.C. at 528. The master gave Otto hundreds of thousands of dollars in a judgment award for damages it is plain she has never suffered and likely never will. This court should rehear this case *en banc*.

WHEREFORE, Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

/s/ Andrew S. Radeker  
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PROOF OF SERVICE

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I certify that I served the foregoing petition for rehearing in this case by providing a copy of it by email to opposing counsel at the email address(es) shown below and on the date shown below:

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Respectfully submitted,

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