THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Courtney Clyburn Pope, Circuit Judge

App. Case No. 2025-001812

SP of Augusta, LLC, ..……Respondent,

v.

Marilyn Kille, ..…….……....…Appellant,

AND

Marilyn Kille, ..…….……....…Appellant,

v.

Bradley Plumbing and Heating, Inc., Duraclean Systems Incorporated or North Augusta and John Does 1 Through 10, ..……Respondents.

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# FINAL REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES



COURT RULES

## STATEMENT OF ISSUES

**I. Did the circuit court err reversibly by issuing an order granting the Respondents' motion to dismiss without holding a hearing on the motion, requiring the order to be reversed or vacated?**

## ARGUMENT IN REPLY

### I. It is plain that the dismissal order is the product of a structural defect. Under controlling precedent, the error here cannot be harmless and requires reversal – regardless of the merits of the underlying motion.

In their joint brief, Respondents contend that the dismissal should be affirmed because Kille has not argued that the substantive findings in the appealed order are wrong. Respondents essentially argue that, had a hearing been held, the substantive outcome would have been the same, so that Judge Pope's error was harmless. Kille certainly does not concede that the Respondents were entitled to any judgment against Kille or dismissal of her causes of action. Kille, however, is not required to litigate that in this appeal. As a result of the unconstitutional procedure used here, Kille is not in the best position to do that, anyway, as no record was made at any hearing. Because no hearing was held, we cannot know what arguments Kille would have made at a hearing in opposition to the motion, nor do we know what additional memoranda or factual material she might have filed in anticipation of a known hearing date. See Rules 6(d) & 56(c), SCRCP (non-moving party may serve opposing affidavits two days before motion's hearing).

Precedent disposes of Respondents' argument. The Supreme Courts of both South Carolina and the United States have already held that there is no need for a merits-based assessment of an order produced by a structurally defective unconstitutional process; the order is simply unlawful under any circumstances and cannot be upheld. Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); LaSalle Bank Nat'l. Ass'n. v. Davidson, 386 S.C. 276, 280-81, 688 S.E.2d 121, 123 (2009). From our state supreme court's LaSalle Bank decision, which reversed where a judgment was issued without a judge ever holding a hearing:

While LaSalle acknowledges the judge's absence from the hearing "may well have been an error," it contends we should view the absence of the judge from the hearing as simply the failure to conform to an "empty ritual." We do not view the presence of the judge in the courtroom as an "empty ritual." We similarly do not adopt LaSalle's assertion that the error here is not reversible because the outcome to the Davidsons would have been the same with, or without, a judge in the courtroom. LaSalle contends:

> Appellants' default as to the allegations of the foreclosure [c]omplaint sealed their fate as to the outcome of a judgment of foreclosure being issued. Appellants have failed to show how any changes in the quality or extent of the hearing in this matter would have produced a different result.

We categorically reject LaSalle's contention that the absence of the judge at the hearing was a harmless error. The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to "harmless error" analysis while the latter are not. In State v. Mouzon, this Court quoted a leading United States Supreme Court case, Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), in explaining that "trial errors [ ] are subject to harmless error analysis"; however, "structural defects in the constitution of the trial mechanism [ ] defy analysis by harmless error standards." 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997).

> [Trial errors] occur during the presentation of the case to the jury, and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. Structural defects affect the entire conduct of the trial from beginning to end.

Id. at 204, 485 S.E.2d at 921 (quoting Fulminante, 499 U.S. at 308–09, 111 S.Ct. 1246) (internal citations and quotation marks omitted). See also Sullivan v. Louisiana, 508 U.S. 275, 282, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (explaining deprivation of the criminal defendant's right to a jury trial, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error'").

We hold that the absence of a judge at a court hearing is a structural defect. The Court is troubled by LaSalle's trial counsel's efforts to proceed without a presiding judicial officer as well as the submission of the erroneous proposed order to the

> judge. The purported hearing was a nullity, and the resulting order must be vacated.
>
> . . .
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> In sum, we vacate the March 18, 2008 Order of Foreclosure and Sale and remand for a *de novo* hearing on the merits.

LaSalle Bank, 386 S.C. at 280-81.

LaSalle Bank was a case in which a judgment was issued without a hearing having been held; the so-called "hearing" was not really a hearing, since it was not attended by the master-in-equity who issued the order of foreclosure. LaSalle Bank, 386 S.C. at 278-79. For the same reason the LaSalle Bank hearing-less judgment-producing process was structurally defective, the hearing-less judgment-producing process used here was structurally defective. Such an error cannot be deemed harmless under governing precedent. Id. at 280-81. Entirely without reference to the merits of the underlying issue, the process Judge Pope used "was a nullity, and the resulting order must be vacated." Id. at 281. Precedent provides that the merits will be addressed on "remand for a *de novo* hearing on the merits." Id.

**II. Kille has shown an abuse of discretion.**

The Respondents contend that Kille has not argued that there was an abuse of discretion here. That is not an accurate reading of Kille's brief.

Kille's brief noted that our state Supreme Court has held that "no court is entitled to the deference associated with the discretion standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law." Morris v. BB&T Corp., 438 S.C. 582, 885 S.E.2d 394 (2023). Kille's brief also pointed out that this court has observed that "[t]he American tradition of rule of law has recognized from its earliest days that a motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." Jordan v. Hartford Fin. Grp., Inc.,

435 S.C. 501, 505, 868 S.E.2d 400, 402 (Ct. App. 2021). As was quoted in Kille's appellant's brief, our Supreme Court has also provided precedent that helps tell us when an abuse of discretion has occurred, including that "[a]n abuse of discretion occurs when the conclusions of the trial court are . . . controlled by an error of law[.]" In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

As discussed at some length in Kille's appellant's brief, the circuit court did not "fulfill[] the responsibility of exercising its discretion according to law." Morris, 438 S.C. at 582. The circuit court's judgment was not "guided by sound legal principles"; rather, the circuit court waved off the procedural due process requirement to give Kille a meaningful opportunity to be heard. Jordan, 435 S.C. at 505. The lower court's handling of the motion was controlled by a rather fundamental error of law: it was structurally defective in that it defied constitutional due process. LaSalle Bank, 386 S.C. at 280-81. Controlled as it was by error of law, the dismissal of Kille's causes of action cannot help but be an abuse of discretion. In re: Miller, 393 S.C. at 256; LaSalle Bank, 386 S.C. at 280-81.

Kille's appellant's brief sets out the authority by which our courts determine if an abuse of discretion has been committed, notes that precedent provides that a decision controlled by an error of law is an abuse of discretion, and demonstrates that the dismissal at issue is the product of a controlling error of law. Kille is not sure what more would have satisfied the Respondents that she has argued that an abuse of discretion occurred, but she trusts that this court does not suffer from any such confusion.

## III. Kille was never informed that her written opposition would be her final word on the motion to dismiss and that it would substitute for a hearing.

Contrary to Respondents' inaccurate characterization, Kille is not arguing that it is never appropriate to decide a motion without a hearing, nor is she arguing that all motions must be in writing. Kille, rather, has pointed out that, on this written motion, a hearing was required. Kille recognizes that sometimes it is possible for a court to give a party a meaningful opportunity to be heard even without an in-person hearing being held. Given that Kille was never informed that any departure from the traditional method of satisfying this requirement – holding a hearing – was to occur, the circuit court never even attempted to satisfy the requirement by alternate means.

First of all, the type of motion the Respondents made is one for which the civil procedure rules *expressly* require a hearing. Respondents filed a "Joint Motion to Dismiss for Lack of Prosecution or, in the Alternative, for Summary Judgment." (R. pp. 113-19.) In light of the evidentiary nature of a motion for summary judgment, it comes as no surprise that our civil procedure rules provide a hearing is to be held on such a motion. Rule 56(c), SCRCP. So, 1) this was not a motion courts are allowed to decide without a hearing and 2) Kille had the right to wait to submit opposing affidavits until up to two days before the day she had been informed would be the motion's hearing date. Id. In a structurally defective procedure, the circuit court deprived Kille of that right. LaSalle Bank, 386 S.C. at 280-81. A hearing is required on a motion of the sort made by Respondents, Rule 56(c), SCRCP, and that requirement was not met.

Second, citing Crestwood Golf Club, Inc. v. Potter, the Respondents correctly note that trial judges have the power to dismiss *sua sponte* for failure to prosecute. 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997). But their conclusion, that "[t]he trial court's ability to act *sua*

*sponte* necessarily means that a hearing is not required to dismiss a case pursuant to Rule 41(b), SCRCP[,]" is a misinterpretation. (Brief of Respondents p. 8.) In Potter, the Supreme Court cited Small v. Mungo, 254 S.C 438, 442, 175 S.E.2d 802, 803 (1970), as authority for the trial court's ability to dismiss *sua sponte* for failure to prosecute. Crestwood Golf Club, 328 S.C. at 211. Small involved the traditional failure to prosecute: the case was called for trial and the plaintiff and his counsel were not ready to proceed. Small, 254 S.C. at 441, 443. It is readily apparent that, if the judge him- or herself observes a plaintiff fail to prosecute his claims at the time the plaintiff is called upon to do so, i.e., when the case is called for trial, the judge is entitled to dismiss the plaintiff's case. Id. The proceedings at the call of the case (the call for trial and the non-appearance of the plaintiff at that time) establish that a failure to prosecute happened. Id. That is a situation in which *sua sponte* dismissal might be proper. Id.

That was not the situation here. The Respondents' motion relied on assertions of what occurred factually *outside* of court. (R. pp. 113-19.) The writer of this brief would have a hard time believing that any judge or lawyer in this state would agree with the notion that a court can dismiss a case based on a view of out-of-court facts that was not informed by the non-moving party's opportunity to develop the factual record at a hearing. See, e.g., LaSalle Bank, 386 S.C. at 279; Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008); Koester v. Citizens Pub. Co., 154 S.C. 154, 151 S.E. 452 (1930). The entire idea of that is contrary to procedural due process. LaSalle Bank, 386 S.C. at 279; Dangerfield, 376 S.C. at 179; Koester, 154 S.C. at 154. To the extent Crestwood Golf Club holds differently, it is wrong and should be overruled – but, as explained above, neither that case nor the one on which it relied for *sua sponte* dismissal authority actually stands for the proposition that a *sua sponte*

dismissal is proper if it based on claimed factual occurrences that did not happen before the court. Crestwood Golf Club, 328 S.C. at 211; Small, 254 S.C. at 441-43.

There are further problems with the idea that Crestwood Golf Club means that Judge Pope could grant the Respondents' written motion without a hearing or the opportunity for one. In the Crestwood Golf Club decision, the Supreme Court noted an express distinction between *sua sponte* dismissal by a judge and a party's motion for dismissal for failure to prosecute under Rule 41, SCRCP. Crestwood Golf Club, 328 S.C. at 211. Crestwood Golf Club indicates that *sua sponte* dismissals and Rule 41 dismissals on a party-made motion are materially different, not that they should be handled the same way. 328 S.C. at 211. Nothing in Crestwood Golf Club or Rule 41 eliminates the requirement for a duly noticed hearing on a written motion. Rules 6(d) & 7(b)(1), SCRCP.

Had this case been called for trial at a roster meeting that Kille did not attend, Respondents would have been within their rights to make an oral dismissal motion right then and there and to get a ruling on it without a further hearing. Rule 7(b)(1), SCRCP; see Small, 254 S.C. at 441, 443. That, though, is not what happened. Kille was entitled to rely on the general legal principle and the rules authority that provide a hearing was required to be held on the motion.

Kille is not asking for a blanket rule stating that a court can never decide a dispositive motion on the basis of written submissions. In certain situations, that method might comport with due process. This is not one of those situations. Neither the circuit court nor the Respondents did anything to inform Kille that her written opposition would be her only opportunity to oppose the motion. Whatever the outer limits of procedural due process are, they at a minimum required that Kille be given some notice that there would not be a traditional

hearing held and that the court would decide the matter solely on the basis of written admissions. See Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002).

> The Due Process Clause demands notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and *afford them an opportunity to present their objections*. It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment *must have a day in court, or opportunity to be heard*, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. . . .
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> . . .
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> Procedural due process contemplates notice, *a reasonable opportunity to be heard*, and *a fair hearing* before a legally constituted impartial tribunal. The fundamental requirement of due process is *the opportunity to be heard at a meaningful time and in a meaningful manner*.

Id. (emphasis added, internal citations omitted).

Neither a hearing, nor an opportunity to have one, nor notice that the traditional hearing format would not be followed were provided to Kille. Providing those things was the minimum – the floor, not the ceiling. E.g., id. The lower court failed to meet the minimum requirements to adjudicate the issues subject of the motion. This controlling error of law requires reversal and remand for a hearing, so that at least this minimum constitutional requirement is met. In re: Miller, 393 S.C. at 256; LaSalle Bank, 386 S.C. at 279, 280-81.

## CONCLUSION

Precedent bars the Respondents' counterarguments from success. Precedent also requires that the appealed order, which violates Kille's due process rights under the federal and state constitutions, be undone. It is void, a nullity that "must be vacated." LaSalle Bank, 386 S.C. at 281.

Respectfully submitted,

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PROOF OF SERVICE

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I certify that I have served the foregoing final brief on the date given below by emailing it to counsel of record in this appeal at the address(es) noted below.

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