THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-000393

U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust,……...…….Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased; South Carolina Department of Revenue; The United States of America acting by and through its agency, Department of the Treasury - Internal Revenue Service; and Elizabeth A. Lowery,.……Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the…….....Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant ("Lowery") hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. A rehearing *en banc* would be best.

ARGUMENT[1]

A panel of this court has affirmed the lower court's decision to grant partial summary judgment in Respondent's favor and to allow Respondent to present its evidence at a trial on damages solely via affidavit, through a procedure that does not allow Lowery an opportunity to cross-examine the witnesses against him. Genuine issues of material fact precluded the court from properly affirming the grant of summary judgment, and the deprivation of Lowery's cross-examination rights mandates reversal for denial of due process. The panel gave short shrift to the mortgage lender's pervasive and undisputed misconduct, which severely prejudiced Lowery.

Rehearing, preferably *en banc*, is proper. It is difficult to believe that the opinion issued in this case represents the full court's views on the law.

I. The record shows a genuine issue of material fact about whether the mortgage lender's deception, unauthorized practice of law, and surrounding misconduct constitute unclean hands and the inducement of the subject mortgage loan by unconscionable conduct.

A panel of this court has held that there is not even a genuine issue of material fact about whether the subject mortgage loan was induced by unconscionable conduct or whether Respondent, as successor in interest to the mortgage lender, has unclean hands. These determinations are at odds with the record and the law.

As discussed in depth in Lowery's briefs, Respondent's predecessor, Household, put Lowery and his wife (to whose interest he has succeeded) in a very bad spot, depriving them of the benefit of an attorney to represent them in the closing and taking advantage of the disadvantage at which Household put them, inducing them to

[1] Lowery's briefs are incorporated herein by reference.

enter into this loan with false promises that Household would shortly refinance the loan on more favorable terms. (R. pp. 310-12.) Household's refusal to use a lawyer in closing the mortgage loan – despite South Carolina law requiring attorney supervision of mortgage closings from 1987 forward – resulted in Household recording a document in the land records stating that it held a mortgage on 53.73 acres of Lowery's land, not just five. (R. pp. 311-12, 331-35.) Household employees slipped the 53.73 acre description in without Lowery ever having an opportunity to see it and stop them, since they added it after he signed the mortgage document. (R. pp. 311, 331-35.) This document remained in the land records for over 16 years, along with the one that Household did in an attempt to correct its mistake, effectively preventing Lowery from ever refinancing the mortgage and getting free of the mortgage relationship Household created. (R. pp. 116-17, 312, 331-35.)

As the things noted in the previous paragraph illustrate, the record contains a great deal of evidence that may be reasonably interpreted as inducement of this loan by Household's unconscionable conduct and as Household having unclean hands. The closing of a South Carolina mortgage loan without its supervision by a licensed South Carolina attorney, particularly where the customer is not given any opportunity to select an attorney to represent him, can be understood to be inducement of the loan by unconscionable conduct – and, here, there is that and more. Viewing the record in the light most favorable to Lowery and drawing all reasonable inferences in his favor, the unauthorized practice of law noted in his affidavit is unconscionable conduct (particularly so when coupled with the 53-acre vs. five-acre property description discrepancy *and* a false promise to refinance or modify the loan), and, reckoning by

that same standard, closing a mortgage loan without the required attorney supervision, a requirement that exists to ensure fundamental fairness and borrower understanding of the terms of the transaction, is inducement of the loan by unconscionable conduct. (R. pp. 310-12.) As analyzed at length in Lowery's briefs, that is a reading of the Simpson, Hagood, Coffey, Matrix, Doe, and Buyers Service decisions Lowery cited and of S.C. Code Ann. §§ 37-1-102, 37-10-102, and 37-10-105 that is logically consistent and is in accord with the public policy of this state.

As Household's assignee, Respondent took the note and mortgage subject to the defenses created by Household's acts and omissions. Under South Carolina law, an assignee takes a mortgage "subject to all the infirmities in and against his assignor." Patterson v. Rabb, 38 S.C. 138, 17 S.E. 463, 467 (1893); accord Woodrow v. Frederick, 133 S.C. 431, 439, 131 S.E. 598, 601 (1926) (same principle described as "settled by an unbroken series of authorities"). This court summarized the law of assignee liability well in Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), noting in pertinent part as follows:

> At common law, an assignee's rights can be no greater than those of his assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor. Id.

288 S.C. at 522-23.

Accordingly, the record shows at the least a genuine issue of material fact about whether this loan was induced by unconscionable conduct, thus entitling Lowery to relief under S.C. Code Ann. § 37-10-105(C), and whether Respondent, having adopted Household's status, has a claim that is compromised by unclean hands. McFarland v.

Wells Fargo Bank, N.A., 810 F.3d 273, 284 (4th Cir. 2016) (analyzing very similar West Virginia statute and discussing differences between unconscionable inducement and substantively unconscionable terms); Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584, 591 (1942) (court "will refuse to lend its aid to one who has been guilty of inequitable conduct in the subject matter").

The court must have overlooked or misapprehended the law, the record, or both in reaching its decision in this regard, and rehearing should be granted.

II. The record tends to show the mortgage was released, so there is at least a genuine issue of material fact about whether it was.

The panel found that the record contained no evidence that makes a genuine issue of material fact about whether the subject mortgage was released. There is a recorded release of the mortgage involved in this case. (R. pp. 116-17.) As noted above and discussed at length in the briefs, the same mortgage document was signed and recorded twice, and that appears to be what drove the lower court's decision that there was no release of the mortgage. There was, however, only one mortgage that has ever existed between the parties, and it is undisputed that a document that states it releases the subject property from that mortgage relationship was executed and recorded.

A mortgage is a legal relationship concerning real estate. It is not, and never has been, a piece of paper. "A mortgage is a specific lien" and is "a security interest[.]" Lever v. Lighting Galleries, Inc., 374 S.C. 30, 647 S.E.2d 214, 216, 218 (2007); accord Manning v. Screven, 56 S.C. 78, 34 S.E. 22, 25 (1899) (mortgage is a lien). "In South Carolina, a mortgage is a mere security for a debt." Blackwell v. Blackwell, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986). "A mortgage is a lien on real property."

Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473, 476, 427 S.E.2d 646, 648 (1993). The mortgage is the contractual relationship that constitutes a lien on real property. Id.; Wallace v. Craig, 27 S.C. 514, 4 S.E. 74, 80 (1887).

The record shows that, shortly after assignment to it of the mortgage, Respondent executed and recorded a document that released a mortgage given by Lowery to Household for the subject debt at the subject time. (R. pp. 116-17.) Respondent's contention was that the release was for a different mortgage than the one it seeks to foreclose. That contention is belied by the evidence. (R. pp. 145, 312, 331-46.) That evidence is that there has only ever been one mortgage here – the document for it was just signed twice. (R. pp. 145, 312, 331-46.) The mortgage release released the only mortgage – the only lien relationship – that has ever been in existence between the parties. At the very least, there is a genuine issue of material fact on this point.

Indeed, the HUD-1 settlement statement for this loan gives September 24, 2002, as the closing date, and no settlement statement has been produced indicating that there was another closing on September 30, 2002. (R. pp. 145, 346.) What happened on September 30, 2002, is just what Lowery's affidavit says happened: at Household's request, Lowery and his now-deceased wife came in and signed the same mortgage a second time. (R. p. 312.) There may have been two pieces of paper, but there has only ever been one mortgage. When Respondent released the mortgage, it released the only mortgage it has ever had on the subject property.

The court must have overlooked or misapprehended the law, the record, or both in reaching its decision in this regard, and rehearing should be granted.

III. There is no indication that Respondent sued on a different mortgage default than in the earlier action. There is at least a genuine issue of material fact about whether this action is barred by res judicata.

In the panel's affirmance of summary judgment on Lowery's res judicata defense, its opinion implies that Respondent sued on a different default than did Household in the previous action the court dismissed. The evidence in the record is that Respondent brought this suit on the same default of the same note as that for which Household sued Lowery in 2008. (R. pp. 35-46, 55-65, 84-90, 278-85.)

"General rules governing the conclusiveness of judgments and decrees ordinarily apply" to mortgage foreclosures. 59A C.J.S. Mortgages § 1051 (2009). Res judicata applies to mortgage foreclosure cases. Id. The Supreme Court has applied res judicata to a mortgage foreclosure claim. Columbia Natl. Bank of Columbia v. Arthur, 151 S.E. 274, 275, 276 (S.C. 1930). "In order for res judicata to apply, the parties—or their privies—and subject matter must be identical, and the prior suit adjudicated the issue." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018). Here, all of that is present. As assignee from Household, Respondent is Household's privy. Yelsen Land Co. v. State, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012); Bailey v. U.S. Fid. & Guar. Co., 185 S.C. 169, 193 S.E. 638, 641 (1937); Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018); Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). By operation of Rule 41(b), SCRCP, a merits adjudication between these parties about this same subject matter – indeed, suing on the same default of the same note – was already made in the 2008 action Household brought. (R. pp. 278-87.) There

is at least a genuine issue of material fact about whether res judicata thus bars Respondent's claim here.

The court must have misapprehended the law or the record in this regard.

IV. The lower court's order rather obviously deprives Lowery of his right to cross-examination. It allows Respondent to put in its evidence – its *trial* evidence – by affidavit without any opportunity for Lowery to examine the affiants.

The panel here determined that "[t]he master did not order that Lowery was prohibited from cross-examining witnesses at the final hearing[,]" so there has been no deprivation of his right to cross-examination. Most respectfully to this court, that reasoning smacks of willful blindness.

Here is what the appealed order says about how trial of the remaining issues is to go:

> Plaintiff is granted summary judgment as to Defendant's liability for foreclosure subject to submitting by affidavit appropriate documentation supporting the amount of the debt at least three days prior to a final hearing.
>
> Defendant is granted judgment by way of offset only for an attorney preference violation subject to submitting the amount claimed for the offset by way of affidavit at least three days prior to a final hearing.

(R. p. 11.)

The order below is not made lawful simply because it does not expressly say "no cross-examination" but merely provides for the submission of affidavits at the trial of the few remaining issues. The plain intention and effect of this order is to provide for how the trial court is to receive the trial evidence: in a manner prohibited by constitutional law. On this point, the scant and conclusory analysis used by the panel fails to supply answers to basic questions about the opportunity for cross-examination

in the procedure ordered here. When, where, or how is cross-examination supposed to happen under the appealed order? There is no room for cross-examination under the existing order, no chance for it to occur, no situation in which cross-examination of Respondent's affiants might be had. (R. p. 11.) Respondent does not have to bring its witnesses to the courtroom or present them live to Lowery in any way. (R. p. 11.) At what point would some cross-examination take place?

Lowery has a due process right to cross-examination. E.g., Moore v. Moore, 376 S.C. 467, 472, 657 S.E.2d 743, 746 (2008). The lower court's prevention of cross-examination is not made proper simply because, in setting up a situation in which it is impossible for cross-examination to happen, its order never mentions denying cross-examination. See id.; (R. pp. 1-13.)

Even were this issue to stand alone, reversal would be required on this point. The court must have misapprehended the law or the record in this regard.

V. Rehearing *en banc* is warranted and advisable. As it stands, this court speaks with a divided voice.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

As discussed above and at length in Lowery's briefs, the lower court's decision is at odds with this court's previous decisions and with state Supreme Court precedent. Further, there has been no published opinion yet in this state that analyzes what "induced by unconscionable conduct" means under S.C. Code Ann. § 37-10-105(C). A different panel of this court has addressed that specific issue in an unpublished

opinion, Wells Fargo Bank, N.A. v. Morgan, 2021 WL 3910274, 2021-UP-313 (S.C. App. Sept. 1, 2021), which came to what seems a directly opposite view of inducement by unconscionable conduct from that taken by the panel in the instant case.

It is important that this court's decisions be uniform in their view of the law. Rule 219(a)(1), SCACR. In a vacuum of on-point published authority on the question, what constitutes "induce[ment] by unconscionable conduct" under S.C. Code Ann. § 37-10-105(C) is a question of exceptional importance. Lowery's constitutional due process right to cross-examination is also a matter of exceptional importance, as the question of whether the *ad hoc* trial process created by the lower court meets due process' minimum requirements. See Moore, 376 S.C. at 472.

A rehearing *en banc* may keep this court from speaking with a divided voice and stands to help with decisional uniformity going forward in other cases. Rehearing, preferably in an *en banc* format, should be granted.

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

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing petition for rehearing on the date given below by emailing it to the other counsel in this appeal at the address(es) noted below.

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October 22, 2025