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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2019-CP-10-4503
Appellate Case No. 2023-001844

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans Inc., Pass-Through Certificates 2007 QH2……Respondent,

v.

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March 2010; Shoreline Farms Community Association, Inc.; Wells Fargo Bank, N.A.; Cadle Rock Joint Venture, L. P. an Ohio Limited Partnership, Curtis Rogers and Julie Rogers, Defendants,

Of whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010 are……..Appellants,

AND

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010, Third-Party Plaintiff,

v.

Nationstar Mortgage, LLC, Curtis Rogers, and Julie Rogers……..……...Third-Party Defendant.

FINAL BRIEF OF APPPELLANT ASHLEY JOHNSON BESHARA AS TRUSTEE

April 16, 2025.

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STATEMENT OF THE CASE

Curt and Julie Rogers ("Rogers") reside in the Subject Property and are beneficiaries of the trust, which holds title to the Subject Property, for whom Appellant Ashley Johnson Beshara is trustee ("Beshara" or "Appellant" collectively "Appellants") (R.p. 148). Plaintiff, Deutsche Bank Trust Company Americas as Trustee for the Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2's ("Deutsche") alleges that Curt Rogers ("Curt Rogers") executed a Note and Mortgage to Homecomings Financial, LLC ("Homecomings") on January 12, 2007 (hereinafter "Note" and "Mortgage") (R.p. 110). The Mortgagee executed in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Homecomings (R.p 82).

Appellant plead the Note contains unconscionable negative amortization terms (R.p. 153, ¶ 33). Deutsche plead the Rogers defaulted on the Note on September 1, 2009 (R.p. 111, ¶ 14). September 15, 2009, Aurora Loan Services, LLC, ("ALS"), through their counsel, caused an Assignment of Mortgage allegedly assigning the Mortgage from MERS to ALS (Assignment 1), and on the same day ALS filed a foreclosure summons and complaint naming the Rogers as defendants in case number 2009-CP-10-05840. The Rogers filed an answer on October 23, 2009 ("Action 1") (R.pp.81-83; 111 ¶ 10; 153-159; 91-96). The Note does not contain an endorsement to ALS (R.pp. 153-159; 451-458; Am. R. pp. 1055-1072).

Appellant plead if the Note was never endorsed to ALS then MERS lacked the authority acting on behalf of Homecomings to assign the Mortgage to (R.pp. 153-160). Appellant plead if Assignment 1 was void and invalid then ALS lacked standing and had no legal right and authority to file for foreclosure of the Mortgage (R.pp. 153-160). Appellant plead from 2008-2011 the Rogers underwent extensive loss mitigation efforts with Deutsche and/or its alleged predecessors in interest and/or alleged predecessor servicers, providing numerous documents upon request, requesting loan modifications and/or short sales; making all required payments pursuant to a Work Out Agreement entered into with Deutsche and/or Its' alleged Predecessors; and submitting a short sale contract, but Deutsche and/or Its' alleged Predecessors failed to act in good faith and modify the Note and/or agree to short sale the Subject Property (R.pp. 153-160; R.pp. 430-446).

Action 1 was dismissed pursuant to Rule 40(j), SCRCP, by Order dated February 24, 2010 and filed March 9, 2010 ("Dismissal 1") (R.pp. 153-160; R.pp 192-203; R.p. 1039). After the Dismissal 1 was signed title to the Subject Property was deeded to Appellant (R.p 108; App. R.pp. 131-140). The action was restored by Order filed March 10, 2011, in civil action number 2011-CP-10-1805 ("Action 2") (R.pp. 153-160; R.p. 1041). By way of grant of motion, the Rogers filed

an amended answer and counterclaim on February 13, 2012 (R.pp. 91-103; R.p. 1041; R. pp 632). June 12, 2013, in Action 2, ALS filed a proposed order alleging that the Note and Mortgage had been assigned to Nationstar Mortgage, LLC ("Nationstar") and that Nationstar was the present lien holder of the Note and Mortgage and therefore Nationstar is substituted as plaintiff for ALS (R.pp. 153-160; R. pp. 44-46; R.p. 1041).

Appellant plead the Note does not bear and endorsement to Nationstar and there is no assignment of record assigning the Mortgage to Nationstar (R.pp. 153-160; Am. R. pp. 1055-1072). Appellant plead if the Note was never endorsed to Nationstar and the Mortgage was never assigned to Nationstar, then Nationstar lacked standing and authority to foreclose upon the Mortgage in Action 2 (R.pp. 153-160). Appellant plead Nationstar as an alleged predecessor in interest to Deutsche stated in discovery responses dated February 28, 2014, in Action 2, that on February 27, 2007, through an assignment and assumption agreement Residential Funding, Company, LLC ("Residential Funding"), assigned the Note and Mortgage to Residential Accredit Loans, Inc. Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QH2 Trust (R.pp. 153-160; R.pp. 430-446). Appellant plead by law the chain of title of a mortgage must follow and correspond to the chain of title of the note it secures. If Residential Funding was owner and holder of the Note on February 27, 2007, then then MERS as nominee for Homecomings had no authority to assign the Mortgage ALS by Assignment 1 (R.pp. 153-160; R.pp. 430-446).

Appellant plead prior to the execution of Assignment 1, on or about July 16, 2009, ALS, sent Curt Rogers a correspondence with an alleged certified copy of the Note and Mortgage ("Note Copy 1"). The note contained an undated endorsement in blank executed by Bakhtiar S. Akhunji as Assistant Secretary of Homecomings ("Endorsement 1"). The Note contained no other endorsements (R.pp. 153-160; Ex. A. Apps Memo Opp. P Mtn SJ filed 2/9/23). Appellant plead

on or about November 19, 2009, counsel for ALS, responding to a qualified written request by the Rogers, sent the Rogers a copy of the Note which bears two endorsements ("Note Copy 2") (Am. Ans; Am. R. pp. 1055-1072). Appellant plead Note Copy 2 bears an altered version of Endorsement 1 whereby Endorsement 1, originally endorsed in blank by Homecomings had been altered to be endorsed to Residential Funding ("Altered Endorsement 1"). The Note Copy 2 bears a second specific endorsement to Deutsche Bank Trust Company as Trustee executed by Judy Faber as Vice President, Residential Funding Company, LLC ("Endorsement 2"). Note Copy 2 does not bear any endorsements other than Altered Endorsement 1 and Endorsement 2 (R.pp. 153-160).

On June 28, 2013, the Rogers filed a Motion to Vacate the Order filed June 14, 2012, substituting Nationstar as Plaintiff, citing as a basis for the motion standing (R.pp. 153-160; R.pp. 117-120). Appellant plead July 10, 2013, Nationstar provided responses to request for production to the Rogers and produced a copy of the Note. Said copy of the Note did not contain any endorsements other than Altered Endorsement 1 and Endorsement 2. Therefore, the copy of the Note produced on July 10, 2013, did not contain a specific endorsement or an endorsement in blank giving Nationstar the right to enforce the Note and Mortgage in Action 2 (R.pp. 153-160; R.pp. 447-458). The Motion to Vacate was scheduled to be heard November 18, 2013 (Am Ans). On or about November 16, 2013, Nationstar's counsel, provided to the Rogers, for the first time, a third copy of the Note ("Note Copy 3"). Note Copy 3 bears Altered Endorsement 1, Endorsement 2 and third endorsement in blank made by Nationstar as attorney in fact for Deutsche Bank Trust Company Americas as Trustee (R.pp. 153-160; R.p. 1041; Am. R. pp. 1055-1072). February 28, 2014, Nationstar served the Rogers Responses Requests for Admissions. In the Admissions Nationstar admits the following: a) Note Copy 3 was not produced in Nationstar's responses to

requests for production dated July 10, 2013; b) the Note does not contain an endorsement to Nationstar or ALS; and c) as of 2/28/14 no assignment of the Mortgage had been executed assigning the Mortgage to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. (R.pp. 153-160; Am. R. pp. 1055-1072; R.pp 430-458).

March 3, 2014, the Rogers filed a motion for summary judgment based on standing and supported by Nationstar's 2/28/14 Admissions (R.pp. 153-160; R.pp. 1041). Appellant plead April 1, 2014, Deutsche's alleged predecessor in interest Nationstar, aware the Roger's, had raised standing issues in their motion for summary judgment, tried to correct the problem prior to the motion hearing by executing an alleged assignment of the Mortgage whereby Nationstar as attorney in fact for ALS assigned the Mortgage to Deutsche. Nationstar's counsel recorded the alleged assignment on April 14, 2014 (R.pp. 153-160; R.pp. 726-728). June 9, 2014, after notice to Nationstar the Rogers motion for summary judgment had been scheduled to be heard, but prior to the hearing, Nationstar moved to have Action 2 dismissed pursuant to Rule 40(J), SCRCP, which was granted by Order filed June 24, 2014 (hereinafter "Dismissal 2") (R.pp. 153-160; R.p. 1041; R.pp. 192-203).

March 13, 2015, Nationstar moved to restore. The action was restored by order filed April 7, 2015, in civil action 2015-CP-10-1971 (hereinafter "Action 3") Thereafter Nationstar made no further filings in Action 3. Action 3 was called for trial on or about May 12, 2016. May 12, 2016, Nationstar moved to have Action 3 dismissed pursuant to Rule 40(J), SCRCP, granted by Order filed May 16, 2016 (Dismissal 3). (R.pp. 153-160; R.pp. 1044; R.pp. 192-203).

In 2018 Nationstar contacted the Roger's counsel stating Nationstar wanted to restore the action. The Rogers' counsel informed Nationstar's counsel that Rogers would contest the motion to restore and assert the Action had been adjudicated on the merits pursuant to Rule 41, SCRCP. The Rogers' counsel's last communication with Nationstar's counsel was December 18, 2018 (R.pp. 153-160; R.pp. 542-550).

August 27, 2019, this action ("Action 4") was caused to be filed by Nationstar, the principle contact for plaintiff's counsel in Action 4. Though Nationstar sought foreclosure same the Mortgage again, this Nationstar named Deutsche plaintiff and Appellant the defendant. The Rogers were not named as parties (R.pp. 108; R.pp. 131-140; R.pp. 153-160; R.p. 594 ¶ 74; R.p. 609 ¶ 74). Appellant plead Nationstar commenced Action 4 naming Deutsche plaintiff and Appellant defendant and not name the Rogers, to intentionally avoid issues of standing and res judicata (R.pp. 153-160; R.pp. 542-550).

October 18, 2019, Appellant filed a motion to dismiss pursuant to Rules 12(b)(6)(7), 19, 41, SCRCP, the doctrine of collateral estoppel, and the South Carolina Supreme Court Administrative Order 2011-05-02-01 ("Foreclosure Admin. Ord.") (R.pp. 131-140). January 21, 2020, Deutsche filed a Return, asserting Appellant owes fiduciary dutie to the Rogers and Deutsche complied with the Foreclosure Admin. Ord. by serving Appellant, not the Rogers, with the Notice of Foreclosure Intervention.[1] (R.pp. 530-535). January 21, 2020, Deutsche filed Certification of Noncompliance with the Admin. Ord. (R.p. 116). January 24, 2020, Appellant filed an Objection to the Certification (R.pp. 557). June 12, 2020, the Rogers filed a Motion to Intervene. (R.pp. 513). June 12, 2020, Appellant filed a Reply to Deutsche's Return. (R.pp. 536) June 23, 2020, the Court issued a form four Order denying Appellant's Motion to Dismiss (R.p

[1] Appellant is not a party to the Note or Mortgage.

47). July 3, 2020, Appellant filed a Motion to Reconsider the Order (R.p. 521). July 8, 2020, Appellant filed an Answer and Counterclaim (R.p. 141). July 9, 2020, Deutsche filed a Return to Defendant's Motion to Reconsider (Am. R. pp. 1073), Deutsche filed a Return to the Roger's Motion to Intervene asserting among Appellant owes the Rogers fiduciary duties and the Rogers interests are adequately represented by Appellant therefore the Rogers are not necessary parties. (Am. R. pp. 1078-1080). July 15, 2020, Appellant filed an amended answer, counterclaim and third-party complaint naming Nationstar a party. (R.p. 148). July 28, 2020, the Court issued an order granting the Motion to Intervene (R.p. 50) August 13, 2020, the Rogers filed an Answer, Counterclaim and Cross-Claim (R.p. 170).

September 9, 2020, Deutsche and Nationstar collectively filed motions to dismiss Appellant's counterclaim and third-party claims and the Rogers' counterclaims and cross-claims. (R.p. 204; R.p. 212). October 21, 2020, Deutsche and Nationstar filed a joint memorandum in support of their motions. (R.p. 616). October 21, 2020, Appellant filed a Memorandum in opposition to the Motion (R.p. 658). October 21, 2020, the Rogers filed a Memorandum in opposition to the Motion. (R.p. 645). January 8, 2021 and July 29, 2021, the Court issued Orders denying both Motions to Dismiss. (R.p. 57; R.p. 60). January 25, 2021, Deutsche filed replies to Appellants and the Rogers' counterclaims (R.p. 588; R.p. 559). January 25, 2021, Nationstar filed an answer to Appellant's third-party claims and an answer to the Roger's cross-claims (R.p. 573; R.p. 602).

September 7, 2022, the Rogers filed a Motion to Compel Deutsche and Nationstar's for joint discovery responses (R.p. 220). September 8, 2022, the Rogers filed a Motion for Summary Judgment (R.p. 240). October 7, 2022, Deutsche and Nationstar filed a joint Motion for Partial Summary Judgment as to Appellant's counterclaims and third-party claims and the Rogers'

counterclaims and cross-claims (R.p. 526). October 7, 2022, Deutsche and Nationstar filed an affidavit of Allen Blunt (R.p. 688). October 10, 2022, Deutsche and Nationstar filed a joint Amended Motion for Partial Summary Judgment (R.p. 528). October 10, 2022, Deutsche and Nationstar again filed the Blunt Affidavit (10/10/22 Aff Blunt). February 1, 2023, Deutsche and Nationstar filed: 1) joint Memorandum in Opposition to the Motion Compel, 2) a joint Memorandum in Opposition to Rogers' Motion for Summary Judgment, and 3) a joint Memorandum in Support of Deutsche and Nationstar's Motion for Summary Judgment. February 9, 2023, Appellant and the Rogers jointly filed a memorandum in opposition to Deutsche and Nationstar's motion for summary judgment (R.p. 408). February 10, 2023, Appellant and the Rogers filed a joint supplemental response in opposition to the motion (R.p. 380).

February 10, 2023, the Court heard all of the motions. July 10, 2023, the Court issued an order denying the Roger's Motion for Summary Judgment; granting Deutsche and Nationstar's joint motion for summary judgment as to Appellant's counterclaims and third-party claims and the Roger's counterclaims and cross-claims; granting in part and denying in part the Roger's motion to compel; and dismissing Nationstar from the action.[2] (R.p. 1). July 20, 2023, Appellant filed a Motion to Reconsider the Order. (R.p. 485). July 20, 2023, the Rogers filed a Motion to Reconsider the Order (R.p. 459). September 29, 2023, Deutsche and Nationstar filed a joint memorandum in opposition to Appellant and the Rogers motions to reconsider (R.p. 505). November 1, 2023, the Court issued an order denying Appellant and Rogers' motion to reconsider respectively. (R.p. 25) This appeal followed.

STANDARD OF REVIEW

[2] The Court erred in Dismissing Nationstar as a party to the action as the relief had not been requested by any party in any motion.

"Since it is a drastic remedy, summary judgment `should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, (2006). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David*, at 250. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Simmons v. Berkeley Elec. Co-op. Inc.*, 404 S.C. 172, 178, 744 S.E.2d 580 (Ct. App. 2013) "A scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror." *Scott v. McAlister*, 436 S.C. 324, 337, 871 S.E.2d 620 (Ct. App. 2022) (Quoting *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31, 61 S.E. 1064, 1067 (1908)). Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete

discovery. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is `not merely engaged in a "fishing expedition."' *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman*, at 112).

ARGUMENT

I. The Court Erred in Finding All of Appellant's Counterclaims and Third-Party Claims were Barred by the Statute of Limitations.

The lower court erred by dismissing Appellant's counterclaims and third-party claims for declaratory judgment, negligent misrepresentation, abuse of process, malicious prosecution, and violation of the SCUPTA based upon the statute of limitations[3]. The Order states: "[the] claims arise *largely* from events that transpired in the litigation of this matter between 2009 and 2016…"

The question of when a statute of limitations runs is generally one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000)("[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve."). Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating in a medical malpractice action that when there is conflicting testimony regarding time of discovery of facts giving notice, the date on which discovery should have been made becomes an issue for the jury to decide); and Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it…and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

[3] The Court did not dismiss Appellant's cause of action for Accounting based upon the Statute of Limitations.

"According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Dean v. Ruscon Corp.* 321, S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

"A defendant will be estopped from asserting a statute of limitations defense "when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct. This conduct may be either an express representation that the claim will be settled without litigation or actions suggesting a lawsuit is unnecessary." *Harvey v. South Carolina Department of Corrections*, 338 S.C. 500, 509, 527 S.E.2d 765 (Ct. App. 2000). "The defendant's conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue". *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 137, 526 S.E.2d 218 (2000) Equitable tolling can also apply to the statute of limitations. "In our view, the situations described above do not constitute an exclusive list of circumstances that justify the application of equitable tolling. The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use. We

have previously tolled a statute of limitations based on equitable considerations." *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 386 S.C. 108, 116, 117 687 S.E.2d 29 (2009).

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991); *City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009). "A declaratory judgment action is like a chameleon." *Noisette v. Ismail*, 299 S.C. 243, 384 S.E. 2d 310 (Ct. App. 1989). "Its color is determined by its background, i.e., the underlying action." *Jacobs v. Service Merchandise Co*., 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988) (the character of a declaratory judgment action is determined by the main purpose of the complaint).

The court order states "A counterclaim must be asserted within the limitations period at the time it is first alleged, or it is untimely. See *Whitfield Const. Co. v. Bank of Tokyo Tr. Co*., 338 S.C. 207, 225, 525 S.E.2d 888, 898 (Ct. App. 1999)."

In *Whitfield* the action was filed in September of 1992, and the Defendant timely answered. In 1994 the defendant BOTT was granted an order amend the pleading. In April of 1996, BOTT again moved to amend its pleading and the motion was granted. BOTT filed a second amended pleading adding a counterclaim for abuse of process asserting Plaintiff filed suit in an attempt to coerce BOTT into paving a road. At trial the Plaintiff moved to strike the abuse of process counterclaim based upon the statute of limitations. The lower court held the abuse of process counterclaim related back to the date of its original pleadings. This Court in issuing its opinion on appeal stated: "An amendment to a pleading relates back to the date of the original pleading whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings. The central requirement here is that the party defending against the new claim have sufficient notice of it, i.e.,

the new claim must be `logically related' to the matters originally pleaded so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired." This Court went on to state: As the special referee held, *Whitfield's act of filing the complaint for this lawsuit may well have been the basis for BOTT's counterclaim for abuse of process.* The proper inquiry, however, is whether BOTT had ever provided notice in any of its prior pleadings that it intended to allege such a counterclaim, not whether Whitfield should have anticipated that the counterclaim would follow as a result of his own actions…. Nowhere in either pleading did BOTT even remotely suggest Whitfield made an improper use of a process to gain a collateral advantage. Without any indication in its prior responsive pleadings that Whitfield was to defend against such an allegation, we fail to see how BOTT had set forth, or even attempted to set forth, the conduct, transaction, or occurrence giving rise to a counterclaim for abuse of process. The special referee, then, erred in concluding BOTT's counterclaim for abuse of process related back to the filing date of any of its prior pleadings." See Generally *Whitfield Const. Co. v. Bank of Tokyo Tr. Co*., 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999)." This case is not analogous to *Whitfield.*

In this case the lower court erred in granting summary judgment, based upon the statute of limitations, for a number of reasons. First, Appellant's cause of action for Declaratory Judgment, sounds in equity (the foreclosure complaint sounds in equity) therefore the statute of limitations does not apply.

Second, Appellant plead allegations, including but not limited injurious acts and omissions of Deutsche and Nationstar which occurred after May of 2016 including intentional delay, and the purpose and manner in which Nationstar and Deutsche caused Action 4 to be filed in 2019. (R.pp. 153, 159-168; R.pp. 134-140). To the extent the statute of limitations did apply, which it did not,

it had not run. The fact dispute as to when the statute began to run is best left for a jury to determine.

Third, under the discovery rule the statute of limitations on Appellant's causes of action did not begin to run until Appellant knew should have known she had a cause of action. Appellant has asserted she had no reason to believe she had causes of action until 2019. She acquired title to the property in 2010 prior to the commencement of Action 2. Deutsche and/or Nationstar never gave any indication of involving appellant in Action 2 or 3. They first caused Appellant's involvement in the ongoing dispute in 2019, when they tactically, with coercive and deceitful intent, named Appellant the defendant in Action 4 instead of the Roger's. Appellant plead and has asserted Deutsche and Nationstar did this avoid the Rogers' asserting res judicata pursuant to Rules 40 and 41 (R.pp. 542-550).

Fourth, Summary Judgment based upon a finding the statute of limitations barred Appellants causes of action is not applicable, even if applicable which Appellant denies, because Deutsche and Nationstar should be estopped and/or equitably tolled from asserting the defense. Appellant plead and there is evidence in the record, that Deutsche and Nationstar failed to take any actions in prosecuting the foreclosure and sought to intentionally delay the foreclosure as soon as the Roger's filed for Summary Judgment in 2014, waiting until August of 2019 to bring Action 4.[4] In Action 4 Deutsche and Nationstar tactically chose to name Appellant defendant instead of naming the Rogers. Appellant has assert the intent in doing so was to avoid issues previously raised by the Rogers. Appellant plead this delay and tactical maneuvering was intentional. In the interest of justice and equity, Deutsche and Nationstar should be estopped from asserting a defense of

[4] Nationstar took no substantive steps to prosecute Action 3.

statute of limitations and/or the statute should be equitably tolled. The lower court erred in granting summary judgment as to Appellants' causes of action based upon the statute of limitations.

II. The Court Erred in Granting Deutsche and Nationstar's Motion for Summary Judgment When Discovery Had Not Been Completed as a Result of Deutsche and Nationstar's Intentional Delays.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Simmons v. Berkeley Elec. Co-op. Inc.,* 404 S.C. 172, 178, 744 S.E.2d 580 (Ct. App. 2013). Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is `not merely engaged in a "fishing expedition."' *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544).

In the lower court's Order granted the Roger's Motion to Compel discovery responses of Deutsche and Nationstar, while also granting summary judgment as to all Appellants causes of action. Deutsche and Nationstar served joint discovery responses upon Appellants in May of 2022. On May 18, 2022, the Rogers sent a deficiency letter stating specific deficiencies with the responses, and emphasizing the importance of identifying a witness(es) they intended to call at trial. All Appellants intended depose sad identified witness(es). All Appellants benefit from and require the opposing parties compliance with the rules of discovery, in order to be able to properly prepare for trial. The Court erred in granting summary judgment as to Appellant's causes of action when Deutsche and Nationstar have caused great delay all Appellants ability to prepare for trial by their failure to comply with the rules of discovery.

III. Appellant Alleged All Necessary Elements as to Each of Her Counterclaims and Third-Party Claims and Evidence in the Record Presents Genuine Issues of Fact

Precluding the Courts Grant of Summary Judgment as to Each of Appellant's Causes of Action.

A. Abuse of Process

"The tort of abuse of process embraces the full range of activities and procedures attendant to litigation." *Food Lion Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 70, 567 S.E.2d 251 (Ct. App. 2002). "The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 550, 730 S.E.2d 340 (Ct. App. 2012). "To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself, it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693 (1967).

"The first element, an "ulterior purpose," exists if the process is used to secure an objective that is "not legitimate in the use of the process. To sustain a claim for abuse of process, it is axiomatic that "the judicial process must in some manner be involved." *Pallares v. Seinar*, 407 S.C. 359, 370-71, 756 S.E.2d 128 (2014). "Furthermore, [] an ulterior purpose may be inferred from an improper willful act…" *Food Lion, Inc.* at 74.

"The second element, a 'willful act', has been described as some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process. The "willful act" element consists of three components: (1) "a `willful' or overt act"; (2) "in the use of the

process"; (3) "that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Pallares* at 371.

The United States Supreme Court in *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384, 110 S. Ct. 2447, 10 L. Ed. 2d 359 (1990) was confronted with determining whether a federal court was divested of jurisdiction from determining Rule 11 sanctions for failure to make sufficient prefiling inquiries to support a complaint, after plaintiff voluntarily dismissed the case pursuant to Rule 41(a)(1), FRCP. Although *Cooter* is not on point, because of certain issues addressed by the Court, it is instructive here. The Court noted that both Rule 11, FRCP and Rule 41(a)(1), FRCP are aimed at curbing abuses of the judicial system. The Court further noted that:

> "Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action based on or including the same claim. Once the defendant has filed a summary judgment motion or answer, the plaintiff may dismiss the action only by stipulation, Rule 41(a)(1)(ii), or by order of the court, upon such terms and conditions as the court deems proper Rule 41(a)(2). If the plaintiff invokes Rule 41(a)(1) a second time for an "action based on or including the same claim," the action must be dismissed with prejudice. *Id.* at 394.

The lower court's Order states: "[Appellants] allegations misapprehend the tort of abuse of process. The improper filing of actions may constitute malicious prosecution, but it can never constitute abuse of process…" (R.p. 12). However, this Court has previously found the improper filing of actions may constitute abuse of process. See *Whitfield Const. Co. v. Bank of Tokyo Tr. Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999) (holding "[A]s the special referee held, Whitfield's act of filing the complaint for this lawsuit may well have been the basis for BOTT's counterclaim for abuse of process…", but ruling the cause of action added by amendment of the pleadings four years into litigation did not relate back to the original pleading and was thus barred by the statute of limitations.). The lower court states: "[L]itigation of an action…availing oneself

of the procedures available to a litigant, cannot be logically characterized as a willful act in the use of the process not proper in the regular conduct of the proceeding." (R.p. 13).

Appellant plead and there is evidence in the record to support a finding willful or overt acts by Deutsche and Nationstar its alleged agent[5] were undertaken in the use of the legal process that were improper because the acts were unauthorized and aimed at an illegitimate collateral objective. Appellant plead and there is evidence in the record to support, rather than Deutsche and/or Nationstar availing itself of procedures available to a litigant, such as moving for a Rule 40(j) dismissal only one time, Nationstar improperly dismissed Action 2 and 3 in 2016 under Rule 40(j), SCRCP. The Rogers, in Action 2 asserted issues of standing, real party in interest, and errors regarding mortgage assignments and note endorsements (R.p. 28-46; R.p. 148; R.p. 91-103; R.pp. 631-644). Deutsche and Nationstar allege, Nationstar became servicing the Note and Mortgage on July 1, 2012. Appellant plead that Nationstar and/or its alleged predecessor in interest filed a proposed order, June 13, 2013 stating that Nationstar was the present lien holder of the Note and Mortgage. (R.pp. 157-158; R.pp 44-46). June 28, 2013, Rogers filed a Motion to Vacate the Order Substituting Nationstar as Plaintiff in Action II citing as a basis for the Motion Nationstar's standing. (R.pp. 157-158; R.pp. 117-119) Nationstar admits the Note and Mortgage have never contained an endorsement or assignment to Nationstar or ALS. (R.pp. 241-248). Nationstar admits Nationstar did not produce a copy of the Note bearing the endorsement in blank executed by Nationstar on Behalf of Deutsche in discovery until July 10, 2013 (R.pp. 242-248; Am. R. pp. 1055-1072). Appellant plead the Rogers Motion to Vacate was scheduled to be heard November 18, 2023. November 16, 2013, Nationstar produced to the Rogers for the first time, a copy of the

[5] Deutsche admitted in response to Appellant's Amended Complaint that Nationstar is and has been the principle contact for Plaintiff's Counsel in this Action. Further Deutsche and Nationstar filed the Affidavit of Alan Blunt alleging, without supporting documentation, that Nationstar began servicing the Subject Note and Mortgage on July 1, 2012.

Note bearing the endorsement executed by Nationstar. Viewing the allegations and evidence, in the light most favorable to Appellant, a presumption can be made that only after July 10, 2013 (four years into litigation), did Nationstar execute the endorsement in blank which it asserted gave it the basis to enforce the Note. A presumption can be made Nationstar undertook this willful overt act for an ulterior purpose and for the collateral objective of trying to correct standing errors, after the Roger's raised said errors to the court by their motion to vacate filed in June of 2013.

Appellant plead and there is evidence in the record, on February 28, 2014, Nationstar admitted there was no assignment assigning the Mortgage to Nationstar or Deutsche. March 4, 2014, the Rogers filed a motion for summary judgment asserting Nationstar lacked standing to enforce the Note and Mortgage. (R.pp. 153-160; R.pp. 447-458). April 1, 2014, Nationstar as alleged attorney in fact for ALS assigned the Mortgage to Deutsche and recorded the assignment on April 14, 2014. Thereafter Rogers motion for summary judgment was scheduled to be heard but before the hearing occurred, Nationstar moved for and was granted pursuant to Rule 40(J), SCRCP Order Dismissal 2 (R.pp. 153-160; R.pp. 723-728). Appellant plead Nationstar acted with willful intent and wrongful ulterior purpose, without authority and for the collateral objective of correcting deficiencies in Nationstar and/or Deutsche's right to enforce the Note and Mortgage after the Rogers raised said issue to the court. Under the explicit language of Rule 40(j), SCRCP, Nationstar lacked the authority move for Dismissal 2.

After June of 2014, Deutsche and Nationstar took no further substantive action to prosecute foreclose of the Note and Mortgage until filing this action August of 2019[6][7] There is evidence in the record to assert a presumption that Deutsche and Nationstar intent in waiting for just over three

[6] Nationstar took no substantive steps to prosecute Action 3.
[7] Nationstar through its counsel did communicate with the Roger's Counsel as late as December of 2018, and were put on full Notice the Roger's contended that the dismissal of Action 2 and Action 3 barred Deutsche and Nationstar from enforcing the Note and Mortgage pursuant to Rules 40 and 41, as well as res judicata (R.pp. 542-550).

years after the filing of dismissal three before filing Action 4[8] was done with the intent of avoiding after to address the standing issues and counterclaims which caused Nationstar to move for Dismissal 2. There is evidence in the record to assert a presumption that for the same reasons and issues, when Nationstar caused Action 4 to be filed on behalf of Deutsche it elected not to name the Rogers as defendants instead naming Appellant the defendant. Thereafter, Deutsche and Nationstar opposed allowing the Rogers to intervene in this matter asserting Appellant could adequately protect the Roger's interest in this action. However, at the same time Deutsche and Nationstar have asserted Appellant lacks standing or is barred from raising any of issues or causes previously raised by the Rogers. The same issues which Appellants contend led to Nationstar and Deutsche's intentional tactical delays beginning in March of 2014 when the Rogers filed the motion for summary judgment. Appellant asserts these acts by Nationstar and Deutsche have resulted in Appellant now being named a defendant in this action which has damaged Appellant These allegations supported by the evidence in the record, establish more than a mere scintilla of evidence that genuine issues of fact exists as to Appellant Appellant's cause of action for abuse of process. Deutsche and Nationstar's alleged affidavit testimony is silent in responding to Appellant's allegations and the evidence of record. It was an error for the lower court to grant summary judgment on Appellant's causes of action for Abuse of Process asserted against both the Deutsche and Nationstar.

B. MALICOUS PROSECTION

"Our Supreme Court has recognized that an action will lie for the malicious prosecution of any ordinary civil action. To recover in an action for malicious prosecution, the plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal (2) by,

[8] Nationstar and Deutsche both admit that Nationstar has been the principle contact for Plaintiff's counsel since the inception of this Action. (R.pp. 566, 581, 594, 609)

or at the instance of, the defendant (3) termination of such proceedings in plaintiff's favor (4) malice in instituting such proceedings (5) want of probable cause and (6) resulting injury or damage. The mere fact that the defendant was unsuccessful in the prior action has no bearing on the issue of probable cause." *Garr v. N. Myrtle Beach Realty Co. Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887 (Ct. App. 1986). In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse. It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution." *McBride v. School Dist. of Greenville*, 389 S.C. 546, 565-66, 698 S.E.2d 845 (Ct. App. 2020) "A party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion." *Pallares v. Seinar*, 407 S.C. 359, 367, 765 S.E.2d 128 (2014)

Appellant plead that in the end 2018, Nationstar's counsel on behalf of Nationstar and/or Deutsche contacted the Rogers counsel stating that Nationstar wished to reinstate Action 3.

Roger's counsel put Nationstar on notice it was the Roger's contention under Rules 40 and 41, SCRCP, and res judicata the matter had been adjudicated on the merits and Nationstar and/or Deutsche was barred from asserting a new cause of action for foreclosure of the Mortgage. Appellant plead on August 27, 2019, Nationstar and Deutsche caused Action 4 to be commenced, but concerned about issues of standing and res judicata elected to name Deutsche plaintiff, Appellant the Defendant and elected not to name the Rogers as parties to the action. Nationstar is the principal contact for Plaintiff's counsel in this action. There is a presumption in favor of Appellant, though it is a fact in dispute, that Deutsche and Nationstar instituted this action without legal right, for their own gratuitous benefit, without regard to the rights of Appellant or the injury which would be inflicted on Appellant. Deutsche and Nationstar lacked the probable cause to file Action 4 against Appellant pursuant to Rules 40 and 41, SCRCP and the doctrine of collateral estoppel. The lower court erred in granting summary judgment as to Appellants causes of action for Malicious Prosecution asserted against Deutsche and Nationstar.

C. DECLARATORY JUDGMENT

"A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Farmer v. CAGC Ins. Co*., 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), and *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). "When a party has a question regarding its rights or obligations under the law, the party may bring an action under the Declaratory Judgments Act to have the question resolved by a court. The Declaratory Judgments Act[2] provides, "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is

or could be claimed." *S.C. Lottery Commission v. Glassmeyer*, 433 S.C. 244, 857 S.E.2d 889 (2021).

The lower court made the following ruling regarding Declaratory Judgment: Appellant's requested for determination of whether "Rule 41, SCRCP, collateral estoppel, or any other defense to the action" precluded Deutsche and Nationstar from causing this Action to be filed against Appellant, is improper. Further stating without supporting authority, "A request for declaratory relief for any issue, including standing to foreclose or challenges to Plaintiff's authority to enforce the debt, will be decided in the Plaintiff's case and a competing action for declaratory relief is unnecessary and duplicative." Additionally, without any factual evidence within the record the court went on to rule "[f]urther, under South Carolina law, Deutsche Bank's constructive possession of the original note, with all proper endorsements, provide Deutsche Bank with standing to prosecute this current action."[9]

Appellant's counterclaim is the very type of controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a contract and law to ask a court to define how the contract and law impacts the party's rights. See *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018). The rulings made by the court illustrate a controversy exists. Deutsche and Nationstar contend Rule 40(j) and Rule 41 do not preclude them from causing this action to be filed against Appellant and Appellant has clearly asserted the opposite position. Deutsche and Nationstar claim the endorsements on the note are "all proper endorsements" (R.p. 210) whereas Appellants have plead and presented evidence of the opposite. (Amended Ans, 3 note copies, discovery). Deutsche and Nationstar assert declaratory judgment fails because under Article 3 of the Uniform Commercial Code as codified in South Carolina Statute states endorsements determine whether a party is entitled to

[9] There is no admissible evidence within the record before the court providing a factual basis to support the finding Deutsche is in constructive possession of the original note. It is an error for the court to make findings of fact on a motion for summary judgment.

foreclosure, which further illustrates a justiciable controversy with Appellant. See *Consignment Sales Llc v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (S.C. App. 2011), citing *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995)("'A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.' *Id.* "Any person interested under a deed, written contract or other writings . . . or whose rights, status, or other legal relations are affected by a statute . . . contract . . . may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status or other legal relations thereunder.' S.C. Code Ann. § 15–53–30 (2005)"). Appellant is the legal title holder to the Property. A foreclosure would extinguish Appellant's title to the property causing Appellant harm. Appellant has a legal interest to protect and the right to determine whether the Mortgage is enforceable, and to determine whether laws of this state and the civil rules of procedure precluded Deutsche and Nationstar from causing this action to be filed against Appellant. The court erred in granting summary judgment as to Appellant's causes of action for Declaratory Judgment.

D. NEGLIGENT MISREPRESENTATION

"In South Carolina, one may bring an action sounding in tort for negligent misrepresentation. A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction. The recovery of damages may be predicted upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation." *Gilliland v. Elmwood Properties*, 301 S.C. 295, 301, 391 S.E.2d 577 (1990). The lower court committed multiple errors with regard to Appellants' the cause of action for negligent misrepresentation. The court erred by making findings of fact. *David* at 5. ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony…")

Appellant plead and there is evidence in the record to support that the Note is a pick a pay loan with a negative amortization feature. Monthly statements required to be sent have been sent contain information and representations as to the account and loan terms. All Appellants contend the monthly statements sent contain inaccurate misinformation. The statements were sent to Appellant and constitute negligent misrepresentation. (R.pp. 316-321; 390-401; 416; 1023-1024, 1030-1031). Additionally, Appellant asserted Deutsche and/or Nationstar's statements regarding their right to file foreclosure against Appellant constitute negligent misrepresentation (R.pp. 153-169; 320-324, Appellant Depo). The misrepresentations caused Appellant injury and loss by continued cloud to title diminishing value to the Subject Property, strife and tension with family members and further causing Defendant to incur attorney's fees in defending this action (R.pp. 316-321; 153-169; 320-324; 390-401; 408-428; 658-686; 1023-1024, 1030). The court erred in granting summary judgment as to Appellant's causes of action for negligent misrepresentation.

E. SCUPTA

The Court erred in granting summary judgment as to Appellant's causes of action for SCUTPA. SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). The UTPA declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are ... unlawful." S.C.Code Ann. § 39-5-20(a) (1985). "To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or

property loss as a result of the defendant's unfair or deceptive act(s). *RFT Management Co.* AT 337. “S.C. Code Ann. § 39-5-10 (1976) holds "the provision of *any* service constitutes commerce within the meaning of the UTPA.” *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996); See also *RFT Management Co. v. Tinsley & Adams L.L.P* 399 S.C. 322 (2012) (holding legal services constitute a trade or commerce for purposes of SCUPTA) “[U]nfair or deceptive acts or practices in the conduct of trade or commerce have an impact upon the public interest if the acts or practices have the potential or repetition. *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 480, 351. S.E.2d 347 (Ct. App. 1986); See also *Beneficial Financial I, Inc. v. Jon Windham*, 431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020) (Mortgage lenders actions of force placing insurance in violation of a consumer mortgage contract has the potential for repetition).

Appellant plead, as defenses to the complaint, unconscionability and violation of the consumer protection code. “FDCPA states any act that violates its provisions also violates the Federal Trade Commission Act” *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109, 120 (1st Cir. 2014). UTPA states: “(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) as from time to time amended. S.C. Code Ann. § 39-5-20(a) & (b). Therefore, evidence of a violation of the S.C Consumer Protection Code is also evidence of a violation of SCUPTA. *See. S.C. Code Ann. 37-5-108(4).*

"Actual damages under the UTPA include special or consequential damages that are a natural and proximate result of deceptive conduct." *Global Prot. Corp. v. Halbersberg*, 332 S.C.

149, 159, 503 S.E.2d 483, 488 (Ct.App.1998) "It is generally held that where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest. such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. In order to recover attorneys' fees under this principle, the plaintiff must show: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of defendant's tortious conduct; (2) that the dispute was with a third party — not with the defendant; and (3) that the plaintiff incurred attorneys' fees connected with that dispute. If the attorneys' fees were incurred as a result of a breach of contract between plaintiff and defendant, the defendant will be deemed to have contemplated that his breach might cause plaintiff to seek legal services in his dispute with the third party." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708.

In this case the court ruled or appears to assert all of Appellant's allegations regarding violations of SCUPTA are asserted in a representative capacity and not in Appellant's individual capacity, which is false. The court goes on to further hold that SCUPTA does not apply to any acts of Deutsche and Nationstar because "litigation is not an act in trade or commerce." The court held Appellant "[has] not shown the accused conduct affects the public interest in anyway". Finally, the court ruled Appellant "failed to identify any pecuniary loss".

Appellant exhaustively plead and asserted the reason Deutsche and Nations caused this Action to be filed against Appellant instead of the Rogers was a result of Deutsche and Nationstar's intentional delays and improper coercive, tactical acts in an attempt to remedy and avoid the issues and causes of action which the Roger's raised in actions 1, 2, and 3. Appellant has held title to the Subject Property since March of 2010. However, Deutsche and Nationstar never felt it was

necessary to name Appellant as a defendant in the prior actions. Appellant has assert that is because Appellant took title to the property by deed recorded after the recorded Mortgage and therefore took title to the Property subject to the Mortgage. (R.pp. 153-169; 658-686; 1024-1032). See *S.C. Code Ann. § 37-7-10*. It is undisputed that Appellant is not a party to the Note or Mortgage. Appellant has asserted and plead that she individually, has been damaged by Deutsche and Nationstar's unfair and deceptive acts and practices by having to incur actuals costs to defend the foreclosure complaint and has suffered actual damages in the form of attorney's fees and costs incurred which are attributable to having to defend the foreclosure complaint which Deutsche and Nationstar caused to be filed against Appellant. Causing appellant to become involved in this legal dispute between Deutsche, Nationstar and the Rogers. Appellant's damages are the natural consequence of Deutsche and Nationstar's tactual tortious conduct in electing to bring this Action in the manner and time period they have, for the reasons Appellant has already asserted (R.pp. 153-169; 658-686; 408-428, 485-504, 1024-1032).

Deutsche and Nationstar, who are business of lending money and/or servicing debts or mortgages for compensation are clearly involved in a trade or commerce with regard to the allegations complained of. Further, litigation is a trade or commerce which this Court has stated falls within the purview of SCUPTA. Finally, the acts complained of by Appellant certainly have the potential for repetition, in fact Appellant plead in her amended answer that in case 2012-CP-15-166, the Honorable Perry M. Buckner dismissed an action against Deutsche acting as a trustee in a mortgage foreclosure for acts which bear great similarity to the allegations Appellant asserted in this case (R.pp. 153-169; 551-556). The court erred in granting summary judgment as to Appellants causes of action for Unfair Trade Practices.

F. ACCOUNTING

The Court erred as a matter of law by concluding an "accounting" is not an affirmative cause of action. The court stated:

> An accounting between a debtor and creditor requires the creditor to establish the amount due, and then the debtor bears the burden of proving payments, discounts, and off-sets. *See Devereux v. McCrady*, 53 S.C. 387,395 (1898). In South Carolina, however, an accounting is an equitable remedy, rather than an affirmative cause of action. *See Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144 (1989) (citing *Cox v. Lunsford*, 272 S.C. 527 (1979)) (emphasis added). Thus, an accounting may be awarded as an equitable remedy to support a claim such as unjust enrichment or breach of a fiduciary duty. *Id.* (citing *Smith v. Union Central Life Ins. Co.*, 112 S.C. 356 (1919)). Likewise, an equitable accounting may be awarded in an action with affirmative claims "involving long and complicated accounts where it would not be practicable for a jury to comprehend the issues and correctly make adjustments ... . " *Id.* (citing *Jefferies v. Harvey*, 206 S.C. 245 (1945))…Further, the accounting claim involves an individual, residential promissory note and mortgage. Accordingly, the loan involved is not so complicated that the trier of fact would not be able to comprehend the issues involved, and Beshera does not allege otherwise. Simply put, an accounting is not an affirmative cause of action. (R.pp. 20-21)

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony…" *David* at 250. An action for accounting is, an equitable remedy. "An action for an accounting sounds in equity" *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 696, S.E.2d 599 (Ct. App. 2010). However, nowhere in *Rogers* does the court assert accounting is not an affirmative cause of action. See *Rogers v. Salisbury Brick Corp.*, 299 S.C. 14, 328 S.E.2d 915 (1989) (remanding the case for an accounting and such other relief as may be appropriate). As the lower court noted, an accounting does require the creditor to establish the amount due. However, the Court erred in making finds of fact on a motion for summary judgment when the record before the court contains no evidence of a calculation or accounting of the amount claimed due, which would support the court's factual finding that "the loan involved is not so complicated that the trier of fact would not be able to comprehend the issues involved" By contrast, all Appellants have plead and asserted that the loan terms and an accounting for the loan are extremely complicated. Appellant plead the Note contains negative amortization terms (R.pp. 153-169). Appellants further asserted at the hearing that the Note is a pick a pay loan with negative amortization terms (R.pp. 1030-1032). The

terms of the Note provide that the interest rate changes on a monthly basis; that the minimum monthly payment changes on a monthly basis; and the principal amount owed may increase on a monthly basis despite the borrower every monthly payment required. (R.pp. 717-719). These fluctuating terms make the account complicated before one even takes into consideration the amounts and varied fees Deutsche, Nationstar, and/or an alleged predecessor in interest have charged to the loan account. Appellant plead and there is evidence in the record show a mere scintilla of evidence that a genuine issue of fact exists as to whether the loan account is complicated enough that it would not be practicable for a finder of fact to comprehend the issues and correctly make adjustments. The court erred in granting Appellant's cause of action for accounting.

IV. The Court Erred in Ruling Successive Rule 40(J), Motions by Nationstar Resulting in Multiple Dismissals did not Constitute Decisions Upon the Merits, Barring the Institution of Action 4 by Deutsche and Nationstar Against Appellant.

Before this Court is an issue of first impression. The issue being whether Rule 40(j), SCRCP allows for repeated dismissals without consequence. The Appellant contends Rule 40(j), SCRCP clearly indicates it provides a one-time privilege and a second dismissal under the Rule is akin to a second dismissal under Rule 41, SCRCP and determination on the merits.

Twice in the last five years this Court has stated striking a case from the active roster pursuant to Rule 40(j), SCRCP, is equivalent to dismissing a case. See. *Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where motion to restore was denied because striking a case pursuant to Rule 40(J) is equivalent to a dismissal.). See. *Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster stating because striking a case under Rule 40(j) is the equivalent of dismissing the case and stating "Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.") In *Goodwin*, the Court reasoned when determining whether a Rule 40(j) Order is equivalent to a dismissal, that "the

tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal." Id. at 831.

Rule 40(j), SCRCP states: "A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties…" *Id.* Rule 40(j), SCRCP replaced Rule 40(3)(c), SCRCP providing for a new procedure for dismissing and restoring cases. *Graham v. Dorchester County School Dist*., 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000); and *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015)("In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as ' substantially revis[ing] the procedure for dismissing a case previously found in Rule 40(c)(3)."). Rule 40(j), SCRCP revised and restricted the former Rule 40(c)(3), SCRCP, which only struck a case and left it pending before the court. Rule 40(j), SCRCP does not leave a matter pending before the court but rather dismisses it and limits the dismissals. Unlike Rule 40(c)(3), SCRCP, Rule 40(j), SCRCP provides for the tolling of the of limitations for a claim dismissed, if the claim is restored upon motion made within one year of the date of removal. See, *Maxwell v. Genez*, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003). '"The effect of the [Rule 40(j)] is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year." Pers. Care, Inc. v. Theos, 825, S.E. 2d 281 (Ct. App. 2019), citing, *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015).

Rule 41(a)(1)(B), SCRCP states: “an action may be dismissed by the plaintiff without order of court by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.” *Id*

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim. . . Only a party to a prior action or one in privity with a party to a prior action can be precluded from relitigating an issue on the basis of offensive collateral estoppel. . . *The term "privity," when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right*. . . Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. . . Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position.” *Carrigg v. Cannon*, 347.S.C.75, 79-81, 552 S.E.2d 767 (Ct. App. 2001) (citations omitted).

“The offensive use of collateral estoppel was first adopted in this State by our Court of Appeals in *Beall v. Doe*, 281 S.C. 363, 315 S.E. (2d) 186 (Ct. App. 1984). Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action. *South Carolina Property and Casualty Insurance Guaranty*

Association v. Wal-Mart Stores, Inc. 304 S.C. 210, 213, 403 S.E.2d 625 (1991). In *Beall* the court stated: "a lack of privity would not prevent the application of the defense of collateral estoppel where "the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. . . Sound reasons . . . support[s] the offensive use of collateral estoppel. In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question, already once decided, simply because he now faces a different plaintiff who for due process reasons could not be adversely bound by the prior judgment. The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation. In our view, a fair rule regarding the application of issue preclusion in subsequent litigation with different parties is the rule recently formulated by the American Law Institute. See RESTATEMENT (SECOND) of JUDGMENTS § 29 at 291-92 (1982). . . [W]e adopt it as the rule by which to determine whether a party in South Carolina is precluded from relitigating an issue with a nonparty. The rule provides: . . . A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue." *Beal v. Doe*, 281 S.C. 363, 367-372, 315 S.E.2d 186 (Ct. App. 1984) (citations omitted).

In interpreting the meaning of the South Carolina Rules of Civil Procedure, courts apply the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc*., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "If a rule's language is plain, unambiguous, and conveys a

clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Pers. Care, Inc. v. Theos*, 825 S.E.2d 281 (S.C. App. 2019), quoting, *Knotts v. S.C. Dept. of Natural Res.*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002), and see *Crusader Servicing Corp. v. Cnty of Laurens*, 382 S.C.25, 29, 674 S.E.2d 495, 497 (Ct. App. 2009) ("Statutory interpretation is a question of law."); *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the [c]ourt has no right to look for or impose another meaning."),

Both Rules 40(j) and 41(a), SCRCP permit only one voluntary dismissal. "Dismissal, unless otherwise stated, is an adjudication on the merits." "*James F. Flanagan, South Carolina Civil Procedure*, 490 (2020 Ed.). The second voluntary dismissal was an adjudication on the merits and therefore with prejudice. Because both Dismissal 2 and Dismissal 3 functioned as an adjudication on the merits. See, *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) ("A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication."); *Laughon v. O'Braitis*, 360 S.C. 520, 527, 602 S.E.2d 108, 111 (Ct. App. 2004) ("In a subsequent action involving the same subject matter, the dismissal finally settles all matters litigated in the earlier proceedings, and all matters which might have been litigated therein.").

Deutsche and Nationstar had constructive notice that Appellant took title to the Subject Property in March of 2010. See *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). Deutsche

and Nationstar's own affiant, Alan Blunt asserts personal knowledge of this fact (R.pp. 687-688).[10] If Deutsche and Nationstar desired to litigate the issue of foreclosure with Appellant they had an opportunity to name Appellant a Defendant in Action 2 and Action 3.

Deutsche and Nationstar are bound by Nationstar's previous acts in Action 2 and Action 3. The court erred in finding Dismissal 2 and Dismissal 3 were not decisions on the merits, barring Deutsche and Nationstar by the doctrine of collateral estoppel from causing Action 4 to be filed against Appellant. The court failing to find this was an error of law which resulted in further errors by the lower court granting summary judgment as to Appellant's causes of action for Abuse of Process, Malicious Prosecution, Negligent Misrepresentation, SCUPTA, and Declaratory Judgment.

V. The Court Erred in Asserting Appellant Lacked Standing to Address, within the Context of Appellant's Asserted Causes of Action, Issues Regarding the Terms of the Note and Mortgage and their respective Alleged Endorsements or Alleged Assignments.

"[T]he United States Supreme Court enunciated a stringent standing test. Lujan set forth the "irreducible constitutional minimum of standing," which consists of the following three elements: First, the plaintiff must have suffered an `injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not `conjectural' or `hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court." Third, it must be `likely,' as opposed to merely `speculative,' that the injury will be `redressed by a favorable decision.'" Spaw v. SC Dept. of Nat. Resources, 345 S.C. 594, 601, 550 S.E.2d 287 (2001). "Where a party champions his own rights,

[10] Alan Blunt's assertion personal knowledge on this subject is baseless, and should raise substantial questions of the credibility of his other statement made upon alleged personal knowledge in the Affidavit filed by Deutsche and Nationstar in this matter on October 10, 2022

and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met" Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80-81 (1978). The party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).

The court Order states Appellant lacks standing to challenge the terms of the mortgage and Appellant cannot assert any claims based on the endorsements on the Note or transfers or assignments of the Mortgage being foreclosed because Appellant is not a party to the Mortgage loan or an intended beneficiary of any assignment agreements to transfer the Note and Mortgage that the Rogers signed.[11] The court does not cite to any binding South Carolina case law in support of this contention, but rather cites two unpublished federal magistrate reports and recommendations.

The standard for the federal court reviewing such reports and recommendations is the Court is charged with conducting a de novo review of any portion of the Magistrate Judge's Report and Recommendation to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636. In conducting this review, the Court applies the following standard: The magistrate judge makes only a recommendation to the Court, to which any party may file written objections. The Court is not bound by the

[11] It should be noted the Rogers have previously raised these issues in Actions 1, 2, and 3. Appellants have plead in this matter that Deutsche and Nationstar' continued delays, abuse acts and tactical maneuvers were for the purpose of Nationstar and Deutsche trying to remedy or avoid the court addressing the issues as raised by the Rogers. Appellant plead in its amended answer to the complaint that Deutsche plead in its Return to the Rogers' motion to intervene, filed July 9, 2020, that the Rogers no longer possess a legal interest in the Property and Appellant adequately represents the Roger's interest in this action through Appellant's fiduciary duties owed to the Rogers. (R.p 153 ¶ 29-31) "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." and must be judicially estopped from maintaining two inconsistent positions. *See. Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). Immediately, thereafter Deutsche and Nationstar have continued to assert Appellant cannot address errors regarding Note endorsements or Mortgage assignments in any of Appellant's causes of action no matter the context.

recommendation of the magistrate judge but, instead, retains responsibility for the final determination. *See Wallace v. Housing Authority of City of Columbia*, 791 F. Supp. 137 (D.S.C. 1992).

The court cites to the report and recommendation in "*Doherty v. PNC Mortg., CIA* No. 0:14-cv-4013-TLW-SVH, 2015 WL 5012781, at 3 (D.S.C. July 16, 2015) *adopted in-part by* 2015 WL 5012823, at 1 (D.S.C. August 21, 2015) (holding that devisee of real property lacked standing to challenge assignment of note and mortgage because she was not party to the agreement transferring the note and mortgage or a party to either the note or mortgage)." However, in the order of upon the report and recommendation filed August 21, 2015, the federal court declines to dismiss plaintiff's claims in total, as recommended by the magistrate report, and order is completely silent as to addressing the lower court's proposition that a devisee of real property lacks standing to challenge assignment of a note and mortgage. See *Doherty v. PNC Mortg.*, Civil Action No. 0:14-4013-TLW. (D.S.C. August 21, 2015)

Next the lower court cites to "*Reese v. US. Bank Ass'n, CIA* No. 3:11-cv-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. Apr. 30, 2012) ("Plaintiff lacks standing to contest the Assignment of Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity.")." However, again the order of the federal court upon the report and recommendation filed May 30, 2012, does not speak to the specific assertions of the magistrates report upon which the lower court relies. See *Reese v. U.S. Bank Nat'l Ass'n*, C/A NO. 3:11-cv-2990-CMC-SVH (D.S.C. May. 30, 2012).

By contrast a contrast, a number of courts throughout this country, in published opinions, have rejected the "standing" challenges lenders have raised against borrowers and owners attempting to keep them from being able to defend against foreclosure.[12]

[12] *Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed. Appx. 249, 253–254 (6th Cir. 2014) (pursuing judicial foreclosure without assignments that would give authority to foreclose caused injury to borrower in having to defend suit; borrower had standing to bring debt collection claims); *Howard*

Here it is undisputed Appellant holds title to the Subject Property which Deutsche and Nationstar seek to foreclose upon. A foreclosure will terminate Appellant's title interest in the Property, and a defective foreclosure sale would impair the significant property rights of Appellant. Appellant in asserting Appellant's causes of action is seeking to protect Appellants interest in the Property and has the standing to do so. Appellant is not seeking to enforce the endorsement and/or assignment contracts, Appellant refers to the endorsements and assignments as evidence that Deutsche and

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v. Chase Home Fin., L.L.C., 555 Fed. Appx. 567 (6th Cir. 2014) (under Michigan law, borrowers have standing to challenge assignments related to authority to foreclose, but after expiration of post-sale redemption period must assert strong claim of fraud or irregularity); *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) (Texas courts follow "the majority rule" that obligors may bring challenges based on any ground that renders assignment of deed of trust void); *Culhane v. Aurora Loan Serv. of Neb*., 708 F.3d. 282 (1st Cir. 2013) (applying Massachusetts law, borrowers may challenge assignments alleged to be invalid, ineffective, or void); *Juarez v. Select Portfolio Serv., Inc*., 708 F.3d 269 (1st Cir. 2013) (same); *Metcalf v. Deutsche Bank Nat'l Trust Co*., 2012 WL 2399369 (N.D. Tex. June 26, 2012) (borrower has standing to challenge whether foreclosing party has authority to enforce deed of trust); *Drouin v. Am. Home Mortg. Lending Serv., Inc*., 2012 WL 1850967, at *4 (D.N.H. May 18, 2012) (borrower has standing to challenge whether assignor had rights to mortgage at time of alleged assignment); *Minnifield v. Johnson & Freedman II, L.L.C*., 2012 WL 5463878, at *4 (N.D. Ga. Nov. 7, 2012), *aff'd on other grounds* 522 Fed. Appx. 782 (11th Cir. 2013) (if borrowers did not have standing to challenge mortgage assignments, they would be in the "perilous position" of being unable to oppose foreclosure by anyone claiming to be an assignee); *Fuller v. Lerner, Sampson, Rothfuss, L.P.A*., 2012 WL 4361454, at *9–10 (N.D. Ohio May 14, 2012), objections to magistrate's report and recommendations denied, 2012 WL 4361448 (N.D. Ohio Sept. 21, 2012) (borrowers have standing to bring claim that entity other than foreclosing party has right to enforce loan documents); *Talton v. BAC Home Loans Servicing, L.P*., 839 F. Supp. 2d 896 (E.D. Mich. 2012) (borrowers may challenge mortgage assignments or authority to conduct non-judicial foreclosure under Michigan's sale by advertisement statute); *U.S. Bank v. George,* 50 N.E. 3d 1049 (Ohio Ct. App. 2015) (maker of a promissory note or mortgage has standing to challenge their transfers and assignments, even if not in privity to the transfer or assignment challenged, declining to follow *Livonia* Properties); *Mruk v. Mortg. Elec. Registration Sys., Inc.*, 82 A.3d 527 (R.I. 2013); *EverBank v. Seedergy Ventures, Inc*., 499 S.W.3d 534, 541 (Tex. App. 2016) (borrowers have standing to challenge void assignments); *Brezzell v. Bank of Am*., 2011 WL 2682973, at *4 n.3 (E.D. Mich. July 11, 2011) ("standing" argument raised by many lenders to dismiss challenge to foreclosures based on invalid assignments is a "bit of a red herring"; borrowers' claim to possession and ownership of property puts them well within the zone of interests required for standing), *quoting Langley v. Chase Home Fin., L.L.C*., 2011 WL 130926, at *2 n.2 (W.D. Mich. Mar. 28, 2011).

Nationstar lacked authority to enforce the Note and/or Mortgage through foreclosure, which then resulted in Deutsche and Nationstar now causing Appellant to be a party to in this current Action. The acts of Deutsche and Nationstar have caused Appellant to incur attorney's fees in defending this action they have involved her in, which is now the fourth iteration of a litigious dispute between the Rogers, Deutsche, Nationstar, and/or alleged predecessors have been undertaking since 2009. The lower court erred in asserting Appellant lacked standing to address, within the context of Appellants asserted causes of action, issues regarding the terms of the Note and Mortgage and their respective alleged endorsements or alleged assignments.

VI. The Court Erred in Determining Deutsche and Nationstar Met their Initial Burden of Proving There is no Genuine Issue of Material Fact as to each of Appellants Causes of Action. Moreover, the Court Erred in Granting the Motion for Summary Judgment by Making Factual Findings as to Disputed Facts.

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 SE 2d 537 (1991). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David*, 367 S.C. at 250, 626 S.E.2d at 250. "Rule 56(e), S.C.R.C.P., requires that on motion for summary judgment supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Thus, opinion testimony, including that of an expert, which would be inadmissible if testified to at trial may not properly be set forth in an affidavit." *Baughman*, at 111. "The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and

shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), *citing* Rule 56(e), SCRCP. The Affidavit submitted by Plaintiff and Nationstar of a Nationstar employee lacked personal knowledge.

A genuine issue of fact "can be created only by evidence which would be admissible at trial." *Hansen* v. *DHL Laboratories*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994). "In order for a court to consider materials and affidavits in support or opposition to summary judgment, they must be admissible and "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993); *See* Rule 11(c), SCRCP; Rule 56(e); SCRCP; *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 656, S.E.2d 20 (2008) (applying the personal knowledge requirement of Rule 56(e)); and *Saro v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 385 (Ct. App. 1994)("facts stated in affidavits must be admissible evidence."). Generally, affidavits are to be made on personal knowledge setting forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. *See Baughman v. American Telephone & Telegraph Co*, 306 S.C. 101, 410 S.E. 2d 537 (1991).

In this case on October 7, 2022, Deutsche and Nationstar filed a joint motion for summary judgment requesting summary judgment as to all counterclaims and third-party claims asserted by Appellant and further a request for summary judgment as to all counterclaims and cross-claims asserted by the Rogers. In support of the motion they filed the Affidavit of Alan Blunt ("Blunt") ("Blunt Affidavit") on the same date. October 10, 2022, they filed an amended motion. February

1, 2023, Deutsche and Nationstar filed a joint memorandum in support of their motion for summary judgment attaching to it, excerpts of the depositions of Appellant and the Rogers.

The Blunt Affidavit does not meet the required standards for admissible evidence. Blunt states he has personal knowledge of the matters set forth within the affidavit. He testifies he is a bank officer and/or custodian of records of Nationstar; and certifies the authenticity of the records produced. It is notable he does not testify the subject loan records are attached nor does he state he is an employee of Deutsche with the authority to speak on behalf of Deutsche. Blunt does not testify as to Nationstar's affiliation with Deutsche. Paragraph 3 of the Affidavit Blunt states Nationstar maintains the records for the subject loan as servicer and as part of Blunt's job responsibilities for Nationstar he is familiar with Nationstar's record keeping practices and the types of records maintained by Nationstar in connection with the loan. *Blunt does not testify he has personal knowledge of the actual records of the loan and including the Note and Mortgage. Blunt does not testify that he has ever reviewed the records for the Loan including the Note and Mortgage.* Paragraph 4 of the Blunt Affidavit states: "The Records [an undefined term] were kept in the ordinary course of regularly conducted business activity by Nationstar personnel or by persons acting under their control. Blunt does not testify that he is referring to the Loan records in Paragraph 4. *Blunt does not testify who is in current possession of the original Note*. Paragraph 6 of the Blunt Affidavit states Homecomings Financial, LLC was the originating lender for the Note and Mortgage and then generically testifies a true and correct copy is attached herewith as Exhibit a without stating what records specifically are attached as exhibit. Blunt did not testify to having personal knowledge of the loan records including the Note and Mortgage, nor did he testify to having reviewed said records. Therefore, he cannot testify that a true and accurate copy of any subject loan records have been attached to the Blunt Affidavit including the Note and Mortgage.

Paragraph 9 of the Affidavit references a Revocable Trust Agreement of the Rogers. Blunt cannot authenticate such a record and has no personal knowledge of said record. Paragraph 10 states the Rogers are in default, but Blunt did not testify that he has personal knowledge of the subject loan records or that he reviewed said records. Blunt's statement of default if hearsay. Lastly Paragraph 12, of the Blunt affidavit makes reference a pooling and servicing agreement and states that pursuant to its terms "Nationstar was authorized to commence a judicial foreclosure *in its name* and as a person entitled to enforce the Note. A true and accurate copy is attached herewith as Exhibit E." Blunt does not state he has personal knowledge of the terms of the subject pooling and servicing agreement or that he has reviewed said terms. The document attached as Exhibit E states that it is a pooling and servicing agreement which predates the Note and Mortgage. It does not specifically reference Nationstar, the Note, the Mortgage, or Deutsche. Importantly, the foreclosure action before this Court on appeal was not brought in the name of Nationstar. This further emphasizes Alan Blunt does not have personal knowledge of the Subject Loan documents, the Note, the Mortgage, or this matter.

Importantly the Blunt Affidavit provides no testimony addressing the allegations Appellants have asserted in their counterclaims, third-party claims, and cross-claims. The Blunt Affidavit appears to be a generic form affidavit that foreclosure counsel would typically submit for a final hearing of uncontested foreclosure. The hearing before the lower court was not a on Deutsche's foreclosure action. It was a hearing upon Deutsche and Nationstar's joint motion for summary judgment as to all of Appellant's counterclaims and third-party claims and the Rogers' counterclaims and cross-claims; the Roger's Motion to Compel; the Roger's Motion for Partial Summary Judgment. The Blunt affidavit provides zero affidavit testimony which would assist Deutsche and Nationstar in meeting their initial burden of proving there is no genuine issue of

material fact as to any of Appellant's counterclaims or third-party claims such that the court should have granted summary judgment as a matter of law. The court erred in granting summary judgment as to all of Appellant's causes of action asserted against Deutsche and Nationstar because Deutsche and Nationstar failed to meet their initial burden of showing there is no genuine issue of material fact with regard to each of Appellant's asserted causes of action.

CONCLUSION

Based upon the allegations, facts and arguments set forth herein above, Appellant respectfully requests this Court issue a decision reversing the findings and rulings of the circuit court found in the July 10, 2023, Order which granted Deutsche and Nationstar's Motion for Summary Judgment as to all of Appellant's counterclaims asserted against Deutsche and third-party claims asserted against Nationstar.

RESPECTUFLLY SUBMITTED,

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