THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2023-000421

Southern First Bank, N.A. d/b/a Greenville First Bank,..……..…..Appellant,

v.

Kenneth J. Vilcheck, Renee M. Vilcheck, Portfolio Recovery Associates, LLC, United States of America, acting through its agency, Department of Treasury – Internal Revenue Service, Federal Housing Commissioner, The South Carolina Department of Revenue, Belfair Property Owners' Association, Inc., and the Greenery, Inc. a South Carolina corporation,..……..……Respondents.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

I. Did the master-in-equity commit reversible error in denying Appellant's motions for a sale in execution of a judgment where the sale could not be completed during the judgment's 10-year lien and execution period?

II. Is this appeal moot?

STATEMENT OF THE CASE

This is an appeal from a set of orders denying the Appellant (hereinafter "Southern First")'s requests for a judicial sale of real property in execution of a judgment. (R. pp. 51-64.) The master-in-equity ruled that, since the sale could not be completed during the 10-year period in which judgment execution is allowed and in which the judgment lien exists, he could not order the sale Southern First sought. (R. pp. 57-59.)

In a suit on a note, Southern First obtained a default judgment for failure to appear against the Respondents, Kenneth J. Vilcheck and Renee M. Vilcheck (hereinafter "the Vilchecks"), in the amount of $391,284.46, in Beaufort County on March 27, 2013. (R. pp. 194-96.) That suit was filed on December 19, 2012, and affidavits of service in the court's file state that the summons and complaint were served on the Vilchecks on January 16, 2013. (Supp. R. pp. 1-11; 2d Supp. R. pp. 1-2.) The Vilchecks later contested whether that service occurred. (R. pp. 276-99.) The Vilchecks never appeared in this case until the judgment collection proceedings subject of this appeal, which were initiated over nine years later, were brought against them.

On February 9, 2021, the Beaufort County clerk of court issued an execution on the judgment to the sheriff. (R. pp. 65-67.) On February 18, 2021, the sheriff returned the execution *nulla bona* "by request of the Plaintiff's attorney." (R. pp. 475-79.) On March 2, 2021, the clerk of court referred the action to the Beaufort County master-in-equity for supplemental proceedings. (R. pp. 1-3.) Southern First filed a petition for supplemental proceedings on March 5, 2021. (R. pp. 206-13.)

On May 17, 2021, Southern First filed a separate action, Case No. 2021-CP-07-00944, seeking to have the real property involved in this appeal sold in execution of the judgment. (R. pp. 278-88.) The Vilchecks answered in that case and raised the issue of whether the judgment

was void for lack of personal jurisdiction, averring that they were not served with the summons and complaint that produced the judgment. (R. pp. 289-96.)

On July 9, 2021, Southern First withdrew its petition for supplemental proceedings. (R. pp. 4-11.)

On May 3, 2022, Southern First filed another petition for supplemental proceedings. (R. pp. 214-21.) The master issued a rule to show cause for supplemental proceedings on May 10, 2022. (R. pp. 18-26.) Through counsel, the Vilchecks appeared in the supplemental proceedings and, on July 13, 2022, filed a motion for relief from the rule to show cause in the supplemental proceedings, stating that the judgment is void, and a motion to stay the proceedings until the validity of the judgment was determined. (R. pp. 276-99.)

The master heard the Vilchecks' motions on October 17, 2022, taking testimony from the Vilchecks and the process server who swore the affidavits of service, and the master ruled on October 21, 2022, that the judgment was not void. (R. pp. 34-35.) On that same day, Southern First filed a motion seeking for the court to sell the real property subject of this appeal and to join other lienholders in that property as parties. (R. pp. 300-82.)

On October 31, 2022, the Vilchecks moved for reconsideration of the order that ruled the judgment was not void. (R. pp. 387-88.)

On November 7, 2022, the master issued orders denying the motion to reconsider and joining the parties Southern First sought to be joined. (R. pp. 36-41.)

On November 17, 2022, the Vilchecks moved for reconsideration of the order joining parties. (R. pp. 389-91.) The master denied that motion to reconsider by order filed November 22, 2022. (R. pp. 44-46.)

On November 28, 2022, the Vilchecks served and filed a notice of appeal of the orders filed October 21, November 7 (both orders filed that date), and November 22, 2022. (R. pp. 257-59.)

By December 7 of 2022, Southern First had all the added parties served with the order joining them and the motion seeking a judicial sale of the Vilchecks' property. (Supp. R. pp. 27-36.)

On January 11, 2023, Southern First's counsel wrote the office of the master-in-equity to ask that a hearing be scheduled on Southern First's motion for a judicial sale. (R. pp. 249-50.) This led to numerous emails and two phone conferences about whether it would be proper for that hearing to go forward in light of the pendency of the Vilchecks' appeal. (R. pp. 222-49.) The master ultimately determined the hearing should go forward and set it for February 3, 2023. (R. p. 222.)

The hearing went forward. (R. pp. 87-129.) Also heard at that hearing was the motion of LongBridge Financial, LLC, one of the parties added to the action, to be dismissed. That motion was granted. (R. p. 90 ln. 4 through p. 101 ln. 24.)

On February 9, 2023, the master denied Southern First's motion for a judicial sale, noting that, because "[a] plain reading of S.C. Code Ann. § 15-39-720 reveals that its provisions concerning holding the bidding open for 30 days to receive upset bids are mandatory" and, thus, the sale could not be completed within the duration of the judgment lien's existence and the judgment's execution period. (R. pp. 57-59.) Southern First filed a motion to reconsider that order on February 14, 2023, and the master heard that motion the next day and denied it by order filed the day of that hearing. (R. pp. 61-62, 130-63, 459-72.)

On February 17, 2023, Southern First filed another motion, styled "motion to establish sales procedures," seeking the sale of the property. (R. pp. 473-74.) The master heard that motion on March 3, 2023, and denied it by order filed March 9, 2023. (R. pp. 63-64, 164-92.)

This appeal by Southern First followed.[1]

STANDARD OF REVIEW

While what was before the court below was not exactly supplemental proceedings, it was something similar. Supplemental proceedings for judgment collection "are equitable in nature." Ag-Chem Equip. Co. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). In an equitable matter referred to a master for final judgment, the appellate court may determine the facts in accordance with its own view of the preponderance of the evidence. Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995). In this review, the appellate court is not required to disregard the findings of the master. Id. Questions of law are, as always, reviewed *de novo*. Transportation Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010); Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010).

ARGUMENT

I. The master made the right decision.

The master did not get it wrong. Southern First asked the court to order a sale that was not just against precedent but also a logical impossibility. Southern First appeals the master's refusal to order a sale to enforce a lien that would have ceased to exist by the time the sale could be completed.

[1] This statement of the case is a proper one. Rule 208(b)(1)(C)&(b)(2), SCACR. Statements of the case may be long or short, but they all must comply with the requirement that a statement of the case "shall not contain contested matters[.]" Rule 208(b)(1)(C), SCACR. Southern First's statement of the case does not comply with this rule. It is argumentative and contains numerous statements of contested matters.

Per our Supreme Court, judgments in South Carolina cannot be enforced more than ten years after they are rendered, even if at that time there are pending proceedings to enforce the judgment. Gordon v. Lancaster, 425 S.C. 386, 823 S.E.2d 173 (2018). Under S.C. Code Ann. § 15-39-30, judgment execution may not be had after 10 years from enrollment of the judgment. Further, per S.C. Code Ann. § 15-35-810, "[t]he *lien* of a judgment" – and a judgment lien was what was sought to be enforced in the proceedings that led to the appealed orders – "is absolutely extinguished and ended after the expiration of ten years from the date of entry." Garrison v. Owens, 258 S.C. 442, 446-47, 189 S.E.2d 31 (1972) (emphasis added). If a judgment's ten-year duration expires before the collection proceedings are complete, those proceedings terminate when the ten-year period runs. Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47.

"When a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution as provided in this Title[,]" i.e., Title 15 of the South Carolina Code of Laws. S.C. Code Ann. § 15-35-180. Property taken in execution of a judgment has to be sold, absent consent of the judgment debtor, and the proceeds applied to the judgment debt. S.C. Code Ann. §§ 15-39-610 & -630. The execution against real property of a judgment is done through a public auction conducted by the sheriff, master-in-equity, or special referee. S.C. Code Ann. §§ 15-39-610 & -630. The sale *is* the execution. S.C. Code Ann. §§ 15-35-180, 15-39-610 & 15-39-630.

In a sale in execution of a judgment, the law provides as follows:

> **In *all*** judicial sales of real estate for the foreclosure of mortgages and ***sales in execution*** **the bidding shall not be closed upon the day of sale but *shall* remain open until the thirtieth day after such sale,** exclusive of the day of sale.
>
> . . .

> The **bidding *shall* be reopened by the officer making the sale on the thirtieth day after the sale**, exclusive of the day of the sale, at eleven o'clock in the forenoon and **the bidding *shall* be allowed to continue until the property *shall* be knocked down in the usual custom of auction to the successful highest bidder complying with the terms of sale. The sales officer *shall* announce the sales about to be closed and *shall* receive the final bids in such sales** in the order determined by him.

S.C. Code Ann. § 15-39-720 (emphasis added). "Ordinarily, the use of the word 'shall' in a statute means that the action referred to is mandatory." S.C. Dept. of Hwys. & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134 (1986). A plain reading of S.C. Code Ann. § 15-39-720 reveals that its provisions concerning holding the bidding open for 30 days to receive upset bids are mandatory. Id.

And the sale is made not when it begins, but when it ends, "upon the acceptance of the highest bid at the judicial sale." Wachesaw Plantation E. Community Servs. Assn. v. Alexander, 420 S.C. 251, 264, 802 S.E.2d 635 (Ct. App. 2017). The Bankruptcy Court for the District of South Carolina has spoken directly to the question of when a sale with required upset bidding under S.C. Code Ann. § 15-39-720 is completed. In re: Riverfront Properties, LLC, 405 B.R. 570 (Bankr. S.C. 2009). Riverfront Properties notes the established rule that a judicial sale "is over when the hammer falls." Id. at 573. As the court there explains, in a sale with upset bidding, the sale is complete when the upset bidding period closes. Id. at 574.

> Because the bidding is reopened, **the hammer does not fall** on a foreclosure sale when deficiency judgment is not waived **until the sales officer closes the sale on the thirtieth day**. The high bidder on the first day of sale has no right that cannot be extinguished by a subsequent bidder and thus no rights or obligations arise in the first day bidder that diminish the title of the mortgagor [or judgment debtor].

Id. (emphasis added).

Under the precedent of our Supreme Court, if the judgment expires before the completion of the sale, the execution process simply ends without the sale being completed. Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47. Southern First is wrong about what it says Gordon and Garrison mean, wrong about its argument that only the hearing that produces the order directing the execution sale has to take place during the judgment's 10-year enforcement and lien period, and an examination of the case law illustrates Southern First is wrong about that.

Southern First argues that only the hearing on the motion seeking the judicial sale had to happen during the judgment's 10-year active energy period. In Gordon, the Supreme Court expressly overruled its earlier decision in Linda Mc Co. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010). Gordon, 425 S.C. at 387, 391, 393. If when the hearing were held had been the determinative point, there would have been no need to overrule Linda Mc to reach the conclusion reached in Gordon. In Linda Mc, the hearing that produced the order that directed execution had been held within the 10-year period. 390 S.C. at 550. If when that hearing was held determined whether execution on the judgment could be had, there would have been no imperative to create any exception to existing law for the Court to reach the result it did in Linda Mc. Id.

The sticky wicket in Linda Mc was that, after the hearing, the judgment collection proceedings continued past the point in time when judgment execution is no longer allowed. Id. at 550, 553-55; S.C. Code Ann. § 15-39-30. An exception was created in Linda Mc that allowed for judgment execution to happen, despite the expiration of this period, so long as the hearing that produced the execution was held within the time period. Linda Mc, 390 S.C. at 550, 553-55. That In Gordon, the Supreme Court overruled Linda Mc and did away with that exception. Gordon, 425 S.C. at 387, 391, 393. Gordon holds that it is *not* the law that, as long as the hearing that

produced the execution was held within the 10-year period, execution may happen after that time is up. Id.

Had Linda Mc been the law, Southern First's motion for a judicial sale would have been granted. (R. pp. 51-60.) The master laid it out well in his order:

> Here, the lien and active energy of the judgment at issue expires on March 27, 2023. The next judicial sales day is March 6, 2023, and there is time to advertise the sale for three weeks before that sales day, as required by S.C. Code Ann. § 15-39-650. Accordingly, the key question before this Court is whether the contemplated judicial sale would be completed on March 6, 2023 – before the judgment expires – or on April 5, 2023, which would be after the judgment expires. If the judgment expires before the completion of the sale, the execution process simply ends without the sale being completed. Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47.
>
> . . .
>
> Here, because the judgment's lien and active energy will expire before the sale can be completed, the judicial sale process cannot be carried to its conclusion. Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47; Riverfront Properties, 405 B.R. at 574; S.C. Code Ann. § 15-39-720.
>
> Courts do not ordinarily issue orders permitting futile acts, even when the requesting party would otherwise be entitled to what is requested. Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 182, 826 S.E.2d 585 (2019) (proper to deny request to amend pleadings when amendment would be futile). It would be futile to grant the Plaintiff's motion here. The expiration of the judgment will make the sales proceedings moot before the hammer can fall on the requested sale. Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47; Riverfront Properties, 405 B.R. at 574; S.C. Code Ann. § 15-39-720.

(R. pp. 58, 59.)

The judgment execution that Southern First sought could not be done within the time frame for execution. S.C. Code Ann. § 15-39-30. By the time the sale to enforce the judgment lien

would have been completed, there would no longer have even been any judgment lien to satisfy out of the sale proceeds. S.C. Code Ann. § 15-35-810; Garrison, 258 S.C. at 446-47.

The master did not err in denying Southern First's motion to have the subject property sold.

II. Southern First is in the wrong court to seek modification of Supreme Court precedent.

Southern First seeks for this court to modify Supreme Court precedent. That is not going to work.

As this court knows well, the Supreme Court's decisions bind this court as precedents. S.C. Const. Art. V, § 9. Tweaking the holdings of Supreme Court decisions is not an option for the Court of Appeals. Id. That is a job for the Supreme Court. Id.

Southern First seeks modification of Gordon from the wrong court.

III. Southern First's arguments are long on vitriol but short on substance.

The Vilchecks' litigation steps were not frivolous, and a discussion of that follows. If the reader of this brief believes, as its author does, that Judge Dukes' appealed orders have to be affirmed regardless of whether the Vilchecks engaged in frivolity, the reader may want to skip this section.

"*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ('Jane you ignorant etcetera . . .') only shows the paucity of your own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 4th 2002). Southern First's argument – virtually its entire argument – is an *ad hominem* attack.

There is a saying in our line of work: "If you have the facts and not the law, argue the facts. If you have the law and not the facts, argue the law. If you don't have either the facts or the law, pound the table." Southern First pounds the table.

a. *Stating* that the Vilchecks took actions frivolously or in bad faith is different from *showing* they did.

To support its contention that the Vilchecks took frivolous, bad-faith actions, Southern First simply states numerous times that the Vilchecks took frivolous, bad-faith actions. Southern First points out things that the Vilchecks did and calls them frivolous and bad faith, but what is missing from the brief is record-based reasoning that points to evidence that they actually were frivolous or done in bad faith. Southern First has engaged in the logical fallacy of *petitio principii*, assuming the initial thing, often called *begging the question* or *circular reasoning*.

"[N]ot all unsuccessful arguments are frivolous or warrant sanction." Mareno v. Rowe, 910 F.2d 1043, 1047 (2d Cir. 1990). Even "creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991) (quoting Davis v. Carl, 906 F.2d 533, 536 (11th Cir. 1990)).

> Losing a summary judgment motion because of lack of factual support does not show that [a litigant]'s counsel pursued a path that a reasonable attorney would have known to be unsound. In fact, if the Court were to accept that alone as evidence of bad faith, every party who has had their motion for summary judgment granted would have a basis for fees and costs against the losing party for multiplying the proceedings[.]

Stradtman v. Republic Servs., 121 F. Supp. 3d 578, 585 (E.D. Va. 2015).

> Obviously the mere loss of a case does not subject a party . . . to a suit by the winner for Sanctions; if it did, the Court system could not function. And no lawyer should be held to a standard of brilliance in the prediction of the outcome of a lawsuit.

Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011) (ellipsis and capitalization in original).

If a litigant makes an argument and loses on it – because she lacks evidence of some element of her claims, because there is a defense that prevails, because her lawyer does a bad job,

because things do not pan out the way she or her lawyer thought they would, because a judge disagrees about what the law is, and for a host of other reasons – that does not mean that she made the argument in a sanctionable way. Southeastern Site Prep, 394 S.C. at 97; Brubaker, 943 F.2d at 1373; Mareno, 910 F.2d at 1047; Davis, 906 F.2d at 536; Stradtman, 121 F. Supp. 3d at 585.

Under the Restatement of Law Governing Lawyers, "[a] frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." Restatement (Third) of Law Governing lawyers § 110, cmt. d (2000). This very restrictive view of what is frivolous is followed generally. See, e.g., Double Oak Const., L.L.C. v. Cornerstone Dev. Intl. L.L.C., 97 P.3d 140, 151 (Colo. App. 2003) (claim is frivolous if its proponent can present no rational argument based on evidence or law to support it); Riston v. Butler, 149 Ohio App. 3d 390, 77 N.E.2d 857 (2002) (claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim).

Per the Fourth Circuit Court of Appeals, the rule of thumb for whether an argument is frivolous is whether the argument had "absolutely no chance of success under the existing precedent." In re: Sargent, 136 F.3d 349, 352 (4th Cir. 1998).

The South Carolina Supreme Court has defined "bad faith" as:

> The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915) (brackets in original opinion, quoting Black's Law Dictionary).

"Good faith" is defined currently by Black's Law Dictionary as:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable

> commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

Black's Law Dictionary 762 (9th ed. 1990). "Good faith," in this context, indicates a state of mind, an honesty in the belief that there is a basis for pursuing the claim or argument, lacking intent to defraud or take undue advantage. The lack of "good faith," on the other hand, indicates some ill motive beyond pursuing a lawful outcome. The lawyer or litigant would have to act with the actual knowledge that there is no hope of prevailing.

Southern First has not shown frivolity or bad faith by the Vilchecks or their lawyer. To prevail on such an argument, Southern First would have had to show a lot more than that the Vilchecks made some arguments that did not prevail. Southeastern Site Prep, 394 S.C. at 97; Mareno, 910 F.2d at 1047.

Let us examine what Southern First claims were frivolous, bad faith acts by the Vilchecks.

Bringing an appeal of a mode of trial order in the related action (not even this action) that Southern First brought against the Vilchecks? Southern First made the motion that produced that appealed order, not the Vilchecks. It is well established that the Vilchecks either had to appeal that ruling or waive their right to challenge it at all. E.g., Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73, 533 S.E.2d 331 (2000). Whether a party has the right to a jury trial in an independent action to enforce a judgment is a question previously unanswered by our appellate courts. It is at least arguable that there is the right to a jury trial in such an action. Judgment liens are creatures of statute, not of equity, and so it follows that suits to enforce them sound at law (carrying with them the right to a jury trial) and not in equity. Further, if, as the Vilchecks have always maintained, they were never served with process in the suit that produced the judgment, Southern First's new suit against them was in reality a suit on a note, which is an action at law.

McCullough v. Kervin, 49 S.C. 445, 27 S.E. 456, 457 (1897) (claim for judgment on note is action at law). Actions at law carry with them the right to trial by jury. Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). Pursuing an appeal on this rather nuanced issue does not meet the test of bad faith or frivolity.

Appealing the order that joined parties and the order that denied the Vilchecks relief from the judgment and determined it was not void? The denial of relief from the judgment was immediately appealable and had to be appealed or the issue forgone. See Ateyeh v. United Omaha Life Ins. Co., 293 S.C. 436, 437, 361 S.E.2d 340 (Ct. App. 1987). Though this court ultimately disagreed, there is support in the law for the Vilchecks' position that appellate review of the order joining parties was properly before this court in that appeal because "[an] order that is not directly appealable may be considered if there is an appealable issue before the court." Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005); accord Briggs v. Richardson, 273 S.C. 376, 379 & n.1, 256 S.E.2d 544, 546 & n.1 (1979); Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). The Vilchecks opposed the entry of the order joining parties on the grounds that there was another action, the judgment lien foreclosure action Southern First brought, that was pending between the same parties Southern First moved to add to this case and in which the same relief was sought that the Southern First sought through its motion to join parties and have the property sold. (R. pp. 401-50.) This court has held that "dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim" when the claim is "precisely or substantially the same in both proceedings[.]" Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 531-32 (Ct. App. 2009). There was a legitimate basis for the Vilchecks to contend that Judge Dukes made the wrong decision in granting the part of Southern First's motion to add the parties.

Moving for briefing extensions? The court need only examine C-Track to see that the undersigned counsel, busy and in a small firm, has sought many briefing extensions in most of the appeals he has handled, and often more than two of a given deadline. Indeed, it is the rare appeal where he has not felt the need to seek an extension of at least some deadline. Southern First argues that the seeking of extensions *must* have been in bad faith, but that conclusion does not follow.

Moving to consolidate appeals? The basis for doing so is certainly not frivolous; rather, it is obvious: if the judgment were determined to be void, the independent action brought to enforce it would fail as a matter of law, and the mode of trial question in the independent action would then be moot. See, e.g., Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (discussing mootness). Since a determination that the judgment is void would have determined that Southern First's success in the independent action to execute on it would be impossible, consolidating the appeals would have allowed this court to deal most efficiently with the appealed issues in both cases. See id.

Arguing that the pendency of an appeal stayed proceedings on the motion for judicial sale? The Supreme Court has held that "[t]he lower court may not act or issue orders that affect an issue on appeal." Arnal v. Fraser, 371 S.C. 512, 641 S.E.2d 419, 422 (2007). "Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal[.]" Tillman v. Oakes, 398 S.C. 245, 254-55, 728 S.E.2d 45, 50-51 (Ct. App. 2012). The appealed order joining parties was critical to the rest of Southern First's motion for a judicial sale. A party who has or claims ownership of an interest in land is a necessary party to a proceeding that could affect that party's ownership interest. See BancOhio Nat. Bank v. Neville, 310 S.C. 323, 329, 426 S.E.2d 773, 777 (1993). A proceeding seeking a judicial lien foreclosure sale is one such proceeding. Green Tree Servicing, LLC v. Adams, 654 S.E.2d 100 (S.C. App. 2007); Susan B.

Berkowitz, et al., South Carolina Foreclosure Law Manual 36 (3d ed. 2013). The Vilchecks' argument was not that the appeal of the denial of relief from the judgment stayed the hearing; rather, it was that the hearing was stayed because whether the parties required to hear the motion had been joined was a decision that was on appeal to this court. Rules 205 & 241(a), SCACR. As the authorities cited above show, that was not a frivolous or bad faith argument. Indeed, the undersigned counsel still believes it was correct. Just because this court ruled against it does not make it frivolous or made in bad faith. Southeastern Site Prep, 394 S.C. at 97; Mareno, 910 F.2d at 1047.

Dismissing the appeals? Once the 10-year lien and enforcement period for the judgment passed, the issues subject of the Vilchecks' appeals were moot, and there was no "effectual relief" that would have "practical legal effect" to be gained from pursuing them. Curtis, 345 S.C. at 567. At that point, an attempt to continue pursuing those appeals might have been frivolous.

Southern First has not shown that the Vilchecks' litigation steps were frivolous or in bad faith. Southern First's brief has skipped over a whole lot of analysis that would be necessary to determine whether there was frivolity or bad faith. The reason is simple: there is not a record that backs up these accusations.

b. What Southern First is trying to do is not what an appeal is.

What Southern First is trying to do here is make a new record and advance new arguments, seeking for the first time a referendum on whether the Vilchecks engaged in sanctionable conduct and seeking sanctions from this court for what Southern First now claims is sanctionable conduct. That is not what an appeal is for.

Procedural vehicles exist to assess whether a party engaged in improperly motivated conduct of the kind Southern First alleges and, if so, what should happen to such a party as a result.

These include motions under the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, and Rule 11, SCRCP, both of which must be made at the trial court level and are not what is at issue here. This appeal is not a review of a ruling on such a motion. This appeal is limited to issues concerning whether the master-in-equity erred in issuing the appealed orders. Southern First seeks to use this appeal to address matters beyond its scope and which must be raised in trial-court level motions.

The purpose of an appeal is for the appellate court "to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court." Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). The Court of Appeals does not "sit as a trial court to receive evidence on disputed issues of fact[.]" Id. "[A]ppellate review should be limited to the record in the trial court." Id. at 461.

Rule 210(c), SCACR, prohibits the inclusion in the record on appeal of "matter which was not presented to the lower court or tribunal." Accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Sanders, 283 S.C. at 461; see Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997). Rule 209(b), SCACR, provides that a designation of matter for inclusion in the record on appeal "may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the record on appeal."

Southern First has designated matter for inclusion in the record on appeal that was never presented to the lower court, and Southern First argues that this improperly designated matter proves the correctness of its position. It is not enough that matter may have been presented to *some* court, *somewhere*, in *some* case. Rule 210(c), SCACR; White, 372 S.C. at 387; Sanders, 283

S.C. at 460. The scope of the appealed record is what was presented in *this* case to *this* lower court. Rule 210(c), SCACR; White, 372 S.C. at 387; Sanders, 283 S.C. at 460.

If Southern First thinks the Vilchecks' litigation conduct was sufficiently improper to warrant it, it should have made a sanctions motion or sued the Vilchecks for abuse of process. This appeal cannot be substituted for such a proceeding. Sanders, 283 S.C. at 460.

c. Southern First has not shown the Vilchecks' actions caused Southern First's timing problem.

Further, delay incident to acts done by the Vilchecks did not cause the decision to deny Southern First the sale it sought. An examination of the timing of events reveals this.

By December 7, 2022, Southern First had succeeded in serving all the added parties with the order joining them and with the motion seeking a judicial sale of the Vilchecks' property. (Supp. R. pp. 27-36.) In practice before masters-in-equity, motion hearings are typically set as the result of a request for a hearing by the moving party. On December 7, 2022, Southern First was in a position to request a hearing on its motion for a judicial sale.

Nevertheless, Southern First's counsel did not write the office of the master-in-equity to ask that a hearing be scheduled until January 11, 2023. (R. pp. 249-50.) That delay is what made it impossible for the master to grant Southern First's motion.[2] If Southern First had asked for the motion hearing in mid-December, and if all of the other events (including acts done by the Vilchecks) had happened the same way and over the exact same duration of time after a mid-December hearing request as they did after the mid-January one, the Vilchecks would be out of their house right now. Had Southern First – the judgment creditor with a clock to beat – requested a hearing earlier, Judge Dukes would likely have issued an order in early January that would have

[2] That delay by Southern First was not improper or wrong in any way, but it, not anything the Vilchecks did, is what prevented Southern First from succeeding on its motion.

directed a judicial sale, and that sale could have been completed during the judgment enforcement period. (R. pp. 51-60.)

Southern First has left that part out. The Vilchecks' actions may have caused some delay, but they did not cause the delay that cost Southern First the judicial sale.

IV. Southern First's arguments to this court are different from what they were below and are not preserved for review.

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992).

Here, Southern First's arguments on appeal are not preserved for review; the only one that Southern First made below is the contention that merely a hearing must be held before the end of the judgment's 10-year period, and that was not made until Southern First's motion to reconsider the denial of the judicial sale. (R. p. 137 ln. 19-25, p. 146 ln. 17 though p. 148 ln. 2, p. 148 ln. 14-19, pp. 464-72.) Southern First never argued below that the Vilchecks even engaged in bad faith, frivolous conduct, much less that such conduct provided a basis for Judge Dukes to order the sale of the property.

Here is the closest that Southern First came to making that argument in the hearing on its motion for a judicial sale:

> All we've done is to try to resolve this through a run-of-the-mill foreclosure and bring everybody in, and just had to fight off appeal after appeal after appeal. That's what we're dealing with here. Nothing has been raised on the merits. There is no defense to this case that's been raised.
>
> . . .
>
> And so we're eager to do - to get this done. We've been fighting and scrapping to have our day in court. And between the status

> conference and this morning I think we've had two more appeals filed and other -- and other things have happened as well.

(R. p. 96 ln. 4-10, p. 102 ln. 17-23.)

For the frivolous-bad-faith argument Southern First now makes to be preserved, it would have had to be made at that hearing. See Wilder Corp., 330 S.C. at 71; Vespazziani, 307 S.C. at 413. It was not. (R. pp. 87-129.)

Here is the closest that Southern First came to making that argument in the hearing on its motion to reconsider the denial of its motion for a judicial sale:

> While we understand this is somewhat of a novel issue, somewhat of a very technical argument, we've been here before in other cases with other masters across the state where we have dealt with *the defendants simply orchestrating delays and hindrances through appeals.* ***They're entitled to do that, Your Honor****. I'm not saying that they're not entitled to bring an appeal, they're not entitled to delay and to create obstacles and hindrances*, but there has been no defense on the merits at all in any way outside of get it to the ten years, and then we're going to live with, hey, apply this bright-line rule of Gordon v. Lancaster. And that's not a fair assessment of Gordon v. Lancaster. That's not a fair view of the facts in this case.
>
> . . .
>
> We haven't asked to be put into this position. We've been kicked into this position. We've been thrown into this position. We had hearing after hearing after hearing after delay after delay after delay appeal after appeal. And everybody's asserted their rights. And they have them. Creditors have rights. Third parties have rights. Defendant debtors have rights.
>
> . . .
>
> They've got seven or eight appeals, but at least preserve our rights and preserve our judgment here. And the tools and the means that the defendant has used over the last two years is not in contemplation from the statute or the Supreme Court to be afforded such protections by simple delays and mechanisms to continue this case.

. . .

> We have fought tooth and nail to get to this point, and we are entitled to a final order for the judicial sale regardless of what the miniscule effects and acts afterwards have to -- are. We've been put in this position. We've been a vigilant and diligent creditor.

(R. p. 136 ln. 7-22, p. 141 ln. 6-13, p. 142 ln. 4-10, p. 148 ln. 7-13)(emphasis added).

Though it would have been too late to do so anyway for issue preservation purposes, see Wilder Corp., 330 S.C. at 71; Vespazziani, 307 S.C. at 413, Southern First did not advance the frivolity argument it now makes at the motion to reconsider stage, either. (R. pp. 130-63.)

The closest Southern First ever came to making the argument it does now was in the hearing on its motion to establish a procedure to have the property sold in a different way:

> We've tried to go through, and various things have delayed it. Various things have prevented this from going through, essentially none of which have actually been viable arguments from the debtors that they should not have the property sold, apart from running out the clock, and reaching the deadline, and then having it not be viable after the ten-year expiration.
>
> . . .
>
> And yet, throughout these proceedings, there have been appeals. There have been delays. Sometimes, just things like hurricanes. Out of everybody's control. Nothing we can do about it.
>
> But it's reached a point where this seems like the only viable way forward for equity to be carried out and Southern First Bank to receive any funds on their debt that is owed.

(R. p. 180 ln. 13-20, p. 180 ln. 24 through p. 181 ln. 6.)

The master's order on that motion does not address this argument. (R. pp. 63-64.) Southern First did not make a Rule 59, SCRCP, motion with regard to that order. The argument Southern First made at that hearing is not preserved for review. See Wilder Corp., 330 S.C. at 71;

Vespazziani, 307 S.C. at 413. In any event, it is not the same argument that Southern First makes now.

Southern First never argued below that the Vilchecks had done anything frivolous or in bad faith. (R. pp. 87-192.) Indeed, Southern First told the master that the Vilchecks had a right to "orchestrat[e] delays and hindrances through appeals." (R. p. 136 ln. 11-16.) That is a far cry from the argument Southern First makes now.

Southern First is not right about its arguments, but, crucially, they are not preserved for review, regardless of their substantive merit. Wilder Corp., 330 S.C. at 71; Vespazziani, 307 S.C. at 413. A party's unpreserved arguments cannot prevail on appeal. E.g., Hatfield v. Hatfield, 327 S.C. 360, 367, 489 S.E.2d 212, 216 (Ct. App. 1997). This court should affirm.

V. The judgment has expired, and this appeal is moot.

In denying the Vilchecks' previous motion to dismiss this appeal, this court's June 21, 2023, order stated that the issue of this appeal's mootness may be argued in the briefs along with the merits.

This appeal is moot. "'A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.' S.C. Ret. Syst. Inv. Comm'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). '[M]oot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties.' 15 S.C. Jur. Appeal and Error § 19 (Supp. 2014)." Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander, 414 S.C. 355, 359, 778 S.E.2d 898 (2015).

Here, an intervening event has prevented a decision in this appeal from having an impact on the parties. The result will be the same whether Southern First does or does not convince the court that Judge Dukes erred.

This is an appeal of orders that all decline to order the sale of a piece of real property in execution of a judgment lien. As is undisputed, at the end of the day on March 27, 2023, the judgment lien expired and its execution period ended. S.C. Code Ann. §§ 15-39-30, 15-35-810; Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47.

There is on-point precedent that judgments in South Carolina cannot be enforced more than ten years after they are rendered, even if at that time there are pending proceedings to enforce the judgment. Gordon, 425 S.C. at 386. Also, the proceedings below sought enforcement of a judgment lien that no longer exists, as "[t]he lien of a judgment is absolutely extinguished and ended after the expiration of ten years from the date of entry." Garrison, 258 S.C. at 446-47.

Accordingly, even if Southern First obtains a decision that Judge Dukes erred in not ordering a sale, no sale can *now* be ordered. S.C. Code Ann. §§ 15-39-30, 15-35-810; Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47. Execution on this judgment cannot be had, and the judgment's lien on real estate no longer exists. S.C. Code Ann. §§ 15-39-30, 15-35-810; Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47.

Southern First seeks to convince this court that, because the appealed orders were issued before the judgment expired, the master was wrong to conclude that he could not order the real property sold. But any order that would *now* be issued directing a sale would come only after the judgment's lien and execution period expired. Such an order would be plainly improper under even Southern First's interpretation of Gordon.

The expiration of the judgment's lien and collection period have mooted this appeal. Whether Southern First wins or loses here, no sale can be made in enforcement of the judgment. S.C. Code Ann. §§ 15-39-30, 15-35-810; Gordon, 425 S.C. at 386; Garrison, 258 S.C. at 446-47. "[I]ntervening events prevent a decision on appeal from having an immediate impact on the parties." Wachesaw Plantation, 414 S.C. at 359 (quoting 15 S.C. Jur. Appeal and Error § 19).

This appeal is also moot for an independent reason. As discussed above, Southern First brought a separate action seeking the same judicial sale it sought in this case. (R. pp. 278-88, 300-82.) After the judgment's lien and execution period ended, Southern First voluntarily stipulated the dismissal of that separate action with prejudice.[3] That suit's "dismissal with prejudice indicates an adjudication on the merits and preclude[s] subsequent litigation to the same extent as if the action had been tried to final adjudication. Where an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication." Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997).

Were this appeal to result in reversal and remand, Southern First then could not succeed in getting the sale it wants because of the bar of res judicata – regardless of whether the judgment's 10-year period has run. "Res judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action. In order for res judicata to apply, the parties—or their privies—and subject matter must be identical, and the prior suit adjudicated the issue." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018) (internal citation and quotation marks omitted). Further, res judicata applies to all

[3] This is shown by that stipulation's attachment to a filing made in this appeal on September 25, 2023. The Vilchecks have not designated this stipulation for inclusion in the record on appeal, as that would be improper. Rule 210(c), SCACR. The stipulation did not exist at the time Judge Dukes rendered any of the appealed orders, and, thus, we can be certain it was not presented to the lower court.

rights and remedies "with respect to *all or part of the transaction, or series of connected transactions, out of which the action arose.*" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 388, 737 S.E.2d 502, 508 (Ct. App. 2013) (emphasis in original; quoting Restatement (Second) of Judgments § 24). Were this case to be remanded, res judicata would independently bar Southern First from *any* relief related to the subject judgment. Id.

Southern First also argues for the application of the capable-of-repetition-yet-evading-review and public importance exceptions to nonjusticiability. Southern First seeks for this court to use one of those exceptions to modify the Supreme Court's holding in Gordon. 425 S.C. at 386. Southern First's argument that these exceptions should apply is premised on the idea that Gordon is unfair. But, because of the constitutional structure of South Carolina's court system, this court cannot modify Gordon even if it agrees with Southern First that Gordon is unfair. S.C. Const. Art. V, § 9. The precedential status of Gordon means that this court cannot change its holding in any way. Id. Arguments about whether Gordon ought to be changed, under these limited mootness exceptions or otherwise, must be made to the Supreme Court to have even a theoretical possibility of success. Id. There is no point in arguing about these exceptions, because the hierarchy of South Carolina courts means that Southern First cannot use them to get this court to modify Gordon. Id. It is in the state constitution. Id.

This appeal is moot, and the limited exceptions to mootness do not save it for Southern First.

CONCLUSION

This appeal should be dismissed as moot. Should this court reach the merits, it should affirm. Southern First has not shown it is entitled to reversal of the master's orders.

Respectfully submitted,

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April 10, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2023-000421

Southern First Bank, N.A. d/b/a Greenville First Bank,..……....…...Appellant,

v.

Kenneth J. Vilcheck, Renee M. Vilcheck, Portfolio Recovery Associates, LLC, United States of America, acting through its agency, Department of Treasury – Internal Revenue Service, Federal Housing Commissioner, The South Carolina Department of Revenue, Belfair Property Owners' Association, Inc., and the Greenery, Inc. a South Carolina corporation,..……...……..…Respondents.

CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

/s/ Andrew S. Radeker
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April 10, 2024